



## post conviction defenders division

Maryland Office of the Public Defender | Justice & Hope for Maryland's Incarcerated

Issue 3

Spring, 2016

### Maryland General Assembly Passes Justice Reinvestment Act

In the 2016 Session, the Maryland General Assembly passed a comprehensive criminal justice reform bill titled, "The Justice Reinvestment Act." Below is a brief summary of major changes. Please note that these changes will not take effect until 10/1/2017 and most changes do not apply retroactively.

#### REPEAL OF MANDATORY MINIMUM DRUG PENALTIES

The bill repeals the mandatory minimum penalties imposed on subsequent drug offenders. Effective 10/1/2017, Courts will have *discretion* on what penalty to impose for distribution and possession with intent to distribute (PWID) offenses. The maximum penalties will remain the same - 2nd offense is up to 20 years, 3rd offense is up to 25 years, and a 4th offense is up to 40 years. But all sentences are with parole. The doubling enhancement statute under Crim. Law 5-609 remains in effect, but after 10/1/2017, defendants cannot receive a double enhancement unless they have also been previously convicted of a crime of violence.



#### MODIFICATION OF SENTENCE FOR MANDATORY DRUG SENTENCES (Crim. Law 5-609.1)

A person who is serving a term of confinement that includes a mandatory drug sentence of 10 years without parole (2<sup>nd</sup> time offender) 25 years without parole (3<sup>rd</sup> time offender) or 40 years without parole (4<sup>th</sup> time offender), may apply to the court to modify or reduce the mandatory sentence, pursuant to Md. Rule 4-345, regardless of whether a motion to modify was previously filed or not. This law goes into effect on 10/1/2017.

The court may modify the sentence and depart from the mandatory minimum sentence *unless* the State shows that, giving due regard to the nature of the crime, the history, and character of the defendant, and the defendant's chances of successful rehabilitation: (1) retention of the mandatory minimum

sentence would not result in substantial injustice to the defendant; and (2) the mandatory minimum sentence is necessary for protection of the public.

An application for a hearing shall be submitted to the court between October 1, 2017 and September 30, 2018, and thereafter only for good cause shown.

Apply for Representation. If you qualify to file a motion under this section, please contact the Public Defender's Office in the county where you were convicted. If you have an active post conviction case, please contact your attorney at the Post Conviction Defenders for representation.

#### **PAROLE AND PROBATION -- TECHNICAL VIOLATIONS**

Effective 10/1/2017. The bill provides that DPSCS establish a program to implement the use of graduated sanctions in response to technical violations of the conditions of supervision instead of seeking revocation. Graduated sanctions may not include incarceration or involuntary detention. Parole and Probation shall provide notice to the court of a technical violation and the graduated sanction imposed as a result. If the graduated sanctions have been exhausted, the agent shall refer the individual to the court or MPC for additional sanctions, including formal revocation of probation, parole or mandatory supervision.

The court and Maryland Parole Commission (MPC) may impose sentences up to a specified maximum for a revocation due to a technical violation as follows:

- 1st violation not more than 15 days
- 2nd violation not more than 30 days
- 3rd violation not more than 45 days

The MPC or court may order any sentence that may have been imposed for a fourth technical violation or a violation that is not technical.

There is a rebuttal presumption that the limits on the period of imprisonment that may be imposed for a technical violation are applicable. The presumption may be rebutted if the Commissioner or Court finds and states on the record that: *adhering to the limits on the period of imprisonment would create a risk to public safety, a victim or a witness.* The commissioner should consider the following factors in making this determination: 1) the nature of the parole/mandatory supervision violation; 2) the facts and circumstances of the crime for which the parolee was convicted; and 3) the parolee's history.

The Court may also depart from the limits if the court commits the probationer or defendant to DHMH under 8-507 of the Health General Article for substance abuse treatment.

"Technical violation" means a violation of a condition of probation, parole, or mandatory supervision that does not involve an arrest or a summons issued by a District Court Commissioner on a statement of charges filed by a law enforcement officer, a violation of a criminal prohibition other than a minor traffic offense, a violation of a no-contact or stay-away order, or absconding. Absconding means "willfully evading supervision." It does not include missing a single appointment.

During the term of parole or probation, certain individuals may earn "Compliance Credits," a program to be established by DPSCS. Earned Compliance Credits can result in the individual being placed on "abatement," which means that they no longer have to regularly report to an agent or pay a supervision fee. The Department shall advise the court or the MPC if an individual is placed on abatement. Persons convicted of the following crimes are not eligible for Compliance Credits: crimes of violence, sexual crimes, homicide by motor vehicle or vessel while under the influence; volume dealer, drug kingpin, importer of certain CDS; CDS near school, use of a minor to distribute CDS, and interstate transfers.

#### **DIMINUTION CREDITS**

The total possible allowance for diminution credits for individuals serving a sentence in a State correctional facility for a crime other than a crime of violence, drug volume dealer, kingpin or a sexual offense increases from 20 days per month to 30 days per month. This includes an increase from 10 to 20 days for special selected work projects or other special programs, including recidivism reduction programming.

