19-6359

No. 19A74

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

STEPHEN NIVENS-- PETITIONER

vs.

MARYLAND PAROLE COMMISSION AND SECRETARY OF THE DEPARTMENT OF PUBLIC SAFETY & CORRECTIONAL SERVICES-- RESPONDENT(S)

(JUDICIAL REVIEW CC #21-C-17-060819-AA)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI

STEPHEN NIVENS Pro Se, #371269-1714119
MCTC
18800 Roxbury Rd.
Hagerstown, MD. 21746

QUESTIONS PRESENTED FOR REVIEW

1.) Whether Judge Daniel P. Dwyer as the Administrative Judge was to preside over and hear Petitioner's hearing for Judicial Review instead of Judge Boyer pursuant to Correctional Services Article §10-210?

2.) Whether the Petitioner is no longer eligible for Special Project Credits (SPC) for double celling, pursuant to COMAR 12.02.06.04N(2) and COMAR 12.02.06.04F, although the Petitioner pursuant to the Correctional Services Article, subtitle 5 sections §11-501 through §11-509 of the Annotated Code of Maryland, is allowed to earn Special Project Credits (SPC) for double celling while in pre-trial status, but once he is committed to the D.O.C. is no longer eligible?

3.) Whether the Petitioner has pre-existing rights and entitlements concerning the law as it existed in 1987 concerning COMAR 12.02.06.04N(2) and COMAR 12.02.06.04F regarding SPC?

4.) Whether the Petitioner received fair notice and did the government show and exercise governmental restraint when the legislature increased punishment beyond what was prescribed when the crime was consummated in 1987 concerning COMAR 12.02.06.04N(2) and COMAR 12.02.06.04F regarding SPC?

5.) Whether the Petitioner has a right to the GCC credited to his prior sentence according to the Double Jeopardy Clause and CPA §6-218 (c) and its ambiguity and vagueness, as the included credit applied to his sentence, after the sentence was vacated, to be credited toward his current sentence?

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LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

[ ] For cases **from federal courts:**

The opinion of the United States Court of Appeals appears at Appendix _____to the petition and is

[ ] reported at_____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States District Court appears at Appendix _____to the petition and is

[ ] reported at_____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[√] For cases **from state courts:**

The opinion of the highest state Court of Appeals appears at **Appendix A** to the petition and is

[ ] reported at_____; or,

[ ] has been designated for publication but is not yet reported; or,

[√] is unpublished.

The opinion of the **WASHINGTON COUNTY CIRCUIT** Court appears at **Appendix B** to the petition and is

[ ] reported at_____; or,

[ ] has been designated for publication but is not yet reported; or,

[√] is unpublished.

JURISDICTION

[ ] For cases **from federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition was filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____A____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[√] For cases **from state courts:**

The date on which the highest Court of Appeals decided my case was **March 29, 2019**.

A Copy of that decision appears at **Appendix A**.

[√] A timely petition for rehearing was thereafter denied on the on the following date: **May 17, 2019**, and a copy of the order denying rehearing appears at **Appendix C**.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____A____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§ 6-218 Criminal Procedure Article-Credit against sentence for time spent in custody.

(b) *In general.*- (1) A defendant who is convicted and sentenced shall receive credit against and a reduction of the term of a definite or life sentence, or the minimum and maximum terms of an indeterminate sentence, for all time spent in the custody of a correctional facility.

(c) *Credit when prior sentence set aside.*- A defendant whose sentence is set aside because of a direct or collateral attack and who is reprosecuted or resentenced for the same crime or for another crime based on the same transaction shall receive credit against and a reduction of the term of a definite or life sentence, or the minimum and maximum terms of an indeterminate sentence, for all the time spent in custody under the prior sentence, including credit applied against the prior sentence in accordance with subsection (b) of this section.

(e) *Credit awarded at sentencing.*- (1) The court shall award the credit required by this section at the time of sentencing.

(2) After having communicated with the parties, the court shall tell the defendant and shall state on the record the amount of the credit and the facts on which the credit is based. **(2012)**

Correctional Services Article § 10-210 Judicial Review

(a) Exhaustion of remedies. – A court may not consider an individual's grievance that is within the jurisdiction of the Office or the Office of Administrative Hearings unless the individual has exhausted the remedies provided in this subtitle.

(b) Circuit Court review. –

(1) The complainant is entitled to judicial review of the final decision of the Secretary under§ 10-207(b)(2)(ii) or § 10-209(b)(1)(ii) or § 10-210(c)(3)(ii) of this subtitle.

(2) Proceedings for review shall be instituted in the circuit court of the county in which the complainant is confined.

(3)Review by the court the court shall be limited to:

(i) A review of the record of the proceedings before the Office and the Office of Administrative Hearings and any order issued by the Secretary following those proceedings; and

(ii) A determination of whether the complainant's rights under Federal or State law were violated.

(c) Appellate Review. –

(1) The Administrative Procedure Act does not apply to appellate review of a final judgment of the circuit court under this section.

(2) A party aggrieved by the decision of the circuit court may file an application for leave to appeal to the Court of Special Appeals in accordance with the Maryland Rules.

§ 3-702 Correctional Services Article - subject to § 3-711 of this subtitle and Title 7, subtitle 5 of this Article, an inmate committed to the custody of the Commissioner is entitled to a diminution of the inmate's term of confinement as provided under this subtitle. **(2008)**

§ 3-704 Correctional Services Article (a) *In general.* An inmate shall be allowed a deduction in advance from the inmate's term of confinement. **(2008)**

Federal Criminal Law § 22, 29, 31 – guaranty against double jeopardy:

The Fifth Amendment guaranty against double jeopardy consists of three separate constitutional protections: **(1)** protection against a second prosecution for the same offense after acquittal; **(2)** protection against a second prosecution for the same offense after conviction; and **(3)** protection against multiple punishments for the same offense.

Former Article 27, § 29 Burglary generally; restitution.—Every person convicted of the crime burglary or accessory thereto before the facts shall restore the thing taken to the owner thereof, or shall pay him the full value thereof, and be sentenced to imprisonment in jail or in the Maryland House of Correction or in the Maryland Penitentiary for not more than 20 years. **(1992 Repl. Volume 2, Replaces 1987 Repl. Volume 3A)**

Former Article 27, § 464A. Second degree sex offense.

(a) *What constitutes.*—A person is guilty of a sex offense in the second degree if the person engages in a sex act with another person:

(1) By force or threat of force against the will and without the consent of the other person; or

(2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless; or

(3) Under 14 years of age and the person performing the sex act is four or more years older than the victim.

(b) *Penalty.*—Any person violating the provisions of this section is guilty of a felony and upon conviction is subject to imprisonment for a period of not more than 20 years. **(1992 Repl. Volume, Replaces 1987 Volume 3A)**

§ 11-702 Criminal Procedure Article- Elements of the conviction. For the purposes of this subtitle, a person is convicted when the person: (1) is found guilty of a crime by a jury or judicial officer; (2) enters a plea of guilty or nolo contendre; (3) is granted a probation after a finding of guilt for a crime if the court, as a condition of probation, orders compliance with the requirements of this subtitle; or (4) is found not criminally responsible for a crime. **(2012)**

§ 11-702.1 Criminal Procedure Article- Retroactive Application of subtitle. (a) *In general.* notwithstanding any other provision of law to the contrary, this subtitle shall be applied retroactively to include a person who: (1) is under custody or supervision of a supervising authority on October 1, 2010; (2) was subject to registration under this subtitle on September

30, 2010; (3) is convicted of a felony on or after October 1, 2010 and has a prior conviction for an offense which registration as an offense is required under this subtitle; or (4) was convicted on or after October 1, 2010, of a violation of §3-324 of the Criminal Law Article. **(2012)**

Article 17 of the Md. Declaration of Rights provides: That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required. Md. Declaration of Rts., Article 17.

Double Jeopardy Clause. —The Fifth Amendment—"nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb." Ratified in 1791 **(Black's Law Dictionary, Ninth Edition 2009)**

State Government Article **Regulation** is defined by the Administrative Procedure Act **("APA")** as:

(g)(1) Regulation means a statement or an amendment or repeal of a statement that:

(i) has general application, **(ii)** has future effect, **(iii)** is adopted by a unit to: **1.** Detail or carry out a law that the unit administers, **2.** Govern organization of the unit, **3.** Govern the procedure of the unit, or **4.** Govern practice before the unit, and

(iv) is in any form, including:

1. a guideline, **2.** a rule, **3.** a standard, **4.** a statement of interpretation, **5.** a statement of policy.

