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Comments: Judgments of Prior Conviction as Substantive Proof in Subsequent Civil Proceedings: A Study of Admissmility and Maryland's Need for Such a Hearsay Exception

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JUDGMENTS OF PRIOR CONVICTION AS SUBSTANTIVE PROOF IN SUBSEQUENT CIVIL PROCEEDINGS: A STUDY OF ADMISSIBILITY AND MARYLAND'S NEED FOR SUCH A HEARSAY EXCEPTION

I. INTRODUCTION

A cursory review of history reveals attempts by convicted criminals to collect insurance benefits from their victims' own insurance policies.[1] More specifically, murderers, after being convicted, have attempted to collect proceeds from the victims' life insurance policies.[2] Even arsonists have attempted to collect under insurance

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1. *See, e.g.*, Brett R. Lindahl, *Insurance Coverage for an Innocent Co-Insured Spouse*, 23 WM. MITCHELL L. REV. 433, 464 n.6 (1998) (observing the basic insurance principle that an insured who "intentionally sets fire to the covered property" may not recover); Cathryn M. Little, *Fighting Fire with Fire: "Reverse Bad Faith" in First Party Litigation Involving Arson and Insurance Fraud*, 19 CAMPBELL L. REV. 43, 50 n.21 (1996) (examining the difference between the "civil 'arson' defense in insurance litigation" and a "criminal arson prosecution" where an insured intentionally burns his or her property); *More Charges Eyed Against Arson Suspect in Federal Court*, CHI. TRIB., Sept. 22, 1999, at 3, *available in* 1999 WL 2914534 (reporting on a one-count indictment charging a man with the arson of his suburban home for which he collected the insurance policy proceeds); *No End in Sight for Jury Deliberation in Arson Trial*, CHARLESTON GAZETTE & DAILY MAIL, Nov. 19, 1999, at P7C, *available in* 1999 WL 6757251 (investigating a case where a man was charged with burning his home to collect insurance proceeds); Karen Lee Ziner, *Man Indicted in Run of Insurance Claims*, PROVIDENCE J. BULL., Apr. 23, 1999, at B1, *available in* 1999 WL 7339574 (detailing a case where a man charged with "a chain of arsons, floods, vandalisms, and auto accidents" that netted him a total of $537,433.49); *see also* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 7.20, at 318 (3d ed. 1996) (observing that in many jurisdictions, a finding that someone purposefully burned her property would bar a suit to recover insurance proceeds); 2 JOHN WILLIAM STRONG, MCCORMICK ON EVIDENCE § 298, at 281 (Practitioner's Series) (5th ed. 1999); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 803.28(4), at 803-132 (Joseph M. McLaughlin, ed., 2d ed. 1999) (discussing instances where convicted arsonists attempt to recover under fire insurance policies).

2. *See e.g.*, Brian P. Henry, *Recent Developments*, 52 ARK. L. REV. 525, 525 (1999) (discussing a convicted murderer's attempt to collect the proceeds from the deceased's life insurance policy); Elizabeth Rapaport, *Some Questions about Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 522 (1990) ("Killing to collect insurance is a perennial theme in the family victim cases."); Ruth

policies issued for the building they have been convicted of destroying.[3]

What often results when a convicted criminal attempts to recover the victim's insurance benefits is a civil action between the insurance company and the convicted criminal.[4] In such actions, when the convicted criminal attempts to recover benefits contingent upon the victim's death, the prior conviction is often raised in an attempt to enter the conviction into evidence.[5] In many jurisdictions, the admission of these statements is blocked by the rule against hearsay.[6]

Whereas the Federal Rules of Evidence and most other states have enacted a hearsay exception that permits the introduction of such evidence,[7] Maryland lacks such a hearsay exception that would permit the admission of a judgment of prior conviction into evi-

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Readon, *Second Suspect's Trial to Start in Insurance Killing Case*, HOUS. CHRON., June 28, 1999, at 19, *available in* 1999 WL 3998085 (reporting about a paramour accused of stabbing his girlfriend's husband to gain a share of the victim's life insurance benefits); Cam Simpson, *Lawyers Wrap up Infant Death Case*, CHI. SUN-TIMES, Feb. 10, 1999, at 18, *available in* 1999 WL 6525005 (covering the murder of a seven week old girl by her mother to collect the proceeds of an insurance policy); *Truth Surfaces in 23-year-old Murder*, S.F. EXAM., Aug. 30, 1999, at A14, *available in* 1999 WL 6876916 (revealing a murder conspiracy in which a doctor hired a hitman to kill his office partner to collect the proceeds from the partner's life insurance policy); Dail Willis, *Father and Son Convicted in Baltimore County Killing*, THE SUN (BALT.), Feb. 26, 1999, at 4B, *available in* 1999 WL 5173930 (disclosing a murder conspiracy between a father and son devised to collect insurance policy proceeds).

3. *See supra* note 1.

4. *See infra* notes 80-120 and accompanying text.

5. *See infra* notes 80-120 and accompanying text; *see also, e.g.*, WEINSTEIN & BERGER, *supra* note 1, § 803.28(4), at 803-132 (noting that courts are more prone to give a prior conviction conclusive effect to bar a criminal from profiting from an act for which the individual was convicted); 2 STRONG, *supra* note 1, § 298, at 281 (explaining that a "strong desire" to prevent a convicted defendant from benefitting from his criminal offense in a subsequent civil case influenced the courts to admit evidence of prior criminal convictions); Thomas D. Sawaya, *Use of Criminal Convictions in Subsequent Civil Proceedings: Statutory Collateral Estoppel Under Florida and Federal Law and the Intentional Act Exclusion Clause*, 40 U. FLA. L. REV. 479, 494 (1988) ("[G]iving collateral estoppel effect to a prior criminal conviction is a more potent weapon for the plaintiff in a civil suit than simply admitting the criminal judgment into evidence."); Andrea R. Spirn, Note, *The Place for Prior Conviction Evidence in Civil Actions*, 86 COLUM. L. REV. 1267, 1267 (1986) (noting the problems with the use of prior criminal convictions when introduced at a subsequent civil proceeding).

6. *See infra* Part V.

7. *See infra* notes 128, 252.

dence at a subsequent civil proceeding as substantive proof that the convicted party was responsible for the victim's loss, and therefore should not be enriched by his actions.[8] In Maryland, in order to admit prior wrongdoing, the party's guilt or innocence must be relitigated.[9] As such, the current Maryland Rules place a weighty monetary burden on the parties in such civil actions, and an exacting administrative burden on Maryland courts.[10]

These burdens faced by civil litigants and Maryland courts, would be greatly reduced if the Court of Appeals of Maryland adopted language similar to Federal Rule of Evidence 803(22).[11] By adopting this language, both parties to a civil proceeding and Maryland courts would be relieved from re-litigating the existence of cer-

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8. *See* LYNN MCLAIN, MARYLAND RULES OF EVIDENCE 241 (1994) (observing that in adopting hearsay exceptions for the Maryland Rules, the court of appeals "adopted no corollary to FED. R. EVID. 803(22), regarding the admission of judgments of conviction to prove facts essential to the judgment"); 6 LYNN MCLAIN, MARYLAND EVIDENCE STATE & FEDERAL § 803(22).1, at 429 (1987) (discussing the several statutes under which a conviction can be admitted as substantive proof).

9. *See* Memorandum from Lynn McLain on Evidence Subcommittee Question Concerning Possible Adoption of Federal Rule of Evidence 803(22) (Sept. 16, 1997) [hereinafter Subcommittee Question] (on file with author). However, Maryland does permit the admission of a prior conviction for the limited purpose of impeachment. *See* MD. R. EVID. 5-609. Rule 5-609 provides:

> (a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party. (b) Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed since the date of the conviction. (c) Evidence of a conviction otherwise admissible under section (a) of this Rule shall be excluded if: (1) the conviction has been reversed or vacated; (2) the conviction has been the subject of a pardon; or (3) an appeal or application for leave to appeal from the judgment of conviction is pending, or the time for noting an appeal or filing an application for leave to appeal has not expired. (d) For purposes of this Rule, "conviction" includes a plea of nolo contendere followed by a sentence, whether or not the sentence is suspended.

Id.

10. *See* Subcommittee Question, *supra* note 9.

11. *See infra* note 252 and accompanying text.

tain judgments of prior convictions.[12] Notwithstanding this benefit, the court of appeals has failed to adopt such a rule.[13]

As an alternative to adopting Federal Rule of Evidence 803(22), Maryland enacted section 10-919 of the Courts and Judicial Proceedings Article of the Maryland Code.[14] Section 10-919 is similar to Federal Rule of Evidence 803(22) as it permits certain judgments of prior conviction to be used as substantive proof in subsequent civil proceedings.[15] However, section 10-919 is limited in scope and restricts admitting judgments of prior conviction to only those felonious, intentional homicides where the common-law slayer's rule[16] is invoked.[17] In contrast, Federal Rule of Evidence 803(22) is much broader in scope applying to all felonies.[18] In addition, where Federal Rule of Evidence 803(22) merely permits the admission of a judgment of prior conviction into evidence at a subsequent civil proceeding, the Maryland statute conclusively establishes a judgment of prior conviction.[19]

Given these benefits and discrepancies, this Comment discusses why Maryland should adopt a rule similar to Federal Rule of Evidence 803(22) and details the benefits that would inure to both Maryland practitioners and the courts if such a rule were adopted by the State. Part II examines the history of Maryland's adoption of the common-law slayer's rule, and how this rule relates to the admission of judgments of prior conviction in subsequent civil proceedings.[20] Part III discusses the factors prompting the adoption of section 10-919 of the Courts and Judicial Proceedings Article.[21]

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12. *See infra* notes 248-51 and accompanying text.
13. *See* MCCLAIN, *supra* note 8, at 241; JOSEPH F. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK § 806, at 344 (3d ed. 1999) (pointing out that the court of appeals has not adopted a proposed rule 5-803(22)).
14. *See infra* note 124.
15. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-919 (1998).
16. *See* BLACK'S LAW DICTIONARY 1393 (7th ed. 1999) (defining the slayer's rule as "[t]he doctrine that neither a person who kills another nor the killer's heirs can share in the decedent's estate").
17. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-919(a)(1) (1998).
18. *See* FED. R. EVID. 803(22); *see also* LILLY, *supra* note 1, § 7.20, at 320-21 (discussing the convictions that are admissible under rule 803(22)); 2 STRONG, *supra* note 1, § 298, at 281 (noting that the exception is limited to convictions for serious convictions because misdemeanors are not sufficiently reliable); WEINSTEIN & BERGER, *supra* note 1, § 803.28[2], at 803-130.
19. *Compare infra* note 124 and accompanying text, *with infra* note 252.
20. *See infra* notes 28-120 and accompanying text.
21. *See infra* notes 121-26 and accompanying text.

