FOURTH AMENDMENT AND INDEPENDENT STATE GROUNDS*

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State court interpretations of state constitutional provisions that are the same as or similar to the United States Constitution have received much attention in recent years.[1] State courts have taken different approaches, with some courts applying the federal interpretation of the United States Constitution to the state constitution on the grounds that the language of the two constitutions are the same or substantially similar and therefore should be construed in a similar manner.[2] Other courts have diverged from the federal interpretation and, recognizing that states may provide greater individual protection to a defendant, not less, have looked to the state constitution as an independent source of individual rights.[3] This article will address which approach might apply in search and seizure cases, as well as a defendant's right to have evidence obtained from an illegal search or seizure, excluded under the Fourth Amendment and Article 26 of the Maryland Declaration of Rights.

The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment,

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1 *See, e.g.*, Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41 (2006).

2 *See, e.g.*, State v. Gallup, 512 S.E.2d 66, 69 (Ga. Ct. App. 1999); Colbert v. Commonwealth, 43 S.W.3d 777, 780 (Ky. 2001); State v. Deck, 994 S.W.2d 527, 534 (Mo. 1999); State v. Vermuele, 453 N.W.2d 441, 446 (Neb. 1990).

3 Michael J. Gorman, *Survey: State Search And Seizure Analogs*, 77 MISS. L.J. 417 (2007).

protects against unreasonable searches and seizures.[4] The Fourth Amendment states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[5]

Article 26 of the Maryland Declaration of Rights is the Maryland analog to the Fourth Amendment.[6] Article 26 provides as follows:

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.[7]

Article 26 of the Maryland Declaration of Rights was adopted originally in 1776 as Article 23 of Maryland's first Declaration of Rights, preceding the Fourth Amendment to the United States Constitution by fifteen years. Article 23 responded to the British colonial government's use of general warrants and writs of assistance, which were search authorizations permitting wide-ranging and open-ended searches for evidence of political crimes.[8] Since its adoption, Article 26 has remained virtually unaltered, except for minor style changes and the renumbering from Article 23, through several subsequent constitutional conventions, held in 1851, 1864, and 1867.[9]

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[4] U.S. CONST. amend. IV.

[5] *Id.*

[6] MD. CONST. art. 26.

[7] *Id.*

[8] Lambert v. State, 75 A.2d 327, 329 (Md. 1950).

[9] In 1967-68, as part of a sweeping revision of the Maryland Constitution and Declaration of Rights, drafters proposed a revision of Article 26 echoing the language of the Federal Constitution, with an added provision covering electronic eavesdropping. The proposed language read as follows:

With respect to Article 26, Maryland has not resolved Fourth Amendment issues on independent state grounds and continues to interpret Article 26 *in pari materia* with the United States Supreme Court's interpretation of the Fourth Amendment. In the last few years, the Maryland Court of Appeals has been called upon to decide search and seizure issues solely on Article 26, to interpret Article 26 on independent state grounds and to reject the reasoning of the United States Supreme Court's interpretation of the Fourth Amendment.[10] The court has declined to do so,[11] noting, however, that although the court interprets the two constitutional provisions *in pari materia* and the United States Supreme Court interpretation is persuasive, each constitutional provision is independent and a violation of one is not necessarily a violation of the other.[12]

Historically, statements in Maryland cases that Article 26 is *in pari materia* with the Fourth Amendment, date from as early as 1902. In *Blum v. State*,[13] the court stated that "the fourth and fifth amendments . . . are in pari materia with arti-

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> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and in their oral or other communications against unreasonable interceptions shall not be violated. No search warrant shall be issued except upon probable cause supported by oath or affirmation, and the place to be searched, the persons or things to be seized, or the communications sought to be intercepted shall be particularly described in the warrant.

