No. 17-_____

In The

Supreme Court of the United States

THEODORE SCOTT,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), should be overruled insofar as it enables the State to have a second opportunity to offer evidence in support of a mandatory minimum recidivist enhancement, once the State's initial proof in support of the enhancement has been reversed for evidentiary insufficiency.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Theodore Scott respectfully petitions for a writ of certiorari to review the judgment of the Maryland Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland, 1a-68a, is published at 164 A.3d 177. The opinion of the Maryland Court of Special Appeals, 69a-115a, is published at 148 A.3d 72.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on July 10, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Double Jeopardy Clause of the Fifth Amendment provides that: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. CONST. amend. V.

INTRODUCTION

The life of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), is not logic, but exception. In this case, prosecutors offered proof in support of a mandatory minimum recidivist enhancement of twenty-five years after an appeals court found that the prosecutors' initial proof in support of the enhancement was insufficient as a matter of law. According to *Burks v. United States*, 437 U.S. 1 (1978), the Double Jeopardy Clause guarantees that prosecutors are not afforded a second opportunity at proof once an appeals court has reversed the initial proof for evidentiary insufficiency, as this failure is the functional equivalent of an acquittal. Also in this case, prosecutors sought and obtained a mandatory minimum predicated on two prior crimes of violence. According to *Alleyne v. United States*, 570 U.S. ___, 133 S.Ct. 2151 (2013), any fact that increases a mandatory minimum is an "element," the reversal of which has the character of an acquittal; an acquittal in turn triggers Double Jeopardy protections. The plain logic of *Burks* and *Alleyne* applies to Petitioner's case, but neither *Burks* nor *Alleyne* applied in actuality because *Almendarez-Torres*'s recidivism exception simply blocks their application.

There is no principled reason for this recidivism carve out in the mandatory minimum sentencing context. The consideration of criminal history does not constitute a multiple punishment. But a primary interest of the Double Jeopardy Clause – ensuring that the State does not take a second attempt at proof after the

first failed for evidentiary sufficiency – exists regardless of whether the proof relates to criminal history. Moreover, requiring the State to muster sufficient proof in support of a mandatory minimum recidivist enhancement at an initial sentencing hearing does not give rise to a major concern with respect to recidivism, namely that it may prejudice a jury. Finally, the sentencing discretion of a judge will not be unduly limited: a judge still may impose on remand an appropriate sentence in light of the proof properly offered at the first sentencing hearing. What is off the table only is the mandatory imposition of a recidivist enhancement that was not sufficiently supported when the State had its fair opportunity to make that showing.

Several Justices and every single court of appeals have recognized that *Almendarez-Torres* has been undermined by subsequent sentencing decisions. This Court has yet to address the Double Jeopardy implications of *Almendarez-Torres* following *Alleyne*. *See United States v. Peña*, 742 F.3d 508, 519 (1st Cir. 2014). Petitioner's case is an ideal vehicle to address this issue, clarify the scope of the Double Jeopardy Clause, and harmonize the Court's recent sentencing jurisprudence by way of logic and not formalistic exceptions.

This case is not just about constitutional principle and jurisprudential consistency. Petitioner has had his liberty restricted for twenty-five years. The practical, human consequences of this case, and for all criminal defendants subject to mandatory minimum recidivist enhancements, cannot be understated. *See*, *e.g.*, United States Sentencing Comm'n, Quick Facts, Mandatory

Minimum Penalties FY2016 (305 defendants qualified as an Armed Career Criminal under 18 U.S.C. § 924(e), which carries a fifteen-year mandatory minimum sentence); *see also* Brent E. Newton, *The Story of Federal Probation*, 53 AM. CRIM. L. REV. 311, 345 n.152 (2016) (federal offenders subject to a mandatory minimum sentence are sentenced on average to 139 months in prison, compared to 28 months on average for federal offenders not subject to a mandatory minimum) (citations omitted).[1]

STATEMENT OF THE CASE

A. The State Had a Fair Opportunity to Present Evidence in Support of the Mandatory Minimum Recidivist Enhancement

In 2012, the State of Maryland successfully prosecuted Petitioner Theodore Scott for attempted robbery with a deadly weapon, a crime of violence, stemming from an aborted robbery of a convenience store located in Mount Rainier. 70a. The State then filed notice that, for purposes of sentencing, it would seek to prove that Petitioner committed two prior crimes of violence on top of the instant crime of violence, thus triggering a

[1] Counsel anticipates that, should the Court grant the petition, Supreme Court practitioners will offer their services to brief the merits and argue the case. Counsel will present any such offers to Petitioner to ensure that this Court is assisted to the greatest degree possible and to maximize Petitioner's chances for possible relief.

twenty-five year mandatory minimum recidivist enhancement. *Id*. Md. Code Ann., Crim. Law (2012) ("CR") § 14-101(d), provides that "on conviction for a third time of a crime of violence, a person shall be sentenced to imprisonment for the term allowed by law but not less than 25 years[.]" At sentencing, the State asserted that the two predicate crimes of violence were 1) a prior conviction for first degree assault in Maryland (secured by way of trial), and 2) a prior conviction for aggravated assault in the District of Columbia (secured by way of a guilty plea). 70a-71a. It is undisputed that the Maryland first degree assault conviction qualifies as a crime of violence for purposes of Maryland law. *See* CR § 14-101(a)(19). 70a.

An open question existed as to whether the District of Columbia aggravated assault conviction counted as a crime of violence in Maryland because the D.C. aggravated assault statute covers two separate crimes, one that mirrors the Maryland aggravated assault statute (and thereby qualifies as a crime of violence in Maryland) and the other that is similar to the Maryland reckless endangerment statute (and thereby does not qualify as a crime of violence in Maryland). 71a. The State was afforded two opportunities to prove that Petitioner's D.C. conviction fell within the first category and therefore served as a valid predicate for the recidivist enhancement. First, the State produced a certified copy of the aggravated assault conviction, to which defense counsel objected as insufficient. *Id*. Second, the State produced the statement of charges listing the aggravated assault charge, which the trial

court deemed sufficient to prove the second predicate needed for the CR § 14-101(d) recidivist enhancement. 71a-72a.

Accordingly, the court sentenced Petitioner to a mandatory minimum of twenty-five years, without parole, for attempted armed robbery. 72a. The court also sentenced Petitioner to ten years (five of which were suspended) for the use of a handgun in the commission of a crime of violence, to be served following the sentence for armed robbery, and ten years (five of which were suspended) for conspiracy, to be served following the sentence for the handgun offense. *Id*.

B. Maryland Court of Special Appeals Reverses Mandatory Minimum Recidivist Enhancement for Evidentiary Insufficiency

On appeal, Scott challenged the legal sufficiency of the prosecutors' evidence tying the D.C. conviction to the Maryland crime of violence statute. The Maryland Court of Special Appeals agreed, vacating the twenty-five year sentence. The court stated: "we are persuaded that the State failed to meet its burden of proving the necessary predicates to support imposition of the mandatory sentence on Count 1 [attempted armed robbery] in this case." 72a-73a (alteration in original).

C. The State is Afforded Another Opportunity to Present Evidence in Support of the Mandatory Minimum Recidivist Enhancement

1. Back at the trial court, the State sought the same twenty-five year mandatory recidivist enhancement. 73a. On this attempt to prove that the D.C. aggravated assault offense is the elusive second predicate crime of violence, the State produced the transcript of Petitioner's guilty plea. *Id*. Petitioner objected, citing state and federal constitutional protections against Double Jeopardy. *Id*. Unmoved, the trial court imposed the twenty-five year mandatory recidivist enhancement. *Id*. The sentences for the other two offenses remained unchanged.

2. In 2016, the Maryland Court of Special Appeals affirmed. The court recognized that, under the controlling precedent of *Bowman v. State*, 552 A.3d 1303 (Md. 1989), the Double Jeopardy Clause precluded the State from attempting at resentencing to seek a mandatory sentencing enhancement based on prior crimes of violence, once an appellate court had ruled that the State had failed at the initial sentencing hearing to provide legally sufficient evidence to establish the predicate crimes of violence. 80a-81a.

The State argued, however, that *Bowman* should not be followed in light of *Almendarez-Torres*, and *Monge v. California*, 524 U.S. 721 (1998). 82a-83a. In *Almendarez-Torres*, this Court ruled that recidivism is a sentencing factor that need not be submitted to a jury that instead may be decided by a judge. Building on

Almendarez-Torres, this Court in *Monge* ruled that the Double Jeopardy Clause is categorically inapplicable to the non-capital sentencing context. But Petitioner responded that the precedential force of *Almendarez-Torres*, and by extension *Monge*, have been called into question. 86a n.4. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court admitted that *Almendarez-Torres* represented an "exceptional departure" from "historic practice," 530 U.S. at 487, and that "it is arguable that *Almendarez-Torres* was incorrectly decided," *id*. at 489.

The Maryland Court of Special Appeals agreed with the State. The court noted that *Apprendi* "acknowledged the continued validity of *Almendarez-Torres*." 86a n.4. In rejecting Petitioner's Double Jeopardy challenge, the court expressed its expectation that the Maryland high court would cut ties with *Bowman* and latch on to the beleaguered, but seemingly valid, *Almendarez-Torres* and *Monge* decisions. 88a-89a.

3. This prediction turned out to be correct. In 2017, the Maryland Court of Appeals expressly overruled *Bowman*. 46a. The Maryland high court asserted that *Apprendi*'s essential holding – that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt[,]" 530 U.S. at 490 – supports, rather than undermines, the takeaway from *Almendarez-Torres* and *Monge* that, in a noncapital

case, recidivism is a sentencing factor that may be considered by a judge free of any Double Jeopardy constraints. 41a-42a. As "*Apprendi* does not abrogate either case," the court went on to "conclude that *Bowman* has been superseded by significant changes in double jeopardy law," namely *Almendarez-Torres* and *Monge*. 44a. With *Bowman* out of the way, the Maryland high court relied on *Almendarez-Torres* and *Monge* to affirm the imposition of the mandatory minimum recidivist enhancement at resentencing.

REASONS FOR GRANTING THE WRIT

This case presents a question of substantial public importance: *Almendarez-Torres* cannot be reconciled with *Burks* or *Alleyne* as a matter of logic, *Almendarez-Torres* survives only due to the perpetuation of a carve out, and *Almendarez-Torres* serves, as in this case, to enable prosecutors to take multiple evidentiary shots at the imposition of a significant mandatory minimum sentence. This case offers the Court with an opportunity to harmonize these cases in a principled way, to clarify the scope of the Double Jeopardy rights of criminal defendants, and to incentivize prosecutors to assemble proof in support of mandatory minimum enhancements at their first fair opportunity.

Each and every circuit court has pointed out that *Almendarez-Torres* has been undermined. But these courts have faithfully followed *Almendarez-Torres* because this Court has instructed lower courts to adhere

to precedent, however precarious, until this Court steps in. It is this Court, and this Court alone, that can overrule a prior case. Due to the circuit courts' institutional fidelity to *Almendarez-Torres*, this Court should not decline review due to an absence of a circuit conflict.

I. Several Justices and Every Circuit Court of Appeals Have Recognized that *Almendarez-Torres* Rests on Shaky Ground

The ongoing viability of *Almendarez-Torres* is in serious doubt. Several Justices share the view that *Almendarez-Torres* was wrongly decided and should be overruled. *See*, *e.g.*, *Apprendi*, 530 U.S. at 489 ("it is arguable that *Almendarez-Torres* was incorrectly decided") (Stevens, J., joined by Scalia, Souter, Thomas, Ginsburg, JJ.); *id*. at 520 (noting the "chief errors of *Almendarez-Torres*") (Thomas, J., concurring, joined by Scalia, J.); *see Monge*, 524 U.S. at 741 ("Th[e] holding [of *Almendarez-Torres*] was in my view a grave constitutional error affecting the most fundamental of rights.") (Scalia, J., dissenting, joined by Souter and Ginsburg, JJ.); *Shepard v. United States*, 544 U.S. 13, 27 (2005) ("*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence[.]") (Thomas, J., concurring in part and concurring in the judgment); *Rangel-Reyes v. United States*, 547 U.S. 1200, 1202 (2006) ("Petitioners, like many other criminal defendants, have done their part by specifically presenting this Court with opportunities to reconsider *Almendarez-Torres*. It is time for the Court to

do its part.") (Thomas, J., dissenting from denial of certiorari).

Moreover, every circuit court of appeals has taken note that *Almendarez-Torres* has been undermined, but have added that they were required nonetheless to follow *Almendarez-Torres* until this Court instructs otherwise. *See United States v. Jimenez-Beltre*, 440 F.3d 514, 520 (1st Cir. 2006) (en banc) ("whatever the continuing viability of *Almendarez-Torres*, we have previously held that we are bound to follow it until it is expressly overruled."); *Portalatin v. Graham*, 624 F.3d 69, 92 (2d Cir. 2010) ("The range of opinions authored by the Supreme Court in *Shepard* . . . bespoke the lingering uncertainty surrounding the recidivism exception, and suggested that the Court might be poised to reconsider its holding in *Almendarez-Torres*," but "despite the reservations expressed in *Shepard*, *Almendarez-Torres* continues to bind this court[.]") (internal quotes and citations omitted); *United States v. Vargas*, 477 F.3d 94, 105 (3d Cir. 2007) ("The holding of *Almendarez-Torres* has since been questioned by the Supreme Court. Despite these questions, the Supreme Court has yet to overrule the case. As a consequence, it continues to bind our decisions.") (citations omitted), *abrogated on other grounds by United States v. Arrelucea-Zamudio*, 581 F.3d 142, 149 (3d Cir. 2009); *United States v. McDowell*, 745 F.3d 115, 124 (4th Cir. 2014) ("[T]he Supreme Court's recent characterizations of the Sixth Amendment are difficult, if not impossible, to reconcile with *Almendarez-Torres*'s lonely exception to Sixth Amendment protections."); *United States v.*

Pineda-Arrellano, 492 F.3d 624, 626 (5th Cir. 2007) (Jones, J.) ("[*Almendarez-Torres*] doesn't fit with the logic of *Apprendi*," but "the Supreme Court has spoken."); *id*. at 631 ("The logical or rational disconnect between the holding in *Almendarez-Torres* and the basic underlying principles of *Apprendi* and subsequent cases were clear in the Justices' opinions and cannot be denied. . . . Indeed, no justice has ever argued that the two decisions are based on intrinsically compatible rationales or that they can be reconciled logically in any principled way.") (Dennis, J., concurring in affirming the conviction and sentence); *United States v. Mack,*729 F.3d 594, 609 (6th Cir. 2013) ("Although *Almendarez-Torres* may stand on shifting sands, the case presently remains good law and we must follow it until the Supreme Court expressly overrules it."); *United States v. Browning*, 436 F.3d 780, 782 (7th Cir. 2006) (Posner, J.) ("*Almendarez-Torres* is vulnerable to being overruled," but "the continued authority of *Almendarez-Torres* is not for us to decide."); *United States v. Davis*, 260 F.3d 965, 969 (8th Cir. 2001) ("A close examination of Supreme Court cases casts further doubt on the future viability of *Almendarez-Torres*. It is our role to apply Supreme Court precedent as it stands, and not as it may develop.") (citations omitted); *Butler v. Curry*, 528 F.3d 624, 643 (9th Cir. 2008) ("Subsequent sentencing cases . . . have substantially undermined the basis for [*Almendarez-Torres*.]. . . . Nonetheless, the Supreme Court has not overruled the *Almendarez-Torres* exception for prior convictions[.]"); *United States v. Moore*, 401 F.3d 1220,

1224 (10th Cir. 2005) ("Although the Court may overrule *Almendarez-Torres* at some point in the future, it has not done so, we will not presume to do so for the Court, and we are bound by existing precedent[.]"); *United States v. Gibson*, 434 F.3d 1234, 1247 (11th Cir. 2006) ("Though wounded, *Almendarez-Torres* still marches on and we are ordered to follow. We will join the funeral procession only after the Supreme Court has decided to bury it."); *United States v. Smith*, 640 F.3d 358, 369 (D.C. Cir. 2011) ("[Defendant] protests that the reasoning of *Almendarez-Torres* is in tension with the reasoning of later sentencing cases from the Supreme Court. Perhaps so. . . . As a lower court, we of course remain bound by *Almendarez-Torres*.") (citations omitted).

Current Justices authored or joined such opinions during their service on circuit courts, recognizing both the wobbly state of *Almendarez-Torres* and the fact that they were not in a position to fully topple the decision. *See United States v. Trotter*, 483 F.3d 694 (10th Cir. 2007) ("[W]e are bound by existing precedent to hold that the *Almendarez Torres* exception to the rule . . . remains good law.") (internal quotes and citation omitted) (joined by Gorsuch, J.), *vacated by* 552 U.S. 1091 (2008); *United States v. Villanueva*, 821 F.3d 1226, 1239 (10th Cir. 2016) ("[a]lthough the Court may overrule *Almendarez-Torres* at some point in the future, it has not done so, [and] we will not presume to do so for the Court" because "we are bound by existing precedent") (internal quotes and citation omitted; alterations in original) (joined by Gorsuch, J.); *United States*

v. Parker, No. 02-1227, 2003 WL 146410, at *1 n.1 (3d Cir. Jan. 15, 2013) (joined by Alito, J.) ("whatever its eventual fate, *Almendarez-Torres* remains binding precedent and forecloses this challenge. Acknowledging the dicta in *Apprendi* contemplating an eventual reversal of *Almendarez-Torres* does not permit this court to treat that reversal as a fait accompli.") (joined by Alito, J.); *United States v. Santiago*, 268 F.3d 151, 155 (2d Cir. 2001) ("*Almendarez-Torres* remains good law, at least for now[.]") (Sotomayor, J.); *id*. at n.6 ("It is not within our purview to anticipate whether the Supreme Court may one day overrule its existing precedent.").

As these decisions indicate, each of the circuit courts has faithfully complied with this Court's instruction that lower courts are to adhere to precedent even if later decisions have undermined that precedent. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Because of this adherence, a split among the circuit courts has not, and will not, emerge. The absence of a split signals only the courts' uniform acceptance of the *Rodriguez de Quijas* principle, and should therefore not serve as a basis to deny review. *See* S. Ct. R. 10(a) (a conflict among the circuit courts is a factor in the consideration of a petition for writ of certiorari). Indeed, the circuit

courts have recognized that they must follow precedent, but, in the same breath, have expressed concerns about the vitality and vulnerability of *Almendarez-Torres*.

II. *Almendarez-Torres* is Inconsistent with *Burks*

The court below gave prosecutors a second opportunity to introduce evidence in support of the mandatory minimum recidivist enhancement despite the fact that the prosecutors already had a fair opportunity to present supporting evidence and the enhancement was reversed for evidentiary insufficiency. But, under traditional Double Jeopardy principles, prosecutors are not given a second attempt once their first attempt failed as a matter of law for evidentiary insufficiency. To the extent that *Almendarez-Torres* blocks the ordinary option of this Double Jeopardy principle, it should be overruled.

The Double Jeopardy Clause of the Fifth Amendment, applicable to the States by way of the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 794, (1969), codifies the "universal maxim of the common law of England [] that no man is to be brought into jeopardy of his life more than once for the same offence," 4 W. Blackstone Commentaries 335; *see also* 3 J.H. THOMAS, A SYSTEMATIC ARRANGEMENT OF LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND 366

(1836) ("*nemo bis punitur aut vexatur pro eodem delicto*" or the rule against "allowing a person to be twice put in jeopardy for one offense[.]").

The Clause does not apply to all successive prosecutions; it applies only when the second prosecution or punishment can be fairly attributed to the State. Accordingly, where the initial conviction was infected by an error committed by the trial court, the State is able to initiate a second prosecution without running afoul of the Double Jeopardy Clause. *See United States v. Ball*, 163 U.S. 662, 672 (1896) (reversing based on the trial court's failure to dismiss the indictment); *see also Tibbs v. Florida*, 457 U.S. 31, 40 (1982) ("retrial after reversal of a conviction is not the type of governmental oppression targeted by the Double Jeopardy Clause."). Moreover, the Clause bars a trial court from correcting its own error in sentencing, even if the correction results in an enhanced punishment. *See Bozza v. United States*, 330 U.S. 160, 166-67 (1947) (rejecting argument that a trial court cannot cure an illegal sentence by imposing an increased sentence, here adding a fine to the original sentence of imprisonment).

The Clause does, however, forbid the State from re-attempting to convict a defendant for an offense once an appeals court has found that the State's first attempt was based on evidence that is insufficient as a matter of law. In *Burks v. United States*, 437 U.S. 1 (1978), this Court addressed two situations implicating the Double Jeopardy Clause. First, as in *Ball*, where reversal is predicated on trial error – "a judicial

process which is defective in some fundamental respect" – the Double Jeopardy Clause does not preclude a retrial on remand. *Id*. at 15. This is because "the accused has a strong interest in obtaining a fair readjudication of his guilt free from error" and "society maintains a valid concern for insuring that the guilty are punished." *Id*.; *see also Tibbs*, 457 U.S. at 40 ("society would pay too high a price were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.") (internal quotes and citation omitted).

Second, the Court in *Burks* asserted that, in contrast to *Ball*, "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks*, 437 U.S. at 11. The Double Jeopardy Clause applies in these situations because the "prosecution . . . has been given one fair opportunity to offer whatever proof it could assemble," *id*. at 16, and successive prosecutions carry "an unacceptably high risk that the Government, with its superior resources, will wear down the defendant and obtain a conviction solely through its persistence," *Tibbs*, 457 U.S. at 43 (internal quotes and citation omitted); *see also Green v. United States*, 355 U.S. 184, 187-88 (1957) (warning that successive prosecutions "enhance[] the possibility that even though innocent he may be found guilty.").

