IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2016

NO. 1804

MDEC: CSA-REG-1804-2016

JOHN F. MCMAHON,
APPELLANT,

v.

WAYNE ROBEY, *et al.*,
APPELLEES.

On Appeal from the Circuit Court
for Anne Arundel County, Maryland

CASE # C-02-CV-16-001949, below
(William C. Mulford, II, J.),

APPELLANT BRIEF

ALLEN R. DYER, Esq.
Law Office of Allen Dyer
13340 Hunt Ridge
Ellicott City, MD 21042
(410) 531-3965
aldyer@lawlab.com
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Page(s)

In The Court of Special Appeals of Maryland

SEPTEMBER TERM, 2016

NO. 1804

MDEC: CSA-REG-1804-2016

JOHN F. MCMAHON,
APPELLANT,

v.

WAYNE ROBEY, *et al.*,
APPELLEES.

On Appeal from the Circuit Court for Howard County, Maryland

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The case below is an action by a 2014 general election candidate for Howard County Sheriff who claims to have received the majority of legal votes cast in the 2014 election. When the 2014 votes were first tallied an opposing candidate, Appellee Fitzgerald, the incumbent Sheriff for the 2010–2014 term, appeared by all accounts to have received the most votes. **R. 64**. The Governor issued a commission for the 2014–2018 term for the office of Sheriff and Appellee Fitzgerald took possession of the Sheriff's office and duties from the beginning of the new term of office.

On March 23, 2016 Appellant received an anonymous packet which raised

questions about whether the Office of Howard County Sheriff was vacant or in the possession of a sham candidate posing to be the legally elected Sheriff since, *inter alia*, Appellee Fitzgerald had apparently failed to take the oath of office, didn't live in Howard County, and fraudulently used Sheriff's office employees as campaign workers. **E026–041**. As of March 23, 2016 through October 17, 2016 no Maryland election official had raised any legal issue, in public, with the legal status of the Sheriff's office. **E044–E046, E047–050.**

Eventually, after Appellant first filed suit in open court (**R. 11–33**), the public began to put pressure on Appellee Fitzgerald and on October 11, 2016 Appellee Fitzgerald announced he was "resigning" (**R. 223–226**) on October 15, 2016 without stating from which term of office he had resigned. Until Appellee Fitzgerald's resignation, no Maryland election official nor the Governor had taken any action against Appellee Fitzgerald pursuant to the MARYLAND CONSTITUTION or the MARYLAND ELECTION LAW ARTICLE. As of July 12, 2016, none of the Appellees had answered for their lack of legal action nor whether they were complicit in the illegal behaviors of fellow Appellee Fitzgerald. **E044–046.**

The trial court granted Appellees' motion to dismiss for failure to state a claim (**E075**) and issued a declaratory judgment (**E073–074**) that, *inter alia*, Appellant did not have a majority of the legal votes. On November 3, 2016 Appellant appealed (**E076–082**) seeking reversal to the judgment to dismiss and a declaratory judgment recognizing the possibility that Appellant may have a majority of the legal votes based on the outcome of a trial of the factual and legal

issues.

The office of county sheriff is an elected office created by MARYLAND CONSTITUTION, ART. IV, § 44 and MARYLAND ELECTION LAW ARTICLE § 12-202 provides for judicial challenges to the results of elections. As the Court of Appeals recently explained in *Cabrera v. Penate*, 439 Md. 99, 109 (2014), "Our cases ... show that [ELECTION ARTICLE] § 12-202 is the mechanism for challenging the qualifications of a candidate seeking election."

This is a case of first impression.

QUESTIONS PRESENTED

1. Did the trial court err when it granted a motion to dismiss for failure to state a claim?

2. Did the trial court err when it declared there was a vacancy in the office of Howard County Sheriff as the term "vacancy" is used in MD. CONST. ART. IV, § 44?

3. Did the trial court err when it declared Appellant John McMahon did not receive the majority of all legally valid votes for Sheriff of Howard County in the 2014 general election?

4. Did the trial court err when it declared any claim by Appellant to the office of Sheriff was barred by laches?

STATEMENT OF THE FACTS

Well-pleaded facts and some of the inferences from those facts:.

1. Appellant received 42,692 votes for Sheriff of Howard County in the 2014 General Election. **E017.**

2. Mr. Fitzgerald, the only candidate for Sheriff that received more votes than Appellant, voluntarily failed to take the constitutionally mandated oath of office. **E026.**

3. Appellant never suspected Mr. Fitzgerald failed to take the oath of office until receiving an anonymous letter on March 23, 2015. **E023.**

4. On March 28, 2016, Appellee Clerk of the Court refused to give the oath of office for Howard County Sheriff to Appellant. **E018. E023.**

5. The 2014 general election ballot misidentified Appellee James Fitzgerald as a valid candidate instead of a sham intended to deceive the voters. **E018–019.**