MARYLAND CONSTITUTIONAL CONVENTION COMMISSION, REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION TO HIS EXCELLENCY, SPIRO T. AGNEW, GOVERNOR OF MARYLAND, THE HONORABLE ASSEMBLY OF MARYLAND, THE DELEGATES TO THE CONSTITUTIONAL CONVENTION OF MARYLAND AND TO THE PEOPLE OF MARYLAND 107 (King Brothers, Inc. 1967). Maryland voters rejected the revised constitution. *See also* Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L.J. 929, 940 (2002) (presenting a useful tabular display of the various versions of the Maryland Declaration of Rights, from the first draft to the current version).

[10] Parker v. State, No. 37 (Md. argued Nov. 3, 2006) (presently pending in the Court of Appeals); Fitzgerald v. State, 864 A.2d 1006, 1007 (Md. 2004); Richardson v. McGriff, 762 A.2d 48, 52 (Md. 2000).

[11] *But see Fitzgerald*, 864 A.2d at 1020 (assuming arguendo that Maryland had an exclusionary rule, the evidence would not be suppressed because a dog sniff at an apartment door was not an illegal search under either the Fourth Amendment or Article 26).

[12] Gahan v. State, 430 A.2d 49, 55 (Md. 1981).

[13] 51 A. 26 (Md. 1902).

cles 26 and 22."[14] During this early period, the United States Supreme Court had not yet mandated that the core rights under the Fourth Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment,[15] and parallels between the federal and state provision, while sometimes viewed as persuasive, were not binding on the states.[16]

The Maryland Court of Appeals has stated repeatedly that Article 26 is "very similar in its verbiage to the 4th Amendment to the Federal Constitution"[17] and in regard to its construction, stated as follows:

> [T]he decisions of the United States (Supreme) Court, in reference to the corresponding provisions of the Federal Constitution, are adopted by our court as authority which is very persuasive, although not necessarily controlling. The Federal constitutional law, therefore, construing these articles of the Federal Constitution is pertinent upon the construction of articles of this class in our State Declaration of Rights.[18]

Chief Judge Brune, writing for the court, stated in *Givner v. State*[19] that Article 26 is *in pari materia* with the Fourth Amendment, and that although Article 26 is older than the Fourth Amendment by some years, both grew out of the same historical background.[20] Chief Judge Brune stated as follows:

> Our Article 26 does not, as does the Fourth Amendment, . . . contain an express declaration of the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. However, Art. 26 has been construed as a limitation upon the power of the Legislature to pass any law, or of the courts to issue any process, which would violate that Article.[21]

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[14] *Id.* at 29.

[15] Wolf v. Colorado, 338 U.S. 25, 28 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

[16] *See Gahan*, 430 A.2d at 54.

[17] *Id.* at 54 (quoting ALFRED S. NILES, MARYLAND CONSTITUTIONAL LAW 50 (1915)).

[18] *Id.* (quoting NILES, *supra* note 19, at 13).

[19] 124 A.2d 764 (Md. 1956).

[20] *Id.* at 768; *see also* Friedman, *supra* note 9, at 937.

[21] *Givner*, 124 A.2d at 768 (citation omitted).

Like the search and seizure provision in the Virginia Constitution upon which it was modeled,[22] the plain language of Article 26 did not address warrantless or unreasonable searches. It seems clear, at least today, that even though the language of the Fourth Amendment and that of Article 26 are not exactly the same, the Maryland Court of Appeals has found it sufficiently similar to the Fourth Amendment to view the provision as a protection against all unreasonable searches and seizures.[23] In fact, in *Liichow v. State*,[24] the court stated that "Article 26 is generally *in pari materia* with the Fourth Amendment and similarly prohibits unreasonable search and seizures."[25]

The notion that Article 26 and the Fourth Amendment are *in pari materia* has continued to this day. Although thus far Article 26 has been construed in lockstep with the Fourth Amendment, historically and today, the door has been left open for the court to rely on Article 26 and to deviate from the United States Supreme Court's Fourth Amendment interpretation. The first hint of such an approach comes from *Liichow*, written for the court by Judge John C. Eldridge, in 1980. The defendant was convicted of multiple counts of possession of controlled dangerous substances.[26] The police seized the drugs contained in a plastic bag, without a warrant, while Liichow was moving his possessions from a rented dwelling.[27] The issue on appeal was