Petitioner's case falls squarely in this second category: the State had the opportunity to submit whatever evidence it could muster to support the argument that the D.C. conviction constituted a crime of violence under Maryland law, and the Maryland Court of Special Appeals ruled that the evidence offered by the State was insufficient as a matter of law. But the trial court on remand afforded the State with a second opportunity to make its showing. *Almendarez-Torres* therefore is in tension with *Burks*.

III. *Almendarez-Torres* and its Progeny are Inconsistent with the Principle of *Alleyne*

In a case building on *Almendarez-Torres*, this Court determined that *Burks* did not apply to sentencing because "[t]he pronouncement of sentence simply does not have the qualities of constitutional finality that attend an acquittal." *Monge*, 524 U.S. at 729 (internal quotes and citations omitted). This conclusion reflects the Court's description of recidivism as a "sentencing factor," to which generally *Burks* does not apply, as opposed to an "element," to which *Burks* does apply. *See Almendarez-Torres*, 523 U.S. 243-44; *Monge*, 524 U.S. at 729.

In *Alleyne v. United States*, however, this Court held that "any fact that, by law, increases the penalty for a crime is an 'element,'" "[m]andatory minimum sentences increase the penalty for a crime," and therefore "any fact that increases the mandatory minimum is an 'element'" for Sixth Amendment purposes. 570

U.S. ___, 133 S.Ct. 2151, 2155 (2013). With *Alleyne*, the *Apprendi* rule governing to statutory maximums now also applies to mandatory minimums.

In Petitioner's case, whether the contested D.C. conduct qualifies as a Maryland crime of violence is a fact that increased the mandatory minimum to twenty-five years in prison. Accordingly, Petitioner's case falls squarely within *Alleyne*.

But the Court in *Alleyne* left undisturbed the carve out for recidivism. The Court explained that it declined to "revisit" *Almendarez-Torres* because the "parties do not contest that decision's vitality[.]" *Id*. at 2160 n.1. As a result, the principle of the decision was trumped by the formalistic and categorical exclusion of recidivism.

Petitioner directly challenges *Almendarez-Torres* as a basis to give prosecutors repeated attempts 1) to prove a sentencing enhancement following reversal for evidentiary insufficiency, in conflict with *Burks*, and 2) to prove mandatory minimum enhancements, in conflict with the logic of *Alleyne*.

IV. *Almendarez-Torres* is Inconsistent with the Purposes of the Double Jeopardy Clause

There is no principled reason to maintain the *Almendarez-Torres* exception in the Double Jeopardy context. An examination of the purposes of the Double Jeopardy Clause reveals that this categorical exclusion is inappropriate.

The Clause serves to shield the criminal defendant from efforts by the State to seek multiple prosecutions or sentences for the same offense. *See Green*, 355 U.S. at 187 ("The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense[.]"). This Court has interpreted the Clause to forbid "a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted," as well as "a second punishment for the same offence[.]" *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1873).

Petitioner accepts that criminal history is a traditional sentencing consideration. Petitioner also accepts that this sentencing consideration does not constitute multiple punishment. *See Gryger v. Burke*, 334 U.S. 728, 732 (1948) ("The sentence as a . . . habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.").

Whether recidivism is a second punishment says nothing, however, about the *Burks* situation, namely whether the prosecution should be afforded a second opportunity to prove an enhancement once it botched its first opportunity as a matter of law. For example, if a defendant is convicted of offense x and the defendant

is later convicted of offense y, the use of x at the sentencing for y does not present a Double Jeopardy problem. But *Burks* prohibits the State from having a second opportunity to present evidence, y-2, after reversal for evidentiary sufficiency, y-1. In short, while the Double Jeopardy Clause does not apply to vertical, x-to-y proceedings, there is no principled reason to immunize horizontal, y-1-to-y2 proceedings from the Clause, and to thereby afford prosecutors multiple (if not unlimited) chances to make their evidentiary showing after a finding of evidentiary insufficiency.

V. Overruling *Almendarez-Torres* Would Not Give Rise to Concerns About Creating Prejudice and Limiting Sentencing Discretion

Overruling *Almendarez-Torres* in the mandatory minimum recidivist context would fulfill the interests of the Double Jeopardy Clause without giving rise to concerns previously registered about the Clause's application to recidivism.

First, some have mentioned the practical reality that defense counsel may not want his or her client's criminal history to be known by a jury for fear that this knowledge would engender prejudice on the question of guilt or innocence. *See*, *e.g.*, *Browning*, 436 F.3d at 782 (Posner, J.) ("defendants normally are loath to have their prior crimes paraded before a jury."); *Pineda-Arrellano*, 492 F.3d at 625-26 (Jones, J.) ("No defendant wants [prior felony crimes] before the

jury!"). But Petitioner urges only that, at the sentencing phase, prosecutors take full advantage of the first opportunity to offer proof of a mandatory minimum recidivist enhancement and be precluded from any reattempts if an appeals court determines that prosecutors squandered the first as a matter of law.

Second, some may be concerned that overruling *Almendarez-Torres* may unduly limit the discretion of a judge to impose an appropriate sentence. Judges may draw upon a wide universe of factors to fashion an appropriate sentence. *See Wasman v. United States*, 468 U.S. 559, 563-64 (1984) (citing *Williams v. New York*, 337 U.S. 241 (1949)) ("It is now well established that a judge . . . is to be accorded very wide discretion in determining an appropriate sentence. The sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed."). Overruling *Almendarez-Torres* as urged would not unduly limit that universe of factors. It only would incentivize prosecutors to make sure it musters the proper evidence at the first opportunity, and would preclude proof only if the prosecutors fell short as a matter of law that first time.

Third, even if a court rules that the proof is insufficient as a matter of law, on remand a judge still would be able to impose an appropriate sentence based on the remaining counts. *See*, *e.g.*, *Ward v. Williams*, 240 F.3d 1238, 1244 (10th Cir. 2001). Here, for example, the trial court on remand could have imposed a sentence

predicated on the handgun and conspiracy counts and could have even imposed a higher sentence based on the acquitted conduct stemming from the reversed count.

What would be forbidden, only, would be the imposition of the mandatory minimum recidivist enhancement. Mandatory minimums, if anything, cabin and complicate orderly and proportionate sentencing decisionmaking. *See* The Hon. Anthony M. Kennedy, Hearings before a Subcommittee of the House Committee on Appropriations, 103d Cong., 2d Sess., 29 (Mar. 9, 1994) ("mandatory minimums are an imprudent, unwise and often unjust mechanism for sentencing."); The Hon. Stephen G. Breyer, *Federal Sentencing Guidelines Revisited*, 14 CRIM. JUSTICE 28, 33 (Spring 1999) (mandatory minimums undermine "coherence, fairness, and effectiveness" in sentencing). By barring mandatory minimum recidivism enhancements if not properly proven the first time, sentencing discretion arguably would be restored. Accordingly, there would be no harm to the recognition of Double Jeopardy protections in the mandatory minimum recidivism context.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 10, 2017

Circuit Court for Prince George's County
Case No. CT120132A

Argued: May 5, 2017

THE COURT OF APPEALS

OF MARYLAND

No. 91

September Term, 2016

THEODORE SCOTT

v.

STATE OF MARYLAND

Barbera, C.J.
Greene
Adkins
McDonald
Watts
Hotten
Getty,

JJ.

Opinion by Watts, J.

Filed: July 10, 2017

Both the Fifth Amendment to the Constitution of the United States and the common law of Maryland provide for a prohibition on double jeopardy. A plea of

autrefois acquit is a common-law plea in which a defendant alleges to have been previously acquitted of an offense, and, as a result, that he or she may not be tried again. *See Scriber v. State*, 437 Md. 399, 403, 86 A.3d 1260, 1262 (2014).[1] Under a valid plea of *autrefois acquit*, the State cannot reprosecute a defendant after an acquittal. The doctrine of collateral estoppel is a common-law doctrine that, in a criminal case, prohibits "the relitigation of an issue of ultimate fact that has been decided in a defendant's favor." *Scriber*, 437 Md. at 403, 86 A.3d at 1262. Under the doctrine of collateral estoppel, the State cannot relitigate an issue of fact that has been decided in a defendant's favor.

This case requires us to determine whether a plea of *autrefois acquit* or the doctrine of collateral estoppel bars a trial court from imposing at resentencing an enhanced sentence based on a prior conviction for a crime of violence after the trial court has previously imposed an enhanced sentence based on the same prior conviction, and an appellate court vacated the enhanced sentence due to insufficient evidence of the prior conviction.

In the Circuit Court for Prince George's County ("the circuit court"), a jury found Theodore Scott ("Scott"), Petitioner, guilty of, among other crimes, attempted robbery with a dangerous weapon, use of a handgun in the commission of a crime of violence, and conspiracy to commit robbery with a dangerous

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[1] "*Autrefois acquit*" means "previously acquitted." *See Autrefois Acquit*, Black's Law Dictionary (10th ed. 2014).

weapon. The State contended that Scott was subject to Md. Code Ann., Crim. Law (2002, 2012 Repl. Vol.) ("CR") § 14-101(d), which provided for an enhanced sentence for a defendant who was convicted of a third crime of violence after having been convicted of two crimes of violence.[2] At sentencing, the prosecutor

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[2] CR § 14-101(d) stated:

> (1) Except as provided in subsection (g) of this section, on conviction for a third time of a crime of violence, a person shall be sentenced to imprisonment for the term allowed by law but not less than 25 years, if the person:
>
> (i) has been convicted of a crime of violence on two prior separate occasions:
>
> 1. in which the second or succeeding crime is committed after there has been a charging document filed for the preceding occasion; and
>
> 2. for which the convictions do not arise from a single incident; and
>
> (ii) has served at least one term of confinement in a correctional facility as a result of a conviction of a crime of violence.
>
> (2) The court may not suspend all or part of the mandatory 25-year sentence required under this subsection.
>
> (3) A person sentenced under this subsection is not eligible for parole except in accordance with the provisions of § 4-305 [(Parole)] of the Correctional Services Article.

In 2013, without making any substantive amendments, the General Assembly recodified CR § 14-101(d) as Md. Code Ann., Crim. Law (2002, 2012 Repl. Vol., 2013 Supp.) § 14-101(c). *See* 2013 Md. Laws 2321 (Vol. III, Ch. 156, S.B. 276).

In this case, CR § 14-101(d) was effective during the original sentencing proceeding, and the amended statute was effective during the resentencing proceeding. For consistency, we refer only to CR § 14-101(d).

offered certified copies of two prior convictions pertaining to Scott, a first-degree assault in Maryland and an aggravated assault in the District of Columbia, as well as the statement of charges for the aggravated assault. The circuit court found that Scott had two prior convictions for crimes of violence, and imposed an enhanced sentence of twenty-five years of imprisonment, without the possibility of parole, for attempted robbery with a dangerous weapon. The circuit court imposed a sentence of ten years of imprisonment, with all but five years suspended, followed by five years of supervised probation, for use of a handgun in the commission of a crime of violence, consecutive to the sentence for attempted robbery with a dangerous weapon, and a sentence of ten years of imprisonment, with all but five years suspended, for conspiracy to commit robbery with a dangerous weapon, consecutive to the other two sentences.

The Court of Special Appeals vacated the twenty-five-year sentence for attempted robbery with a dangerous weapon and remanded for resentencing, concluding that the evidence was insufficient to support the circuit court's determination that the conviction for aggravated assault in the District of Columbia constituted a conviction for a crime of violence under CR § 14-101(a). The Court of Special Appeals did not vacate the sentences for use of a handgun in the commission of a crime of violence and conspiracy to commit robbery with a dangerous weapon, which the circuit court had imposed consecutively.

On remand, the State sought to have the circuit court reimpose the enhanced sentence for attempted robbery with a dangerous weapon. Scott opposed the State's attempt to seek an enhanced sentence, contending that the imposition of such a sentence would violate the prohibition on double jeopardy. At the resentencing proceeding, the circuit court admitted into evidence a transcript of Scott's guilty plea for aggravated assault in the District of Columbia, and again found that Scott had two prior convictions for crimes of violence. The circuit court again sentenced Scott to twenty-five years of imprisonment for attempted robbery with a dangerous weapon.

Scott's counsel requested that the circuit court make the new sentence for attempted robbery with a dangerous weapon concurrent with the two existing sentences. The circuit court responded that it lacked the discretion to do so. As such, the circuit court reimposed the enhanced sentence for attempted robbery with a dangerous weapon, with the sentences for use of a handgun in the commission of a crime of violence and conspiracy to commit robbery with a dangerous weapon remaining ordered to be served consecutively.

Before us, Scott contends that the circuit court violated the principles of *autrefois acquit* and collateral estoppel by readjudicating the issue of whether he had the requisite prior convictions for an enhanced sentence. Additionally, Scott argues that the circuit court erred in concluding that it lacked the discretion to impose the new sentence for attempted robbery with a

dangerous weapon to be concurrent with the two existing sentences.

An examination of the Supreme Court's and this Court's case law leads to the conclusion that, where an appellate court determines that the evidence was insufficient to establish a requisite prior conviction as a basis for an enhanced sentence and vacates the enhanced sentence, the appellate court's determination does not preclude a trial court from determining at resentencing that the same prior conviction satisfies the requirement for an enhanced sentence.

We hold that: (I) where an appellate court vacates an enhanced sentence due to insufficient evidence of a requisite prior conviction, neither the plea of *autrefois acquit* nor the doctrine of collateral estoppel bars a trial court from imposing an enhanced sentence at resentencing based on the same prior conviction; and (II) where an appellate court vacates a sentence to which another sentence has been ordered to be consecutive and remands for resentencing without vacating the consecutive sentence, the trial court may not make the new sentence concurrent with the non-vacated consecutive sentence.

BACKGROUND

Charges and Trial

The State charged Scott with attempted robbery with a dangerous weapon, attempted robbery, first- and second-degree assault, use of a handgun in the

commission of a crime of violence, wearing or carrying a handgun, and conspiracy to commit robbery with a dangerous weapon.

At trial, as a witness for the State, Detective Stephen Johnson of the Prince George's County Police Department testified that, on December 23, 2011, at approximately 8 p.m., he and another detective began surveilling the 7-Eleven at 2310 Varnum Street in Mount Rainier from an unmarked police vehicle in an adjacent parking lot. Shortly after 2 a.m. on December 24, 2011, two men walked to the side of the 7-Eleven, spoke to each other, and pulled ski masks over their heads. The taller of the two men pulled out a silver handgun, and the shorter man pulled out a black handgun. The men ran to the front of the 7-Eleven and pulled on the front door handles, but the front door was locked. The men pointed the handguns at the employees inside the 7-Eleven, but the employees did not unlock the front door. The shorter man ran toward the back of the 7-Eleven, and the taller man ran through the parking lot, turned onto Russell Avenue, and got into the front passenger seat of a vehicle whose engine was running. The detectives and other law enforcement officers chased the vehicle until it ultimately crashed in the District of Columbia.

Detective Johnson provided a description of the shorter man to another detective. Later, Detective Johnson learned that a patrol unit had stopped someone who matched the shorter man's description at 2208 Queens Chapel Road, which is on the street that is directly behind the 7-Eleven. At trial, Detective Johnson

identified Scott as the shorter man who had attempted to enter the 7-Eleven with a black handgun.

A jury found Scott guilty of all charges.[3]

Original Sentencing Proceeding

After trial, but before the sentencing proceeding, the State filed a Notice of Enhanced Penalty (Crime of Violence), contending that Scott was subject to a mandatory minimum sentence of twenty-five years of imprisonment, without the possibility of parole, under CR § 14-101(d). According to the State, Scott had been convicted of two prior crimes of violence: first-degree assault in Maryland, and aggravated assault in the District of Columbia.[4] The District of Columbia conviction resulted from a guilty plea.

Scott filed a motion to strike the notice of enhanced penalties, contending that the conviction for aggravated assault in the District of Columbia did not constitute a conviction for a crime of violence under

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[3] Scott filed a Motion for Judgment Notwithstanding the Verdict, which the circuit court granted as to first-degree assault.

[4] DC Code § 22-404.1(a) (2017) provides that a person commits aggravated assault if:

> (1) By any means, that person knowingly or purposely causes serious bodily injury to another person; or
>
> (2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.

CR § 14-101(a). Specifically, Scott argued that the elements of aggravated assault under District of Columbia law were not the same as the elements of first-degree assault under Maryland law. Scott pointed out that, although first-degree assault is identified as a crime of violence under CR § 14-101(a)(19), CR § 14-101(a) does not include aggravated assault in its list of crimes of violence. Additionally, Scott maintained that CR § 14-101(a) does not provide that a conviction in another jurisdiction is to be considered a qualifying conviction if it is based on conduct that would have been a crime of violence if the defendant had committed it in Maryland. Scott did not dispute that he had been convicted of a separate first-degree assault offense in Maryland.

At the sentencing proceeding, after the State offered certified copies of Scott's prior convictions, the circuit court continued the sentencing proceeding to engage in additional research. When the sentencing proceeding resumed, the prosecutor argued that, contrary to Scott's position, a conviction in another jurisdiction is a qualifying prior conviction under CR § 14-101(d) if the conviction is based on conduct that would have been a crime of violence if the defendant had committed it in Maryland. To establish that the conviction for aggravated assault in the District of Columbia was based on conduct that would have been first-degree assault if Scott had committed the offense in Maryland, the prosecutor advised that the statement of charges from the District of Columbia indicated that Scott had

stomped on a person's head until the person lost consciousness. The prosecutor argued that, by stomping a person into unconsciousness, Scott had caused serious physical injury, and engaged in conduct that would have been first-degree assault if it had occurred in Maryland.

The circuit court determined that the conviction for aggravated assault in the District of Columbia constituted a conviction for a crime of violence under CR § 14-101(d). The circuit court sentenced Scott to: twenty-five years of imprisonment, without the possibility of parole, for attempted robbery with a dangerous weapon; ten years of imprisonment, with all but five years suspended, followed by five years of supervised probation, for use of a handgun in the commission of a crime of violence, consecutive to the sentence for attempted robbery with a dangerous weapon; and ten years of imprisonment, with all but five years suspended, for conspiracy to commit robbery with a dangerous weapon, consecutive to the other two sentences. The circuit court merged the remaining convictions for sentencing purposes.

First Opinion of the Court of Special Appeals

Scott noted an appeal. In an unreported opinion, the Court of Special Appeals affirmed the convictions, but vacated the sentence for attempted robbery with a dangerous weapon and remanded for resentencing. The Court of Special Appeals held that the State had

failed to prove that the conviction for aggravated assault in the District of Columbia constituted a conviction for a crime of violence under CR § 14-101(d). The Court of Special Appeals concluded that the statement of charges for the aggravated assault did not constitute proof of the conduct that was the basis for the conviction because the facts given in support of the guilty plea may have been different from the facts in the statement of charges. The Court of Special Appeals determined that a remand for resentencing was warranted, relying on Maryland Rule 8-604(d)(2), which states: "In a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing." The Court of Special Appeals's mandate stated, in pertinent part: "SENTENCE ON COUNT 1 [(ATTEMPTED ROBBERY WITH A DANGEROUS WEAPON)] VACATED AND THE CASE IS REMANDED FOR RESENTENCING. ALL JUDGMENTS OTHERWISE AFFIRMED."

Resentencing Proceeding

On remand, in a letter to Scott's counsel that was filed with the circuit court, the prosecutor advised that the State again intended to request an enhanced sentence, and attached the transcript of Scott's guilty plea proceeding in the District of Columbia.[5]

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[5] The transcript of Scott's guilty plea proceeding in the District of Columbia reveals that the prosecutor provided the following facts in support of the guilty plea. Scott picked a victim's

Scott filed a Response to Notice of Enhanced Penalties, contending that the conviction for aggravated assault in the District of Columbia did not constitute a conviction for a crime of violence under CR § 14-101(d) because the statement of facts at Scott's guilty plea proceeding did not establish that Scott intentionally caused injury to the victim. Scott also argued that the Double Jeopardy Clause and the prohibition on double jeopardy under the common law of Maryland barred the State from seeking an enhanced sentence on remand.

At the resentencing proceeding, the circuit court admitted into evidence the transcript of Scott's guilty plea proceeding in the District of Columbia, and determined that the conviction for aggravated assault was the equivalent of a conviction for first-degree assault under CR § 14-101(a), *i.e.*, a crime of violence.

As to whether the enhanced sentence for attempted robbery with a dangerous weapon would be imposed consecutive to or concurrent with the two existing sentences, the following exchange occurred:

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jacket up off the ground, and told the victim to remove anything that he wanted from his jacket. The victim refused to give up his jacket and a man named Calvin Mason started punching the victim. Scott began punching the victim as well. After the victim fell to the ground, both Scott and Mason stomped on the victim's face and body. The victim lost consciousness and suffered bruising, subdural bleeding, and a fracture of the left orbital bone.

[PROSECUTOR]: Your Honor, just before you hear from [Scott], Counts 5 [(use of a handgun in the commission of a crime of violence)] and 7 [(conspiracy to commit robbery with a dangerous weapon)] can't – those aren't here for re-sentencing, so those cannot be changed. I think that the only thing that you can sentence on is the [twenty-five] mandatory without parole[, which was for Count 1 (attempted robbery with a dangerous weapon)].

