

IN THE
COURT OF APPEALS OF MARYLAND

September Term 2002

No. 6

LARRY BLEDSOE, GEORGE KOPP, AND JOSEPH JOHNSON,

Appellants

v.

STATE OF MARYLAND,

Appellee

APPEAL FROM THE PRINCE GEORGE'S COUNTY CIRCUIT COURT,
(Sherrie Krauser, Judge)

**BRIEF AND APPENDIX OF APPELLANTS LARRY BLEDSOE, GEORGE KOPP,
AND JOSEPH JOHNSON**

Jonathan L. Katz

MARKS & KATZ, L.L.C.
1400 Spring Street, Ste. 410
Silver Spring, MD 20910
(301) 495-4300

Attorneys for Appellants Larry Bledsoe, George
Kopp, and Joseph Johnson

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF CITATIONS.....	ii-iii
STATEMENT OF THE CASE	1-2
A. Nature of the Case	1
B. Course of the Proceedings	1-4
C. Disposition	4
QUESTION PRESENTED.....	5
STATEMENT OF MATERIAL FACTS.....	5-6
ARGUMENT	6
A. The Circuit Court's Remand Order Violates Appellants' Double Jeopardy Rights	6
B. Appellants Will Be Denied Their Speedy Trial Rights If The Circuit Court's Ruling Is Allowed To Stand.	9.
C. The Ordinance Cannot Be Lawfully Applied to Appellants	14
CONCLUSION	19
CERTIFICATE OF SERVICE	20
APPENDIX	App. 1-14

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<i>City of Renton v. Playtime Theatres, Inc.</i> , 475 U.S. 41 (1986)	18-19
<i>City of Erie v. Pap's A.M.</i> , 529 U.S. 277 (2000).	18
<i>Divver v. State</i> , 356 Md. 379 (1999)	9, 10, 12
<i>Farris, Jr. v. State</i> , 351 Md. 24 (1998)	16
<i>Finch v. U.S.</i> , 433 U.S. 676 (1977)	6-7
<i>Flanagan Enterp. v. Fulton County</i> , 242 F.3d 976 (11th Cir. 2001).	18
<i>In re Wallace W.</i> , 333 Md. 186 (1993)	18
<i>Messina v. State</i> , 212 Md. 602 (1957)	16
<i>State v. Desperitt</i> , 73 Md. App. 620 (1988)	6-8
<i>State v. Shaw</i> , 282 Md. 231 (1978)	6, 8, 9
<u>Statutes</u>	
Md. Ann. Code Cts. & Jud. Proc. art. § 5-106	14
<u>Court Rules</u>	
Md. Rule 7-108(a)	3, 14
Md. Rule 7-113(h)	3, 4
<u>Constitutional Provisions</u>	
U.S. Const., Sixth Amend.	10
Article 21, Maryland Declaration of Rights	10
<u>Regulations</u>	
Prince George's. County Code § 1-102(28),	15
Prince George's County Code § 14-139.02(b)(2)	1

Treatises

2A Sutherland Stat. Const. § 47.18, at 200 (5th ed. 1992))

18

STATEMENT OF THE CASE

A. NATURE OF THE CASE

The District Court, Rhodes, J., properly dismissed this prosecution by finding that (1) the Prince George's County anti-public nudity ordinance ("Ordinance") does not apply to Appellants, because the alleged criminal activity did not occur in a public place, and (2) even if the activity occurred in a public place, the First Amendment precludes this prosecution.

The Circuit Court, Krauser, J., erroneously reversed the District Court, and ordered this prosecution to proceed forward. Moreover, to force Appellants to proceed to trial will violate their speedy trial rights and their rights against double jeopardy.

B. COURSE OF THE PROCEEDINGS

In August 1999, the State filed a multiple-count criminal Information against each Appellants, with each count alleging that each Appellant conspired with each of several different women on May 22, 1999, to violate the Ordinance, which is found at Prince George's County Code § 14-139.02(b)(2). The State also filed criminal charges against the women, but the State subsequently and voluntarily entered a *nolle prosequi* all of the women's charges.

Appellants were jointly represented through the Circuit Court stage by attorneys Richard Kovelant and Charles Shaffer. Appellants hired undersigned counsel to handle their proceedings before this Court of Appeals.