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[22] *Id.*

[23] Miller v. State, 198 A. 710, 716 (Md. 1938). The court in *Miller* stated as follows:

> Article 26 of the Maryland Bill of Rights provides: "That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted." If a general search warrant is condemned, how much more obnoxious must be an authorization to conduct a general and indiscriminate search of persons and property without any warrant. Cornelius on Search and Seizure, §§ 3, 4, 5; Cooley on Const. Lim. 610 et seq.

Id.; *but see* Thomas K. Clancy, *A Vision of Search and Seizure Protection*, 34 MD. B. J. 11, 12 (Jan./Feb. 2001) (stating that Article 26 addresses abuses associated with warrants, and does not contain a broad "statement of the right to be secure from all forms of unreasonable searches and seizures").

[24] 419 A.2d 1041 (Md. 1980).

[25] *Id.* at 1044 n.1.

[26] *Id.* at 1042.

[27] *Id.*

whether the warrantless search and seizure of the plastic bag violated petitioner's constitutional rights to be free from unreasonable search and seizure.[28] The court had an interesting footnote, explaining the court's choice to reach the issue on both federal and state constitutional grounds. The court stated as follows:

> The [certiorari] question presented did not limit the scope of the search and seizure issues to the Fourth Amendment to the United States Constitution. Therefore we shall treat the contentions as being grounded on both the Fourth Amendment and Article 26 of the Maryland Declaration of Rights. Although the wording of Article 26 is somewhat different than that of the Fourth Amendment, this Court has taken the position that Article 26 is generally *in pari materia* with the Fourth Amendment and similarly prohibits unreasonable search and seizures.[29]

The court held, in a four to three opinion, that Liichow had a constitutionally protected expectation of privacy in the plastic bag and "[t]he search violated the Fourth Amendment *and Art. 26 of the Maryland Declaration of Rights, and the evidence obtained should have been suppressed.*"[30]

The next year, in 1981, in *Gahan v. State*,[31] the court addressed the United States Supreme Court's rejection of automatic standing of a defendant charged with criminal possession of certain property and his right to contest the search and seizure of that property. The court, on its own initiative, directed that "[the argument] should include the question of the applicability of Art. 26 of the Maryland Declaration of Rights."[32] Discussing the *in pari materia* notion, and again recognizing the very persuasive, although not controlling authority of the decisions of the United States Supreme Court as to the interpretation of the Fourth Amendment, the court reiterated that "each provision is independent, and a violation of one is not necessar-

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[28] *See id.* at 1044.
[29] *Id.* at 1044 n.1.
[30] *Id.* at 1048 (emphasis added).
[31] 430 A.2d 49 (Md. 1981).
[32] *Id.* at 50 (internal quotation marks omitted).

ily a violation of the other."[33] Reasoning that the United States Supreme Court holdings in *Rawlings v. Kentucky*[34] and *United States v. Salvucci*[35] are very similar to prior statements of the Maryland Court of Appeals regarding Article 26, the Maryland court rejected automatic standing and instead followed the United States Supreme Court's interpretation.[36] The court held that a defendant challenging the validity of a search and seizure must establish that his or her own rights have in fact been violated.[37] Judge Rita Davidson dissented. She would have decided the case on independent state grounds based upon Article 26.[38] Agreeing with the majority that Article 26 is *in pari materia* with the Fourth Amendment, and that decisions of the United States Supreme Court on the Fourth Amendment are entitled to great respect, Judge Davidson stressed that they are only persuasive when interpreting the Maryland Declaration of Rights.[39]

Significantly, in addition to the historical court approach consistently interpreting Article 26 and the Fourth Amendment *in pari materia*, to date Maryland has not recognized an exclusionary rule that would preclude the admission of evidence seized in violation of Article 26.[40] And so, in order to proceed on independent state grounds and diverge from the United States Supreme Court interpretation of the Fourth Amendment, the court would have to recognize an exclusionary rule.

