DOCKET NUMBER _____

SUPREME COURT OF THE UNITED STATES

Rickey Nelson Jones,

Petitioner,

vs.

Maryland Court of Appeals/Chief Judge Mary Barbera/State of Maryland

Respondent.

On Petition for Writ of Certiorari to the Maryland Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the United States Constitution violated when the highest court in Maryland supported the lower courts' decisions to [i] apply federal statutory discrimination law without considering its language and legislative history, [ii] rely on federal courts that overlooked the federal statute's language and legislative history, and [iii] not address the only question in Petitioner's case, namely, "Is it unconstitutional for the State of Maryland, via its Judicial Branch (commingling with the Executive Branch), to sponsor a process that has [i] historically and statistically excluded qualified non-Caucasians from the circuit court for Anne Arundel County at 99.97% and [ii] engaged in a race-focused evaluation of Petitioner in order to exclude him from recommendation to the Governor when he was imminently more objectively qualified than the Caucasians recommended and appointed to the bench?"

LIST OF PARTIES

Petitioner is an individual. He is a multi-state, multi-discipline, and multiple-areas-of-law practitioner in state and federal court, approaching thirty (30) years.

Respondent is the State of Maryland as represented by its judicial branch of government (Court of Appeals/MEB [chief justice]) and its Trial Courts Judicial Nominating Committee.

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CITATIONS

The ORDER of the Maryland Court of Appeals denying Petitioner's Petition for Certiorari is attached as Appendix "A." It was issued on May 22, 2020. The case is cited with its number in that court, namely, No. COA-PET-0475-2019.

The OPINION of the Maryland Court of Special Appeals, affirming the judgment of the Circuit Court for Anne Arundel County, dismissing Petitioner's action, is attached as Appendix "B." It was issued on January 24, 2020. The case is titled "RICKEY NELSON JONES V. MARY E. BARBERA" and cited as follows in that appellate court: No. 1415, September Term, 2017.

The OPINION of the Circuit Court for Anne Arundel County dismissing Petitioner's action is attached as Appendix "C." It was issued on September 17, 2017. The case is titled "RICKEY NELSON JONES V. MARY E. BARBERA" and cited as follows in that court: Case No.: C02-CV-16-003948.

BASIS FOR JURISDICTION

The Maryland Court of Appeals is the highest court in the State of Maryland. Its May 22, 2020 denial of Petitioner's Petition for a Writ of Certiorari upheld the lower courts' misinterpretation of a federal statute. Hence, the basis of jurisdiction is 28 U.S.C. Sec. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. Sec. 2000e-2(k) and 42 U.S.C. Sec. 2000e(f)

42 U.S.C. Sec. 2000e-2(k) states in pertinent part as follows:

"An unlawful employment practice based on disparate impact is established under this subchapter only if – (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;…."

42 U.S.C. 2000e(f) states in pertinent part as follows:

"The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or any immediate adviser with respect to the exercise of the constitutional or legal powers of the office…."

CONCISE STATEMENT OF CASE

On December 20, 2016, Petitioner filed his "Complaint" (See. Appendix "D") in the Circuit Court for Anne Arundel County alleging racial discrimination after [i] being subjected to race-based questions during an interview process for judicial vacancies and [ii] being excluded from recommendation to the governor when abnormally far less objectively qualified Caucasians were recommended. At the time of the lawsuit, the U.S. District Court for the District of Maryland and the U.S. Court of Appeals for the Fourth Circuit had dismissed Petitioner's

federal lawsuit based on its interpretation of a federal statute, despite the statute's language and legislative history to the contrary of the interpretation and laws in Maryland against any and all racial discrimination. On March 10, 2017, Respondent filed a motion to dismiss Petitioner's state lawsuit. Because the motion was not filed timely, Petitioner filed a Motion for Order of Default and Default Judgment. On November 17, 2017, the circuit court denied Petitioner's motions and granted Respondent's motion to dismiss, relying largely on the U.S. District Court reasoning that Title VII does

not apply to circuit court judgeships. In Petitioner's Brief to the appellate court and in his Writ of Certiorari to Maryland's Highest Court, he raised the fact that the State of Maryland acts through its judicial branch of government, under which the Trial Courts Judicial Nominating Commission (hereinafter "TCJNC") operates, statistically and factually acting in a racially discriminatory manner as the State, and such is not immune from state and federal anti-discrimination laws. The Maryland Court of Special Appeals upheld the decision of the circuit court, and the

Maryland Court of Appeals denied Petitioner's Writ of Certiorari.

CONCISE ARGUMENT FOR ALLOWANCE OF WRIT

The State of Maryland's TCJNC Process of evaluating candidates for vacant judgeships is not immune from anti-discrimination laws, state or federal. The reliance placed on a definition found in 42 U.S.C. 2000e(f) cannot apply based on {i} its language, {ii} its expressed historical purpose, and {iii} the facts of Petitioner's case.

[I]

42 U.S.C. 2000e(f) states in pertinent part as follows,

> *"The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or any immediate adviser with respect to the exercise of the*

> *constitutional or legal powers of the office….”*

In short, [1] a person not elected to public office, [2] a person not chosen by someone elected to public office, [3] a person not an appointee on the policy making level, and [4] a person not an immediate adviser with respect to the exercise of the constitutional or legal powers of an elected or policy-making officer, cannot be subject to this exemption regarding Title VII lawsuits. The Petitioner is in the “not” category of each reference made by 42 U.S.C. 2000e(f).

[II]

The history behind 42 U.S.C. 2000e(f) shows that the state's reliance on it to permit the TCJNC's history of racial exclusion to continue is incorrect.

The legislative history of 42 U.S.C. 2000e(f) counters the manner in which the State of Maryland relies upon it. The conference report on this legislation states, "It is the conferees intent that this exemption shall be construed narrowly." 1972 U.S. Code Cong. & Ad.News, 2137, 2180. The legislative history goes on to give the

purpose of this exemption. Senator Ervin (the sponsor of the amendment) said the purpose was to "exempt from coverage those who are chosen by…the elected official, and who are in a close personal relationship and an immediate relationship with him. Those who are his first line advisers." 118 Cong.Rec. 4492-93. This has nothing to do with the process applicants undergo for vacant judgeships. Petitioner is not, nor ever has been, a state employee. He has never worked for an elected or appointed state official, and he has never held judicial office.

Anti-Discrimination Law

[A]

Disparate Impact

42 U.S.C. Sec. 2000e-2(k) provides as follows: "An unlawful employment practice based on disparate impact is established under this subchapter only if – (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged

practice is job related for the position in question and consistent with business necessity;...." Disparate impact claims involve employment practices that are facially neutral in their treatment of different groups but that fall more harshly on one group than another, without justification for business necessity. International Brotherhood of Teamsters v. United States Inc v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); 42 U.S.C. Sec. 2000e-2(k). In proving disparate impact, statistical analysis serves an important role,

particularly in grave imbalances to the detriment of members of protected groups. International Brotherhood of Teamsters, 431 U.S. at 339.

Disparate Treatment

42 U.S.C. Sec. 2000e-2(a)(1)(2) provides as follows: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion,

sex, or national origin; or (2) to limit, segregate, or classify his employees or applicant for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) provides the established order of proof in a private, non-class, action challenging employment discrimination. We know

that the complainant must prove {i} he belongs to a racial minority, {ii} that he applied and was qualified for a job for which the employer was seeking applicants, {iii} that despite his qualifications, he was rejected, and {iv} after rejection, the position remained open (or was filled by a non-minority). Then, the employer must articulate some legitimate, nondiscriminatory, reason for the rejection. Finally, the complainant must be afforded a fair opportunity to show that the employer's stated reason for rejection was in fact pretext. McDonnell Douglas Corp., 36 L.Ed. 2d at 677-679.

[B]

What Has Occurred?

DISPARATE IMPACT

In Anne Arundel County's history, there have been only two[1] African Americans to serve on the Circuit Court for Anne Arundel County, despite eighteen applying (Source: Public Information of Maryland's Administrative Office of the Courts). According to Freedom of

[1] Following Petitioner's lawsuit, protests in front of the courthouse, EEOC Complaints, etc., one African-American female was recently appointed by the Governor and had to face competitors in an election.

Information Act Information acquired by Petitioner, despite decades of objectively qualified diverse non-Caucasians applying for vacancies on the circuit court, since 1837, the county has a 99%-plus success rate in "locking" them out. Of the fifty-four judges who have served over the span of 179 years, two African Americans served for a total of 9 years. Statistically, regarding number of judges, three hundredths of one percent (0.03) served. Statistically, regarding number of years, five hundredths of one percent (0.05) was the length of time. In Anne Arundel County, 1/3 of its residents are non-

Caucasian (Census Information). This Court has said that it will repeatedly approve of the use of statistical proof where the exclusion of protected members reach the proportions condemned in International Brotherhood of Teamsters v. United States Inc. v. United States, 431 U.S. 324. 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). In that case, minorities in better jobs constituted 0.4% (much greater than the statistical exclusion of minorities from this Maryland county court of 0.03%). In 2014, four objectively qualified African-American Attorneys applied for two vacancies.

None were recommended to the Governor. The Petitioner's [1] diverse legal experience, [2] multi-state legal experience, [3] legal scholarship (i.e., published legal articles & bar association CLE organizer and panelist), and [4] work in the community, far exceeded the credentials of the Caucasian applicants recommended to the Governor (according to public records). Hence, the TCJNC/State' s facially neutral process of guiding qualified candidates to the Governor for appointment to the bench is a barrier operating in favor of Caucasian applicants that was explicitly

condemned in International Brotherhood of Teamsters. With Title VII, Congress proscribed all practices that are fair on the surface but discriminatory in operation. Griggs v. Duke Power Co. 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2df 158 (1971). In theory, a TCJNC should evaluate in a color-blind manner and provide the best qualified for consideration by the Governor. However, in practice in Maryland, race/ethnicity has illegally "entered" the evaluation process in result and historical fact. Moreover, the intent behind the process that discriminates cannot govern. Hence, claims by the state that [i] the

Governor ultimately decides who gets appointed to the bench (despite following recommendations from the TCJNC nearly 100% historically), [ii] the TCJNC has one or two minorities on it, [iii] those selected by the Governor must still run in the next election, etc. do not excuse the racially exclusionary process that has deep historical roots and continues, approaching four centuries. Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

[C]

What Is Happening?