The monthly allowance for "good time" is increased from 5 to 10 days per month for an individual serving a sentence for drug distribution.

The monthly allowance for "good time" is increased from 5 to 10 days per month for an individual serving a sentence in a local correctional facility for a crime other than a crime of violence, drug volume dealer or kingpin.

### **GERIATRIC AND MEDICAL PAROLE**

The bill changes the standards under which an inmate can be granted geriatric parole for violent offenders or medical parole. Geriatric parole may be granted to a person who is at least 60 years of age (changed from 65 years of age) but it may not be granted to a sex offender. The Governor must still approve medical parole for a person serving a life sentence. The Office of the Public Defender does not provide representation for parole hearings.

---

## **Illegal Sentences**

Md. Rule 4-345(a) provides that a "court may correct an illegal sentence at any time." The Court of Appeals has repeatedly held that "[i]f a sentence is 'illegal' within the meaning of that section of the rule," it may be corrected under Rule 4-345(a) even if "(1) no objection was made when the sentence was imposed, (2) the defendant purported to consent to it, or (3) the sentence was not challenged in a timely-filed direct appeal." *Chaney v. State*, 397 Md. 460, 466 (2007); *see also Matthews v. State*, 424



Md. 503, 519 (2012); *Walczak v. State*, 302 Md. 422, 427 (1985). Generally, the illegality must actually inhere in the sentence itself and must not be a procedural illegality or trial error antecedent to the imposition of sentence. *See e.g. Chaney v. State*, 397 Md. 460, 466 (2007); *Johnson v. State*, 427 Md. 356, 367 (2012). Below are the most common examples of illegal sentences. Inmates with illegal sentences

should contact their trial attorney or the public defender's office in the county where they were convicted for assistance.

### **Pre-Trial Credit**

Failure of court to award pre-trial incarceration credit. *Smith v. State*, 31 Md. App. 310 (1976). Failure of court to award pre-trial incarceration credit earned on a separate nol-prossed case. *Gilmer v. State*, 389 Md. 656 (2005). However, if separate case was not dismissed or nol prossed, awarding credit is discretionary. Crim. Pro. 6-218. Failure to award credit for time spent on pre-trial release or home detention that is incarcerative in nature. *Dedo v. State*, 343 Md. 2 (1996); *Toney v. State*, 140 Md. App. 690 (2001).

### **Sentence Exceeded Promised Cap or Range / Breach of Plea Agreement**

*Banks v. State*, 56 Md. App. 38 (1983); *Miller v. State*, 272 Md. 249 (1974); *State v. Poole*, 321 Md. 482, 493 (1991). Unexecuted or suspended portion of sentence exceeded promised range. *Cuffley v. State*, 416 Md. 568 (2010). Trial court failed to impose agreed upon sentence to which the court bound itself. *Matthews v. State*, 424 Md. 503 (2012).

### **Binding Pleas**

Three-judge panel cannot increase sentence on binding plea. *Dotson v. State*, 321 Md. 515 (1991). Judge cannot reduce sentence on binding plea without State consent. *Chertkov v. State*, 95 Md. App. 104 (1993).

### **Lesser Included Offenses**

Offenses that pass the Blockburger test will only merge if they "arose out of the same act or transaction." See e.g. *Morris v. State*, 192 Md. App. 1 (2010). Underlying felony merges into felony murder. See e.g. *Lovelace v. State*, 214 Md. App. 512 (2013); *Newton v. State*, 280 Md. 260 (1977).

Lesser sentence for volume dealing would merge with possession with intent to distribute. *Kyler v. State*, 218 Md. App. 196 (2014). Convictions for rape and false imprisonment merged for sentencing purposes, where the precise factual basis of the jury's conviction for false imprisonment was not readily apparent. *Brooks v. State*, 439 Md. 698 (2014). Conviction for first degree burglary merged into sentence for first degree rape when state proceeds on theory that to convict for first degree rape, the jury must find that the defendant committed the offense in connection with a burglary in the first, second or third degree. *Utter v. State*, 139 Md. App. 43 (2001). The crime of wear/carry handgun merges into use of a handgun in the commission of a felony/crime of violence. *Hunt v. State*, 312 Md. 494 (1988). When defendant is charged with greater offense and lesser included offense based upon same conduct, with jeopardy attaching to both charges at trial, and when defendant is convicted only of lesser included charge, he may not receive sentence for that conviction which exceeds maximum sentence which could have been imposed had he been convicted of greater charge. *Simms v. State*, 288 Md. 712 (1980).

### **Sentence Exceeds Maximum that can be Imposed for VOP**

- *Benedict v. State*, 377 Md. 1 (2002).

### **Illegal Subsequent Offender Enhancement**

A prior conviction for a crime of violence that results in a time served disposition cannot serve as a predicate offense for a 2nd time offender for a crime of violence. *Stevenson v. State*, 180 Md. App. 440 (2008).