On December 16, 1999, Appellants filed a "Motion to Dismiss, or in the Alternative

For Judgment of Acquittal." The parties argued this Motion to Dismiss on December 17, 2000, before District Court Judge Thurman Rhodes. E.19. Judge Rhodes took the Motion to Dismiss under advisement, E. 54, after the parties stipulated to the following facts for purposes of the Motion (no other evidence was offered at the motions hearing): At the time and place of the alleged criminal activity, nude dancing took place in an enclosed building located in an industrial park. The Showcase Theater ("Showcase") -- which is the alleged location of the alleged criminal activity -- is a for-profit business that does not admit any person into the cabaret without being over the age of eighteen and without paying admission. The Showcase Theater has doors, and has security present. The Showcase has a stage and lighting. Inside are women who begin their performances in costumes, and eventually disrobe. E.47-49

On February 14, 2000, District Court Judge Rhodes issued a written opinion, E.70, accompanied by an oral ruling, E.57, that same day, that dismissed the criminal proceedings against Appellants. Judge Rhodes based his ruling on a finding that the Showcase did not qualify as a public place under the Ordinance (the Ordinance only applies to activity in public places), E.73, and that the Ordinance was unconstitutional as applied to the nude dancing that is the subject of this criminal prosecution, E.81.

After District Court Judge Rhodes ordered a dismissal of Petitioners' cases, the State noted an appeal in the Appellants' cases, in February 2000.

In February 2000, the State filed with the District Court a Notice requesting a transcript of "testimony" from December 17, 1999, and February 14, 2000.

Over nine months passed between the State's filing of a notice of appeal and the provision of the full District Court record, including the District Court hearing transcripts from December 17, 1999, and February 14, 2000, to the Circuit Court. *See, e.g.*, E.112-118. (showing that the December 17, 1999, transcript was still not ready). Generally, the District Court Clerk is required to transmit the record to the Circuit Court within sixty days after the date the first notice of appeal is filed. *See* Md. Rule 7-108(a). The State filed with the District Court in February 2000 a Notice requesting a transcript of "testimony" from December 17, 1999, and February 14, 2000.

On August 31, 2000, the Circuit Court Clerk sent the parties a Md. Rule 7-113 notice, that the appeal had been entered on the docket. The State filed a Memorandum in Opposition to the District Court's decision on September 28, 2000.

On October 3, 2000, Appellants' counsel filed a motion to dismiss, alleging that the State had not provided Petitioners with the District Court transcripts or record. on a timely basis. Circuit Court Judge Krauser held a hearing on November 2, 2000, on Petitioners' motion to dismiss the appeal. E.109. Judge Krauser took strong exception to the December 17, 2000, transcript's still not being in the Court's jacket. She also explained that, at the time the State filed its appeal notice, the court clerk's office had no mechanism to handle a State's appeal from the District Court. E. 112. Judge Krauser further stated that she and Judge Missouri realized that notices "needed to be sent by the clerk's office that the clerk's office was unprepared to send. So we in fact drafted the notice to make sure that it comported with the rules..." . E. 112.

On January 26, 2001, Judge Krauser held a hearing on the appeal. E.122. Without stating whether she planned to affirm or reverse District Court Judge Rhodes's dismissal of the criminal action, Judge Krauser concluded the hearing by stating that, "Well, since the law requires that I give you a written opinion, I will do that." E. 157 (*see* Md. Rule 7-113(h)) (requiring that "In every appeal, the circuit court shall render a concise opinion, which shall be reduced to writing and filed with the clerk").

A full eleven months then elapsed before Judge Krauser issued her written opinion. E. 159. Judge Krauser's opinion was entered January 3, 2002. The record provides no explanation for this eleven-month delay in issuing the judge's written opinion. Even a review of Judge Krauser's written opinion does not provide the answer for this delay.

C. DISPOSITION

In her January 3, 2002, opinion, E. 149, Circuit Court Judge Krauser remanded this matter to District Court to proceed to trial. Subsequently, the District Court issued an order that stayed all District Court proceedings pending the outcome of the current appellate process.