DISPARATE TREATMENT

Since the McDonnell Douglas Corp. decision, this Court has provided some clarity on proving discrimination. It said the following in International Brotherhood of Teamsters v. United States Inc v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), "We expressly noted that '(t)he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from (a plaintiff)

is not necessarily applicable in every respect to differing factual situations.... The importance of McDonnell Douglas lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." International Brotherhood of Teamsters, 431 U.S. at 358. Consistent with this court, in reversing the District Court's

decertification of a class of minority workers alleging promotion discrimination, the United States Court of Appeals for the 4th Circuit gave some guidance regarding disparate impact and disparate treatment. It said, "Unlike a disparate impact claim, a showing of disparate treatment does not require the identification of a specific employment policy responsible for the discrimination…. A pattern of discrimination, revealed through statistics and anecdotal evidence, can alone support a disparate treatment claim, even where the pattern is the result of discretionary decision-

making." Brown v. Nucor Corp. 785 F.3d 895, 915 (4th Cir., 2015).

When {i} an African-American member of the TCJNC was removed from the interview of Petitioner, {ii} she had no affiliation whatsoever with Petitioner, {iii} she was a member of the TCJNC for 2014, and {iv} the only reason discovered for her absence was her familiarity with another African-American Candidate, a decision was made along racial lines to limit Petitioner's opportunity to obtain the votes needed to receive recommendation to the Governor for appointment to the Circuit Court for

Anne Arundel County. The likelihood of Petitioner's appointment by then Governor Martin O'Malley was good in light of [1] his expressed preference for diversity on the bench (SEE. Addendum "E": Maryland Governor's diversity desire) and [2] the absence of any diversity on the Circuit Court for Anne Arundel County in 2014. Yes, the excluded member's presence on the commission during Petitioner's interview would not guarantee her vote for him, but more significant for Title VII purposes is the fact that she was removed due to her common race with the

Petitioner. What is the TCJNC doing using race "at all" for exclusionary purposes when it is wholly irrelevant in evaluating Petitioner's qualifications? Further, since Petitioner and the excluded member were complete strangers to one another, a very significant fact emerges implicating Title VII violations. That fact is as follows: if every Caucasian member of the commission was not removed for every Caucasian candidate being interviewed, it is impossible to articulate a legitimate, nondiscriminatory, reason for the exclusion of the African American

from Petitioner's interview.[2] Since the voting of the commission members is a secret, the elimination of any member from the process is gigantic. One vote could be determinative in a recommendation or non-recommendation to the Governor. In short, the TCJNC {I} made a decision along racial lines illegitimately, {II} excluded a racial minority member improperly, {III} limited an African-American

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[2] This shows the length and breath of discrimination in Maryland regarding the circuit court in this county. It also explains why Petitioner's Cross Motion for Summary Judgment should have been granted. Respondent never offered any reason whatsoever for excluding Petitioner from recommendation for the judicial vacancy, and certainly did not offer any non-discriminatory one.

Candidate's opportunity undoubtedly, {IV} did this in the midst of the evaluation of Petitioner's judicial qualifications clearly, and {V} contributed to his non-recommendation to the Governor unquestionably. Combined with the statistics outlined herein, Petitioner's exclusion cannot legitimately be explained as a non-discriminatory decision. Additionally, there is no doubt that Petitioner is an African American, well qualified, was excluded, and the positions were eventually given to white applicants. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.

2d 668 (1973). The statistics buttress the illegal process used in Maryland to recommend judges for the Circuit Court in Anne Arundel County and highlight the offence to Title VII committed by the state.

The 2014 candidates recommended to the Governor further expose the disparate treatment of Petitioner by the state. Per the candidates' own social media Linked-In Profile, one was working in the House of Delegates and had only been in private practice for about 2 years. The other was in private practice for over two decades but engaged in

limited practice areas. Both spent substantial time under the guidance of other attorneys. The 2007 Revised Administrative Order of Chief Judge Robert M. Bell required the judicial nominating commission to find individuals "most fully professionally qualified." (emphasis added). Petitioner's legal experience is rich, diverse, and expansive. He has not only run a multi-state law office for nearly three decades, but he has {i} represented individuals and businesses, {ii} done civil, criminal, administrative, and appellate law, {iii} represented people or businesses in other states, {iv} practiced state and

federal law, {v} been published by multiple bar associations, {vi} served as a panelist on multiple Continuing Legal Education Panels covering multiple areas of the law, and {vii} served the less fortunate in Maryland extensively as a leader in a ministry. The rich and diverse legal experience of Petitioner (as well as community service) is superior to the credentials of those recommended to the Governor in 2014 and arguably superior to any Caucasian ever recommended to any Governor in the history of the State of Maryland. To wit, the process used by Maryland in evaluating Petitioner injected race "into the picture" when it

was irrelevant,[3] causing his exclusion when he should have been included.

FINAL STATE ARGUMENTS REBUTTED

[1] The State of Maryland has argued that the proper defendant was not the Chief Judge of the state. However, Petitioner's complaint indisputably identifies the Chief Judge as the representative of the state via its judicial branch of

[3] During the evaluation process (supposedly about legal knowledge, skill, experience, and scholarship), the TCJNC commenced several inquiries about Petitioner's race discrimination federal lawsuit, suggesting "wrong move, not wise, what are you doing, etc."

government. It appears that the state is seeking to maneuver around being identified as the defendant herein. Petitioner's complaint, paragraph 5, "put that to rest" (Appendix "D") by explaining the representative capacity of the Chief Judge for the State of Maryland.

[2] The state and lower courts also argued that the federal decisions had preclusive effect on Petitioner's case. However, each federal decision failed to address the specific language of 42 U.S.C 2000e(f) as it relates to its legislative history and the Petitioner. Moreover, the only issue in the case

has never been addressed by any court, federal or state. That issue is: "Is it unconstitutional for the State of Maryland, via its Judicial Branch (commingling with the Executive Branch), to sponsor a process that has [i] historically and statistically excluded qualified non-Caucasians from the circuit court for Anne Arundel County at 99.97% and [ii] engaged in a race-focused evaluation of Petitioner in order to exclude him from recommendation to the Governor when he was objectively more qualified than the Caucasians recommended and appointed to the bench?

Finally, Maryland's "tight grip" on a definition in 42 U.S.C. 2000e(f) to maintain its racial exclusion in the process of evaluating candidates for judicial vacancies simply because the judicial position sought is arguably immune from Title VII Demands must be stopped. The state is trying to be sophisticated with its discrimination by doing it in preliminary steps leading to the candidates considered by the Governor. Is not unlawful racial exclusion in creating a pool of candidates from which the Governor chooses more insidious than unlawful racial exclusion in the selection itself? This is an important question of

federal law which should be settled by this court when federal courts have not addressed it per the statute's language and legislative history.

CONCLUSION

Petitioner respectfully requests that this court grant his Writ of Certiorari.

ALTERNATIVELY,

Petitioner requests that this court end the racial discrimination in the evaluation process for judicial vacancies in Maryland by

[1] reversing the lower courts, [2] granting all relief requested by Petitioner, and [3] such other and further relief as the court deems appropriate.

Respectfully submitted,

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APPENDIX "A"- ORDER Denying Petitioner's Writ of Certiorari by Maryland Court of Appeals

RICKEY NELSON JONES v. MARY E. BARBERA MARYLAND COURT OF APPEALS/ADMINISTRATIVE OFFICE OF THE COURTS	* IN THE * COURT OF APPEALS * OF MARYLAND * COA-PET-0475-2019 * CSA-REG-1415-2017 * (No.C-02-CV-16-003948, Circuit Court for Anne Arundel County

ORDER

Upon consideration for the petition for a writ of certiorari to the Court of Special Appeals, the amended petition for writ of certiorari, and answer filed thereto, in the above-captioned case, it is this 22nd day of May, 2020

ORDERED, by the Court of Appeals of Maryland, that the petition and the amended petition be, and they are hereby, DENIED as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert N. McDonald

Senior Judge

APPENDIX "B"- OPINION of the Maryland Court of Special Appeals Affirming Circuit Court

Court of Special Appeals

Gregory Hills

1/24/2020 11:28 AM

UNREPORTED[1]

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1415

September Term, 2017

RICKEY NELSON JONES

V.

MARY E. BARBERA

Reed

[1] *This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of state decisis or as persuasive authority. Md. Rule 1-104.

Friedman

Alpert, Paul E.

(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed:

Unreported Opinion

This case involves whether an applicant for a gubernatorial judicial appointment may state a claim of racial discrimination pursuant to the Maryland Fair Employment Practices Act, Md. Code Ann., State Gov't 20-606 (a) (hereinafter "Title 20") and Title VII of the Civil Rights Acts, 42 U.S.C. §§ 2000e-2(a), 2000e-2(k) (hereinafter "Title VII"). Rickey Nelson Jones (hereinafter "Appellant") was unsuccessful when he applied to secure an appointment by Governor Lawrence J. Hogan to a vacancy on the Circuit Court for Anne Arundel County. Subsequently, Appellant brought suit against Chief Judge Mary E. Barbera of the Maryland Court of Appeals/Administrative Office of the Courts. Appellant alleged that Chief Judge Barbera discriminated against him in violation of Title VII and Title 20.

Chief Judge Barbera moved to dismiss the complaint or ion the alternative summary judgment. Subsequently, Appellant moved for default judgment arguing that Chief Judge Barbera's motion to dismiss was filed thirty-two minutes past the midnight filing deadline and also filed a cross-motion for summary judgment. The circuit court granted Chief Judge Barbera's motion to dismiss finding that the filing of the motion to dismiss resulted in prejudice against Appellant and denied Appellant's motion for default judgment and cross-motion for summary judgment. It is from this decision Appellant files this timely appeal. In doing so, Appellant brings the following questions for our review, which we have rephrased for clarity:[2]

[2] Appellant presents the following questions:

I. Did the circuit court err when it dismissed Appellant's complaint and denied Appellant's cross-motion for summary judgment?

II. Did the circuit court err in accepting Chief Barbera's motion to dismiss as timely?

For the foregoing reasons, we answer in the negative and affirm the decision of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Application Process for Circuit Court Judges

A person who wants to become a judge in Maryland must reside in the county, district, or judicial circuit in which he or she is elected or appointed. Candidates are "selected from those who have been admitted to the practice of law in this State, and who are most distinguished for integrity, wisdom, and sound legal knowledge." Md. Const. Art. 4, § 2. The Governor may appoint an individual who meets these qualifications to the circuit court of the jurisdiction in which the candidate resides. Id. Circuit court judges, after appointment, must stand for

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1. Was it prejudicial error for the judge to ignore the clearly identified Defendant herein.
2. Was it prejudicial error for the Judge to not grant Plaintiff's Motion for Order of Default per the mandatory wording of Rule 2-6:13(b) and set a hearing to determine Default Judgment?
3. Was it prejudicial error for the Judge to not grant Plaintiffs Motion for Default Judgment (and grant all damages requested) or Summary Judgment (and set a hearing to determine all damages)?
4. Was it prejudicial error for the Judge to grant Defendant's late motion to dismiss?

election in contested elections. Md. Const. Art. 4, § 3. If a judicial vacancy occurs in circuit court 'the Governor shall appoint a person duly qualified to fill said office." Md. Const. Art. 4, § 5.