(2) Regulation does not include:

(i) a statement that:

1. concerns only internal management of the unit, **2.** Does not affect directly the rights of the public or the procedures available to the public, **(ii)** a response of the unit to a petition for adoption of a regulation, § 10-213 of this subtitle, or **(iii)** a declaratory ruling of the unit as to a regulation, order, or statute, under Subtitle 3 of this title. **(3) Regulation**, as used in §§ 10-110 and 10-111.1, means all or any portion of a regulation. The APA defines **"substantively"**

as **"a manner substantially affecting the rights, duties, or obligations of: (1)** a member of a regulated group or profession, or **(2)** a member of the public. Md. Code (1984, 2004 Repl. Vol.) § 10-101(h).

Correctional Services Article, section **§ 2-109(c)** provides:

(c)(1) Except as provided in paragraph **(2)** of this subsection, the Secretary shall adopt regulations to govern the policies and management of correctional facilities in the Division of Correction in accordance with Title 10, Subtitle 1 of the State Government Article. **(2)** Paragraph **(1)** of this subsection does not apply to a guideline pertaining to the routine internal management of correctional facilities in the Division.

Federal Criminal Law § 32 – double jeopardy - retrial – credit for time served:

The protection against multiple punishments for the same offense, afforded by the Fifth Amendment guaranty against double jeopardy, is necessarily implicated in any consideration of the question whether, in the imposition of a sentence for the same offense after conviction upon retrial following the setting aside of the first conviction, the Constitution requires that the credit be given for punishment already endured under the original sentence.

The constitutional guaranty against multiple punishment for the same offense, provided by the double jeopardy clause of the Fifth Amendment, absolutely requires that punishment by imprisonment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense upon retrial after the first conviction has been set aside, and such credit must include the time credited during service of the first sentence for good behavior **(GCC)**.

Federal Constitutional Law § 848 – due process – reconviction- heavier sentence:

It is a flagrant violation of the due process clause of the Fourteenth Amendment for a State trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside.

Federal Appeal and Error § 1010; Criminal Law § 112 – record – reconviction – heavier sentence:

In order to assure the absence of retaliatory motivation on the part of a trial judge in sentencing a defendant upon reconviction after the defendant has successfully attacked his first conviction, whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear, which reasons must be based upon objective information concerning identifiable conduct on the defendant's part occurring after the time of the original sentencing proceeding, and the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Federal Appeal and Error § 1675 – habeas corpus – affirmance:

Upon review of the judgment in federal habeas corpus proceedings ordering the release of state prisoners on the ground that more severe sentences imposed by the state trial courts after reconviction upon retrial were unconstitutional, the first convictions having been set aside on constitutional grounds, the United States Supreme Court will affirm such judgments where there is nothing in the record to show that the states in question offered any reason or justification for the increased sentences either at the time such sentences were imposed or at any stage in the habeas corpus proceedings.

COMAR 12.02.06.04 (F) (A) Diminution credit may be awarded under Correctional Services Article, §§ 3-703 [thru] 3-707, Annotated Code of Maryland, in one or more of the following categories**(1)** Good conduct;**(2)** Work tasks;**(3)** Education; or **(4)** Special Projects. ****E.** Special Projects Credit.**(1)** the Commissioner, with the approval of the Secretary and based on the Division's current policy and procedure, may establish a list of assignments that qualify for special projects credit that may, but need not, be limited to the following:

(2) Special projects credit awarded by a local detention center, between the date an inmate is sentenced to the custody of the Commissioner and the date the inmate is transferred to the

Division, shall qualify as special projects credit. **F.** Special Projects Credit for Housing. **(1)** Except as provided in **§F(3)** of this regulation, an inmate may be awarded special projects credit for housing under **Correctional Services Article, § 3-707, Annotated Code of Maryland**, if the inmate is: **(a)** Assigned to a cell containing two beds and is not serving a period of disciplinary segregation; or **(b)** Housed in a dormitory or dormitory-type housing and the housing area where the inmate is confined does not provide 55 square feet of living space per inmate, exclusive of dayrooms, toilets, and showers. **(2)** An inmate mat be awarded a maximum of five special projects credit for housing for each calendar month, and on a prorated basis for any portion of a calendar month, beginning on a date and ending on a date the Secretary determines appropriate, based on the demand for inmate housing and services in the Division, subject to **§§ F(3)** and **G** of this regulation. **(3)** An inmate may not be awarded special projects credit under this section during the inmate's term of confinement if the inmate is serving a term of confinement that includes a:

(a) Sentence for: **(b)** Mandatory sentence for the commission of a felony; or **(c)** Sentence as a repeat offender under Criminal Law Article, § 14-101, Annotated Code of Maryland. **(4)** This section may not be interpreted, understood, or construed to mean that an inmate who is eligible to receive the credits described in this section has a right to these credits or that an inmate will continue to receive these credits in the future. **G.** An inmate may not be awarded more than 20 diminution credits for a calendar month.

Former COMAR 12.02.06.05 (N). Special Project Credit for Doubled Celled Inmates. **(1)** Inmates who meet the eligibility criteria in **§ N(2)** are in a special project pursuant to Article **27, § 700(f)**, Annotated Code of Maryland, except inmates who are serving a:

(2) Inmates eligible for special project credits under this section are inmates who:

(3) Inmates who meet the criteria described above shall receive 5 days credit for each calendar month, and on a prorated basis for any portion of a calendar month, beginning on the date and the ending on the date the Secretary determines appropriate, based on the demand for inmate

housing and services in the Division of Correction. **(4)** And an inmate may not, under any circumstances, be entitled to earn from all sources, including this regulation, more than the statutory maximum of 15 credit days per month. **(5)** The Commissioner shall revoke all special project credits earned under this section if, within 30 days before the inmate's release on mandatory supervision, an inmate is found guilty of an intentional rule violation for: **(6)** The Department of Public Safety and Correctional Services shall give the name, last known address, date of birth, release date, and current convictions, of each inmate released, to the state or local law enforcement officials in the jurisdiction into which the inmate is released. **(7)** This section may not be interpreted, understood, or construed to mean that an inmate who is eligible to receive the credits described in this section has a right to these credits or that an inmate will continue to receive these credits in the future.

Maryland Constitution, Article IV § 10(a)((1)(2)provides: **(a)(1)** the Clerks of the Courts shall have charge and custody of records and other papers and shall perform all duties which appertain to their offices, as are regulated by law and; **(2)** the office and business of the Clerks, in their departments, shall be subject to and governed in accordance with rules adopted by this Court of Appeals pursuant to § 18 of this Article. **(SEE Md. Rules 16-1001 thru 16-1011) (2012)**

Maryland Constitution, Article IV § 18(a)(b)(1) provides: **(a)** the Court of Appeals from time to time **shall** adopt rules and regulations concerning the practice and procedure in and the **administration of the appellate courts** and **in the other courts of this State**, which **shall** have the **force of law** until rescinded, changed or modified **by the Court of Appeals** or otherwise by law. The power of courts other than the Court of Appeals to make rules of practice and procedure, or administrative rules, shall be subject to the rules and regulations adopted by the Court of Appeals and; **(b)(1)** The **Chief Judge** of the Court of Appeals **shall be the administrative head of the Judicial system of the State. The Chief Judge** of the Court of Appeals **shall from time to time require, from each of the judges of the Circuit Courts**, of the District Court and of any

intermediate courts of appeal, **reports as to the judicial work and business** of each **of the** judges and their **respective courts. (2012)**

STATEMENT OF THAT CASE

Nivens was tried and convicted for a crime **[allegedly]** committed on October 25, 1987, over 20 years later, in 2008 and then again in 2011 after the fact, as the State contended, where laws were substantially changed altering the consequences. Nivens filed a timely appeal according to the Md. Rules, the same day his appeal was denied, for an Application for Leave to Appeal and Notice of Appeal **(SEE Appendix H)** concerning the denial of 2 Judicial Reviews heard in the Washington County Circuit Court on June 22, 2018 @ 9:30 a.m. by way of a Video Hearing before Judge Boyer.

It has been over 425 days since the Petitioner filed his appeal to the Court of Special Appeals through the Washington County Circuit Court **(SEE Appendix B, D, H)**, but pursuant to Md. Rule 8-412 the above captioned case **was not transmitted as required** by and in accordance with the Maryland Rules. Additionally, **no** Court Docket Entry had been forwarded to the Petitioner according and pursuant to the Md. Rules from the Washington County Circuit Court.

Pursuant to the Maryland Constitution Article IV § 10(a)((1)(2) provides: **(a)(1)** the Clerks of the Courts shall have charge and custody of records and other papers and shall perform all duties which appertain to their offices, as are regulated by law and; **(2)** the office and business of the Clerks, in their departments, shall be subject to and governed in accordance with rules adopted by this Court of Appeals pursuant to § 18 of this Article **(SEE Md. Rules 16-1001 thru 16-1011)**, but the Clerk for the Washington County Circuit Court failed to **transmit as required** pursuant to Md. Rule 8-412 the above captioned cases in accordance with the Maryland Rules. Additionally, **no** Court Docket Entry had been forwarded to the Appellant, according and pursuant to the Md. Rules from the Washington County Circuit Court.

