



## post conviction defenders division

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

Issue 5

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### **National Association of Public Defense Post-Election Statement**

On November 27, 2016, The National Association of Public Defense (NAPD) issued the following statements of commitment. The Post Conviction Defenders pledge the same commitments to our clients and our community:

- We will work with local legislators to prove that public safety can be guaranteed while passing reasonable legislation and reducing jail and prison populations. Criminal justice reform is a bi-partisan issue, and it is one that must continue regardless of changes in political leadership.
- We will increase our efforts to engage in community dialogue and outreach to reassure the communities in which we live and work of our commitment to protecting their rights. And we will continue to fight prejudice against our client communities wherever we find it.
- We will expand and re-double our efforts to provide support and legal advice to immigrant communities concerning the impact of immigration policies.
- We will resist any efforts, either nationally or locally, to implement "stop and frisk" or "show your papers" laws which violate the Fourth Amendment and often state law as well.
- We will vigilantly guard against attacks on the rights of



Statue of Frederick Douglass, Talbot County

religious, ethnic, LGBTQ, racial or other minorities, and any actions undermining the independence of our judiciary.

Circuit Courthouse

*"If there is no struggle, there is no progress."*

- We will continue to press local, state and nationwide efforts to reform police practices. These efforts include work by the Black Lives Matter movement and others to stop the unjustified use of violence by police.
- We also will continue to play a critical role by litigating racial and ethnic justice issues in court, exposing disparities in arrests, bail and sentencing.
- We will also continue to look within, to examine implicit bias as we go about fulfilling our duties to the individuals we are honored to represent.
- We will continue the fight for bail and pretrial reform. Pretrial detention is the front door to mass incarceration.
- We will redouble our efforts to reduce collateral consequences of conviction that block access to jobs, housing, education, transportation, and voting rights-all of which are necessary for successful, productive membership in families, communities, and our broader society.
- We will in addition advocate for reducing the many unnecessary criminal offenses to violations that do not carry with them such restrictions.
- We will continue to assert that all clients should be provided counsel if they are too poor to afford an attorney, and that any court in America that proceeds without counsel should stop this practice immediately.
- We will advocate for persons who are being jailed due their poverty and their inability to pay fines and fees, and will further work to ensure that no one is being jailed because they are poor.
- We will let our clients know every day that we are there for them, that we have their back and that we will continue to fight for them.
- We are used to fighting the toughest battles, and we never, ever quit, even if things look bleak and uncertain. This is the public defender way, and it will carry us - and our clients and their families - as we forge ahead, shoulder to shoulder.

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## Public Information Act News

Maryland's Public Information Act (PIA) was amended in 2015 to create two new programs to help make the Act more accessible: these are the **Public Information Act Compliance Board** (PIACB) and the **Office of the Public Access Ombudsman** (Ombuds). Each program has a different function, can consider different issues, and employs different methods of resolving disputes.



### Public Access Ombudsman

The Ombudsman accepts requests for assistance from either requestors or agencies concerning a broad range of issues and problems including: 1) denial of a request for waiver of the fees to produce records based on the requestor's financial need ("indigency"), 2) the withholding of records, in whole or in part, due to claims of privilege, exemption or the provisions of other laws which may require or authorize records to be withheld; 3) the timeliness of the agency's response; 4) any other issue or problem relating to a PIA request or response that the parties agree to submit to the Ombuds.

The Ombuds does not have authority to decide or compel any party to do anything. For example, the Ombuds cannot compel an agency to produce a record it is withholding under claim of privilege. Rather, the Ombuds tries to help the parties reach a voluntary agreement, which may be based on compromise or an alternative solution the parties agree to.

All information provided to the Ombuds as part of the mediation process is maintained in confidence, and can only be disclosed to another with advance written permission of the parties. This means that the Ombudsman cannot communicate information received from a requestor with anyone at a DPSCS facility, or with any other office, agency or person, except with the requestor's written permission.

Thus, if you wish to allow the Ombudsman to speak with another person (such as your case manager, attorney, family member or any other person) about your PIA questions or case, you must give the Ombudsman advance written permission to do this. In most cases, it will be necessary for the Ombudsman to contact the PIA representative, or attorney for the agency involved in order to address your issue.