The judicial nominating commissions are responsible for screening each applicant and nominating the best candidates and submitting their names to the Governor[3]. The members of the Trial Court Nominating Commission, who are responsible for screening circuit court judge applicants, are selected by the Governor and the presidents of the Bar Association in the "political subdivision or subdivisions for which the Commission is responsible." The Trial Court Commission interviews each candidate and selects three candidates to recommend to the governor. Chief Judge Barbara and the Administrative Office of Courts ("AOC") are not responsible for appointing members of the commission.

Appellant's First Judicial Application and Federal Lawsuit

Appellant has been practicing law in the state of Maryland for almost twenty-five years. In 2014, Appellant submitted an application for a judicial vacancy on the Circuit Court for Anne Arundel County. Appellant's name was not recommended to the Governor. Appellant filed a complaint with the Equal Employment Opportunity

[3] "Governor Marvin Mandel created by Executive Order, multiple judicial nominating commissions. Since 1971, each governor has re-issued substantially similar orders authorizing such commissions. In 2015, Executive Order 01.01.2015.09 applied to the judicial nominating commissions selection process. That Executive Order established an Appellate Judicial Nominating Commission and sixteen Trial Court Nominating Commissions organized within the Executive Department."

Commission ("EEOC") alleging that the AOC discriminated against him based on his race. Subsequently, Appellant filed a complaint with the United States District Court for the District of Maryland against the AOC alleging race discrimination pursuant to Title 20 and Title VII[4].

The AOC moved to have .the case dismissed on the following grounds: "(1) Maryland circuit court judges are exempt from the protections of Title VII by virtue of appointment by the Governor on a "policy making level" and election to the bench for a term of 15 years, and (2) the AOC.is not the employer of a Maryland circuit judge and, therefore, not a proper defendant." The federal district court granted the AOC's motion to dismiss stating: "the position [Appellant] seeks is not protected by Title VII..." because Title VII does not apply to "[1] any person elected to public office in any state or political subdivision of any State by the qualified voters thereof, or [2] any person chosen by such office to be...an appointee on the policy making level." The district cost held that Title VII does not apply to Maryland circuit court judges. The federal district 'court also held that Appellant's Title 20 claim must fail because "like Title VII, [Title 20] exempts from coverage elected officials and appointees on the policy making level." Appellant appealed his case to the United States Court of Appeals for the Fourth Circuit. The United Stated Court of Appeals affirmed the federal district court's decision and on June 19, 2017, the United States Supreme Court denied Appellant's petitions for writ of certiorari.

[4] Jones v. Administrative Office of the Court/Maryland Judiciary, No. 1:15-CV-3336.

Appellant's Second Judicial Application

In 2015, Appellant applied for a second time to be a circuit court judge on the Circuit Court for Anne Arundel County. Appellant was interviewed by the Trial Court Judicial Nominating Commission. During Appellant's interview, Appellant alleges that he was asked about "his [then*] pending federal racial discrimination lawsuit against [the AOC]." Appellant's name was not recommended to the Governor for an appointment on the circuit court. On April 13, 2016, Appellant filed a complaint with the EEOC alleging that he was racially discriminated against during his interview. On September 30, 2016, the EEOC dismissed Appellant's complaint. Subsequently, Appellant filed a complaint in the Circuit Court for Anne Arundel County naming Chief Judge Barbera as a defendant.

Chief Judge Barbera filed a motion to dismiss or in the alternative a motion for summary judgment thirty-two minutes after the midnight deadline. On March 17, 2017, Appellant filed a motion for default judgment and a cross motion for summary judgment stating that Chief Judge Barbera filed her response pleading thirty-two minutes after the midnight deadline. In response, Chief Judge Barbera filed a motion to accept the motion to dismiss *nuric pro tunc* and filed a motion to oppose Appellant's motion fort default judgment.

On May 11, 2017, the circuit court held a hearing on the following motions: 1. Chief Judge Barbera's motion to dismiss or in the alternative for summary judgment; 2. Chief Judge Barbera's motion to accept the motion to dismiss as timely; 3. Appellant's motion for default judgment; and 4. Appellant's cross-motion

for summary judgment. "During the hearing, the circuit court granted Chief Judge Barbera's motion to accept her motion to dismiss as timely and denied Appellant's motion for default judgment as moot. The circuit court found that the-two minutes late motion to dismiss filing did not prejudice Appellant. Subsequently, Appellant filed a motion to reconsider the circuit court rulings. On September 19,. 2017, the circuit court ultimately granted Chief Barbera's motion to dismiss and denied Appellant's cross-motion for summary judgment and motion for reconsideration.

Discussion

I. Appellant's Cross Motion for Summary Judgment

A. Parties' Contention

Appellant contends that Chief Judge Barbera is not the sole defendant named in his complaint. Specifically, Appellant argues that there are no punctuation marks between Mary E. Barbera Maryland Court of Appeals/Administrative Office of the Courts which indicates that they are "one and the same." Appellant maintains that "according to the Maryland Constitution, Article IV, Part II, Section 18(b)(1)... '[t]he Chief Judge of the Court of Appeals shall be the administrative head of the judicial system of the State.'" As such, Appellant asserts that Chief Judge Barbera was named as a party "due to her status as the representative of the true Defendant, Court of Appeals/ State of Maryland." Appellant further argues that Chief Judge Barbera was not sued in her individual Capacity because "the caption of the complaint states clearly to 'Serve On' the Office of the Attorney General." Moreover, Appellant argues that his cross-motion for

summary judgment should be granted because he is not "suing a person elected to public office... [t]he lawsuit is against the State of Maryland via its judiciary."

Appellant further argues that the circuit court erred when it held that Title VII and Title 20 did not apply to Appellant's situation. Appellant maintains that Title VII and Title 20 applies to his situation because "Appellant [1] is not an employee of the State of Maryland, [2] did not sue a person elected to public office, and [3] did not sue a person chosen by such officer (or others) to be an appointee on the policy making level." Specifically, Appellant contends that his suit is against the State not an individual as such, the exemption language of both Title VII and Title 20 do not apply to Appellant's situation. Appellant argues that the facially neutral process of appointing a judge on the Circuit Court of Anne Arundel County has a negative impact on minorities.

Chief Judge Barbera responds that the circuit court properly granted her motion to dismiss and denied Appellant's cross-motion for summary judgment. Chief Judge Barbera argues that Appellant is not protected by Title VII and Title 20. Specifically, Chief Judge Barbera maintains denial of Appellant's cross-motion for summary judgment was proper because circuit court judges are "excluded from the coverage of Title VII and Title 20 for two alternative reasons: first, because a judge is appointed initially by the Governor to 'serve on a policy making level'; and second, because an appointed circuit court judge must stand for election and, if successful, would hold a 'public elective office' of the State." As such, Chief Judge Barbera asserts that the position Appellant sought was an appointment "by the

Governor to 'serve on a policymaking level,' and is not subject to the State's civil service laws." Moreover, "courts have consistently recognized the policymaking implications of judicial decision making to hold that judges are exempt' from Title VII and Title 20. Chief Judge Barbara contends that circuit court judges run for election and 'therefore, are [also] exempt under the public elective office exemption."

Additionally, Chief Judge Barbera argues that she is the sole defendant in this case because Appellant "failed to request or ensure that summonses were issued and severed on" the other defendants. Chief Judge Barbera maintains that a claim under Title VII and Title 20 is only made against an employer or prospective employer and Chief Judge Barbera is not Appellant's prospective employer because she does not appoint or hire circuit court judges. Moreover, Chief Judge Barbera maintains that the circuit court properly denied Appellant's cross-motion for summary judgment because the circuit court "properly recognized that it could not intrude on the Governor's exclusive authority to make judicial appointments and provide the requested relief."

Lastly, Chief Judge Barbera argues the circuit court should have applied the doctrine of collateral estoppel to preclude Appellant from "relitigation of the exemption issue." Chief Judge Barbera contends that 'be issue resulting in the dismissal of the federal suit was whether Mr. Jones may bring a claim of race discrimination arising out of his non- selection for a judicial appointment under Title VII and Title 20." As such, Appellant had a fair opportunity to litigate and thus, Appellant is barred from relitigating the same issues before this Court.

B. Standard of Review

Appellate review of an order granting summary judgment is a two-step process. The first is to decide whether there were disputes of material fact before the circuit court. *Koste v. Town of oxford*, 431 Md. 14, 24-25 (2013). We perform this review *de novo. Id.* at 25. Summary judgment is proper where the trial court determines that there are no genuine disputes as to any material fact and that the moving party is entitled a judgment as a matter of law. *See* Md. Rule 2-501. The trial court should not resolve any issue regarding the credibility of witnesses as those matters are left to the trier of fact.

Secondarily, appellate courts focus on whether the trial court's grant of the motion was legally correct. The parameter for appellate review is determining "whether a fair minded jury could find for the plaintiff in light of the pleadings and the evidence presented and there must be more than a scintilla of evidence on order to proceed to trial…" *Laing v. Volkswagen of Am, Inc.,* 180 Md. App. 136, 152-53 (2008). Additionally, if the facts are susceptible to more than one inference the court must view the inferences in the light most favorable to the non-moving party. *Id.* An appellate court ordinarily may uphold the grant of summary judgment only on the grounds relied on by the trial court. *See Ashton v. Brown,* 339 Md. 70, 80 (1995).

C. Analysis

1. Appellant's Complaint and Service of Process

Appellant maintains that Chief Judge Barbera is not the sole defendant named in his complaint. Specifically, appellant argues that there are no punctuation marks between Mary E. Barbera Maryland Court of Appeals/Administrative Office of the Courts which indicates that they are "one and the same." Appellant stated in his complaint that the Chief Judge, Court of Appeals, and the AOC were all defendants in this case. Appellant maintains that "according to the Maryland Constitution, Article IV, Part II, Section 18(b)(1)… '(t)he Chief Judge of the Court of Appeals shall be the administrative head of the judicial system of the State.'"

Maryland Rule 2-112 prescribes as relevant:

> (a) Summons. Upon the filing of the complaint, the clerk shall issue forth with a summons for *each* defendant and shall deliver it, together with a copy of each paper filed and a blank copy of the information report form required to be provided by Rule 16-302 (b), to the sheriff or other person designated by the plaintiff. Upon request of the plaintiff, more than one summons shall issue for a defendant.

Maryland Rule 2-112 (a) (emphasis added).

Here, Appellant's complaint caption stated, "Mary E. Barbera Maryland Court of Appeals/Administrative Office of the Courts- Serve on: Michele McDonald,

Assistant Attorney General Chief Counsel, Courts-Judicial Affairs Division, Office of the Attorney General, 200 St. Paul Place, 20th Floor, Baltimore, Maryland 21202." During the hearing on May 11. 2017, Appellant stated "the Defendant, your honor is the State of Maryland."

