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Comment: When Considering Whether Prior Criminal Convictions Are Admissible in Subsequent Civil Proceedings as a Hearsay Exception, Should Maryland Keep Its Kuhl or Take a Walk on the Wald Side?

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COMMENT

WHEN CONSIDERING WHETHER PRIOR CRIMINAL CONVICTIONS ARE ADMISSIBLE IN SUBSEQUENT CIVIL PROCEEDINGS AS A HEARSAY EXCEPTION, SHOULD MARYLAND KEEP ITS *KUHL* OR TAKE A WALK ON THE *WALD* SIDE?

By: Michael Rynd*

I. INTRODUCTION

Assume that Usama Bin Ladin has been captured, tried, and convicted for his role in participating in the murder of over 3,000 people. In wrongful death suits arising after the criminal judgment, plaintiffs in federal court have the option under Federal Rule of Evidence ("FRE") 803(22) of introducing the conviction "to prove any fact essential to sustain the judgment."[1] The Court of Appeals of Maryland has considered proposals for, but declined to adopt, a rule of evidence similar to FRE 803(22).[2] If this hypothetical situation played out in Maryland state courts, the burden would exist for each subsequent civil suit plaintiff to redraw, for the finder of fact, all facts necessary to sustain Bin Ladin's culpability. Fully seventy-five percent of states other than Maryland have adopted rules of evidence substantially similar in language and intent to FRE 803(22).[3] On the

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1. FED. R. EVID. 803(22) ("Judgment of previous conviction. 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.").
2. LYNN MCLAIN, MARYLAND RULES OF EVIDENCE 250 (2d ed. 2002).
3. ALA. R. EVID. 803(22); ARIZ. REV. STAT. R. 803(22); ARK. R. EVID. 803(22); CAL. EVID. CODE § 1300; COLO. R. EVID. 803(22); DEL. R. EVID. 803(22); HAW. R. EVID. 803(22); IDAHO R. EVID. 803(22); IND. R. EVID. 803(22); IOWA R. EVID. 5.803(22); KAN. STAT. ANN. § 60-460(r); KY. R. EVID. 803(22); LA. CODE EVID. art. 803(22); ME. R. EVID. 803(22); MICH. R. EVID. 803(22); MINN. R. EVID. 803(22); MISS. R. EVID. 803(22); MONT. R. EVID. 803(22); NEB. R. STAT. § 27-803(21); NEV. REV. STAT. § 51.295; N.J. R. EVID. 803(22); N.M. R. EVID. 11-803V.; N.D. R. EVID. 803(22); OHIO R. EVID. 803(21); OKLA. STAT. tit. 12 § 2803(22); OR. REV. STAT. § 40.460(22); R.I. R. EVID. 803(22);

question of admitting a prior criminal conviction as evidence in a subsequent civil proceeding, Maryland has definitely not followed the herd.[4]

There is a tension between the desire for judicial economy and fairness to persons injured by criminal activity on one hand, and the need to protect traditional rights of all litigants on the other. Is a modified version of FRE 803(22) the answer? This article posits that the tension may be eased by emphasizing the judge's role as gatekeeper, empowered to determine relevancy and materiality and to balance probative value against prejudicial effect.

In order to understand the applicability of the proposed rule it is imperative that it not be confused with established uses of criminal convictions. Under Maryland law, a witness may be impeached by a past conviction for an infamous crime or a crime that reflects negatively on the witness' credibility for truthfulness.[5] A party's plea of guilty may come into a subsequent proceeding as an admission of a party opponent.[6] It is essential to differentiate between proof of the fact of the conviction, proof of which might be admissible as a public record,[7] and the facts essential to sustain the conviction. FRE 803(22) and its kin are not in place to say that Party A has been convicted of arson (and therefore is a three-time loser), rather to show that Party A set fire to his insured's building (and therefore invoked the exclusionary clause regarding intentional acts in the policy).

It is helpful to retain three concepts while considering this topic. First, there is a long-standing tradition that a criminal should not profit from the fruits of his crime. It is a legitimate question to ask whether the party, against whom the evidence might be offered, would in the absence of a rule like FRE 803(22), benefit from forcing the offeror of the evidence to re-litigate the underlying facts necessary to sustain the conviction. Second, there is an equally long-standing tradition that the party, against whom the evidence might be offered, is entitled to have fully litigated all the underlying contentions. Third, nothing in the

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S.C. R. EVID. 803(22); S.D. CODIFIED LAWS § 19-16-26; TENN. R. EVID. 803(22); TEX. R. EVID. 803(22); UTAH R. EVID. 803(22); VT. R. EVID. 803(22); WASH. R. EVID. 803(a)(22); W. VA. R. EVID. 803(22); WIS. STAT. § 908.03(22); WYO. R. EVID. 803(22).

4. *See* Stephen B. Gerald, *Comment: Judgments of Prior Conviction as Substantive Proof in Subsequent Civil Proceedings: A Study of Admissibility and Maryland's Need for Such a Hearsay Exception*, 29 U. BALT. L. REV. 57 (1999); Stephen J. Karina, *Ford v. Ford: A Maryland Slayer's Statute is Long Overdue*, 46 MD. L. REV. 501 (1987).

5. MD. RULE 5-609 (a).

6. MD. RULE 5-803(a).

7. MD. RULE 5-803(b)(8)(A).

FRE 803(22) rule places it beyond the twin threshold evaluations of relevance and the balancing test of prejudicial effect against probative value.

Part II of this comment will discuss the development of the law in three areas: (a) Maryland's common law dealing with the topic; (b) sample jurisdictions' applications of rules similar to FRE 803(22); and (c) Maryland's existing statutory exceptions to the exclusionary practice. Part III will identify the areas of concern raised in Maryland courts and in the rule proposal process in Maryland regarding admissibility of antecedent criminal convictions in subsequent civil proceedings. Part IV will address the concerns raised. Part V will propose a specific modified version of the rule.

II. DEVELOPMENT OF THE EXISTING LAW

Maryland case law has evolved so that a criminal conviction related to a civil case may be proved to impeach the evidence of a party who testifies inconsistently with facts that were necessary to the conviction but not as substantive proof of those facts. Federal courts and a large majority of states have followed the trend away from the former majority rule of exclusion, towards admissibility of a conviction as substantive evidence of facts necessary to sustain the judgment. Even in Maryland, the legislature has created exceptions to the exclusionary practice to allow antecedent convictions into subsequent civil proceedings as substantive evidence.

A. The Evolution of Maryland Case Law

The near century-old case of *Mattingly v. Montgomery*[8] foreshadowed the blending of issues that can occur when using criminal convictions as evidence. In *Mattingly*, the central question was whether the driver of a carriage, acting as an agent of the defendant, had been negligent in the handling of his horse at a railroad crossing.[9] The horse, frightened by locomotive air brakes, leaped wildly forward, knocking the plaintiff to the ground.[10] Appealing the judgment for the plaintiff, the defendant took exception to the trial court's admission of the evidence that the carriage driver had been arrested and fined for driving too fast as a result of the same

8. 106 Md. 461, 68 A. 205 (1907).
9. *Id.* at 468, 62 A. at 207.
10. *Id.* at 465, 68 A. at 206.

incident.[11] The court held admission of the evidence was proper as "[t]he credibility of the witness was . . . directly in issue upon a material point, and *the fact proved* tended to impair the weight of his evidence, and was properly admitted without the production of the record of conviction."[12] As this line of cases developed, admissibility for credibility was retained while admissibility to show facts necessary to sustain the conviction fell by the wayside.