QUESTIONS PRESENTED

1. Whether Appellants' rights against double jeopardy requires a reversal of the Circuit Court's judgment, seeing that the District Court previously dismissed this criminal action after accepting the parties' factual stipulation for the motion .
2. Whether the Ordinance may be lawfully applied to Appellants' alleged criminal conduct, where the Ordinance applies only to public places, and the Showcase is an enclosed nightclub that presents nude dancing and that is open only to paying customers over eighteen years old.
3. Whether Appellants will be denied their speedy trial rights if the Circuit Court's ruling is allowed to stand, where twenty-two months elapsed from the time the State noted an appeal to the time the Circuit Court issued its written opinion sitting as an appellate court. .

STATEMENT OF MATERIAL FACTS

The parties stipulated to the following facts for purposes of the Motion to Dismiss that was granted by District Court Judge Rhodes. No other evidence was offered at the motions hearing: At the time and place of the alleged criminal activity, nude dancing took place in an enclosed building located in an industrial park. The Showcase Theater ("Showcase") -- which is the location of the alleged criminal activity -- is a for-profit business that does not admit any person into the cabaret without being over the age of eighteen and without paying admission. The Showcase Theater has doors, and has security present. The Showcase has a stage and lighting. Inside are women who begin their

performances in costumes, and eventually disrobe. E. 47-49.

ARGUMENT

A. The Circuit Court's Remand Order Violates Appellants' Double Jeopardy Rights

Appellants fully argued in the Circuit Court that double jeopardy principles prohibit a remand to District Court. E. 135-145. Here, District Court Judge Rhodes entered a final dismissal of the cases against Appellants. E.82.

Where, as here, the parties argued a motion to dismiss before a District Court judge who would hear the case without a jury, and submitted the motion to the trial judge with an agreed statement of facts for the motion, E. 47-49, jeopardy attached by the time the District Court dismissed the case. Therefore, Judge Rhodes's dismissal of the case prohibited the appeal that the State subsequently took. The applicable case law squarely settles this issue. *See Finch v. U.S.*, 433 U.S. 676 (June 29, 1977), *State v. Shaw*, 282 Md. 231 (1978), and *State v. Despertt*, 73 Md. App. 620 (1988).

The Supreme Court confirmed in *Finch* that a dismissal of a criminal case after the submission of an agreed factual statement raises double jeopardy issues. *Finch v. U.S.*, 433 U.S. 676. In *Finch*, after first denying a pretrial motion to dismiss the criminal charges, the trial judge more carefully reviewed the case and agreed statement of facts, and dismissed the charges. *Finch v. U.S.*, 395 F. Supp. 205 (Mt. 1975). The prosecution appealed, and the Ninth Circuit reversed. However, by a *per curiam* decision, the Supreme Court reversed the Ninth Circuit on double jeopardy grounds.

Essentially, where, as here, the trial court dismisses a prosecution -- whether correctly or erroneously -- upon a determination on an agreed set of facts, that the applicable law does not permit a conviction for the crime charged -- the prosecutor is barred from seeking appellate relief. Specifically, the Supreme Court in *Finch* held that: "because the dismissal was granted prior to any declaration of guilt or innocence, 'on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged,' [citation omitted], we hold that the Government's appeal was barred by the Double Jeopardy Clause." *Finch v. U.S.*, 433 U.S. 676.

In other words, here, as in *Finch*, it is a distinction without a difference for the prosecutor to claim that jeopardy does not attach before the first witness is sworn in, so long as the prosecutor has already submitted to the court the operative facts that will enable the trial court to determine whether the applicable law permits a guilty finding, and so long as the court holds the submitted facts in the light most favorable to the prosecutor. This is what District Court Judge Rhodes in fact did. This point was made crystal clear by the Court of Special Appeals in *State v. Despertt*, 73 Md. App. 620, where the Court of Special Appeals affirmed a bench trial acquittal in a breaking and entering and theft case, where the acquittal came after opening statement and before the presentation of any witnesses. *Id.* at 622. Important to the finding of double jeopardy in *Despertt* was that during the State's opening statement, he presented evidence (even though the prosecutor did not offer the photographs into evidence), by way of photographs, to the judge, and started explaining what they depicted. *Id.* at 626.