Appellant argued:

> Because the State acts through its executive, legislative, and judicial branches, the actions of those under the umbrella of the judiciary is [sic] the action of the State. And the person who's the administrative head of the entire state if Mary E. Barbera, the Chief Judge of the Court of Appeals. So the Defendant is the State of Maryland. The representative and on a duly head of the judicial system in the State of Maryland [sic].

The Assistant Attorney General of Maryland who represented Chief Judge Barbera stated: "the sole summons that was issued in this case was issued to Mary Ellen Barbera and served on me. There was no summons served on either the Court of Appeals or the Administrative Office of the Courts."

Maryland Rule 2-112(a) makes clear that each defendant in a case must be served. In fact, all three entities Appellant named in his complaint are capable of being sued and served. Nonetheless, Appellant only served Chief Judge Barbera and failed to serve the other potential defendants. Maryland Rule 2-507 provides in part, "[a]n action against any defendant who has not been served...is subject to

dismissal as to that defendant." As such, the sole defendant in Appellant's case is Chief Judge Barbera and Appellant's claims against the other potential defendants were properly dismissed for lack of jurisdiction.

2. Appellant's Title 20 and Title VII Claims

Appellant argues that on November 9, 2015, during his interview for two judicial vacancies on the Circuit Court for Anne Arundel County he was "questioned about his pending federal racial discrimination lawsuit against the defendant." Appellant contends that this improper questioning coupled with "be long history of racial exclusion on the court'...[and] the Anne Arundel County Trial Court Nominating Commission recommend[ation] all Caucasian candidates with less qualifications to the Governor" demonstrates that he was discriminated against.

In relevant part, Title 20 provides:

> (a) An employer may not:
>
> (1) **Fail or refuse to hire,** discharge, or otherwise discriminate against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of:
>
> (i) the individual's race….
>
> (2) limit, segregate, or classify its employees or applicants for employment in any way that deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect the individual's status as an employee because of:

(i) the individual's race…

Md. Code Ann. § 20-66(a). The statute further prohibits employment agencies from failing or refusing to "refer for employment any individual on the basis of the individual's race..."

Md. Code Ann. § 20-66(b). The federal counterpart to Title 20 is outlined in Title VII and further permits-an "employee" .to sue his "employer." .See 42 U.S.C. §§ 2000e-2(a). However, Title VII does not permit suits against "[a]ny person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or [2] any person chosen by such officer to be… an appointee on the policy making level." 42 U.S.C. § 2000e.

Appellant had previously filed a similar complaint in the United States District Court for the District of Maryland against the AOC, alleging race discrimination pursuant to Title 20 and Title VII. *See supra* footnote 3. The AOC moved to dismiss Appellant's claims on the grounds that:

> (1) Maryland circuit court judges are exempt from the protections of Tithe VII by virtue of appointment by the governor on a 'policy making level' and election to the bench for a term of 15 years, and (2) the AOC is not the employer of a Maryland circuit court judge and, therefore, not a proper defendant.

On March 16, 2016, the Honorable Catherine C. Blake for the United States District Court for the District of Maryland granted the AOC's motion to dismiss, reasoning in its Memorandum that:

> Even assuming [Appellant] were able to identify the correct defendant, his claim must fail because the position he seeks is not protected by Title VII. The statute permits an "employee" to sue his "employer", but exempts from coverage "[1] any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or [2] any person chosen by such officer to be… an appointee on the policy making level." 42 U.S.C. § 2000e(f). A Circuit Court judge in Maryland initially I appointed by an elected official, the governor, to a position "on the policy making level." *See Gregory v. Ashcroft,* 501 U.S. 452, 467 (1991) (holding Missouri state judges are appointees on the policy making level); *Birch v. Cuyahoga Cty. Probate Court,* 392 F. 3d 151, 161 (6th Cir. 2004); *Burgess v. City of Lake City,* 2013 WL 4056315 at *2 (D.S.C. 2013). The exemption does not include employees "subject to the civil services laws of the State government," 42 U.S.C. § 2000e(f), but Maryland Circuit Court judges are not subject to the State's civil service laws. Md. Code Ann., State Pers. & Pens. § 6-301(2); *see also Williams v. Anderson,* 753 F. Supp. 1306, 1310-11 (D. Md. 1990).
>
> Accordingly, it is not necessary to discuss the particular facts of the application process, or to compare Jones's qualifications with those of other candidates. This court does not dispute the importance of diversity on the bench, but Jones is not entitled to the relief he seeks.

(Internal footnote omitted).

The substance of Appellant's claims against Chief Judge Barbera, which gave rise to this present appeal, is similar to the claims he brought before the United States District Court. In the instant case, Appellant contends that his rights under Title VII and Title 20 were violated, however the judicial position that Appellant sought is not protected by Title VII or Title 20. Title VII states, in relevant part:

> The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof; or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office: The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 U.S.C. § 2000e. Appellant applied for a judicial vacancy on the Circuit Court for Anne Arundel County, however, neither circuit court judges or applicants for judicial appointments are not protected under Title VII definition of an employee pursuant to the "public elective office" exclusion. See 42 U.S.C. § 2000e; Md. Const. Art. 4, § 3.

According to Maryland Constitution, Article IV § 3; state circuit court judges must run for election and if elected they are considered to hold a "public elective office" Such applicants are also excluded because, when appointed by the governor, they are considered to work on "policy, making level." The Supreme Court of the United States previously addressed whether judicial appointees are considered appointees on the policy level in *Gregory v. Ashcroft,* 501 U.S. 452 (1991).

In *Gregory,* Missouri state court judges challenged the mandatory retirement provision of the State Constitution. *See Article V, § 26 of the Missouri Constitution* (providing "[a]ll judges other than municipal judges shall retire at the age of seventy years"). The judges argued that the provision discriminated against them based on their age pursuant to the Federal Age Discrimination Employment Act ("ADEA"). *Id.* at 456. However, the ADEA stated, "the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level." 29 U.S.C. § 630(f). The Court held that Missouri state judges were not covered by the ADEA because they constitute appointees "on a policymaking level," and such appointees are excluded from coverage under the ADEA. *Gregory,* 501 U.S at 466-67. Moreover, other courts have recognized the policymaking implications of judicial decisions, thus excluding judges from coverage under Title VII as appointees on the policymaking level. *See e.g., Birch v. Cuyahoga County Prob. Court*, 392F.3d 151,

160(6th Cir. 2004) (reasoning the probate court magistrate was exempt from the provisions of Title VII because the judge made policy).

Hence, given the nature of Maryland's circuit court judicial appointments and the policymaking responsibilities of circuit court judges, it is clear that state circuit court judges and applicants seeking judicial appointment are excluded from Title VII's definition of employee. Thus, the judicial vacancy Appellant sought is not covered by Title VII.

We also note that Appellant failed to sue the proper entity. The members of the Trial Court Nominating Commission, who are responsible for screening circuit court judge applicant are selected by the governor and the presidents of the Bar Associations in the "political subdivision or subdivisions for which the Commission is responsible." Chief Judge Barbera and the AOC are not responsible for appointing-members of the commission and are not involved in the nomination process. Therefore, Chief Judge Barbera was also not Appellant's prospective employer because she played no part in the nominating process.

Accordingly, the circuit court did not err when it denied Appellant's cross-motion for summary judgment. Appellant failed to show that he is entitled to judgment as a matter of law because he is not protected by Title VII and Title 20, and he failed to bring suit against the proper defendant.

3. Issue Preclusion

Chief Judge Barbera argues that the circuit court should have applied the doctrine of collateral estoppel to preclude Appellant from relitigating the exemption issue.

> To apply collateral estoppel or issue preclusion to issue or fact, proponent must demonstrate that (1) issue or fact is identical to one previously litigated, (2) issue or fact was actually resolved in prior proceeding, (3) issue or fact was critical and necessary to judgment in prior proceeding, (4) judgment in prior proceeding is final and valid, and (5) party to be foreclosed by prior resolution of issue or fact had full and fair opportunity to litigate issue or fact in prior proceeding.

***In Re Microsoft Corp. Antitrust Litigation,* 355 F.3d 322, 326 (4th Cir. 2004) (citation omitted).**

As we previously noted, the issues and facts before the United States District Court for the District of Maryland and the Fourth Circuit are identical to the issues before this Court. Similar to his current claim against Chief Judge Barbera, Appellant previously filed a complaint against the AOC alleging race discrimination pursuant to Title 20 and Title VII. The issue of whether Appellant was protected under Title 20 and Title VII was resolved in the prior proceeding and the court's finding was necessary to its dismissal of Appellant's complaint. In fact, the federal district court dismissed Appellant's complaint, the fourth circuit affirmed, and the

United States Supreme Court denied writ of certiorari, thus, the issues before the federal court were resolved, final, and valid. We hold that the doctrine of collateral estoppel applies and bars Appellant from relitigating the same issues that were presented before the federal district court and the Fourth Circuit.

DISCUSSION

i. Motion to Accept a Late Filing

A. Parties' Contentions

Appellant maintains the circuit court erred when it denied his motion for default judgment. Appellant argues that he was "gravely prejudiced" by the circuit court granting Chief Judge Barbera's motion to accept her motion to dismiss as timely. Specifically, Appellant argues that the rules explicitly state that if a party files a late pleading the opposing party is entitled to an "order of default". As such, the circuit court erred when it granted Chief Judge Barbera's motion to accept her late filing.

Chief Judge Barbera responds that the circuit court did not err when it granted her motion to accept a late filing and denying Appellant's motion for default judgment as moot. Specifically, Chief Judge Barbera argues that Appellant's failed to identify any prejudice arising from the circuit court granting her motion to accept her late filing. Chief Judge Barbera argues that the circuit court granted her "motion to accept the motion to dismiss as timely filed [because] there was no predicate basis upon which a default judgment could be based." We agree.

B. Standard of Review

There is an abuse of discretion "where no reasonable person would take the view adopted by the [circuit] court," or which the court acts "without reference to any guiding rules or principles." *In re Adoption/Guardianship No. 3598,* 347 Md. 295, 312 (1997). "An abuse of discretion may also be found where the ruling under consideration is 'clearly against the logic and effect of fact and inference before the court,' or when the ruling is 'violative of fact and logic.'" *Id.*

C. Analysis

Appellant argues that the circuit court erred when it denied his motion for default judgment and granted Chief Judge Barbera's motion to accept her motion to dismiss as timely. Appellant contends that he was "gravely prejudiced" by this decision. On May 11, 2017, the circuit court held a hearing on the following motions: 1. Chief Judge Barbera's motion to dismiss or in the alternative for summary judgment; 2. Chief Judge Barbera's motion to accept the motion to dismiss as timely; 3. Appellant's motion for default judgment; and 4. Appellant's cross-motion for summary judgment. The circuit court stated the following about Chief Judge Barbera's motion to accept her motion to dismiss as timely:

> The issue of the prejudice- and the ruling on this motion is in no way intended as a ruling or even a commentary on the merits of the case at this stage. I view it as a procedural issue.
>
> ***

> The Plaintiff obviously, if the motion to dismiss were to be granted, would be prejudiced. But he would also be prejudiced if the case was lost. It would just be in a different manner. One would be on the basis of law and the other one would be on the basis of the facts that surround this case.
>
> So the bottom line is that the Court does not believe that the plaintiff has been prejudiced in a manner that would require it to refuse to exercise its discretion and declines to do so, which means I am exercising the discretion to grant the defendant's motion to accept as timely Defendant's motion to dismiss on, in the alternative, for summary judgment. I'm not granting summary judgment, obviously. And-at this point, if at all. And I am denying the plaintiffs motion for an order of default for the reasons that I just stated.