Two years after *Mattingly* the court revisited this discussion in *Baltimore & Ohio Railroad Co. v. Strube.*[13] Strube was returning home from a visit to a gypsy camp by way of tracks on a viaduct owned by the defendant when he was assaulted by a private detective in the employ of the defendant.[14] The railroad's agent, McCarron, testified on cross-examination that he had been convicted for beating Strube.[15] The appellate court considered the admissibility of this testimony. Citing *Mattingly* as directly on point, the court said "[t]he answer affects the weight of McCarron's testimony as to the *character of the assault*, and therefore in a sense his credibility as a witness."[16] The court appears to be looking at the facts underlying the conviction but limiting the scope of the testimony by applying those facts to make a determination regarding the witness's credibility.

The court's reluctance to make use of a judgment as substantive evidence of the underlying facts continued to become more firmly entrenched across the subsequent decades in a line of cases whose authority for this approach was *Strube.*[17] In 1983, the court firmly reiterated this position in *Aetna Casualty & Surety Co. v. Kuhl.*[18]

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11. *Id.* at 471, 68 A. at 208.
12. *Id.* (emphasis added).
13. 111 Md. 119, 73 A. 697 (1909).
14. *Id.* at 122, 73 A. at 698.
15. *Id.* at 125, 73 A. at 699.
16. *Id.* at 126, 73 A. at 699 (emphasis added).
17. *See* Eagan v. Calhoun, 347 Md. 72, 86, 698 A.2d 1097, 1104 (1997) ("A criminal conviction is not conclusive of the facts behind it in a subsequent civil proceeding, and, indeed, the conviction is ordinarily not even admissible in the civil action as evidence of the underlying facts."); Eisenhower v. Baltimore Transit Co., 190 Md. 528, 538, 59 A.2d 313, 319 (1948) ("[T]he judgment in a criminal prosecution is not competent evidence, 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."); Gen. Exch. Ins. Corp. v. Sherby, 165 Md. 1, 7, 165 A. 809, 811 (1933) (finding that the case before it was "within the general rule that the judgment in the criminal prosecution is not competent evidence, 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.").
18. 296 Md. 446, 450, 463 A.2d 822, 825 (1983).

While *Kuhl* is convoluted both factually and procedurally, the thrust of the court's opinions regarding the subject at hand is clear. The central factual issue was whether the insured driver had deliberately struck the victims with the vehicle he was operating.[19]

Kuhl was one of several hitchhikers picked up by car salesman, Leonard Prahl, on a late night trip to the beach.[20] After a roadside argument, Prahl briefly deserted his former riders.[21] Subsequently, Kuhl and a companion were struck by the company vehicle Prahl was driving.[22] Prahl signed a written statement admitting striking the pedestrians, but asserted that it had been an accident.[23] Prahl was convicted in the District Court of Maryland for Dorchester County of assault and battery.[24]

Kuhl and the other victim sued Prahl and his employer in the Circuit Court for Anne Arundel County.[25] While that suit was pending, the insurer filed a declaratory judgment action in the same court.[26] At issue in the declaratory judgment action was whether Prahl had intended to strike the victims, thereby negating the coverage.[27] A jury found for the insurer.[28] On appeal of the declaratory judgment, the Court of Special Appeals reversed and remanded finding that the trial court improperly admitted the prior conviction of assault and battery.[29] The insurer petitioned for certiorari and the victims filed an answer and a conditional cross-petition.[30] The Court of Appeals affirmed the judgment of the appellate court.[31]

The Court of Appeals held the trial court had improperly admitted the evidence of Prahl's conviction.[32] The court noted the "well-settled rule in Maryland that a criminal conviction is inadmissible to establish the truth of the facts upon which it is rendered in a civil action for

19. *Id.* at 450, 463 A.2d at 825.
20. *Id.* at 448, 463 A.2d at 824.
21. *Id.* at 448, 463 A.2d at 824.
22. *Id.* at 449, 463 A.2d at 824.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id* at 450, 463 A.2d at 825.
30. *Id.*
31. *Id.*
32. *Id.*

damages arising from the offense for which the person is convicted."[33] The court explained:

> The reasons for this exclusion of the judgment in a criminal case as evidence of the plaintiff's claim against the traverser are various. There is a weighty difference in the parties, objects, issues, procedure, and results in the two proceedings with different rules with respect to the competency of the witnesses and the relevancy, materiality, and weight of the testimony. In a civil proceeding, the act complained of is the essential element, but in a criminal prosecution it is the intent with which the act is done.[34]

Kuhl remains effective today for the premise that a judgment is not admissible as evidence of the facts necessary to sustain the conviction.[35] The application of FRE 803(22) and similarly derived rules of evidence in other jurisdictions fairly raises the question of whether Maryland's dogged adherence to this particular aspect of the common law is the most efficacious approach to evidence of a prior judgment.

An interesting counterpoint to the weight of these decisions is the 1931 case of the allegedly philandering Baltimore baker, *Wald v. Wald*.[36] In *Wald* the trial court was called upon to reconcile disharmonious testimony regarding the plight of the Walds' relationship.[37] The underlying premise of both parties was that the other had abandoned the marital relationship.[38] The husband initiated the action by filing a bill for absolute divorce and Mrs. Wald responded with a cross-bill for permanent alimony.[39] On appeal, in light of the contradictory testimony, the appellate court relied on "one independent, decisive, and undisputed corroborative fact which is convincing proof of the guilt of the husband."[40] Mr. Wald had been

33. *Id.* at 450, 463 A.2d at 825. (citing Eisenhower v. Balt. Transit Co., 190 Md. 528, 59 A.2d 313 (1948); Galusca v. Dodd, 189 Md. 666, 57 A.2d 313 (1948); Gen. Exch. Ins. Corp. v. Sherby, 165 Md. 1, 165 A. 809 (1933); Pugaczeweka v. Maszko, 163 Md. 355, 163 A. 205 (1932); Balt. & Ohio R.R. Co. v. Strube, 111 Md. 119, 73 A. 697 (1909)).
34. *Id.* at 450-51, 463 A.2d at 825 (quoting Gen'l Exch. Ins. Corp. v. Sherby, 165 Md. 1, 165 A. 809, at 811 (1933) (citing Wharton's Criminal Evidence §§ 570-570d (10th ed.)).
35. State Farm Fire & Cas. Co. v. Carter, 154 Md. App. 400, 409, 840 A.2d 161, 167 (2003).
36. 161 Md. 493, 159 A. 97 (1931).
37. *Id.* at 495, 159 A. at 98.
38. *Id.* at 495-96, 159 A. 98-99.
39. *Id.* at 495, 159 A. at 98.
40. *Id.* at 497, 159 A. at 99.

convicted of desertion and non-support on more than one occasion.[41] The court held the "repeated judgments are convincing evidence of the husband's wrongful abandonment of the wife."[42]

The *Kuhl* court distinguished *Wald* when the insurer cited the case, noting only that there had been no objection raised to the testimony of the convictions at the original *Wald* trial.[43] Regarding the lack of objection, the *Wald* appellate court said "the testimony must be given its effect, which is clearly that the husband was prosecuted for desertion, accompanied by non-support, of the wife."[44] The appellate *Wald* court, noting the absence of an objection, made equitable use of the facts underlying the judgment in order to arrive at a fair solution.[45] The steady track in Maryland case law, apart from *Wald*, may be contrasted with dissimilar developments in other jurisdictions.

B. A Sampling of Other Jurisdictions

The cases discussed below illustrate how other jurisdictions have justified the alternative approach. Case law permitting evidence of prior judgments has not only been used for the inferences available about the underlying facts necessary to sustain a conviction, but also to conclusive effect regarding the specific issues presented. FRE 803(22), other similar rules, and the proposed rule outlined below, do not go that far. Rather the intent of these rules remains to introduce the prior judgment as evidence to assist the trier-of-fact in making a determination regarding the issues whose relevance encompasses both proceedings.