6. Subsequent to the 2014 general election, Appellee Fitzgerald served as a holdover Sheriff. **E019.**

7. Appellee James Fitzgerald did not obtain a bond as required by Maryland law at the beginning of the 2014 term of office. **E026.**

8. Appellee James Fitzgerald, while the incumbent Sheriff, authorized a number of deputies to work on Mr. Fitzgerald's 2014 general election campaign and the deputies were paid almost $8000 with county tax payer dollars for their work on Mr. Fitzgerald's campaign. **E028.**

9. While serving as Howard County Sheriff, Appellee Fitzgerald actually lived at 12715 Whisper Trace Dr, Ocean City MD 21842. **E039.**

10. As of March 23, 2016 through October 17, 2016 no Maryland election official had raised any legal issue, in public, with the legal status of

the Sheriff's office. **E044–E046, E047–050.**

STANDARD OF REVIEW

The Court of Appeals has repeatedly found that when reviewing a motion to dismiss "the court must view all well-pleaded facts and the inferences from those facts *in a light most favorable to the plaintiff*." *Arfaa v. Martino*, 404 Md. 364 (2008). Emphasis added. Further, "where an order involves an interpretation and application of Maryland constitutional, statutory or case law, [the appellate] Court must determine whether the trial court's conclusions are 'legally correct' under a *de novo* standard of review." *Schisler v. State*, 394 Md. 519, 535 (2006).

ARGUMENT

The legal status of the position of the Sheriff of Howard County and the term of years in which the Sheriff is serving is the core of this action. Unfortunately, Maryland election officials and the trial court have conflated two different terms of office with the limits of the legal authority held by the individual claiming the right to exercise the power of the Howard County Sheriff's office. The term of years associated with the service of the person claiming to be the Howard County Sheriff defines the actual legal status of the person performing the Sheriff's duties, and, thus, is critical to the orderly democratic transfer of power.

According, Appellant first presents a short sketch of the resources informing Appellant's perspective on the approach of the MARYLAND CONSTITUTION to democratic succession via elections. The following will provide a more coherent

description of Appellant's view of how succession of elected officers should be construed through the framework of the MARYLAND and UNITED STATES CONSTITUTIONS and the case law interpreting same.

INTRODUCTION: MARYLAND'S DEMOCRATIC SUCCESSION VIA ELECTIONS

I. List of Relevant Constitutional Provisions.

MARYLAND CONSTITUTION, Art. I, § 7. Laws to be passed for preservation of purity of elections.

MARYLAND CONSTITUTION, Art. I, § 9. *Oath of office.*

MARYLAND CONSTITUTION, ART. I, §10. *How officers may qualify; ....*

MARYLAND CONSTITUTION, ART. I, §11. *Refusal to take oath; violation of oath.*

MARYLAND CONSTITUTION, ART. II, §11. *Power of Governor to fill vacancies.*

MARYLAND CONSTITUTION, ART. IV, §44. *Sheriffs.*

UNITED STATES CONSTITUTION. AMENDMENT XIV, *Equal Protection Clause.*

The text of the above constitutional provisions is appended to the end of this brief in the PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES APPENDIX.

II. Citations to Relevant Election Terminology.

Oath of Office —

> "[The Treasurer] could not enter upon the duties of the office until he had taken the oath and given the bond. They were preliminary steps indispensably necessary to his possession of the office."

Archer v. State, 74 Md. 410, 427 (1891).

Qualified —

"Any officer elected or appointed in pursuance of the provisions of this Constitution, may qualify, either according to the existing provisions of law, in relation to officers under the present Constitution, or before the Governor of the State, or before any Clerk of any Court of Record in any part of the State; but in case an officer shall qualify out of the County in which he resides, an official copy of his oath shall be filed and recorded in the Clerk's office of the Circuit Court of the County in which he may reside, or in the Clerk's office of the Superior Court of the City of Baltimore, if he shall reside therein."

MARYLAND CONSTITUTION, ART. I, §10. *How officers may qualify*;....

"2. Every person elected or appointed pursuant to the CONSTITUTION must take the oath of office prescribed in ARTICLE I, §9. *See* 71 *Opinions of the Attorney General* 334, 335-36 (1986). An officer elected or appointed pursuant to the CONSTITUTION qualifies by taking the applicable oath of office. ARTICLE I, §10."

79 *Opinions of the Attorney General* 438 (1994) at footnote 2.

Term of Office —

"The provision in the Constitution that the term of the Treasurer should last for two years 'and until his successor shall qualify,' was inserted to prevent the possibility of a vacancy and interregnum. It presupposed the possibility that the constitutional machinery might not always run with perfect exactness and regularity--that newly-elected officers might fail to qualify--that incumbents might decline to vacate--that contingencies might happen whereby an official who ought to retire in favor of his successor might contest the right of his successor to the office, and might in consequence of such dispute hold on to his office until such contest could be settled--and that an official elected as his own successor might neglect to put an end to his existing term by qualifying under his second appointment and entering upon a new term."