Further, as Maryland currently lacks case law interpreting section 10-919, Part III reviews other jurisdictions interpreting similarly worded statutes.[22] By comparison, Part III further reviews case law focusing on Maryland statutes, other than section 10-919, that permit the admission of judgments of prior conviction.[23] The focus then shifts in Part IV, from the slayer's rule and intentional homicide, to other criminal offenses warranting the admission of guilt in subsequent civil proceedings.[24]

Through a study of Federal Rule of Evidence 803(22) and the case law interpreting that Rule, Part V further explores the benefits of permitting the admission of judgments of prior conviction for offenses other than intentional homicide.[25] Part VI then compares the policies and circumstances that induced Maryland's passage of section 10-919 of the Courts and Judicial Proceedings Article with those that prompted the federal government to adopt Federal Rule of Evidence 803(22).[26] Finally, Part VII concludes that Maryland law would be greatly enhanced by the adoption of an amendment that encompasses the language of Federal Rule of Evidence 803(22).[27]

II. THE SLAYER'S RULE

A. *The Birth of the Slayer's Rule*

The slayer's rule[28] was first addressed by the Maryland appellate courts in *Price v. Hitaffer*.[29] In *Price*, the Court of Appeals of Mary-

22. *See infra* notes 127-91 and accompanying text.
23. *See infra* notes 192-221 and accompanying text.
24. *See infra* notes 222-47 and accompanying text.
25. *See infra* notes 248-76 and accompanying text.
26. *See infra* notes 277-91 and accompanying text.
27. *See infra* notes 292-300 and accompanying text.
28. *See* Ford v. Ford, 307 Md. 105, 118-19, 512 A.2d 389, 396 (1986). In *Ford*, the court stated that the slayer's rule is invoked when a claimant "establish[es a] prima facie . . . entitlement to the property by proving the validity of the will and his designation as legatee." *Id.* The court further explained that the burden then shifts to the person protesting the claim. *See id.* The protestor must prove by a preponderance of the evidence that the claimant killed the decedent and that the homicide was intentional and felonious. Therefore, under the slayer's rule, "the claimant would be excluded from the distribution of the estate." *Id.* The beneficiary would recover only upon successfully defended against the claim of the protestor by refuting guilt or by establishing a lack of capacity. *See id.*
29. 164 Md. 505, 516, 165 A. 470, 474 (1933) (holding that where a man killed his wife and then killed himself, public policy would prevent his estate from profiting from her death).

land decided whether a husband who killed his wife, or his potential heirs or representatives, could be enriched by taking a portion of his wife's estate.[30] In *Price*, the husband killed his wife and then committed suicide shortly thereafter.[31] The husband's personal representative then sought to inherit the victim's estate.[32] The parties did not raise the issue of whether to admit a judgment of prior conviction into evidence at a subsequent civil proceeding, and the murder conviction was admitted into evidence without objection.[33] In permitting the admission of this prior conviction, the *Price* court's rationale focused on the ramifications of the murder upon a subsequent determination of whether the husband's personal representative could collect any of the proceeds from the wife's estate.[34]

As *Price* was a case of first impression,[35] the court of appeals considered two opposing lines of decisions. The first line of decisions applied the common-law principle of equity, "that no one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found any claim upon his own iniquity, or to acquire property by his own crime."[36] The second stemmed from the legislature's enactment of statutes of direct descents and distribution, and statutes governing the execution and effect of testamentary disposition.[37] Under a strict construction of the statutes in the second approach, the husband, and consequently his personal representative, would have been entitled to a one-half interest in his wife's estate.[38]

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30. *See id.* at 506, 165 A. at 470.
31. *See id.*
32. *See id.*
33. *See id.*
34. *See id.*
35. *See id.*
36. *Id.* (holding that the provisions of a will and the statutes of descent and distribution should be interpreted in light of justice and morality).
37. *See id.* at 506-07, 165 A. at 470. Courts also consider the constitutional or statutory declarations to the effect that a conviction of a crime shall not work a corruption of blood or forfeiture of estate. *See id.*
38. *See id.* (citing MD. ANN. CODE art. 93, §§ 124, 127 (1957), *repealed by* Acts 1974, ch. 11, § 1). Section 124 provided that, "[w]hen all debts of an intestate exhibited and proved or notified and not barred shall have been discharged or settled, or allowed to be retained as herein directed, the administrator shall proceed to make distribution of the surplus as follows." *Id.* at 506, 165 A. at 470. To be read in conjunction with section 124, section 127 provides for distribution of the estate as follows: "[i]f there be a surviving husband or a widow, . . . and no child or descendant of the intestate, but the said intestate shall leave a father or mother, or brother or sister, or child of a brother or

The *Price* court held that the "constitutional and statutory prohibition against corruption of blood and forfeiture of estate by conviction ha[d] no application, because by reason of his murderous act the husband never acquired a beneficial interest in any part of his wife's estate."[39] The court of appeals stated that even if an insurance policy did not contain a provision that defeated recovery, "equity would prevent recovery by applying the common law maxim that no one shall be permitted to profit by his own fraud, or found any claim upon his own iniquity."[40] Hence, the slayer's rule was adopted in Maryland.

To reach its decision in *Price*, the court of appeals cited *New York Mutual Life Insurance Co. v. Armstrong*.[41] In *Armstrong*, the Supreme Court held that evidence proving that the assignee of a life insurance policy caused the death of the insured by felonious means was admissible to defeat the assignee's recovery on the policy.[42] There, the issuer of the policy, New York Mutual Life Insurance Company, granted a $10,000 life insurance policy to John M. Armstrong, naming Benjamin Hunter as the assignee.[43] Armstrong was subsequently murdered by Hunter, who then brought an action against the insurance company to recover the proceeds from the life insurance policy.[44]

In its opinion, the *Armstrong* Court addressed two issues. First, it examined whether evidence relating to the felonious death of the insured was admissible to prove that the assignee of the life insurance policy intentionally caused the insured's death.[45] If so, the Court next would determine whether such evidence was sufficient to defeat the assignee's recovery on the policy.[46]

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sister, the surviving husband or widow, . . . shall have one-half." *Id.* at 507, 165 A. at 471. According to a plain reading of the statute, the husband was entitled to receive one-half of his deceased wife's estate. *See id.*

39. *Id.* at 508, 165 A. at 471. It was the intent of the legislature that the donees of a will receive the property given to them, but it could not have been their intention to reward a donee, who murdered the testator to make the will operative, by allowing him to receive any of the will's benefits. *See id.* at 512, 165 A. at 473.
40. *Id.* at 515, 165 A. at 474.
41. 117 U.S. 591 (1886).
42. *See id.* at 598.
43. *See id.* at 592, 598.
44. *See id.* at 591, 593.
45. *See id.* at 592.
46. *See id.*

In discussing these issues, the *Armstrong* Court declared that, "[i]t would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of the party whose life he had feloniously taken."[47] In addition, the Court noted it would be equally unacceptable to permit an individual to "recover insurance money upon a building that he had wilfully fired."[48] The Court analogized a murderer's attempt to obtain his victim's life insurance proceeds to an arsonist's attempt to collect insurance proceeds from a building for which he was convicted of destroying.[49]

The reasoning of the *Armstrong* Court led Maryland's General Assembly to eventually pass section 10-919 of the Courts and Judicial Proceedings Article. This statute permits the admission of a prior felonious murder conviction. If the *Armstrong* Court's analysis is applied to section 10-919, it follows that a judgment of prior conviction for arson should be admitted.[50]

The slayer's rule was further developed by the Court of Appeals of Maryland in *Chase v. Jenifer*.[51] In *Chase*, the court examined the issue of whether a claimant was disqualified from receiving the proceeds of her husband's insurance policy after she was found not guilty of murder, but guilty of manslaughter.[52] The insurance company that issued the decedent's policy brought an action against the accused and the victim's daughter to prevent them from collecting any insurance proceeds.[53]

In its analysis of *Chase*, the court of appeals held that the killing was intentional and, therefore, there was no need to determine whether an unintentional killing was a bar to recovery.[54] The *Chase* court further stated that, regardless of whether the crime was man-

47. *Id.* at 600. The Court decided that the insurance was obtained by Hunter with the intent to cheat and defraud the insurance company. *See id.* Moreover, Hunter forfeited all rights to the proceeds when he murdered the insured to secure the immediate payment of the policy. *See id.*

48. *Id.*

49. *See id.*

50. *See infra* notes 120-25 and accompanying text.

51. 219 Md. 564, 150 A.2d 251 (1959).

52. *See id.* at 565-68, 150 A.2d at 252-53. The trial judge found that the wife was not required to resort to the killing in order to protect herself and that she did use excessive means for her protection; notwithstanding, the fact that he found the stabbing, though not an accident, was not done maliciously. *See id.* at 566, 150 A.2d at 252-53.

53. *See id.* at 565, 150 A.2d at 252.

54. *See id.* at 569, 150 A.2d at 254.

slaughter or murder, "[w]here the killing is both felonious and intentional . . . the beneficiary cannot prevail . . . ."[55] Regardless of the holding in *Chase*, this case acts to further exemplify the need to introduce a judgment of prior conviction in a subsequent civil proceeding.[56]

In *Schifanelli v. Wallace*,[57] the court of appeals examined the question that *Chase* left unanswered. The *Schifanelli* court addressed whether a husband could collect the proceeds from his wife's life insurance policy after he was convicted of unintentionally killing her.[58] In *Schifanelli*, the decedent's personal representative initiated a civil suit on behalf of the decedent's two children.[59] The *Schifanelli* court held that a beneficiary may still recover where death is the result of an accident, or gross negligence on the part of the beneficiary, even if upon conviction he is found guilty of involuntary manslaughter.[60] The *Schifanelli* court did not address whether it was proper to admit a judgment of prior conviction into evidence during a subsequent civil proceeding.[61] Since the beneficiary was granted probation before judgment, the only evidence relating to the criminal proceeding admitted at the subsequent civil proceeding was an indictment charging the beneficiary with feloniously killing his wife.[62]

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55. *Id.* at 570, 150 A.2d at 255.
56. *See id.* at 565-66, 150 A.2d at 252. The facts in *Chase* show that in the civil action brought by the insurer, the parties stipulated to the facts contained in the oral opinion and the verdict of the prior criminal case for the civil proceeding. *See id.* This stipulation allowed the beneficiary's prior conviction to be admitted into evidence at the subsequent civil proceeding. *See id.* (explaining that the stipulation by the beneficiary allowed the oral opinion and verdict of her prior criminal conviction to be the sole statement of facts introduced in the civil proceeding; in essence, the stipulation constituted a waiver of her objection to the admission of the prior conviction). The admissibility of the judgment of prior conviction was not before the *Chase* court and so it was never answered by it.
57. 271 Md. 177, 315 A.2d 513 (1974).
58. *See id.* at 187, 315 A.2d at 519.
59. *See id.* at 178, 315 A.2d at 514.
60. *See id.*
61. *See id.* Although the husband was found guilty of manslaughter, following a pre-sentence investigation, the court struck the finding of guilt and placed the husband on probation before judgment. *See id.* at 182, 315 A.2d at 516. This action resulted in a complete eradication of the guilty verdict. *See id.* at 182 n.2, 315 A.2d at 516 n.2. Therefore, there was no judgment of conviction that could be admitted in the civil proceeding. *See id.*
62. *See id.* at 182 n.1, 315 A.2d at 516 n.1.

Here, the court of appeals held that the beneficiary was not barred from recovering the insurance proceeds because his wife's death was the result of unintentional, gross negligence.[63] Thus, the *Schifanelli* court held that the beneficiary may still recover where death is the result of an accident, or gross negligence on the part of the beneficiary, even if upon conviction he is found guilty of involuntary manslaughter.[64]

The court of appeals further examined the slayer's rule in *Ford v. Ford*.[65] The *Ford* court studied the applicability of the slayer's rule when the beneficiary, who attempts to collect her victim's estate, is insane.[66] In *Ford*, the beneficiary was convicted of the first-degree murder of her mother.[67] An application of the slayer's rule would have precluded the beneficiary from sharing in her mother's estate.[68] However, in *Ford*, the court found that the beneficiary was in-

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63. *See id.* at 189, 315 A.2d at 519. The court explained:

> The rule which prevents a beneficiary who has intentionally killed the insured from recovering on an insurance policy is grounded on the public policy against permitting a wilful and felonious killer to profit by his felony. Thus, it has no application where even though the acts of the beneficiary cause death, they are without the intent to do so . . . .