An early entry in the trend towards admissibility may be found in the 1927 Virginia decision of *Eagle, Star & British Dominions Ins. Co. v. Heller*.[46] In *Heller* the Supreme Court of Virginia considered the issue of whether a criminal conviction for arson could be used in a subsequent civil proceeding as evidence against the convicted insured.[47] The insurance company was the defendant in an action brought by Heller to enforce his policy.[48] The trial court, in line with the common law of the day, held that the prior conviction was of no

41. *Id.* at 498, 159 A. at 99.
42. *Id.*
43. *Kuhl*, 296 Md. at 451, 463 A.2d at 825 (1983).
44. *Wald*, 161 Md. at 498, 159 A. at 99 (1931).
45. *Id.* at 498, 159 A. at 99.
46. 140 S.E. 314 (Va. 1927).
47. *Id.* at 315.
48. *Id.*

consequence for the jury hearing the civil case.[49] On appeal, the Virginia Supreme Court reversed.[50] The court found relevance in the judicially determined "fact of guilt" especially when "it is also the precise fact in issue in the civil case."[51] The court stated that "rigid adherence to a general rule and to some judicial expressions would be a reproach to the administration of justice."[52] In reaching its conclusion, the court addressed many questions that continue to be raised today, including differing burdens of proof,[53] mutuality,[54] and the fullness of the prior litigation.[55] The court held that logic, fairness, and public policy all argued for giving the prior conviction conclusive effect.[56]

In a pre-Federal Rules of Evidence decision in *Connecticut Fire Ins. Co. v. Farrara,*[57] the United States Court of Appeals for the Eighth Circuit addressed: "whether or not a criminal conviction may

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49. *Id.* at 315.
50. *Id.* at 323.
51. *Id.* at 316.
52. *Id.* at 315.
53. *See id.* at 316 ("It is perfectly logical to hold in such cases that if the offender has been acquitted in the criminal prosecution, that acquittal should not bind another party who, for a personal injury arising out of the same occurrence, seeks redress in a civil action; and this because the prosecution may have failed merely because the guilt of the accused was not proved beyond any reasonable doubt. As has been frequently said, the acquittal of one accused of crime is only a finding that his guilt has not been proved beyond a reasonable doubt. This reason, however, seems to fail where there is a conviction, and the fact of guilt (when it is also the precise fact in issue in the civil case) has been judicially determined, because the plaintiff in the civil action is only bound to prove that fact by a preponderance of the evidence. Therefore, as the greater includes the less, we can see no logical reason, considering the question from this point of view, why the conviction should not be admissible, certainly as relevant evidence for the consideration of the jury.").
54. *See id.* ("[T]he same rule of exclusion applies to convictions as to acquittals, the reason given being that the parties not being the same there is the consequent lack of mutuality. [citations omitted]. It is certainly clear in such cases that the plaintiff who is seeking redress in the civil case for the injury, not having been a party to the criminal prosecution, is not bound by its result. We confess our inability to perceive, however, why the accused person himself should not be held either as bound or affected by the result of the prosecution, if adverse to him.").
55. *See id.* ("He has had his day in court, with the opportunity to produce his witnesses, to examine and cross-examine the witnesses for the prosecution, and to appeal from the judgment.").
56. *See id.* at 321 ("The rule of exclusion is a shield for the protection of those who have had no opportunity to assert their defense. To apply it here would be to convert it into a sword in the hands of one who has had such an opportunity, to be used by him for the effectuation of the same fraud which has been established, condemned and punished in the criminal case. If there be a rule which cannot stand the test of reason, it is a bad rule.").
57. 277 F.2d 388 (8th Cir. 1960).

be considered in a subsequent civil proceeding for the purpose of establishing the truth of the facts upon which it was based."[58] *Farrara* arose from an incident in Missouri and dealt with an insured's claim in federal district court for benefits from two policies written on property which the insured had been convicted of burning.[59] The insurers filed a declaratory action regarding their liability in the federal court at the same time the insured attempted to recover on the policies in state court.[60] The state civil suit was consolidated in federal court with the declaratory action.[61] Because the insurers raised the conviction on cross-examination while the prior criminal judgment was being appealed, the district court initially found for the insured.[62] When the insured's conviction was affirmed by the Missouri Supreme Court, the insurer sought to revisit the matter.[63]

The federal court noted the common law of Missouri had held that a criminal judgment could not be used "in a subsequent civil proceeding for the purpose of establishing the truth of the facts upon which it was based."[64] The Court of Appeals looked to other jurisdictions that had expressed traditional concerns such as that "civil proceedings differ as to the issues, objects and procedures involved."[65] The court distinguished the instant case from the common law tradition by citing the fact that the insured had instituted the action.[66] The court noted strong public policy arguments for the twin propositions that criminals should not benefit from the fruits of their crimes and that to hold otherwise would diminish confidence in the judicial process.[67] The court also addressed the weight to be given the evidence. The court found the conviction affirmed by the Missouri Supreme Court to not only be admissible, but to be conclusive, so that there was no need to re-litigate the insured's culpability.[68]

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58. *Id.* at 390.
59. *Id.* at 389 (citing State v. Farrara, 320 S.W.2d 540 (Mo. 1958)).
60. *Id.* at 389.
61. *Id.*
62. *Id.*
63. *Id.* at 389-90.
64. *Id.* at 390 (citations omitted).
65. *Id.* (citing W.E. Shipley, Annotation, *Conviction or Acquittal as Evidence of the Facts on Which it Was Based in Civil Action,* 18 A.L.R.2D 1287 (1951)).
66. *Id.* at 390.
67. *Id.* at 390-92. It is the opinion of the author that both arguments lend credence to the position that the proposed rule is fairly applicable even in circumstances where the convicted party has not instituted the action.
68. *Id.* at 392. (holding "if public policy demands that a criminal be not allowed to profit by his crime and considering the fact that the criminal judgment was based upon a burden of

A similar result, affording a conviction conclusive effect, was reached in Arkansas, despite a common law tradition similar to Maryland's and Missouri's. In *Zinger v. Terrell,*[69] the Supreme Court of Arkansas "effectively overruled Arkansas' common law position that a judgment in a criminal prosecution was not admissible in a subsequent civil suit to prove the facts upon which it was based."[70] Zinger, already convicted of murdering her mother, sought review of a grant of summary judgment in favor of Terrell, the administratrix of the victim's estate.[71] The trial court held, and the Arkansas Supreme Court affirmed, that Zinger's conviction precluded her claim to any life insurance proceeds from her mother's estate.[72] The Arkansas Supreme Court cited the enhanced rights of criminal defendants as part of the rationale justifying a break with the common law.[73] The court went on to apply the doctrine of collateral estoppel[74] and held that "a defendant who has been adjudged guilty of murdering a person is collaterally estopped from re-litigating that same issue in a later civil proceeding to inherit or take the victim's property."[75]

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proof requiring guilt beyond a reasonable doubt, there seems little justification for allowing the civil tribunal to reach a conclusion inconsistent with that policy. The facts of this case are such, however, that it is unnecessary for us to decide this issue. The opinion of the Missouri Supreme Court in *State v. Ferrara* reveals clearly that the evidence adduced at the criminal proceeding was fully as complete as that presented in this action. No basis for a collateral attack on the validity of that judgment appears. Thus, even accepting the majority rule that a criminal conviction is only additional evidence in a subsequent civil proceeding, we hold in this case that any conclusion of the finder of fact, having been apprised of this conviction, that this fire was not due to the act and design of the insured would be unsupported by substantial evidence and would demand reversal by us.").