Archer v. State, 74 Md. 410 (1891).

"[The Sheriff] shall hold office for four years, **until his successor is duly elected and qualified**, give such bond, exercise such powers and perform such duties as now are or may hereafter be fixed by law."

MARYLAND CONSTITUTION ART. IV, § 44. Emphasis added.

"'[T]erm of office' as used here means the period or limit of time during

which the incumbent is permitted to hold."

People ex rel. Bentley v. Le Fevre, 21 Colo. 218, 229-230 (Colo. 1895).

> "The effect of the words following the express limitation of the term of an office, as in this case, 'and until his successor shall be appointed and qualified,' or, 'and until his successor shall qualify,' has been the subject of frequent judicial determinations of Courts of high authority, and the construction of those terms has become fixed and settled. They are held to mean, according to their plain import, an extension of the definite term of office, and that no vacancy exists in the office while an incumbent, lawfully appointed, holds by virtue of such extension of his term; and, of course no vacancy existing, no appointment can be made merely to fill a vacancy."

Smoot v. Somerville, 59 Md. 84, 95 (1882).

Franchise —

> "The case of the political franchise of voting is [a fundamental political right]. Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights."

Yick Wo v. Hopkins, 118 U.S. 356, 370 (U.S. 1886).

***De Jure* Officer** —

> "The Maryland cases hereinbefore cited make it abundantly clear that the failure to take a proper, or any, oath of office is simply one of the factors which may reduce a *de jure* officer to the status of a *de facto* officer, and the weight of authority elsewhere is in accord. 43 Am. Jur., Public Officers, § 483."

Reed v. President & Comm'rs of North East, 226 Md. 229, 245 (1961).

***De Facto* Officer** —

> "A person is a *de facto* officer where he exercises the duties of an office under color of a known and valid appointment or election, but where he failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like. Vide, *Public Officer*, 22 R.C.L. § 306, p. 588.

Thibodeaux v. Comeaux, 243 La. 468, 488-490 (La. 1962).

Hold Over Officer —

> The *de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient.

Ryder v. United States, 515 U.S. 177, 180 (U.S. 1995).

> "This Court has held that an elected or appointed officer may remain in office at the expiration of his term and is entitled to exercise the powers of the office until his successor qualifies, whether or not the statute creating the office so provides."

Reed v. President & Comm'rs of North East, 226 Md. 229, 242 (1961).

> "From the whole record before us, it is clear that all those who were incumbents at the time of the adoption of the resolutions were 'hold-overs' claiming office under color of election or appointment and continuing to serve after expiration of terms to which they had either been elected or appointed."

Reed v. President & Comm'rs of North East, 226 Md. 229, 240 (1961).

> "It has long been recognized in this State, as elsewhere, that the public interest requires, in the absence of any provision to the contrary, that public offices should be filled at all times, without interruption."

Reed v. President & Comm'rs of North East, 226 Md. 229 (1961).

> "[U]nder and by the very terms of the Constitution, the respondent was occupying the office as an officer *de facto* and *de jure* at the time the relator was appointed and commissioned, and because he was thus occupying, there was no vacancy, and hence no power in the executive to appoint."

State ex rel. Carson v. Harrison, 113 Ind. 434, 448 (Ind. 1888).

III. Constitutional Imperatives (Citations).

Role of U.S. CONSTITUTION —

> "Our province is not to make or unmake Constitutions, but to interpret them; not by the light of reason and common sense alone, or that higher law which has been invoked, but which has no oracle, but by the text of the Constitution of the United States, as construed by its authorized expounders."

Anderson v. Baker, 23 Md. 531, 629 (1865).

> "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination."

Lane v. Wilson, 307 U.S. 268, 275 (U.S. 1939).

> "[V]oters who allege facts showing disadvantage to themselves as individuals have standing to sue."

Baker v. Carr, 369 U.S. 186, 206 (U.S. 1962).

> "The question here is the consistency of state action with the FEDERAL CONSTITUTION. .... Judicial standards under the *Equal Protection Clause* are well developed and familiar, and it has been open to courts since the enactment of the FOURTEENTH AMENDMENT to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action."

Baker v. Carr, 369 U.S. 186, 226 (U.S. 1962).

> "[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State."

Reynolds v. Sims, 377 U.S. 533, 560-561 (U.S. 1964).

> "Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less."

Reynolds v. Sims, 377 U.S. 533, 565 (U.S. 1964).

> "We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative

> apportionment schemes.[f.n. omitted] However, in determining the validity of a State's apportionment plan, the same federal constitutional standards are applicable whether the matter is litigated in a federal or a state court. Maryland's plan is plainly insufficient under the requirements of the *Equal Protection Clause* as spelled out in our opinion in *Reynolds*."

Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 674 (U.S. 1964).

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

Gomillion v. Lightfoot, 364 U.S. 339, 347 (U.S. 1960).