Id. at 188, 315 A.2d at 519.

64. *See id.* The *Schifanelli* court did not actually address the issue of whether it was proper to admit a judgment of prior conviction into evidence during a subsequent civil proceeding. *See id.* at 182, 315 A.2d at 516. This action resulted in a complete eradication of the guilty verdict. *See id.* at 182 n.2, 315 A.2d at 516 n.2. Therefore, there was no judgment of conviction that could be admitted in the civil proceeding. *See id.* Since the beneficiary was granted probation before judgment, the only evidence relating to the criminal proceeding admitted at the subsequent civil proceeding was an indictment charging the beneficiary with feloniously killing his wife. *See id.* at 182 n.1, 315 A.2d at 516 n.1.

65. 307 Md. 105, 512 A.2d 389 (1986) (giving a brief history of the slayer's rule and emphasizing that a criminal case disposition is not conclusive of the character of the homicide or of the criminal agency of the putative killer in a civil suit regarding entitlement to assets of the decedent).

66. *See id.* at 113, 512 A.2d at 393-94.

67. *See id.* at 112, 512 A.2d at 393-94.

68. *See id.* at 113, 512 A.2d at 393. In determining sanity, the court of appeals had to decide whether to use the old test or new test. *See id.* at 113-14, 512 A.2d at 393-94. The old test, referred to as the M'Naghten-Spencer Test, analyzed whether the accused had the capacity to distinguish between right and wrong. *See id.* at 113, 512 A.2d at 393. Unlike the old test, the legislative intent of the new test, as defined in the Maryland Code, was not whether the accused would be found innocent for the crime committed, but whether she would be punished for it. *See id.* at 113-14, 512 A.2d at 393-94.

sane and therefore not criminally responsible at the time she committed the murder.[69] Due to her lack of criminal responsibility, the court of appeals held that she was entitled to the bequest devised from her mother's will.[70]

While the *Ford* court did not squarely confront the issue,[71] its decision further exemplifies the importance of admitting judgments of prior criminal conviction in subsequent civil proceedings. The significance of the *Ford* court's ruling to the admission of judgments of prior conviction can be found in the dicta that laid out the procedure to be followed by the trial court in a slayer's rule suit.[72]

With the procedure clearly laid out,[73] the benefits to be gained by admitting a judgment of prior conviction can readily be seen. By permitting a protestor to admit a judgment of prior conviction, the protestor is more likely to meet the burden of establishing that the claimant killed the testator. Ultimately, when faced with the prior conviction, refuting the claimant's guilt, which was rendered under a stricter burden, is more difficult.[74] In protecting the claimant's rights, the court of appeals held that "the lack of or result of criminal proceedings, although not necessarily dispositive of a subsequent civil proceeding, has probative value as a factor to be considered."[75]

All of the cases discussed above involve a slaying where the slayer, either himself or through a beneficiary, later attempted to collect either the proceeds from a victim's life insurance policy or a bequest from a victim's will.[76] In fact, all of these cases occurred

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69. *See id.* at 113, 512 A.2d at 393.
70. *See id.* at 125, 512 A.2d at 399.
71. *See id.* at 112, 512 A.2d at 393. The issue was not directly raised because the beneficiary never disputed the fact that she killed her mother. *See id.*
72. *See id.* at 118, 512 A.2d at 396.
73. *See supra* note 28.
74. *See In re* Winship, 397 U.S. 358, 361-64 (1970) (holding that the due process clause of the Fourteenth Amendment requires the State to persuade the finder of fact of the defendant's guilt beyond a reasonable doubt). In a civil case, the burden to obtain a judgment is the lower standard of a preponderance of the evidence. *See* MARYLAND CIVIL PATTERN JURY INSTRUCTIONS § 1:7 (3d ed. 1999).
75. *Ford*, 307 Md. at 120, 512 A.2d at 397. In a civil proceeding regarding the entitlement of assets, the trier of fact makes an independent determination of the corpus delicti of the crime. *See id.* at 121, 512 A.2d at 397.
76. *See id.* (examining whether the insane daughter was entitled to collect her mother's insurance benefits). *See, e.g.*, Schifanelli v. Wallace, 271 Md. 177, 187-89, 315 A.2d 513, 519 (1974) (reviewing whether the husband, acting as the personal representative, could initiate a declaratory judgment suit on behalf

prior to the adoption of section 10-919 of the Courts and Judicial Proceedings Article;[77] none of these cases directly contemplated the admission of a judgment of prior conviction. The following case, which also invoked the slayer's rule, finally addressed this critical issue.[78]

B. The 'Finneyfrock Case"

Connecticut General Life Insurance Co. v. Swiger,[79] most commonly known as the "Finneyfrock case,"[80] decided whether Maryland should reconsider admitting judgments of prior convictions to prove the truth of the matter asserted.[81] In *Swiger,* the Circuit Court for Baltimore County considered "whether a criminal conviction of premeditated and intentional murder . . . is conclusive proof of intent in a subsequent civil proceeding when the 'slayer's rule' is invoked to bar recovery."[82]

Prior to adjudicating the civil case in *Swiger,* James Garland Finneyfrock was convicted of the first-degree, premeditated murder of his parents.[83] He later attempted to collect the proceeds of his parents' life insurance policy.[84] In the subsequent civil proceeding, Finneyfrock contested nothing other than whether the killings were intentional.[85] When Connecticut General, the insurance company holding the life insurance policy covering Finneyfrock's parents, in-

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of his two children); Chase v. Jenifer, 219 Md. 564, 565, 150 A.2d 251, 252 (1959) (analyzing whether an insurance company could prevent a murderer from collecting the benefits of his victim's life insurance policy); Price v. Hitaffer, 164 Md. 505, 506, 165 A. 470, 470 (1933) (examining whether the murderer's personal representative could collect the victim's insurance benefits); Pannone v. McLaughlin, 37 Md. App. 395, 399-400, 377 A.2d 597, 600 (1977) (evaluating whether an estate could initiate a declaratory judgment suit against his murdered victim's estate).

77. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-919 (1998). Section 10-919 was effective on October 1, 1998, whereas the cases cited in note 76 all predate 1986.

78. *See* Connecticut Gen. Life Ins. Co. v. Swiger, No. 03-C-95-10392, at 1 n.1 (Cir. Ct. Md. Balt. County, June 26, 1997).

79. Case No. 03-C-95-10392 (Cir. Ct. Md. Balt. County, June 26, 1997).

80. This case was named after James Garland Finneyfrock, the convicted murderer who attempted to collect the insurance proceeds on the life of his victims. *See id.* at 1.

81. *See id.* at 1.

82. *Id.* at 2.

83. *See id.* at 3.

84. *See id.*

85. *See id.* at 4 n.5.

troduced into evidence the docket sheets evidencing Finneyfrock's conviction for the felonious, intentional murders, it did so with the intention of invoking the slayer's rule and demonstrating Finneyfrock's criminal intent.[86]

Finneyfrock argued that the fact-finder in the civil proceeding must independently determine the issue of intent, and that the introduction of the docket sheets was not conclusive proof of that intent.[87] The *Swiger* court held that Finneyfrock's conviction of murder was neither dispositive, nor admissible in the subsequent civil proceeding, and the issue of intent needed to be re-litigated.[88]

Finneyfrock relied upon two federal cases: *Sherman v. Sherman*[89] and *Johnson v. Hebb*.[90] In *Sherman*, the United States District Court for the District of Maryland ordered a de novo finding as to whether a slayer feloniously and intentionally killed his parents.[91] In *Sherman*, Timothy Sherman was convicted of first-degree murder of his parents.[92] Timothy's father, Stevenson T. Sherman, purchased a life insurance policy worth $50,000.[93] Timothy was the second beneficiary of his father's life insurance policy, while Timothy's deceased mother was the primary beneficiary, and Timothy's grandparents were the third beneficiaries.[94]

The grandparents sought to invoke the slayer's rule by using Timothy's criminal conviction and precluding Timothy from recovering any of the proceeds of his parent's life insurance policy.[95] The *Sherman* court held that Timothy's criminal conduct must be proven

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86. *See id.*
87. *See id.*
88. *See id.* at 16. The judge mentioned that, "it is a waste of judicial time to say that a criminal court verdict of premeditated intentional murder is not issue preclusion in a civil court determination involving the same issues of premeditation and intent, [but] the Court of Appeals of Maryland evidently does not agree." *Id.* at 2.
89. 804 F. Supp. 729 (D. Md. 1992) (stating that under Maryland law, even though a beneficiary is convicted of homicide, the fact-finder applying the slayer's rule must still determine independently whether the homicide was intentional and felonious).
90. 729 F. Supp. 1524 (D. Md. 1990) (holding that the burden of proving that a homicide is felonious and intentional is upon the one alleging the homicide, and the finding in a prior criminal proceeding that the slayer is not guilty is not dispositive in the civil action).
91. *See Sherman*, 804 F. Supp. at 733.
92. *See id.* at 730.
93. *See id.*
94. *See id.*
95. *See id.* at 731.

by a preponderance of the evidence in order to invoke the slayer's rule and denied the parties' motions for summary judgment.[96] Like the Maryland courts in *Chase*[97] and *Ford*,[98] the *Sherman* court held that if the slayings were unintentional or grossly negligent, or the slayer was insane, then the slayer's rule could not be invoked.[99]

In *Johnson v. Hebb*,[100] the United States District Court for the District of Maryland held that just as a court's determination of innocence in a prior criminal case is not dispositive in a subsequent civil proceeding, neither should a conviction be dispositive in a later civil proceeding.[101] In *Johnson*, William Hebb, Jr. killed his wife Sonya Hebb.[102] Mrs. Hebb was insured by Metropolitan Life Insurance Company.[103] This insurance policy provided for a payment of $59,200 upon her death.[104] Under the terms of the policy, William Hebb received eighty percent of the total payment while Mrs. Hebb's mother, Theresa Johnson, received the remaining twenty percent.[105]

William Hebb pled guilty to felony murder in the death of his wife and received a life sentence.[106] Thereafter, Theresa Johnson, acting as the sole heir, moved to collect the maximum available under the policy.[107] The court held that, "William Hebb feloniously and intentionally killed his wife, and by virtue of the slayer's rule applicable in Maryland, he cannot and should not participate in her estate or in the proceeds of a life insurance policy that insured her."[108]

In reaching its determination, the *Johnson* court did not rely upon William Hebb's prior criminal conviction as conclusive proof in the subsequent civil proceeding.[109] Rather, the court reviewed the record from the criminal proceeding and based its decision, which granted Theresa Johnson the full amount of the policy, on William

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96. *See id.*
97. *See supra* notes 51-56 and accompanying text.
98. *See supra* notes 65-72 and accompanying text.
99. *See Sherman*, 804 F. Supp. at 731.
100. 729 F. Supp. 1524 (D. Md. 1990).
101. *See Johnson*, 729 F. Supp. at 1526; *see also supra* note 75.
102. *See Johnson*, 729 F. Supp. at 1525.
103. *See id.*
104. *See id.*
105. *See id.*
106. *See id.*
107. *See id.*
108. *Id.* at 1527.
109. *See id.* at 1526.