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[33] *Id.* at 55.

[34] 448 U.S. 98 (1980).

[35] 448 U.S. 83 (1980).

[36] *Gahan*, 430 A.2d at 55.

[37] *Id.*

[38] *Id.* at 60 (Davidson, J., dissenting).

[39] *Id.*

[40] *See* Brown v. State, 916 A.2d 245, 251 (Md. 2007) ("Although the alleged conduct may also violate the Maryland Declaration of Rights, because there is no general exclusionary provision in Maryland for such violations, the conduct must violate the federal Constitution to be excluded.") (citing Fitzgerald v. State, 864 A.2d 1006, 1019 (Md. 2004) (citing Chu v. Anne Arundel County, 537 A.2d 250 (Md. 1988))); Anne Arundel County v. Chu, 518 A.2d 733, 738 (Md. Ct. Spec. App. 1987) (Moylan, J.) ("Maryland, for that matter, has no Exclusionary Rule of its own to this very day."). *See also* Stephen E. Henderson, *Learning From All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373, 410 n.157 (2005) (noting that Maryland state analog's lack of exclusionary remedy "presumably discourages litigants from raising it as an alternative ground" to Fourth Amendment).

Oddly enough, it was not always the case that there was no exclusionary rule in Maryland for illegally seized evidence. Turning to the historical perspective of an exclusionary rule in search and seizure cases in Maryland, "*a funny thing happened on the way to the forum*," so far as an exclusionary rule goes.

The legality of the search and seizure of evidence did not affect the admissibility of evidence in Maryland, at least until 1929. In *Lawrence v. State*, [41] the Maryland Court of Appeals reasoned that:

> [T]hough papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice of how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.[42]

In other words, the admissibility of evidence is not affected by the illegality of the means through which the evidence was obtained.

In *Weeks v. United States*,[43] the United States Supreme Court held that, subject to some restrictions and qualifications, evidence illegally obtained by federal agents is inadmissible in a federal prosecution and that the Fourth Amendment incorporated an exclusionary rule.[44] The Court did not hold that the Fourth Amendment was applicable to state proceedings. Nonetheless, many state courts after *Weeks* held that state constitutional provisions similar to the Fourth Amendment also incorporated exclusionary rules.[45]

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[41] 63 A. 96 (Md. 1906).

[42] *Id.* at 103 (quoting 1 GREENLEAF ON EVIDENCE § 254 (a)).

[43] 232 U.S. 383 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

[44] *Id.* at 398.

[45] *See generally* Gorman, *supra* note 3; Fitzgerald v. State, 864 A.2d 1006, 1020 (Md. 2004) (noting that forty-six states have an exclusionary rule for their state constitutions).

The Maryland Court of Appeals rejected the federal rule in *Meisinger v. State*.[46] *Meisinger* was an important case because it triggered legislative reform. Meisinger was indicted for the misdemeanor offense of having in his possession intoxicating, spiritous or fermented liquors, with the intent to unlawfully sell the same.[47] Pursuant to a search warrant, the defendant's premises were "invaded" by the sheriff, who searched and seized intoxicating liquor, utensils and materials used in its making.[48] The court found that the search was illegal because the warrant should not have been issued and the sheriff was therefore a trespasser.[49] The primary question in the case was the admissibility of the evidence secured under an illegal search warrant. The court was urged to adopt and apply the *Weeks* exclusionary rule to Maryland law enforcement officers, but, in a four to three decision, declined to do so.[50] Based on *Lawrence* and the doctrine of stare decisis, the court held that the evidence was admissible.[51]

At the next general session of the Maryland General Assembly, in direct response and in disagreement with the underlying policy expressed by the court in *Meisinger*, the Legislature passed Chapter 194 of the Acts of 1929, known as the Bouse Act.[52] The Legislature adopted an exclusionary rule for certain misdemeanors, but not felonies. The statute read, in pertinent part, as follows:

> No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through,

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[46] 141 A. 536, 538 (Md. 1928), *superseded by statute*, Bouse Act, MD. ANN. CODE art. 25, § 5 (Supp. 1935), *as recognized in* Chu v. Anne Arundel County, 537 A.2d 250 (Md. 1988).

