



## post conviction defenders division

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

Issue 2

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### Post Conviction Law Updates

#### The Court of Appeals Upholds *Unger*

In *State v. Waine*, 444 Md. 692 (2015), the Court of Appeals reaffirmed the holding in *Unger v. State*, 487 Md. 383 (2012) and its application to cases with advisory jury instructions.

Essentially, this solidifies the path for successful post conviction challenges in cases where advisory jury instructions were given.



To place the issue in context, it is necessary to understand that prior to 1980 most trial courts in Maryland followed the rubric of Art. 23 of the Maryland Declaration of Rights and instructed juries that they were the judges of law and fact and that all of the court's instruction were advisory only. Per the holdings of *Stevenson*, 289 Md. 167 (1980) and *Montgomery*, 292 Md. 84 (1981) such an instruction violates the guarantees of due process, particularly if those instructions allow the jury to ignore bedrock principles such as the presumption of innocence and the State's burden to prove guilt beyond a reasonable doubt.

The post conviction battle ground has been whether *Stevenson* and *Montgomery* had announced a new rule of law. In *Adams v. State*, 406 Md. 240 (2008), the court held that *Stevenson* and *Montgomery* did not announce a new rule of law and, therefore, without any objection the issue was waived and no post conviction relief could be granted. *Unger* overruled *Adams* and held that *Stevenson* and *Montgomery* had indeed posited a new rule of law and, as such, any post conviction challenge to the jury instruction should not be considered waived and a new trial could be granted.

In *Waine*, the court declined the State's request to overrule *Unger*, and the precept that *Stevenson* and *Montgomery* announced a new rule of law intended to be applied retroactively remains intact. Additionally, the court held that there was no abuse of discretion in granting Mr. Waine's motion to reopen his post conviction case. Notably, the court also held that an advisory jury instruction is an error that is structural and, therefore, can never be subject to a harmless error analysis. The culmination of these holdings ensure post conviction relief for persons whose trials were tainted by an erroneous advisory jury instruction.

### **Uncertain Legal Advice on Immigration Consequences Falls Below an Objective Standard of Reasonableness**

In *Sanmartin Prado v. State*, 225 Md.App. 201 (2015) the Court of Special Appeals held that an attorney's uncertain advice on immigration consequences fell below an objective standard of reasonableness. Prado pled guilty on an agreed statement of facts in the Circuit Court for Baltimore County to one count of second degree child abuse. Prado, a citizen of Ecuador and a legal permanent resident of the United States, asked his attorney about deportation consequences. His attorney testified at the coram nobis hearing that "there could and probably would be immigration consequences as a result of the plea . . . that it was a deportable or possibly deportable offense." Sanmartin Prado alleged that this advisement was insufficient.

In *Padilla v. Kentucky*, the Supreme Court held that "under the Sixth Amendment, an attorney representing a noncitizen, in order to provide constitutionally effective representation, must inform the noncitizen client of the risk of deportation that follows a criminal conviction."

Relying on *Padilla*, the Court of Special Appeals determined that the uncertain advice that a conviction is "possibly deportable" or "may be deportable" constitutes inadequate advice because "they suggest the discretion of the federal government in initiating immigration proceedings against a convicted noncitizen, which a trial attorney is in no position to determine." However, the *Padilla* court highlights that "'if a noncitizen has committed a removable offense, his removal is practically inevitable.'" The *Prado* court found that the attorney's advice fell below an objective standard of reasonableness (the first prong of Strickland's ineffective assistance of counsel standard) and remanded the case to the circuit court to reach the second prong -- which is whether there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceedings would have been different.

***Kulbicki* Revisited: Comparative Bullet Lead Analysis, Perjured Testimony, and Ineffective Assistance of Counsel**



In *Maryland v. Kulbicki*, 136 S. Ct. 2 (2015), the U.S. Supreme Court reversed the Maryland Court of Appeals decision in *Kulbicki v. State*, 440 Md. 33 (2014), which had granted a new trial based on an ineffective assistance of counsel claim. The Supreme Court held that there was no ineffective assistance for an attorney's failure to predict the demise of

Comparative Bullet Lead Analysis (CBLA) or for failing to unearth an FBI report that contained one finding, among many, that may have cast doubt on the validity of the CBLA.

Mr. Kulbicki was convicted in 1995 of first-degree murder for the shooting death of his 22-year old mistress. At his trial, an FBI expert who utilized the CBLA method testified that a bullet fragment found in Kulbicki's trunk matched the composition of a bullet found in the victim. He also testified that a bullet taken from Kulbicki's gun found in his house was not an exact match to the bullet found in the victim, but was similar enough that the bullets came from the same package.