Hebb's prior judicial admissions.[110] The court noted that though the criminal conviction was not conclusive, this did not "preclude the Court from considering admissions made by him in the criminal proceeding to determine in this action as an independent question whether he killed Sonya Hebb feloniously and intentionally."[111]

In both *Sherman* and *Johnson,* the federal courts made an assessment, independent of the prior criminal conviction, of whether the beneficiary feloniously and intentionally killed the victim.[112] While prior Maryland cases invoking the slayer's rule had not involved a defendant that was previously convicted of an intentional, premeditated slaying, *Swiger* did.[113] In these prior cases, the issue of intent had been re-litigated in the subsequent civil proceeding, "where the defendant was convicted of something less than premeditated, intentional murder, where the defendant was acquitted, or where the killer was never tried."[114]

In consideration of whether Finneyfrock's judgment of prior conviction could be offered as conclusive proof of intent, the trial court recognized that when the Maryland Rules of Evidence were adopted, the court of appeals failed to adopt the language of Federal Rule of Evidence 803(22).[115] The *Swiger* court pointed out that in all Maryland cases analyzing the admissibility of a judgment of prior conviction, the conviction at issue involved either an assault and battery or a criminal violation of the motor vehicle laws; none involved a conviction for premeditated, intentional murder.[116] Further, the trial court in these cases precluded the admission of the judgment of a prior conviction.[117]

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110. *See id.*

111. *Id.* at 1527.

112. *See supra* notes 88-89 and accompanying text.

113. *See* Connecticut Gen. Life Ins. Co. v. Swiger, Case No. 03-C-95-10392, at 6 (Cir. Ct. Md. Balt. County, June 26, 1997).

114. *Id.* at 8.

115. *See id.* at 9; *see also* 6 MCLAIN, *supra* note 8, § 803(22).1, at 428; MURPHY, *supra* note 13, § 806, at 344. When a rule is adopted in Maryland, it is drafted by the Rules Committee and adopted by the Court of Appeals of Maryland. *See* 6 MCLAIN, *supra* note 8, at 428.

116. *See Swiger,* Case No. 03-C-95-10392, at 11; *see also* Aetna Cas. & Sur. Co. v. Kuhl, 296 Md. 446, 452, 463 A.2d 822, 826 (1983) (holding a conviction for assault and battery inadmissible in a subsequent civil action); Eisenhower v. Baltimore Transit Co., 190 Md. 528, 538, 59 A.2d 313, 318-19 (1948) (examining the admissibility of evidence that a party had been found guilty of reckless driving).

117. *See* General Exch. Ins. Corp. v. Sherby, 165 Md. 1, 6-7, 165 A. 809, 811 (1933) (holding that, "the judgment in the criminal prosecution is not competent ev-

Further, the *Swiger* court noted that many courts took the same approach as Maryland, denying the preclusive effect of a conviction, but made an exception in a case such as *Swiger*, where a convicted criminal sought to profit from a slaying.[118] The trial court stated that where intent to kill has been established in a criminal trial, beyond a reasonable doubt, the issue of intent should be conclusive in a subsequent civil proceeding when applying the slayer's rule.[119] However, as the law stood in Maryland at that time, the issue of intent was not admissible.[120]

III. ADMISSION OF A JUDGMENT OF PRIOR CONVICTION

A. *Section 10-919 of the Courts and Judicial Proceedings Article*

The Finneyfrock case brought much attention to the need to permit the admission of judgments of prior conviction.[121] The Maryland Rules Committee presented a proposed draft of 5-803(b)(22), with language similar to that of Federal Rule of Evidence 803(22), to the Court of Appeals of Maryland; however, the court has not adopted it.[122] Following *Swiger*, there was a growing concern as to

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idence to establish the truth of the facts upon which it has been rendered in a civil action for damages occasioned by the offense of which the party stands convicted").

118. *See, e.g., Swiger*, Case No. 03-C-95-10392, at 15; *see also* Webb v. Voirol, 773 F.2d 208, 210-12 (8th Cir. 1985) (holding that a woman convicted of murdering her husband was precluded from re-litigating the issue of whether she had intentionally murdered him).

119. *See Swiger*, Case No. 03-C-95-10392, at 16.

120. *See id.*

121. *See, e.g.*, Joan Jacobson, *Senate Panel is Asked to Limit Rights of Convicted*, THE SUN (BALT.), Jan. 29, 1998, at 3B (covering the debate to change the law to allow a criminal conviction to be sufficient legal proof in a subsequent civil proceeding); Joan Jacobson, *State Senator is Outraged by Killer's Claim*, THE SUN (BALT.), Sept. 4, 1997, at 2B (stating the outrageousness for a family to spend "thousands of dollars to hire counsel to fight [an] action that's brought by a convicted murderer" (quoting F. Vernon Boozer, State Senator)); Joan Jacobson, *Killer to get Civil Trial in Inheritance Battle*, THE SUN (BALT.), Aug. 18, 1997, at 1B (allowing a convicted murderer to defend inheriting from his murder victim in a subsequent civil trial is inherently unfair).

122. A recent draft of Maryland Rule 5-803(b)(22) provides:

> Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year to prove any fact essential to sustain the judgment. In criminal cases, the State may not offer evidence of a judgment against persons other than the accused, except for purposes of impeachment.

the efficiency that would be created by the conclusive admissibility of a judgment of prior conviction when the slayer's rule is invoked.[123] As a result, Maryland passed section 10-919 of the Courts and Judicial Proceedings Article.[124] Section 10-919 makes a judgment of prior conviction for felonious, intentional murder not only admissible, but conclusive in a subsequent civil proceeding.[125] Whereas the draft proposal of the Maryland Rule of Evidence 5-803(b)(22) would apply to all offenses having a sentence of at least one year, section 10-919 is limited to convictions for felonious and intentional murder.[126]

> The pendency of an appeal may be shown but does not preclude admissibility.

Proposed MD. RULE 5-803(b)(22) (draft of proposed Rule). The court of appeals refused to adopt the rule. *See* MURPHY, *supra* note 13, § 806, at 344.

123. *See* Subcommittee Question, *supra* note 9; *see also Jacobson, State Senator, supra* note 121 ("'[I]t is a waste of judicial time to say that a criminal court verdict of premeditated intentional murder' cannot be used to disinherit a killer." (quoting The Honorable John F. Fader, II)).

124. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-919 (1998). This statute provides:

> (a) After all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of a decedent: (1) Is admissible in a subsequent civil proceeding in which the Common Law slayer's rule is raised as an issue; and (2) Conclusively establishes that the convicted individual feloniously and intentionally killed the decedent. (b) This section may not be construed to prohibit a court, in the absence of a criminal conviction, from determining by a preponderance of the evidence in a civil proceeding that a killing was felonious and intentional.

Id. Section 10-919 is based on section 2-803(g) of the Uniform Probate Code, which provides:

> After all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section. In the absence of a conviction, the court, upon the petition of an interested person, must determine whether, under the preponderance of the evidence standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent. If the court determines that, under that standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent, the determination conclusively establishes that individual as the decedent's killer for purposes of this section.

Id.

125. *See id.* § 10-919(a).

126. *See id.*; *see also* proposed MD. R. EVID. 5-803(b)(22).

B. Foreign States' Interpretations of Probate Statutes

Section 10-919 of the Courts and Judicial Proceedings Article has not been interpreted by the courts.[127] This warrants an analysis of cases from other states that have adopted the same or similar language from section 2-803(g) of the Uniform Probate Code.[128]

1. Final Judgment of Conviction

Section 10-919 of the Courts and Judicial Proceedings Article permits the admission of a judgment of prior conviction of an intentional and felonious murder after all right to appeal has been exhausted.[129] When adopting section 2-803(g) of the Uniform Probate Code, Maryland, unlike other states, adopted the "after all right to appeal has been exhausted" language.[130] In so doing, Maryland eliminated the potential for confusion, which other states have faced, as to what constitutes a final judgment.[131]

For example, Minnesota enacted a statute similar to section 10-919 in 1975.[132] Minnesota, like many other states, incorporated its

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127. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-919 (1998).

128. *See, e.g.*, ALASKA STAT. § 13.12.803(f) (Michie 1999) (containing almost verbatim adoption); ARIZ. REV. STAT. § 14-2803(F) (1999) (using comparable language); COLO. REV. STAT. ANN. § 15-11-803(7) (West 1999) (conveying a similar idea); FLA. STAT. ANN. § 732.802(5) (West 1999) (containing similar language); HAW. REV. STAT. § 560:2-803(g) (Michie 1999) (containing similar language); IDAHO CODE § 15-2-803(a)(1), (m) (1999) (adopting similar idea); ME. REV. STAT. ANN. tit. 18-A, § 2-803(e) (West 1999) (adopting similar idea); MICH. COMP. LAWS ANN. § 700.2803(6) (West 1999) (containing an almost verbatim adoption); MINN. STAT. ANN. § 524.2-803(f) (West 1999) (adopting similar idea); NEB. REV. STAT. § 30-2354(e) (Michie 1999) (conveying similar idea); N.M. STAT. ANN. § 45-2-803(G) (Michie 1999) (adopting almost exact language); N.D. CENT. CODE § 30.1-10-03(7) (1999) (using nearly the exact same wording); S.C. CODE ANN. § 62-2-803(e) (Law. Co-op. 1999) (adopting very similar idea); S.D. CODIFIED LAWS § 29A-2-803(g) (Michie 1999) (using almost exact same language); UTAH CODE ANN. § 75-2-803(7) (1999) (using almost exact same language). For the text of the Uniform Probate Code, see *supra* note 124.

129. *See supra* note 124.

130. *See supra* note 124.

131. *See infra* notes 132-61 and accompanying text.

132. MINN. STAT. ANN. § 524.2-803 provides:

> (a) A surviving spouse, heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under this article, and the estate of the decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent . . . . (c) A named beneficiary

slayer's rule into its probate statute.[133] The relevant section of this statute not only permits the admission of a judgment of prior conviction of an intentional and felonious killing when the slayer's rule is invoked in a subsequent civil proceeding, but also permits the conviction to have conclusive effect.[134] However, as Maryland requires that all rights to appeal be exhausted,[135] Minnesota requires a "final judgment" in order for a prior conviction to be conclusive in a subsequent civil proceeding.[136]

More recently, in *Johnson v. Gray*,[137] the Court of Appeals of Minnesota was called upon to determine the definition of a "final judgment" as applied in section 524.2-803.[138] In *Gray*, the slayer was convicted of the second-degree murder of his wife.[139] The decedent's father then claimed that the slayer lost his right to claim the benefits from his wife's life insurance policy, as well as the property held in joint tenancy.[140] The court stated that "[g]enerally, a judgment becomes final when the appellate process is terminated or the

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> of a bond or other contractual arrangement who feloniously and intentionally kills the principal obligee is not entitled to any benefit under the bond or other contractual arrangement and it becomes payable as though the killer had predeceased the decedent. (d) A named beneficiary of a life insurance policy who feloniously and intentionally kills the person upon whose life the policy is issued is not entitled to any benefit under the policy and the proceeds of the policy shall be paid and distributed by order of the court as hereinafter provided. If a person who feloniously and intentionally kills a person upon whose life a life insurance policy is issued is a beneficial owner as shareholder, partner or beneficiary of a corporation, partnership, trust or association which is the named beneficiary of the life insurance policy, to the extent of the killer's beneficial ownership of the corporation, partnership, trust or association, the proceeds of the policy shall be paid and distributed by order of the court as hereinafter provided. (f) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this section. In the absence of a conviction of felonious and intentional killing the court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this section.

Id.