[47] *Id.* at 536.

[48] *Id.*

[49] *Id.* at 538.

[50] *Id.* at 537. Judge Parke, writing for three members of the court in dissent, would have adopted the federal rule of exclusion in Maryland as a matter of Maryland constitutional law, noting that "[t]he doctrine advocated in this dissent would bring the state and federal rule in harmony and make the rights of the citizen no less secure under the state than the federal Constitution." Meisinger v. State, 142 A. 190, 194 (Md. 1928) (Parke, J., dissenting). The majority and dissenting opinions are in two separate volumes of the *Atlantic Reporter*.

[51] *Meisinger*, 141 A.2d at 538.

[52] 1929 Md. Laws 534 (codified until 1973 as MD. CODE ANN. art. 25, § 5).

> or in any consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State . . . .[53]

The effect of this Act was to make inadmissible in the trial of misdemeanors evidence which is obtained by means of an illegal search and seizure.[54] This exclusionary rule was quite limited because, first, it only applied to misdemeanors, and second, certain counties were permitted to use evidence obtained from an illegal search and seizure in prosecuting the violations of gambling, lottery and alcoholic beverage laws.[55] The Legislature overruled *Meisinger* and created an exclusionary rule for illegally seized evidence with respect to misdemeanor cases.[56] Significantly, *Meisinger* dealt with misdemeanors only.

We turn next to the cases of *Wolf v. Colorado*[57] and *Mapp v. Ohio*.[58] *Wolf v. Colorado* held that the Fourth Amendment was applicable to the states, but that the exclusionary rule was not applicable to state proceedings.[59] *Mapp v. Ohio* overruled that portion of *Wolf,* and held that the Fourth Amendment's exclusionary rule *was* applicable to the states.[60]

After *Wolf v. Colorado* and *Mapp v. Ohio* held that the Fourteenth Amendment did not require the states to adopt an exclusionary rule for evidence derived from an illegal search and seizure, the Maryland Legislature amended Article 27, section 551, the statute which addressed the return of illegally seized property. That statute provides for a civil proceeding for the return of property seized pursuant to a search warrant if there is no probable cause to support the issuance of the warrant.[61] The initial form of section 551 included an exclusionary rule which was unlimited as to the nature of the offense involved, and unlike the Bouse Act, applied to felonies as well as

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53 Silverstein v. State, 6 A.2d 465, 466 (Md. 1939) (quoting art. 25, § 5).

54 *Id.* at 468.

55 *See* Belton v. State, 178 A.2d 409, 411 (Md. 1962).

56 *See supra* notes 52-54 and accompanying text.

57 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

58 367 U.S. 643 (1961).

59 *Wolf*, 338 U.S. at 33.

60 *Mapp*, 367 U.S. at 655-56.

61 *See* MD. ANN. CODE art. 27, § 551 (1987) (recodified in 2001 with the current version at MD. CODE ANN., CRIM. PROC. § 1-203 (West 2007)).

misdemeanors.[62] The Legislature struck that proposed exclusionary rule from the bill before the bill was enacted. The court has held recently that section 551 does not include an exclusionary rule, although in the case of *Chu v. Anne Arundel County*, the court noted, in a footnote, that "[w]e do not intimate by the foregoing review any opinion as to whether an exclusionary rule might operate under Maryland law in contexts other than that of § 551."[63]

In the interim, the Bouse Act was repealed in 1973—a very curious occurrence. The Legislature repealed the Act as part of the Maryland Code revision project, and under the belief that based on *Mapp v. Ohio,* the Bouse Act was unconstitutional.[64]

I pose the rhetorical questions: Why was the Bouse Act, a state statute creating an exclusionary rule specifically for misdemeanors, unconstitutional in light of *Mapp*? Is it simply because *Mapp* applies also to felonies? Why could not Maryland have *Mapp* as a constitutional matter, applying to felonies and misdemeanors, and the Bouse Act as a statutory matter applying only to misdemeanors?