Although the CBLA was a widely accepted scientific method at the time of his trial and was regularly admitted in most courts until 2003, the Maryland Court of Appeals nonetheless found Kulbicki's attorney performance lacking. The court held that his attorney should have discovered an FBI report from 1991 that contained one finding suggesting that the CBLA method may be flawed even though the report concluded by supporting the CBLA as a reliable scientific tool. Had the attorney used this report to impeach the FBI expert's conclusion about the bullet comparisons, the outcome of Kulbicki's trial may well have been different.

The U.S. Supreme Court took the Court of Appeals to task for improperly engaging in Monday morning quarterbacking and second guessing the attorney's chosen trial strategies. They schooled the court on the rule of "contemporaneous assessment of counsel's conduct," that is, when a court evaluates an attorney's conduct on an ineffective assistance claim it must view the reasonableness of the conduct at the time the conduct takes place. At the time of Kulbicki's trial, the CBLA was an uncontroversial mode of bullet analysis. There was no evidence or reason to believe that any reasonable attorney would have been able to locate the FBI report in question. Moreover, even if the report could have been discovered the Court questioned whether an attorney would have found the one part that called the science into doubt and whether an attorney would have still used that report, even for impeachment purposes, when the report still concluded that the CBLA was a valid investigative technique. Assessing that the Court of Appeals applied an improper standard for evaluating ineffective assistance of counsel claims, the U.S. Supreme Court reversed *Kulbicki v. State*.

All hope is not lost for Mr. Kulbicki, however. There are still several issues that were not addressed by the Court of Appeals that need a resolution, including a direct attack on the CBLA evidence and the perjured testimony of the State's ballistics expert (Joseph Kopera) as a violation of due process.

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## Post Conviction Filing Fees

Effective October 1, 2015, courts will now require a \$165 filing fee for post conviction petitions. The Clerk shall waive the fee without a court order if an attorney from Office of the Public Defender makes a written request to waive the fees. Md. Rule 1-325(d). If the petition sets forth that the petitioner is indigent, the Clerk's office will send a copy of the petition to Post Conviction Defenders Division. After a file has been opened and the petitioner is determined to be eligible for representation, PCD will automatically enter its appearance and request the fee waiver in its Notice of Appearance.

Alternatively, a petitioner may request that the court waive the filing fees if the petition is accompanied by a Petition for Waiver of Costs, Form CCDC008 (available <http://www.courts.state.md.us/courtforms/joint/ccdc008.pdf>).

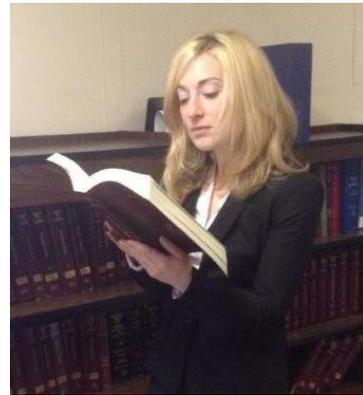
Petitions will be time-stamped, but not formally docketed until an attorney from PCD enters his/her appearance and requests a fee waiver, or a Petition for Waiver of Costs is granted. The date the motion was time stamped will be the date listed as the filing date. Petitioners represented by private attorneys will have to pay the filing fee.

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## Public Defender Spotlight

### Gabriela Kahrl

Gabriela Quercia Kahrl (formerly Gabriela Hopkins) has been leading the Immigration Unit at the Post Conviction Defenders Division since August 2012. The Immigration Unit provides representation to non-US citizens with convictions that adversely affect their immigration status and they are facing imminent deportation. Ms. Kahrl challenges the constitutionality of their convictions in the district and circuit courts throughout the State of Maryland. To maximize success in court, Ms. Kahrl collaborates with the University of Maryland Francis King Carey School of Law Immigration Clinic, the Capital Area Immigrants Rights Coalition, and the American Civil Liberties Union.



In 2014, Ms. Kahrl has testified before Maryland House and Senate in support of her clients. Ms. Kahrl is a board member of the Maryland Immigrants Rights Coalition and routinely gives training sessions on post conviction/coram nobis to the private bar. Last April, she was a presenter at the Federal Bar Association's Symposium on the Intersection of Criminal Law, Immigration and Detention. In March 2016, she will be the featured speaker at a training for the Bar Association for Montgomery County. Recently, her article, *How Post Conviction/Coram Nobis Can Help Your Immigration Client* was published in Immigration Briefings.