133. *See id.* § 524.2-803(f).
134. *See id.*
135. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-919(a) (1998).
136. *See* MINN. STAT. ANN. § 524.2-803(e).
137. 533 N.W.2d 57 (Minn. 1995).
138. *See id.* at 61.
139. *See id.* at 59.
140. *See id.*

time for appeal has expired."[141]

Following the conviction, the slayer obtained a dismissal of the appeal of his conviction in order to bring a post-conviction proceeding.[142] In Minnesota, when an appeal is dismissed and the case is remanded for a post-conviction hearing, the petitioner is permitted to raise the same issues that he could have raised on his direct appeal.[143] The court held that this sequence of events acted as a stay of the direct appeal and, therefore, the conviction was not a "final judgment."[144]

The *Gray* court found that if an appeal was dismissed and remanded for a post-conviction hearing, and the defendant failed to file a post-conviction petition, the direct appeal would remain pending indefinitely.[145] This course of events would thereby prevent a judgment from ever being deemed "final" under section 524.2-803(f).[146] Further, the *Gray* court found that the finality of a judgment depends on the availability of direct appellate review or the pendency of a post-conviction proceeding following the dismissal of the direct appeal.[147]

To solve this problem, the court held that when a petitioner obtains a dismissal of his appeal in order to bring a post-conviction hearing, the dismissal of his appeal is a "final judgment" under section 524.2-803(f), unless the defendant files a petition for post-conviction relief before the estate files a motion to determine finality.[148] The *Gray* court opined that if the defendant files a post-conviction petition, the conviction is not a "final judgment" until the appeal from the post-conviction order terminated or the time for appeal expired.[149]

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141. *Id.* at 60. The court held that under this rule, the defendant's conviction would only be final when "the appeal from the post-conviction order is terminated or the time for appeal from that order has expired." *Id.* at 61.

142. *See id.* at 60. In such a case, Minnesota courts grant the dismissal and remand the case for immediate post-conviction proceedings. *See id.*

143. *See id.* at 61; *see also* MINN. STAT. § 590.01, subd. 1 (1992) (permitting the following issues to be raised post-conviction: violation of petitioner's rights under the Constitution or under state law, and the existence of scientific evidence not available at trial tending to prove petitioner's innocence).

144. *See Gray*, 533 N.W.2d at 61.

145. *See id.*

146. *See id.*

147. *See id.*

148. *See id.*

149. *See id.*

Section 10-919 of the Courts and Judicial Proceedings Article differs from section 524.2-803 of the Minnesota Statutes in that the Maryland statute permits the conclusiveness of a judgment of a felonious and intentional killing "after all right to appeal has been exhausted," rather than after the judgment is "final."[150] However, both states permit post-conviction hearings.[151] A question may arise in Maryland as to whether all appeals are deemed to be exhausted when a petitioner seeks a post-conviction hearing.[152] If that confusion arises, the *Gray* court's analysis may be helpful.

The finality of a judgment of conviction was also defined by the Connecticut Superior Court in *Crafts v. Newtown Probate Court.*[153] The Connecticut probate statute, which incorporates Connecticut's slayer's rule, provides that a person "finally adjudged guilty," cannot benefit from a killing.[154] The *Crafts* court was faced with defining

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150. *Compare supra* note 124 *with supra* note 132.

151. *See* MD. ANN. CODE art. 27, § 645A(a) (1996). Section 645A provides:

> (a)(1) Subject to the provisions of paragraphs (2) and (3) of this subsection, any person convicted of a crime and either incarcerated under sentence of death or imprisonment or on parole or probation . . . who claims that the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of this State . . . may institute a proceeding under this subtitle in the circuit court for the county to set aside or correct the sentence . . . .

Id.

152. *See id.* § 645A(b), which provides in part:

> (b) For the purposes of this subtitle, an allegation of error shall be deemed to be finally litigated when an appellate court of the State has rendered a decision on the merits thereof, either upon direct appeal or upon any consideration of an application for leave to appeal filed pursuant to § 645-I of this subtitle . . . .

Id.

153. No. 302091, 1993 WL 328622 (Conn. Super. Ct., Aug. 17, 1993).

154. *See* CONN. GEN. STAT. ANN. § 45a-447(a) & (c)(2) (West 1998). This statute provides:

> (a) A person finally adjudged guilty, either as the principal or accessory, of any crime under section 53a-54a or 53a-54b, or in any other jurisdiction, of any crime, the essential elements of which are substantially similar to such crimes, shall not inherit or receive any part of the estate of the deceased . . . or otherwise under the will of the deceased, or receive any property as beneficiary or survivor of the deceased . . . . (c)(2) a conviction under section 53a-54a, 53a-54b, 53a-54c, 53a-54d, 53a-55 or 53a-55a, shall be conclusive for purposes of this subsection . . . .

Id.

when one is "finally adjudged guilty."[155] In *Crafts*, following the plaintiff's conviction for murdering his wife, the plaintiff sought to remove the executrix of his wife's estate.[156] He argued that because a judgment had not yet been rendered on his criminal conviction appeal, he had not been "finally adjudged guilty" under section 45a-447, the Connecticut slayer's rule statute.[157]

The court examined the Uniform Probate Code section pertaining to the effect of a homicide on intestate succession.[158] The *Crafts* court noted that under the Uniform Probate Code, a conviction is not conclusive until "all right to appeal has been exhausted."[159]

However, when interpreting the state legislature's intent, under section 45a-447, the *Crafts* court held that the opposite was true. It reasoned that, had the intent of the Connecticut legislature been the same as the drafters of the Uniform Probate Code, it would have included the requirement that all appeals be exhausted as well.[160] The *Crafts* court further held that if such a liberal interpretation were adopted, a convict could indefinitely avoid being finally adjudged guilty, for a prisoner has the right of a habeas corpus petition at his disposal.[161]

The *Crafts* and *Gray* decisions are useful in clarifying any ambiguity that be present in Maryland in determining when section 10-919 of the Courts and Judicial Proceedings Article is invoked. When Maryland adopted the exact language of section 2-803(g) of the Uniform Probate Code, it did so with the intention of avoiding the confusion that arose in Minnesota and Connecticut.

Other states, such as Florida, have taken a very different approach when adopting the Uniform Probate Code.[162] In *Prudential*

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155. *See* Crafts v. Newton Probate Ct., No. 302091, 1993 WL 328622 at *2 (Conn. Super. Ct., Aug. 17, 1993) (noting that the Connecticut courts had not previously determined when one is "finally adjudged guilty").

156. *See id.* at *1.

157. *See id.* at *2.

158. *See id.* at *3 (observing that the Uniform Probate Code provides useful insight in determining the Connecticut legislature's intent).

159. *Id.* Unlike the Connecticut statute that excludes the language, "after all appeals are exhausted," section 10-919 includes such language. *See supra* note 124.

160. *See Crafts*, at *3 ("Had the Connecticut legislature formed the same intent as the drafters of the UPC, [it] could have added the same right to appeal language, but chose not to.").

161. *See id.* at *4.

162. *See* FLA. STAT. ANN. § 732.802 (West 1998). This statute provides:

Insurance Co. of America v. Baitinger,[163] the district court of appeals held that the Florida legislature intended a "final judgment of conviction" to mean an adjudication of guilt by the trial court.[164] In *Baitinger*, Lee Johnson was convicted of first-degree murder of his wife.[165] Prudential Insurance Company issued a life insurance policy on Johnson's wife, naming him as the beneficiary.[166] Following his conviction, the probate court ordered Prudential to pay the policy proceeds to the estate's personal representative.[167] Prudential appealed the decision, claiming since Johnson's appeal was still pending, the judgment was not yet final.[168]

The *Baitinger* court compared Florida's present slayer's rule statute to its predecessor.[169] The most noticeable difference between the two was the amount of difficulty a slayer faced in trying to collect from his victim's estate.[170] The current Florida statute does not require a conviction of murder to invoke the slayer's rule.[171] Rather, the homicide may be proved by a preponderance of the evidence in the civil proceeding.[172]

Florida's interpretation of "final judgment" of conviction is interesting because the court's rationale relies upon the ability to in-

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> A final judgment of conviction of murder in any degree is conclusive for purposes of this section. In the absence of a conviction of murder in any degree, the court may determine by the greater weight of the evidence whether the killing was unlawful and intentional for purposes of this section.

Id.

163. 452 So. 2d 140 (Fla. Dist. Ct. App. 1984).

164. *See id.* at 143 (articulating that "the legislature clearly intended to make it more difficult for a killer to receive any beneficial interest as a result of his wrongdoing").

165. *See id.* at 141.

166. *See id.*

167. *See id.*

168. *See id.* at 142. Prudential relied on *Joyner v. State*, 30 So. 2d 304 (Fla. 1947), for the proposition that a judgment does not become final for the purpose of conviction until it is affirmed by the appellate court. *See id.*

169. *See id.* The present statute was broadened to prevent a killer from obtaining property that passes outside of the decedent's estate. *See id.*

170. *See id.* at 142-44.

171. *See id.* at 143. However, under the prior statute, a criminal conviction was required before a killer's interest in the estate would be forfeited. *See id.* at 142.

172. *See id.* ("The present statute . . . does not require a conviction of murder. In the absence of such a conviction, it specifically provides for a civil homicide proceeding where the standard of proof is 'the greater weight of the evidence.'") (citing FLA. STAT. ANN. § 732.802(5) (1982))).

voke the slayer's rule without a conviction.[173] Like Maryland, Florida courts can invoke the slayer's rule, in a subsequent civil proceeding, by a preponderance of the evidence.[174] In Maryland, however, in the absence of a conviction, both the slayer's rule and section 10-919 of the Courts and Judicial Proceedings Article may be invoked by a preponderance of the evidence.[175] When a conviction is present, it is not conclusive nor admissible until all appeals have been exhausted.[176]

2. Subsequent Civil Proceeding

Section 10-919 of the Courts and Judicial Proceedings Article and section 524.2-803 of the Minnesota Statutes both permit that, in the absence of a criminal conviction, a civil court may determine by a preponderance of the evidence whether a killing was felonious and intentional.[177] In *Estate of Congdon v. LeRoy*,[178] the Supreme Court of Minnesota was called upon to decide whether, pursuant to section 524.2-803,[179] there should be a civil proceeding to determine an alleged slayer's right to collect from the victim's will and trust.[180]

In *Congdon*, Mrs. Caldwell, the alleged slayer, was arrested for the murder of her mother.[181] Her husband, Mr. Caldwell, was also arrested for the same crime.[182] After Mrs. Caldwell was found not guilty, her siblings initiated a civil suit to determine the distribution of the estate.[183]

The *Congdon* court held that section 524.2-803(e) permitted a civil trial to determine whether Mrs. Caldwell feloniously and intentionally killed her mother.[184] The court cited the Uniform Probate Code comments, which state that "the concept that a wrongdoer

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173. *See id.*

174. *See* FLA. STAT. ANN. § 732.802 (West 1995); MD. CODE ANN., CTS. & JUD. PROC. § 10-919 (1998).

175. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-919.

176. *See id.*

177. *See supra* notes 124, 132.

178. 309 N.W.2d 261 (Minn. 1981).

179. *See supra* note 132.

180. *See Congdon*, 309 N.W.2d at 264.

181. *See id.* at 263.

182. *See id.*

183. *See id.* at 264.