69. 985 S.W.2d 737 (Ark. 1999).

70. Ray B. Schlegel, *Case Note: Zinger v. Terrell: The Collateral Estoppel Effect of Criminal Judgments in Subsequent Civil Litigation: New Law in Arkansas and the Questions Unanswered*, 54 ARK. L. REV. 127 (2001).

71. *Zinger*, 985 S.W.2d at 738 (Ark. 1999).

72. *Id.*

73. *Id.* at 740.

74. *Id.* at 741 ("The doctrine of collateral estoppel or issue preclusion bars the re-litigation of issues of law or fact actually litigated by the parties in the first suit, provided that the party against whom the earlier decision is being asserted has a full and fair opportunity to litigate the issue in question and that issue is essential to the judgment (citations omitted). The following elements must be shown in order to establish collateral estoppel: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) the issue must have been actually litigated; (3) the issue must have been determined by a final and valid judgment; and (4) the issue must have been essential to the judgment (citations omitted). We hold that a defendant who has been adjudged guilty of murdering a person is collaterally estopped from re-litigating that same issue in a later civil proceeding to inherit or take the victim's property.").

75. *Id.* at 741.

There are several recurring themes in these cases. All three broke from the common law, due to public policy arguments based on fairness, logic, and evolving judicial doctrines.[76] In each case, the prior conviction had a conclusive effect in the subsequent civil proceeding.[77] The proposed rule, like its existing counterparts, is not intended to inevitably preclude rebuttal.

In *Gines-Vega v. Crowley American Transport, Inc.*,[78] the United States District Court for the District of Puerto Rico considered the plaintiffs' motion for summary judgment grounded on a conviction held to be admissible under FRE 803(22).[79] In *Gines-Vega,* a civil suit followed a multi-vehicle accident resulting in the death of four people.[80] The driver of the tractor, hauling the trailer owned by Crowley, pled guilty and was convicted of four counts of involuntary manslaughter.[81] The court rejected the plaintiff's argument that the convictions were determinative on the issue of negligence stating, "To admit the evidence is not, however, to render it conclusive of the question of liability."[82] The court affirmed the intent behind the rule that the parties against whom the evidence is offered have the opportunity "[t]o rebut such evidence by offering whatever explanation there may be concerning either the circumstances surrounding the conviction or the underlying event. . . . The ultimate weight to be afforded to evidence of conviction is for the trier of fact to determine."[83] Given the weight of the evidence, the effect is appropriately delegated to the trier of fact. While circumstance may result in a preclusive effect, the result of admitting a conviction is not predetermined by the proposed rule.

C. Existing Maryland Exceptions to the Exclusionary Practice

For similar public policy reasons, the Maryland legislature has given criminal convictions an effect in subsequent civil proceedings across a wide range of circumstances in Maryland. These include the following circumstances whereby the common law slayer's rule might

76. *See Heller*, 140 S.E. 314 (Va. 1927); *Farrara*, 277 F.2d 388 (8th Cir. 1960); *Zinger*, 985 S.W.2d 737 (Ark. 1999).
77. *Id.*
78. 178 F.R.D. 351 (P.R. 1981).
79. *Id.* at 355.
80. *Id.* at 351.
81. *Id.* at 353.
82. *Id.* at 355.
83. *Id.* (quoting MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 6773, at 492 (1997)).

previously have been invoked;[84] a disciplinary action before the Attorney Grievance Commission related to criminal activity giving rise to the petition for discipline;[85] third party actions by victims of defendants convicted of violations of anti-trust law;[86] and actions before the State Ethics Commission regarding a criminal conviction in connection with lobbying activities.[87] Additionally, a criminal conviction of another may be offered as exculpatory substantive evidence by a defendant where the crime is of the nature that only one actor could have committed the offense.[88] The various statutes are motivated by concerns of fairness, integrity of criminal convictions, easing the burden on the litigants, and enhancing the impact of the conviction.[89] The weight of the prior convictions is generally of greater impact than mere admissibility as evidence.[90] The language used offers the convictions conclusive effect resulting in a form of collateral estoppel applied to the underlying issues.[91]

The statutory response enhancing Maryland's common law slayer's rule was accomplished when the legislature responded to a frustrating judicial conundrum.[92] James Finneyfrock murdered his parents, was convicted of the crimes, then sued the family estate for benefits from the victims' insurance.[93] Common law prevented Finneyfrock's conviction from being offered into evidence in the subsequent civil trial as proof of the central issue of Finneyfrock's culpability.[94] The bare logic of the circumstances prompted the General Assembly to act.[95] The result was statutory leave for the courts to admit prior convictions as conclusive evidence in slayer's rule cases.[96]

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84. *See infra* text accompanying notes 92-96.
85. *See infra* text accompanying notes 97-111.
86. *See infra* text accompanying notes 112-122.
87. *See infra* text accompanying notes 123-126.
88. *See infra* text accompanying notes 127-132.
89. *See generally infra* text accompanying notes 92-132.
90. *Id.*
91. *Id.*
92. *See* Memorandum from Lynn McLain on Court of Appeals Hearing on 141st Report of the Rules Committee: Proposed Evidence Rules 5-803(b)(22) and Committee Note to Rule 5-702 (Dec. 11, 1998) [hereinafter Memorandum on 141st Report of the Rules Committee] (on file with author).
93. *Id.*
94. *Id.*
95. *Id.*
96. MD. CODE ANN., CTS. & JUD. PROC. § 10-919 (2005).

Maryland Rule 16-711(g) gives conclusive weight to prior criminal convictions when adjudicating petitions for disciplinary action related to criminal conduct by an attorney.[97] The effect is the same regardless of whether the conviction results from a verdict at trial, a guilty plea, or a plea of *nolo contendere*.[98]

In *Attorney Grievance Commission v. Mandel*,[99] the court applied the predecessor to the current rule to conclusive effect. The Court of Appeals held "in disciplinary matters a final judgment by a judicial tribunal in another proceeding convicting an attorney of a crime is conclusive proof of the guilt of the attorney of that crime."[100] The respondent, former Maryland governor Marvin Mandel, was convicted after a federal trial, of mail fraud and racketeering.[101] In response to a challenge to the underlying conviction, the state court noted the respondent's guilt had been established beyond a reasonable doubt and that there was no constitutional mandate to re-litigate the issue.[102] The court also noted there was no preclusion of evidence of mitigating factors at the subsequent disciplinary hearing.[103]

In *Attorney Grievance Commission v. Tayback*,[104] the rule factored into an attorney's suspension from the practice of law following his guilty plea for willful failure to file income tax returns. The Court of Appeals held that the guilty plea prevented the respondent from asserting that his actions were not willful.[105] The Court noted that the integrity of a criminal conviction is a factor that "cannot be attacked in

97. MD. RULE 16-771(g) ("Conclusive effect of final conviction of crime. In any proceeding under this Chapter, a final judgment of any court of record convicting an attorney of a crime, whether the conviction resulted from a plea of guilty, nolo contendere, or a verdict after trial, is conclusive evidence of the guilt of the attorney of that crime. As used in this Rule, "final judgment" means a judgment as to which all rights to direct appellate review have been exhausted. The introduction of the judgment does not preclude the Commission or Bar Counsel from introducing additional evidence or the attorney from introducing evidence or otherwise showing cause why no discipline should be imposed.").

98. *Id.*

99. Att'y Grievance Comm'n v. Mandel, 294 Md. 560, 571, 451 A.2d 910, 915 (1982) (applying MD. Rule BV10 e 1).

100. *Id.* at 569, 451 A.2d at 914.

101. *Id.* at 562-63, 451 A.2d at 911.