Pursuant to the Maryland Constitution Article IV § 18(a)(b)(1) provides: **(a)** the Court of Appeals from time to time **shall** adopt rules and regulations concerning the practice and procedure in and the **administration of the appellate courts** and **in the other courts of this State**, which **shall** have the **force of law** until rescinded, changed or modified **by the Court of Appeals** or otherwise by law. The power of courts other than the Court of Appeals to make rules of practice and procedure, or administrative rules, shall be subject to the rules and regulations adopted by the Court of Appeals and; **(b)(1)** The **Chief Judge** of the Court of Appeals **shall be the administrative head of the Judicial system of the State. The Chief Judge** of the Court of Appeals **shall from time to time require, from each of the judges of the Circuit Courts**, of the District Court and of any intermediate courts of appeal, **reports as to the judicial work and business** of each **of the** judges and their **respective courts.**

Court of Appeals is the **administrative head of the Judicial system of the State** having the **inherent power** to administer the **proper** practice and procedure, and authority over the Court of Special Appeals, and Washington County Circuit Court, to order both lower courts with an entry that shall have the same legal force and effect as if made at the time when it should have been made upon the record and failed to do so requiring and mandating the lower courts to do so.

I firmly and honestly believe that my Constitutional Rights have been and were violated by both lower Courts and lower tribunals and continues to be violated because no action has taken place to correct the matter.

On September 11, 2018 the Appellant wrote letters to the Court of Special Appeals Chief Judge Patrick L. Woodard **(SEE Appendix I)** and Gregory Hilton, Clerk of the Court of Special Appeals **(SEE Appendix J)** asking if his Application for Leave to Appeal & Notice of Appeal had been filed with that Court and if the appeal had been transmitted by the Circuit Court of Washington County. Gregory Hilton, the Clerk for the Court of Special Appeals forwarded a reply letter **(SEE Appendix K)** stating that **"he was returning my recent letter because it did not**

contain a certificate of service as required by Md. Rules 1-321 and 1-323" and that **"*Nivens* could resubmit his request with a proper certificate of service,"** but no time limit was given or stated in the reply letter as to when the request must be refiled. **(SEE Judicial Review 21-C-17-060819-AA)**

On November 2, 2018 the Court of Special Appeals **erred** in dismissing *Nivens'* appeal pursuant to Md. Rules 8-602(b)(1) after **knowingly acknowledging** that the Circuit Court for Washington County **never filed or transmitted** his appeal pursuant to Md. Rule 8-412 and **never** forwarded a Court Docket Entry, before I could send my appeal's brief containing a **"concise statement of the reasons why the judgment should be reversed or modified,"** and **"specify the errors"** that the IGO, the lower court of the Circuit Court for Washington County, D.P.S.C.S., Secretary, Commissioner, Warden, the Parole Commission and Probation committed. **(SEE Appendix D)**

Nivens is challenging his right to be free from ex post facto laws, prohibition, restriction and clause, and the violation of the Double Jeopardy Clause **(SEE Appendix E, F, G)** which are his justiciable issues and controversy pursuant to the U.S. Constitution, Md. Constitution and Md. Declaration of Rights Article 17. Pursuant to Correctional Services Article § 10-210(b)(3)(i)(ii) for Judicial Review the Petitioner's rights have been violated under Federal and State laws by the IGO, Secretary, Commissioner the State, trial Court, Parole, and Probation. **(SEE Judicial Review 21-C-17-060819-AA)**

The IGO, Secretary, Commissioner, the State, trial Court, Parole, and Probation, are all precluded from subjecting *Nivens* to the Ex Post Facto Clause and is a violation of the Due Process Clause of the Fourteenth Amendment by using invalid laws not in effect in 1987 against *Nivens* to his detriment and disadvantage, depriving him of any defense available.

The enactment and amendment in question here in *Nivens'* case here is clearly a **"regulation"** pursuant to the definition of regulation in the Administrative Procedure Act **("APA")**, Md. Code (1984, 2004 Repl. Vol.), § 10-101(g)(1)(i)(ii)(1-4)(iv)(1-5)(3)(1) of the State Government

Article that has general application, future effect, that was adopted by a unit **(DPSCS)**, to detail or carry out a law that the unit **(DPSCS)** administers, to govern organization of the unit **(DPSCS)**, to govern the procedure of the unit **(DPSCS)**, or to govern practice before the unit **(DPSCS)**, and is in any form, including a guideline, a rule, a standard, a statement of interpretation, a statement of policy and requiring *Nivens* to serve a longer sentence of confinement than is authorized by law. **(SEE Appendix E, F, G)**

Regulation, as used in §§ 10-110 and 10-111.1, means all or any portion of a regulation. The Administrative Procedure Act **("APA")** defines **"substantively"** as **"a manner substantially affecting the rights, duties, or obligations of** a member of a regulated group **(inmate)** or profession, or a member of the public.

Correctional Services Article § 2-109 (c)(1) provides that the Secretary shall adopt regulations to govern the policies and management of correctional facilities in the Division of Correction in accordance with Title 10, Subtitle 1 of the State Government Article. **(SEE Appendix E, F, G)**

The enactment of COMAR 12.02.06.04N(2) and amendment of COMAR 12.02.06.04F are laws for ex post facto purposes, it is by virtue of the legislative discretion granted to the Secretary and the Commissioner pursuant to Correctional Services Article § 3-707 regarding SPC of this Act, thus violates ex post facto prohibition, the application of both these new laws alters *Nivens'* punishment, requiring Petitioner to serve a longer sentence of confinement than is authorized by law. By no means has the Legislature given the Secretary, the Commissioner and the D.P.S.C.S. discretion to make *Nivens'* punishment more burdensome than it was at the time the offense was [allegedly] committed in 1987 as the State contends, and once the special program was created and defined in accordance with section § 3-707, it became a legislatively created benefit, albeit one accomplished through the Secretary and Commissioner. Under section CSA § 3-707, the IGO, the State, trial Court, Parole, Probation, Secretary and Commissioner **may only** determine whether any special project credits are available, what projects earn such credits, how many credits may be earned, and who may earn them.

Subsection (7) of CSA § 3-707 **does not expand** their authority, but merely reserves this authority. **(SEE Appendix E, F, G)**

The reason for applying the Clause to such legislative rules is straightforward, the Legislature, the IGO, the State, trial Court, Parole, Probation, the Secretary and Commissioner should not be allowed to do indirectly what it is forbidden to do directly. Unlike Legislative rules, **"which have force of law,"** interpretative rules "are statements of enforcement policy, they are merely guides, and not laws: guides may be discarded where circumstances require; **laws may not.**"

When the Legislature has **delegated** to an agency **(DPSCS)** the authority to make a rule instead of making the rule itself the resulting administrative rule is an extension of the statute for purposes of the Ex Post Facto Clause.

Interpretative rules simply state what the administrative agency thinks the statute means, and only "remind affected parties of existing duties." In contrast, a substantive or legislative rule, pursuant to properly delegated authority, has the force of law, and creates new law or imposes new rights and duties.

Protection is provided by the U.S. and Maryland Constitutions for ex post facto laws that have an effect on judicial decisions that the Constitution imposes on a new standard that applies after a decision on the merits of an allegation of error or after a proceeding in which an allegation of error may have been waived, but notwithstanding any other provision of the U.S. and Maryland Constitutions concerning an allegation of error may not be considered to have been finally litigated or waived under the U.S. and Maryland Constitutions if a court whose decisions are binding on the lower courts of the State holds that the Constitution of the United States or the Maryland Constitution imposes on State criminal proceedings a procedural or substantive standard not previously recognized; and the standard is intended **to be applied retrospectively** and would thereby now **affect the validity of *Nivens'* conviction or sentence** is prohibited.

The Petitioner's appeal should also be granted under the rule of lenity, due to the applicable law and for not crediting Petitioner his previous Good Conduct Credits (4,200)(GCC) pursuant to § 3-702 and § 3-704 of the Correctional Services Article applied in advance, applied to his previous sentence of 70 years, as the **"included credit"** pursuant to § 6-218(c) of the Criminal Procedure Article, its **ambiguity**, and **vagueness** is a **jurisdictional defect** and his previous and present Special Project Credits (SPC) for housing that he has never received due to the Ex Post Facto Clause enactment, amendment and Double Jeopardy. The **ambiguity** and **vagueness** of the wording **"included credit"** of Criminal Procedure Article § 6-218(c) is a **jurisdictional defect** and is **unconstitutionally vague**, this statute **does not** allocate or specify exactly which credit is to be included or applied, so the rule of lenity must be invoked. The 4,200 GCC were applied to Petitioner's first sentence of 70 years. **(SEE Appendix E, F, G)**

So, under Maryland law ambiguity in penal statutes is to be construed against the State. Similarly, if doubt exists as to the proper penalty, punishment **"must"** be construed to favor a milder penalty. The rule of lenity **"requires"** that **ambiguity** and **vagueness** in a statute and in favor of a person who is affected by the statute. The rule of lenity forbids the extension of punishment to cases not plainly within the language of the statute." *See Wilson v. Simms,* 157 Md. App. 82, 849 A.2d 88 (2004); *Stouffer v. Staton*, 152 Md. App. 586, 833A.2d 33 (2003). **(SEE Appendix E, F, G)**

The Court has a duty and obligation by law to uphold the law and *Nivens'* rights under and pursuant to ex post facto prohibition, restriction, and clauses.

