



post conviction defenders division

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

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U.S. Supreme Court Expands Rights for Juveniles Sentenced to Life without Parole

On January 25, 2016, the U.S. Supreme Court decided another landmark case about juvenile sentencing rights - *Montgomery v. Louisiana*. The Court held that the prior holding in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) was to be applied retroactively to sentences imposed prior to the 2012 *Miller* decision.

In *Miller v. Alabama* (2012), Miller received a mandatory life without parole sentence for first-degree murder. The Supreme Court overturned this sentence finding that a mandatory life sentence constitutes cruel and unusual punishment for a juvenile. The *Miller* case requires judges have discretion to impose lower sentences than life without parole. It also requires a sentencing judge to consider certain factors before imposing a sentence, such as: the age of the defendant, home and family environment, role in the crime, and potential for rehabilitation of the person being sentenced.

Montgomery further narrowed the circumstances in which a juvenile could receive a life without parole sentence to only those cases where a juvenile is "irredeemably corrupt" and where the offense does not represent the "transience of youth." It is likely that defining those terms - and thus who can get life without parole as a juvenile - will take appellate courts many years.

The *Montgomery* decision now joins a line of Supreme Court decisions acknowledging that

juveniles are different and certain sentencing practices are unconstitutional: imposing the death penalty on a juvenile (*Roper v. Simmons*); imposing life without parole on a juvenile for a non-homicide crime (*Graham v. Florida*); a mandatory life without parole sentence for a juvenile (*Miller v. Alabama*).

The *Graham* decision made clear that a State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term. Because of Maryland's unique parole system which severely restricts parole and includes the Governor in the process, this decision may allow for re-sentencing hearings for Maryland inmates who are serving life sentences (or the equivalent of a life sentence) for non-homicide crimes. "Non-homicide" crime has not been defined yet by the courts: it could include an offense such as felony murder, where the defendant did not "kill or intend to kill."

Our office is reviewing cases to decide how to best challenge these sentences. If you or a family member received a life sentence or an excessive sentence for an offense which occurred while a juvenile, you may contact us at:

Youth Re-Sentencing Project
Post Conviction Defenders Division
Maryland Office of the Public Defender
217 East Redwood Street, Suite 1020
Baltimore, Maryland 21202

The Evolving Law on Writs of Actual Innocence: *Seward & Yonga*

by Michele Nethercott, Director, Innocence Project

Seward v. State

In *Seward v. State*, 2016 WL 320719, the Court of Appeals finally put to rest the notion that the State has a right of appeal when a defendant is granted a new trial by a circuit court pursuant to Criminal Procedure § 8-301 (Writ of Actual Innocence). The Court rejected the State's argument that granting a new trial pursuant to § 8-301 constituted a "final judgment" under Courts & Judicial Proceedings § 12-301, pointing out that "the merits of the case remain to be decided" at a new trial. The Court of Appeals also noted that the right to appeal when a defendant is denied relief under the statute is a final judgment because even if a defendant files another petition pursuant to § 8-301, the newly discovered evidence must be distinguished from any claims made in prior petitions. The denial of a petition constitutes a final order because the right to raise a claim of actual innocence based on a particular piece of



evidence is foreclosed and no further action is taken in the case.

The *Seward* case involved a rape that occurred in 1984 and resulted in Seward being convicted of the crime in 1985 based solely on a cross-racial identification by the victim. Prior to his trial, Seward told his trial attorney that he may have been working at a dog grooming shop during the time the crime occurred but was not sure, as his arrest occurred ten weeks after the incident. His trial attorney contacted Seward's employer and asked her to check her records for the date in question. The employer responded that she did not have the records. The prosecutor also contacted the employer and was unable to obtain any records. The employer appeared at Seward's trial pursuant to a subpoena issued by Seward and told the presiding judge that due to the demands of caring for her ill husband she had been unable to locate the records. The trial judge advised her to search again and report back to the Court if she located them. The employer never reported back to the trial judge that she had found the records.

At some point in 1997, Seward's post-conviction counsel found the records and the employer concluded after reviewing them that it was "impossible" for Seward to have been at the scene of the rape at the time it occurred because employees were not allowed to leave the premises during their shift. The employees were locked into the work area due to her concern that her husband who was suffering from dementia at the time would wander out of the building if the doors were not locked. In a post-conviction proceeding, Seward argued that his counsel was ineffective for not properly presenting an alibi defense. The State argued that trial counsel acted reasonably in his efforts to present the alibi defense and the post-conviction court agreed and denied relief. All efforts to locate physical evidence for DNA testing proved unsuccessful.