102. *See id.* at 571-72, 451 A.2d at 915-16 (quoting Md. State Bar Ass'n v. Rosenberg, 273 Md. 351, 354-55, 328 A.2d 106, 108 (1972) (applying MD. RULE BV4 f 1)).

103. *Id.*

104. 378 Md. 578, 590, 837 A.2d 158,165 (2003) (citing Att'y Grievance Comm'n v. Barnes, 286 Md. 474, 487, 408 A.2d 719, 722 (1979)).

105. *Id.*

a disciplinary proceeding by invoking this Court to re-weigh or to re-evaluate the respondent's guilt or innocence."[106]

In *Maryland State Bar Ass'n. v. Agnew,*[107] both the Court and the defendant recognized a plea of *nolo contendere* as "conclusive proof of his guilt of the crime charged."[108] Following a *nolo contendere* plea to a felony charge of willfully filing a fraudulent income tax return, Agnew unsuccessfully argued against the recommendation of a three-judge panel that he be disbarred.[109] The Court gave the plea full weight as evidence of a crime involving moral turpitude and constituting "conduct prejudicial to the administration of justice."[110] Agnew was disbarred.[111]

When a civil proceeding arises from the same events that resulted in a prior criminal conviction, the plaintiff frequently replaces the state as the adversary of the defendant in the civil action. Lack of mutuality is frequently mentioned as a factor weighing against admission of prior convictions as evidence in subsequent civil proceedings.[112] The Maryland legislature has set aside mutuality concerns by providing that a criminal conviction for violations of the anti-trust laws may be considered "prima facie evidence against the defendant in an action for damages brought by another party."[113] By legislative intent,[114] the Maryland statute parallels the federal antitrust law.[115] By the plain

106. *Tayback*, 378 Md. at 590, 837 A.2d at 165 (quoting Bar Ass'n of Balt. City v. Siegel, 275 Md. 521, 527, 340 A.2d 710, 713 (1975)).

107. 271 Md. 543, 318 A.2d 811 (1974).

108. *Id.* at 548, 318 A.2d at 814.

109. *Id.*

110. *Id.* at 547, 318 A.2d at 813.

111. *Id.* at 553-54, 318 A.2d at 817.

112. *See supra* text accompanying note 34.

113. MD. CODE ANN., COM. LAW § 11-210 (2003) ("Judgment as evidence. (a) In general. – 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. (b) Exception. – This section does not apply to a civil consent judgment or decree entered before any testimony is taken.").

114. Cities Serv. Oil Co. v. Burch, 29 Md. App. 430, 436, 349 A.2d 279, 283 (1975) ("It is the intent of the General Assembly that in construing the Maryland Antitrust Act courts be guided by the interpretation given by the federal courts to federal antitrust acts.").

115. 15 U.S.C.S. § 16. ("Judgments. (a) Prima facie evidence; collateral estoppel. A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in

language of both federal and Maryland statutes, third parties may benefit from a collateral estoppel effect of a prior judgment.[116]

Emich Motors Corp. v. General Motors[117] is illustrative of both the intent behind the federal statute and a broad reading of the weight of the conviction in a subsequent proceeding. In *Emich,* the court considered whether evidence of a prior criminal conviction for restraint of trade was properly admitted in a subsequent civil proceeding for damages resulting from the criminal behavior.[118] Respondents General Motors and General Motors Acceptance Corporation had applied questionable practices in an effort to force dealerships to promote financing revenue.[119] The court noted a goal of the statute was to "minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions."[120] In evaluating the appropriate use of the conviction by the trial court, the court said:

> The evidentiary use which may be made under § 5 of the prior conviction of respondents is thus to be determined by reference to the general doctrine of estoppel. . . . Accordingly, we think plaintiffs are entitled to introduce the prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based.[121]

In remanding the case, the court placed the burden on and the discretion with the civil trial judge to examine the record of the

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any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 5 of the Federal Trade Commission Act [15 U.S.C.S. § 45] which could give rise to a claim for relief under the antitrust laws.") (brackets in original).

116. *See supra* notes 97 & 99.

117. 340 U.S. 558 (1951).

118. *Id.* at 559.

119. *Id.*

120. *Id.* at 568 (citing H.R. REP. NO. 627 (1914); S. REP. NO. 698 (1914); 51 CONG. REC. 9270, 9490, 13851 (1914)).

121. *Id.* at 568-69.

antecedent case and utilize jury instructions in arriving at a determination of the issues decided by the prior judgment.[122]

Under Maryland law, the state agency empowered to regulate lobbying activities may suspend an individual's registration as a lobbyist if the lobbyist "has been convicted of a criminal offense arising from lobbying activities."[123] By the language of the statute, the actions of the State Ethics Commission may be taken following a determination of the nature of the underlying issues of the conviction in their relationship to lobbying activities.[124] The facts underlying the conviction are not re-litigated. The Commission merely accepts the determination of the earlier judgment. In *State Ethics Commission v. Evans*,[125] the Court of Appeals of Maryland noted that the use of a prior conviction under the statute would further the purpose of promoting the Commission's regulatory powers.[126]

Finally, the Maryland legislature has said that a prior conviction of a third party may be offered by a defendant in the circumstance where only one actor could have committed the offense.[127] The purpose behind the statute was described in *State v. Joynes*.[128] In *Joynes*, two neighborhood combatants fought over loud music. Joynes' attempt to introduce evidence of the neighbor's battery conviction was denied at trial.[129] Joynes' counsel's intent was to use the neighbor's conviction

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122. *Id.* at 571-72.

123. MD. CODE ANN., STATE GOV'T.15-405(e)(1)(2003).

124. *Id.* ("(1) If the Ethics Commission determines it necessary to protect the public interest and the integrity of the governmental process, the Ethics Commission may issue an order to: (i) suspend the registration of an individual regulated lobbyist if the Ethics Commission determines that the individual regulated lobbyist: 1. has knowingly and willfully violated Subtitle 7 of this title; or 2. has been convicted of a criminal offense arising from lobbying activities; or (ii) revoke the registration of an individual regulated lobbyist if the Ethics Commission determines that, based on acts arising from lobbying activities, the individual regulated lobbyist has been convicted of bribery, theft, or other crime involving moral turpitude.").

125. 382 Md. 370, 855 A.2d 364 (2004) (holding under the factual circumstances, the law, which became effective Nov. 1, 2001, could not be applied retroactively).

126. *Id.* at 365, 855 A.2d at 375 (describing the recommendations of the Study Commission on Lobbyist Ethics, the body whose findings gave rise to the legislation, as "[A] number of statutory changes designed to prohibit certain specific practices and provide greater regulation of lobbying activities and more effective enforcement of the regulatory requirements.").

127. MD. CODE ANN., CTS. & JUD. PROC. § 10-904 (2005) ("Proof of other's convictions. 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.").

128. 314 Md. 113, 549 A.2d 380 (1988).

129. *Id.* at 118, 549 A.2d at 382.

as proof that Joynes was not the aggressor.[130] Ultimately, the Court of Appeals affirmed the denial by the trial judge holding the statute did not apply under the circumstances and that "because of the serial nature of the altercation," it was reasonable to find that there may have been more than one offense.[131] The statute would apply only to preclude an obviously problematic result of convicting two parties of a crime only one could have committed.[132]

There exists a broad range of circumstances where judgments are given a range of effects in Maryland. This raises the question of why there is reluctance to eliminate the common law exclusionary practice.

III. RESERVATIONS IN MARYLAND REGARDING ADMISSIBILITY

The Court of Appeals twice declined the recommendations of the Court's Standing Committee on Rules of Practice and Procedure ("Rules Committee") to adopt an 803(22)-type rule.[133] Some objections to the proposed rule stem from Maryland's case law while additional reservations were articulated during the consideration of the proposed evidence rules.