The reason I brought the Count 5 up was because that was, in fact, consecutive. We're not here to change that sentence. I just wanted to make sure that was on the record because those two counts – those two sentences that the Court issued remain the same, so the only thing that we're here for is the Count 1.

[SCOTT'S COUNSEL]: The Court is here sentencing – the Court can make Count 1 consecutive [to] or concurrent [with] the already existing sentences.

[PROSECUTOR]: But those sentences, Count 5 actually says –

THE COURT: The problem is, is that I didn't make Count 1 consecutive to the other sentences. I made the gun charge [Count 5] consecutive. And so if I did have the discretion to make this concurrent, that would change, in effect, the sentence on the other counts, which are not before the Court.

> [SCOTT'S COUNSEL]: At the moment they're consecutive to a sentence that doesn't exist. So the Court does have the power to make Count 1, which you're sentencing on, concurrent [with] all other sentences which already exist in this case, and that's what we ask the Court to do.
>
> THE COURT: All right. Well, I disagree with you, [Scott's counsel], but I'll hear from [] Scott as to how he feels or what he wants to say at this point.
>
> [SCOTT'S COUNSEL]: Given the Court's rulings, the fact that the Court is ruling it has essentially no discretion in the sentence it's going to impose, [] Scott has nothing to add.

Following this exchange, the circuit court reimposed the original enhanced sentence for attempted robbery with a dangerous weapon – twenty-five years of imprisonment without the possibility of parole. The circuit court noted that the other "sentence[s] remain[ed] the same."

Second Opinion of the Court of Special Appeals

Scott noted an appeal. The Court of Special Appeals affirmed the circuit court's judgment, holding that,

> when a mandatory enhanced sentence for a third crime of violence is vacated on appeal because the evidence was legally insufficient to support a finding that one of the prior convictions was for a crime of violence, double

> jeopardy [does not] bar[ ] the State from introducing new evidence at resentencing on remand to show that the same prior conviction was for a crime of violence.

Scott v. State, 230 Md. App. 411, 450, 416, 148 A.3d 72, 95, 75 (2016). The Court acknowledged that its "holding [wa]s at odds with" *Bowman v. State*, 314 Md. 725, 740, 552 A.2d 1303, 1310 (1989), in which this Court held that the State could not seek an enhanced sentence on remand where an enhanced sentence was vacated due to insufficient evidence of qualifying prior convictions. Scott, 230 Md. App. at 416, 148 A.3d at 75. The Court of Special Appeals concluded that "*Bowman* was based solely on an analysis of federal constitutional double jeopardy law that the [ ] Supreme Court has since rejected" in *Monge v. California*, 524 U.S. 721, 734 (1998), in which the Court held "that the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context." *Scott*, 230 Md. App. at 416, 430, 148 A.3d at 75, 83.

The Court of Special Appeals explained that, in *Monge*, the Supreme Court extended the holding of *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998), to resentencing proceedings. *See Scott*, 230 Md. App. at 426, 148 A.3d at 81. The Court of Special Appeals noted that, in *Almendarez-Torres*, 523 U.S. at 226-27, the Supreme Court held that the Constitution did not require the government to charge a defendant with being subject to an enhanced sentence due to a qualifying prior conviction because the use of a prior

conviction for sentence enhancement purposes is not the same as establishing an element of an offense. *See Scott*, 230 Md. App. at 425, 148 A.3d at 80-81. The Court of Special Appeals concluded that, in light of *Monge*, "a failure of proof on sentencing is [ ] not an acquittal (or the functional equivalent of an acquittal) of the sentence that was imposed or any greater sentence under the principle of *autrefois acquit." Scott*, 230 Md. App. at 435-36, 148 A.3d at 86-87. Before the Court of Special Appeals, Scott contended that, in the case of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court indicated that it would someday overrule *Almendarez-Torres* and *Monge. See Scott*, 230 Md. App. at 428 n.4, 148 A.3d at 82 n.4. In *Apprendi*, 530 U.S. at 490, 489, the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt[,]" and stated that "it is arguable that *Almendarez-Torres* was incorrectly decided[.]" (Footnote omitted). In response to Scott's contention concerning *Apprendi*, the Court of Special Appeals stated: "Quite apart from the fact that we must take Supreme Court law as it is, not as it might become, we note that the *Apprendi* Court acknowledged the continued validity of *Monge* and *Almendarez-Torres* as applied to subsequent offender sentencing statutes." *Scott*, 230 Md. App. at 428 n.4, 148 A.3d at 82 n.4 (citing *Apprendi*, 530 U.S. at 488 n.14).

Concerning the doctrine of collateral estoppel, the Court of Special Appeals concluded that the doctrine "applies when there has been a factual finding favorable to the defendant that is central to his [or her] criminal liability for an offense[,]" and that "[t]he doctrine has never been extended to apply to sentencing." *Scott*, 230 Md. App. at 439, 148 A.3d at 89. The Court of Special Appeals explained that, even if the doctrine of collateral estoppel applied to sentencing, the circuit court had not made a final adjudication, as a matter of fact, that the aggravated assault in the District of Columbia was not a crime of violence. *See id*. at 439, 148 A.3d at 89.

The Court of Special Appeals held that Scott had failed to preserve for appellate review his contention that the circuit court erred in not making the two existing sentences concurrent with the new sentence for attempted robbery with a dangerous weapon. *See id*. at 444-46, 148 A.3d at 92-93. Specifically, the Court of Special Appeals observed that, in the circuit court, Scott had asked that the new sentence for attempted robbery with a dangerous weapon be imposed concurrent with the two existing sentences, as opposed to having requested that the two existing sentences be made concurrent with the new sentence. *See id*. at 444-46, 148 A.3d at 92-93. The Court of Special Appeals concluded that the propriety of the two existing sentences having been imposed consecutively was not before the circuit court on remand because those

sentences had not been vacated. *See id*. at 450, 148 A.3d at 95.[6]

Petition for a Writ of *Certiorari*

Scott petitioned for a writ of *certiorari*, which this Court granted, *see Scott v. State*, 451 Md. 579, 155 A.3d 434 (2017), raising the following four issues:

> 1. Where the State fails to prove the existence of a prior conviction for purposes of imposing a mandatory sentence pursuant to [CR] § 14-101, is the State barred from attempting to prove the prior conviction on remand for resentencing under the Double Jeopardy Clause of the Fifth Amendment and/or the Maryland common law prohibition against double jeopardy?
>
> 2. If the answer to Question 1 is yes, did the Court of Special Appeals err in holding that the State was not barred from attempting to prove the existence of a prior conviction of [Scott] on remand for resentencing?

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[6] The Court of Special Appeals also held that the circuit court did not exceed the scope of the remand by receiving additional evidence of the conviction for aggravated assault in the District of Columbia, and that the additional evidence was sufficient to prove that the aggravated assault in the District of Columbia constituted a crime of violence under CR § 14-101(a). *See Scott*, 230 Md. App. at 441, 443, 148 A.3d at 90, 91. Scott does not raise either of these issues before us.

3. Where [Scott] was originally sentenced to a mandatory term of twenty-five years without parole on Count 1 [(attempted robbery with a dangerous weapon)], to ten years with all but five years suspended on Count 5 [(use of a handgun in the commission of a crime of violence)], consecutive to Count 1, and to ten years with all but five years suspended on Count 7 [(conspiracy to commit robbery with a dangerous weapon)], consecutive to Count 5, and the Court of Special Appeals vacated Count 1 and remanded for resentencing, did the [circuit] court err at resentencing in concluding that it did not have discretion to make the sentence on Count 1 run concurrent with the sentences on Count 5 and Count 7 (without changing the consecutive nature of Counts 5 and 7 to each other)?

4. Did the Court of Special Appeals err in holding that the issue in Question 3 was not preserved?

DISCUSSION

I. Double Jeopardy

The Parties' Contentions

Scott contends that the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States and the prohibition on double jeopardy under the common law of Maryland barred the State on remand from attempting to prove that his conviction for aggravated assault in the District of Columbia constituted a crime of violence under CR § 14-101(a). Scott

argues that the plea of *autrefois acquit* applies to the determination of whether the State has established a qualifying prior conviction for purposes of an enhanced sentence. Scott asserts that *Bowman*, 314 Md. at 740, 552 A.2d at 1310 – in which this Court held that the prohibition on double jeopardy barred the State from seeking an enhanced sentence on remand after an enhanced sentence was vacated on appeal due to insufficient evidence of qualifying prior convictions – remains good law. Scott maintains that this Court's holding in *Bowman* was based on both the Double Jeopardy Clause and the prohibition on double jeopardy under the common law of Maryland, which this Court may interpret to grant more protection than that given under federal law. Scott asserts that *Monge*, 524 U.S. at 734 – in which the Supreme Court held that, at resentencing in a noncapital case, the Double Jeopardy Clause does not bar a readjudication, for purposes of an enhanced sentence, of the existence of a prior conviction – is no longer good law in light of *Apprendi*, 530 U.S. at 490. Specifically, Scott maintains that, as a result of the Supreme Court's holding in *Apprendi*, "the holding in *Monge* hangs only by the thread of an exception."

Scott argues that the constitutional prohibition on double jeopardy applies to the determination of a requisite prior conviction for an enhanced sentence because the existence of the prior conviction is essential to justifying the punishment in question. Scott points out that, if the circuit court had found that the State failed to meet the burden of establishing a necessary

prior conviction, the State would have been unable to note an appeal of that determination in an attempt to secure a new sentencing proceeding. Scott asserts that the holding of the Court of Special Appeals in this case essentially gives the State unlimited attempts to secure an enhanced sentence.

Scott maintains that the doctrine of collateral estoppel bars the State from proving his prior conviction on remand because establishing the existence of a qualifying prior conviction involves a factual determination. According to Scott, the Court of Special Appeals made such a determination in his favor by concluding in the first appeal that the evidence was insufficient to support the circuit court's finding that he had two prior convictions for crimes of violence.

The State responds that the constitutional prohibition on double jeopardy does not extend to resentencing proceedings involving a sentencing enhancement under CR § 14101(d). The State contends that the Supreme Court's holding in *Monge*, 524 U.S. at 734 – *i.e.*, that, at resentencing in a noncapital case, the Double Jeopardy Clause does not bar a trial court from readjudicating whether a defendant has a prior conviction – unequivocally precludes application of the prohibition against double jeopardy to resentencing, and is dispositive here. The State points out that the prohibition against double jeopardy applies where there has been an acquittal based on insufficient evidence, but does not apply where a reversal is based on an erroneous legal decision by a trial court. The State argues

that this Court's holding in *Bowman* has been effectively superseded by the Supreme Court's holdings in *Monge* and *Almendarez-Torres*. The State asserts that, more recently, in *Twigg v. State*, 447 Md. 1, 133 A.3d 1125 (2016), this Court essentially followed *Monge* by holding that, where a sentence for a lesser-included crime was vacated, resentencing for a greater-inclusive crime would not violate the Double Jeopardy Clause. The State maintains that, even if *Bowman* remains good law, it is not applicable here because, in *Bowman*, this Court concluded there was no evidence, either admissible or not, that was sufficient to support the enhanced sentence – whereas, in this case, the Court of Special Appeals held only that the statement of charges did not provide the factual basis that was used for Scott's guilty plea to aggravated assault in the District of Columbia.

The State contends that the plea of *autrefois acquit* applies to a determination as to whether a defendant has previously been acquitted of a crime. The State argues that the plea of *autrefois acquit* does not apply to the reimposition of an enhanced sentence on remand because this is a legal determination that is made by a judge. The State asserts that the doctrine of collateral estoppel does not apply in this case because the circuit court did not find, as a matter of fact, that the conviction for aggravated assault in the District of Columbia was not a conviction for a crime of violence.

Standard of Review

An appellate court reviews without deference a trial court's conclusion as to whether the prohibition on double jeopardy applies. *See Giddins v. State*, 393 Md. 1, 15, 899 A.2d 139, 147 (2006).

The Prohibition on Double Jeopardy

The Double Jeopardy Clause states: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. Although the Constitution of Maryland does not contain a counterpart to the Double Jeopardy Clause, the common law of Maryland provides for a prohibition on double jeopardy. *See Scriber*, 437 Md. at 408, 86 A.3d at 1265. Under the prohibition on double jeopardy, a court cannot subject a defendant to multiple trials and sentences for the same offense. *See id*. at 408, 86 A.3d at 1265.

The Plea of *Autrefois Acquit*

Generally, the Double Jeopardy Clause does not bar a second prosecution for the same offense after an appellate court reverses a conviction. *See Winder v. State*, 362 Md. 275, 324, 765 A.2d 97, 124 (2001). An exception to this general rule applies where the ground for the reversal of a conviction is insufficiency of the evidence. *See id*. at 325, 765 A.2d at 124.

The Supreme Court created this exception in *Burks v. United States*, 437 U.S. 1, 18 (1978), in which

the Court held that "the Double Jeopardy Clause precludes a second trial once [a] reviewing court has found the evidence legally insufficient[.]" In *Burks*, *id*. at 3-4, a Court of Appeals reversed a conviction on the ground that the evidence was insufficient, and remanded to a District Court with instructions to determine whether to issue a directed verdict of acquittal or order a new trial. The Supreme Court concluded that the decision of the Court of Appeals functioned as an acquittal because the decision "represented a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id*. at 10 (brackets, citation, and internal quotation marks omitted). The Supreme Court concluded that the Court of Appeals erred in remanding because, if the District Court had determined that the evidence was insufficient, the District Court would have entered a judgment of acquittal, and the defendant could not have been retried; and "it should make no difference that the reviewing court, rather than the trial court, determined the evidence to be insufficient[.]" *Id*. at 10-11 (citation and emphasis omitted). The Supreme Court explained that its decision furthered the Double Jeopardy Clause's purpose, which is to deny "the [government] another opportunity to supply evidence [that] it failed to muster in the first proceeding" – *i.e.*, "to make repeated attempts to convict an individual for an alleged offense[.]" *Id*. at 11 (citation and internal quotation marks omitted). The Court noted that its holding did not undermine the general rule that the Double Jeopardy Clause does not bar a second prosecution for the same offense after a reviewing court reverses a conviction; "reversal for trial error,

as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." *Id*. at 15.

In *United States v. DiFrancesco*, 449 U.S. 117, 139, 118-21 (1980), the Supreme Court held that the Double Jeopardy Clause was not violated by a statute that authorized an enhanced sentence for "dangerous special offenders" and authorized the United States to appeal from an imposition of a sentence under certain circumstances in cases in which the United States had sought the enhanced sentence. In *DiFrancesco*, *id*. at 122, a District Court sentenced a defendant to concurrent terms of imprisonment as a dangerous special offender. The defendant appealed from the convictions, and the United States appealed from the sentences. *See id*. at 123. A Court of Appeals affirmed the convictions, but dismissed the United States's appeal on double jeopardy grounds. *See id*. The Supreme Court reversed and remanded. *See id*. at 143.

The Court began its analysis by explaining: "Where a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." *Id*. at 132 (brackets, citation, and internal quotation marks omitted). The Court explained that the United States's ability to appeal from a sentence did not necessarily violate the Double Jeopardy Clause "just because its success might deprive [a defendant] of the benefit of a more lenient sentence." *Id*. The Court concluded that a sentence lacks "constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal[,]" and observed

that the plea of *autrefois acquit* was a "protection[] against retrial" rather than resentencing. *Id*. at 132, 133. The Court explained that the Double Jeopardy Clause's purpose – to avoid "repeated attempts to convict" – has "no significant application" to the United States's ability to appeal from a sentence, as such an appeal "does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence." *Id*. at 136. The Court rejected the idea that an imposition of a "sentence is an 'implied acquittal' of any greater sentence." *Id*. at 133 (citation omitted). The Court also explained that "[t]he Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of [the defendant's] punishment will turn out to be." *Id*. at 137.

In *Bullington v. Missouri*, 451 U.S. 430, 444-45, 432 (1981), the Supreme Court held that the Double Jeopardy Clause bars a second capital sentencing proceeding at which the government must prove certain elements before the death penalty may be imposed. In *Bullington*, *id*. at 435-36, the State of Missouri sought the death penalty, but a jury sentenced the defendant to life imprisonment without the possibility of parole. The defendant moved for a new trial, which the trial court granted on the ground that the Supreme Court had struck down Missouri's laws allowing women to be automatically excused from jury duty. *See id*. at 436. The State of Missouri filed a notice of intent to seek the death penalty again, and the defendant moved to

strike the notice on the ground that the Double Jeopardy Clause barred the State from seeking the death penalty again because the jury had not sentenced the defendant to death. *See id*. at 436. The trial court agreed with the defendant and ruled that the State could not seek the death penalty again; the Supreme Court of Missouri ruled that the State could seek the death penalty again; and the Supreme Court of the United States reversed and remanded. *See id*. at 436-37, 446-47.

The Court began its analysis by acknowledging:

> The imposition of a particular sentence usually is not regarded as an "acquittal" of any more severe sentence that could have been imposed. The Court generally has concluded, therefore, that the Double Jeopardy Clause imposes no absolute prohibition against the imposition of a harsher sentence at retrial after a defendant has succeeded in having [the defendant's] original conviction set aside.

Id. at 438 (citations omitted). The Court distinguished *Bullington*, the case at hand, from previous cases in which it had held that the Double Jeopardy Clause did not apply to sentencing on the ground that, in *Bullington*, the sentencing proceeding constituted "a trial on the issue of punishment" because, rather than having "unbounded discretion to select an appropriate punishment from a wide range authorized by statute[,]" the jury had two alternatives (death or life imprisonment without the possibility of parole); additionally, the jury could not impose the death penalty unless the State

met its burden of proving certain facts beyond a reasonable doubt. *Id*. at 438. The Court explained that *Bullington* was subject to *Burks*'s "insufficient evidence" exception to the general rule that the government may prosecute a defendant a second time after an appellate court reverses a conviction. *See Bullington*, 451 U.S. at 444-45.

In *Lockhart v. Nelson*, 488 U.S. 33, 34 (1988), the Supreme Court held that the Double Jeopardy Clause did not bar a retrial where an appellate court reversed a conviction on the ground that the trial court erred in admitting certain evidence, and determined that the remaining evidence was insufficient. In *Nelson*, *id*. at 34-35, the State of Arkansas sought to have a defendant sentenced under a habitual criminal statute, which provided for an enhanced sentence upon a fifth or subsequent conviction for a felony. At a sentencing proceeding, the prosecutor offered certified copies of the defendant's four prior felony convictions; unbeknownst to the prosecutor and the defendant's counsel, the Governor had pardoned the defendant as to one of the convictions. *See id*. at 36. A jury found that the State had established four qualifying prior convictions, and imposed an enhanced sentence. *See id*. The defendant petitioned for a writ of habeas corpus, contending that the enhanced sentence was invalid because of the pardon. *See id*. at 37. A District Court agreed, and vacated the enhanced sentence. *See id*. The State of Arkansas sought to have the defendant resentenced under the habitual criminal statute, relying on a prior conviction

that had not been raised at the original sentencing proceeding. *See id*. The defendant argued that the Double Jeopardy Clause barred such a resentencing. *See id*. The District Court agreed; a Court of Appeals affirmed; and the Supreme Court reversed. *See id*. at 37, 33.

The Court explained that *Burks* dictated the result because

> *Burks* was careful to point out that a reversal based solely on evidentiary insufficiency has fundamentally different implications, for double jeopardy purposes, than a reversal based on such ordinary "trial errors" as the "incorrect receipt or rejection of evidence." 437 U.S.[ ] at 14-16[ ]. While the former is in effect a finding "that the government has failed to prove its case" against the defendant, the latter "implies nothing with respect to the guilt or innocence of the defendant," but is simply "a determination that [the defendant] has been convicted through a judicial process which is defective in some fundamental respect." *Id.* at 15[.]

Nelson, 488 U.S. at 40 (emphasis omitted).

The Court concluded that the trial court's error in admitting evidence of the conviction that was the subject of a pardon constituted trial error, as opposed to an issue of insufficient evidence. *See id*. The Court pointed out that, although the trial court's admission of evidence of the conviction was error, the evidence – comprised of proof of four prior convictions – was sufficient to support the enhanced sentence. *See id*. The Court

concluded that the Double Jeopardy Clause was not aimed at circumstances like the ones in *Nelson* because, if the defendant had proven at the original sentencing proceeding that one of the four prior convictions was the subject of a pardon, the trial court presumably would have given the State of Arkansas the opportunity to offer evidence of another prior conviction. *See id*. at 42.

In *Bowman*, 314 Md. at 740, 552 A.2d at 1310, this Court distinguished the Supreme Court's holding in *Nelson* and held that the State could not seek an enhanced sentence on remand where this Court vacated an enhanced sentence due to insufficient evidence of qualifying prior convictions. In *Bowman*, 314 Md. at 728, 552 A.2d at 1304, at a sentencing proceeding, a prosecutor alleged, and the trial court found, that the defendant had two prior convictions for robbery with a deadly weapon. The trial court imposed an enhanced sentence under CR § 14-101(d)'s predecessor, Md. Code Ann., Art. 27 (1957, 1987 Repl. Vol.) § 643B(c), and the Court of Special Appeals affirmed. *See Bowman*, 314 Md. at 728-29, 552 A.2d at 1304. The defendant filed a motion for reconsideration, pointing out that he had only one prior conviction for robbery with a deadly weapon; on a separate date, the defendant had been convicted of robbery and assault with a deadly weapon. *See id*. at 729, 552 A.2d at 1304. The Court of Special Appeals issued a new opinion in which it affirmed again, reasoning that the prior convictions for robbery and assault with a deadly weapon were based on conduct that constituted robbery with a deadly weapon.

