
post conviction defenders division
Maryland Office of the Public Defender | Justice & Hope for Maryland's Incarcerated

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# THE DOJ INVESTIGATES: What does it mean for the people of Baltimore?

**Natasha Dartigue Moody, Felony Trial Supervisor, OPD, Baltimore City**

If we are to reduce crime, expand opportunities and revitalize our neighborhoods, police misconduct must be acknowledged and stopped. It is with recognition of this universal truth that the unrelenting cries of the Baltimore citizens are finally being heard. With the untimely death of Freddie Gray while in police custody and the subsequent uprisings in the streets of Baltimore, the Government took notice and began to listen to the countless accounts of police mistreatment.

In May 2015, pursuant to the Violent Crime Control and Law Enforcement Act of 1994, the Department of Justice (DOJ) opened an investigation into the Baltimore Police Department's(BPD) patterns and practices. The investigation into the BPD was an investigation separate from the civil rights investigation into the death of Freddie Gray. The DOJ's Civil Rights Division employed the "patterns or practice" investigation to bring to light the persistent patterns of misconduct within the BPD.

DOJ's investigation and evaluation of BPD was based on numerous sources including interviews of (1) citizens; (2) BPD officers, supervisors and staff; (3) religious and community leaders; (4) City and State leaders, including the Maryland Office of the Public Defender; as well as the review of documents, reports and BPD training manuals. The Office of the Public Defender played an integral part in connecting clients and providing detailed accounts of experiences to the DOJ attorneys.

In August 2016, the DOJ revealed its detailed findings to the public in a 163 page report. The 14 month investigation brought to light the sad reality that the BPD offers two different services, one to affluent white neighborhoods and another to impoverished black neighborhoods. This police strategy failed terribly and contributed to community distrust and the lack of respect for officers. The DOJ investigation confirmed that BPD routinely targeted African American residents during stops, searches and arrests. Although "African Americans made up only 63% of the city population, 84% of pedestrian stops were against African Americans." The investigation further revealed that BPD leadership pressured officers to increase arrests and "clear corners" regardless of whether the

officer observed criminal activity. The reliance on "zero tolerance" street enforcement resulted in a massive increase in the number of arrests, many of which lacked probable cause. The DOJ concluded that the "BPD's application of city ordinances banning loitering, trespassing, and failing to obey an officer's order violates the Fourteenth Amendment."

As the investigation continued to dig deeper more skeletons were revealed. The DOJ also found that the BPD engages in excessive force far too often. Sadly, the use of force was neither isolated nor sporadic. Even where different views regarding the propriety of a single incident existed, the DOJ found there was a broader practice of unreasonable force in African American communities. Police routinely relied on physical force rather problem solving or conflict resolution techniques to resolve situations. Officers repeatedly issued commands rather than engage in respectful communication with citizens. The DOJ report referenced numerous examples where unreasonable force was applied as punishment for a person's verbal remarks or physical resistance to an officer's command. In these instances, use of force was not based on any physical threat. How was this able to continue? The DOJ discovered systemic deficiencies that contributed to the misconduct of the BPD and enabled it to persist for years. DOJ confirmed that the BPD routinely fails to (1) investigate allegations of misconduct; (2) identify and respond to poor police behavior; and (3) provide officers with adequate training, support or supervision.

Now that the patterns and practices of discriminatory conduct have been brought to light, what are the next steps to correcting decades of wrongdoing? The BPD will enter into a consent decree. It is an agreement where the BPD agrees to take specific actions to resolve the department's deficiencies, without the admission of guilt for the underlying situation. The BPD is cooperating with DOJ, and both parties are optimistic that a consent decree will be reached in the coming months. The consent decree will incorporate specific remedies, which become part of a court order that is overseen by an independent monitor. The Federal court maintains jurisdiction over the case to ensure that the agreement is followed. The court will have the authority to impose penalties upon the BPD if the terms of the agreement are not met.

BPD can no longer serve as an occupying force but must work as a partner and resource for the betterment of the community. It is imperative that new policies are established to address discriminatory community policing, deficient BPD oversight and poor officer accountability. Transparency is key in establishing better policies. The DOJ continues to seek the input and participation by the community in establishing the details of the consent decree. The Office of the Public Defender is actively participating and engaged in the process to ensure that the concerns of its clients and all the citizens of Baltimore are addressed.

The road to change will be a long and arduous one. However, we must remain hopeful. The BPD's cooperation with the DOJ is a positive indication that the police recognize failure to take remedial action is not an option. With the energized efforts of the DOJ, community organizations and State and City leaders, such as the OPD, the voices of the Baltimore people will be heard loud and clear.

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"Justice Department Announces Findings of Investigation into Baltimore Police Department." *U.S. Department of Justice*, N.p. 10 Aug 2016. Web. 12 Aug. 2016.