The *Kuhl* court, considered the admissibility of the judgment in a criminal proceeding as evidence in a subsequent civil proceeding, and identified as areas of concern the following differences between the two proceedings: issues, procedure, results of the proceedings, rules with respect to competency of the witnesses, and parties (raising the concept of mutuality).[134] The court was also concerned with "relevancy, materiality, and the weight of the testimony."[135] These themes are consistent in Maryland appellate case law from 1933[136] through 2003.[137]

The Court of Appeals also has considered the proposed rule change in two separate public hearings. The first was conducted on October 4 and 5, 1993, when it considered adoption of Title 5 of the Maryland

130. *Id.*
131. *Id.* at 121, 549 A.2d at 384-85.
132. *Id.* at 121, 549 A.2d at 383-84 (citing Gray v. State, 221 Md. 286, 290, 157 A.2d 261, 264 (1990) (quoting JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 142 (3d ed. 1983)).
133. LYNN MCLAIN, MARYLAND EVIDENCE STATE AND FEDERAL § 803(22):1 (West 2002).
134. *See supra* note 34.
135. *Id.*
136. Gen. Exch. Ins. Corp. v. Sherby, 165 Md. 1, 7, 165 A. 809, 811 (1933).
137. *See supra* note 35.

Rules of Procedure as set forth in the Rules Committee's One Hundred Twenty-Fifth Report to the Court.[138] The Court, by its order of December 15, 1993, adopted Title 5 of the Maryland Rules as recommended by the Rules committee, which has declined to include Rule 803(22) in the recommendation.[139] During the second public hearing on January 7, 1999, the court considered proposed rule changes, including the recommendation to add 5-803(22) as set forth in the Rules Committee's One Hundred and Forty-First Report to the Court.[140] The court remanded the proposed rule to the Rules Committee for further study.[141]

The concerns of the court raised during the October, 1993 hearing may be discerned from the audio tape of the proceeding.[142] The court noted adoption of the proposed rule would result in a significant departure from existing Maryland common law.[143] The court was troubled by proposed language[144] applying the rule when judgments were punishable by imprisonment in excess of one year.[145] Examples of potential problems included the following: the effect of recidivist statutes that enhanced penalties for repeat offenders (presumably asking: Did this qualify as beyond the one year mark, if the underlying crime, absent recidivism, would not?); when payment of a fine resulted in a finding of guilt (presumably asking: Had the underlying issue been fully litigated?); when a party made a technical guilty plea with an agreed statement of facts (presumably asking: Was that party, in fact, agreeing to the truth of these facts?).[146]

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138. 20 Md. Reg. 1 (July 23, 1993).
139. 21 Md. Reg. 1 (Jan. 7, 1994).
140. 25 Md. Reg. 1745 (Nov. 20, 1998).
141. 26 Md. Reg. 263, 264 (Feb. 12, 1999).
142. Audio tape: Court of Appeals of Maryland Public Hearing to Consider the One Hundred Twenty-Fifth Report of the Court's Standing Committee on Rules of Practice and Procedure (Oct. 4-5, 1993) [hereinafter Hearing Audio Tape (1993)].
143. Hearing Audio Tape (1993), *supra* note 142.
144. Court of Appeals Standing Committee on Rules of Practice & Procedure, 125th Report, Title 5 of the Maryland Rules of Procedure: Evidence (Dec. 1993). ("Judgment of Previous Conviction [Vacant], 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 State, 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 it does not preclude admissibility. [There is no subsection 22.]").
145. Hearing Audio Tape (1993), *supra* note 139.
146. Hearing Audio Tape (1993), *supra* note 139.

Prior to submitting the One Hundred Forty-First Report the Rules Committee had several occasions to reconsider the proposed rule. It came to the attention of the Rules Committee that several civil cases involving the slayer's rule (prior to passage of Md. Cts. & Jud. Proc. Code Ann. § 10-919) had recently been through the courts, creating an opportune time to resubmit the proposed rule.[147] A revised rule was adopted by the Rules Committee with the intent to resubmit the proposed rule to the Court of Appeals.[148] A further change was made to the proposed rule by adding a cross-reference when the slayer's rule statute passed.[149]

At a public hearing on January 7, 1999, the Court of Appeals considered the newly proposed language.[150] The court again expressed concern regarding the length of time required for potential punishment of the criminal judgment before the rule kicked in.[151] The court noted a discrepancy between what it perceived as the intent of the federal rule (that is, the rule becomes effective upon punishment for a felony) and the possible creeping effect of lesser crimes that would come within the purview of the rule if sentences for minor crimes, through statutory adjustment, resulted in enhanced sentences beyond one year.[152] A question was raised regarding reconciling the language of the rule with the need to demonstrate convictions of a third party as an element of the crime with which the defendant was charged (for example, cases of conspiracy or as an accessory before or after the fact).[153] A further question was raised as to the standard of

147. Meeting Mins., Court of Appeals Standing Committee on Rules of Practice & Procedure 39 (Nov. 21, 1997).

148. Meeting Mins., Court of Appeals Standing Committee on Rules of Practice & Procedure 51 (Feb. 13, 1998).

149. Meeting Mins., Court of Appeals Standing Committee on Rules of Practice & Procedure 61 (Sep. 11, 1998).

150. 25 Md. Reg. 1762 (Nov. 20, 1998) ("5-803(22) [Vacant] *Judgment of Previous Conviction.* [There is no subsection 22.] Evidence of a final judgment entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere) that adjudges a person guilty of a crime punishable by death or imprisonment in excess of one year offered 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 pendency of an appeal may be shown but does not preclude admissibility.").

151. Audio tape: Court of Appeals of Maryland Public Hearing to Consider the One Hundred Forty-First Report of the Court's Standing Committee on Rule of Practice and Procedure (Jan. 7, 1999) [hereinafter: Hearing Audio Tape (1999)].

152. Hearing Audio Tape (1999), *supra* note 158.

153. Hearing Audio Tape (1999), *supra* note 158.

finality of judgment as it applied to the proposed rule.[154] The court elected to remand the proposal to the Rules Committee for consideration of the questions raised.[155]

All the concerns raised, historically in the common law and recently in the rule proposal process, deserve to be addressed. They fall into five categories: 1) questions of differing issues, differing parties and whether an issue is fully litigated; 2) questions of relevancy, materiality, and weight of the evidence; 3) questions regarding what triggers the application of the hearsay exception; 4) questions regarding procedural issues, nature of the results, competency; and 5) questions regarding the departure from the common law.