Similarly, in the case below, the State and the defense jointly submitted an agreed factual statement to assist Judge Rhodes in deciding whether to dismiss the case. E. 47-49. When Appellants' motion to dismiss was filed, *Desperitt* had already been decided two years earlier, which certainly put the State on full notice that jeopardy would attach if Judge Rhodes granted the Appellants' dismissal motion.

Double jeopardy estoppel applies here so long as the State had no other operative facts to submit to Judge Rhodes to change his ruling, whether or not his ruling was correct or incorrect. *See State v. Desperitt*, 73 Md. App. 620 (1988). Here, there were no other operative facts for the State to offer. Judge Rhodes dismissed on a finding that the Showcase is not a public place; based on the parties' agreement that the Showcase is an enclosed building that only admits paying patrons over eighteen; neither party could have been expected to contest that factual assertion. Judge Rhodes also dismissed on a finding that prohibiting nude dancing at the Showcase cabaret is unconstitutional, E.81; here, too, there were no other facts to present to try to change Judge Rhodes's ruling on this constitutional matter.

The Court of Appeals' holding in *Shaw* also supports that the reversal of District Court Judge Rhodes's dismissal of the case constitutes a violation of Appellants' double jeopardy rights. *State v. Shaw*, 282 Md. 231. *Shaw* confirmed that not even one witness needs to testify before finding that jeopardy attaches: "[I]t makes no difference what the action is called which terminates the trial; the real question is whether the [dismissal] order contemplates an end to further proceedings. If it does, further prosecution is barred." *Shaw*,

282 Md. at 236-37. Here, as well, Judge Rhodes's dismissal contemplates an end to further proceedings.

B. Appellants Will Be Denied Their Speedy Trial Rights If The Circuit Court's Ruling Is Allowed To Stand.

Appellants' speedy trial rights will be denied if the Circuit Court's ruling is allowed to stand. The Circuit Court's ruling requires Appellants' cases to go back to District Court for trial. Appellants waited eleven months between the time the State filed its notice of appeal in February 1999, from District Court, and the time that the Circuit Court held a hearing on the appeal on January 26, 2001. E. 122. Another delay, without explanation in or on the record, of eleven more months took place between the January 26, 2001, appellate hearing date in Circuit Court and the entry of the Circuit Court's judgment on January 3, 2002. E. 159.

Under *Divver v. State*, 356 Md. 379 (1999), Appellants' speedy trial rights will be violated if Circuit Court Judge Krauser's reversal order is not reversed.

"The right of an accused to a speedy trial is guaranteed by article 21 of the Maryland Declaration of Rights as well as by the sixth amendment to the Constitution of the United States." *Id.* at 387-88. Specifically:

"When the [pre-trial] delay is of a sufficient length, it becomes "presumptively prejudicial," thereby triggering a "balancing test [which] necessarily compels courts to approach speedy trial cases on an ad hoc basis."
[citations omitted]. The factors to be weighed are [1] 'length of delay, [2] the reason for the delay, [3] the defendant's assertion of his right, and [4] prejudice to the defendant.' [citation omitted]. Because whether a period is presumptively prejudicial, or not, depends upon the length of a pre-trial delay, the first factor 'is to some extent a triggering mechanism. Until there is some delay which is

presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.' [citation omitted]. And this factor cannot be applied until it is determined from what point the period of delay is measured." [citation omitted].

Divver, 356 Md. at 388 (quoting *State v. Henson*, 335 Md. 326, 332-33 (1994)).

Appellants demonstrate as follows that the foregoing four factors weigh in their favor to reinstate the dismissal of this criminal action.

1. **The Length of the Delay Will Be Over Two Years**

Even if Appellants had not appealed to this Court, the length of the delay to re-try this case will be at least two years. The State noted an appeal in February 2001. The record then took many months to reach the Circuit Court, which did not hold oral argument until eleven months after the State noted its appeal. E. 122.

Then, without any explanation in or on the record, Circuit Judge Krauser took another eleven months to issue a judgment in this case. E. 159.