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## Guilty Pleas: 5 Truths about "Nature and Elements" Claims for Post Conviction Defendants

**by Eli Braun, Assistant Public Defender**

**Truth 1:** You can't plead guilty unless you know what you're pleading guilty to.

If you don't know what you are pleading guilty to, your guilty plea cannot be considered "knowing and voluntary." This idea dates to *Henderson v. Morgan*, 426 U.S. 637 (1976), where Mr. Morgan pled guilty to second-degree murder, an offense that requires the defendant to have an "intent" to kill. The Supreme Court reversed Mr. Morgan's guilty plea because "[t]here was no discussion of the elements of the offense of second-degree murder, no indication that the nature of the offense had ever been discussed with [the defendant], and no reference of any kind to the requirement of intent to cause the death of the victim." *Id.* at 642-43. "Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary," said the Court. *Id.* at 645 n.13. Maryland Rule 4-242(c) implements this constitutional requirement by requiring the trial court to determine at the guilty plea hearing that "the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea."

**Truth 2:** The trial court uses a "totality of the circumstances" test.

How does the trial court know whether a defendant understands the charges that he or she is pleading guilty to? In *State v. Priet*, 289 Md. 267 (1981), the Maryland Court of Appeals, instructed trial courts to use a "totality of the circumstances" test. It asks "whether, considering the record as a whole, the trial judge could fairly determine that the defendant understood the nature of the charge to which he pleaded guilty." *Id.* at 291. Circumstances to be considered may include the simple or complex nature of the offense, your age, your education, whether you're represented by counsel, and the prosecution's statement of facts. "Simple" offenses don't need to be explained.

**Truth 3:** To plead guilty, you have to know the "elements" of the offense.

"Elements" are what the State must prove to obtain a conviction. In 2005, the U.S. Supreme Court in *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), required that a defendant be advised of the elements. It explained:

> A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, "with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). *Where a defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is not met and the plea is invalid*. *Henderson v. Morgan*, 426 U.S. 637 (1976).

*Bradshaw*, 545 U.S. at 182-83 (underlining added). In other words, a defendant does not understand the "nature" of the charge unless he or she understands the "elements."It wasn't always this way. In *Priet* (1981), the Court of Appeals said: "The rule does not require that the precise legal elements comprising the offense be communicated to the defendant as a prerequisite to the valid acceptance of his guilty plea." 289 Md. at 288. What happens, then, if you challenged the voluntariness of your plea after *Priet* (1981) but before *Bradshaw* (2005)? Can you challenge your guilty plea again?

**Truth 4**: It is not easy to re-open closed post convictions based on *Bradshaw* and *Daughtry*.

In *State v. Daughtry*, 419 Md. 35 (2011), the Court of Appeals sought to determine whether *Priet* remained "good law" after *Bradshaw*. The trial court had asked Mr. Daughtry: "Have you talked over your plea with your lawyer?" Mr. Daughtry answered yes. *Id.* at 42. The Court of Appeals reversed his guilty plea because "there is no record evidence tending to show that Daughtry's plea was entered knowingly and voluntarily." *Id.* It wasn't sufficient that "the defendant discussed generically the plea with his or her attorney." *Id.* at 71. The trial court needed more information before it could decide whether Mr. Daughtry had understood what he was pleading guilty to.

The Court of Appeals did not overrule *Priet*'s "totality of the circumstances" test. Instead the Court in *Daughtry* said: "We reiterate that the test, as stated in *Priet*, in determining whether a guilty plea is voluntary under current Rule 4-242(c), is whether the totality of the circumstances reflects that a defendant knowingly and voluntarily entered into the plea." *Id.* at 71. It was not "declar[ing] a new principle of law." *Id.* at 79.

In other words, the "totality of the circumstances" test has always been the law when it comes to evaluating whether you understood what you were pleading guilty to. While every case is different, it can be said that if you contested the voluntariness of your guilty plea before *Bradshaw*, and your post conviction court determined, based on "the totality of the circumstances," that you understood what you were pleading guilty to, then a post conviction court is not likely to re-open the closed post-conviction proceedings. When a post conviction court decides to re-open proceedings, it is often because there's new information or entirely new claims that could not have been raised earlier.

**Truth 5:** The elements themselves do not need to be recited at the guilty plea hearing.

The judge does not need to explain every legal element of the offense at the guilty plea hearing. *Daughtry*, 419 Md. at 72 n.19 (stating that no "specific litany" is required). Instead, there are many ways a court can conclude that a defendant understands the charges that he or she is pleading guilty to. For example, "(1) the defendant informs the trial court that either he understands personally or was made aware by, or discussed with, his attorney the nature of the changes against him"; "(2) the attorney informs the trial court that he informed his client of the charges against the client"; and "the trial court itself informs the defendant of the charges against the defendant." *Daughtry*, 419 Md. at 74-75. The defendant can speak personally, or an attorney may speak on his or her behalf.