Popular Elections —

> "The election, commencing with the primary, will indeed not be finally completed until the winner has taken the oath of office. Up to then the vacancy which occasioned the election has not been filled."

Fortson v. Morris, 385 U.S. 231, 238 (U.S. 1966).

Hesitancy to Void Election —

> "It is generally held that an election which has been honestly and fairly conducted will not be vitiated by mere failure to follow the statute precisely unless the result is shown to have been affected or the statute expressly states that such failure renders the election void."

Lexington Park Volunteer Fire Dept., Inc. v. Robidoux, 218 Md. 195, 200 (1958).

> "It never has been accepted as a proper rule of law, that the mistake of a merely clerical officer would be permitted to render void an action which had been legally taken."

Seyboldt v. Mayor & Common Council of Mt. Ranier, 130 Md. 69, 73 (1917).

> "The whole case made by the bill rests upon the *mere* mistake, or error in the preparation of the ballot, and for the reasons stated and upon the authorities cited the order appealed [dismissal of petition for injunction] from will be affirmed."

Carr v. Mayor, etc. of Hyattsville, 115 Md. 545, 551 (1911). Emphasis in original.

> It would be a dangerous thing and put a premium upon misconduct to declare that an election officer by his dereliction in performing a duty, such as preserving the secrecy of individual ballots, may disfranchise the electorate in part or in whole and perhaps swing an election from one candidate to another, as here, or from one group of candidates to another group. .... [T]he irregularities will be eliminated if it can be determined with reasonable certainty who has received a plurality or majority of legal votes notwithstanding them, for nullification of an election is a serious matter and is to be avoided if possible.

Stabile v. Osborne, 309 Ky. 427, 434 (Ky. 1949).

Minimize Appointments to Elected Offices —

> "The controlling, if not the sole, consideration has been that the law requires, in the public interest, that the offices be filled at all times, without interruption, and to this end the intention and understanding that incumbents shall hold until their successors qualify, has grown up and taken position as part of the law; and according to the law as it has been laid down for us, it is upon this provision or rule that dependence is placed primarily for having the offices continuously filled, notwithstanding any delay or failure in the election of successors in ordinary course. And so long as the offices are so filled the exigency which requires or authorizes resort to the Governor's power to fill vacancies by appointment does not exist. This conclusion appears to prevail with many courts in other jurisdictions, too."

Benson v. Mellor, 152 Md. 481, 491 (1927).

> "[T]he Circuit Court, on appeal, invalidated the order, finding the Board to be improperly constituted since it had purported to appoint a "substitute" member to fill a non-existent "vacancy", where the duly elected member, though on leave of absence, had not resigned."

Board of Medical Examiners v. Steward, 203 Md. 574 (1954).

> "The resolution of the House of Delegates did not and could not name a successor; all that was within its power was to give judgment against the incumbent and order a new election; that it did, and the appellant now holds the office only until some other person has been legally selected and qualified to take the place. How that person is to be chosen is clearly pointed out by the 12th section. He is to be elected by the people at the 'new election.' That method of filling the place having been provided, it is not

Carr v. Mayor, etc. of Hyattsville, 115 Md. 545, 551 (1911). Emphasis in original.

> It would be a dangerous thing and put a premium upon misconduct to declare that an election officer by his dereliction in performing a duty, such as preserving the secrecy of individual ballots, may disfranchise the electorate in part or in whole and perhaps swing an election from one candidate to another, as here, or from one group of candidates to another group. .... [T]he irregularities will be eliminated if it can be determined with reasonable certainty who has received a plurality or majority of legal votes notwithstanding them, for nullification of an election is a serious matter and is to be avoided if possible.

Stabile v. Osborne, 309 Ky. 427, 434 (Ky. 1949).

Minimize Appointments to Elected Offices —

> "The controlling, if not the sole, consideration has been that the law requires, in the public interest, that the offices be filled at all times, without interruption, and to this end the intention and understanding that incumbents shall hold until their successors qualify, has grown up and taken position as part of the law; and according to the law as it has been laid down for us, it is upon this provision or rule that dependence is placed primarily for having the offices continuously filled, notwithstanding any delay or failure in the election of successors in ordinary course. And so long as the offices are so filled the exigency which requires or authorizes resort to the Governor's power to fill vacancies by appointment does not exist. This conclusion appears to prevail with many courts in other jurisdictions, too."

Benson v. Mellor, 152 Md. 481, 491 (1927).

> "[T]he Circuit Court, on appeal, invalidated the order, finding the Board to be improperly constituted since it had purported to appoint a "substitute" member to fill a non-existent "vacancy", where the duly elected member, though on leave of absence, had not resigned."

Board of Medical Examiners v. Steward, 203 Md. 574 (1954).

> "The resolution of the House of Delegates did not and could not name a successor; all that was within its power was to give judgment against the incumbent and order a new election; that it did, and the appellant now holds the office only until some other person has been legally selected and qualified to take the place. How that person is to be chosen is clearly pointed out by the 12th section. He is to be elected by the people at the 'new election.' That method of filling the place having been provided, it is not

within the power of the Governor under the general appointing power to name him. *Cantwell v. Owens*, 14 Md. 215; *Magruder v. Swann*, 25 Md. 173."