IV. RESERVATIONS ADDRESSED

A. Issues, Parties and the Fullness of Prior Litigation

Questions of differing issues, differing parties and whether an issue is fully litigated are best understood when viewed from the parallel framework of the doctrine of collateral estoppel. In a discussion of collateral estoppel effects of judgments (a standard which should be higher than the mere admission of evidence) within the broader context of Maryland civil procedure, Professors Lynch and Bourne have written, "It is difficult to see that any public policy is furthered by permitting a wrongdoer to expend judicial resources re-litigating what the state has already proved."[156]

In effect, what the proponents of evidence under FRE 803(22)-type rules would be attempting is a modified form of non-mutual offensive collateral estoppel. A party that was not party to the first proceeding is drawing on the antecedent action to offer evidence of facts necessarily decided, in an effort to convince the trier of fact in the second proceeding that there is no need to offer further proof of the underlying issues. Nothing in the proposed rule bars the litigant against whom the evidence is offered from challenging the evidence. Collateral estoppel, in other circumstances, would of course bar the litigation. The rule, however, allows the issue to enter into the subsequent proceeding for, in the words of the Advisory Committee

154. Hearing Audio Tape (1999), *supra* note 158.

155. Hearing Audio Tape (1999), *supra* note 158.

156. JOHN LYNCH & RICHARD BOURNE, MODERN MARYLAND CIVIL PROCEDURE § 12.3(d)(6) (2d ed. 2002).

commenting on the federal rules, "what it is worth."[157] While not every other state has adopted this view, nearly three out of every four have.[158]

The predicate circumstances that apply to a determination of whether there is a valid collateral estoppel effect also may be applied to a determination whether the facts necessary to sustain the conviction should be permitted as evidence through the vehicle of introducing the antecedent conviction in a subsequent proceeding. The first necessary circumstance is that the "particular issue must have been actually decided in the prior adjudication."[159] The second circumstance is that "issue must have been an ultimate fact necessary in the prior decision"[160]

In *Ferrell v. State*,[161] the court conducted an extensive discussion of collateral estoppel in light of the State's making a fourth attempt to convict the same individual of a single armed robbery.[162] Judge Eldridge, writing for the court, set a standard for determining whether an issue was ripe for re-litigation based on a thorough examination of the record of the prior proceeding.[163] Similarly, proper use of proposed rule 5-803(22) would require the proponent of the conviction as evidence to proffer that the facts the conviction was offered to prove (1) were actually decided, (2) were necessary to the prior conviction, and (3) are relevant to the subsequent civil proceeding.

The Colorado Court of Appeals, Division Five, found the existence of Colorado Rule of Evidence 803(22) was an argument supporting a finding of conclusive issue preclusion in *A-1 Auto Repair & Detail, Inc. v. Bilunas-Hardy*.[164] In *A-1 Auto Repair*, the court found identical issues underlying the antecedent criminal case resulting in a conviction for conversion and the subsequent civil proceeding

157. FED. CIV. JUD. PROC. & R. 454 (West 2005).

158. *See supra* note 3; *but see* N.H. R. EVID. 803 Reporter's Notes ("[T]he Committee believes that the issue of whether to admit a judgment of prior conviction after a not guilty plea is not one that should be addressed at the present time as a hearsay exception. Rather, it depends on substantive principles of collateral estoppel and *res judicata* and should be determined by the courts and/or the Legislature.").

159. Klein v. State, 52 Md. App. 640, 648, 452 A.2d 173, 178 n.3 (1982).

160. *Id.*

161. 318 Md. 235, 567 A.2d 937 (1990).

162. *Id.* at 239, 567 A.2d at 939 (explaining that double jeopardy became a factor only at fourth trial: at first trial defendant was convicted on 5 of 8 counts but was granted a motion for a new trial; second trial resulted in hung jury, third trial was declared a mistrial).

163. *Id.* at 245-46, 567 A.2d at 942.

164. 93 P.3d 598, 602 (Colo. Ct. App. 2004).

resulting from the same events.[165] The defendant in both actions had been convicted of conversion of cash payments to her employer.[166] The court methodically evaluated the facts underlying the conviction to determine whether issue had been actually litigated and was necessary to the earlier proceeding, that there had been a judgment on the merits, that Bilunas-Hardy was a party to the earlier proceeding, and that she had had an opportunity to fully litigate the issue.[167] Upon a determination that all the above factors were present in the earlier proceeding, the court held the earlier conviction had conclusive effect to the subsequent motion by the plaintiff in the civil trial for summary judgment and affirmed the trial court's ruling for the plaintiff.[168] *A-1 Auto Repair* illustrates a methodology for a sound determination of appropriate treatment of underlying issues.

B. Relevancy and Prejudice

Questions of relevancy, materiality, and weight of the evidence all fall readily under the superior rules of § 5-401[169] (Definition of "Relevant Evidence") and § 5-403[170] (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time) and may be managed by the trial judge. The trial judge has existing rules at her disposal governing relevancy,[171] materiality,[172] and giving her the power to weigh the probative value against the prejudicial effect.[173]

In *Kowalski v. Gagne*,[174] the United States Court of Appeals for the First Circuit weighed the relevance of a murder conviction, as evidence in a wrongful death suit for damages arising from the same event, against the prejudicial effect of the evidence.[175] Defendant

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165. *Id.* at 602-03.
166. *Id.* at 600.
167. *Id.* at 602.
168. *Id.* at 602, 605.
169. MD. RULE 5-401 (2004) ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").
170. MD. RULE 5-403 (2004) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").
171. MD. RULE 5-401 (2004).
172. *See* LYNN MCLAIN, MARYLAND RULES OF EVIDENCE 63 (2d ed. 2002) ("Rule 5-401 defines 'relevance' by collapsing common law relevance and materiality into one term.").
173. MD. RULE 5-403 (2004).
174. 914 F.2d 299 (1st Cir. 1990).
175. *Id.* at 305.

Gagne challenged the conviction's relevance as to damages in the civil case and also contended that the prejudicial impact of the conviction outweighed any probative value.[176] As to relevance, the court concluded that because the Massachusetts wrongful death statute, it was applying related damages to the degree of culpability, that it could "think of few things more relevant to the question of culpability than a defendant's conviction of second degree murder for the conduct that caused the wrongful death."[177] The court also dismissed the challenge regarding prejudice, stating the lower court "properly could have concluded that any prejudice caused by the evidence of defendant's murder conviction was more than outweighed by the relevancy of the evidence to the question of defendant's blameworthiness for the killing."[178]

The proposed rule yields to the threshold rules regarding relevancy and prejudice. The proposed rule would admit the conviction merely as evidence. The party against whom the conviction would be offered has the same opportunity to challenge admissibility as applies to all other forms of evidence.

C. Appropriate Sentencing Threshold to Trigger the Rule

Questions regarding what level of sentence triggers the application of the hearsay exception may be resolved by examining the degree to which the relevant issues are litigated in the prior criminal proceeding. The proposed rule would join sixteen other states[179] in adopting the language of the federal rule regarding the type of sentence that would permit the conviction to be admissible as a hearsay exception. The proposed rule thereby sets a standard that insures a high probability that the criminal defendant will fully litigate the underlying issues. It is essential that the party against whom the evidence is offered had been fully motivated to litigate the issue in the prior proceeding. The standard of proof beyond a reasonable doubt in the earlier proceeding legitimately allows the civil court to begin a balancing test as to the weight of the evidence.

A criminal charge that may result in a sentence of one year or longer (or death), sets a convenient departure point to presume that a

176. *Id.*
177. *Id.* at 306.
178. *Id.*
179. Ark., Colo., Haw., Idaho, Ind., Iowa, Mich., Minn., Miss., Mont., Neb., Nev., N.M., Ohio, Okla., Utah; *see supra* note 3.

defendant will make the utmost effort in his own defense. Under the proposed rule, a first time conviction for sex offense in the fourth degree would not be admissible in a subsequent civil suit by a victim.[180] If, however, the defendant was a two-time loser for the same offense, the second conviction would be admissible[181] to help prove the facts essential to sustain the conviction in a subsequent suit. Another example of an admissible conviction would be a conviction for causing a life-threatening injury by vehicle while intoxicated.[182] A conviction for driving under the influence, or under the influence *per se*, second offense (and upwards) would be admissible.[183] Convictions for driving under the influence, or under the influence *per se*, first offense,[184] or driving while impaired by alcohol, subsequent,[185] would not fall within the rule. The proposed rule appropriately matches the severity of its potential consequences with more egregious antecedent circumstances.