2. **No Good Reason Has Been Given For the Delay**

No good reason has been given for the delay. There were in fact two unreasonable delays, those being the eleven months that intervened between the State's noting its appeal in February 2000 and the Circuit Court's holding oral argument thereon in January 2001; and the second being the eleven months that intervened between the January 2001 holding of oral argument and the entry of the Circuit Court's judgment in January 2002.

The record is devoid of a good reason for the first delay, which caused Circuit Court oral argument to take place eleven months after the State noted an appeal. Circuit Court

Judge Krauser acknowledged at the Circuit Court's November 2, 2000, hearing on Appellants' motion to dismiss the appeal that, at the time the State filed its appeal notice, the court clerk's office had no mechanism to handle a State's appeal from the District Court.

E.112. Judge Krauser further stated that she and Judge Missouri realized that notices "needed to be sent by the clerk's office that the clerk's office was unprepared to send. So we in fact drafted the notice to make sure that it comported with the rules..." *Id.*

If the court system in Prince George's County -- which handles one of Maryland's largest criminal dockets -- had no sufficient mechanism in the clerk's office to handle appeals by the State to Circuit Court in the year 2000, one is left to wonder whether the same debacle is waiting to happen in other county courthouses in Maryland.

The record is also devoid of any explanation, let alone a good explanation, for the second delay, which is the eleven months that it took Circuit Court Judge Krauser to issue her appellate opinion in this case. Knowing full well that she had taken eleven months to issue her written opinion, Judge Krauser had every opportunity to include in her written opinion the reason for this eleven month delay. Judge Krauser chose not to do so. Consequently, without any explanation in the record for this eleven month delay in issuing Judge Krauser's opinion, Appellants urge that this delay be considered unreasonable. *See Divver*, 356 Md. at 389 (confirming that a nine-month trial delay may be wholly unreasonable under the circumstances).

The combination of the unreasonable eleven-month delay in getting this appeal heard in Circuit Court, and the eleven-month delay in getting a written Circuit Court opinion is

without justification, nor can it instill confidence in the public that speedy trial rights will not be harmed through future appeals by the State to the Circuit Court in other criminal actions.

3. Appellants Asserted Their Right To An Expeditious Resolution of the Appeal

The Appellants properly asserted their right to a speedy resolution of the State's appeal to the Circuit Court. On October 3, 2000, Appellants' counsel filed a motion to dismiss, alleging that the State had not provided Appellants with the District Court transcripts or record. on a timely basis. Circuit Court Judge Krauser held a hearing on November 2, 2000, on Appellants' motion to dismiss the appeal. Judge Krauser took strong exception to the December 17, 1999, transcript's still not being in the Court's jacket. Nevertheless, despite Judge Krauser's own disappointment with the delay in getting the case heard in Circuit Court, Judge Krauser proceeded to cause an additional eleven-month delay in issuing her appellate opinion.

Although the record does not show communication by the Appellants seeking an earlier appellate opinion, Appellants had already asserted their speedy trial rights through their October 3, 2000, notice to dismiss the appeal. Moreover, litigants should not be required to make a record of seeking a quick decision from a deciding judge when an appellate opinion is pending in the deciding judge's hands. A diplomatic approach is for a litigant to call a judge's clerk to ask if the clerk knows the time frame for issuing the opinion; such a call would not be recorded in the record. Rightly or wrongly, plenty of

litigants could fear a judge's backlash to a client's detriment if the formal route of a motion for a quicker written opinion were filed. In any event, Judge Krauser's own written opinion simply is silent about why it took so long for her to issue a written opinion.

4. This Lengthy Delay Prejudices Appellants, and Violates Maryland's Statute of Limitations for Misdemeanors Punishable for Less Than One Year

The Appellants will clearly be prejudiced by the delay. With this over two-year delay in bringing this case to trial also come faded memories of witnesses and the greater risk of the loss of material evidence.