We hold that the circuit court did not err when it exercised its discretion to accept Chief Judge Barbera's motion to accept her motion to dismiss as timely. See *Holly Hall Publications, Inc. v. City Banking & Tr. Co., 147* Md. App. 251, 265 (2002) (acknowledging "discretion should be exercised so as to ensure that justice is done") Here, the circuit court found that Appellant was not prejudiced when Chief Judge Barbera filed her response pleading thirty-two minutes late. Furthermore, Appellant fails to show that court's ruling was "clearly against the logic and effect of facts and inferences before the court". Accordingly, we hold that the circuit court did not abuse its discretion when it granted Chief Judge Barbera's motion to accept the late motion to dismiss as timely.

JUDGEMENT OF THE CIRCUIT COURT

FOR ANNE ARUNDEL COUNTY

AFFIRMED: COSTS TO BE PAID BY

APPELLANT.

APPENDIX "C"- OPINION of Circuit Court for Anne Arundel County granting Defendant's Motion to Dismiss

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

RICKEY NELSON JONES **Plaintiffs** **v.** **MARY ELLEN BARBERA** **Defendant**	**Case No. C02-CV-16-003948**

OPINION AND ORDER OF COURT

I. INTRODUCTION

Before the Court is the Defendant, Mary Ellen Barbera's Motion to Dismiss the Plaintiffs "Complaint-Discrimination: Maryland Annotated Code, State Government Article, Section 20- 606(a), 42 U.S.C. 2000c-2(a) and 42 U.S.C. 2000 e-2(k) as well as the Plaintiff's Motion for Summary Judgment.

II. THE PARTIES

a. The Plaintiff is "Rickey Nelson Jones", an African American attorney whose residence is in Anne Arundel County, Maryland. Reverend Jones' practice and license as set forth in his Complaint is to practice 'both state and federal law has been in the State of Maryland for nearly a quarter of a century"

b. The named Defendant and the only Defendant duly served in this case is "Mary E. Barbers". Mary E. Barbera is the Chief Judge of the Court of Appeals of Maryland, the highest court of this state. The caption of the Plaintiffs Complaint sets forth under the name of Mary E. Barbera the words "Maryland Court of Appeals/Administrative Office of the Courts-Serve on: Michele McDonald, Assistant Attorney General Chief Counsel, Courts-Judicial Affairs Division, Office of the Attorney General, 200 St. Paul Place, 20th Floor, Baltimore, Maryland 21202."

Notwithstanding the naming of Mary E. Barbera as the sole Defendant in this case, Plaintiff takes the position in Paragraph 5 of his Complaint that the "Defendant is the Court of Appeals." But at the hearing on the pending motions on May 11, 2017, Plaintiff flatly stated "the Defendant, your honor, is the State of Maryland" explaining his position as follows:

> "Mary, the chief judge, is the administrative head of the judiciary. As the Court knows, the State acts. There is executive, legislative and judicial arms of the government. Because, according to the Maryland Constitution, Article 4, Section 2— Article 4, part 2, Section 18: "A chief judge of the Court of Appeals is designated as the administrative head of the judicial system of government," Because the State acts through its executive, legislative, and judicial branches, the actions of those under the umbrella of the judiciary is (sic) the action of the State. And the person who's the administrative head of the entire state is

> Mary Barbera, the Chief Judge of the Court of Appeals. So the Defendant is the State of Maryland. The representative and on a duly head of the judicial system in the State of Maryland (sic)".

The Assistant Attorney General of Maryland on behalf of Defendant, Mary E. Barbera, takes issue with both the designation and the explanation as follows, stating in open court as follows:

> "The complaint, which I would refer the Court to, styled against Mary E. Barbera, Court of Appeals, Administrative Office of the Court, the sole summons that was issued in this case was issued to Mary Ellen Barbera and served on me. There was no summons served on either the Court of Appeals or the Administrative Office of the Courts. I would also note that the complaint itself- and I'm reading from paragraph 5 of the complaint: "Defendant is the Court of Appeals." Then it goes on to state that the judicial power of the State of Maryland is vested in the Court of Appeals, et cetera, et cetera. And the rest of the paragraph ends, "in short, the action of the AOC was the action of the Court of Appeals was the action of the State of Maryland," All three of those things are distinct legal entities capable of being sued and capable of being served. None of them were served or, frankly, sued in this particular lawsuit. (emphasis added)

This Court agrees with the Attorney General. The named Defendant sued and the only defendant served and before this court in this case is Mary E. Barbera.

III. THE CASE

Plaintiff Rickey Nelson Jones brings this law suit to complain specifically about the "process" of judicial selection for the trial courts of Anne Arundel County, Maryland focusing his attention and ire as well as the scrutiny of this court on that part of the "process" which when applied to his candidacy for seats on the Circuit Court for Anne Arundel County resulted in his view in his not being "recommended" by the gubernatorially appointed Trial Court Judicial Nominating Commission to the Governor of Maryland for appointment to one of the four seats on the Circuit Court for which he applied.

In his Complaint, Plaintiff recites under the heading of **"Facts"** his personal and professional history as a lawyer who "for nearly a quarter of a century, has practiced civil law, criminal law, administrative law (state and federal) and appellate law" as well as describing his authorship of published legal articles, experience serving as a panelist on various Continuing Legal Education Programs and his licenses and representation of clients in courts in Maryland and other states and federal circuits. He then proffers a history of trial courts specifically the Circuit Court of Anne Arundel County which attempts to integrate his personal quest for a seat on the Circuit Court for Anne Arundel County directly into the context of what Plaintiff refers to as "the long history of racial exclusion on the court". In doing so, he seeks to have his personal narrative in effect serve as a metaphor for what he pleads in his Complaint as "the long history of racial exclusion on the court." The

metaphor for the distinct constitutional, legal, and factual reasons which follow doesn't completely resemble either history or the current reality.

The conduct described in Plaintiff's Complaint which aggrieves Reverend Jones personally and he argues has adversely affected him professionally according to his pleading violates the "rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of the state" (sic). That conduct consisted of questions propounded to Plaintiff by members of the Anne Arundel County Trial Courts Judicial Nominating Commission (TCJNC) on November 9, 2015 as he was interviewed for two judicial vacancies on the Circuit Court for Anne Arundel County. Specifically, Plaintiff complains about being "questioned about his pending federal racial discrimination lawsuit against the defendant." He explains that the "lawsuit concerned the improper and unlawful focus on race in evaluating judicial candidates" which Plaintiff avers "was occurring again by this TCJNC (in light of its inquiry)"

Plaintiff then states in his Complaint:

> "8. The questioning was improper and unhelpful in determining legal education, legal experience, legal scholarship or legal thinking.
>
> 9. Moreover, the questioning injected a criterion into the evaluation process that is prohibited in the State of Maryland by law"

Reverend Jones cites as his authority for these assertions, language from an Administrative Order from former Chief Judge Robert M. Bell dated August 29, 2007 in which the then Chief Judge stated:

> "The Commission shall select and nominate to the Governor the names of the individuals it finds to be legally and most fully professionally qualified"

Plaintiff then argues that as a result of this "improper and unhelpful" (sic) questioning by members of the TCJNC coupled with "the long history of racial exclusion on the court "the Anne Arundel County Trial Court Nominating Commission recommended all caucasian candidates with less qualifications to the governor, dismissing the ordered procedure for the commission concerning "most fully professionally qualified, " dismissing state law and federal law's prohibition on race discrimination in employment and employment opportunities and otherwise abandoning competent, meritorious evaluation of legal qualifications."

Whether these conclusory allegations are factual and whether they flow logically from the personal narrative pied by the Plaintiff which he attempts to place in historical context are issues not before this Court presently. What is before this Court at this time are the Defendant's Motion to Dismiss and the Plaintiffs Motion for Summary Judgment.

But before this Court reviews and again addresses the well settled legal issues and authorities argued yet again by the Attorney General's Office in support

of the Defendant's Motion to Dismiss in this case, this Court believes it would be instructive to briefly examine the legal and constitutional feasibility of granting the relief requested by the Plaintiff and the procedural history of the Plaintiffs efforts to secure that relief at this stage of these proceedings via his own Motion for Summary Judgment.

IV. THE RELIEF REQUESTED BY PLAINTIFF

The declaratory and other relief requested by the P1a›ntiff, Rickey Nelson Jones in this case is as follows:

> "A. Declare the process undertaken by the 2015 TCJNC for Commission District 7, on behalf of the State of Maryland, be deemed discriminatory,
>
> B. Determine that the recommendations submitted to the Governor for the judicial vacancies in late 2015 be deemed invalid,
>
> C. Determine that the appointments made by the governor based on those recommendations be deemed invalid,
>
> D. Order that the Plaintiff be appointed to the bench as the most qualified judicial applicant regarding legal knowledge, experience, and scholarship (per the Court of Appeals' August 2007 Order),
>
> E. Order that the TCJNC for Commission District 7 be (i) revamped/changed to reflect the county's diversity for which it operates, (ii) prohibited from limiting or excluding members on the

basis of race unjustifiably, (iii) required to honor Section 5(d) of the Court of Appeals' Order regarding the proper procedure for the commission, (iv) required to document the weight given to each factor considered in evaluating applicants, (v) mandated to make the basis for its decision(s) public information, and (vi) mandated to submit to judicial and public oversight the entire process of evaluating candidates and its results (to assure compliance with the Court of Appeals Order, Section 5(d), and competent meritorious evaluations),

F. Order that Plaintiff be compensated in the amount of $154,000.00,

G. Order that this case not be assigned any judges appointed during Plaintiff's period of applying for judicial vacancies, namely since 2014,

H. Order that Plaintiff be reimbursed for all costs and attorney's fees, and

I. Grant such other and further relief as the court deems proper."

Counsel for the Defendant, the Assistant Attorney General of Maryland correctly points out in her pleadings and in open court at the Hearing on the motions in this case that these "remedies" "raise all sorts of concerns under the separation of powers doctrine". However, the Assistant Attorney General suggests that "we don't really need to address them here". This Court, however, on the contrary holds that it should and will address them here because it is necessary to

do so in order to describe the alternative universes of fact/fiction and law that the Plaintiff, Reverend Rickey Nelson Jones and the Defendant, Mary E. Barbera, Chief Judge of the Court of Appeals of Maryland inhabit in this case. This accounts for and explains their stark differences on even what the issues are in this case and drives the grounds on which they argue the merits of their dueling dispositive motions before this Court.