In 2010, Seward filed a Writ of Actual Innocence under § 8-301 and his employer testified that based on the records and the circumstances of his employment at the time Seward was at work when the rape occurred. The State conceded the materiality of the work records but argued that the evidence was not "newly discovered." The Circuit Court for Baltimore County (Judge Brobst) concluded that the records constituted "newly discovered evidence" because defense trial counsel had acted diligently to obtain the records and granted Seward a new trial. The State filed an appeal to the Court of Special Appeals arguing that the State had a right of appeal and that the circuit court had erred in finding that the evidence that was at issue in the petition was "newly discovered."

The Court of Special Appeals held that the State did have a right to appeal the lower court's decision to grant a new trial and also held that the trial court erred in its finding that the trial attorney had acted with sufficient diligence. This was so, according to the Court of Special Appeals, because the trial attorney could have issued another subpoena for the employment records on the day of trial and moved to hold the witness in contempt for not complying with the subpoena. Hopefully, trial courts will not defer to the standard that the Court of Special Appeals imposed on a petitioner for demonstrating that an attorney acted with "due diligence" as it is such a demanding standard that it would virtually never be met. The Court of Special Appeals essentially imposed a diligence standard that requires trial counsel for a defendant to take every conceivable action that a reviewing court may in retrospect decide they could have taken as opposed to a standard that requires a reasonable and good faith effort to obtain evidence, a standard that is more typically applied when the actions of prosecutors are questioned regarding whether they were sufficiently diligent. *See Muhammad v. State*, 177 Md. App. 188, 298 (2007). Because the Court of Appeals held that there was no appellate jurisdiction in Seward, it did not address the portion of the Court of Special Appeals opinion dealing with the "newly discovered evidence" claim.

In *Yonga v. State*, 2016 WL 320721, the Court of Appeals affirmed the holding of the Court of Special Appeals that defendants who were convicted as a result of a guilty plea cannot seek relief under Criminal Procedure § 8-301. The facts in *Yonga* involved the recantation by the victim of the allegations that resulted in Yonga being convicted of a third degree sexual offense. The Court of Appeals reviewed the legislative history of the statute and decided that the failure of the legislature to explicitly preclude defendants convicted as a result of a guilty plea and the legislature's rejection of a proposed amendment to the same effect was not persuasive as to the legislative intent. The Court noted that the text of § 8-301 is similar to that of Maryland Rule 4-331 (c) and noted that no Maryland case law exists in which a trial court granted a new trial in a case where the convicted was predicated on a guilty plea. Ultimately, the Court of Appeals adopted the rationale of the Court of Special Appeals that a court can only make an assessment as to the materiality of the newly discovered evidence when it has available to it a trial record. It remains to be seen how this rationale will apply in cases where a conviction resulted from a not guilty agreed statement of facts.

Public Defender Spotlight

James Johnston

James Johnston directs the Youth Resentencing Project, the Maryland Office of the Public Defender's program to obtain post-conviction relief for clients sentenced to life without parole and other long prison terms for crimes committed as children.



Mr. Johnston joined OPD in 2003 and the Post-Conviction Defenders Division in 2015. Prior to joining PCD, he supervised OPD's Youthful Defendant Unit which focused on trial representation of children charged as adults, represented clients facing felonies in Baltimore, and also worked in the Frederick and Hagerstown offices.

Mr. Johnston speaks nationally on issues surrounding children in the adult court and correctional systems. He helped create a ground-breaking consent agreement which removed children from the Baltimore City Detention Center and that lead directly to legislation removing children from jails statewide. He also contributed to the national Trial Defense Guidelines for representing children facing life in prison.

Mr. Johnston is a graduate of Dickinson College and Tulane University Law School. He is the Vice-President of the Maryland Criminal Defense Attorneys Association and Vice-Chair of the Maryland State Bar Association Section on Correctional Reform. He has a special interest in representing individuals with mental illness and intellectual disabilities and authored the article "Mental Health and Maryland's Prisons" in the November/December 2011 issue of the Maryland Bar Journal.