In the past 2 years, Ms. Kahrl has successfully vacated a number of convictions and successfully reduced multiple sentences, culminating in the prevention of over 25 deportations, allowing her clients to stay with their families in the US.

Ms. Kahrl is a graduate of the University of Maryland School of Law and St. John's College. She is a native speaker of Spanish and German, and is fluent in French. Ms. Kahrl is the 2014

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## Inmate Resources

### REPORTING DOC MALTREATMENT AND ASSAULTS

The Department of Public Safety & Correctional Services has an internal investigation unit that investigates allegations of inmate abuse. If you want to report an incident, please contact:

#### Internal Investigative Unit

**P.O. Box 418**

**8510 Corridor Road, Suite 100**

**Savage, Maryland 20763**

#### Complaint Phone Number:

**410-724-5742**

### DOC CREDITS

If you believe that the DOC has improperly calculated your credits, contact:

#### PRISM

**P.O. Box 929**

**Chestertown, MD 21620**

### MOTIONS FOR MODIFICATION

If you have a pending motion for modification, be sure to contact your trial attorney for representation at a hearing. Please note that if you were sentenced after 7/1/2004, the court retains jurisdiction to rule on the motion for only 5 years after the date the sentence was imposed. Md. Rule 4-345.



## Medical Parole

Medical Parole is governed by the Correctional Services Article, §7-309. This statute applies to any inmate who is serving a term of incarceration for which all sentences are with the possibility of parole.

The inmate must demonstrate that he or she is "so debilitated or incapacitated by a medical or mental health condition, disease, or syndrome as to be physically incapable of presenting a danger to society may be released on medical parole at any time during the term of that inmate's sentence."

The Office of the Public Defender does not provide representation with medical parole. However, a request for medical parole may be filed with the Maryland Parole Commission by: the inmate, an attorney, a prison official or employee, a medical professional, a family member or any other person. The request shall be in writing and must state the grounds to support the granting of medical parole.

The Parole Commission will consider the following factors: the medical condition, prognosis, availability of treatment or professional services within the community, family support, housing, hospital or hospice availability, institutional history, circumstances of current offense, and criminal history.

If parole is granted and the parolee is no longer so debilitated or incapacitated as to be

physically incapable of presenting a danger to society, the parolee shall be returned to the custody of the Division of Correction for a hearing. If the commission determines that the incapacitation no longer exists, the parolee shall remain in custody.

Medical parole under this section for a person serving a life sentence shall require the approval of the Governor.



## Post Conviction 101

**Motions to Reopen.** Defendants eligible to file a post conviction petition have the statutory right to one hearing and a ruling on the merits of the claims. The 1-petition statute went into effect on 10/1/1995.

Those sentenced prior to that date had the right to 2 post conviction hearings; however, the 1995 statute provided a one-year time frame to file the second petition.

After a defendant exhausts his/her right to one post conviction, any subsequent petition is considered a Motion to Reopen under Md. Crim. Pro. Code Ann. §7-104. Crim. Pro §7-104 provides: "[t]he court may reopen a post-conviction proceeding that was previously concluded if the court determines that the action is in the interests of justice." This provision requires the court to exercise discretion when ruling on a petition to reopen a post-conviction proceeding. *Gray v. State*, 388 Md. 366, 382 (2005). This requirement "prevents the court from acting arbitrarily." *Id.* An appellate court will reverse based on an abuse of that discretion. *Id.* at 382-83. Some reasons for reopening include: a change made in the law that should be applied retroactively or ineffective assistance of post conviction, appellate, or trial counsel. *See e.g. Oken v. State*, 367 Md. 191, 195 (2001); *Harris v. State*, 160 Md. App. 78 (2004).

There is no limit to the number of Motions to Reopen that can be filed. However, each motion will be subject to the waiver provisions set forth in Crim. Pro. §7-106 and the defendant may have to establish why the issue was not litigated in a prior post conviction. Therefore, defendants should be strategic about filing multiple post convictions.

There is not an automatic right to counsel, a hearing, or a ruling on the merits on a Motion to Reopen. It is within the court's discretion whether to hold a hearing and whether to provide a written findings on each claim. However, the Post Conviction Defenders Division will provide representation on Motions to Reopen on a very limited basis. PCD will evaluate each motion and determine whether to provide representation. Defendants can send motions directly to PCD for evaluation, preferably prior to filing it in court. PCD will either request additional information or provide a written decision typically within 90 days.

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#### **Extradition**

Norman Handwerger

#### **Immigration Unit**

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#### **Parole Revocation Unit (DOC) Unger Litigation Team**

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