Moreover, because each count against Appellants is punishable by less than one year (each count is punishable by up to six months incarceration), the Maryland law's statute of limitations provisions bar the Circuit Court's remand to District Court. Specifically, Md. Ann. Code Cts. & Jud. Proc. art. § 5-106 mandates, in relevant part, that "a prosecution for a misdemeanor shall be instituted within 1 year after the offense was committed." When we calculate the amount of time that constituted an unreasonable delay in getting this case resolved on appeal in the Circuit Court, we easily arrive at a one-year period, that should be considered towards calculating whether the statute of limitations bars a trial of Appellants. First, the Circuit Court did not issue a notice that it had received the District Court record until August 2000, which is four months longer than the sixty days that is generally allowed to transmit the record. Md. Rule 7-108(a). Then, as of November 2000, the court's jacket still did not have both District Court transcripts. E. 110. Second, it took Circuit Court Judge Krauser eleven months to order the case remanded for trial in District Court, when Judge

Krauser was on notice of the one-year statute of limitations in Appellants' case. E. 159.

C. The Ordinance Cannot Be Lawfully Applied to Appellants

The Ordinance cannot be lawfully applied to Appellants. *First*, the Ordinance only applies to acts in public places, and the Showcase is not a public place within the meaning of the Ordinance. *Second*, assuming *arguendo* that the Ordinance applies to the Showcase, enforcement of the Ordinance against the Showcase would amount to an outright and unconstitutional ban on fully nude dancing in all adult nightclubs in Prince George's County.

The Ordinance, Prince George's. Code § 14-139.02(b)(2), provides in full the following language:

(a) For the purposes of this Section, the term "nudity" shall mean the showing of the human male or female genitals or pubic area, with less than a fully opaque covering.

(b) It is unlawful for any person to knowingly or intentionally, in a public place:

(1) Engage in sexual intercourse;

(2) Appear in a state of nudity; or

(3) Fondle one's own genitals or those of another person.

(c) Any person who violates any provision of this Section shall be guilty of a misdemeanor punishable by a fine not exceeding One Thousand Dollars (\$1,000) or by imprisonment not exceeding six (6) months, or both.

Because the Ordinance does not define "public place" we must look at the general definition section of the County Code for this definition:

Public place means any park, lake, stream, stadium, athletic field, playground, school yard, street, avenue, plaza, square, bus, train or railroad depot, station, terminal, cemetery, open space adjacent thereto, or any other place commonly open to the public.

Prince George's. County Code § 1-102(28),

1. **The Showcase Theater Is Not a Public Place**

The Showcase is not a public place within the definition of this phrase in the Prince George's County Code, Code § 1-102(28), nor is it a public place within the ordinary sense of the phrase, for purposes of a criminal prosecution. The Court of Appeals settled this latter point in 1957, when the Court held that:

What constitutes a public place within the meaning of this offense [indecent exposure] depends on the circumstances of the case. The place where the offense is committed is a public one *if the exposure be such that it is likely to be seen by a number of casual observers*. Indecent exposure on a public highway so that one person sees, and others passing by can see, is an offense.

Messina v. State, 212 Md. 602, 606 (1957) (citations omitted) (emphasis added).

Thus, under *Messina*, there cannot be a conviction for exposure of one's genitals if there are no casual and unwilling observers to see the exposure. To hold otherwise subjects to prosecution under the ordinance a man in Prince George's County who uses a urinal in a men's bathroom, or who disrobes at a YMCA locker room to put on his gym shorts or to go to the shower. The Showcase is no more a public place -- for purposes of the Ordinance -- than a public restroom or gym locker room. Clearly, under *Messina*, the Showcase is not a public place, for there are no casual observers at the Showcase. *Messina*, 212 Md. 602, 606. The people who go to the Showcase either work there, or are paying patrons over eighteen who want to see the nude dancing that is provided at the Showcase. E. 18.

Any ambiguity in the Ordinance, must be resolved in favor of Appellants.

Specifically, "[c]riminal statutes must be strictly construed in favor of the defendant to prevent courts from extending punishment to cases not plainly within the language of the statute." *Farris, Jr. v. State*, 351 Md. 24 (1998) (citations omitted). Here, the County code's definition of "public place" does not sufficiently put Appellants on notice that the Showcase is a public place. For one thing, every specific type of place described in the definition of "public place" aside from stadiums, is either located outdoors or is inextricably intertwined with an outdoor location (e.g. bus and train depots are connected to the outdoors, where the respective vehicles arrive and depart from). Historically, at least before the twentieth century, stadiums typically were outdoor locales, and the majority still are. The common thread to this outdoor theme is that people can easily access such locales, many of these locales will have casual observers, and it is difficult to limit people's access to such locales, nor is there typically any effort or desire to limit access on the basis of age. By contrast, the Showcase is an enclosed indoors location where nobody is admitted without paying an admission, and being over eighteen.