The result of these developments is that today, in Maryland, other than the federal exclusionary rule, the court has not recognized an exclusionary rule for illegally seized evidence under Article 26.[65]

Although the court has not found an exclusionary rule when considering search and seizure issues under Article 26, there have been occasions where the court has excluded evidence that was illegally seized. *Kostelec v. State*[66] is an interesting case. In that case, the petitioner was convicted of controlled dangerous substance violations.[67] He moved to suppress the evidence seized under an anticipatory search warrant.[68] The issue was

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[62] *Id.*

[63] Chu v. Anne Arundel County, 537 A.2d 250, 253 n.2 (Md. 1988).

[64] 1973 Spec. Sess. Md. Laws 332. The Revisor's note states that the Bouse Act was unconstitutional under *Mapp v. Ohio*. *Id.* ("'Bouse Act' similar statute held unconstitutional; *see* Mapp v. Ohio. 367 U.S. 643 1961).").

[65] This discussion does not include exclusionary provisions for violations of the state wiretap or eavesdropping laws.

[66] 703 A.2d 160 (Md. 1997).

[67] *Id.* at 160.

[68] *Id.* at 160-61.

whether Article 27, section 551 authorized anticipatory search warrants.[69] The trial court denied the motion to suppress and Kostelec was convicted. The intermediate appellate court affirmed, holding "that anticipatory warrants did not violate the Fourth Amendment" and therefore did not violate Maryland law because Maryland search and seizure law "should be construed *in pari materia* with the Fourth Amendment to permit anticipatory search warrants."[70] On the merits, the Maryland Court of Appeals disagreed, and held that the search warrant was not authorized by section 551.[71] The court recognized that if the violation of section 551(a) also violated the Fourth Amendment, suppression would be available as a remedy under federal law.[72] However, the court assumed that the violation of the state statute was *not* a violation of the Fourth Amendment, but nonetheless reasoned that the evidence should be suppressed.[73]

Following an extended discussion of the failure of the State to argue that section 551 did not contain an exclusionary rule, the court held that the evidence should be suppressed, "under the unique procedural history of this case."[74] The court reasoned as follows:

> From the time Kostelec filed his motion to suppress in the circuit court through the grant of the writ of certiorari by this Court, this case proceeded on the assumption by Kostelec and by the representatives of the State that the remedy would be suppression of the evidence if the search warrant were issued in violation of § 551(a). Inasmuch as § 551(a) was violated and there has been no previous challenge to Kostelec's assertion of a right to suppression as the remedy for that violation, the motion to suppress should be granted under the unique procedural history of this case.[75]

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[69] *Id.* at 163.

[70] *Id.* at 162.

[71] *Id.* at 165.

[72] *See* Mapp v. Ohio, 367 U.S. 643 (1961).

[73] *Kostelec*, 703 A.2d at 165 ("In our discussion of this new issue we shall assume that the violation of § 551(a) here is not also a violation of the Fourth Amendment.").

[74] *Id.* at 166.