No one can dispute that the Petitioner was convicted on 7 Ex Post Facto Laws, in fact Judge Finifter admits that all 7 laws are *ex post facto* to *Nivens*, Judge Finifter[1] agreed with Petitioner in his denial of Petitioner's Post Conviction Petition **without a hearing** and the right to counsel, that the 7 ex post facto laws mentioned violates the *Ex Post Facto* Clause.

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[1] **SEE pp. 5-6** Petitioner's denial of Post-Conviction Petition, Judge Finifter stated, "Hence, these are all ex post facto laws", to the Petitioner.

The amended laws of Md. Rules 4-212(a) and 4-601(a) the second sentence **(effective July 1, 1994)** and the enactments of Md. Rule 5-101 **(effective July 1, 1994)**, Court and Judicial Proceedings § 10-915 **(effective January, 1990 & July 1, 1997)**, Public Safety Article § 2-508, § 2-510 **(effective October 1, 2003)**, Criminal Procedure Article § 11-702 and § 11-702.1 **(effective October 1, 2010)**, however changed the quantum of evidence necessary to sustain a conviction, under the new amendments and laws, petitioner could be and was convicted.

Judge Cox stated that *Nivens* should have raised the issues previously and that the record did not reflect a double jeopardy complaint and that the **DPSCS is responsible for the application of Petitioner's GCC and SPC**, and that a complaint must be made with the IGO, but she forgets and negates the fact that she must pursuant to **Criminal Procedure Article § 6-218(c)(e), Federal Appeal and Error § 1010; Federal Criminal Law § 112 – record – reconviction – heavier sentence**, and **Federal Appeal and Error § 1675 – habeas corpus – affirmance**, she failed to include on the record as required and the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. **(SEE Appendix E, F, G)**

Nivens raised the issue first **(1)** in a direct appeal filed November 11, 2011[2] in an application for leave to appeal a conviction based on a guilty plea,; **(2)** October 10, 2012 *Nivens* filed a Post-Conviction Petition **(Court Docket Entry Sheet at p. 17)** that Judge Finifter denied the Post-Conviction **(Court Docket Entry Sheet at p. 18) without a hearing** and the right to counsel then *Nivens* filed an Application for Leave to Appeal.[3] Every issue presented in this appeal was argued in *Nivens'* **initial ARP** and in his direct appeal for an application for leave to appeal of a guilty plea, Post-Conviction Petition and its appeal for an application for leave to appeal. In fact a provision within Post-Conviction Article § 7-106(c) provides protection by the U.S. and Maryland Constitutions for ex post facto laws as follows:

> (c) *Effect of judicial decision that Constitution imposes new standard.*- (1) This subsection applies after a decision on the merits of an allegation of error or after a proceeding in which an allegation of error may have been waived.
> (2) Notwithstanding any other provision of this title, an allegation of error may not be considered to have been finally litigated or waived under this title if a court whose decisions are binding on the lower courts of the State holds that:
> (i) the Constitution of the United States or the Maryland Constitution imposes on State criminal proceedings a procedural or substantive standard not previously recognized; and
> (ii) the standard is intended to be applied retrospectively and would thereby affect the validity of the Petitioner's conviction or sentence.

The conduct in question in *Nivens'* case is the commission of his respective crime, therefore this Court must focus on the date *Nivens'* crime was committed as the State contended and the law in effect at that time **(1987)**, and not the date upon which *Nivens* was sentenced **(2008 and 2011)**. *See Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S. Ct. 68 68, 70 L. Ed. 216 (1925)(noting that the *ex post facto* clause prohibits "any statute which...makes more burdensome the punishment for a crime, after *its commission*, or which deprives one charged with a crime of any defense available according to law *at the time when the act was*

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[2] **SEE** Unreported Opinion of a Guilty Plea, *Nivens v. State*, No. 2082 September Term, 2011 (filed August 16, 2012).
[3] **SEE** Unreported Opinion Post Conviction, *Nivens v. State*, No. 243 September Term, 2013 (filed November 10, 2014).

committed"(emphasis added)); *Calder v. Bull*, 3 U.S. 386, 391, 1 L. Ed. 648, 3 Dall. 386 (1796)(holding that a statute is considered to be in violation of the *ex post facto* clause when it inflicts a greater punishment for the commission of a crime than that which was originally assigned to the crime when *committed.*(emphasis added)). **(SEE Appendix E, F, G)**

Nivens' past and current sentences for GCC are incorrect both the Department of Corrections and Judge Cox have erred in their calculation of *Nivens'* past and current GCC and SPC diminution credits so *Nivens* will use their formula and calculate the future and surviving credits pursuant to former Article 27, § 700(d)(1) now Correctional Services Article § 3-704(a), at the rate of 5 days of each calendar month, this should be simple for Judge Cox, the State, the Secretary, Commissioner, Parole, and Probation to follow as *Nivens* will simplify for the State, the trial Court, the Secretary, Commissioner, Parole, and Probation so that they can understand. **(SEE p. 24)**

The IGO, Secretary, Commissioner, the State, trial Court, Parole, and Probation, are all precluded from subjecting *Nivens* to the Double Jeopardy Clause and is a violation of the Due Process Clause of the Fourteenth Amendment. So, it is clear that this basic constitutional guarantee has been violated because the punishment has already been exacted for his offense after the reversal of his conviction, not being fully credited in his imposing sentence on October 31, 2011 by Judge Cox. **(SEE Appendix E, F, G)**

Upon review of the judgment in federal habeas corpus proceedings ordering the release of state prisoners on the ground that more severe sentences imposed by the state trial courts after reconviction upon retrial were unconstitutional, the first conviction of June 12, 2008 having been set aside on constitutional grounds as in the case of *Nivens* at his behest, the United States Supreme Court will affirm such judgments where **there is nothing in the record** to show that the State trial Court of Baltimore County and Judge Cox in question here, **never** offered any **reason** or **justification** for the increased sentences either at the time such sentences were imposed or at any stage in *Nivens'* proceedings.

The protection against multiple punishments for the same offense, afforded by the Fifth Amendment guaranty against double jeopardy, is necessarily implicated in any consideration of the question whether, in the imposition of a sentence for the same offense after conviction upon retrial on September 15, 2011, following the setting aside of the first conviction of June 12, 2008 on February 23, 2010 by the Court of Special Appeals, and the U.S. and Maryland Constitutions requires that the credit be given for punishment already endured under *Nivens'* original sentence.

The constitutional guaranty against multiple punishment for the same offense, provided by the double jeopardy clause of the Fifth Amendment, absolutely requires that punishment by imprisonment already exacted must be fully credited in *Nivens* imposing sentence upon his new conviction for the same offense upon retrial after *Nivens'* first conviction has been set aside, and such credit **must include the time credited** during service of the first sentence for good behavior the **4,200 GCC** and the **670 SPC** for double celling pursuant to **Criminal Procedure Article § 6-218(c)(e), Federal Appeal and Error § 1010; Federal Criminal Law § 112 – record – reconviction – heavier sentence**, and **Federal Appeal and Error § 1675 – habeas corpus – affirmance.**

It is a flagrant violation of the due process clause of the Fourteenth Amendment for the State trial court of Baltimore County and Judge Cox to follow an announced practice of imposing a heavier sentence **(Federal Constitutional Law § 848 – due process – reconviction- heavier sentence)** upon *Nivens* who is the reconvicted defendant for the explicit purpose of punishing *Nivens* for his having succeeded in getting his original conviction set aside on February 23, 2010 by the Court of Special Appeals.

In order to assure the absence of retaliatory motivation on the part of the trial judge, Kathleen G. Cox, in sentencing *Nivens* upon reconviction after *Nivens* successfully attacked his first conviction of June 12, 2008, and whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for her doing so must affirmatively appear, which

reasons must be based upon objective information concerning identifiable conduct on *Nivens'* part occurring after the time of the original sentencing proceeding on July 18, 2008, and the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal, which never transpired and Judge Cox failed to do so on the record. **(SEE Appendix E, F, G)**

Purpose.--The purpose of this statute **[CPA § 6-218]** demonstrates a legislative policy of fairness and is an effort to avoid inequitable **"stacking of punishment"** that could result in actual service of a period of imprisonment longer than the sentence imposed by the trial court, *See Maus v. State,* 311 Md. 85, 532 A.2d 1066 (1987).