Ijams v. Duvall, 85 Md. 252, 260-262 (1897).

> "We have not deemed it necessary to go into a consideration of the question as to the power of the Mayor to fill vacancies during a recess of the City Council, for the reason that no vacancies exist. Nor do we feel called on to enter into an extended refutation of the Mayor's asserted right to create a vacancy by appointing some one else than the incumbent to the same office in such a case as this; because we held in *Hooper v. New* that the old Commissioners had been legally appointed, and we hold now that they were not subject to be removed by the Mayor under sec. 31, Art. 4, Local Laws, or under any other law or ordinance; and that, therefore, there were no vacancies to be filled."

Hooper v. Farnen, 85 Md. 587, 600-601 (1897).

> "In the case of *Marshall vs. Harwood*, 5 Md. 423, the Court of Appeals decided, that the election of Marshall before the expiration of Harwood's term, was valid, and that he would enter upon the office when Harwood's term expired. But we insist, that the election of Marshall by the Legislature, in pursuance of a joint resolution, was equivalent to an act declaring such election valid; a power which is not denied to the Legislature. But in this case no action on the part of the Legislature is shown, and we submit, that an appointment or election to fill an office in which no vacancy exists at the time, independent of constitutional or legislative provision, is a nullity and void. *Watkins vs. Watkins*, 2 Md. 341, 11 Wend., 132, 511, *People vs. Coutant*. 3 J. J. Marshall, 401, *Taylor vs. Commonwealth*. 7 Wend., 493, *People vs. Brown*."

Sansbury v. Middleton, 11 Md. 296 (1857).

> "The effect of the [Indiana] constitutional [rule with respect to holding over] provision is to add 'an additional, contingent and defeasible term to the original fixed term, and excludes the possibility of a vacancy, and consequently, the power of appointment, except in case of death, resignation, ineligibility or the like.'"

State ex rel. Fares v. Karger, 226 Ind. 48, 53 (Ind. 1948).

Fraud —

> "These principles [requirement may be held directory and not mandatory] do not apply to a situation where there is a preemptory requirement designed to safeguard the integrity of elections, the neglect of which presents an apparent opportunity for fraud. An illustration of this is the recent case of *Hammond v. Love*, 187 Md. 138, 146 (1946) in which we held that ballots, which were not properly initialed should not be counted."

Wilkinson v. McGill, 192 Md. 387, 395 (1949).

> "The rules prescribed by the law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain with certainty the result."

Carr v. Mayor, etc. of Hyattsville, 115 Md. 545, 549 (1911).

> "When fraud on the part of the officers of election is established, the poll will not be rejected, unless it shall prove to be impossible to purge it of the fraud. [cites omitted]."

Attorney Gen. ex rel. Seavitt v. McQuade, 94 Mich. 439, 443 (Mich. 1892).

Open Court Proceedings —

> "Difficult times such as these have always tested our fidelity to the core democratic values of openness, government accountability, and the rule of law. The Court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. By the same token, the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship."

Ctr. for Nat'l Sec. Studies v. United States DOJ, 215 F. Supp. 2d 94, 96 (2002).

1. The trial court erred when it granted a motion to dismiss for failure to state a claim because the trial court failed to properly apply Appellant's factual allegations and affidavits to consideration of whether Appellees disenfranchised voters and undermined the purity and integrity of the 2014 general election for office of Sheriff of Howard County? MD. CONST. ART. I, § 7. E019–E020 ¶14. E063–070/T12–19.

Appellant received a majority of the legal votes. In his *Amended*

Complaint, Appellant argues he won the election for Sheriff in the 2014 General Election. When Defendant Fitzgerald **voluntarily** failed to take the oath of office, Mr. Fitzgerald, who had campaigned for re-election, renounced and nullified all votes cast by Howard County voters for Mr. Fitzgerald in the 2014 General Election. Thus, Appellant, who received 42,692 votes becomes the winner of the 2014 General Election and is eligible to receive the oath of office from the Defendant Clerk and qualify for service as Sheriff of Howard County.

The MD Constitution; qualification for office; and, the oath of office.

The Maryland Attorney General addressed the general issue of qualification for office in 80 *Op. Att'y Gen.* 262, at 262–263:

> ARTICLE I, §10 of the CONSTITUTION describes the process of qualification as follows:
>
> > Any officer elected or appointed in pursuance of the provisions of this Constitution, may qualify, either according to the existing provisions of law, in relation to officers under the present Constitution, or before the Governor of the State, or before any Clerk of any Court of Record in any part of the State; but in case an officer shall qualify out of the County in which he resides, an official copy of his oath shall be filed and recorded in the Clerk's office of the Circuit Court of the County in which he may reside, or in the Clerk's office of the Superior Court in the City of Baltimore, if he shall reside therein.