**Congratulations to the 2105
PCD Award Winners!**



Post Conviction Attorney of the Year (Culture of Excellence) -

James Nichols

Tenacious Advocacy Award -

Melissa McDonnell

Client Centered Award - Judith Jones

Spirit Award (United in Our Mission) - Norman Handwerger

Inmate Resources

PAROLE HEARINGS

The Office of the Public Defender does not provide representation at parole hearings. For additional information, you may contact the Maryland Parole Commission at:

Maryland Parole Commission
6776 Reisterstown Road, Suite 307
Baltimore, MD 21215

Phone: 410-585-3200

CORAM NOBIS

Writs for Error Coram Nobis petitions are similar to post conviction petitions, except that defendants are no longer serving a sentence, or on parole or probation for that conviction. Defendants must demonstrate a constitutional or fundamental error, as well as demonstrate that they are suffering a "significant collateral consequences" as a result of that conviction (such as: enhanced federal sentence or deportation). The Post Conviction Defenders Division provides representation on these motions if a defendant is facing deportation. For those at risk of deportation, please contact Gabriela Kahrl at gkahl@opd.state.md.us. For assistance in filing a Coram Nobis, templates and information are available on this website: www.opd.state.md.us (click on Post Conviction Defenders, then Coram Nobis).

Parole vs. Mandatory Supervision

There is often a lot of confusion about the differences between parole and release on mandatory supervision.

The term **parole** refers to a discretionary decision for early release rendered by the Maryland Parole Commission after an inmate serves a period of time as provided in Title 7 of the Md. Code, Correctional Services Article. Generally, inmates become eligible for parole consideration after serving 1/4 of their sentence, unless the conviction is for a "violent crime" (sentenced after 10/1/1994). A "violent crime" means a crime of violence as defined in § 14-101 of the Criminal Law Article, or burglary in the 1st, 2nd or 3rd degree.

For violent crime convictions, an inmate is eligible for parole consideration after the greater of 1/2 of the



aggregate sentence for violent crimes, or 1/4 of the inmate's total aggregate sentence. Additionally, if a portion of the sentence includes a no-parole sentence, the inmate is not eligible for parole until the inmate has served the greater of: 1) 1/4 of the aggregate sentence for violent crimes; 2) 1/4 of the inmates total aggregate sentence; or 3) a period equal to the term during which

the inmate is not eligible for parole.

The term **mandatory supervision** is another form of early release that does not require the approval of the Maryland Parole Commission. Correctional Services Article § 7-501 provides that an inmate shall be granted conditional release based on the amount of diminution credits he/she obtained during the course of the detention. As of 10/1/2009, an inmate convicted of a "violent crime" is not eligible for conditional release until the inmate becomes eligible for parole, as explained above. For example, a defendant sentenced to 5 years no parole for use of a handgun in the commission of a crime of violence will have to serve the entire 5 year sentence -- day for day. Inmates eligible for diminution credits, and the amount of diminution credits available, is outlined in Corr. Services § 3-701 et. seq. Generally, inmates are entitled to 10 days per month for good conduct. However, if the conviction is for a drug crime or a crime of violence, inmates can only earn up to 5 days per month for good conduct. Inmates can also earn up to 5 days per month for work tasks, and 5 days per month for vocational or educational tasks. Inmates cannot earn more than 20 days credit per month

Patuxent Institution has a separate parole board, called "Board of Review, and the various terms of release are defined in Correctional Services § 4-301, et. seq.



Post Conviction 101

Guilty Pleas. Guilty pleas can be reviewed on post conviction. The most common allegations include that the plea was not knowing and voluntary because the court failed to advise the defendant of the right to a jury trial or elements of the crime. If successful in establishing these violations on post conviction, the remedy is to vacate the plea and order a new trial. However, defendants should be cautious of pursuing this remedy. At a new trial, the State may choose to prosecute a defendant for all of the original offenses, including any that were originally dismissed or nolle prossed as part of the plea. If convicted of those offenses, defendants are subject to the maximum penalties for those offenses, which may result in more time than the original plea. See *Sweetwine. v. State*, 288 Md. 199 (1980).

Free Mind Book Project Update

We are thrilled to report that our Agency donated over 1000 books to various DOC institutions across the state! Thank you to everyone who donated books!



We continue to accept donations and deliver books to



Thank you for all of the incredible submissions from incarcerated artists to be published in our newsletter.

This piece was done by Erik Dixon at JCI. Congratulations!

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