184. *See id.* at 269-70. The court referred to the official comments to Uniform Probate Code section 2-803, which state that a defendant found not guilty may later be found to have feloniously and intentionally killed the victim. *See id.* at 270.

may not profit by his own wrong is a civil concept, and the probate court is the proper forum to determine the effect of killing on succession to property of the decedent."[185]

In opposition, Mrs. Caldwell argued that the initiation of the civil trial violated principles of double jeopardy, res judicata, and collateral estoppel.[186] In her double jeopardy argument, she noted that the double jeopardy right originated from the United States and the Minnesota constitutions.[187] However, in response to the double jeopardy argument, the court held that "[i]t is well established that the prohibition against double jeopardy does not preclude separate civil and criminal proceedings based on the same incident."[188]

Furthermore, in response to Mrs. Caldwell's res judicata argument, the *Congdon* court held that the different burdens of proof required in criminal and civil cases preclude its application.[189] The court stated that "[w]hen an acquittal in a criminal prosecution on behalf of the Government is pleaded, or offered in evidence, by the same defendant, in an action against him by *an individual*, the rule does not apply, for the reason that the parties are not the same . . . ."[190] Finally, in response to Mrs. Caldwell's collateral estoppel argument, the court held that because the criminal and civil trials had different parties, such an argument was precluded.[191]

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185. *Id.* (citing The Uniform Probate Code comments to section 2-803). The comments provide:

> Hence it is possible that the defendant on a murder charge may be found not guilty and acquitted, but if the same person claims as an heir or devisee of the decedent, he may in the probate court be found to have feloniously and intentionally killed the decedent and thus be barred under this section from sharing in the estate.

Id. (emphasis omitted).

186. *See Congdon*, 309 N.W.2d at 270.

187. *See* MINN. CONST. art. I, § 7 ("[N]o person shall be put twice in jeopardy of punishment for the same offense . . . ."); *see also* U.S. CONST. amend. V (providing that no person may "be subject for the same offence to be twice put in jeopardy of life and limb").

188. *Congdon*, 309 N.W.2d at 270 (quoting State v. Enebak, 272 N.W.2d 27, 30 (Minn. 1978)).

189. *See id.* (citing United States v. National Assoc. of Real Estate Bds., 339 U.S. 485, 493 (1950)); Burns v. United States, 200 F.2d 106 (4th Cir. 1952) (holding that an acquittal did not bar a subsequent civil proceeding from determining whether the accused was entitled to insurance benefits).

190. *Congdon*, 309 N.W.2d at 270 (citing Coffey v. United States, 116 U.S. 436, 443 (1886)).

191. *See id.* at 271 (citing Travelers Ins. Co. v. Thompson, 163 N.W.2d 289, 292

Both Maryland and Minnesota permit a subsequent civil proceeding, in the absence of a conviction, to determine if a felonious and intentional killing occurred. Therefore, the *Congdon* decision may be helpful in situations where section 10-919 is questioned on grounds of double jeopardy, res judicata, or collateral estoppel.

C. Other Maryland Statutes Permitting the Admission of Judgments of Prior Conviction

Section 10-919 of the Courts and Judicial Proceedings Article is not the only statute in Maryland that permits the use of a judgment of prior conviction in a subsequent proceeding as substantive proof.[192] Section 10-904 of the Courts and Judicial Proceedings Article snd section 11-210 of the Commercial Article also permit the use of such judgments in subsequent proceedings. Further, Maryland Rule 16-710(e) allows the admission of prior judgments in subsequent attorney disciplinary proceedings.

1. Section 10-904 of the Courts and Judicial Proceedings Article

Section 10-904 of the Courts and Judicial Proceedings Article permits a criminal defendant to admit the judgment of a prior conviction of another person for a crime with which the defendant is presently charged.[193] Although section 10-904 permits the admission of a judgment of prior conviction to be used as substantive proof, it does not make the judgment conclusive in a subsequent suit.[194]

In *Gray v. State*,[195] the Court of Appeals of Maryland was called upon to interpret the predecessor of section 10-904.[196] The statute

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(Minn. 1968), *cert. denied*, 395 U.S. 161 (1969)) (defining collateral estoppel as a form of res judicata with the same parties or privies).

192. *See generally* 8 MCLAIN, *supra* note 8 § 803(22).1, at 429 (discussing Maryland's other statutes that allow convictions to be offered as substantive proof); MURPHY, *supra* note 13, § 806, at 344-46 (discussing the admissibility of judgments).

193. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-904 (1997) ("In a civil or criminal case in which a person is charged with commission of a crime or act, evidence is admissible by the defendant to show that another person has been convicted of committing the same crime or act."). In other words, if one is arrested and charged with a crime, he may introduce and have admitted, evidence of another's conviction for the same crime.

194. *See id.*

195. 221 Md. 286, 157 A.2d 261 (1960).

196. *See id.* at 288-89, 157 A.2d at 263. The predecessor of section 10-904, passed in 1933, applies to both persons and corporations, and allows the admissibility of such evidence in any proceeding, criminal or civil. *See* MD. ANN. CODE art. 35, § 11 (1957). The present law applies to persons only and allows the admission of such evidence in a criminal proceeding only. *See* MD. CODE ANN., CTS. &

provided, "[i]f any person or corporation charged with committing any crime is found guilty thereof, such fact shall be admissible as evidence in any proceeding, criminal or civil, in which another person, firm or corporation shall be charged with committing the same crime or act."[197] In *Gray*, the appellant and two alleged accomplices were convicted of armed robbery.[198] Following the conviction, Gray appealed to the court of appeals, which subsequently remanded the case to the circuit court.[199] This appeal involved the alleged error at the remanded trial in which the State's Attorney, over objection, called the deputy clerk to testify to the appellant's and his accomplices' convictions.[200] The court of appeals held that under the statute, if a person is charged with committing a crime in which another has already been convicted, and the "conviction is predicated as the deed of one person, not of joint actors," then the conviction is admissible to prevent the possibility of convicting two people of a crime that only one could have committed.[201]

In *State v. Joynes*,[202] the Court of Appeals of Maryland applied the *Gray* interpretation of section 10-904.[203] In *Joynes*, the defendant was charged with battery and carrying a deadly weapon with the intent to injure, following a dispute with his neighbor.[204] At the trial, the defendant sought to introduce evidence of his neighbor's conviction of battery from the same incident.[205] The court of appeals held that the neighbor's prior conviction was inadmissible because of the need to determine the criminal responsibility of both men. The prior conviction of one would not have assisted the jury in determining the guilt of the other.[206] The distinguishing factor in *Joynes* was that more than one individual could have been convicted, for both parties may have been aggressors at different times.[207] The *Joynes* court reiterated that when it is impossible for both parties to have committed the same crime, judicial fairness requires the intro-

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JUD. PROC. § 10-904.

197. MD. ANN. CODE art. 35, § 11 (1957), *repealed by*, Sec. 15, ch. 10, Acts 1996.

198. *See Gray*, 221 Md. at 288, 157 A.2d at 262.

199. *See id.*

200. *See id.* at 288, 157 A.2d at 263.

201. *See id.* at 290, 157 A.2d at 264.

202. 314 Md. 113, 549 A.2d 380 (1988).

203. *See id.* at 120, 549 A.2d at 383.

204. *See id.* at 115, 549 A.2d at 381.

205. *See id.* at 117, 549 A.2d at 382. The purpose of admitting the conviction was to prove who was the first aggressor. *See id.*

206. *See id.* at 121, 549 A.2d at 384.

207. *See id.*

duction of the judgment of prior conviction.[208] The court stated that "the statute was necessary to 'avoid the absurdity of convicting two persons' for a crime only one could commit."[209] This, the court of appeals held, applies to a subsequent civil suit as well.[210]

2. Section 11-210 of the Commercial Article

The admission of a judgment of prior conviction is also admissible in antitrust suits per section 11-210 of the Commercial Article.[211] Section 11-210 provides that a final judgment or decree in a civil or criminal proceeding is not only admissible in a subsequent civil antitrust suit, but is prima facie evidence of a violation.[212]

3. Maryland Rule 16-710

Finally, Maryland permits the admission of judgments of prior conviction in attorney disciplinary actions.[213] Specifically, Rule 16-710(e) of the Maryland Rules states that when an attorney is brought before a disciplinary proceeding, a prior conviction of that attorney is substantive proof of guilt.[214] Maryland Rule 16-710 provides that a final judgment of conviction of an attorney by a judicial tribunal is conclusive proof of an attorney's guilt.[215] Rule 16-710 also provides that a final adjudication by any disciplinary agency, finding an attorney guilty of professional misconduct, is conclusive proof of

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208. *See id.* (holding section 10-904 inapplicable when both parties have not been accused of the same crime).

209. *Id.* at 121, 549 A.2d at 384 (quoting Gray v. State, 221 Md. 286, 290-91, 157 A.2d 261, 264 (1960) (quoting 1 WIGMORE, EVIDENCE § 142 (3d ed.)).

210. *See id.*

211. *See* MD. CODE ANN., COM. LAW II § 11-210 (a) (1990). That section provides:

> Except as provided in subsection (b) of this section, a final judgment or decree rendered in a criminal proceeding or civil action brought by the Attorney General under this subtitle to the effect that a defendant has violated this subtitle is prima facie evidence against the defendant in an action for damages brought by another party against him under § 11-209(b) with respect to all matters where the judgment or decree would be an estoppel between the parties to it.

Id.

212. *See id.*; *see also* Cities Serv. Oil Co. v. Burch, 29 Md. App. 430, 435-38, 349 A.2d 279, 283-84 (1975) (authorizing an entry of a consent decree before taking testimony and without finding a violation of the Maryland Antitrust Act).

213. *See generally* 6 MCLAIN, *supra* note 8, § 803(22).1, at 429.

214. *See* MD. RULE 16-710(e).

215. *See id.* ("[A] final adjudication . . . in another proceeding convicting an attorney of a crime shall be conclusive proof of the guilt of the attorney of that crime.").

that misconduct.[216]

In *Attorney Grievance Commission v. Meisnere*,[217] the Attorney Grievance Commission filed a disciplinary petition against the defendant alleging violations of the Code of Professional Responsibility.[218] The court referred to a circuit court holding where the defendant was convicted of giving perjured testimony before a grand jury,[219] and knowingly conspiring to defraud the Internal Revenue Service.[220] The court of appeals ordered disbarment of the defendant after admitting the judgment of prior conviction.[221]

IV. ADMISSION OF A JUDGMENT OF PRIOR CONVICTION OF A FELONIOUS OFFENSE OTHER THAN A SLAYING USED AS SUBSTANTIVE PROOF

Following *Swiger*,[222] Maryland contemplated the adoption of Federal Rule of Evidence 803(22), which permits judgments of all felony convictions to be used as substantive evidence in a subsequent civil proceeding.[223] However, the focus shifted to adopt section 10-919 of the Courts and Judicial Proceedings Article for two reasons. First, the *Swiger* court only considered the admission of judgments of intentional, felonious murder.[224] Second, section 2-803(g) of the Uniform Probate Code permits the court to find an individual "criminally accountable for the felonious and intentional killing of the decedent," even in the absence of a conviction.[225]

While some criminal charges are worth the time, money, or energy to defend, a felony, and specifically a charge of intentional, felonious murder is. The Maryland Legislature, demonstrated, through its adoption of section 10-919, that it believed a reasonable

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216. *See id.* ("A final adjudication . . . that an attorney has been guilty of misconduct is conclusive proof of the misconduct in the hearing of charges pursuant to this Rule."); *see also* Attorney Grievance Comm'n v. Meisnere, 301 Md. 514, 516, 483 A.2d 776, 777 (1984) (holding that an admission of the judgment of a prior conviction is conclusive to order the disbarment of the defendant).

217. 301 Md. 514, 483 A.2d 776 (1984).

218. *See id.* at 515, 483 A.2d at 776.

219. *See id.* at 515, 483 A.2d at 776-77 (noting Meisnere had been convicted of giving false testimony before a grand jury, a violation of 18 U.S.C. § 1623).

220. *See id.* (noting Meisnere had been convicted of conspiring to defraud the United States government, a violation of 18 U.S.C. § 371).

221. *See id.* at 516, 483 A.2d at 777.

222. *See supra* notes 79-120 and accompanying text.

223. *See supra* note 122 and accompanying text.

224. *See supra* note 82 and accompanying text.