If an incumbent official fails to qualify to serve another term, the incumbent is duty bound to hold-over until his replacement is elected and has qualified.

The incumbent official that holds-over is called a *de facto* official and the duties and limitations of such *de facto* officials and the public policy behind their status were explained by the Court of Appeals in *Reed v. President & Comm'rs of*

North East, 226 Md. 229 (1961):

> From the whole record before us, it is clear that all those who were incumbents at the time of the adoption of the resolutions were 'hold-overs' claiming office under color of election or appointment and continuing to serve after expiration of terms to which they had either been elected or appointed. The appellees contend that the President and Commissioners were at least *de facto* officers, and that all their acts as such officers, including adoption of the two amendatory resolutions and other necessary action with respect to issuance of the bonds, are to be taken as valid and binding in the same manner as if they had been performed by *de jure* officers.
>
> It has long been recognized in this State, as elsewhere, that the public interest requires, in the absence of any provision to the contrary, that public offices should be filled at all times, without interruption. In accordance with that policy, § 13 of ART. II of the MARYLAND CONSTITUTION provides that all civil officers appointed by the Governor and Senate shall, except in cases otherwise provided for in the CONSTITUTION, continue to hold office until their successors qualify according to law.

Reed, 226 Md. at 240.

Rulings from Other States.

Because the issue before the Court is an unusual contested election matter, it is appropriate to examine holdings dealing with similar situations in sister states to seek guidance. *See: Waicker v. Banegura*, 357 Md. 450, 473 (2000).

When reviewing an election matter in one of our sister states, the U.S. Supreme Court noted in *Fortson v. Morris*, 385 U.S. 231 (U.S. 1966):

> The election, commencing with the primary, will indeed not be finally completed until the winner has taken the oath of office. Up to then the vacancy which occasioned the election has not been filled.

Fortson, 385 U.S. at 238.

New Jersey courts have found that: "Where an oath is required, it is a prerequisite to full investiture with the office." *Manahan v. Watts*, 64 N.J.L. 465;

Hayter v. Benner, 67 N.J.L. In an explanation of the importance of the oath of office, the New Jersey Supreme Court stated:

> It is manifestly desirable that public officers should act under the sanction of an official oath, and there is no hardship in treating their failure to take an oath as equivalent to a vacation of the office, especially as it is probable that the taking of the oath is in most cases the only formal acceptance of the office.

Murphy v. Freeholders of Hudson, 91 N.J.L. 40, 42 (Sup. Ct. 1918), *caveat*, overruled by *Murphy v. Board of Chosen Freeholders*, 92 N.J.L. 244, 104 A. 304, 1918 N.J. LEXIS 245 (E. & A. 1918).

Although not directly analogous, there are a fair number of appellate opinions discussing the impact of dead or otherwise ineligible candidates on the tallying of the votes cast. Generally the cases divide into "American Rule" and "English Rule" states. Appellant argues that the current situation. where a living candidate voluntarily refuses to take the oath of office is easily distinguishable from dealing with an act of god. Regardless, for historical purposes if no other, *State ex rel. Wolff v. Geurkink*, 111 Mont. 417, 426 (Mont. 1941) presents an English Rule example:

> But the trouble with it all is that the 400 friends of (the widow of the deceased) Mrs. Gallagher resorted to an entirely wrong method of attempting to bring about the desired result. They seem to have wholly misunderstood the purpose of holding an election, or at least they did not know how to use their ballot so as to effectively influence the selection of someone to the office to be filled. Elections are held for the purpose of selecting persons to fill public office and to give the public an opportunity to express their choice in making the selection. Casting a ballot at such an election is an affirmative act, not a negative one.

In contrast, *Bates v. District of Columbia Bd. of Elections & Ethics*, 625 A.2d 891

(D.C. 1993) presents an American Rule example:

> Our reading of the statute produces a result that is consistent with the overwhelming majority view in American jurisdictions, also known as the "American rule," that holds that where the candidate receiving the most votes is deceased, disqualified, or ineligible, the runner-up candidate will not be deemed the winner of the election. According to the American rule: votes cast for a deceased, disqualified, or ineligible person are not to be treated as void or thrown away, but are to be counted in determining the result of the election as regards to other candidates. . . . The result of its application in such cases is to render the election nugatory, and to prevent the election of the person receiving the next highest number of votes.

625 A.2d at 895.

The Maryland Court of Appeals has never accepted either the American Rule or the English Rule even though the list of election disputes that have been resolved by the Court of Appeals is long and predates any equal protection clause analysis of election law cases by the U.S. Supreme Court.