See id. at 729, 731-32, 552 A.2d at 1304, 1305-06. This Court reversed the judgment of the Court of Special Appeals insofar as it affirmed the enhanced sentence, and remanded for resentencing. *See id*. at 741, 552 A.2d at 1310.

This Court determined that the evidence was insufficient to support a determination that the defendant had two prior convictions for crimes of violence because the record established only that the defendant had been convicted of one crime of violence (robbery with a deadly weapon). *See id*. at 733, 552 A.2d at 1306. This Court observed that the only evidence of prior convictions for crimes of violence were the records of the defendant's convictions for robbery with a deadly weapon, robbery, and assault with a deadly weapon. *See id*. at 733, 552 A.2d at 1306. This Court concluded that the Court of Special Appeals erred in inferring that the defendant had committed a second robbery with a deadly weapon based on the circumstance that the defendant had been convicted of robbery and assault with a deadly weapon. *See id*. at 733, 552 A.2d at 1306-07.

This Court ordered that, on remand, the State would be prohibited from again seeking an enhanced sentence – whether on the theory that the convictions for robbery and assault with a deadly weapon had been based on conduct that constituted robbery with a deadly weapon, or on the basis of another prior conviction that had not been raised at the original sentencing proceeding. *See id*. at 740, 552 A.2d at 1310. This Court distinguished *Nelson*, 488 U.S. 33, on the ground that,

in *Nelson*, the trial court erroneously admitted evidence that was sufficient to prove that the defendant was subject to an enhanced sentence; by contrast, in *Bowman*, the trial court "simply completely misinterpreted the evidence[,]" and there was never evidence, whether erroneously admitted or not, that was sufficient to prove that the defendant was subject to an enhanced sentence. *Bowman*, 314 Md. at 740, 552 A.2d at 1310. This Court concluded that "it [wa]s evident from *Nelson* that the *Burks'* exception to the general rule is applicable"; in other words, this Court applied *Burks*'s "insufficient evidence" exception to the general rule that the government may prosecute a defendant a second time after an appellate court reverses a conviction. *Bowman*, 314 Md. at 740, 552 A.2d at 1310.

In *Almendarez-Torres*, 523 U.S. at 226, 235, the Supreme Court held that the enhanced penalty provision of a statute making it a crime for a deported person to return to the United States authorized an enhanced sentence, and, as such, did not create a separate crime that the government was required to independently charge. The Court concluded that neither the statute nor the Constitution required the government to specifically charge a person with being subject to the enhanced penalty provision. *See id*. at 226-27. In *Almendarez-Torres*, *id*. at 227, a defendant pled guilty to returning to the United States after having been deported due to three convictions for aggravated felonies. At the sentencing proceeding, the defendant contended that the trial court could not sentence him to more

than two years of imprisonment because the indictment had not mentioned the convictions for aggravated felonies, which, the defendant argued, constituted elements of a crime. *See id*. The District Court disagreed and sentenced the defendant to more than two years of imprisonment; a Court of Appeals affirmed; and the Supreme Court did the same. *See id*. at 227, 248.

As a matter of statutory interpretation, the Court concluded that Congress intended for the subsection in question to be a sentencing provision, not a definition of a separate crime; the Court noted that "prior commission of a serious crime[ ]is as typical a sentencing factor as one might imagine." *See id*. at 235, 230. Next, the Court rejected the defendant's contention that the doctrine of constitutional doubt required the Court to interpret the subsection as a definition of a separate crime. *See id*. at 237-38. The Court explained that, under the doctrine of constitutional doubt, if fairly possible, a court interprets a statute in a way that avoids not only the conclusion that the statute is unconstitutional, but also doubts about the statute's constitutionality. *See id*. at 237. The Court concluded that the doctrine of constitutional doubt did not apply in *Almendarez-Torres* because the canons of statutory interpretation weighed heavily in favor of concluding that the subsection was a penalty provision, not a definition of a separate crime; alternatively, even if the defendant's interpretation of the subsection were fairly possible, "the constitutional questions [that] he raises, while requiring discussion, simply do

not lead us to doubt gravely that Congress may authorize courts to impose longer sentences upon recidivists who commit a particular crime." *Id*. at 238 (emphasis omitted). The Court stated that, if it adopted "a rule that any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement[,]" the Court would "find it difficult to reconcile any such rule with [the Court's] precedent holding that the sentencing-related circumstances of recidivism are not part of the definition of the offense for double jeopardy purposes." *Id*. at 247 (citation omitted).

In *Monge*, 524 U.S. at 734, the Supreme Court held that "the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context." In *Monge*, *id*. at 724-25, a defendant was convicted of drug-related crimes, and the State of California sought an enhanced sentence pursuant to a recidivist statute under which a defendant who had been convicted of a "serious felony" for a second time was subject to double the term of imprisonment to which the defendant would have been subject otherwise. Under California law, an assault was a "serious felony" if the defendant either inflicted great bodily injury or personally used a dangerous or deadly weapon. *See id*. In *Monge*, *id*. at 725, at the sentencing proceeding, the only evidence of the defendant's criminal history was a record that the defendant had been convicted of assault with a deadly weapon. The trial court found credible the prosecutor's allegation that the defendant had personally used a dangerous or

deadly weapon – namely, a stick – and imposed an enhanced sentence under the recidivist statute. *See id*. On appeal, the State of California conceded that the evidence was insufficient to prove that the defendant had personally inflicted great bodily injury or used a deadly weapon – *i.e*., that the defendant had been convicted of a serious felony – but requested the opportunity to prove the same on remand. *See id*. The California Court of Appeal agreed that the evidence was insufficient, and concluded that the Double Jeopardy Clause barred the remand that the State of California had requested. *See id*. at 725-26. The Supreme Court of California reversed, and the Supreme Court of the United States affirmed. *See id*. at 726, 734.

The Court observed that *Bullington*, 451 U.S. at 432, 444-45, in which the Court applied the Double Jeopardy Clause to a capital sentencing proceeding, "established a narrow exception to the general rule that double jeopardy principles have no application in the sentencing context." *Monge*, 524 U.S. at 730 (citation and internal quotation marks omitted). In *Monge*, *id*. at 731-32, the Court declined to extend *Bullington* to noncapital sentencing proceedings because "the death penalty is unique in both its severity and its finality," and there is "acute need for reliability in capital sentencing proceedings." (Citation and internal quotation marks omitted). The Court "conclude[d] that *Bullington*'s rationale is confined to the unique circumstances of capital sentencing and that the Double Jeopardy Clause does not preclude retrial on a prior

conviction allegation in the noncapital sentencing context." *Monge*, 524 U.S. at 734.

In a dissenting opinion, Justice Scalia agreed with the Court that the Double Jeopardy Clause does not apply to noncapital sentencing proceedings, but opined that, in *Monge*, the prior conviction constituted an element of a crime, not simply a sentencing factor. *See id*. at 737 (Scalia, J., dissenting). Justice Scalia acknowledged that his position was inconsistent with *Almendarez-Torres – which*, he opined, was erroneous, consistent with his dissent in that case. *See Monge*, 524 U.S. at 741 (Scalia, J., dissenting); *Almendarez-Torres*, 523 U.S. at 249 (Scalia, J., dissenting).

In *Monge*, 524 U.S. at 728-29, the Court further explained that, in *Almendarez-Torres*, the Court "rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." The Court stated:

> Sentencing decisions favorable to the defendant, moreover, cannot generally be analogized to an acquittal. We have held that where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is comparable to an acquittal, and the Double Jeopardy Clause precludes a second trial. *See Burks* [], 437 U.S. [at] 16[]. Where a similar failure of proof occurs in a sentencing proceeding, however, the analogy is inapt. The pronouncement

> of sentence simply does not "have the qualities of constitutional finality that attend an acquittal." [] *DiFrancesco*, 449 U.S. [at] 134[]; *see also Bullington*, [451 U.S.] at 438[] ("The imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed").

Monge, 524 U.S. at 729.

Subsequently, in *Apprendi*, 530 U.S. at 469, 490, the Supreme Court held that, under the Due Process Clause of the Fourteenth Amendment, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Apprendi*, *id*. at 469-70, a defendant and the State of New Jersey entered into a plea agreement under which the defendant would plead guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of third-degree unlawful possession of an antipersonnel bomb, and the State of New Jersey would nol pros the remaining charges and would have the right to request an enhanced sentence for one of the offenses on the ground that the defendant had acted with racial bias. Under New Jersey law and pursuant to the plea agreement, if the defendant had acted with racial bias, he was subject to up to a total of thirty years of imprisonment, with a fifteen-year period of ineligibility for parole; otherwise, the defendant was subject to up to a total of twenty years of imprisonment. *See id*. at 470. A

trial court accepted the guilty plea, found that the defendant had acted with racial bias, and imposed an enhanced sentence. *See id*. at 47071. On appeal, the defendant contended that the Due Process Clause required the State to prove to a jury beyond a reasonable doubt the fact that he had acted with racial bias. *See id*. at 471. The New Jersey appellate courts affirmed, and the Supreme Court reversed. *See id*. at 471-72, 474.

The Court explained that, as to the two separate acts that New Jersey had criminalized – *i.e*., unlawfully possessing a firearm and acting with racial bias – "[m]erely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently." *Id*. at 476. The Court observed: "Any possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown . . . during the years surrounding our Nation's founding." *Id*. at 478. The Court stated that, although "it is arguable that *Almendarez-Torres* was incorrectly decided," it was not necessary to revisit *Almendarez-Torres;* instead, the Court deemed *Almendarez-Torres* "a narrow exception to the general rule[.]" *Id*. at 489-90 (footnote omitted). In other words, although, generally speaking, any fact that increases the maximum possible sentence constitutes an element of a crime – and thus must be proven beyond a reasonable *doubt* – *Almendarez-Torres* created an exception for the fact of a prior conviction. *See Apprendi*, 530 U.S. at 488, 489-90.

In *Twigg*, 447 Md. at 21, 5, 133 A.3d at 1137, 1128, this Court held that the Double Jeopardy Clause did not bar resentencing for child abuse on remand where a trial court erroneously sentenced a defendant for both child abuse and second-degree rape instead of merging the conviction for the latter with the conviction for the former for sentencing purposes. In *Twigg*, *id*. at 8, 133 A.3d at 1130, a jury found the defendant guilty of child abuse, second-degree rape, third-degree sexual offense, and incest, and the trial court sentenced the defendant for all four crimes. On appeal, the defendant contended that the trial court should have merged the convictions for second-degree rape, third-degree sexual offense, and incest with the conviction for child abuse for sentencing purposes. *See id*. at 8, 133 A.3d at 1130. The Court of Special Appeals agreed, but vacated the sentences for all four crimes – including child abuse, the sentence for which the defendant had not challenged – and remanded with instructions to resentence the defendant for child abuse. *See id*. at 9, 133 A.3d at 1130. This Court affirmed in part, reversed in part, and remanded for resentencing. *See id*. at 30, 133 A.3d at 1143.

Notably, this Court held that the Court of Special Appeals had the authority to remand with instructions to resentence the defendant for child abuse. *See id*. at 10, 133 A.3d at 1131. This Court rejected the defendant's contention that such resentencing would violate the Double Jeopardy Clause or be inconsistent with due process. *See id*. at 21, 133 A.3d at 1137. Citing *DiFrancesco*, 449 U.S. at 132, this Court explained:

"[R]esentencing does not offend double jeopardy principles." *Twigg*, 447 Md. at 21, 133 A.3d at 1137.

The Doctrine of Collateral Estoppel

"The Supreme Court has recognized that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel." *Odum v. State*, 412 Md. 593, 603, 989 A.2d 232, 238 (2010) (citing *Ashe v. Swenson*, 397 U.S. 436, 444-45 (1970)). Under the doctrine of collateral estoppel, which applies to both civil cases and criminal cases, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Odum*, 412 Md. at 603, 989 A.2d at 238 (quoting *Ashe*, 397 U.S. at 443) (internal quotation marks omitted).

Unlike the plea of *autrefois acquit*, the doctrine of collateral estoppel "is not based on two offenses being the same"; instead, it is based on two offenses "having a common necessary factual component." *Apostoledes v. State*, 323 Md. 456, 463, 593 A.2d 1117, 1121 (1991). If a trial court or jury finds in a defendant's favor as to a common necessary factual issue at a trial, then "the State may not relitigate the same factual issue" at a subsequent trial. *Id*. at 464, 593 A.2d at 1121. The doctrine of collateral estoppel usually, but not always, arises in cases in which defendants have been acquitted. *See State v. Woodson*, 338 Md. 322, 331, 658 A.2d 272, 277 (1995).

Analysis

Here, we conclude that, where an appellate court vacates an enhanced sentence due to insufficient evidence of a qualifying prior conviction, the plea of *autrefois acquit* and the doctrine of collateral estoppel do not bar a trial court from reimposing an enhanced sentence.

The plea of *autrefois acquit* does not apply where an appellate court vacates an enhanced sentence and remands for resentencing because the vacation of the enhanced sentence does not constitute an acquittal. An acquittal is "a resolution, correct or not, of some or all of the factual elements of the offense charged." *Burks*, 437 U.S. at 10 (citation and internal quotation marks omitted). As the Supreme Court held in *Almendarez-Torres*, 523 U.S. at 226, 235, and reaffirmed in *Monge*, 524 U.S. at 728-29, for purposes of statutes that authorize enhanced sentences, a qualifying prior conviction is not an element of a crime; it is simply a sentencing factor. Where an appellate court determines that the evidence was insufficient to establish a qualifying prior conviction, the appellate court's determination does not act as an acquittal or preclude a trial court from receiving additional evidence of a qualifying prior conviction.

The Supreme Court's holdings in *Almendarez-Torres* and Monge – that a qualifying prior conviction is not an element of a crime – were not undermined by the Court's holding in *Apprendi.* Significantly, in commenting on the significance of the Supreme Court's

holding in *Apprendi*, the Court of Special Appeals stated: "Quite apart from the fact that we must take Supreme Court law as it is, not as it might become, we note that the *Apprendi* Court acknowledged the continued validity of *Monge* and *Almendarez-Torres* as applied to subsequent offender sentencing statutes." *Scott*, 230 Md. App. at 428 n.4, 148 A.3d at 82 n.4 (citing *Apprendi*, 530 U.S. at 488 n.14).

Indeed, rather than being undercut by the Supreme Court's holding in *Apprendi*, our conclusion that the Double Jeopardy Clause does not bar a trial court from reimposing an enhanced sentence is supported by *Apprendi.* In *Apprendi*, 530 U.S. at 490, the Supreme Court held that, **[o]ther than the fact of a prior conviction**, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added). In other words, in *Apprendi,* the Court did not vitiate its holding in *Almendarez-Torres*, 523 U.S. at 226, and its reaffirmance in *Monge*, 524 U.S. at 728-29, that a qualifying prior conviction is not an element of a crime. Although the Court remarked in *Apprendi* that "it is arguable that *Almendarez-Torres* was incorrectly decided," the Court declined to revisit *Almendarez-Torres. Apprendi*, 530 U.S. at 489-90 (footnote omitted). Scott is incorrect in contending that *Almendarez-Torres* and *Monge* should not be relied upon because they are inconsistent with *Apprendi.* There is no such inconsistency;

to the contrary, in *Apprendi*, the Supreme Court expressly acknowledged that it refrained from overruling *Almendarez-Torres.*[7]

In *Apprendi*, 530 U.S. at 488 n.14, the Court distinguished *Monge* on the ground that *Monge* involved a double jeopardy issue, while *Apprendi* did not. Specifically, the Court stated: "*Monge* was [a] recidivism case in which the question presented and the bulk of the Court's analysis related to the scope of double jeopardy protections in sentencing." *Apprendi*, 530 U.S. at 488 n.14. In other words, as counsel for the State in this case remarked at oral argument, *Apprendi* was a Sixth Amendment case involving the right to a jury trial, not a Fifth Amendment case involving the prohibition on double jeopardy. Given that the two cases involved the interpretation of different constitutional provisions, absent express direction by the Supreme Court that its holding in *Apprendi* was intended to abrogate its holding in Monge – *i.e.*, that the prohibition

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[7] Similar to *Apprendi*, in another case on which Scott relies, *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 2155, 2160 n.1 (2013), despite holding that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury[,]" the Supreme Court expressly refrained from overruling *Almendarez-Torres*, stating: "In *Almendarez-Torres* [], we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today." Scott interprets this statement as an invitation for defendants to challenge *Almendarez-Torres.* Regardless of whether Scott's interpretation is correct, the fact remains that *Almendarez-Torres* has not been overruled.

on double jeopardy does not apply to resentencing proceedings in recidivist cases – *Apprendi* does not vitiate *Monge.*

Plainly, the Supreme Court's holdings in *Almendarez-Torres, Monge*, and, indeed, *Apprendi* are at odds with *Bowman*, 314 Md. at 740, 552 A.2d at 1310, in which this Court earlier held that the prohibition on double jeopardy barred the State from seeking an enhanced sentence on remand. This Court decided *Bowman* in 1989 – *i.e.*, before the Supreme Court held in *Almendarez-Torres* in 1998, and reaffirmed in *Monge* in the same year, that the existence of a qualifying prior conviction is strictly a sentencing factor, not an element of a crime. *Bowman* also predates *Apprendi*, in which the Supreme Court did not overrule its holding in *Almendarez-Torres.* This case presents the first opportunity for this Court to review *Bowman* in light of the Supreme Court's holdings in *Almendarez-Torres, Monge*, and *Apprendi.*

Recognizing that *Bowman* is contradicted by the subsequent Supreme Court cases of *Almendarez-Torres* and *Monge*, and that *Apprendi* does not abrogate either case, we conclude that *Bowman* has been superseded by significant changes in double jeopardy law. Under the doctrine of *stare decisis*, an appellate court may overrule a case that either was "clearly wrong and contrary to established principles" or "has been superseded by significant changes in the law or facts." *Meyer v. State*, 445 Md. 648, 669, 128 A.3d 147, 159 (2015) (citations omitted); *see also DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 64, 5 A.3d 45, 55-56 (2010).

Having determined that *Bowman* has been superseded by significant changes in the Supreme Court's jurisprudence, we must now ascertain whether there is any basis in Maryland common law on which *Bowman* survives. In *Bowman*, this Court did not expressly indicate whether its holding was based on the Double Jeopardy Clause or the common law of Maryland. Tellingly, however, in *Bowman*, this Court made no mention whatsoever of the common law prohibition on double jeopardy, and rather expressly referred to the Double Jeopardy Clause in discussing *Nelson*, 488 U.S. 33. *See Bowman*, 314 Md. at 739-40, 552 A.2d at 1309-10. In *Bowman*, *id.* at 730, 735, 739, 552 A.2d at 1305, 1308, 1309, this Court relied on Maryland case law in which, in turn, this Court referred to the prohibition on double jeopardy. Nevertheless, in all of the cases underlying *Bowman*, this Court either discussed, or issued a holding that was expressly based on, the Double Jeopardy Clause, not the prohibition on double jeopardy under the common law of Maryland. *See id*. at 735, 552 A.2d at 1308 (This Court discussed *Brown v. State*, 311 Md. 426, 430-31, 535 A.2d 485, 487 (1988), whose holding was expressly based on the Double Jeopardy Clause.); *Bowman*, 314 Md. at 730, 552 A.2d at 1305 (This Court cited *Whack v. State*, 288 Md. 137, 150, 142, 416 A.2d 265, 271, 267 (1980), *appeal dismissed*, 450 U.S. 990 (1981), whose holding was expressly based on the Double Jeopardy Clause, and in which this Court mentioned the prohibition on double jeopardy under the common law of Maryland in only one sentence.); *Bowman*, 314 Md. at 730, 552 A.2d at 1305 (This Court discussed *Temoney v. State*, 290 Md.

251, 257 & n.4, 429 A.2d 1018, 1021 & n.4 (1981), in which this Court addressed the Supreme Court's precedent regarding the Double Jeopardy Clause.); *Bowman*, 314 Md. at 739, 552 A.2d at 1309 (This Court cited *Butler v. State*, 46 Md. App. 317, 324, 416 A.2d 773, 777, *cert. denied*, 288 Md. 743 (1980), in which the Court of Special Appeals discussed the Supreme Court's case law regarding the Double Jeopardy Clause.).

In light of this Court's lack of reference to the common law of Maryland, and its discussion of case law that pertained to the Double Jeopardy Clause, it is evident that this Court's holding in *Bowman* that the prohibition on double jeopardy prevented proof of a qualifying prior conviction on remand was based on an analysis of the Double Jeopardy Clause. This Court's holding in *Bowman* has been superseded by the Supreme Court's interpretation of the Double Jeopardy Clause in *Almendarez-Torres, Monge*, and *Apprendi.* Consistent with the longstanding principle of *stare decisis* that authorizes overruling a case that has been superseded by significant changes in the law, we overrule *Bowman.*

We decline Scott's invitation to extend the prohibition on double jeopardy under the common law of Maryland beyond the limits that the Supreme Court has placed on the Double Jeopardy Clause by holding that, after an appellate court vacates an enhanced sentence due to insufficient evidence of a qualifying prior conviction, the plea of *autrefois acquit* bars a trial court from receiving additional evidence of a qualifying prior

conviction and reimposing an enhanced sentence. Instead, we adopt the Supreme Court's sound logic in *Almendarez-Torres* and *Monge* – specifically, the principle that that the prohibition on double jeopardy does not apply to the fact of a qualifying prior conviction – as applicable to the prohibition on double jeopardy under the common law of Maryland.