**Cost to use PIACB or Ombudsman programs** There is **no charge** for filing a complaint with the PIACB or for requesting help from the Public Access Ombudsman. Both programs are housed within and supported administratively by the Maryland Office of the Attorney General in Baltimore City, but are functionally independent of it.

#### **How to Contact the Ombudsman:**

The Ombudsman can be reached by phone (410-576-6560), by email ([pia.ombuds@oag.state.md.us](mailto:pia.ombuds@oag.state.md.us)) or by regular mail by writing to: Lisa Kershner, Public Access Ombudsman, c/o Office of the Attorney General, 200 St. Paul Place, Baltimore, Maryland 21202.

#### **Information Needed by the Ombudsman:**

In order to assist you, the Ombudsman generally needs to know the name of the state/city or county agency, program or office to which you made a PIA request; the date when you made the request; the nature of your request (i.e., what records you are seeking); the response you received from the agency (agencies are required to respond in writing to a PIA request and generally do this initially within 10 working days of receiving a PIA request); information about how best to contact you; and if applicable, permission to communicate with you through another person (e.g., through a case manager, family member, attorney, or anyone else you may designate to assist in communicating with you).

Whenever possible, provide the Ombudsman with a copy of your request and/or the written response you received to your request. Also, if possible, provide the name and contact information for any person you wish the Ombudsman to contact or communicate with on your behalf about your PIA request.

#### **PIACB: Role and Process**

The Public Information Act Compliance Board hears complaints involving the imposition of fees under the Act. Specifically, a requester who is assessed a fee of more than \$350 may file a complaint with the Board if the requester believes that the fee is unreasonable. The agency will have an opportunity to respond to the complaint, after which the Board may hold an informal conference to hear from both the requester and the records custodian. The Board will issue a written opinion and, if the Board finds that the custodian charged an unreasonable fee, may order the custodian to reduce the fee to a reasonable amount or refund the excessive portion of a fee that was paid.

The Board cannot decide complaints that involve fees of less than \$350 or that arise out of a records custodian's handling of a PIA request. Disputes involving these issues and other aspects of the PIA may be referred to the Public Access Ombudsman for mediation.

To file a complaint with the Board, consult the information on the board's website at <http://www.marylandattorneygeneral.gov/Pages/OpenGov/piacb.aspx#MeetingNotices> or email a complaint to the board at [piaopengov@oag.state.md.us](mailto:piaopengov@oag.state.md.us). The Board's procedures, meeting notices and minutes, and its decisions also appear on the Attorney General's website.

#### **PIA Manual and Other Resources**

The Office of the Attorney General has posted a Manual to its website which contains information and sample forms used in making PIA requests, requesting a waiver of fees, and other purposes. The Manual is available online at <http://www.marylandattorneygeneral.gov> and is accessed via the Public Information Act link on the Open Government page under the "Services" tab. The Ombudsman has asked DPSCS to maintain a print copy in the library of each DPSCS facility, and is attempting to otherwise facilitate inmate access to this and other resource material.

#### **Questions & Suggestions**

The PIACB and Ombudsman programs are new in Maryland, having been in effect for only one year and operational for less than one year. Interested persons are welcome and invited to send their suggestions or questions to the email and office address above given above.

## Public Defender Spotlight

### Melissa McDonnell

Ms. McDonnell received her B.A., cum laude, from the University of Notre Dame in 2000, where she majored in political science and philosophy. She then attended the University of Maryland School of Law and received her J.D., magna cum laude, in 2009. Ms. McDonnell graduated in the top 10 percent of her class, was named to the Order of the Coif, and was the Editor in Chief of the Journal of Health Care Law and Policy.



Following her graduation, she served as a judicial law clerk to the Honorable Clayton Green on the Maryland Court of Appeals. She joined the Post Conviction Defenders Division in 2010. In 2015, Ms. McDonnell was awarded PCD's 2015 Tenacious Advocate Award. As an Assistant Public Defender, Ms. McDonnell is always seeking out creative ways to get her clients the results they want. This year, Ms. McDonnell negotiated sentence reductions for clients in Allegany County, Charles County, and Baltimore County. Ms. McDonnell has won new trials for clients at the Circuit Court level and from the Court of Special Appeals. She also participated in the Unger litigation, and won new trials for clients serving life sentences. One of these clients subsequently won an acquittal on all charges in the Circuit Court for Howard County.