The notion of a rigid rule, whether "American" or "English" resolving a contested election is contrary to the spirit of recent U.S. Supreme Court opinions. The Supreme Court recommends judges take an analytical approach to resolving election contests in order to insure there is no violation of the FOURTEENTH AMENDMENT *Equal Protection Clause*. As the Supreme Court explained in *Anderson v. Celebrezze*, 460 U.S. 780, 789-790 (U.S. 1983):

> Constitutional challenges to specific provisions of a State's election laws ... cannot be resolved by any "litmus paper test" that will separate valid from invalid restrictions. .... Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the FIRST and FOURTEENTH AMENDMENTS that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and

> strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. [Cites omitted.] The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made." [Cite omitted.]

460 U.S. at 789-790.

A century ago, the Maryland Court of Appeals developed and applied a mature, equal rights analysis in *Smith v. Hackett*, 129 Md. 73 (1916):

> If their votes are to be rejected, it can not be on the ground of any want of legal right or competency on their part, but solely because of a mistake of judgment or misconception of duty on the part of the board of supervisors in reference to the proper location, in the district, of the precinct polling room in which the ballots were cast and counted. The Court below regarded this as an insufficient reason, upon the facts stated, for excluding the vote of the precinct in question, and we can have no doubt as to the correctness of that conclusion. In the absence of any proven injury to any interest involved from the mere fact that the polling room for the precinct was at the location mentioned, we can find in that circumstance no just cause for invalidating the entire vote of the precinct and depriving the candidates for whom it was cast of its legitimate effect. This would be far too serious a result to recognize as a proper and necessary consequence of the particular breach of administrative duty under consideration.

129 Md. at 77-78. The Maryland Court of Appeals pioneered application of the what amounts to application of the FOURTEENTH AMENDMENT equal protection clause to Maryland election law and used the analytical processes necessary to make "the hard judgments that must be made." To wit: first, consider the character and magnitude of the asserted injury to the protected rights; second, identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule(s); third, determine the legitimacy and strength of each of those interests and consider the extent to which those interests make it necessary

to burden the plaintiff's rights. Finally, weigh all these factors and decide whether the challenged provision is unconstitutional.

2. The trial court erred when it declared there was a vacancy in the office of Howard County Sheriff as the term "vacancy" is used in MD. CONST. ART. IV, § 44? E021 ¶20. MD. CONST. ART. XI, § 11. MD. CONST. ART. IV, § 44. E066.

The trial court conflated the concept of a "vacancy" with the term of years associated with an elected office. In so doing, the trial court failed to appreciate the hold-over Sheriff could only resign from the term of years (2010–2014) to which he properly qualified by taking the 2010 oath of office. At this point, no one is currently serving in the 2014–2018 term of office for Howard County Sheriff because Appellant has been repeatedly rebuffed in his efforts to be administered the oath of office for the term of 2014–2010. Effectively, the current Maryland election officials have colluded to deprive Appellant of three of the four years of office to which he was elected.

3. The trial court erred when it declared Appellant John McMahon did not receive the majority of all legally valid votes for Sheriff of Howard County in the 2014 general election. E021 ¶23, E073.

The argument related to this declaratory judgment error is contained within argument #1 above explaining how the trial court erred when it granted a motion to dismiss for failure to state a claim.

4. The trial court erred when it declared any claim by Appellant to the office of Sheriff was barred by laches. E067.

No statute of limitations is applicable. Appellant is not challenging Mr. Fitzgerald's residency pursuant to the ELECTION ARTICLE. Appellant has asked the

Court to answer a novel case of first impression relating to the effect of a notorious failure of a candidate to take the Maryland oath of office. As such, the ELECTION ARTICLE statute of limitations is inapplicable.

The equity doctrine of laches is not applicable. The Attorney General's office has decided to argue that Appellant, a bona fide candidate in the 2014 General Election had plenty of opportunity to discover how the Defendant Clerk, the Defendant Secretary of State, the Defendant Administrator of State Elections Attorney, the Defendant Governor and their attorney, the Maryland Attorney General's office had failed to advise the Appellant candidate for the Sheriff's office of the failure of Mr. Fitzgerald to take the constitutionally required oath.

The Laches and the Clean Hands Doctrine. Defendants' *Motion to Dismiss* relies on the equity doctrine of laches and argues Appellant could have discovered Mr. Fitzgerald's betrayal of those who cast their ballots for him at an earlier time. Is is too much to ask our knowable elected officials to advise the general public that there is a constitutional issue involed with the General Election because of an almost unprecedented failure of a reputedly successful candidate intentionally refusing to take the constitutional mandated oath of office? Appellant and all of the voters of Howard County had a right to expect the Defendants in this action to uphold and support the operation of the constitutional machinery of democracy.

Appellee Clerk's statutory duties, COURTS AND JUDICIAL PROCEEDINGS ARTICLE § 2-212 (a), include forwarding to the Maryland Secretary of State a

Court to answer a novel case of first impression relating to the effect of a notorious failure of a candidate to take the Maryland oath of office. As such, the ELECTION ARTICLE statute of limitations is inapplicable.