These conflicting worlds are illustrated in the record of this case, and in particular, the oral argument and interpretation of exhibits proffered in support of their respective positions at the Hearing on the motions in this case on May 11, 2017 as follows:

I. SEPARATION OF POWERS

A. THE LAW

Maryland Declaration of Rights

1. "Article 8. Separation of Power: The legislative, executive and judicial powers of government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said departments shall assume or discharge the duties of any other."
2. The doctrine of separation of powers precludes the judicial branch from reviewing or interfering with the conclusions, acts or decisions of another branch of

government made within its sphere of authority.

Ohara III v. Kovens, 92 Md. App 9 (1992).

B. ALTERNATIVE LAW

"The Court: So, you said your complaint is with the process. The process you're complaining about is the judicial selection, the trial court judicial selection commission's selection process. And the trial court commission process was created by the governor not by the judiciary.

Mr. Jones: Yeah. It wasn't created by the judiciary. It was created by the governor beyond it. But it seemed as if they are inseparably connected. And the reason why is because-

The Court: Who's they?

Mr. Jones: The executive branch here and the judiciary branch as far as who gets on the bench. They're inseparably connected because the executive order puts the authority in the judiciary branch to have a trial court judicial nominating commission to recommend people to the governor to be appointed."

II. THE CREATION, BRANCH OF GOVERNMENT ANDD POWER OF THE TRIAL COURT JUDICIAL NOMINATION COMMISSIONS

A. THE LAW

Executive Order (Governor Lawrence J. Hogan, Jr.)

01-01.2008.04

Trial Courts Judicial Nominating Commissions:

"(1) Creation. A trial Courts Judicial Nominating Commission is hereby established as **part of the Executive Department** for each of the Commission Districts…" (emphasis added).

"E. Request for Assistance from Administrative Office of the Courts- The Chair of each Commission shall **request the assistance of the Administrative office of the Courts** in providing training to commission members, in notifying the appropriate commission when a vacancy occurs, in developing a form or forms for submission by applicants and any other assistance the chair deems appropriate.

B. ALTERNATIVE LAW

"The Court: So, you said your complaint is with the process. The process you're complaining about is the judicial selection, the trial court judicial selection commission's selection process. And the trial court commission process was created by the governor not by the judiciary.

Mr. Jones: Yeah. It wasn't created by the judiciary. It was created by the governor beyond it. But it seemed as if they are inseparably connected. And the reason why is because-

The Court: Who's they?

Mr. Jones: The executive branch here and the judiciary branch as far as who gets on the bench. They're inseparably connected because the

executive order puts the authority in the judiciary branch to have a trial court judicial nominating commission to recommend people to the governor to be appointed."

III. THE "PROCESS" AND PROCEDURES OF THE TRIAL COURT JUDICIAL NOMINATING COMMISSIONS

A. THE LAW

Executive Order (Governor Lawrence J. Hogan Jr. 01-01.2008.04

Section F. Commission Procedures

.....

(3) The Commission shall evaluate each applicant. In the course of its evaluation, the Commission may seek information beyond that contained in the materials submitted by an applicant. The Commission may obtain pertinent information from knowledgeable persons known to Commission members, the Attorney Grievance Commission, judges, personal references given by the candidate, criminal justice agencies, or other sources. The Commission shall place notices in at least one newspaper read by members of the general public identifying the applicants and invite written and signed comments to the Commission regarding the applicants. A criminal justice agency, including the Central Repository, may release the criminal history record information, ine1u‹ling conviction and non-conviction data, to a

Commission upon request of its chair, for the purpose of evaluating a candidate

……

(5) A Commission shall interview each applicant for each vacancy for which it is responsible for recommending candidates. The interview shall be in person unless, due to extraordinary circumstances, a candidate is unable to appear in person. In cases of extraordinary circumstances, and upon prior approval of the Governor, an interview may be held via video teleconference. In considering a person's application for appointment to fill a vacancy, a Commission shall consider the applicant's integrity, maturity, temperament, diligence, legal knowledge, intellectual ability, professional experience, community service, and any other qualifications that the Commission deems important for judicial service, as well as the importance of having diverse judiciary.

……..

(7) No applicant may be recommended to the Governor for appointment unless by vote of a majority of members present at a voting session of the appropriate Commission, as taken by secret ballot. A Commission may conduct more than one round of balloting during its deliberations, in order to achieve the number of candidates required under this Order.

B. ALTERNATE LAW

Paragraph 6, 7, 8, 9, 10 of the Plaintiff's Complaint in the Circuit Court for Anne Arundel County, Maryland

……..

6. On November 9, 2015, Plaintiff sat for an interview before the TCJNC for Commission District 7 for two judicial vacancies.
7. During the interview, Plaintiff was questioned about his pending federal racial discrimination lawsuit against the defendant. The lawsuit concerned the improper and unlawful focus on race in evaluating judicial candidates, something which was occurring again by this TCJNC (in light of its inquiry)
8. The questioning was improper and unhelpful in determining legal education, legal experience, legal scholarship, or legal thinking.
9. Moreover, the questioning injected a criterion into the evaluation process that is prohibited in the State of Maryland by law.
10. The rules of procedure for TCJNC are clear and counter any focus on race. Pursuant to the August 29, 2007 Administrative Order from Chief Judge Robert M. Bell, Section 5(d), "the commission shall select and nominate to the Governor the names of the individuals it finds to be legally and most fully professionally qualified."

IV. PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGEMENT

Plaintiff, Rickey Nelson Jones, moves for Summary Judgment and Damages citing as his grounds as follows which are set forth in their entirety:

"Granting Plaintiff's Cross Motion and Damages

Defendant, after approximately three years and various pleadings has failed to articulate any legitimate nondiscriminatory reason for the exclusion of Plaintiff from recommendation to the Governor, especially in light of the candidates who were recommended with less diverse legal knowledge and experience. Defendant has failed to counter the racially exclusionary statistics and data Plaintiff has represented in his lawsuits. Defendant has failed to explain how the judicial requirement of recommending to the Governor the "most fully professionally qualified" can exclude Plaintiff and include those with less diverse legal knowledge and experience.

Defendant has failed to offer one case, federal or state, that makes the evaluation process for a vacant judgeship identical to the position of judge (the latter being immune from the demands of Title VII). It is beyond reasonable dispute that Plaintiff was the "most fully professionally qualified" for the judicial vacancies on Anne Arundel County's Circuit Court in 2015; the qualifications outlined in the Complaint (paragraphs 12-13) establish Plaintiffs objective superior qualifications for the position,

> and no logical explanation can justify his exclusion. He was questioned about his federal racial discrimination lawsuit during his interview, proving race occupied the minds of those on the commission, despite such being completely irrelevant in evaluating legal knowledge and experience. The facts outlined in Plaintiff s Complaint, along with statistics and stat from the State of Maryland, are sufficient to show disparate treatment and disparate impact discrimination, entitling him to relief. The processes in place in the State of Maryland cannot, consistent with law, ignore superior legal qualifications, recommend those with fewer qualifications, disregard an exclusionary practice along racial lines, and proceed as if the superior qualifications are non-existent because the candidate is African American. This is discrimination that can be proven".

Maryland Rule 2-501 governs the filing and disposition of Motions for Summary Judgment. The relevant and pertinent parts of Maryland Rule 2-501 which govern the disposition of Plaintiff, Rickey Nelson Jones' Motion for Summary Judgment in this case reads as follows:

(a) **Motion**. Any party may file a written Motion for Summary Judgment on the ground that there is no genuine dispute as to any material *fact* and the party is entitled to judgment as a matter of law….

(f) **Entry of Judgment**. The Court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine

dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

Webster's Dictionary defines **"fact"** as (1) "something known to exist or to have happened", (2) "reality; actuality", (3) "something known to be true". Contrasted with that the same Webster's Dictionary defines **"opinion"** as "(1) a belief based on grounds insufficient to produce certainty" (2) "a personal attitude or appraisal", (3) "the formal expression of a professional judgment".

The express language of Maryland Rule 2-501 requires the Trial Court in considering any Motion for Summary Judgment to address two separate issues: (1) whether the pleadings show there is no genuine dispute as to any material **fact** and (2) whether the movant is entitled to judgment as a matter of law. *Syme v. Marks rentals, Inc.,* 70 Md. App. 235, 520 A.2d 1110 (1987). In doing so, the Court does not attempt to decide any issue of fact or of credibility, but only whether such issues exist. "*White v. Fricl,* 210 Md.274, 123 A.2d 303 (1956).

Furthermore, in ruling on a Motion for Summary Judgment, all inferences to be drawn from the underlying facts must be resolved against the moving party, *Merchants Mtg CO. v. Lubow,* 275 Md. 208, 339 A.2d 664 (1975); *Honaker v. W.C. & A.N. Miller Dev. Co.,* 285 Md. 216, 401 A. 2d 1013 (1979).

In this case, Plaintiff, Rickey Nelson Jones, the moving party, in his Motion for Summary Judgment has asserted as "undisputed facts" and therefore grounds for granting his Motion for Summary Judgment *inter alia*:

> "it is beyond reasonable dispute that Plaintiff was the "most fully professionally qualified" for the judicial vacancies on Anne Arundel County's Circuit Court in 2015"….."the qualifications outlined in the Complaint (paragraphs 12-13) establish Plaintiff's objective superior qualifications for the position, and no explanation can justify his exclusion. He was questioned about his federal racial discrimination lawsuit during his interview, proving race occupied the minds of those on the Commission, despite such being completely irrelevant in evaluating the legal knowledge and experience."

Unfortunately for Plaintiff in this case, simply saying a statement is "undisputed fact" doesn't make it a fact, let alone 'undisputed". At best-Plaintiff's asserted "undisputed facts" are his personal opinions which may or may not be shared by a neutral fact-finder. His statement that

> "it is beyond reasonable dispute that Plaintiff was the "most fully professionally qualified" for the judicial vacancies on Anne Arundel County's Circuit Court in 2015; the qualifications outlined in the Complaint (paragraphs 12-13) establish Plaintiffs objective superior qualifications for the position and no logical explanation can justify his exclusion".

is a classic example of "opinion" i.e. a personal attitude of professional judgment under the Webster's Dictionary and any other definition of "opinion" as distinguished from "fact".