She has the distinction of having appeared in Circuit Court in every county in the state of Maryland. When she is not crusading for justice from the mountains to the ocean, she enjoys cooking, baking, gardening, and watching Star Trek reruns.

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## Recent Post Conviction Appellate Decisions

***Jamison v. State*** (decided Nov. 15, 2016)

Court of Appeals held that a Petition for DNA Testing filed under Criminal Procedure §8-201 is not available for those who entered Alford pleas.

***Washington v. State*** (decided November 1, 2016)

Court of Appeals held that a Petition for DNA Testing is not available for those convicted of conspiracy to commit murder. Only convictions for crimes of violence qualify under the statute. Conspiracy, for any crime, is not a crime of violence listed in Maryland's crime of violence statute.

***State v. Newton*** (decided September 13, 2016)

In 2013, the circuit court granted the petition for postconviction relief in the form of a new trial, finding that trial counsel rendered ineffective assistance of counsel because he failed to object to: (1) "the presence of an alternate juror during jury deliberations"; and (2) "the State's closing arguments." During closing argument, the prosecutor, in response to defense counsel's argument that the State presented no witnesses to the shooting except the victim, stated that other witnesses did not want to get involved because they did not want retaliation.

On September 13, 2016, the Court of Special Appeals reversed the post conviction court's decision.

COSA found that the prosecutor's remark in closing concerned witnesses in general being reluctant to testify, and did not indicate that the defendant was responsible for the witnesses' fear. COSA held that it was a "fair response to defense counsel's criticism regarding the State's lack of witnesses . . ." and that under those circumstances, they could not conclude that "defense counsel's failure to object was 'outside the wide range of professionally competent assistance.'"

Next, COSA held that allowing an alternate to be present during deliberations does not automatically entitle a defendant to a new trial. Further, trial counsel's acquiescence to the juror was a tactical decision that he believed would be beneficial to his client. Therefore, trial counsel's conduct was not deficient.

**Burke v. State** (unreported, decided September 30, 2016)

The 1995 amendment to the post-conviction statute limiting the number of petitions to 1 per trial or sentence does not violate the ex post facto clause.

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## Immigration Update Post-Election

by Gabriela Kahrl

- n President elect Donald Trump pledged to end DACA (Deferred Action for Childhood Arrivals)
- n Trump will not be president until he is inaugurated on January 20, 2017. Until then, DACA will remain in effect and applications & DACA renewal requests will continue to be processed
- n Those who receive or apply for DACA will not necessarily be targeted for deportations. It could be extremely costly for the government to deport all 700K+ DACA recipients
- n Expanded DACA & DAPA (Deferred Action for Parents of Americans) will likely not make it through the courts
- n Generally speaking, it would take an act of Congress to fundamentally change the immigration laws, as they are today
- n Under immigration law as it stands today, the President has broad discretion to affect certain forms of relief
- n Refugees: Under the law, a president has great authority to select the number of refugees admitted each year and from which countries. Expect the overall number of refugees to diminish and the number of Muslim refugees to approach zero under Trump
- n A ban on Muslims morphed during the campaign season mostly into administrative "extreme vetting" of individuals from countries with Muslim terrorism issues. Additional vetting or other executive action (such as "temporary suspension") could be extensive enough to become a de facto ban.
- n Build a wall: Donald Trump's signature issue to build a wall across the southern border and "make Mexico pay for it" may be more difficult to achieve than other parts of his domestic agenda. That is because it almost certainly would require Congress to pass new legislation and will inspire opposition. For many reasons, building a wall is not a good way to decrease illegal immigration. History shows increased enforcement without Congress or the executive branch establishing new ways to work legally at lower-skilled jobs encourages individuals to stay in America after making it across the border



### In the News!

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

[Maryland Parole Commission to Hold Hearings for Hundreds of Lifers, Washington Post, October 15, 2016](#)

[Bank Robber Serving 20 Years Seeks New Hearing in Hagerstown, Herald News, October 25, 2016](#)

[Md. Juvenile Lifers Could be Considered for Minimum-Security, Work Release Programs, Washington Post, June 27, 2016](#)

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