A purpose of the credit statute is the elimination of **"dead"** time, which is time spent in custody that will not be credited to any valid sentence; by enacting former Art., 27 § 638C(a) (now subsection (b) of this section, CPA § 6-218), the General Assembly sought to ensure that a defendant receive as much credit as possible for time spent in custody as is consistent with **"constitutional and practical considerations,"** *See Chavis v. Smith,* 834 F. Supp. 153 (D. Md. 1993).

The statute has a dual purpose: to preclude a defendant from **"banking"** time before he or she commits a new offense and to eliminate **"dead"** time, which is time spent in custody that will not be credited to a future sentence, *See Dedo v. State,* 343 Md. 2, 680 A.2d 464 (1996).

Nivens falls under the dual purpose, **{193 Md. App. 519}** the **"dead"** time refers to pre-trial confinement and its credits he received, but the **"banked"** time refers to the **"reserve of time"** concerning the 4, 200 GCC pursuant to Correctional Service Article § 3-702 and § 3-704; **(*See Parker v. State,* 193 Md. App. 469; 997 A.2d 912 (2010))**. Ambiguity arises when there is more than one reasonable interpretation of a statute. Once a sentence is set aside, ambiguity arises. Similarly, if doubt exists as to the proper penalty, punishment must be construed to favor a milder penalty. Moreover, "[t]he rule of lenity 'instructs that a court not interpret

a ...criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based no more on than a guess as to what [the Legislature] intended.'

Nivens was convicted of Count 1 **(Former Article 27 § 464A)** and Count 5 **(Former Article 27 § 29)(Court Docket Entry Sheet at pp. 5** by a jury on June 12, 2008. *Nivens* was then sentenced to 70 years **(Circuit Court Docket Entry at p. 11)**, *Nivens* filed a direct appeal and then on February 23, 2010 the Court of Special Appeals reversed *Nivens'* Conviction.

On September 15, 2011 *Nivens* entered an ill-advised Alford Plea and was reconvicted of Count 2 **(Former Article 27 § 464A)** and Count 5 **(Former Article 27 § 29)(T. 9/15/2011 2, 15)** and then on October 31, 2011 **(T. 10/31/2011 at 33)** was resentenced to 40 years he was sentenced to 20 years incarceration for Count 2 **(Former Article 27 § 464A)** and 20 years incarceration consecutive for Count 5 **(Former Article 27 § 29)**. On August 1, 2016 *Nivens* filed a Motion to Correct an Illegal Sentence **(Court Docket Entry Sheet at p. 21)**. On August 17, 2016 Judge Cox denied *Nivens'* Motion he then filed a timely Application for Leave to Appeal on August 30, 2016 **(Court Docket Entry Sheet at p. 21)**. *Nivens* filed a brief in support of his application on November 14, 2016.

On March 13, 2017 *Nivens* filed an Administrative Remedy Procedure[4] **("ARP")** against the Secretary and D.P.S.C.S. which was dismissed by the Warden, the Commissioner and then the IGO **(No Court Docket Entry Sheet forwarded by the Clerk of the Washington County Circuit Court)**. *Nivens* then filed for a Judicial Review in the Washington County Circuit Court **(No Court Docket Entry Sheet forwarded by the Clerk of the Washington County Circuit Court)**.

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[4] Administrative Remedy Procedure or ARP (DOC.185.0002 to DOC.185.004), provides a means for informal resolution of a complaint, formal presentation of the complaint to the **Warden** for resolution at the institutional level, and formal appeal of the **Warden's** response to the **Commissioner** for resolution of the complaint at **Division Headquarters**. The Administrative Remedy Procedure is a structured procedure to resolve inmate complaints in accordance with specified procedures and within specified time frames as part of a continuum in the formal complaint process.

Nivens filed a timely Application for Leave to Appeal with the Court of Special Appeals through the Circuit Court of Washington County on June 22, 2018 **(No Court Docket Entry Sheet forwarded by the Clerk of the Washington County Circuit Court). (SEE Appendix B, D, H)**

The State proffered: on October 25, 1987, at 1 a.m., a man wearing a ski mask entered the home of Patricia Regan without permission, bound Ms. Regan's hands, fondled her breast and had anal intercourse.

Hereinafter all section references to the Criminal Procedure Article of the Maryland Code are identified as "CPA §", and Correctional Services Article of the Maryland Code are identified as "CSA."

REASONS FOR GRANTING THE WRIT

Judge Daniel P. Dwyer as the Administrative Judge was to preside over the Petitioner's Judicial Review pursuant to Correctional Services Article § 10-210.

Nivens is entitled to judicial review of an administrative decision of the Executive Director or the Secretary **by an Administrative Law Judge** under this chapter according to Correctional Services Article § 10-207(b)(2)(ii) or § 10-209(b)(1)(ii) or (c)(3)(ii) of this subtitle and § 10-210, Annotated Code of Maryland and the Maryland Rules of Procedure.

Judge Boyer an Associate Judge for the Washington County Circuit Court presided over the Petitioner's case on June 22, 2018 via a Video Hearing, instead of the Administrative Judge Daniel P. Dwyer, Judge Dwyer also issued the hearing notice.

DIMINUTION CREDITS

70 years x 12 months = 840 months at the rate of 5 days a month per CSA § 3704(a) = 4,200[5] GCC **(11 years, 6 months)**. Sentence imposed on July 18, 2008-June 10, 2078 **STILL OWED** pursuant to Corr. Serv. Art. § 3-704(a), CPA § 6-218 (c) and the *double jeopardy* clause.

40 years x 12 months = 480 months at the rate of 5 days a month per CSA § 3704(a) = 2,400[6] GCC **(6 years, 6 months, 3 weeks, 6 days)**. Sentence imposed on October 31, 2011-August 28, 2047 pursuant to Corr. Serv. Art. § 3-704(a). **STILL OWED (251 GCC) have not been applied out of the 2,149.**

130 GCC+130 SPC = 260 GCC[7] (8 months, 2 weeks, 3 days)

1525[8] credit applied by Judge Cox on February 7, 2012 = 4 years, 2 months, 3 days

326 diminution credits earned from DOC and local detention center, accrued for previous sentence imposed on July 18, 2008 = 10 months, 3 weeks, 1 day

569 SPC = 1 year, 6 months, 2 weeks, 6 days

472 IC = 1 year, 3 months, 2 weeks, 1 day

460 SPC for current sentence for housing, **STILL OWED** pursuant to the *double jeopardy* clause, ex post facto clause COMAR 12.02.06.04N(2) and COMAR 12.02.06.04F = 1 year, 3 months, 3 days

210 SPC for previous sentence for housing, **STILL OWED** pursuant to the *double jeopardy* clause, ex post facto clause, COMAR 12.02.06.04N(2) and COMAR 12.02.06.04F = 6 months, 4 weeks

TOTAL OF: 10, 422 DIMINUTION CREDITS = 28 years, 6 months, 1 week, 4 days + 8 years *Nivens* has been serving since 2011 = 36 years, 6 months, 1 week, 4 days, to be deducted from *Nivens'* total sentence, then another 12 years subtracted from his total time of incarceration that he served from August 28, 2007 to present, leaving 0 years, 0 months and 0 days left to be resentenced to. Now *Nivens* is eligible for immediate release.

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5 **SEE Appendix F** of this appeal the D.P.S.C.S. worksheet, the 4,351 GCC Diminution Credits were not applied.

6 **SEE Appendix G** of this appeal the D.P.S.C.S. worksheet, 2,400 GCC Diminution Credits.

7 **SEE Appendix E** of this appeal D.O.C. Confinement Certification Baltimore County Detention Center, where it shows that the prior GCC (4,200) and the prior and present *Demby* SPC for double celling have been withheld and not credited to *Nivens'* current sentence.

8 **SEE p. 2** of Amended Commitment Record top of the page.

The Petitioner is eligible for Special Project Credits (SPC) for double celling, pursuant to COMAR 12.02.06.04N(2) and COMAR 12.02.06.04F, although pursuant to Correctional Services Article, subtitle 5 sections § 11-501 through § 11-509 of the Annotated Code of Maryland, is allowed to earn Special Project Credits (SPC) for double celling while in pre-trial status, but once he is committed to the D.O.C. is no longer eligible.