Furthermore, Plaintiffs follow up statement that his being "questioned about his federal racial discrimination lawsuit during his interview, proves race occupied the minds of those on the Commission despite being completely irrelevant in evaluating legal knowledge and experience" is again, even viewing it in the light most favorable to the Plaintiff which this Court cannot do when considering a Motion for Summary Judgment a statement which purports to interpret the actions and words of other persons and to infer from those actions and words the state of mind of those persons is one of malevolence. This again is classic opinion...not facts.

There are multiple inferences as to their purpose which could be drawn from any of the questions that may have been asked of Plaintiff by members of the Anne Arundel County Trial Court Nominating Commission regarding Plaintiffs previously filed federal racial discrimination lawsuit. Those possible inferences and purposes include to probe the judicial applicant's knowledge of the law which formed the basis of his lawsuit and the defenses to it as well as his knowledge, understanding and appreciation of the U.S. and Maryland Constitutional principles of separation of powers, checks and balances and federalism which govern a large part of the operation of our Federal and State governments; and arguably substantially impact the merits of Plaintiff's case. This questioning is in fact similar to the questions that this Court asked Plaintiff at the Hearing on the Motions in this case to which Plaintiff voiced no objections.

In any case, this Court not only cannot legally draw these inferences desired by Plaintiff from these questions and Plaintiffs other opinions regarding his

superior qualifications for the purpose of acting in his Motion for Summary Judgment, it must draw inferences favorable to the opposing party and therefore submit the issues to the trier of fact if not otherwise legally barred. *Roland v. Lloyd E. Mitchell, Inc.*, 221 Md. 11, 155 A.2d 691 (1959); Fenwick Motor Co. v. Fenwick, 258 Md. 134, 265 A. 2d 256 (1970).

This Court has previously said in acting on Plaintiffs Motion for Summary Judgment that in addition to examining whether the pleadings show there is no genuine dispute as to any material fact we are required to separately determine whether movant could be entitled to judgment as a matter of law. It is therefore instructive to examine the relief requested by Plaintiff in order to determine if any or all of that relief which he seeks either through summary judgment or after a trial would or even could ever be granted without violating either the U.S. or Maryland Constitution, state or federal statues, or well settled federal and/or Maryland case law.

A passing glance convinces this Court that the following relief expressly requested by Plaintiff in his Complaint and his Motion for Summary Judgment is obviously not within the power or jurisdiction of this Court to grant for among other reasons to grant such relief would clearly violate the constitutionally mandated separation of powers between the executive and judicial branches of Maryland's government based on the record, in this case to date for the reasons references supra under the heading "The Law":

Requested relief Deemed Unconstitutional

B. Determine that the recommendations submitted to the Governor for the judicial vacancies in late 2015 be deemed invalid.

C. Determine that the appointments made by the Governor based on those recommendations be deemed invalid.

D. Order that the Plaintiff be appointed to the bench as the most qualified judicial applicant regarding legal knowledge, experience, and scholarship.

E. Order that the TCJNC for Commission District 7 be (i) revamped/changed to reflect the county's diversity for which it operates, (ii) prohibited from limiting or excluding members on the basis of race unjustifiably, (iii) required to honor Section 5(d) of the Court of Appeals' Order regarding the proper procedure for the commission, (iv) required to document the weight given to each factor considered in evaluating applicants, (v) mandated to make the basis for its decision(s) public information, and (vi) mandated to submit to judicial and public oversight the entire process of evaluating candidates and its results (to assure compliance with the Court of Appeals Order, Section 5(d), and competent meritorious evaluations),

F. Order that Plaintiff be compensated of $154,000.00

G. Order that Plaintiff be Reimbursed for all costs and attorney's fees.

For these reasons as well as the reasons stated by the Court at the Hearing on May 11, 2017 the Plaintiff, Rickey Nelson Jones' Cross Motion for Summary Judgment by Order following this Opinion will be denied as will his Motion for Reconsideration of this Court's previous rulings made in open court at the hearing on the Plaintiffs Motion for Order of Default Judgment.

V. DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGEMENT

Defendant, Mary Ellen Barbera moves to dismiss the Plaintiffs Complaint on essentially two grounds. Those grounds are:

(1) The position of State Circuit Court Judge is not covered by title VII of the Civil Rights Act and Title 20 of the Maryland State Government Article.

and

(2) The Complaint fails to state a claim upon which relief may be granted.

Maryland Rule of Procedure 2-322(b) & (c) governs the disposition of Defendant's Motion which this Court will treat solely as a Motion to Dismiss. That Rule in pertinent part reads as follows:

"Rule 2-322. Preliminary Motions.

(b) Permissive. The following defenses may be made by motion to dismiss filed before the answer, if an answer is required: (1) lack of jurisdiction over the subject matter, (2) failure to state a claim upon which relief can be granted, (3) failure to join a party under Rule 2-211, (4) discharge in bankruptcy, and

(5) governmental immunity. If not so made, these defenses and objections may be made in the answer, or in any other appropriate manner after answer is filed.

(c) Disposition. A motion under sections (a) and (b) of this Rule shall be determined before trial, except that a court may defer the determination of the defense of failure to state a claim upon which relief can be granted until the trial. In disposing of the motion, the court may dismiss the action or grant such lesser or different relief as may be appropriate. If the court orders dismissal, an amended complaint may be filed only if the court expressly grants leave to amend. The amended complaint shall be filed within 30 days after entry of the order or within such other time as the court may fix. If leave to amend is granted and the plaintiff fails to file an amended complaint within the time prescribed, the court, on motion, may enter an order dismissing the action. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501.

The Plaintiff disputes both of these as grounds for his Complaint to be dismissed. However, he acknowledged at the hearing that his lawsuit is based on

Title VII of the Federal Civil Rights Act and Title 20 of the Maryland State Government Article as follows:

> "The Court: Do you agree that your lawsuit…and I'm looking right at it…is based in Title 7 and/or Title 20 or both?
>
> Mr. Jones: That's correct, your honor."

That being said, this Court's short answer to this Motion is the same as that of United States District Court Chief Judge Catherine C. Blake who articulated the basis for the granting of Defendant's Motion to Dismiss in the instant case as well if not better than this judge could as follows:

> "Even assuming Jones were able to identify the correct defendant, his claim must fail because the position he seeks is not protected by Title VII. The statute permits an "employee" to sue his "employer," but exempts from coverage "[1] any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or [2] any person chosen by such officer to be…an appointee on the policy making level." 42 U.S.C §2000e(f). A Circuit Court judge in Maryland initially is appointed by an elected official, the governor, to a position "on the policy making level," *See Gregory v. Ashcroft,* 501 U.S. 452, 467 (1991) (holding Missouri state judges are appointees on the policy making level)' *Birch v. Cuyahoga Cty. Probate Court,* 392 F.3d 1151, 160 (6th Cir. 2004); Burgess v. City of Lake City, 2013 WL

> 4056315, at *2 (D.S.C. 2013). The exemption does not include employees "subject to the civil service laws of a State government," 42 U.S.C § 2000e(f), but Maryland Circuit Court judges are not subject to the State's civil service laws. Md. Code Ann., State pers. & Pens. § 6-301(2); see also *Williams v. Anderson,* 753 F. Supp. 1306, 1310-11 (D. Md. 1990)
>
> Accordingly, it is not necessary to discuss the particular facts of the application process, or to compare Jones' qualifications with those of other candidates. This court does not dispute the importance of diversity on the bench but Jones is not entitled to the relief he seeks".

Plaintiff appealed Chief Judge Blake's dismissal of his suit to the Fourth Circuit Court of Appeals which affirmed in a per curiam **Opinion number 16-1341, Rickey Nelson Jones v. Administrative Office of the Courts.**

Whether the U.S. District Court's decision and the Fourth Circuit's affirmance is entitled to preclusive effect in the form of collateral estoppel as argued by the Assistant Attorney General, or not, this court agrees with the decision and analysis of the U.S. District Court (Blake, C.J.) and every other federal and state court in this country which has addressed these and similar issues. Whether the Administrative Office of the Courts, the Court of Appeals, or Chief Judge Barbera are alleged to be a Circuit Court Judge's employer, neither the Chief Judge, the Court of Appeals nor the Administrative Office of the Courts are a Circuit Court Judge's employer. This analysis is reinforced in this state by the fact that alone

among the Maryland Judiciary, Circuit Court judges are required to stand for election promptly after their appointment.

Accordingly, this Court by Order following this Opinion will grant the Defendant's Motion to Dismiss. Like the U.S. District Court, this Court does not dispute or in any way minimize the importance of diversity on the bench, but for the constitutional, statutory and fact- based reasons set forth supra this Court cannot grant the relief requested by the Plaintiff in this case.

THEREFORE, it is this 19th day of September, 2017 by the Circuit Court for Anne Arundel County, Maryland,

ORDERED, that the Plaintiff Rickey Nelson Jones' Motion for Summary Judgment is **DENIED**, and is further,

ORDERED, that the Plaintiff's Motion to Reconsider this Court's previous rulings on Plaintiff's Motion for Default and Cross Motion for Summary Judgment is hereby **DENIED;** and it is further,

ORDERED, that the Defendant's Motion to Dismiss is hereby **GRANTED.**

_____

Steven I. Platt,

Senior Judge, Circuit Court for Anne Arundel

County, Maryland

Cc:

Rickey Nelson Jones, Esquire

Law Office os Reverend Rickey Nelson Jones

3rd Floor, Suite 5

1701 Madison Avenue

Baltimore, MD 21217

Michele J. McDonald, Esquire

Assistant Attorney General

200 St. Paul Place, 20th Floor

Baltimore, MD 21202

APPENDIX "D"- Petitioner's Circuit Court Complaint
CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

RICKEY NELSON JONES **3043 Shoreline Boulevard** **Laurel, Maryland 20724** **Plaintiff,** **v.** **MARY E. BARBERA** **MARYLAND COURT OF APPEALS/ADMINISTRATIVE OFFICE OF THE COURTS** **Serve On:** **Michele McDonald** **Asst. Attorney General** **Chief Counsel, Courts & Judicial Affairs Div.** **Office of the Attorney General** **200 St. Paul Place,** **20th Floor** **Baltimore, MD 21202** **Defendant**	**Civil Case No: C-02-CV-16-003948**

COMPLAINT[5]

Discrimination: Maryland Annotated Code,

State Government Article, Section 20-606(a),

[5] Plaintiff's law office is currently preparing a Writ of Certiorari to the United States Supreme Court concerning similar discrimination by the same defendant in 2014. There exists no federal case holding or promulgated EEOC Rule addressing the application of anti-discrimination laws against indisputable racial discrimination (particularly "impact") during the Trial Courts Judicial Nominating Commission Process.