Our holding does not vitiate the principle that, when seeking an enhanced sentence, the State must establish a requisite prior conviction beyond a reasonable doubt. *See Bryant v. State*, 436 Md. 653, 671, 84 A.3d 125, 136 (2014). The standard of proof by which the State must establish a requisite prior conviction is wholly independent of the issue of whether the prohibition on double jeopardy bars the State from attempting to establish a qualifying prior conviction under certain circumstances.[8]

Applying our holding to this case's facts, we conclude that the plea of *autrefois acquit* did not bar the circuit court from receiving additional evidence of Scott's prior conviction for aggravated assault in the District of Columbia. At the original sentencing proceeding, the prosecutor introduced certified copies of Scott's prior convictions and a statement of charges for the aggravated assault. The circuit court found that

[8] And, of course, our holding has no effect on the principle that a trial court, not a jury, determines whether a qualifying prior conviction exists. *See* Md. R. 4-245(e) ("Before sentencing and after giving the defendant an opportunity to be heard, the court shall determine whether the defendant is a subsequent offender as specified in the notice of the State's Attorney.").

Scott had two prior convictions for crimes of violence, and imposed an enhanced sentence under CR § 14-101(d). The Court of Special Appeals vacated the enhanced sentence, concluding that the evidence was insufficient to support a finding that the conviction for aggravated assault constituted a conviction for a crime of violence, and remanded for resentencing. As explained above, a determination by an appellate court that the evidence is insufficient to support a finding of a qualifying prior conviction does not act as an acquittal, and does not bar the trial court from revisiting the matter of the qualifying prior conviction. It was entirely permissible for the circuit court, on remand, to admit into evidence a transcript of the guilty plea proceeding in the District of Columbia, and to determine that Scott was subject to an enhanced sentence.

Like the plea of *autrefois acquit*, the doctrine of collateral estoppel does not bar a trial court from reimposing an enhanced sentence after an appellate court vacates an enhanced sentence due to insufficient evidence of a qualifying prior conviction. The doctrine of collateral estoppel precludes relitigation of a factual issue where there has been a finding in the defendant's favor as to the factual issue. *See Apostoledes*, 323 Md. at 464, 593 A.2d at 1121. The doctrine of collateral estoppel does not apply here because, at the original sentencing proceeding, the circuit court did not find in Scott's favor as to a factual issue. The Court of Special Appeals did not affirm a factual finding by the circuit court that Scott lacked the requisite prior convictions to be subject to an enhanced sentence; rather, that

Court determined that the evidence was insufficient to support the circuit court's finding that Scott had the requisite prior convictions to be subject to an enhanced sentence.

We are unpersuaded by Scott's reliance on *Ashe*, 397 U.S. at 439, 446, in which the Supreme Court held that, where multiple people allegedly robbed multiple victims, and a jury acquitted a defendant of robbing one of the victims, the doctrine of collateral estoppel barred the government from attempting to prove, in a separate prosecution as to a different victim, that the defendant was one of the robbers. In *Ashe*, the acquittal rendered the doctrine of collateral estoppel applicable because the acquittal constituted a finding of fact in the defendant's favor as to whether he was indeed one of the robbers. By contrast, an appellate court's vacation of an enhanced sentence due to insufficient evidence of a qualifying prior conviction is not a finding of fact; as such, the doctrine of collateral estoppel is inapplicable. Indeed, other than *Ashe*, Scott offers no case law supporting his contention that his resentencing is barred by the doctrine of collateral estoppel, and we know of none in which the Supreme Court or this Court has applied the doctrine of collateral estoppel in a noncapital sentencing proceeding to preclude resentencing by a trial court after an enhanced sentence is vacated for insufficient evidence.

For these reasons, we affirm the judgment of the Court of Special Appeals and hold that the circuit court was not precluded from reimposing the enhanced sentence of twenty-five years of imprisonment without the

possibility of parole for attempted robbery with a dangerous weapon at resentencing.

II. Concurrent Sentences

The Parties' Contentions

Scott contends that the circuit court erred in concluding that it lacked the discretion to impose the new sentence for attempted robbery with a dangerous weapon concurrently with the existing sentences for use of a handgun in the commission of a crime of violence and conspiracy to commit robbery with a dangerous weapon. Scott argues that, on remand for resentencing, a trial court has the discretion to determine whether a new sentence will be imposed consecutively or concurrently with existing sentences that were not affected by the remand. Scott asserts that his argument is preserved for review because, in the circuit court, his counsel requested that the circuit court make the new sentence for attempted robbery with a dangerous weapon concurrent with the two existing sentences. Scott acknowledges that, in the Court of Special Appeals, he argued that the two existing sentences should have been concurrent with the new sentence for attempted robbery – not the other way around, as he argues in this Court. Scott asserts, however, that his argument in the Court of Special Appeals was consistent with his argument in the circuit court.

The State responds that Scott's contention is not preserved for review because it differs from the argument that he raised in the Court of Special Appeals.

The State contends that, in the circuit court, Scott argued that the new sentence for attempted robbery with a dangerous weapon should have been concurrent with the two existing sentences; and, in the Court of Special Appeals, Scott argued the opposite – that the two existing sentences should have been imposed to be concurrent with the new sentence for attempted robbery with a dangerous weapon. As to the merits, the State asserts that the circuit court was correct in refraining from resentencing Scott for the convictions other than attempted robbery with a dangerous weapon, as the Court of Special Appeals remanded solely for resentencing for the offense of attempted robbery with a dangerous weapon.

Standard of Review

An appellate court reviews without deference the issue of whether a trial court made a legal error in sentencing. *See Bonilla v. State*, 443 Md. 1, 6, 115 A.3d 98, 100-01 (2015).

Preservation

Maryland Rule 8-131(a) governs preservation for appellate review generally, in pertinent part, as follows:

> Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court

> may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

Maryland Rule 8-131(b)(1) governs preservation for this Court's review where there has been a decision by the Court of Special Appeals, in pertinent part, as follows:

> Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals . . . , the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals.

Under Maryland Rule 8-131(b)(1), to preserve an issue for this Court's review, a party must raise the issue in the Court of Special Appeals if the case came before that Court. *See State v. Earp*, 319 Md. 156, 168 n.4, 571 A.2d 1227, 1233 n.4 (1990) (This Court concluded that the State failed to preserve an argument for review in this Court "by failing to raise the argument in the Court of Special Appeals."). For example, in *Ferguson v. Cramer*, 349 Md. 760, 775 n.8, 709 A.2d 1279, 1286 n.8 (1998), this Court concluded that an "issue [wa]s not preserved for our review because it was not advanced before the Court of Special Appeals and was not raised in the [] petition for writ of certiorari." By contrast, in *Thompson v. UBS Fin. Servs., Inc.*, 443 Md. 47, 69 n.12, 115 A.3d 125, 138 n.12 (2015), this Court concluded that an issue was preserved for this

Court's review because it was encompassed by "the broad issue" that was raised in the Court of Special Appeals.

Consistent with Maryland Rule 8-131(b)(1)'s use of the word "ordinarily," this Court has the discretion to consider an issue that was not preserved for this Court's review where "extraordinary circumstances" provide a reason to do so. *Wynn v. State*, 351 Md. 307, 323, 718 A.2d 588, 596 (1998). For example, in *Montgomery Cty. v. May Dep't Stores Co.*, 352 Md. 183, 201, 721 A.2d 249, 258 (1998), we "exercise[d] our discretion under Maryland Rule 8-131(b)(1) to consider [a] question [that was raised for the first time in a party's brief] because of the public importance of the issue, which [wa]s likely to recur, and for the guidance of the trial court on remand." By contrast, in *Wynn*, 351 Md. at 32324, 718 A.2d at 596, this Court declined to exercise its discretion to consider an issue regarding an "'intent' exception" where the issue was not raised in the trial court, in response to the petition for a writ of *certiorari*, or in any cross-petition, and where the State's purpose in offering the relevant witness's testimony was not to prove the defendant's intent, but rather to prove whether the defendant obtained stolen property.

Concerning an illegal sentence, Maryland Rule 4-345(a) states: "The court may correct an illegal sentence at any time." Maryland Rule 4-345(a) applies only where a sentence is allegedly inherently illegal – *i.e.*, where a defendant contends that there was no

underlying conviction, or that the sentence was not authorized for the underlying conviction. *See Colvin v. State*, 450 Md. 718, 725, 150 A.3d 850, 854 (2016). In other words, Maryland Rule 4-345(a) does not apply where there was allegedly a "flaw in the sentencing procedure." *Id*. at 725, 150 A.3d at 854 (citation and internal quotation marks omitted).

Concurrent Sentences and Consecutive Sentences

"A [trial] court may make a sentence concurrent with[,] or consecutive to[,] any other unsuspended actual sentence of confinement that then exists." *Parker v. State*, 193 Md. App. 469, 486, 997 A.2d 912, 922 (2010) (citation and internal quotation marks omitted). Conversely, a trial court may not make a sentence concurrent with, or consecutive to, any other unsuspended actual sentence of confinement that does not then exist. *See DiPietrantonio v. State*, 61 Md. App. 528, 532-33, 487 A.2d 676, 678-79, *cert*. *denied*, 303 Md. 295, 493 A.2d 349 (1985).

The Court of Special Appeals first applied this principle in *Alston v. State*, 38 Md. App. 611, 615, 379 A.2d 754, 757 (1978), in which the Court held that a trial court erred in making a sentence concurrent with a sentence that another trial court was expected to impose – *i.e*., a sentence that did not then exist. In *Alston*, *id.* at 612, 379 A.2d at 755, a defendant had been convicted, but had not yet been sentenced, in a Maryland trial court and in a District of Columbia trial court. The

Maryland trial court imposed a sentence that was to be concurrent with the sentence that the District of Columbia trial court would impose. *See id*. at 612, 379 A.2d at 755. Afterward, the District of Columbia trial court imposed a sentence that was to be consecutive to the sentence that the Maryland trial court had imposed. *See id*. at 612, 379 A.2d at 755. As a result, even though the Maryland trial court purportedly imposed a concurrent sentence, the defendant began serving the Maryland sentence without receiving any credit toward the District of Columbia sentence. *See id*. at 614, 379 A.2d at 756. The Court of Special Appeals concluded that the Maryland trial court's sentence was improper "because it was made to run concurrently with a sentence that had not yet been meted out to the [defendant]." *Id*. at 615, 379 A.2d at 757. Accordingly, the Court vacated the Maryland trial court's sentence and remanded for resentencing. *See id*. at 615, 379 A.2d at 757.

In *Stanton v. State*, 290 Md. 245, 250, 428 A.2d 1224, 1227 (1981), this Court held that a trial court did not err in making a sentence consecutive to an existing District Court sentence that was later superseded by a circuit court sentence that resulted from a *de novo* appeal. In *Stanton*, 290 Md. at 246, 250, 428 A.2d at 1225, 1227, a circuit court convicted a defendant and deferred sentencing; in a second criminal case, the District Court convicted and sentenced the defendant, who noted a *de novo* appeal; before the *de novo* appeal's disposition, in the first criminal case, the circuit court

imposed a sentence that was consecutive to the District Court sentence; and, finally, in the *de novo* appeal in the second criminal case, the defendant was convicted, and the circuit court imposed a new sentence that superseded the District Court sentence. This Court concluded that it was proper for the circuit court to make the sentence in the first criminal case consecutive to the District Court sentence in the second criminal case, as the latter sentence existed at the time, even though it was later superseded. *See id*. at 250, 428 A.2d at 1227.

In *DiPietrantonio*, 61 Md. App. at 535, 529-30, 487 A.2d at 679, 677, the Court of Special Appeals held that, where a trial court imposed a sentence that included probation, and the defendant violated the order of probation, the trial court did not err in imposing a new sentence that was consecutive to an existing sentence in another criminal case. In *DiPietrantonio*, *id.* at 529, 487 A.2d at 677, a trial judge imposed a sentence that included both imprisonment and probation. After the defendant served the term of imprisonment, during the probationary period, in a second criminal case, the defendant was convicted of, and sentenced for, additional crimes. *See id*. at 530, 487 A.2d at 677. The second trial judge did not refer to the sentence in the first criminal case. *See id*. at 530, 487 A.2d at 677. In the first criminal case, the first trial judge revoked the defendant's probation and imposed a portion of the previously suspended period of imprisonment, consecutive to the sentence in the second criminal case. *See*

id. at 530, 487 A.2d at 677. The Court of Special Appeals explained that the sentence in the second criminal case could not have been concurrent with, or consecutive to, the original sentence in the first criminal case, as the defendant was not serving a term of imprisonment at the time. *See id*. at 534, 487 A.2d at 679. The Court held that the first trial judge did not err in making the new sentence in the first criminal case consecutive to the sentence in the second criminal case, as the defendant was serving a term of imprisonment at the time. *See id*. at 535, 487 A.2d at 679.

In *Stouffer v. Pearson*, 390 Md. 36, 41, 887 A.2d 623, 626 (2005), this Court held that a sentence for crimes that a defendant committed while on parole could not be consecutive to the defendant's term of parole because the defendant's parole was not revoked until after the defendant was sentenced. In *Stouffer*, *id.* at 41-42, 887 A.2d at 626, a trial court sentenced the defendant to a term of imprisonment; the defendant was released on parole; and, subsequently, the defendant was arrested. In a second criminal case, the defendant was convicted of, and sentenced for, additional crimes; the trial court made one of the sentences "'consecutive with any sentence on violation of parole[.]'" *See id*. at 42, 887 A.2d at 626. Afterward, the defendant's parole was revoked, and he was ordered to serve the balance of his original sentence. *See id*. at 42, 887 A.2d at 626.

This Court held that the trial court erred in making the sentence in the second criminal case consecutive to the defendant's term of parole, as that

constituted "a sentence to commence in the future." *Id*. at 59, 887 A.2d at 636. This Court found "persuasive" the statement in *DiPietrantonio*, 61 Md. App. at 532, 487 A.2d at 678, that a trial court

> may make [a] sentence concurrent with[,] or consecutive to[,] whatever other sentence then exists, actually being served. [The trial court] may not, however, presume to bind the future. To do so would be, *ipso facto*, to usurp the sentencing prerogative of some other [trial] judge operating in a near or distant time yet to be.

Stouffer, 390 Md. at 58, 887 A.2d at 636 (brackets omitted). This Court concluded:

> When a parolee is sentenced for a new crime before revocation of parole, a [trial court] may not treat parole as an existing term of confinement and, as such, a new sentence may not be served consecutive to a parole term because a "sentence may not be consecutive with a term of confinement [that] is not then [in existence]."

Id. at 58-59, 887 A.2d at 636 (quoting *DiPietrantonio*, 61 Md. App. at 533, 487 A.2d at 679) (ellipsis omitted).

Resentencing as to Sentences That the Defendant Did Not Challenge

In *Twigg*, 447 Md. at 21, 5, 133 A.3d at 1137, 1128, this Court held that no Maryland law barred resentencing for child abuse on remand where a trial court

erroneously sentenced a defendant for both child abuse and second-degree rape instead of merging the conviction for the latter with the conviction for the former for sentencing purposes, where the defendant had not challenged the sentence for child abuse. This Court noted that, in *Jones v. State*, 414 Md. 686, 690-92, 703, 997 A.2d 131, 133-34, 141 (2010), this Court held that, where the Court of Special Appeals concluded that a trial court erroneously sentenced a defendant for both a greater-inclusive offense and a lesser-included offense, vacated both sentences, and remanded for resentencing on the greater-inclusive offense, the trial court erred in refusing to allow the defendant to argue in mitigation during the resentencing proceeding. *See Twigg*, 447 Md. at 20, 133 A.3d at 1137. In *Twigg*, *id*. at 20-21, 133 A.3d at 1137, this Court observed that, in *Jones*, 414 Md. at 707, 997 A.2d at 143, this Court "expressed no concern that the Court of Special Appeals was without the authority to order a remand for resentencing on the greater[-inclusive] offense"; "[t]o the contrary, we stated that the trial court's 'primary task' on remand was to conduct the 'resentencing of the [defendant]' on the greater[-inclusive] offense." In *Twigg*, 447 Md. at 21, 133 A.3d at 1137, this Court explained: "[The defendant] offers no authority for the proposition that remand for resentencing, as was done in *Jones* and as the Court of Special Appeals did in the present case, is unauthorized by Maryland statute, our rules, or our case law, and we are not aware of any."

This Court directed that, on remand, the trial court could resentence the defendant for child abuse to

any term of imprisonment that would not cause the aggregate sentence to be greater than it originally was. *See Twigg*, 447 Md. at 30, 133 A.3d at 1142-43. Addressing the convictions for third-degree sexual offense and incest – *i.e.*, the convictions that, unlike second-degree rape, were not to be merged with the conviction for child abuse for sentencing purposes – this Court observed that the State did not seek to have the sentences for third-degree sexual offense and incest vacated because the trial court imposed the maximum possible sentences for both crimes. *See id*. at 30 n.14, 133 A.3d at 1143 n.14. This Court explained:

> We do not intend this opinion to be read as precluding, in the appropriate case, vacation of all sentences originally imposed on those convictions and sentences left undisturbed on appeal, so as to provide the court maximum flexibility on remand to fashion a proper sentence that takes into account all of the relevant facts and circumstances.

Id. at 30 n.14, 133 A.3d at 1143 n.14. This Court added that the only caveat was that, generally, the new aggregate sentence could not exceed the original one. *See id*. at 30 n.14, 133 A.3d at 1143 n.14.

Analysis

Here, as a threshold matter, we conclude that Scott preserved for this Court's review his contention that the circuit court erred in not making the new sentence for attempted robbery with a dangerous weapon concurrent with the two existing sentences. The circuit

court sentenced Scott to twenty-five years of imprisonment, without the possibility of parole, for attempted robbery with a dangerous weapon; ten years of imprisonment, with all but five years suspended, followed by five years of supervised probation, consecutive to the sentence for attempted robbery with a dangerous weapon, for use of a handgun in the commission of a crime of violence; and ten years of imprisonment, with all but five years suspended, consecutive to the other two sentences, for conspiracy to commit robbery with a dangerous weapon. The Court of Special Appeals vacated the sentence for attempted robbery with a dangerous weapon and remanded for resentencing. The Court of Special Appeals's mandate stated in pertinent part: "SENTENCE ON COUNT 1 [(ATTEMPTED ROBBERY WITH A DANGEROUS WEAPON)] VACATED AND THE CASE IS REMANDED FOR RESENTENCING."

At the resentencing proceeding, the circuit court observed that the existing sentences for use of a handgun in the commission of a crime of violence and conspiracy to commit robbery with a dangerous weapon were not before it. Nonetheless, Scott's counsel contended that the two existing sentences were consecutive to a sentence that allegedly no longer existed, and requested that the circuit court make the new sentence for attempted robbery with a dangerous weapon concurrent with the two existing sentences. The circuit court responded that it lacked the discretion to do so, and added: "I'll hear from [ ] Scott as to how he feels or

what he wants to say at this point." Scott's counsel responded: "Given the Court's rulings, the fact that the Court is ruling it has essentially no discretion in the sentence it's going to impose, [] Scott has nothing to add." The circuit court reimposed the original sentence for attempted robbery with a dangerous weapon – twenty-five years of imprisonment without the possibility of parole. The circuit court noted that the other two "sentence[s] remain[ed] the same."

In the Court of Special Appeals, Scott contended that the circuit court erred in not making the two existing sentences concurrent with the new sentence for attempted robbery with a dangerous weapon. In finding the issue not to be preserved, the Court of Special Appeals noted that the circuit court expressly "gave [Scott] the opportunity to allocute and present mitigating information[,]" which, through counsel, Scott declined to do. *Scott*, 230 Md. App. at 445, 148 A.3d at 92. Accordingly, the Court of Special Appeals concluded that Scott had waived the argument that the circuit court had violated his right to allocution and to present mitigating evidence. *Id*. at 444-45, 148 A.3d at 92.[9] The

[9] We do not interpret the conclusion of the Court of Special Appeals to suggest that allocution is a proper vehicle for preserving issues for appellate review, which it is not. In other words, a defendant does not waive appellate review of an issue by failing to raise it during allocution, which is simply an opportunity for a defendant "to explain in his [or her] own words the circumstances of the crime as well as his [or her] feelings regarding his [or her] conduct, culpability, and sentencing." *Jones*, 414 Md. at 697, 997 A.2d at 137 (citation and internal quotation marks omitted). Here, in our view, the Court of Special Appeals determined only that Scott had waived the contention that the circuit court refused

Court of Special Appeals also concluded that Scott had failed to preserve for appellate review his contention that the circuit court erred in not making the two existing sentences concurrent with the new sentence for attempted robbery with a dangerous weapon because, in the circuit court, Scott had advanced a different argument – namely, that the circuit court should have imposed the new sentence for attempted robbery with a dangerous weapon concurrently with the two existing sentences. *See Scott*, 230 Md. App. at 445-46, 148 A.3d at 92-93.