This again makes COMAR 12.02.06.04N(2) and COMAR 12.02.06.04F Ex Post Facto and works to *Nivens'* disadvantage and legally speaking this makes no sense, again the enactment and amendment of this Act requires *Nivens* to serve a longer sentence of confinement than is authorized by law. **(SEE Appendix E)**

In *Secretary, Dep't. of Public Safety and Correctional Services v. Demby*, 390 Md. 580, 890 A.2d 310 (2006), the Court of Appeals stated:

> **{890 A.2d 315}** Mr. *Demby's* Petition for judicial review was heard on May 16, 2003, in the Circuit Court for Somerset County. That **{390 Md. 588}** Court affirmed the decision of the IGO, finding that the Secretary and Commissioner have the authority to abolish, revoke, or revise the eligibility standards for double celling credits. The Circuit Court also found that the *ex post facto* clause did not apply to Mr. *Demby's* case. On June 12, 2003, Mr. *Demby* filed for leave to appeal from the decision of the Circuit Court for Somerset County.
>
> We note that all respondents were serving terms of confinement that included at least one sentence that made them eligible to receive special **{390 Md. 589}** project housing credits for double celling prior to the amendment. The dismissals of the respondents' grievances were affirmed by the Circuit Courts for Somerset and Washington Counties.
>
> After granting respondents petitions for leave to appeal, the Court of Special Appeals held that the COMAR amendments were laws for *ex post facto* purposes, "by virtue of the legislative discretion granted to the Secretary and the Commissioner pursuant to Correctional Services Article § 3-707." *Demby supra*, 163 Md. App. At 67-68, 877 A.2d at 199.
>
> Further, the intermediate appellate court held that the amendments violated the *ex post facto* prohibition because the "application of current COMAR § 12.02.06.04F... alters [respondents'] punishments by increasing the lengths of **{890 A.2d 316}** their sentences." *Id* at 64, 877 A.2d at 197.

The Court of Special Appeals in *Smith v. State*, 140 Md. App. 445, 780 A.2d 1199 (2001) quoting from *Secretary, Dep't. of Public Safety and Correctional Services v. Demby*, 390 Md. 580, 890 A.2d 310 (2006) stated:

> As we have discussed, the DOC does not have complete discretion to deny double celling credits to inmates who clearly meet the eligibility standards in the regulation. Accordingly, we shall not construe this language as an attempt to confer on the DOC impermissible authority to exercise its power and discretion in an arbitrary manner that conflicts with its own regulation. **{390 Md. 598}** Instead, we view this language as a forthright reminder that the Secretary and Commissioner have authority to abolish, to revoke, or to revise the eligibility standards for double celling credits. Under section CSA § 3-707, they may determine whether any special project credits are available, what projects earn such credits, how many credits may be earned, and who may earn them. **Subsection {890 A.2d 321} (7)** does not expand, but merely reserves this authority. *Smith*, 140 Md. App. at 461-62, 780 A.2d at 1209-10. The intermediate appellate court remanded the case to the hearing court to determine if Smith was eligible for any double celling credits for the time served on his robbery sentence. *Id* at 462-63, 780 A.2d at 1210.

The intermediate appellate court in the *Demby* case addressed the impact of *Watkins* (*Watkins v. Secretary, Dep't. of Public Safety and Correctional Services*, 377 Md. 34, 831 A.2d 1079 (2003)), it said, the Court of Appeals **by no means implied** in *Watkins*, however, **that the Legislature has given the Commissioner discretion to make a prisoner's punishment more burdensome than it was at the time the offense was committed."** *Demby, supra*, 163 Md. App. at 64, 877 A.2d at 197.

The Court of Special Appeals also acknowledged that its opinion in *Smith, supra*, did not quantify the special project credits for double celling as a law, but did not note that it was established under the authority of § 3-707 of the Correctional Services Article and **"once the special program was created and defined in accordance with section § 3-707, it became a legislatively created benefit, albeit one accomplished through the Secretary and Commissioner."** *Demby, supra*, 163 Md. App. at 62-63, 877 A.2d at 196 (quoting *Smith, supra*, 140 Md. App. at 461, 780 A.2d at 1199).

In the determination of whether the enactment in 1990 and amendments in 2002, in the present case of *Nivens* for the purposes of the *ex post facto* prohibition, this Court must focus its analysis on the nature of the enactment and amendments. The United States Court of Appeals for the Fourth (4th) Circuit has noted the relevant factors to consider when determining whether actions of administrative agencies are exempt from scrutiny under the *ex post facto* clause, "When Congress has delegated to an agency the authority to make a rule instead of making the rule itself, the resulting administrative rule is an extension of the statute for purposes of the Clause." *Rodriguez v. United States Parole Commission*, 594 F.2d 170, 173 (7th Cir. 1979)

The United States Court of Appeals for the Fourth (4th) Circuit stated that the reason for applying the Clause to such legislative rules is straightforward: **Congress "should not be allowed to do indirectly what it is forbidden to do directly."** *Prater*, 802 F.2d at 954 (*Prater v. U.S. Parole Commission*, 802 F.2d 948, 953-54 (7th Cir. 1986)), but when an agency promulgates an interpretative rule, the *Ex Post Facto* Clause is inapplicable. So the same applies with the State, the Court, the Secretary, Commissioner, Parole, and Probation.

Interpretative rules simply state what the administrative agency thinks the statute means, and only "remind affected parties of existing duties." *Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Commission*, 874 F.2d 205, 207 (4th Cir. 1989). Unlike legislative rules, **"which have force of law,"** interpretative rules **"are statements of enforcement policy, they are merely guides, and not laws: guides may be discarded where circumstances require; laws may not."** *Prater*, 802 F.2d at 954 (quoting *Inglese v. United States Parole Commission*, 768 F.2d 932, 936 (7th Cir. 1985)); *United States v. Ellen*, 961 F.2d 462, 465 (4th Cir. 1992), *cert. denied, Ellen v. U.S.*, 506 U.S. 875, 113 S. Ct. 217, 121 L. Ed. 2d 155 (1992).

Such a distinction between **"interpretative"** rules and **"something more," "substantive"** or **"legislative"** rules, is not always easily made. Nonetheless, courts are in general agreement that interpretative rules simply state what the administrative agency thinks the statute means, and only **"remind"** affected parties of existing duties. *Chula Vista City School District v. Bennett*, 824 F. 2d 1573, 1582 (Fed. Cir. 1987); *Southern California Edison Co. v. Federal Energy Regulatory Commission*, 770 F.2d 779, 783 (9th Cir. 1985); *General Motors Corp. v. Ruckelhaus*, 239 U.S. App. D.C. 408, 742 F.2d 1561, 1562 (D.C. Cir. 1984); *Gibson Wine Co. v. Snyder*, 90 U.S. App. D.C. 135, 194 F.2d 329, 331 (D.C. Cir. 1952).

In contrast, a substantive or legislative rule, pursuant to properly delegated authority, has the force of law, and creates new law or imposes new rights and duties. *National Latino Media Coalition v. Federal Communications Commission*, 259 U.S. App. D.C., 481, 816 F.2d 785, 788 (D.C. Cir. 1987).

The enactment and amendment in question here in *Nivens'* case here is clearly a **"regulation"** pursuant to the definition of regulation in the Administrative Procedure Act **("APA")**, Md. Code (1984, 2004 Repl. Vol.), § 10-101(g) of the State Government Article.

The enactment and amendments were adopted for the purposes of determining who is eligible for special project housing credits, such as *Nivens*, and have substantially affected his rights of a specific group of inmates by taking away his eligibility for those credits with **Count 2, former Article 27, § 464A (1992 Repl. Volume, Replaces 1987 Volume 3A)**. This subtitle applies to the Secretary and the DOC. *See Massey v. Secretary, Dep't. of Public Safety and Correctional Services*, 389 Md. 496, 886 A.2d 585, No. 142, 2005 WL 3092137 at *1 (Md. Nov. 21, 2005)(noting that the State Government Article of the Maryland Code, Title 10, subtitle 1 (encompassing §§ 10-101 through 10-117) applies to both the DOC and the Department of Public Safety and Correctional Services). The regulation, unlike the DCD's, were part of the notice and comment procedure per the APA.

This Court's next determination must focus on whether this regulation is legislative or merely interpretative in nature and should find that the enactment and amendments in *Nivens'* case are not merely guides that may be discarded where circumstances require. The enactment and amendments here are **"substantive"**, pursuant to properly delegated authority in Md. Code (1999), § 2-109(c) of the Correctional Services Article, and **"have force of law"** as they effectively create a **"new law"** governing who shall receive special project credits. The **"force of law"** is evident in the fact that the enactment and the adoption of the amendments immediately prohibits various categories of inmates, such as *Nivens*, from receiving special housing credits for double celling for Count 2, **former Article 27, § 464A (1992 Repl. Volume, Replaces 1987 Volume 3A)** and alters his punishment by increasing the length of my past and current sentences, which *Nivens* still has not received or has not been credited to his current sentence pursuant to Administrative Procedure Act **("APA")**, Md. Code (1984, 2004 Repl. Vol.), § 10-101(g)(i)(ii) of the State Government Article that has general application and future effect on *Nivens'* past and current sentence(s), requiring him to serve a longer sentence of confinement than is authorized by law.