# How to Pursue Federal Habeas Corpus Claims in Federal Court Pursuant to 28 U.S.C. § 2254

**by Robert Biddle, Nathans & Biddle LLP, Baltimore**

The federal writ of habeas corpus, or "Great Writ," is rarely considered a likely avenue to obtain a new trial or a reduction of sentence, despite being specially referenced in the U.S. Constitution, Article I, Section 9, clause 2, which provides that it cannot be suspended other than in times of rebellion. However, inmates should keep the federal habeas option in mind, although to do so requires initiative or access to private counsel as the state public defender is not authorized to represent inmates bringing federal habeas corpus claims.

The writ of habeas corpus refers to the long established right under pre-Revolutionary English law to have an inmate brought before a judge to determine if the person is lawfully incarcerated. In 1789, federal courts were empowered to hear habeas corpus claims of federal prisoners. In the Habeas Corpus Act of 1867, federal courts were permitted to hear claims of prisoners held pursuant to state law. The federal habeas corpus law is set forth in 28 USC § 2241 et seq. The core provision governing claims of state prisoners is 28 USC § 2254.

To file a federal habeas corpus action, you must first exhaust all of your state remedies. This means you should file a Maryland post conviction petition within one year that your direct appeal is decided. If a circuit court declines to grant relief on a post conviction claim, it is quite unlikely that Court of Special Appeals (COSA) will grant your application for leave to appeal (ALA). However, a federal habeas corpus action including all the claims previously brought in state court can be filed promptly after COSA's denial of the ALA. Federal law only gives you 365 days after your direct appeal is final to file a Section 2254 claim, however days are not counted while the state post conviction is pending, including the ALA.

By allowing an inmate to relitigate claims already presented in the state courts, a federal habeas action offers the possibility of a new trial or resentencing. However, you have to persuade a federal court judge that the state court's denial of relief was an unreasonable application of law or the facts - showing that the state courts were just mistaken to deny relief is not enough.

Because of the one year time limit, it is essential that an inmate not wait on the public defender's office to file an initial post conviction petition within one year of direct appeal being final. The inmate needs to take steps to file their own state post conviction petition within one year of the direct appeal being final to stop that one year clock from running out. Post conviction templates and instructions can be obtained by contacting the Post Conviction Defenders Division directly or downloading them from the Post Conviction page on the OPD website.

Similarly, depending on how much of that one year period is burned before the state post conviction is filed, when the state post conviction ends with denial of an ALA, a 2254 petition has to be filed immediately. A Maryland inmate needs to prepare their own federal 2254 petition and get it filed on time through their own efforts, or retain counsel to do so for them. There is an appendix of forms at the back of the Federal 2254 rules which includes a fill in the blanks 2254 petition. Forms are also available here: http://www.uscourts.gov/forms/habeas-corpus-petitions/petition-writ-habeas-corpus-under-28-usc-ss-2254. Once filed, an indigent inmate without resources to hire their own counsel can ask the federal court to appoint counsel for the 2254 action, although it is rare that federal courts will appoint counsel.

As they say in batting in baseball, you will never hit the ball if you don't swing. Keep in mind the possibility of preserving your right to seek relief pursuant to Section 2254 by proactively protecting your rights.

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## Public Defender Spotlight
## James Nichols

James Nichols joined the Office of the Public Defender's Post

Conviction Defender's Division in 2013 after having worked in private practice for Warnken, LLC, a small firm in Towson, Maryland. As a law student, Mr. Nichols interned for Professor Warnken and gained valuable hands on experience reviewing transcripts and crafting legal arguments in collateral and appellate proceedings. Before graduating, he completed a summer internship at Kramon & Graham, where he assisted in civil litigation and a variety of other matters. Mr. Nichols, however, found his passion lied in post-verdict claims and returned to Warnken, LLC.

Mr. Nichols has appeared on behalf of clients in the Circuit Courts for nearly every county in Maryland, both of Maryland's appellate courts, and the Fourth Circuit Court of Appeals. Mr. Nichols was the principal counsel in both *Matthews v. State*, 424 Md. 503 (2011), and *United States v. Moore*, 709 F.3d 287 (4th Cir. 2013), which resulted in successful outcomes. More recently, Mr. Nichols played a role in the ongoing *Unger* litigiation and, through that work, secured the release of numerous clients. As the *Unger* litigation winds down, he has begun assisting the juvenile life team in designing and implementing litigation strategies.

Mr. Nichols' developed his interest in law while earning his undergraduate degrees from the University of Delaware, and later graduated in the top of his class from the University of Baltimore School of Law. He has co-authored articles in the Daily Record, and has recently begun speaking to various lifer organizations.

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