Although Scott's argument in the circuit court technically differed from his argument in the Court of Special Appeals, we find this circumstance to be a distinction without a difference. Regardless of which sentence or set of sentences that Scott argued should have been made concurrent with the other – *i.e.*, whether the new sentence for attempted robbery with a dangerous weapon allegedly should have been concurrent with the two existing sentences, or vice-versa – Scott sought to serve the sentence for attempted robbery with a dangerous weapon and the two existing sentences at the same time; *i.e.*, Scott sought concurrent sentences.

In this Court, Scott repeats the contention that he raised in the circuit court – namely, that the circuit

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to consider allocution and mitigating evidence, and not that Scott had forfeited appellate review of the argument concerning concurrent sentences by failing to allocute.

court erred in not making the new sentence for attempted robbery with a dangerous weapon concurrent with the two existing sentences. As such, Scott preserved his contention in this Court for appellate review pursuant to Maryland Rule 8-131(a). In light of the circumstances that Scott's contention in this Court is identical to the one that he raised in the circuit court, and that Scott argued in favor of the same ultimate outcome in the Court of Special Appeals, we conclude that Scott's contention is preserved for this Court's review.

Turning to the merits, we conclude that, where an appellate court vacates a sentence to which another sentence is ordered to be served consecutively and remands for resentencing without vacating the consecutive sentence, the non-vacated consecutive sentence remains consecutive to the newly imposed sentence – *i.e.,* the trial court cannot make the new sentence concurrent with the non-vacated consecutive sentence.

In this case, the Court of Special Appeals vacated the sentence for attempted robbery with a dangerous weapon, and remanded for resentencing without vacating the sentences for use of a handgun in the commission of a crime of violence and conspiracy to commit robbery with a dangerous weapon. Scott did not challenge the validity of the latter two sentences. The Court of Special Appeals vacated only the first sentence – which was an enhanced sentence – due to insufficient evidence of Scott's prior convictions. As discussed above in Part I, the circuit court had the authority to admit additional evidence of Scott's prior

convictions at the resentencing proceeding, and to reimpose the enhanced sentence.

We are not persuaded by Scott's reliance on *Twigg* for the proposition that the circuit court had the authority to vacate the sentences that had not been challenged on appeal. To be sure, under *Twigg*, 447 Md. at 20-21, 133 A.3d at 1137, the Court of Special Appeals had the authority in this case to vacate all four sentences, and remand for resentencing as to all four sentences. However, the Court of Special Appeals did not do so. A critical difference between this case and *Twigg* is that, in the latter, the Court of Special Appeals vacated all of the sentences – including the one that the defendant had not challenged – and remanded with express instructions to resentence the defendant as to all of the sentences. By contrast, here, the Court of Special Appeals vacated only the first sentence, and did not grant the circuit court the authority to resentence Scott as to the other two sentences on remand.[10]

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[10] We are unpersuaded by Scott's contention that *Twigg* vests a trial court with the discretion to resentence as to a sentence that an appellate court did not vacate. *Twigg* did not involve a trial court that resentenced as to a non-vacated sentence. To the contrary, in *Twigg*, 447 Md. at 9, 133 A.3d at 1130, it was the Court of Special Appeals that vacated the sentences and ordered resentencing. Whenever this Court mentioned the trial court's "discretion," this Court was referring to the trial court's discretion to resentence as to a vacated sentence. *See id*. at 5, 19 & n.11, 30, 133 A.3d at 1128, 1136 & n.11, 1142-43. Thus, under *Twigg*, an appellate court, not a trial court, has the discretion to vacate a sentence that the defendant did not challenge.

Without the sentences for use of a handgun in the commission of a crime of violence and conspiracy to commit robbery with a dangerous weapon having been vacated and remanded for resentencing, the circuit court could not resentence Scott as to those two sentences on remand.[11]

Scott raises a red herring in contending that, when the Court of Special Appeals vacated the sentence for attempted robbery with a dangerous weapon, the other two sentences became consecutive to a sentence that no longer existed. In this case, the circuit court did not violate case law prohibiting the imposition of a sentence consecutively to a sentence that does not exist. At the time of the original sentencing proceeding, the circuit court properly imposed sentences consecutively to an existing sentence. The sentences for use of a handgun in the commission of a crime of violence and conspiracy to commit robbery with a dangerous weapon were imposed consecutively to a sentence that existed at the time of their imposition.

Although this Court has held that a trial court may not impose a sentence that is concurrent with, or consecutive to, a sentence that does not exist, *see*

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[11] The circuit court's revisory power over the two sentences was governed by Maryland Rule 4-345 (Sentencing – Revisory Power of Court), but that Rule did not apply here. Maryland Rule 4-345(a) allows a court to correct an inherently illegal sentence, but there was no allegation that the two sentences were inherently illegal. Similarly, Maryland Rule 4-345(b) grants a court "revisory power over a sentence in case of fraud, mistake, or irregularity[,]" but there was no allegation of any such circumstance.

Stouffer, 390 Md. at 59, 887 A.2d at 636, this Court has never held that an appellate court cannot vacate a sentence to which another sentence is consecutive and remand for resentencing with the non-vacated sentence remaining imposed consecutively.[12] Such a rule would prevent an appellate court from vacating only a sentence that was not imposed properly where other sentences were imposed to be consecutive, and would necessarily require that the appellate court vacate all sentences – even the ones that have no defects – and

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[12] *Twigg*, 447 Md. at 30 n.14, 133 A.3d at 1143 n.14, in a footnote, we remarked:

> The State does not seek to have vacated the sentences for incest and third degree sexual offense, for both of which [the defendant] received the maximum sentence. We do not intend this opinion to be read as precluding, in the appropriate case, vacation of all sentences originally imposed on those convictions and sentences left undisturbed on appeal, so as to provide the court maximum flexibility on remand to fashion a proper sentence that takes into account all of the relevant facts and circumstances.

Although the Court of Special Appeals vacated the sentences for child abuse, second-degree rape, third-degree sexual offense, and incest, on review, this Court vacated the sentence only for second-degree rape, and stated that, at the new sentencing hearing, "the sentencing court has the discretion to resentence [the defendant] to a term of active incarceration on the child abuse conviction[,]" the conviction with which the conviction for second-degree rape was to merge for sentencing purposes. *Id*. at 5, 133 A.3d at 1128. Our observation in the footnote in *Twigg* supports the conclusion that a bright-line rule requiring an appellate court to vacate all sentences where only one sentence is found to be deficient is not warranted. It is properly left to the discretion of the appellate court, based on the circumstances of the case, whether to vacate the deficient sentence alone or all sentences imposed.

remand for resentencing. Simply put, *Stouffer* and similar cases do not bar an appellate court from vacating solely a sentence to which a non-vacated sentence was ordered to be consecutive.

For these reasons, the circuit court did not err in declining to make the new sentence for attempted robbery with a dangerous weapon concurrent with the existing sentences for use of a handgun in the commission of a crime of violence and conspiracy to commit robbery with a dangerous weapon.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. PETITIONER TO PAY COSTS.

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2412

September Term, 2014

THEODORE SCOTT

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: October 26, 2016

In this case we must decide whether, when a mandatory enhanced sentence for a third crime of violence is vacated on appeal because the evidence was legally insufficient to support a finding that one of the prior convictions was for a crime of violence, double jeopardy bars the State from introducing new evidence at resentencing on remand to show that the same prior

conviction was for a crime of violence. We hold that it does not. Our holding is at odds with the Court of Appeals decision in *Bowman v. State*, 314 Md. 725 (1989). As we shall explain, the holding in *Bowman* was based solely on an analysis of federal constitutional double jeopardy law that the United States Supreme Court has since rejected.

FACTS AND PROCEEDINGS

A jury in the Circuit Court for Prince George's County convicted Theodore Scott, the appellant, of attempted robbery with a deadly weapon, use of a handgun in the commission of a crime of violence, and conspiracy to commit robbery with a deadly weapon. Scott committed the crimes on December 24, 2011, at a convenience store in Mt. Rainier.

For Scott's attempted armed robbery conviction, the State sought a mandatory minimum sentence of 25 years, without parole, for a third crime of violence, under Md. Code (2002, 2012 Repl. Vol.), section 14-101(d) of the Criminal Law Article ("CL"). The two predicate convictions for crimes of violence were Scott's prior conviction for first degree assault in Maryland[1] and his prior conviction for aggravated assault in the Superior Court for the District of Columbia ("the D.C. conviction"). The D.C. conviction resulted from a guilty plea.

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[1] First degree assault is a crime of violence under Md. Code (2002, 2012 Repl. Vol.), section 14-101(a)(19) of the Criminal Law Article.

Under the D.C. aggravated assault statute, there are two modalities by which that crime may be committed. First, a person commits the crime if "(1) By any means, that person knowingly or purposely causes serious bodily injury to another person[.]" Second, a person commits the crime if "(2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury." D.C. Code 22-404.01(a)(1)-(2). The first modality of aggravated assault is virtually identical to the Maryland crime of first degree assault, which, as noted, is a "crime of violence" under CL section 14-101(a)(19). The second modality is similar to the Maryland crime of reckless endangerment, which is not a "crime of violence" under that statute.

At the sentencing hearing, the State introduced a certified copy of Scott's D.C. conviction. When defense counsel argued that the document was inadequate to prove the modality of the crime, and therefore that it was a crime of violence, the court postponed the sentencing hearing. At the reconvened sentencing hearing, the State introduced the statement of charges in the D.C. case. From that evidence, the sentencing court found that Scott's D.C. conviction was for a crime of violence and that his attempted armed robbery conviction was his third conviction for a crime of violence, under CL section 14-101(d). On that basis, it imposed the mandatory minimum sentence of 25 years' imprisonment, without parole, for attempted armed robbery.

In addition, it sentenced Scott to 10 years, with all but 5 years suspended, for use of a handgun, to be served consecutively to the sentence for attempted armed robbery, and 10 years, all but 5 years suspended, for conspiracy, to be served consecutively to the sentence for use of a handgun.

Scott noted an appeal to this Court in which he argued, among other things, that the State's evidence at sentencing was legally insufficient to prove that his D.C. conviction was for a crime of violence, as defined in CL section 14-101(a), and therefore to establish that his attempted armed robbery conviction was for a third crime of violence. We agreed and vacated the sentence for attempted armed robbery, explaining:

> [T]he transcript of the D.C. plea hearing was not produced at [Scott's] Maryland sentencing hearing. We are unable to tell "whether the statement of facts in support of the guilty plea tracked the Statement of Charges or whether other facts were subsequently developed or ignored for purposes of securing the plea."
>
> * * *
>
> Furthermore, the D.C. indictment alleged, in the alternative, conduct that the State concedes would have amounted to the Maryland crime of reckless endangerment, a crime not included as a "crime of violence" under C.L. § 14-101[a].
>
> In the absence of evidence of a clear judicial admission by [Scott], we are persuaded that the State failed to meet its burden of proving

> the necessary predicates to support imposition of the mandatory sentence on Count 1 [attempted armed robbery] in this case.

Theodore Scott v. State of Maryland, No. 2491, September Term, 2012 (filed September 3, 2014), slip op. at 61. Citing Rule 8-604(d)(2), we remanded the case "for resentencing."

At the resentencing hearing on remand, the State again sought to have Scott sentenced to a mandatory term of 25 years' imprisonment, without parole, for attempted armed robbery, under CL section 14-101(d), based on the same two prior convictions. This time, the State moved into evidence the transcript of the guilty plea hearing that led to Scott's D.C. conviction. Scott objected, arguing that, having failed to introduce legally sufficient evidence to prove that the D.C. conviction was for a crime of violence at the original sentencing, the State was prohibited, by principles of double jeopardy, from introducing evidence to prove the same thing on remand.

The sentencing court overruled Scott's objection and, based on the guilty plea transcript, found that his D.C. conviction was for a crime of violence under CL section 14-101(a) and imposed the mandatory sentence of 25 years' imprisonment, without parole, for attempted armed robbery, under CL section 14-101(d). The court did not resentence Scott on the use of a handgun and conspiracy convictions.

Scott noted this appeal, presenting four questions, which we have rephrased:

I. Did the resentencing court violate his double jeopardy rights by imposing a mandatory twenty-five year sentence for attempted armed robbery, under CL section 14-101(d), based on prior convictions that included the D.C. conviction?

II. Did the resentencing court exceed the scope of its authority under this Court's remand order?

III. Did the resentencing court err by ruling the evidence legally sufficient to prove that the D.C. conviction was for a crime of violence?

IV. Did the resentencing court err by refusing to consider making the sentences for use of a handgun and conspiracy concurrent with the mandatory twenty-five year sentence for attempted armed robbery?

For the following reasons, we shall affirm the judgments.

DISCUSSION

I.

A. Federal Constitutional Law of Double Jeopardy

Because the evidence adduced at his original sentencing hearing was legally insufficient to prove that

his D.C. conviction was for a crime of violence, Scott contends the State was barred by the Double Jeopardy Clause of the Fifth Amendment from introducing new evidence at resentencing to prove that the D.C. conviction was for a crime of violence. He relies primarily on *Bowman v. State*, 314 Md. 725 (1989).

The State responds that double jeopardy principles did not bar it from introducing the new evidence on resentencing because the evidence was being used to prove "sentencing factors," not to prove the elements of an offense. It relies on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and *Monge v. California*, 524 U.S. 721 (1998), and argues that the precedential effect of *Bowman* must be re-evaluated in light of those Supreme Court cases.

The Double Jeopardy Clause guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. That right, applicable to the states through the Fourteenth Amendment, *see Benton v. Maryland*, 395 U.S. 784 (1969), protects criminal defendants from successive prosecution for the same offense and cumulative punishment for the same offense. *Farrell v. State*, 364 Md. 499, 504 (2001); *see also Randall Book Corp. v. State*, 316 Md. 315, 323 (1989) ("The Double Jeopardy Clause of the Fifth Amendment protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction and multiple punishments for the same offense.").

As long ago as *United States v. Ball*, 163 U.S. 662 (1896), the Supreme Court recognized that a defendant who successfully challenges his conviction for an offense on direct appeal can be retried for the same offense, without double jeopardy acting as a bar. *United States v. Tateo*, 377 U.S. 463, 465 (1964) (allowing retrial of an offense after conviction was reversed on collateral attack). In *Ball*, the reversal on appeal was for trial court error. As the Court later explained in *Burks v. United States*, 437 U.S. 1, 14-15 (1978), however, the cases that arose after *Ball* "generally do not distinguish between reversals due to trial error and those resulting from evidentiary insufficiency."

The *Burks* Court was presented with the question whether the Double Jeopardy Clause bars a retrial of a defendant for an offense after his conviction was reversed on appeal not for trial court error but for "the evidence [being] insufficient to sustain the verdict of the jury." *Id.* at 5 (footnote omitted). The defense argued that, for double jeopardy purposes, no rational distinction could be drawn between an acquittal by the trial court for legally insufficient evidence and a reversal by a reviewing court for legally insufficient evidence. In the former situation, a retrial for the offense plainly is prohibited because the defendant was acquitted. In the latter situation, the only trial court error was to have not granted a judgment of acquittal, and therefore a retrial also should be prohibited.

Recognizing that in some of its previous decisions it had permitted a retrial after a reversal for legally insufficient evidence, when the defendant had sought

a new trial as one form of relief, the Court characterized its holdings in those cases as inconsistent and unclear and rejected them, adopting the defense's argument. It gave the following rationale for allowing a retrial after reversal for trial court error:

> [The reversal] does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant had been convicted through a judicial process which is defective in some fundamental respect. . . . When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Burks, 437 U.S. at 15. By contrast, "when a defendant's conviction has been overturned due to a failure of proof at trial . . . the prosecution cannot complain of prejudice for, it has been given one fair opportunity to offer whatever proof it could assemble." *Id.* at 16 (footnote omitted). The Court emphasized that a reversal for legally insufficient evidence "means that the government's case was so lacking that it should not have even been *submitted* to the jury." *Id.* (emphasis in original).

> Since we necessarily afford absolute finality to a jury's *verdict* of acquittal – no matter how erroneous its decision – it is difficult to conceive how society has any greater interest in

> retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Id.

Ten years later, in *Lockhart v. Nelson*, 488 U.S. 33, 40 (1988), the question before the Supreme Court was whether a defendant could be retried after his conviction was reversed for trial court error in admitting evidence without which the evidence would have been legally insufficient to support the conviction. The Court characterized as the "general rule" the settled law that the Double Jeopardy Clause does not bar the retrial of a defendant for an offense after a reversal of a conviction of that offense for trial court error. *Lockhart,* 488 U.S. at 39. The Court explained that the *Burks* holding is an exception to that general rule: "*Burks* was based on the view that an appellate court's reversal for insufficiency of the evidence is in effect a determination that the government's case against the defendant was so lacking that the trial court should have entered a judgment of acquittal[.]" *Id.*

In *Lockhart*, the defendant was convicted of burglary and theft and was given an enhanced sentence under a state habitual criminal statute. That statute required the state to prove, beyond a reasonable doubt, to a trier of fact (in his case a jury), that the defendant had a certain number of prior convictions (in his case, four). The state introduced evidence of four prior convictions and the jury imposed an enhanced sentence. During that proceeding, the defendant testified that he

had been pardoned for one of his prior convictions, but then agreed that his sentence on that conviction merely had been commuted.

In a later habeas corpus proceeding, the defendant introduced evidence that he had in fact been pardoned for the conviction. The district court ruled that the enhanced sentence was invalid and further ruled that the Double Jeopardy Clause barred the government from using another fourth prior conviction to obtain an enhanced sentence.

After an affirmance by the Eighth Circuit Court of Appeals, 828 F.2d 446 (8th Cir. 1987), the Supreme Court took the case and reversed. It held that the *Burks* exception did not apply, because the case involved an error by the trial court in admitting the evidence of a conviction for which, as was later revealed, the defendant was pardoned. As admitted, the evidence was legally sufficient to support the jury's finding of four prior convictions. The Court held that the fact that the evidence would not have been legally sufficient to support the jury's finding if the evidence that should not have been admitted had been excluded did not put the case within the *Burks* exception. Accordingly, a "retrial" on the habitual offender sentencing was permissible under the Double Jeopardy Clause. *Lockhart*, 488 U.S. at 42.

Such was the state of federal double jeopardy law in 1989, when the Court of Appeals decided *Bowman.* There, a jury found the defendant guilty of armed robbery and related crimes. The State sought a mandatory

sentence of 25 years' imprisonment without parole for the armed robbery conviction, as a third crime of violence, under section 643B(c) of Article 27 of the Maryland Code, the predecessor statute to CL section 14-101(d). It relied upon two D.C. convictions for the predicate crimes of violence. The prosecutor and the sentencing judge were under the mistaken belief that the D.C. convictions both were for armed robbery. In fact, one was for armed robbery and the other was for robbery. In D.C., robbery is a statutory offense that can be committed a number of ways, some of which would be a crime of violence within the meaning of CL section 14-101(a) and others of which would not (for example, pickpocketing). Although the prior robbery conviction could have resulted from a modality of perpetration that was a crime of violence, there was no evidence introduced at sentencing to show that it was. The Court of Appeals concluded that the evidence presented at sentencing was legally insufficient to support a finding that the defendant had committed two prior crimes of violence, and therefore the trial court had erred by imposing the mandatory 25 year sentence without parole under section 643(c).

The Court then turned to the issue of resentencing. Reasoning that, for Fifth Amendment Double Jeopardy purposes, there is no distinction between a retrial of an offense and resentencing for a conviction, the Court stated:

> It is apparent that the case at hand does not fall within the holding of [*Lockhart*]. There

> was never evidence *erroneously* admitted legally sufficient to establish the necessary proof that Bowman was a subsequent offender within the contemplation of § 643B. The trial judge simply completely misinterpreted the evidence. Only one qualifying predicate conviction was shown and there was no competent evidence to establish the second. . . . [*T*]*he Burks exception to the general rule* [*as stated in Lockhart*] *is applicable.*

314 Md. at 740 (first emphasis in original). It held that the Double Jeopardy Clause prohibited the State "from attempting to resentence [the defendant] as a subsequent offender either on the basis that the District of Columbia robbery conviction in fact met the definition of a crime of violence under Maryland law or on the basis of another qualifying conviction not offered or admitted at the initial sentencing hearing." *Id.* at 740.[2]

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[2] Before the Court of Appeals decided *Bowman*, this Court on two occasions had held that, under *Burks*, federal double jeopardy principles prohibited the State from attempting to prove, on remand for resentencing, the existence of prior crimes of violence to support an enhanced sentence when the State's evidence in the original sentencing hearing was legally insufficient to support such a finding. In *Butler v. State*, 46 Md. App. 317 (1980), we vacated an enhanced sentence, imposed under section 643B(c), based on two prior convictions for crimes of violence, because one conviction was not final and the other conviction, for robbery in the District of Columbia, may have been for a crime of violence but the evidence at sentencing was insufficient to prove that it was. We held that federal double jeopardy principles protected the defendant from being "subjected to two hearings to determine an[ ] enhanced mandatory sentence under § 643B(c)[.]" *Id.* at 324. *See also Ford v. State*, 73 Md. App. 391 (1988) (relying upon *Butler* to hold that when the State failed to introduce any competent

Scott argues that *Bowman* controls and cannot be distinguished from his case. He maintains that, under *Bowman*, the resentencing court violated his federal double jeopardy rights by sentencing him to a mandatory 25 year sentence without parole for a third crime of violence, based on newly introduced evidence that the D.C. conviction was for a crime of violence, when the evidence at the original sentencing hearing was legally insufficient to prove that the D.C. conviction was for a crime of violence.