Regulation is defined by the Administrative Procedure Act **("APA")** as:

(g)(1) Regulation means a statement or an amendment or repeal of a statement that:

(i) has general application, **(ii)** has future effect, **(iii)** is adopted by a unit to: **1.** Detail or carry out a law that the unit administers, **2.** Govern organization of the unit, **3.** Govern the procedure of the unit, or **4.** Govern practice before the unit, and

(iv) is in any form, including:

1. a guideline, **2.** a rule, **3.** a standard, **4.** a statement of interpretation, **5.** a statement of policy.

(2) Regulation does not include:

(i) a statement that:

1. concerns only internal management of the unit, **2.** Does not affect directly the rights of the public or the procedures available to the public, **(ii)** a response of the unit to a petition for

adoption of a regulation, § 10-213 of this subtitle, or **(iii)** a declaratory ruling of the unit as to a regulation, order, or statute, under Subtitle 3 of this title. **(3) Regulation**, as used in §§ 10-110 and 10-111.1, means all or any portion of a regulation. The APA defines **"substantively"** as **"a manner substantially affecting the rights, duties, or obligations of: (1)** a member of a regulated group or profession, or **(2)** a member of the public. Md. Code (1984, 2004 Repl. Vol.) § 10-101(h).

Correctional Services Article, section **§ 2-109(c)** provides:

(c)(1) Except as provided in paragraph **(2)** of this subsection, the Secretary shall adopt regulations to govern the policies and management of correctional facilities in the Division of Correction in accordance with Title 10, Subtitle 1 of the State Government Article. **(2)** Paragraph **(1)** of this subsection does not apply to a guideline pertaining to the routine internal management of correctional facilities in the Division.

Petitioner has pre-existing rights and entitlements concerning the law as it existed in 1987 concerning COMAR 12.02.06.04N(2) and COMAR 12.02.06.04F regarding SPC.

Under any commonsense understanding of *Calder v. Bull's* second and third categories or prongs, plainly fits for *Nivens* and brings it squarely within the second and third categories or prongs of *Calder* and this Court can correctly point out that the prohibition which may not be evaded is the one defined by the *Calder's* categories or prongs. *See Carmell v. Texas*, 529 U.S. 513, 146 L. Ed. 2d 577, 120 S. Ct. 1620 (2000); *Calder v. Bull*, 3 Dall 386, 390 1 L. Ed. 648 (1798).

In challenging his pre-existing rights *Nivens* is relying on, *Carmell v. Texas*, 529 U.S. 513, 146 L. Ed. 2d 577, 120 S. Ct. 1620 (2000) and *Calder v. Bull*, 3 Dall 386, 390 1 L. Ed. 648 (1798), and the ex post facto clauses of the Federal and State constitutions. *See* Constitution of the United States, Article I, § 10, cl. 1 and Maryland Declaration of Rights, Article, 17. *Nivens* contends that, because of the new amendment of COMAR 12.02.06.04F from the new

enactment of COMAR 12.02.06.04N for special project credits for housing were changed subsequent to his criminal activity, application of the new enactment and amendments and provision for SPC's operate to his disadvantage and, therefore, violates the Federal and State constitutional prohibitions against ex post facto laws. This Court cannot dispute that the change in the enactment and amendments for SPC's operates to *Nivens'* disadvantage, and cannot contend that the ex post facto prohibition is applicable. The same is true of the ex post facto clause in the Maryland Declaration of Rights, Article, 17, which has been viewed as having the same meaning as the Federal prohibition. *Spielman v. State*, 298 Md. 602, 608-609, 471 A.2d 730 (1984); *Tichnell v. State*, 287 Md. 695, 735-736, 415 A.2d 830 (1980); *Elliot v. Elliot*, 38 Md. 357, 362 (1873). **(SEE Appendix E, F, G)**

The nature of the special project credits in *Nivens'* case should be the focus of this Court's analysis and whether the enactment and amendments to the regulations which provides these credits has the effect of lengthening *Nivens'* sentence and whether it is more onerous than the prior law. This Court can clearly determine that the sentence of *Nivens* who is doubled celled, whose qualifying crime of **Count 2, former Article 27, § 464A (1992 Repl. Volume, Replaces 1987 Volume 3A)**, has been changed to a disqualifying crime by the enactment and amendments, has been lengthened. *Nivens* will clearly serve a longer period of time as a result of the amendments and the determination of that increase. **(SEE Appendix E, F, G)**

In its reversal of the opinions of the respective circuit courts and the decisions of the Secretary, the Court of Special Appeals quoting from *Secretary, Dep't. of Public Safety and Correctional Services v. Demby*, 390 Md. 580, 890 A.2d 310 (2006) noted:

> With this opinion, we do not suggest that once double celling credits are established they must remain unchanged and available to all inmates in perpetuity. **Clearly, current COMAR §12.02.06.04F may lawfully be applied to inmates who committed their offenses after it took effect.** Nor do we suggest that an inmate who is serving a sentence for an offense that is eligible for double celling credits may not be removed to a single cell in accordance with DOC policies and regulations.
> **{390 Md. 590}** We hold only that an inmate serving a term of confinement for an offense committed prior to January 1, 2002 **(i)** may not be denied double celling credits, for periods of time during which he or she was or is serving only an eligible sentence, for the sole reason that another sentence in his or her term of confinement is eligible, and **(ii)** may not be denied double celling credits on sentences for offenses that were eligible under the former regulation but are ineligible under the current regulation. *Id* at 68, 877 A.2d at 199-200 (footnote omitted). We granted both sides petitions for writ of certiorari.

So what the IGO, State, Court, the Secretary, Commissioner, Parole, Probation, and Judge Cox failed to mention and inform this Court was that in the Editor's Note, this version of the new enactment COMAR 12.02.06.04N and amendment of COMAR 12.02.06.04F was originally drafted by the Legislature as House Bill 174 and not by the Department as they all contend. The wording House Bill indicates that the Legislature created this law or statute. This Act requires *Nivens* to serve a longer sentence of confinement than is authorized by law.

Editor's Note – Section 2 Ch. 466, Acts 1990, provides that this Act shall be construed to apply **only** prospectively and may not be **applied** or **interpreted** to have any effect on or application to any offense committed before the effective date of this Act."

Petitioner did not receive fair notice and the government did not show and exercise governmental restraint when the legislature increased punishment beyond what was prescribed when the crime was consummated in 1987 concerning 12.02.06.04N(2) and COMAR 12.02.06.04F regarding SPC.

Two paramount protections provided by the *ex post facto* clause are the assurance "that Legislative Acts give fair warning of their effect and permit *Nivens* to rely on their meaning until explicitly changed, *See Booth v. State*, 327 Md. 142, 174, 608 A.2d 162, 177 (1992)(quoting *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), and to restrict "government power by restraining arbitrary and potentially vindictive legislation." *Booth, supra*, 327 Md. at 174, 608 A.2d at 177 (quoting *Weaver*, *supra*, 450 U.S. at 29).

Moreover, this Court must note the language included in the regulation providing that, "this section may not be interpreted to mean that an inmate who is eligible to receive the credits described in this section has a right to these credits or will continue to receive these credits in the future," does not provide sufficient notice to *Nivens* for the purposes of the ex post facto prohibition. *See Miller v. Florida*, 482 U.S. 423, 431,107 S. Ct. 2446, 2452, 96 L. Ed. 2d 351 (1987) That disclaimer alone does not exempt the regulation from the ex post facto scrutiny. The enactment and amendments at issue in *Nivens'* present case are constitutionally valid when applied to inmates such as *Nivens* who are doubled celled and who committed any of the enumerated disqualifying crimes after the date that the enactment took effect on April 1, 1990 and retroactively to July 1, 1989, and the amendments took effect on January, 2, 2002, which, still requires *Nivens* to serve a longer sentence of confinement than is authorized by law. This Court's holding must apply only to inmates such as *Nivens* who committed one or more of the enumerated disqualifying crimes prior to the adoption of the enactment and amendments of what was **prescribed when the crime was consummated in 1987** concerning COMAR 12.02.06.05N(2) and COMAR 12.02.06.04F regarding SPC for housing. **(SEE Appendix E, F, G)**

So the IGO's, State, Court, the Secretary, Commissioner, Parole, Probation, and Judge Cox's arguments supports *Nivens'* argument in his initial ARP grievance and in this appeal because of the enactments of COMAR 12.02.06.05N(2), former Article 27, § 700(h) now CSA § 3-707 violates the ex post facto clause, restriction, and prohibition and 1990 or 1989 has no effect upon *Nivens* who was not incarcerated nor a convicted criminal at the time of this enactment. Judge Raker of the Court of Appeals concluded in *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004) that:

> {383 Md. 38}"DNA evidence **was not ex post facto only to convicted felons** and **are limited to convicted felons already incarcerated prior to the enactment of the statute**, and the law only applies to persons convicted of felonies and certain misdemeanor burglaries. The inmate has a diminished expectation of privacy the person being searched is already a convicted and incarcerated felon."
>
> **Petitioner has a right to the GCC credited to his prior sentence according to the Double Jeopardy Clause and CPA § 6-218 (c) and its ambiguity and vagueness, as the included credit applied to his sentence, after the sentence was vacated, to be credited toward his current sentence.**