The equity doctrine of laches is not applicable. The Attorney General's office has decided to argue that Appellant, a bona fide candidate in the 2014 General Election had plenty of opportunity to discover how the Defendant Clerk, the Defendant Secretary of State, the Defendant Administrator of State Elections Attorney, the Defendant Governor and their attorney, the Maryland Attorney General's office had failed to advise the Appellant candidate for the Sheriff's office of the failure of Mr. Fitzgerald to take the constitutionally required oath.

The Laches and the Clean Hands Doctrine. Defendants' *Motion to Dismiss* relies on the equity doctrine of laches and argues Appellant could have discovered Mr. Fitzgerald's betrayal of those who cast their ballots for him at an earlier time. Is is too much to ask our knowable elected officials to advise the general public that there is a constitutional issue involed with the General Election because of an almost unprecedented failure of a reputedly successful candidate intentionally refusing to take the constitutional mandated oath of office? Appellant and all of the voters of Howard County had a right to expect the Defendants in this action to uphold and support the operation of the constitutional machinery of democracy.

Appellee Clerk's statutory duties, COURTS AND JUDICIAL PROCEEDINGS ARTICLE § 2-212 (a), include forwarding to the Maryland Secretary of State a

monthly list of those to whom the clerk has given the oath of office. Thus, Appellee Clerk and the Secretary of State had actual knowledge that the Howard County Sheriff's Office was, until Defendant Fitzgerald's recent resignation, operated by a person that was constitutionally unqualified.

The equity doctrine of laches is unavailable to Defendant Clerk and his counsel because there is a nexus between the studied inaction of Defendant Clerk and the Secretary of State and the lapse of time before Appellant discovered his right to take the oath of office and qualify to assume the office to which he was elected by the voters of Howard County. *Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. 705, 729-730 (2007); *Adams v. Manown*, 328 Md. 463, 476 (1992) (Quoting, D. Dobbs, *Remedies* § 2.4, at 46 (1973) "It is only when the plaintiff's improper conduct is the source, or part of the source, of his equitable claim, that he is to be barred because of this conduct. 'What is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts.'").

At no time did the Appellees or the Attorney General or any other state or local official provide notice to Appellant candidate and the public of the unnecessary snarl in the machinery of democracy.

CONCLUSION

Appellant avers when Howard County voters went to the polls in the general election of 2014, they were unaware that one of the major candidates for Howard County Sheriff would betray his promise to comply with the MARYLAND CONSTITUTION and take an oath of office to finalize his qualification for office.

CONSTITUTION and take an oath of office to finalize his qualification for office. The likelihood of a selfish reason for Mr. Fitzgerald's failure to take the oath of office is high and the voters of Howard County should not be held hostage. The democratic election machinery of Maryland failed to provide notice to the general public about a constitutional dereliction of duty by Mr. Fitzgerald and, thereby, compounded the need for this Court to fashion an appropriate remedy. Finally, Appellee Fitzgerald, as a wrong doer in this election dispute, should not be allowed to benefit from his decision to betray the voters. Maryland's election machinery should not permit—nor assist—those who purloin votes or, in effect, stuff the ballot boxes with illegal votes to sabotage an entire election. Fortunately, the full extent of the fraud can be determined and the illegal votes counted and tossed aside, BUT ONLY IF, this Court sets aside the premature trial court dismissal order.

April 6, 2017

Respectfully Submitted,

/s/
Allen R. Dyer, Esq.

13340 Hunt Ridge
Ellicott City, Maryland 21042
aldyer@lawlab.com
410-531-3965

Attorney for Appellant

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 7709 words as provided by MD RULE 8-503 and as calculated by WordPerfect, the word processor used to prepare this document.

2. This brief complies with the font, spacing, and type size requirements stated in MD RULE 8-112; to wit: Times New Roman, 14-point font for text and 16-point font for the titles of those sections required by MD RULE 8-504.

Allen R. Dyer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of April, 2017, a copy of the foregoing *Appellant's Brief* and on the 5th day of April, 2017, the accompanying *Joint Record Extract* were served via the Maryland Electronic Courts System (MDEC) to: Stuart J. Cordish, Assistant Attorney General, counsel for Appellees, Attorney General of Maryland; Courts Unit, 20th Floor; 200 St. Paul Place; Baltimore, Maryland 21202 and Jason L. Levine, Assistant Attorney General, counsel for Appellees, 80 Calvert Street, 4th Floor; Annapolis, Maryland 21401.

In addition, pursuant to RULE 20-406, a paper copy of both will be printed and mailed to Mr. Cordish and to Mr. Levine at the above addresses on April 7th, 2017, by a copy service retained by counsel for Appellant, to print and deliver *Appellant's Brief* and accompanying *Joint Record Extract* .

/s/ Allen R. Dyer
Allen R. Dyer

CERTIFICATE OF COMPLIANCE WITH RULE 20-201(f)

I HEREBY CERTIFY THAT this submission does not contain any restricted information.

/s/ Allen R. Dyer
Allen R. Dyer