The State responds that two Supreme Court cases decided in 1998, after *Bowman*, undercut that decision's foundation. *In Almendarez-Torres*, *supra*, the Supreme Court held that when the fact of a prior conviction is being used for sentence enhancement purposes, it is not an "element of [the] offense" or a separate crime; therefore, its existence need not be decided by a jury and proven beyond a reasonable doubt. 523 U.S. at 244. "To hold that the Constitution requires that recidivism be deemed an 'element' of petitioner's offense would mark an abrupt departure from a longstanding tradition of treating recidivism as 'go[ing] to the punishment only.'" *Id.* (citation omitted). The "prior commission of a serious crime – is as typical a sentencing factor as one might imagine." *Id.* at 230.

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evidence of a prior weapons conviction to support an enhanced sentence for a subsequent weapons conviction, double jeopardy principles precluded the State from introducing evidence on remand to support imposition of the same enhanced sentence).

A few months later, the Supreme Court decided *Monge*, *supra*, which extended its holding in *Almendarez-Torres*, and is especially pertinent here. After the defendant was found guilty of three drug-related felonies, the government sought to have the court impose a statutory enhanced penalty based on his having committed a prior "serious felony." *Monge*, 524 U.S. at 724. The defendant's prior conviction was for assault and, under the enhanced penalty statute, an assault qualified as a "serious felony" "if the defendant either inflicted great bodily injury on another person or personally used a dangerous or deadly weapon during the assault." *Id.* at 724-25.

At the sentencing hearing, the court considered the evidence relevant to whether the defendant's prior assault conviction was for a "serious felony" under the sentence enhancement statute and found that it was. It imposed an enhanced sentence. When the defendant challenged that finding on appeal, the government conceded that it had not introduced legally sufficient evidence to prove that the prior assault conviction was for a "serious felony." The government argued that on remand for resentencing it should have another opportunity to prove that the prior assault conviction was for a "serious felony."

Ultimately, the case reached the Supreme Court on the question of whether the Double Jeopardy Clause barred the government from having a second chance to prove that the prior assault conviction was for a "serious felony." The defendant argued that *Burks* controlled and prohibited the government from doing

so. The government countered that *Burks* did not apply because failure of proof of a sentencing enhancement factor is not tantamount or even comparable to an acquittal. It maintained that only when the evidence of criminal liability *for an offense* was legally insufficient, which should have produced an acquittal, is a retrial prohibited by the Double Jeopardy Clause.

In a 5-to-4 decision, the Supreme Court held that, except in death penalty cases, for which it already had carved out an exception, the Double Jeopardy Clause does not apply to sentencing, and therefore on remand the government could attempt, a second time, to prove that the defendant's prior assault conviction was for a "serious felony."[3] The Court reasoned that because a sentence enhancement is not part of the "offense," a second decision on sentencing does "not place a defendant in jeopardy for an 'offense.'" 524 U.S. at 728 (citations omitted). Nor is a sentence enhancement an "additional punishment for the previous offense; rather," it is an increased punishment "imposed on a persistent offender." *Id.* It is not a "'new jeopardy or additional penalty for the earlier crimes' but . . . 'a

[3] In *Bullington v. Missouri*, 451 U.S. 430 (1981), the Supreme Court held that the Double Jeopardy Clause barred a retrial of the penalty phase of a capital case, when the penalty phase was tried before a jury, in a process identical to a trial on criminal liability. The Court reasoned that in that circumstance, the jury's decision not to impose the death penalty bears the hallmarks of an acquittal. The *Monge* Court maintained that exception.

stiffened penalty for a latest crime[.]" *Id.* (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948)).

Contrasting *Burks*, the Court explained that "[s]entencing decisions favorable to the defendant . . . cannot generally be analogized to an acquittal[,]" as is the case when there is "insufficient evidence of guilt[.]" *Id.* at 729.

> The pronouncement of sentence simply does not "have the qualities of constitutional finality that attend an acquittal." *United States v. DiFrancesco*, 449 U.S. 117, 134, (1980); see also *Bullington*, *supra*, at 438 ("The imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed.").
>
> The Double Jeopardy Clause "does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." *DiFrancesco*, 449 U.S., at 137. Consequently, it is a "well-established part of our constitutional jurisprudence" that the guarantee against double jeopardy neither prevents the prosecution from seeking review of a sentence nor restricts the length of a sentence imposed upon retrial after a defendant's successful appeal. *See id.*, at 135; [*North Carolina v.*] *Pearce*, [395 U.S. 711,] 720 (1969); *see also Stroud v. United States*, 251 U.S. 15, 18 (1919) (despite a harsher sentence on retrial, the defendant was not "placed in second jeopardy within the meaning of the Constitution").

Id. at 729-30.

We return to the case at bar. The question is whether *Bowman* still controls the outcome of the Double Jeopardy Clause issue before us, given that its double jeopardy analysis later was rejected by the Supreme Court in *Monge* (except in death penalty cases).[4] As the State notes, other state appellate courts that once held that federal double jeopardy protections apply to sentencing enhancement proceedings have changed their positions under the authority of *Monge.* For example, in *People v. Porter*, 348 P.3d 922, 928 (Colo. 2015), the Supreme Court of Colorado overruled its holding in *People v. Quintana*, 634 P.2d 413 (Colo. 1981), that double jeopardy principles applied to recidivist sentencing laws, concluding, based on *Monge*, that there was "no sound reason for maintaining" that holding. *Id.* at 927. The court pointed out that recidivist sentencing statutes concern "'a *status rather than a substantive offense.*'" *Id.* at 928 (quoting *People ex rel. Faulk v. District Court*, 673 P.2d 998, 1000 (Colo. 1983) (emphasis in *Porter*)). "Thus, enhancing a penalty based on prior convictions does not put the defendant in jeopardy for an 'offense.'" *Id.* It observed that the recidivist sentencing phase of a trial "does not generate the same concerns that drive protecting a defendant against

[4] Scott asserts that *Almendarez-Torres* and *Monge* are no longer good law because the "writing is on the wall" that they will someday be overruled. He makes this prognostication based on *Apprendi v. New Jersey*, 530 U.S. 466, 521 (2000). Quite apart from the fact that we must take Supreme Court law as it is, not as it might become, we note that the *Apprendi* Court acknowledged the continued validity of *Monge* and *Almendarez-Torres* as applied to subsequent offender sentencing statutes. 530 U.S. at 488 n. 14.

double jeopardy at the substantive trial." *Id.* Furthermore, "when the prosecution fails to proffer evidence of prior convictions in a sentencing proceeding, the analogy to an acquittal is 'inapt.' . . . The pronouncement of sentence simply does not have the qualities of a constitutional finality that attend an acquittal." *Id.* (quoting *Monge*, 524 U.S. at 729).[5]

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[5] *See also Jaramillo v. State*, 823 N.E.2d 1187, 1188-90 (Ind. 2005) (overruling, based on *Monge, Bell v. State*, 622 N.E.2d 450, 456 (Ind. 1993), and other prior cases holding that double jeopardy bars retrial of habitual offender sentencing enhancements); *State v. Nelson*, 262 Neb. 896, 905 (2001) (holding, based on "the rationale of *Monge,"* that double jeopardy principles do not apply to habitual criminal sentencing enhancement proceedings, overruling *State v. Gray*, 8 Neb. App. 973 (2000) (which had relied upon *Bowman*)); *State v. Eggleston*, 164 Wn.2d 61 (2008) (holding that, under *Monge*, double jeopardy does not prevent retrial of an aggravating factor for sentencing purposes), implicitly overruling *State v. Hennings*, 100 Wn.2d 379 (1983)); *Bell v. State*, 994 S.W.2d 173 (Tex. Crim. App. 1999) (overruling *Carter v. State*, 676 S.W.2d 353 (Tex. Crim. App. 1984), based on *Monge*). In addition, appellate courts addressing for the first time whether resentencing is governed by double jeopardy principles have held that it is not. *See State v. Collins*, 985 So.2d 985, 993 (Fla. 2008) (holding, based on *Monge*, that Florida's "Double Jeopardy Clause does not preclude granting the State a second opportunity to demonstrate that [the defendant] meets the criteria for habitualization"); *State v. McLellan*, 149 N.H. 237, 243 (2003) ("While we recognize that we have found New Hampshire's Double Jeopardy Clause to provide greater protection than its federal counterpart in certain circumstances . . . we are not persuaded that we should interpret the State Constitution differently than the Federal Constitution in this context.") (citation omitted); *Commonwealth v. Wilson*, 594 Pa. 106, 116 n.6 (2007) (holding that double jeopardy protections did not prevent the State from presenting evidence of youth/school sentencing enhancement when the original sentence was overturned on appeal).

The holding in *Monge*, that the *Burks* exception does not bar the government from proving a sentencing enhancement on resentencing when its proof of the same sentencing enhancement in the original sentencing was not supported by legally sufficient evidence, is inconsistent with the holding in *Bowman.* On federal constitutional issues, we are bound by United States Supreme Court precedent. U.S.C.A. Const. Art. VI, cl. 2; *Baker, Whitfield & Wilson v. State*, 15 Md. App. 73, 77-78 (1973) (citing *Wilson v. Turpin*, 5 Gill 56 (1847); *Howell v. State*, 3 Gill 14 (1845)). In the past, we have departed from a decision of the Court of Appeals when it was based on Supreme Court federal constitutional precedent that had been supplanted by more recent Supreme Court precedent to the contrary, when we expected that the Court of Appeals, if presented with an indistinguishable scenario, would do the same. For example, in *Morgan v. State*, 79 Md. App. 699, 703 (1989), we declined to follow *Allen v. State*, 183 Md. 603 (1944), in which the Court of Appeals held that a court order requiring the defendant to don a hat found near the crime scene in front of the jury amounted to compelled self-incrimination. We did so because in the intervening years the Supreme Court had decided *Schmerber v. California*, 384 U.S. 757 (1966), holding that an accused's compelled submission to a blood alcohol test did not violate his privilege against compelled self-incrimination, and *Allen* and *Schmerber* could not be reconciled.

In light of the Supreme Court's express rejection in *Monge* of the application of the *Burks* exception to

resentencing under the Fifth Amendment Double Jeopardy Clause, in particular for sentencing enhancement findings, we conclude that in a case such as this, which presents a scenario that is not substantively distinguishable from *Bowman*, the Court of Appeals would depart from its resentencing holding in *Bowman* and follow *Monge.* Accordingly, federal double jeopardy principles did not bar the State from presenting new evidence, at resentencing, to prove that Scott's D.C. conviction was for a crime of violence, within the meaning of CL section 14-101(a)(19), and therefore was a proper predicate for the mandatory enhanced sentence under CL section 14-101(d).

B. Maryland Common Law of Double Jeopardy

Although there is no guarantee against double jeopardy in the Maryland Constitution or Declaration of Rights, "Maryland common law provides well-established protections for individuals against being twice put in jeopardy." *State v. Long*, 405 Md. 527, 536 (2008) (citing *Taylor v. State*, 381 Md. 602, 610 (2004)).

Before the Supreme Court's 1969 decision in *Benton v. Maryland*, double jeopardy applied to Maryland prosecutions "only as a common law principle." *Cornish v. State*, 272 Md. 312, 316 n. 2 (1974). *Bowman* was decided on federal constitutional double jeopardy grounds alone; the opinion makes no reference to the Maryland common law of double jeopardy. Our examination of the common law of double jeopardy leads us to conclude that it also did not preclude the State from

attempting to prove a second time, on resentencing on remand, that Scott's D.C. conviction was for a crime of violence, for purposes of sentence enhancement under CL section 14-101(a) and (d).

"Under the Maryland common law of double jeopardy, a defendant cannot be 'put in jeopardy again for the same offense – in jeopardy of being convicted of a crime for which he had been acquitted; in jeopardy of being twice convicted and punished for the same crime.'" *State v. Griffiths*, 338 Md. 485, 489 (1995) (quoting *Gianiny v. State*, 320 Md. 337, 347 (1990)). These principles derive from the English common law "pleas of former jeopardy (*autrefois acquit, autrefois convict*, and *pardon*)" that protect a defendant from being retried for an offense when he previously was acquitted, convicted, or pardoned for the same offense. *Ward v. State*, 290 Md. 76, 85 (1981) (emphasis in *Ward*). With some exceptions, the Maryland common law of double jeopardy also precludes multiple sentences for the same offense. *Middleton v. State*, 318 Md. 749, 757 (1990) (additional citations omitted).

The plea in bar of *autrefois convict* (already convicted), which "generally means that 'where there had been a final [judgment] . . . of . . . conviction, . . . the defendant could not be a second time placed in jeopardy for the particular offense[,]" *Middleton*, *supra*, at 756-57 (quoting *Hoffman v. State*, 20 Md. 425, 434 (1863)) (alterations in *Middleton*), is not relevant to the resentencing issue before us because resentencing did not expose Scott to the risk of being convicted twice for the offense of attempted armed robbery. Nor would the

double jeopardy principle against multiple punishments for the same offense apply, as Scott's sentence for attempted armed robbery was vacated in the first appeal and on remand he simply was being resentenced for the same conviction. The only possibly relevant common law double jeopardy principle is *autrefois acquit*.

The plea in bar of *autrefois acquit* (already acquitted) protects a defendant who has been acquitted of an offense from being retried for the same offense. *Copsey v. State*, 67 Md. App. 223, 225-26 (1986) (stating that the plea of former acquittal is designed to prevent a defendant "who has once survived his initial jeopardy from being 'twice vexed' by a fresh exposure to the hazard of conviction for that same offense"). More than a century ago, the Court of Appeals explained:

> It has always been a settled rule of the common law that after an acquittal of a party upon a regular trial on an indictment for either a felony or a misdemeanor, the verdict of acquittal can never afterward, on the application of the prosecutor, in any form of proceeding, be set aside[.]

State v. Shields, 49 Md. 301, 303 (1878).

As discussed, the *Bowman* decision was based on a parity of reasoning to *Burks:* Just as a failure of evidence necessary to prove an offense is tantamount to an acquittal, and therefore bars a retrial upon reversal, a failure of evidence to prove a prior conviction for a crime of violence, in order to support a mandatory

enhanced sentence, is tantamount to an acquittal of that enhanced sentence, and therefore bars resentencing based on the same (or even an additional new) prior conviction. The Supreme Court rejected that analogy in *Monge.* The question is whether the common law principle of *autrefois acquit* supports it. It does not.

The Court of Appeals has recognized that a ruling by a trial court that is not an outright acquittal can be the functional equivalent of an acquittal under *autrefois acquit.* In *State v. Taylor*, 371 Md. 617 (2002), the Court held in two consolidated cases that erroneous trial court rulings were tantamount to acquittals. The defendant in *Taylor* filed a motion to dismiss the information charging him with a statutory crime, and in granting the motion, the trial court ruled that the conduct alleged in the information was not prohibited by the statute. The State noted an appeal. In *Bledsoe v. State*, after the charges against the defendant were dismissed by the District Court, the State appealed to the circuit court, which reinstated the charges and remanded the case to the District Court for trial. The defendant appealed.

The Court of Appeals held that the trial courts in both cases erred by granting the motions to dismiss, but the rulings "were the equivalent of granting acquittals," under the common law principle of *autrefois acquit*, and therefore had to "be treated as such for jeopardy purposes." 371 Md. at 654. It dismissed the appeal in *Taylor* because *autrefois acquit* barred the

State from appealing from an acquittal, or its equivalent; and it reversed the judgment in *Bledsoe*, because *autrefois acquit* barred the State from prosecuting the defendant when he had been granted the equivalent of an acquittal.

A few years later, in *Giddins v. State*, 393 Md. 1 (2006), the Court once again was faced with a disposition by the trial court that the defendant contended was tantamount to an acquittal. The defendant was charged with two counts of possession of controlled dangerous substances with intent to distribute. The drugs were found in his residence. After the trial court ruled that the officers who had obtained the search warrant for the defendant's residence could not testify about the evidence on which they had based their warrant application, the prosecutor asked one of them to identify the "target of that investigation." 393 Md. at 11. The defense moved for a mistrial. The judge granted the motion, explaining that he was doing so because by asking that question the prosecutor was bringing to the fore all the evidence in the search warrant application, none of which would be admissible.[6]

When the State sought to retry the defendant, he moved to dismiss. Raising the common law plea in bar of *autrefois acquit*, he argued that the trial judge's remarks in granting the mistrial were a rejection of

[6] The defense maintained that the prosecution had engaged in misconduct by asking the question in order to goad the defense into moving for a mistrial. A hearing before another judge was held on the issue of prosecutorial misconduct, and that judge found that the prosecutor had not engaged in misconduct.

critical evidence against him and therefore amounted to an acquittal. The court denied the motion, and the defendant noted an immediate appeal. Eventually, the case came before the Court of Appeals.

The Court observed that "[i]n determining whether the defendant can successfully plead autrefois acquit, the essential inquiry is whether there has been a ruling on the evidence[.]" *Id.*, at 20. Using the consolidated cases in *State v. Taylor* as examples, it explained that "where the trial judge has taken action based upon the evidence, that action, despite its characterization, constitutes an acquittal for double jeopardy purposes." *Id.* at 22. The Court held that the trial judge's comments about the evidence underlying the search warrant were not a substantive ruling on the evidence, however. They were observations about the admissibility, or more precisely, the inadmissibility, of that evidence. Accordingly, the mistrial motion ruling was not the functional equivalent of an acquittal, and a second prosecution for the same offense was not barred by *autrefois acquit*.

The rulings in question in *State v. Taylor* and *Giddins* all concerned criminal liability for the offenses the defendants were being tried for – not sentence impositions. That is the context in which the Court analyzed whether a ruling that is not expressly an acquittal may be equivalent to one. This is not surprising because, as noted, the plea in bar of *autrefois acquit* applies to a *verdict* of acquittal, or the equivalent of a *verdict* of acquittal, *i.e.*, an acquittal *of the offense* for which the defendant is on trial. *See Pugh v. State*, 271 Md. 701, 705

(1974) (observing with respect to the common law principle of *autrefois acquit,* "nom the earliest days, it has been clear that *once a verdict of not guilty* has been rendered at the conclusion of a criminal trial, that verdict is final and cannot be set aside.") (emphasis added)).

The common law plea of *autrefois acquit* is designed to protect a defendant against criminal liability for the "same offense" for which he was acquitted, a protection later incorporated in the Fifth Amendment Double Jeopardy Clause. Indeed, the Fifth Amendment double jeopardy protections embody several common law pleas, including *autrefois convict* and *autrefois acquit*. *See Ex Parte Lange*, 85 U.S. 163, 168-69 (1873); *Hoffman v. State*, 20 Md. 425, 432 (1863) ("[A]lthough handed down by common law for centuries . . . it was thought proper to embody it in the Constitutions of several of the States, and engraft [double jeopardy], by way of amendment, on that of the United States.").

Although the Maryland common law of double jeopardy is not coextensive with the Fifth Amendment Double Jeopardy Clause in every way,[7] the Maryland appellate courts never have interpreted *autrefois acquit* to extend beyond an acquittal of an offense (or a functional equivalent of an acquittal of an offense) to

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[7] *See e.g.*, *Fields v. State*, 96 Md. App. 722, 728-729 (1993), explaining that under common law double jeopardy principles, as followed in Maryland, jeopardy does not attach until the verdict is rendered; but the Supreme Court, in interpreting the Double Jeopardy Clause, has altered the time of attachment to when the jurors are sworn.

the sentencing for a conviction of an offense. For the same reason the *Monge* Court held that, under the Fifth Amendment Double Jeopardy Clause, a failure of proof on sentencing is not an "acquittal" of the sentence imposed or any greater sentence, a failure of proof on sentencing is also not an acquittal (or the functional equivalent of an acquittal) of the sentence that was imposed or any greater sentence under the principle of *autrefois acquit*. One of the bases for *Monge* was *North Carolina v. Pearce*, 395 U.S. 711 (1969), in which the Supreme Court explained:

> [T]he guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction. . . . [A] corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction.

395 U.S. at 719-720 (footnote omitted).[8] *See also Stroud v. United States*, 251 U.S. 15 (1919) (upholding against

[8] In *Pearce*, and as later refined in *Texas v. McCullough*, 475 U.S. 134 (1986), and *Alabama v. Smith*, 490 U.S. 794 (1989), the Supreme Court held that when a defendant's trial conviction is reversed and he is retried and found guilty of the same offense, it is a violation of his due process right for the court to impose *for a vindictive purpose* a greater sentence than originally was imposed. "[V]indictiveness is not to be presumed from the imposition of a more severe sentence on remand following the defendant's successful appeal." *Twigg v. State*, 447 Md. 1, 23 (2016).

a double jeopardy challenge the defendant's death sentence for murder on retrial after his original murder conviction, for which he had been sentenced to life in prison, was reversed on appeal). The principle of *autrefois acquit* in the common law and as incorporated in the Fifth Amendment does not effectively "acquit" the defendant of a greater sentence on resentencing.[9]

On resentencing on remand, the State was not barred by the Maryland common law of double jeopardy from presenting additional information to prove that Scott's D.C. conviction was for a crime of violence, in an effort to have the court impose the mandatory enhanced sentence under CL section 14-101(d).

C. Collateral Estoppel Form of Double Jeopardy

Scott also argues that the collateral estoppel form of double jeopardy, first recognized by the United States Supreme Court in *Ashe v. Swenson*, 397 U.S.