The Double Jeopardy Clause of the Fifth Amendment requires that punishment already exacted must be fully "credited" in imposing sentence upon a new conviction for the same offense, and a defendant who has once been convicted and sentenced such as *Nivens* has, to a particular punishment may not on retrial be placed again in jeopardy of receiving a greater punishment than what was first imposed, for not crediting *Nivens* his previous Good Conduct Credits **(4,200)(GCC)** pursuant to § 3-702 and § 3-704 of the Correctional Services Article applied in advance, applied to his previous sentence of 70 years, **as the included credit** pursuant to § 6-218(c) of the Criminal Procedure Article, its **ambiguity, vagueness**, and the **Rule of Lenity**, and his previous and present Special Project Credits (SPC) for housing that he has never received due to the Ex Post Facto Clause, enactment, amendment and Double Jeopardy before and after the Court of Special Appeals reversed his conviction on February 23, 2010. **(SEE Appendix E, F, G)**

The Fifth Amendment guaranty against double jeopardy consists of three separate constitutional protections: **(1)** protection against a second prosecution for the same offense after acquittal; **(2)** protection against a second prosecution for the same offense after conviction; and **(3)** protection against multiple punishments for the same offense *Nivens* has met all 3 standards. The last protection is what is necessarily implicated in *Nivens'* case and consideration of the question whether, in the imposition of sentence for the same offense after retrial, the Constitution requires that credit must be given for punishment already endured, the same was held in *Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969). It is clear that this basic constitutional guarantee has been violated because the punishment has already been exacted for his offense after the reversal of his conviction, not being fully credited in his imposing sentence on October 31, 2011, which was required by **§ 6-218(c)(e) of the Criminal Procedure Article, Federal Appeal and Error § 1010; Federal Criminal Law § 112 – record – reconviction – heavier sentence**, and **Federal Appeal and Error § 1675 – habeas corpus – affirmance**, the trial judge **(Judge Cox)** failed to include on the record as required and the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. The constitutional violation is flagrantly apparent in *Nivens'* case involving the imposition of his maximum sentence on both Counts 2 **(Former Article 27 § 464A)** and 5 **(Former Article 27 § 29)** after his reconviction.

Suppose for example, in a jurisdiction where the maximum allowable sentence for larceny is 10 years imprisonment, a man succeeds in getting his larceny conviction set aside after serving 3 years in prison. If, upon reconviction, he is given a 10 year sentence, then quite clearly, he will have received multiple punishments for the same offense. For he will have been compelled to serve separate prison terms of 3 years and 10 years, although the maximum single punishment for the offense is 10 years imprisonment. Though dramatically evident in Petitioner's case, the same principle obviously holds true whenever punishment already he has

endured has not been fully subtracted from any of his new sentences for Count 2 **(Former Article 27 § 464A)** and Count 5 **(Former Article 27 § 29)** that still has not been fully credited in his imposing sentences upon his new conviction for the same offense. If upon a new trial, defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is convicted, those years can and must be returned by **"subtracting"** them from whatever new sentence is imposed and is apparent in *Nivens'* case pursuant to **Federal Criminal Law § 32**, such credit must include the time credited during service of the first sentence for good behavior **(4,200)(GCC)**.

The provisions of the Federal Constitution's Bill of Rights that are applicable to the States: U.S. L. Ed Digest, Constitutional Law §§ 512, 848; Criminal Law § 32, ALR Quick Index, Due Process of Law; Equal Protection of Law; Former Jeopardy; Sentence and Punishment.

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Federal Criminal Law § 22, 29, 31 – guaranty against double jeopardy:

> The Fifth Amendment guaranty against double jeopardy consists of three separate constitutional protections: **(1)** protection against a second prosecution for the same offense after acquittal; **(2)** protection against a second prosecution for the same offense after conviction; and **(3)** protection against multiple punishments for the same offense.

Federal Criminal Law § 32 – double jeopardy - retrial – credit for time served:

> The protection against multiple punishments for the same offense, afforded by the Fifth Amendment guaranty against double jeopardy, is necessarily implicated in any consideration of the question whether, in the imposition of a sentence for the same offense after conviction upon retrial following the setting aside of the first conviction, the Constitution requires that the credit be given for punishment already endured under the original sentence.
> The constitutional guaranty against multiple punishment for the same offense, provided by the double jeopardy clause of the Fifth Amendment, absolutely requires that punishment by imprisonment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense upon retrial after the first conviction has been set aside, and such credit must include the time credited during service of the first sentence for good behavior **(4,200 GCC). (SEE Appendix E, F, G)**

Federal Constitutional Law § 848 – due process – reconviction- heavier sentence:

> It is a flagrant violation of the due process clause of the Fourteenth Amendment for a State trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside.

Federal Appeal and Error § 1010; Federal Criminal Law § 112 – record – reconviction – heavier sentence:

> In order to assure the absence of retaliatory motivation on the part of a trial judge in sentencing a defendant upon reconviction after the defendant has successfully attacked his first conviction, whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear, which reasons must be based upon objective information concerning identifiable conduct on the defendant's part occurring after the time of the original sentencing proceeding, and the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Federal Appeal and Error § 1675 – habeas corpus – affirmance:

> Upon review of the judgment in federal habeas corpus proceedings ordering the release of state prisoners on the ground that more severe sentences imposed by the state trial courts after reconviction upon retrial were unconstitutional, the first convictions having been set aside on constitutional grounds, the United States Supreme Court will affirm such judgments where there is nothing in the record to show that the states in question offered any reason or justification for the increased sentences either at the time such sentences were imposed or at any stage in the habeas corpus proceedings.

The governing principle has thus developed that a convicted man may be retried after a successful appeal, (*Bryan v. United States*, 338 U.S. 552, 94 L. Ed. 335, 70 S. Ct. 317); that he may run the risk, on retrial, of receiving a sentence as severe as that previously imposed, (*United States v. Ball*, 163 U.S. 662, 41 L. Ed. 30, 16 S. Ct. 1192 (1896); and that he may run the risk of being tried for a separate offense, (*Williams v. Oklahoma*, 358 U.S. 576, 3 L. Ed. 2d. 516, 79 S. Ct. 421).

But with all deference the State does not, because of prior error, have a second chance to obtain an enlarged sentence.[9] Where a man successfully attacks a sentence that he has already "fully served" (*Street v. New York*, 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969)), the State cannot create an additional sentence and send him back to prison. Similarly, where *Nivens* was successful attacking his sentence that he began to serve, the State cannot impose an added sentence by sending him back to prison for a greater term by not crediting his sentence and applying his previous 4,200 GCC as the included credit pursuant to CPA § 6-218(c) and CSA §§ 3-702 and 3-704, previous 210 SPC for housing, and present 460 SPC for housing, along with invoking the rule of lenity. **(SEE Appendix E, F, G)**

In relying on its own conceptual fiction, Judge Cox, the IGO, State, trial Court, the Secretary, Commissioner, Parole, and Probation forgets that *Green v. United States*, 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221, 61 ALR2d 1119 (1957), prohibits the imposition of an increased punishment on retrial precisely because *Nivens'* convictions were set aside only at the *Nivens'* behest, and not in spite of that fact, 355 U.S, at 193-194, 2 L. Ed. 2d at 207, 208, 61 ALR 2d 119; *supra*, at 746, 23 L. Ed. 2d 681, *Nivens'* choice to appeal his erroneous conviction is protected by the rule that he may not again be placed in jeopardy of suffering the greater punishment not imposed at his first trial. Moreover in its exaltation of form over substance and policy, Judge Cox, the IGO, State, trial Court, the Secretary, Commissioner, Parole, and Probation, all misconceives the essential principle in *Green*.

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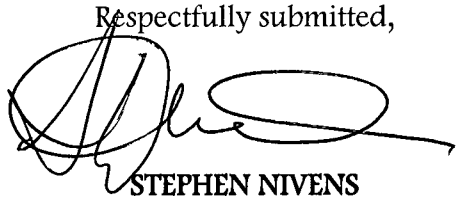
[9] **(Justice Douglas dissenting)** *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 656 (1969), I read the Double Jeopardy Clause as applying a strict standard. It is designed to help equalize the position of government and the individual, to discourage abusive use of the awesome power of society. **Once a trial starts jeopardy attaches.** The prosecution must stand or fall on its performance at the trial. The policy of the Bill of Rights is to make rare indeed the occasions when the citizen can for the same offense be required to run the gantlet twice. The risk of judicial arbitrariness rests where, in my view, the Constitution puts it on the Government. *Gori v. Unites States*, 367 U.S. 364, 372-373, 6 L. Ed. 2d 901, 907, 81 S. Ct. 1523.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



STEPHEN NIVENS

Footlight MT Light 12pt.