Convictions resulting from means other than a trial should be given effect proportionally to circumstances giving rise to the conviction.[186] An informed guilty plea is an acknowledgement of the existence of the underlying facts.[187] Admissibility of a plea accompanied by an agreed statement of facts should be reviewed under a "totality of the circumstances" test which establishes that the plea has not been motivated by exigencies forcing the hand of the pleader.[188] A plea of *nolo contendere* should remain beyond the reach of the rule for the

180. Md. State Comm'n on Criminal Sentencing, Sentencing Guidelines Offense Table), http://www.msccsp.org/guidelines/AppendixA-2005.pdf, 35 (classifying offense as a misdemeanor, maximum punishment available: one year) (updated Mar. 28, 2005).

181. *Id.* (classifying offense as a misdemeanor, maximum punishment available: three years).

182. *Id.* (classifying offense as a misdemeanor, maximum punishment available: three years).

183. *Id.* (classifying offense as a misdemeanor, maximum punishment available: two years).

184. *Id.* (classifying offense as a misdemeanor, maximum punishment available: one year).

185. *Id.*

186. *See, e.g.,* Briggeman v. Albert, 322 Md. 133, 136, 586 A.2d 15, 16 (1991) ("The payment of a traffic fine is neither a guilty plea nor an express acknowledgment of guilt; it is at most a consent to conviction, closely analogous to a plea of *nolo contendere*.").

187. *See* Sutton v. State, 289 Md. 359, 364, 424 A.2d 755, 758 (1981). ("An acceptable guilty plea is an admission of conduct that constitutes all the elements of a formal criminal charge.").

188. *See, e.g.,* Yanes v. State, 52 Md. App. 150, 448 A.2d 359 (1982) (reversing trial court's conviction on a plea of not guilty with an agreed statement of facts, in part because the trial court had not complied with then existing MD. RULE 731(c), predecessor to MD. RULE 4-242, creating a liability for the defendant, who had in effect plead guilty to the charge with no finding on the record that the defendant had been made aware of the consequences.).

simple reason that existence of the underlying facts will not have been fully litigated.[189]

D. Procedural Questions Resolved in Light of the Higher Burden Placed on the Criminal Court

Questions regarding procedural issues, nature of the results, and competency of witnesses, may be resolved by the higher burden of proof in a criminal trial. Minnesota's Committee Notes accompanying Minnesota Rule of Evidence 803(22) make the strong statement that the rule "represents a belief in the trustworthiness of verdicts based on the reasonable doubt standard." Also, the logic of the Supreme Court of Virginia in *Heller* is compelling. Addressing the issue specifically the Minnesota court indicated that the higher burden of proof lent credence to utilization of the finding in a court with a lesser standard.[190]

The Colorado Court of Appeals, Fifth Division, in *A-1 Auto Repair* articulates a strong argument for respecting the integrity of the criminal judgment:

> To preclude a civil litigant from re-litigating an issue previously found against him in a criminal prosecution is less severe than to preclude him from re-litigating such an issue in successive civil trials, for there are rigorous safeguards against unjust conviction, including the requirements of proof beyond a reasonable doubt and of a unanimous verdict, the right to counsel, and a record paid for by the state on appeal. Stability of judgments and expeditious trials are served and no injustice done, when criminal defendants are estopped from re-litigating issues determined in conformity with these safegaurds.[191]

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189. *See* Thomas C. Hayden, Jr., *Comment: The Plea of Nolo Contendere*, 25 MD. L. REV. 227, 233 (1965) ("Although the plea acts as an admission of guilt for the purpose of the case, it is uniformly recognized that the plea does not estop the defendant to deny the facts upon which the prosecution was based in a subsequent civil suit.").

190. *Heller*, 140 S.E. at 316 (Va. 1927) ("This reason, however, seems to fail where there is a conviction, and the fact of guilt (when it is also the precise fact in issue in the civil case) has been judicially determined, because the plaintiff in the civil action is only bound to prove that fact by a preponderance of the evidence. Therefore, *as the greater includes the less*, we can see no logical reason, considering the question from this point of view, why the conviction should not be admissible, certainly as relevant evidence for the consideration of the jury.") (emphasis added).

191. *A-1 Auto Repair*, 93 P.3d at 601.

Of course the rule proposed is not asking for the strict remedy of issue preclusion. The logic that successfully argues for the more substantial effect of a prior judgment certainly applies to a proposal for a lesser effect of a previous conviction. The rule proposes a smaller brush in the civil plaintiff's palette, but applied with the same standard of care.

E. The Public Policy Argument for Changing the Common Law

Questions regarding the departure from the common law are best answered from a public policy perspective. The Supreme Court of Arkansas in *Zinger*[192] found itself in the position that this article asks the Court of Appeals to take. That position is to overrule a substantial line of cases. It is within the power of the Court of Appeals to establish an attainable standard for weighing the fairness and logic of the slayer's rule on behalf of the plaintiffs while protecting a defendant's rights through a rigorous multi-step evaluation of the prior litigation, including the nature of the underlying issue, the extent to which it was litigated, the probative value to the present litigation, and the possibility of prejudicial effect. Adoption of the rule would bring Maryland into accord with the vast majority of American jurisdictions.

V. PROPOSED RULE

The rule proposed by this article contemplates that the conviction is admissible merely as evidence and subject to challenge by the party against whom it is offered. Maryland should expand the admission of criminal convictions in subsequent civil proceedings so as to be considered as substantive proof of facts necessary to sustain the conviction.

A. Draft Rule Proposal

> Judgment of a Previous Conviction.
>
> Evidence of a final judgment entered after a trial or upon a plea of guilty (but not a plea of *nolo contendere*) that adjudges a person guilty of a crime punishable by death or imprisonment in excess of one year, offered to prove any fact essential to sustain the judgment, *but only after the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the party against whom it is offered.*

192. 985 S.W.2d 737 (Ark. 1999).

> In criminal cases the State may not offer evidence of a judgment against a person other than the accused, except for purposes of impeachment. The pendency of an appeal may be shown but does not preclude admissibility.
>
> Committee note: *This rule does not affect Rule 5-609. This rule is not intended to have any effect on a statutory or common law requirement to show a prior conviction as an element of proof or as required to illuminate an offense or charge of a separate nature.*

Emphasis is added where there is a substantive departure from the federal rule.

Issues raised by the admissibility of evidence through this hearsay exception will have to withstand the tests identified in the language of the rule. The party against whom the evidence is offered will have had opportunity and motivation to fully litigate the issues. The issues will have been necessary to the antecedent proceeding and based on a conviction, will have necessarily been litigated. The standard of proof is higher in the prior proceeding. Relevancy is weighed against prejudicial effect. The party against whom it is offered has the opportunity to explain or rebut the implications of the evidence. The proposed rule expresses confidence in criminal judgments and reinforces the integrity of the fact-finding process.

VI. CONCLUSION

Case law in Maryland precludes the admissibility of a criminal conviction, as a hearsay exception, as substantive evidence of the facts necessary to sustain the conviction in a subsequent civil trial. This position is out of step with federal courts and three-quarters of the other states that recognize a hearsay exception under Federal Rule of Evidence 803(22) or similar rules. Legitimate concerns exist in finding a balance between the concept of fairness to the plaintiff injured by a criminal activity and protection of a defendant's right to a proceeding untainted by overtly prejudicial evidence.

The rationale expressed in the case law and the concerns of the Court of Appeals of Maryland raised during earlier rules adoption proceedings may be addressed by adopting a modified version of the federal rule. The logical underpinning of the slayer's rule, holding that the convicted defendant should not subsequently be able to profit from his crime, argues for an expansion of the rule. The standards

required for evaluating appropriate use of collateral estoppel, if utilized by analogy, when weighing the admissibility of a prior conviction, help to insure that the evidence is of value.