In other words, the doctrine of *eiusdem generis* shows that the Ordinance does not apply to the Showcase, nor does it apply to the Appellants, who are accused of violating the Ordinance at the Showcase. The *eiusdem generis* doctrine applies as follows:

"The doctrine of *eiusdem generis* applies when the following conditions exist: (1) the statute contains an enumeration by words; (2) the members of the enumeration suggest a class; (3) the class is not exhausted by the enumeration; (4) a general reference supplementing the enumeration, usually following it; and (5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires. It is generally held that the rule of *eiusdem generis* is merely a rule of construction and is only applicable where legislative intent or language expressing that intent is unclear." (Footnote

omitted).

In re Wallace W., 333 Md. 186 (1993) (quoting 2A Sutherland Stat. Const. § 47.18, at 200 (5th ed. 1992)).

2. The Ordinance is Not Constitutional as Applied to Appellants

Even assuming *arguendo* that the Ordinance applies to Appellants, enforcement of the Ordinance against the Appellants would amount to an outright and unconstitutional ban on fully nude dancing in all adult nightclubs in Prince George's County.

The Supreme Court and the Prince George's County Code have recognized that nude dancing is expressive activity that implicates the First Amendment. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97 (2000), and Prince George's County Code § 14-149 (exempting artistic performances from the laws that prohibit providing nude images to minors).

Municipalities are forbidden from prohibiting nude dancing at such adult nightclubs as the Showcase Theater absent reasonable reliance on evidence showing negative secondary effects from nude dancing. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97 (2000). It is outdated and unconstitutional automatically to assume negative secondary effects from nude dancing. Fulton County, Georgia's experience is a case in point. *See Flanagan Enterprises, Inc., of Georgia v. Fulton County, Georgia*, 242 F.3d 976 (11th Cir. 2001). In Fulton County, a government-commissioned study determined that there was no statistical correlation showing an increase in crime at adult entertainment establishments that served alcoholic

beverages. "Rather, the statistics indicated greater instances of calls for service and reported crime at non-adult entertainment establishments that served alcoholic beverages." *Id.* at 979.

Moreover, in mid-1997, Fulton County's six adult entertainment establishments commissioned "a study of the clubs' economic impact on their surrounding environs." *Id.* In Fulton County, Georgia, "[t]he study revealed high occupancies and rental rates in existing buildings, expensive improvements, business expansions, turn-away business volume and proposed development in the Clubs' vicinities." *Id.* at 979.

Here, the thin legislative record, which is less than ten pages, does not make any direct or indirect mention of reliance on secondary effects evidence. A. 7-14. Consequently, the Ordinance is unconstitutional as applied to the alleged criminal activity of Appellants, which involves nude dancing at the Showcase adult cabaret. *Renton*, 475 U.S. at 51-52

CONCLUSION

Appellants have established the grave injustice they will suffer if their case is not dismissed. Moreover, the implications of this case extend beyond Appellants' case, on such issues as guaranteeing subsequent speedy trials when the State appeals a District Court dismissal, defining when double jeopardy applies where there is a District Court dismissal, and defining the limitations on ordinances that criminals nude dancing without even reasonably relying on secondary effects evidence. All these issues should be expected to arise on numerous occasions in Maryland's trial courts; however, the case law is lacking in

specific enough guidance to the trial courts for achieving just results on these matters.

For all the foregoing reasons, Appellants seeks an order reversing the Circuit Court's decision and requiring the dismissal of this prosecution.

Respectfully submitted,

Jonathan L. Katz
MARKS & KATZ, L.L.C.
1400 Spring Street
Suite 410
Silver Spring, MD 20910
(301) 495-4300

Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Brief of Appellant were mailed by first-class mail, postage prepaid, to the following parties, this 5th day of June, 2002, to:

Gary E. Baer, Esquire
Assistant Attorney General
Maryland Attorney General's Office
200 St. Paul Place
Baltimore, MD 21202

Jonathan L. Katz

Font: Times New Roman 13 pt.