225. *See supra* note 124.

person, charged with murder, would spend the time, money, and energy to defend such charges. However, the statute overlooks the fact that there are other felony charges that warrant an aggressive defense.[226] Therefore, for the same reasons that a judgment of intentional, felonious murder is admissible in a subsequent civil proceeding, so too should other felony judgments be admissible as substantive proof in a subsequent civil proceeding.

Currently, a judgment of prior conviction of any felony, other than an intentional felonious murder, is still inadmissible in a subsequent civil proceeding.[227] Long before the court of appeals adopted the Maryland Rules of Evidence, in *Baltimore & Ohio Railroad Co. v. Strube*,[228] the court addressed in dicta the admissibility of a judgment of conviction as substantive proof.[229]

In *Strube*, after the plaintiff admittedly trespassed upon the defendant's property, an officer hired by the defendant assaulted the plaintiff.[230] At the civil trial, during cross-examination of the defendant, the plaintiff's attorney asked the defendant how many times he had been convicted of assault.[231] The defendant failed to include the present assault for which he had been convicted in his reply, and the plaintiff's attorney questioned the defendant about that particular conviction.[232] The court of appeals held that because the defendant answered the first question untruthfully, the second question went to the credibility of the witness and was therefore ad-

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226. *See, e.g.*, 2 STRONG, *supra* note 1, § 298, at 281 (rationalizing that a person charged with a felony has more of a motivation to defend); WEINSTEIN & BERGER, *supra* note 1, § 803.28[2], at 803-103 (recognizing there is more of a motivation to defend against a felony charge than a lower charge).

227. *See, e.g.*, Aetna Cas. & Sur. Co. v. Kuhl, 296 Md. 446, 452, 463 A.2d 822, 826 (1983) (concluding that a conviction in a criminal case is not admissible in a civil case as evidence of the facts upon which it was based); Galusca v. Dodd, 189 Md. 666, 669, 57 A.2d 313, 314 (1948) (precluding admission of evidence indicating the defendant has been tried and convicted in a criminal prosecution for the purpose of proving the crime was committed); *see also* 6 MCLAIN, *supra* note 8, § 803(22).1, at 428 ("Maryland does not recognize a general hearsay exception which would permit the use of a criminal conviction as substantive proof of the truth of the facts upon which it is based.").

228. 111 Md. 119, 73 A. 697 (1909).

229. *See id.* at 126, 73 A. at 699 (holding that questions concerning a prior conviction for assault in a civil suit for the same assault are proper on cross examination for the purpose of showing the credibility of the witness).

230. *See id.* at 124, 73 A. at 698.

231. *See id.* at 125, 73 A. at 699.

232. *See id.*

missible.[233] The court held, however, that "[s]uch evidence would not be admissible in chief for the purpose of proving the fact of the assault . . . ."[234]

In *Galusca v. Dodd*,[235] a civil suit for assault, the Court of Appeals of Maryland held that evidence of the defendant's prior criminal conviction for the assault was inadmissible to prove it was committed.[236] In *Galusca*, the plaintiff sought to recover damages for injuries sustained as the result of an assault allegedly committed by the defendant.[237] In the civil suit that followed the defendant's arrest, the defendant contended that it was error for the trial judge to admit evidence of her arrest.[238] The court, however, disagreed and held that the evidence of arrest was admissible.[239] However, the court further held that a judgment of prior conviction is inadmissible in the plaintiff's case-in-chief, to prove the truth of the matter asserted.[240] The court did emphasize that such evidence could still be admitted on the cross-examination of the defendant.[241]

The Court of Appeals of Maryland further examined the admissibility of a judgment of prior conviction, used as substantive proof, in *Aetna Casualty & Surety Co. v. Kuhl*.[242] In *Kuhl*, following an altercation between the parties, one of the defendants struck the plaintiffs with his employer's vehicle.[243] After he was convicted of assault and battery, the plaintiffs sued their assailant and his employer.[244] At the same time, Aetna, who held an insurance policy on the employer's vehicle, initiated a suit for a judgment that the policy did

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233. *See id.* at 126, 73 A. at 699.

234. *Id.; see also* Pugaczewska v. Maszko, 163 Md. 355, 163 A. 205 (1932) (holding that in an action for assault and battery, evidence by a police officer that the defendant was tried and fined in the police court was inadmissible). Maryland courts have also held that judgments of traffic violations are inadmissible in subsequent civil suits to prove the truth of the matter asserted. *See* Eisenhower v. Baltimore Transit Co., 190 Md. 528, 538, 59 A.2d 313, 318 (1948); General Exch. Ins. Corp. v. Sherby, 165 Md. 1, 4, 165 A. 809, 810 (1933).

235. 189 Md. 666, 57 A.2d 313 (1948).

236. *See id.* at 669, 57 A.2d at 314. However, it was not erroneous for a judge to admit evidence showing that the defendant had been arrested on the criminal charges. *See id.* at 669, 57 A.2d at 314-15.

237. *See id.* at 668, 57 A.2d at 314.

238. *See id.* at 669, 57 A.2d at 314.

239. *See id.* at 669, 57 A.2d at 315.

240. *See id.* at 669, 57 A.2d at 314.

241. *See id.*

242. 296 Md. 446, 463 A.2d 822 (1983).

243. *See id.* at 449, 463 A.2d at 824.

244. *See id.*

not cover the victims' injuries.[245]

The *Kuhl* court affirmed the settled rule in Maryland that a criminal conviction is inadmissible in a subsequent civil suit to establish the truth of the facts upon which that civil suit is based.[246] However, if the preceding evidentiary issues had been decided under the Federal Rules of Evidence, the judgments of prior conviction would have been admissible.[247]

V. FEDERAL RULE OF EVIDENCE 803(22)

When the admissibility of a judgment of prior conviction is considered in a subsequent civil suit, there are three possible results. The first is that the judgment will be conclusive under the doctrine of res judicata, as either a bar or collateral estoppel.[248] The second possibility is that the judgment will be admissible and the trier of fact is given the opportunity to weigh its value.[249] Lastly, the judgment may have no effect at all upon the subsequent civil proceeding.[250] When substantive law does not require res judicata, Federal Rule of Evidence 803(22) applies the second alternative to judgments of felony convictions and permits the trier of fact to weigh its value.[251]

Federal Rule of Evidence 803(22) permits the admission of a prior conviction, as evidence, to be considered by the trier of fact as substantive proof.[252] Although the rule does not provide the trier of

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245. *See id.*

246. *See id.* at 450, 463 A.2d at 825. The court of appeals reasoned that "[t]here is a weighty difference in the parties, objects, issues, procedure, and results in the two proceedings . . . ." *Id.* In addition, there are "different rules with respect to competency of witnesses and the relevancy, materiality, and weight of the testimony. In a civil proceeding, the act complained of is the essential element, but in the criminal prosecution it is the intent with which the act is done." *Id.* at 451, 463 A.2d at 826.

247. *See infra* Part V.

248. *See* FED. R. EVID. 803(22), advisory committee notes; *see also* LILLY, *supra* note 1, § 7.20, at 318 (explaining that, for instance, if someone was convicted of arson, that jury's finding might be conclusive in a subsequent civil case).

249. *See* FED. R. EVID. 803(22), advisory committee notes; LILLY *supra* note 1, § 7.20, at 320-22 (explaining that the judgment is often persuasive to the jury).

250. *See* FED. R. EVID. 803(22), advisory committee notes.

251. Where res judicata, collateral estoppel, or claim or issue preclusion make findings in the first case binding in the second case, the judgment is not only admissible in the subsequent suit but is also conclusive. *See* 2 STRONG, *supra* note 1, § 298; *see also* LILLY, *supra* note 1, § 7.20, at 320-22 (clarifying that Rule 803(22) is not applicable when res judicata requires a conclusive effect).

252. FED. R. EVID. 803(22). Federal Rule of Evidence 803(22) provides:

fact with a way to evaluate the conviction once it is admitted, "it seems safe to assume that the jury will give it substantial effect unless defendant [sic] offers a satisfactory explanation . . . ."[253]

Federal Rule of Evidence 803(22) generally provides that hearsay will not bar the admission of a final judgment of conviction into evidence after a trial or plea of guilty.[254] This rule, however, does not apply to judgments of acquittal.[255] A judgment that is entered into the evidence of a subsequent proceeding may be used to prove any fact essential to the judgment.[256] Determining which facts were essential to the prior judgment is a matter for the trial judge and may be a difficult task.[257] For instance, general verdicts have been held to fall outside the reach of Federal Rule of Evidence 803(22). In *Columbia Plaza Corp. v. Security National Bank*,[258] the United States Court of Appeals for the District of Columbia Circuit, held that a

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> Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

Id.

253. FED. R. EVID. 803(22) advisory committee note. *Accord* LILLY, *supra* note 1, § 7.20, at 322 ("[T]he judgment is usually persuasive . . . but its allowable probative force is restricted to 'any fact essential to sustain the [prior] criminal judgment.'"); 2 STRONG, *supra* note 1, § 298, at 282 ("The provision merely removes the hearsay bar from a qualifying judgment and does not purport to dictate the use to be made of the judgment once admitted.").

254. *See* 29A AM. JUR. 2D *Evidence* § 1343 (1994); *see also* 2 STRONG, *supra* note 1, § 298, at 282.

255. *See* United States v. Viserto, 596 F.2d 531, 537 (2d Cir. 1979) (holding that a criminal defendant's prior acquittal of income tax evasion was not permissible to prove that certain monies were obtained through illegal drug sales); *see also* WEINSTEIN & BERGER, *supra* note 1, § 803.28[7], at 803-134.

256. *See* FED. R. EVID. 803(22); LILLY, *supra* note 1, § 7.20, at 322 ("[I]ts allowable probative force is restricted to 'any fact essential to sustain the [prior] criminal judgment.'").

257. *See* Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951) (declaring that the trial judge hearing the suit must determine what was decided by the judgment and that determination may be made upon examination of the record, including pleadings, evidence submitted, jury instructions and opinions of the court); *see also* WEINSTEIN & BERGER, *supra* note 1.

258. 676 F.2d 780 (D.D.C. 1982) (concerning allegations by plaintiffs that early exhaustion of a construction loan caused damages to a building in which the plaintiff owned).

general verdict rendered in a prior criminal case did not provide a basis for concluding whether the alleged acts had been proved.[259] The court applied a test from *Emich Motors Corp. v. General Motors Corp.*,[260] to determine whether and how certain matters had been decided in the prior criminal case.[261]

In order for a judgment to be admissible in a subsequent civil proceeding it must refer to a crime punishable by death or imprisonment in excess of one year, which is the federal standard for a felony.[262] Judgments entered upon a plea of nolo contendere, however, are excluded from the reach of Federal Rule of Evidence 803(22).[263] If a judgment pending appeal is contemporaneously admitted into the evidence of a subsequent proceeding, disclosure of the appeal to the trier of fact is permitted, but the status of the appeal will not affect the admissibility of the judgment.[264]

In criminal prosecutions, the government may not enter a judgment of a conviction into evidence of a subsequent civil suit, except for impeachment purposes.[265] This exclusion generally includes prosecutions where the government tries to prove an element of a charge by showing that someone other than the accused has been

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259. *See id.* at 790.