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[9] In Maryland, what remains of the *Pearce* doctrine is codified at Maryland Code (1974, 2013 Repl. Vol.), § 12-702(b) of the Courts and Judicial Proceedings Article. *Twigg*, 447 Md. at 23. That statute provides that "[i]f an appellate court remands a criminal case to a lower court in order that the lower court may pronounce the proper judgment or sentence . . . the lower court may impose any sentence authorized by law to be imposed for the offense." It may not impose a more serious sentence than originally imposed unless "(1) The reasons for the increased sentence affirmatively appear; (2) The reasons are based upon additional objective information concerning identifiable conduct on the part of the defendant; and (3) The factual data upon which the increased sentence is based appears as part of the record."

436, 445 (1970), barred the State from relitigating the issue whether his D.C. conviction was for a crime of violence.[10] The State responds that the collateral estoppel form of double jeopardy does not apply here.

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. "If the fact previously litigated is a key component in later offenses, then a subsequent finding in favor of the defendant in the first trial naturally will compel an acquittal in the latter trial." *Long*, 405 Md. at 539.

In *Ashe*, six men playing poker in one room were robbed by several masked men. Soon thereafter, four armed men, including Ashe, were arrested and charged. Ashe was tried in a Missouri state court for the armed robbery of one of the poker players. The testimony of the state's witnesses was extremely weak on criminal agency, and the jury acquitted him. The state then convened a new jury and tried Ashe for the armed robbery of one of the other poker players. At that trial, the same state's witnesses gave stronger testimony on criminal agency, and Ashe was convicted.

The case came before the Supreme Court on the denial of a petition for writ of habeas corpus. The Court reversed. It held that the doctrine of collateral estoppel

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[10] The Court of Appeals has recognized the collateral estoppel form of double jeopardy as part of the Maryland common law of double jeopardy. *Long*, 405 Md. at 538.

as recognized in federal criminal law "is embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe*, 397 U.S. at 445. "Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that [Ashe] was one of the robbers, the State could not present the same or different identification evidence in a second prosecution for the robbery of either the same victim *or* any of the other five victims." *Id.* at 446. "For the name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the petitioner was one of the robbers." *Id.*

Scott does not cite any case holding that the collateral estoppel form of double jeopardy would apply to resentencing, and he acknowledges that the one case he cites does not support his position. In *Simms v. State*, 83 Md. App. 204 (1990), the trial court sentenced the defendant to a mandatory term of life in prison without parole for daytime housebreaking, under section 643B(b) of former Article 27, based on his having committed three prior crimes of violence, including a 1970 conviction. In another case against the defendant that was tried shortly before his trial in the case on appeal, he was found guilty in another county of another offense. The sentencing judge in that case ruled that the State's evidence about the 1970 conviction was insufficient to support a finding that it was for a crime of violence, for purposes of statutory sentence enhancement.

On appeal, the defendant argued that the collateral estoppel form of double jeopardy precluded the

sentencing judge from finding that the 1970 conviction was for a crime of violence because that issue had been finally decided to the contrary in the prior case. We disagreed, stating that "the *issue* of the sufficiency of the State's evidence of a predicate offense in support of enhanced punishment" was not, as the defendant was arguing, a "valid and final judgment[.]" *Id.* at 213-14 (emphasis in original). We noted that the defendant's position was inconsistent with the Court of Appeals holding in *State v. Tichnell*, 306 Md. 428 (1986), that the sentencing jury in a capital case was not collaterally estopped to find fewer mitigating circumstances than those found by a previous sentencing jury in the same case. *See also Johnson v. State*, 303 Md. 487, 519-22 (1985) (same). It also was inconsistent with the Supreme Court's holding in *Poland v. Arizona*, 476 U.S. 147 (1986), that the trial judge's rejection of a particular aggravating circumstance in a death penalty case did not amount to a death penalty "acquittal" for purposes of double jeopardy.

The collateral estoppel form of double jeopardy has no application here. First, it is clear from the holding in *Ashe* that collateral estoppel applies when there has been a factual finding favorable to the defendant that is central to his criminal liability for an offense. The doctrine has never been extended to apply to sentencing. Second, even if it applied to sentencing, the original sentencing court in this case found on the evidence submitted that the D.C. conviction was for a crime of violence, and on appeal this Court found that

the evidence before the sentencing court was not sufficient to support that finding. There was no "final adjudication" by a court that, *as a matter of fact*, the D.C. conviction was *not* for a crime of violence. The collateral estoppel form of double jeopardy did not prohibit the State from proving Scott's prior conviction at resentencing.

II.

Court's Authority on Remand

Scott contends the resentencing court exceeded the scope of its authority on remand, in violation of Rule 8-604(d)(2) and our opinion and mandate in his prior appeal, by considering the guilty plea transcript of his D.C. conviction.

Rule 8-604(d)(2) provides that, "[i]n a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing." Scott argues that *Southern v. State*, 371 Md. 93 (2002), supports the proposition that this rule does not permit a remand for the purpose of introducing new evidence at resentencing. *Southern* is inapposite. It did not concern resentencing under Rule 8-604(d)(2), and indeed did not concern sentencing at all. Rather, the issue there was whether, when the State failed to meet its burden to prove that the initial stop of the defendant was constitutional, but the trial court denied the defendant's motion to suppress evidence obtained by virtue of the stop, this Court could dispose of the defendant's appeal

by a limited remand, under Rule 8-604(d)(1), for a new suppression hearing at which the State could introduce additional evidence that the stop was constitutional.

The Court of Appeals held that we could not. The limited remand rule "does not afford parties who fail to meet their burdens on issues raised in a completed suppression hearing an opportunity to reopen the suppression proceeding for the taking of additional evidence after the appellate court has held the party has failed to meet its evidentiary burden." *Southern*, 371 Md. at 105. This holding has no effect upon an appellate court's authority to remand a criminal case for resentencing, under Rule 8-604(d)(2).

In our opinion in Scott's first appeal, we stated:

> In the absence of evidence of a clear judicial admission by [Scott], we are persuaded that the State failed to meet its burden of proving the necessary predicates to support imposition of the mandatory sentence on Count 1 in this case. Accordingly, we shall vacate the sentence on Count 1 and remand this case for resentencing. See Md. Rule 8-604(d)(2). . . .

Scott, slip op. at 61. The mandate read:

> SENTENCE ON COUNT 1 VACATED AND THE CASE IS REMANDED FOR RESENTENCING. ALL JUDGMENTS OTHERWISE AFFIRMED.

Scott argues that our opinion and mandate did not permit the State to introduce additional evidence at resentencing because we would have said so if that was our intention and because, under *Temoney v. State*, 290 Md. 251, 260 (1981), unless an appellate court's mandate expressly permits additional evidence to be taken on remand, that is prohibited.

The absence of any statement in our opinion as to whether new evidence could be introduced on resentencing does not suggest that we were prohibiting any such evidence. Moreover, *Temoney* is inapposite. There, the sentencing court refused to decide whether evidence of prior convictions supported the imposition of a mandatory sentence. The Court of Appeals upheld the sentence imposed, even though the sentencing judge should have considered the evidence before it, because, by the sentencing court's own analysis, the evidence was not legally sufficient to support imposition of the mandatory sentence. The Court did not decide whether, under *Burks*, additional evidence could be introduced on resentencing (the issue later decided in *Bowman)*, because the State did not propose to introduce additional evidence on resentencing.

Here, the issue of the introduction of new evidence at resentencing is squarely before this Court. As we already have held, the introduction of new evidence does not violate double jeopardy protections.

III.

Sufficiency of the Evidence that the D.C. Conviction was for a Crime of Violence

Scott contends the evidence at resentencing on remand was legally insufficient to prove that his prior D.C. conviction for aggravated assault was for a crime of violence, under CL section 14-101(a).

The transcript of the guilty plea hearing in D.C. Superior Court on the offense of aggravated assault shows that the government proffered that Scott and two other men (Calvin Mason and Jeffrey Mason) got into a dispute with the victim over a North Face jacket. They surrounded the victim and the following events took place:

> At this point the [victim] retreated to a wall, and was covering his face in order to avoid being hit in the face and body by [Scott] and Calvin Mason. [Scott] and Calvin Mason continued to hit the [victim] until the [victim] fell to the ground, at which point Jeffrey Mason told [Calvin] Mason to stomp on the [victim].
>
> Calvin Mason and [Scott] then began to stomp on the [victim's] face and body while [Scott] was wearing boots.
>
> [A]t approximately this point the [victim] lost consciousness and began to suffer bruising, subdural bleeding and a fracture of the left orbital bone, the bone surrounding the eye.

At the conclusion of this proffer, the judge asked Scott, "So, . . . that's the evidence the Government had in

your case. Do you agree or disagree, sir?" Scott replied, "I agree."

At the resentencing hearing on remand, the court observed that "[s]tomping somebody around the face and the eye with boots on while he's on the ground obviously is an intent, obviously expresses an intent to cause serious bodily harm. I mean that's the whole purpose of doing it." The court found that the facts proffered by the government and accepted by Scott in support of the aggravated assault guilty plea would support a conviction for first degree assault, under CL section 3-202, and therefore the aggravated assault was a crime of violence under CL section 14-101(a)(19).

Scott argues that because he did not admit at the plea hearing that he had the intent to cause serious physical injury, the evidence was insufficient to establish the elements of the offense of first degree assault. He relies on *Bowman*. There, despite efforts by the prosecutor on cross-examination, Bowman refused to admit that he had committed robbery with a deadly weapon, which would have qualified the D.C. robbery offense as a crime of violence under the Maryland predecessor statute to CL section 14-101.

The State points out that here, in contrast to *Bowman*, Scott agreed to facts proffered by the government that would constitute a crime of violence under CL section 14101(a)(19). It maintains that Scott's agreement, without reservation, to these facts was sufficient for the sentencing court to infer that he had an intent to cause serious physical injury.

A factfinder "may infer the necessary intent from an individual's conduct and the surrounding circumstances[.]" *Chilcoat v. State*, 155 Md. App. 394, 403 (2004). *See also In re Lavar D.*, 189 Md. App. 526, 590 (2009) (holding that the court, as the factfinder, was permitted to draw the inference that a group of juveniles intended to inflict serious physical injury by repeatedly hitting, punching, and kicking the victim). As such, the facts underlying Scott's D.C. conviction for aggravated assault, as agreed to by Scott, offered sufficient evidence to establish that that conviction was for a "crime of violence" under CL section 14-101(a)(19), so as to trigger the mandatory enhanced sentencing provision of CL section 14-101(d).

IV.

Resentencing on Counts 5 and 7

As noted above, at the original sentencing the court imposed a 10 year sentence, with all but 5 years suspended, for use of a handgun (Count 5), to be served consecutively to the 25 years without parole sentence for attempted armed robbery (Count 1); and a 10 year sentence, with all but 5 years suspended, for conspiracy (Count 7), to be served consecutively to the sentence for Count 5 and Count 1. This Court vacated the sentence for attempted armed robbery (Count 1). We otherwise affirmed the judgments, *i.e.*, the convictions and sentences on Counts 5 and 7.

At the resentencing hearing on remand, counsel for the parties argued as follows regarding the sentences for Counts 5 and 7:

> [PROSECUTOR]: Your Honor, just before you hear from the defendant, Counts 5 and 7 can't – those aren't here for re-sentencing, so those cannot be changed. I think that the only thing that you can sentence on is the 25 mandatory without parole [Count 1].
>
> The reason I brought the Count 5 up was because that was, in fact, consecutive. We're not here to change that sentence. I just wanted to make sure that was on the record because those two counts – those two sentences that the Court issued remain the same, so the only thing that we're here for is Count 1.
>
> [DEFENSE COUNSEL]: The Court is here sentencing – *the Court can make Count 1 consecutive or concurrent to the already existing sentences.*
>
> [PROSECUTOR]: But those sentences, Count 5 actually says –
>
> [THE COURT]: The problem is, is that I didn't make Count 1 consecutive to the other sentences. I made the gun charge [Count 5] consecutive. And so if I did have the discretion to make this concurrent, that would change, in effect, the sentence on the other counts, which are not before the Court.
>
> [DEFENSE COUNSEL]: At the moment they're consecutive to a sentence that doesn't

> exist. *So the Court does have the power to make Count 1, which you're sentencing on, concurrent to all other sentences which already exist in this case, and that's what we ask the Court to do.*
>
> [THE COURT]: All right. Well, I disagree with you, [defense counsel], but I'll hear from [Scott] as to how he feels or what he wants to say at this point.
>
> [DEFENSE COUNSEL]: Given the Court's rulings, the fact that the Court is ruling it has essentially no discretion in the sentence it's going to impose, [Scott] has nothing to add.
>
> [THE COURT]: All right. Very well.

(Emphasis added.) The court imposed the mandatory 25 years without parole sentence on Count 1. The consecutive sentences on Counts 5 and 7 remained.

Scott's final contention is that, on resentencing, the court erred by "refus[ing] to consider making the sentences under Counts 5 and 7 run concurrently with the mandatory sentence under Count 1" and that its doing so "was effectively a refusal to consider [his] allocution and evidence in mitigation." He relies upon Rule 4-342(f), which states that "[b]efore imposing sentence, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment[,]" and *Jones v. State*, 414 Md. 686 (2010), which holds that a defendant has a right of allocution at resentencing. He also maintains that *Bowman*

supports his position that the resentencing judge had discretion to revise the sentences on Counts 5 and 7.

The State responds that we should not address Scott's allocution argument because he waived allocution, and we should not address his argument that the court should have exercised discretion to make the sentences for Counts 5 and 7 concurrent with the sentence for Count 1 because it is not preserved, as it is not the argument he made below. Alternatively, the State argues that the resentencing court did not have the authority to make the sentences on Counts 5 and 7 concurrent with the reimposed sentence on Count 1.

In his reply brief, Scott asserts that the recent decision in *Twigg v. State*, 447 Md. 1 (2016), supports his position.

We find merit in the State's waiver and preservation arguments. The record discloses that the resentencing judge expressly recognized that Scott had the right to allocution and gave him the opportunity to allocute and present mitigating information. Through counsel, Scott declined, thereby waiving any right to complain on appeal that the court violated Rule 4-342(f).

The record also discloses that the argument Scott made below about the sentences on Counts 5 and 7 is not the argument he is advancing on appeal. At resentencing, Scott's counsel asked the judge to make the sentence it was imposing on Count 1, *i.e.*, the mandatory 25 years' imprisonment without parole, concurrent with the sentences previously imposed on Counts

5 and 7. The judge declined to do so on the ground that the effect would be to alter the sentences on Counts 5 and 7, which had been imposed consecutive to Count 1 (for Count 5) and consecutive to Count 5 (for Count 7). The judge was of the view that because this Court had not vacated the sentences on Counts 5 and 7, he could not alter them. Defense counsel argued that doing so would not alter those sentences because the sentence on Count 1 no longer existed, having been vacated on appeal, and therefore there was no sentence for the sentences on Counts 5 and 7 to run consecutively to.[11]

On appeal, Scott mischaracterizes his request of the resentencing judge, stating that he asked him to reconsider the sentences on Counts 5 and 7 to make *them* run concurrently with the newly imposed sentence on Count 1, but the judge refused. That plainly is not what happened below.

Even if the issue whether the resentencing court had the authority to reconsider the sentences imposed on Counts 5 and 7 to make them run concurrently with the newly imposed sentence on Count 1 were properly preserved, we would not find merit in it. The cases Scott relies upon – *Jones, Bowman*, and *Twigg* – are inapposite.

In *Jones*, the defendant was convicted of first degree assault and robbery with a deadly weapon. This Court vacated both sentences on the ground that the

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[11] This could not be accurate as to Count 7, which was imposed to run consecutively to the sentence on Count 5.

convictions should have merged for sentencing, and remanded for resentencing. The trial court did not allow the defendant to allocute and present mitigating evidence on resentencing. The case reached the Court of Appeals, which held that on resentencing the defendant had a right to allocution and present mitigating evidence. *Jones* did not concern a situation in which the defendant was seeking to have sentences that had not been vacated reconsidered.

In *Bowman*, after holding that the mandatory 25 year sentence without parole was not supported by sufficient evidence and the State could not offer otherwise sufficient evidence on resentencing, the Court of Appeals vacated that sentence *and* two sentences that had been imposed to run consecutively to it and directed that on remand there be resentencing on all those convictions. In the case at bar, this Court did not vacate the sentences on Counts 5 and 7. We only vacated the sentence on Count 1 and remanded for resentencing on that count alone.

Finally, *Twigg* does not lend support to Scott's contention. In that case, the defendant was convicted of child sexual abuse and three sex offenses (second degree rape, third degree sexual offense, and incest), "any one of [which] could have provided the basis for the child abuse conviction." *Twigg*, 447 Md. at 5. The trial court sentenced him to consecutive terms of 20 years for second degree rape, 10 years for third degree sexual offense, and 10 years for incest. It imposed a 15 year sentence for child sexual abuse and suspended all of it in favor of 5 years' probation.

On appeal to this Court, the defendant maintained that, under *Blockburger v. United States*, 284 U.S. 299 (1932), he was entitled to have the convictions "and/or" sentences for the three sexual offenses vacated because they were lesser included offenses of the crime of child sexual abuse. *Twigg v. State*, 219 Md. App. 259, 266 (2014). We held that the three sex offense convictions had to be vacated, and we also vacated the sentence for the child sexual abuse and remanded for resentencing on that conviction.

The Court of Appeals took the case on *certiorari.* It held that only one sexual offense conviction would be the necessary predicate for the child sexual abuse conviction, and because the verdict did not specify which one, it would be the one carrying the greatest sentence. It further held that resentencing on the child sexual abuse conviction would not violate the Double Jeopardy Clause because "'the pronouncement of sentence has never carried the finality that attaches to an acquittal,'" *Twigg*, 447 Md. at 21 (quoting *United States v. DiFrancesco*, 449 U.S. 117, 133 (1980)); "resentencing following an appeal does not subject the defendant to 'multiple' sentences," *id.* (quoting *DiFrancesco*, 449 U.S. at 138-39); and the Supreme Court in *Pearce* made plain that the Double Jeopardy Clause "does not bar the imposition of a longer sentence after a retrial and reconviction than was imposed in the original vacated proceeding." *Id.*

The Court further rejected the defendant's argument that allowing the trial court to resentence him to a potentially greater sentence for the child sexual

abuse conviction on remand would violate his due process rights. Its analysis focused on CJP section 12702(b), *see footnote 9*, *supra*, in particular the provision that on remand, the court "may not impose a sentence more severe than the sentence previously imposed for the offense[.]" *Id.* at 23. The Court concluded that the word "offense" "means not simply one count in a multicount charging document, but rather the entirety of the sentencing package that takes into account each of the individual crimes of which the defendant was found guilty." 447 Md. at 26-27. The Court agreed that, "'[a]fter an appellate court unwraps the [sentencing] package and removes one or more charges from its confines, the sentencing judge, herself, is in the best position to assess the effect of the withdrawal and to redefine the package's size and shape (if, indeed redefinition seems appropriate).'" *Id.* at 28 (quoting *United States v. Pimienta-Redondo*, 874 F.2d 9, 14 (1st Cir. 1989)).

The Court held that under the sentencing package approach, the "sentence" in multicount cases is the aggregate of the sentences on the individual counts. Thus, "a defendant's sentence will be considered to have increased under § 12-702(b) only if the total sentence imposed after retrial or on remand is greater than the originally imposed sentence." 447 Md. at 30. Therefore, so long as the sentence for child sexual abuse imposed on remand did not result in a total executed sentence of more than 40 years – the total executed sentence originally imposed – there would be no

increase in sentence within the meaning of CJP section 12-702.

For our purposes, a comment made by the Court in a footnote is pertinent. The Court noted that its construction of CJP section 12-702(b) "does not result in unfair prejudice to a defendant who has been successful on appeal in having one or more, but not all, convictions and/or sentences vacated." *Twigg*, 447 Md. at 29 n.13. It cited *Greenlaw v. United States*, 554 U.S. 237 (2008), in which the Supreme Court explained that in multicount "sentencing package cases," the appellate court "*may* vacate the entire sentence on all counts so that, on remand, the trial court can reconfigure the sentencing plan to ensure that it remains adequate to satisfy the [federal sentencing factors]." 554 U.S. at 253 (emphasis added). When that happens, the trial court can impose longer sentences on the counts where the original sentences were vacated solely for sentencing package purposes, "but yielding an aggregate sentence no longer than the aggregate sentence initially imposed." *Id.*

This comment makes clear that it is within the discretion of the appellate court in an appeal in a multicount case to vacate all the sentences when less than all of the convictions/sentences must be vacated. The appellate court is not required to vacate all the sentences. *Twigg*, 447 Md. at 30 n.14 (stating that in an appropriate case the appellate court may vacate "all sentences originally imposed on those convictions and sentences left undisturbed on appeal, so as to provide the court maximum flexibility on remand to fashion a

proper sentence that takes into account all of the relevant facts and circumstances").

In the case at bar, this Court vacated the mandatory minimum sentence of 25 years' imprisonment without parole for attempted armed robbery (Count I) but did not vacate the consecutive 10 year sentence, with all but 5 years suspended, for use of a handgun (Count 5) and the consecutive sentence of 10 years, with all but 5 years suspended, for conspiracy (Count 7). It was within this Court's discretion not to vacate those sentences, and their consecutive nature was a part of them. Because those sentences were not vacated on appeal, they were not before the resentencing court to reconsider on remand.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.