42 U.S.C. 2000e-2(a), & 42 U.S.C. 2000e-2(k)

JURISDICTION

1. In December 2015, Plaintiff filed a charge of discrimination against the above defendant.
2. On September 30, 2016, Plaintiff received his "Dismissal And Notice of Rights" from the United States Equal Employment Opportunity Commission (hereinafter "EEOC"). Plaintiff was notified of his right to sue within 90 days of receipt of the notice.
3. Maryland law and federal law prohibit racial discrimination in employment that (i) limits applicants in any way which deprives or tends to deprive them of employment opportunities and {ii} impacts in a disparate manner based on race.

PARTIES

4. Plaintiff, Rickey Nelson Jones, is a United States citizen who is a licensed attorney in the State of Maryland, practicing both state and federal law for nearly a quarter of a century.
5. Defendant is the Court of Appeals. The judicial power of the State of Maryland is vested in the Court of Appeals and such other courts created by the General Assembly.[6] The jurisdiction of the Court of Appeals shall be co-

[6] Maryland Constitution, Article IV; Judiciary Department, Section 1

extensive with the limits of the State.[7] 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 the State, which shall have force of law.[8] Pursuant to this power, the Administrative Office of the Courts (hereinafter "AOC"), as an arm of the State, organized and oversaw the processing of steps to fill judicial vacancies, part of that process being candidate evaluations by the Trial Courts Judicial Nominating Commission (hereinafter "TCJNC"). In short, the action of the AOC was the action of the Court of Appeals, which was the action of the State of Maryland.

FACTS

6. On November 9, 2015, Plaintiff sat for an interview before the TCJNC for Commission District 7 for two judicial vacancies.
7. During the interview, Plaintiff was questioned about his pending federal racial discrimination lawsuit against the defendant. The lawsuit concerned the improper and unlawful focus on race in evaluating judicial candidates, something which was occurring again by this TCJNC (in light of its inquiry).
8. The questioning was improper and unhelpful in determining legal education, legal experience, legal scholarship, or legal thinking.

[7] Maryland Constitution, Article IV; Judiciary Department, Section 14

[8] Maryland Constitution, Article IV; Judiciary Department, Section 18

9. Moreover, the questioning injected a criterion into the evaluation process that is prohibited in the States of Maryland by law.

10. The rules of procedure for TCJNC are clear counter any focus on race. Pursuant to the August 29, 2007 Administrative ORDER from Chief judge Robert M. Bell, Section 5(d), "the commission shall select and nominate to the Governor the names of the individuals it finds to be legally and most fully professionally qualified."

11. Maryland's Public Information from the Administrative Office of the Courts reveals the following about Anne Arundel County: [i] there have been two African Americans to serve on the circuit court in its 366-year history, despite nineteen applying; [ii] since 1837, defendant has a 99% plus success rate of keeping minorities off the circuit court; [iii] of the total number of judges who have served on the circuit court for nearly two centuries, statistically the two African Americans equal 0.03 percent; [iv] the minority population in the country is nearly 30%, with over half of that percentage being African American, [v] for the last ten years, the TCJNC has recommended 22 Caucasian Applicants to the Governors for all of the most recent vacancies (no African Americans, no Asian/Pacific Islanders, no American Indian, no Alaskan Natives, no Hispanics, and no Multi-Racial Applicants!), and [vi] there are no minorities on the circuit court presently despite the far superior qualifications of a multiple-applicant in Plaintiff.

12. When Plaintiff applied in November 2015, he was not recommended to the Governor, but four Caucasians were. All of them practiced in the area of either criminal law or civil law. None of them possessed the rich and diverse legal knowledge, experience, and scholarship of the Plaintiff.
13. Plaintiff, for nearly a quarter of a century, [i] has practiced civil law, criminal law, administrative law (state and federal), and appellate law, [ii] has had legal articles published multiple times (nationwide) covering various legal topics, (iii] has served as a panelist on four different Continuing Legal Education ("CLE") Panels at bar association conferences, [iv] has organized CLEs at a bar conference, [v] has practiced both state and federal law, [vi] has represented individuals and corporations in several states outside of Maryland, [vii] is licensed in Maryland, U.S. District Court for the District of Maryland, U.S. District Court for the District of Columbia, U.S. Court of Appeals for the District of Columbia, U.S. Court of Appeals for the Third Circuit, U.S. Court of Appeals for the Fourth Circuit, U.S. Court of Appeals for the Fifth Circuit, and the United States Supreme Court, and [viii] has served the less fortunate in the community for years as a minister.
14. The TCJNC's predominate Caucasian membership, particularly in light of the long history of racial exclusion on the court, illegally focused on race in evaluating Plaintiff, revealed by them limiting Plaintiffs superior legal qualifications, recommending all Caucasian Candidates with less qualifications to the Governor, dismissing the Ordered procedure for the

commission concerning "most fully professionally qualified," dismissing state law and federal law's prohibition on race discrimination in employment and employment opportunities, and otherwise abandoning competent meritorious evaluation of legal qualifications.

WHEREFORE, Plaintiff respectively requests that

[A] the process undertaken by the 2015 TCJNG for Commission District 7, on behalf of the State of Maryland, be deemed discriminatory,

[B] the recommendations submitted to the Governor for the judicial vacancies in late 2015 be deemed invalid,

[C] the appointments made by the Governor based on those recommendations be deemed invalid,

[D] the Plaintiff be appointed to the bench as the most qualified judicial applicant regarding legal knowledge, experience, and scholarship (per the Court of Appeals' August 2007 Order),

[E] the TCJNC for Commission District 7 be {i} revamped/changed to reflect the county's diversity for which is operates, {ii} prohibited from limiting or excluding members on the basis of race unjustifiably, {iii} required to honor Section 5(d) of

the Court of Appeals' Order regarding the proper procedure for the commission, {iv} required to document the weight given to each factor considered in evaluating applicants, {v} mandated to make the basis for its decision(s) public information, and {vi} mandated to submit to judicial and public oversight the entire process of evaluating candidates and its results (to assure compliance with the Court of Appeals Order, Section 5(d), and competent meritorious evaluations),

[F] plaintiff be compensated in the amount of 154,000.00,

[G] that this case not be assigned to any judges appointed during Plaintiff's period of applying for judicial vacancies, namely, since 2014,[9]

[H] that Plaintiff be reimbursed for all costs and attorney's fees, and

[I] such other and further relief as the court deems proper.

---

[9] They were all Caucasians and were similarly far less qualified that Plaintiff. Their handling of the case should invoke the Maryland Code of Judicial Conduct, RULE 16-813, Section 2, Rule 2.11(a).

I solemnly affirm under the penalty of perjury that the contents of the foregoing Complaint are true to the best of my knowledge, information, and belief.

/s/ Rickey Nelson Jones
Rickey Nelson Jones

Respectfully submitted,
/s/s Rickey Nelson Jones
Rickey Nelson Jones
Law Offices of Reverend Rickey Nelson Jones, Esquire
3rd Floor- Suite 5

1701 Madison Avenue
Baltimore Maryland 21217
410-462-5800
joneses003@man.com

Attorney for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial in this section.

/s/ Rickey Nelson Jones .

Rickey Nelson Jones
Law Offices of Reverend Rickey
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1701 Madison Avenue
Baltimore, Maryland 21217
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Attorney for Plaintiff

APPENDIX "E"- Governor Martin O'Ma€ey 2007 Press Release Stating His Preference for a Racially Diverse Judiciary in the State of Maryland (covering period when Petitioner applied for a judicial vacancy)

Press Release- Office of the Governor

Governor O'Malley Appoints Eight Circuit Court Judges

Highly Qualified, Diverse Candidates Selected to Serve Across the State

ANNAPOLIS, MD (December 3, 2007) — Governor Martin O'Malley announced today the appointment of eight Circuit Court judges who will serve in Baltimore City, Harford County, Howard County, Prince George's County, and Talbot County.

"The appointment of judges is one of the most important responsibilities of any chief executive," said Governor O'Malley. "I am pleased to announce these eight appointees to serve on Maryland's bench. Each appointee represents the geographic and ethnic diversity of the State of Maryland, and all share in common exceptional qualifications to serve as Circuit Court judges in the State."

Over the last several months, Governor O'Malley has conducted dozens of interviews with candidates recommended to him by the trial court judicial nominating commissions. All of the judges selected to serve on Maryland's Circuit Court were recommended

to him by the commissions.

In **Anne Arundel County**, Governor O'Malley has elevated District Court judge Michael Wachs to the Circuit Court. Judge Wachs has served since 2000 as a District Court Judge for Anne Arundel County, where he oversees the Drug Treatment Court program for the Anne Arundel County District Court.

Prior to his appointment as a judge, Judge Wachs served as Master in Chancery for Anne Arundel County Circuit Court, where he handled family law matters. He also has worked as a solo practitioner, a member of a small law firm, and as an Anne Arundel County Public Defender. He is a past President of the Anne Arundel County Bar Association, a recipient of the Anne Arundel County Bar Association's President Award, and an organizer of the "Schools in Court" program.

In **Baltimore City**, Governor O'Malley has elevated District Court Judge Emanuel Brown to the Circuit Court. Judge Brown has been a District Court judge since 1996, and since 2005 has been the Judge- in-charge of the Civil Division. Judge Brown grew up in Baltimore City and has spent his entire legal career in the City. Before becoming a judge, Judge Brown spent 12 years as a prosecutor in the Baltimore City State's Attorney's

Office, where he tried over 300 cases, and served as the Division Chief of the Sex Offense Unit. Judge Brown spent four years in the United States Air Force and four years in the U.S. Air Force Reserves.

In **Harford County**, Governor O'Malley has elevated District Court Judge Angela Michelle Eaves to the Circuit Court. Judge Eaves has been an Associate Judge of the District Court of Maryland for Harford County since 2000. Prior to her appointment, Judge Eaves served as an Assistant Attorney General for the State of Maryland, as an attorney for the Legal Aid Bureau in Harford County, and as a prosecutor in the State of Texas. She is a member of the National Association of Women Judges, the chair of the Harford County Community Mediation Commission, a member of the Upper Chesapeake Medical Systems Board of Directors, and a recipient of the Associated Black Charities Living Legend Award.

In **Howard County**, Governor O'Malley has appointed Timothy McCrone, who is currently the State's Attorney for Howard County. Mr. McCrone has also served as an Assistant County Solicitor and legal advisor to the Howard County Police Department, and spent ten years in private practice at the firm of O'Connor, Keehner, Hogg & McCrone. Mr. McCrone is the

past president of the Howard County Bar Association, and has served on the Board of Governors of the Maryland State Bar Association and the Executive Board of the Howard County Child Advocacy Center. He is the recipient of the 2005 Ralph Mulloy Advocacy Award for his work on behalf of persons with disabilities.

In **Prince George's County**, Governor O'Malley has appointed District Court Judge Crystal Mittelstaedt, District Court Judge Beverly Woodard, and Nicholas Rattal to the Circuit Court.

Judge Mittelstaedt has been a District Court judge in Prince George's County since 2005. Before her