260. 340 U.S 558 (1951). In *Emich*, plaintiff brought suit under the Clayton Act alleging damages sustained because defendants conspired to restrain trade, thereby violating the Sherman Act. *See id.* at 559. Emich was allowed, in accordance with section 5 of the Clayton Act, to introduce into evidence a criminal indictment, verdict, and judgment against General Motors. *See id.* at 559-60. The Supreme Court held that the criminal judgment was prima facie evidence of the conspiracy to monopolize the financing of General Motors cars. *See id.* at 570-71. In reaching its conclusion, the Court determined that the trial judge should: (1) examine the record of the antecedent case in order to determine the issues decided; (2) instruct the jury on that case to the extent that the court sees necessary to acquaint the jury with the issues decided; and (3) explain to the jury the scope and effect of the former judgment. *See id.* at 572.

261. *See Columbia Plaza Corp.*, 676 F.2d at 790.

262. *See id.*; LILLY, *supra* note 1, § 7.20, at 320-21. The purpose of limiting the application of Federal Rule of Evidence 803(22) to felonies is to exclude lesser offenses where the motivation to defend is not as strong. *See* 31 MICHAEL H. GRAHAM, FED. PRAC. & PROC. § 6773 (interim ed. 1997); 2 STRONG, *supra* note 1, § 298, at 281; WEINSTEIN & BERGER, *supra* note 1, § 803.28[3], at 803-130.

263. *See supra* note 252; 2 STRONG, *supra* note 1, § 298, at 282.

264. *See* WEINSTEIN & BERGER, *supra* note 1, § 803.28[6], at 803-133 to 803-134 (explaining that the fact an appeal is pending can be evaluated by jurors).

265. *See* FED. R. EVID. 803(22); *see also* WEINSTEIN & BERGER, *supra* note 1, § 803.28[3], at 803-130.

convicted of a separate but related crime.[266] In *United States v. Diaz*,[267] the defendant was charged with transporting undocumented aliens.[268] The elements of the crime, which the government needed to prove, included the alien's status, the defendant's knowledge of the illegal status and her knowing and intentional furtherance of the violation of the law by the alien.[269] In proving these elements, the government relied upon the conviction of the aliens, which the court held to be outside of the boundaries of Federal Rule of Evidence 803(22).[270]

The proviso restricting the use of convictions of persons other than the accused is intended to incorporate the holding of *Kirby v. United States*.[271] In *Kirby*,[272] a criminal defendant was charged with receiving stolen goods belonging to the United States.[273] There, the trial judge instructed the jury that the sole evidence of the record of the principal felons' theft conviction was more than sufficient to prove the first element of the charge against Kirby.[274] On appeal, the Supreme Court overturned the trial court, and held that the "mere production of the record" violated the Confrontation Clause of the Constitution because cross-examination was precluded.[275] The Court quoted, "in all criminal prosecutions the accused shall . . . be confronted with the witnesses against him."[276]

VI. ANALYSIS

Despite the differences between section 10-919 of the Courts and Judicial Proceedings Article and Federal Rule of Evidence

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266. *See* 29A AM. JUR. 2D *Evidence* § 1345 (1994).
267. 936 F.2d 786 (5th Cir. 1991).
268. Transporting undocumented aliens is a federal crime under 8 U.S.C § 1324 (a)(1)(B).
269. *See Diaz*, 936 F.2d at 788.
270. *See id.*
271. *See* 29A AM. JUR. 2D *Evidence* § 1345 (1994) (noting that this proviso is intended to incorporate the holding of *Kirby v. United States*, 174 U.S. 47 (1899), where the Supreme Court held that use of the convictions violated the Confrontation Clause, and distinguished a hypothetical situation in which the proof of prior convictions of others would be required as an element of the offense with which the accused had been charged).
272. 174 U.S. 47 (1899).
273. *See id.* at 49.
274. *See id.* at 50..
275. *Id.* at 54-55; *see also* WEINSTEIN & BERGER, *supra* note 1, § 803.28[3], at 803-130 to 803-131 ("[A]dmission of evidence of a conviction of a third party violates the confrontation clause.").
276. *Kirby*, 174 U.S. at 55 (quoting U.S. CONST. amend. VI).

803(22), the policy that led to their adoptions are interrelated.[277] The history of the slayer's rule exemplifies Maryland's policy that one should not be permitted to profit from their own wrongdoing.[278] The court of appeals articulated this policy as early as 1933 in *Price v. Hitaffer*.[279]

In *Price*, the court of appeals specifically referred to the policy, prohibiting an individual from profiting from "their own fraud," or taking "advantage of his own wrong . . . ."[280] However, *Price* narrowly focused on a murderer's attempt to enrich himself at the expense of his victim. Expansion of *Price*'s underlying policy to other areas of law would occur if Maryland adopted a rule similar to Rule 803(22) of the Federal Rules of Evidence. The adoption of this rule would complicate the ability of a felon, convicted of a crime such as arson, from profiting from his own wrongdoing.

Price's rationale proved significant enough that the court of appeals applied it to the interpretation of the statute of descent and distribution. *Price* provides further support for adopting a rule similar to the Federal Rule of Evidence 803(22) by citing *New York Mutual Life Insurance Co. v. Armstrong*.[281] In *Armstrong*, the Supreme Court analogized prohibiting murderers from enriching themselves at the expense of their victim's estate to prohibiting convicted arsonists from collecting the insurance proceeds from the buildings they have destroyed.[282]

Prior to *Swiger*,[283] a party had not attempted to enter a conviction of felonious, intentional murder into the evidence at a subse-

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277. *See, e.g.*, 2 STRONG, *supra* note 1, § 298, at 281 (opining that a strong desire to stop criminals from benefitting from a criminal offense influenced the courts to admit judgments of prior conviction); WEINSTEIN & BERGER, *supra* note 1, § 803.28[1], at 803-128 (explaining that judgments of conviction are admissible under 803(22) because of a belief that the fact-finding process leads to reliable decisions that justify being given weight and that their exclusion would deprive the jury of valuable evidence).

278. *See, e.g.*, LILLY, *supra* note 1, § 7.20, at 317-18 (explaining that a jury's findings that someone burned her property might be conclusive in a later civil case); 2 STRONG, *supra* note 1, § 298, at 281; WEINSTEIN & BERGER, *supra* note 1, § 803.28[4], at 803-132 (exemplifying that one use for evidence of prior conviction would be in a case brought by an accused arsonist in a suit for the proceeds of a fire insurance policy).

279. 164 Md. 505, 165 A. 470 (1933).

280. *See supra* note 36 and accompanying text.

281. *See Price*, 4 Md. 505, 515, 5 A. 470, 474 (1933) (citing New York Mutual Life Ins. v. Armstrong, 117 U.S. 591, 600 (1886)).

282. *See Armstrong*, 117 U.S. at 600.

283. *See supra* notes 79-120 and accompanying text.

quent civil proceeding. The frustrating inability to admit Finneyfrock's conviction led Maryland to pass section 10-919 shortly thereafter. Section 10-919 is an extreme measure that insures a res judicata effect upon a conviction in a subsequent civil suit when all of the appropriate conditions are met.[284]

The reliability of prior convictions further contributed to the passage of section 10-919, and the resultant conclusiveness of judgments of prior conviction in a subsequent civil proceeding.[285] A charge of intentional, felonious murder is serious enough to impose a presumption that any reasonable person would defend the charge. The gravity of the crimes covered by Federal Rule of Evidence 803(22) warrants a similar presumption that any reasonable person would defend himself against the charges.[286] It is patent to permit the admission of such judgments in a subsequent civil proceeding.

In *Lloyd v. American Export Lines, Inc.*,[287] the Third Circuit stated that "[a]doption by Congress of this exception to the hearsay rule 'is in harmony with previous federal practice and policy[,]' . . . is consistent with modern decisional trends, . . . and reflects the views of many commentators."[288] The party against whom the judgment is being offered is usually the convicted defendant from the prior criminal case.[289] Therefore, not only was there an opportunity to defend the action, but also the incentive.[290] Because the burden of proof is heavier in the prior criminal case, the facts upon which the judgment of conviction is based are more reliable than those deter-

284. *See* MURPHY, *supra* note 13, § 806, at 344 (stating that a judgment is admissible under section 10-919 to establish "collateral estoppel, double jeopardy, and/or res judicata, as well as to prove that a witness has been convicted if the witness refuses to acknowledge the conviction when asked about it on cross-examination").

285. *See id.*

286. *See* 2 STRONG, *supra* note 1, § 298, at 281 (opining that a party charged with a serious offense usually had the opportunity and motive to defend fully); WEINSTEIN & BERGER, *supra* note 1, § 803.28[2], at 803-130 (pointing out the limitation of Rule 803(22) to felony charges "recognizes that motivation to defend at a lower level may be lacking").

287. 580 F.2d 1179 (3d Cir. 1978).

288. *Id.* at 1187 (citations omitted).

289. *See* 2 STRONG, *supra* note 1, § 298. The admission of judgments of prior conviction are most noticeable when the convicted defendant subsequently attempts to profit from his crime. *See id.*

290. *See id. But see* Banek v. Thomas, 733 P.2d 1171-72 (Colo. 1986) (holding a misdemeanor conviction inadmissible because of the limited motive to defend such an action).

mined under a preponderance of the evidence standard.[291]

VII. CONCLUSION

Many convicted felons are subsequently involved in a civil proceeding where the judgment of their conviction is at issue. In Maryland, however, other than judgments of a felonious and intentional murder, a judgment of prior conviction is considered hearsay and may not be used to prove the truth of the matter asserted.[292]

Section 10-919 of the Courts and Judicial Proceedings Article of the Maryland Code and Federal Rule of Evidence 803(22) both permit admitting judgments of prior conviction into the evidence at subsequent civil proceedings. However, section 10-919 applies only to felonious, intentional killings when the slayer's rule is invoked, whereas Federal Rule of Evidence 803(22) applies to all felonies.[293] In addition, section 10-919 makes a judgment conclusive in a subsequent civil proceeding, but Federal Rule of Evidence 803(22) only makes the judgment admissible.[294] Given the res judicata effect of section 10-919, it is safeguarded by the requirement that all appeals be exhausted.[295] Federal Rule of Evidence 803(22), however, permits the admission of a judgment of conviction after a trial or a plea of guilty.[296] Because of the disregard for the status of an appeal, the person who the judgment is being offered against is given an opportunity to present evidence, explaining or denying the conviction.[297]

This Comment demonstrates that Maryland has a general belief that wrongdoers should not be permitted to benefit from their crimes.[298] Following the *Swiger* decision, Maryland moved toward

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291. *See* 2 STRONG, *supra* note 1, § 298. One commentator also observes:

> [T]he safeguards afforded the accused under criminal procedure are greater than those in a civil action, so that he has no cause for complaint that an adverse decision arrived at under such restraints should be used against him, especially where it is admitted only as prima facie evidence, subject to rebuttal.

W. E. Shipley, *Conviction or Acquittal as Evidence of the Facts on Which it Was Based in Civil Action*, 18 A.L.R.2d 1287 (1951).

292. *See supra* notes 121-26 and accompanying text.

293. *See supra* notes 248-76 and accompanying text.

294. *See supra* notes 248-76 and accompanying text.

295. *See supra* note 124 and accompanying text.

296. *See supra* notes 248-76 and accompanying text.

297. *See supra* notes 248-76 and accompanying text.

298. *See supra* notes 28-126 and accompanying text.

adopting language similar to Federal Rule of Evidence 803(22).[299] Since the passage of section 10-919, the momentum to permit judgments of prior conviction ceased.[300] Yet, there are still many instances that require the admission of a judgment of conviction, and many litigants would benefit from a rule or statute permitting such an admission. Maryland should adopt language similar to Federal Rule of Evidence 803(22). By adopting such language, both the parties to a civil proceeding and the Maryland courts would be relieved from re-litigating whether certain judgments of prior conviction exist.

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299. *See supra* note 79-126 and accompanying text.
300. *See supra* note 121-26 and accompanying text.