[75] *Id.*

This case was remanded with instructions to suppress the evidence.[76]

There are other occasions in which the court has ordered suppression of illegally or improperly seized evidence, *albeit* not under Article 26. In *Chase v. State*,[77] a violation of probation proceeding, which in Maryland is a civil proceeding, the court considered whether the Fourth Amendment exclusionary rule applied to illegally seized evidence.[78] The court concluded that the federal rule would not *generally* apply to our probation revocation proceedings and adopted the general rule that in revocation of probation proceedings, the exclusionary rule does not apply to bar evidence illegally seized by the police from the probationer.[79] Nonetheless, the court went on to hold that "when the officer has acted in bad faith and not as a reasonable officer would and should act in similar circumstances, the evidence should, in any event, be suppressed."[80]

Sheetz v. Mayor and City Council of Baltimore[81] was a civil, administrative employee discharge case. Recognizing that the exclusionary rule of the Fourth Amendment does not apply ordinarily in employee discharge proceedings, the court held that "as a matter of Maryland administrative law, we are unwilling to hold that such evidence is always admissible."[82] The court held that where the police were motivated improperly to illegally seize evidence to benefit civil proceedings, such evidence is inadmissible in civil administrative discharge proceedings.[83] This all still leaves the question: What is the Maryland rule with respect to the Fourth Amendment Article 26, and the exclusion of illegally seized evidence?

Two recent cases are of interest. The first is *Fitzgerald v. State*.[84] Petitioner's conviction rested upon evidence obtained after a dog purportedly detected illegal drugs by sniffing peti-

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[76] *Id.*
[77] 522 A.2d 1348 (Md. 1987).
[78] *Id.* at 1351.
[79] *Id.* at 1362.
[80] *Id.*
[81] 553 A.2d 1281 (Md. 1989).
[82] *Id.* at 1284.
[83] *Id.* at 1285.
[84] 864 A.2d 1006 (Md. 2004).

tioner's apartment door from a public hallway.[85] The Maryland Court of Appeals first considered whether the dog sniff was a search under the Fourth Amendment, and held that a dog sniff of the exterior of a residence is not a search under the Fourth Amendment.[86] Petitioner urged the court to find that the dog sniff violated Article 26, and urged the court to adopt an exclusionary rule for evidence seized in violation of Article 26.[87] The court found that because the majority of state courts holding a dog sniff constituted a search under state constitutions apply a reasonable suspicion standard, and reasonable suspicion existed in the instant case, "[t]here is no need to determine whether this is a case in which Article 26 mandates our finding an illegal search, while the Fourth Amendment mandates a conclusion that no search occurred. Similarly, this is not the case to revisit whether Article 26 contains an exclusionary rule."[88] Judge Greene, writing in dissent, joined by Chief Judge Bell, would have broken "the tradition of reading Article 26 of the Maryland Declaration of Rights *in pari materia* with the Fourth Amendment . . . [and interpreted] Article 26, in such a fashion, so as to afford citizens greater protections than those as interpreted under the Fourth Amendment."[89] Clearly, the court left the door open to decide whether to proceed on independent state grounds and whether Article 26 contains an exclusionary rule.

The final case is *Parker v. State*.[90] In that case, petitioner argued that law enforcement officers' "no-knock" entry into petitioner's home violated the Fourth Amendment and Article 26.[91] After the Maryland Court of Appeals granted the writ of certiorari, the United States Supreme Court decided *Hudson v. Michigan*,[92] holding that the exclusionary rule of the Fourth Amendment does not apply to evidence obtained in violation of the knock and announce requirement embodied in the Fourth

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[85] *Id.* at 1008.
[86] *Id.* at 1017.
[87] *Id.* at 1019.
[88] *Id.* at 1020.
[89] *Id.* at 1027 (Greene, J., dissenting).
[90] Parker v. State, No. 37 (Md. argued Nov. 3, 2006) (presently pending in the Court of Appeals).
[91] *Id.*
[92] 126 S. Ct. 2159 (2006).

Amendment.[93] Petitioner has fully briefed the independent state grounds issue, urging the court to hold that as a matter of Maryland law, exclusion is the appropriate remedy for evidence obtained in violation of knock and announce requirements of Article 26 and Maryland common law. The resolution of that case is for another day.

In sum, at least as of today, Maryland continues to resolve search and seizure issues arising under Article 26 of the Maryland Declaration of Rights in accordance with the jurisprudence of the United States Supreme Court and its interpretation of the Fourth Amendment.

[93] *Id.* at 2170-71.