### **Illegal Increase of Sentence**

Imposing a probationary term that was not previously imposed is illegal. *Cathcart v. State*, 169 Md. App. 379 (2016)). However, probation must be added if the sentence is a life sentence. *Greco v. State*, 427 Md. 477 (S2012)). Increase in sentence upon resentencing after original sentence was reversed on appeal is illegal. *Nimon v. State*, 71 Md. App. 559 (1987); *N.C. v. Pearce*, 395 U.S. 711 (1976). Court cannot increase sentence through exercise of its revisory power to correct an alleged irregularity resulting from a violation of victim's statutory rights to be notified, attend, and be heard at sentence reconsideration hearings. *Hoile v. State*, 404 Md. 591 (2008).

### **No Polling of Jury or Harkening of Verdict**

- *Jones v. State*, 384 Md. 669 (2005).

Initia Lettau joined the Post Conviction Defenders Division in September 2005 as a post conviction public defender. In January 2014, she was promoted to Deputy Chief Attorney. In this role, she serves as the primary liaison between the courts and new clients in scheduling and assigning pro se post conviction cases.



Last year, Ms. Lettau started the *Free Mind Book Project* which is dedicated to replenishing inmate libraries with books. She collects books donated by the public and delivers them to DOC and detention center libraries. In 2015, over 1000 books were donated to inmate libraries throughout the state.

Ms. Lettau is a native of Baltimore, Maryland. She is a graduate of the University of South Carolina - Coastal Carolina College, where she received a Bachelor of Science Degree in Marine Science. Ms. Lettau worked as an environmental chemist for 10 years prior to entering law school. She is a graduate of the University of Maryland School of Law and a Rose Zetzer fellow. Following law school, she was a judicial law clerk for The Honorable William O. Carr in the Circuit Court for Harford County.

---

## Post Conviction 101

### UNREPORTED OPINIONS



The Court of Special Appeals determines whether each decision will be reported or unreported. Decisions that are reported are published and can be cited to as legal authority. Unreported opinions are not published and generally cannot be cited in pleadings or legal argument. All decisions from the Court of Appeals are reported.

#### **Md. Rule 1-104 provides:**

**(a) Not Authority.** An unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority.

**(b) Citation.** An unreported opinion of either Court may be cited in either Court for any purpose other than as precedent within the rule of stare decisis or as persuasive authority. In any other court, an unreported opinion of either Court may be cited only (1) when relevant under the doctrine of the law of the case, res judicata, or collateral estoppel, (2) in a criminal action or related proceeding involving the same defendant, or (3) in a disciplinary action involving the same respondent. A party who cites an unreported opinion shall attach a copy of it to the pleading, brief, or paper in which it is cited.



### In the News!

Click on links below to read latest PCD/OPD news stories.

[Juvenile Life Sentence Challenged in '00 Hunt Valley Burger King Murder, Baltimore Sun, May 27, 2016](#)

[Meet the Ungers, Huffington Post, May 12, 2016](#)

[Efforts to Reconsider Life Sentences for Juveniles Gains Momentum in MD, Baltimore Sun, April 23, 2016](#)

[Teen Sentenced to Life for Dundalk Murder Amid Debate Over Juvenile Sentencing, Baltimore Sun, March 21, 2016](#)

## Our Staff

Becky Feldman, Chief  
Initia Lettau, Deputy Chief  
Jennifer Caffrey, Supervisor  
Margaret Lanier, Supervisor

Eli Braun, APD  
Brendan Costigan, APD  
Brianna Ford, APD  
Norman Handwerger, APD  
Gabriela Kahrl, APD  
James Johnston, APD  
Judith Jones, APD  
Matthew Lynn, APD  
Melissa McDonnell, APD  
Alyssa Navarrete, APD  
James Nichols, APD  
David Russell, APD  
Harun Shabazz, APD  
Karla Showalter, APD  
Scott Whitney, APD

Sheila Sloan, Office Manager  
Brittany Leister, Paralegal  
Amanda Ridenour, Secretary  
Rudy Hill, Law Clerk

---

### **Brady Litigation Team**

Jennifer Caffrey  
Brianna Ford  
Matthew Lynn

### **Parole Revocation Unit (DOC)**

Karla Showalter

### **Unger Litigation Team**

Becky Feldman  
James Nichols  
Scott Whitney

### **Extradition**

Norman Handwerger

### **Youth Resentencing Project**

Jay Johnston  
Judith Jones  
Harun Shabazz

### **Immigration Unit**

Gabriela Kahrl

---

### **FOLLOW US:**



Post Conviction Defenders Division | 217 E. Redwood Street, Suite 1020, Baltimore, MD  
21202 | 410.209.8600 | [pcdefenders@opd.state.md.us](mailto:pcdefenders@opd.state.md.us) | [www.opd.state.md.us](http://www.opd.state.md.us)