



post conviction defenders division

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

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New Deputy Public Defender & Chief of Post Conviction Defenders Appointed

On January 11, 2017, Public Defender, Paul DeWolfe, appointed Becky Feldman to be the Agency's next Deputy Public Defender, subject to Board approval, to replace Charles "Chip" Dorsey, III. On December 7, 2016, Governor Larry Hogan appointed Mr. Dorsey to the bench of the Circuit Court for Baltimore City. Initia Lettau, who was serving as the Deputy Chief of the Post Conviction Defenders, was subsequently appointed as the new Acting Chief of PCD.

Ms. Feldman served as PCD's Chief for the past 3 years. During her time as a post-conviction attorney, Ms. Feldman successfully negotiated the release of 25 men serving life sentences in Maryland. She helped manage the Agency's statewide *Unger*, Juvenile Life Without Parole, and Justice Reinvestment Act litigation.

In October 2014, she was awarded the Office of the Public Defender's Alan H. Murrell Leader of Justice Award for her leadership of the *Unger* litigation and the implementation of PCD's 5-year strategic plan to improve many aspects of the Division. In her new role as Deputy Public Defender, Ms. Feldman will assist in developing leadership and management goals for the Agency.



Becky Feldman, Acting Deputy Public Defender

Photo courtesy of [Baltimore Law](#) magazine



Initia Lettau, Acting Chief,
Post Conviction Defenders

Ms. Lettau will continue the mission of providing cutting-edge and impactful post conviction representation to PCD's many clients. Congratulations to both!

WHEN IS POLLING, HEARKENING AND A UNANIMOUS JURY AN ISSUE FOR POST CONVICTION RELIEF?

BY JUDITH JONES

Many post conviction petitioners challenge whether their juries were properly polled, their verdicts were properly hearkened, or whether the record reveals a unanimous verdict. Here are a few definitions and situations when this issue could apply in post conviction petitions.

Hearkening the verdict simply means that the clerk repeats the verdict aloud and the jury assents. "The common law procedure is explained in *Grant v. State*, 33 Fla. 291 (1894) wherein the court said: 'By the common-law procedure, . . . the verdict of the jury was orally pronounced in open court, then recorded by the clerk, and affirmed by the jury, which was done by that officer saying to them to hearken to their verdict as recorded by the court, and repeating to them what had been taken down for record.'" *Ross v. State*, 24 Md. App. 246, 252 (1975).

Polling means asking each of the 12 jurors to state on the record his or her verdict for each charge. Usually, the clerk will ask the Foreperson if the jury has reached a verdict and then ask the Foreperson the verdict for each charge. Then the clerk will ask each remaining 11 jurors if his or her verdict is the same as the Foreperson's.

The poll of the jury is governed by Maryland Rule 4-327(e) which states: On request of a party or on the court's own initiative, the jury shall be polled after it has returned a verdict and before it is discharged. If the sworn jurors do not unanimously concur in the verdict, the court may direct the jury to retire for further deliberation, or may discharge the jury if satisfied that a unanimous verdict cannot be reached.

If the Foreman read the verdict, then the Foreman need not be polled. See *Colvin v. State*, 450 Md. 718 (2016). The Court of Appeals held that the failure to also poll the Foreman does not render the sentence illegal under Maryland Rule 4-345(a). Additionally, in *Colvin's* case, the verdict was hearkened, which cured any possible defect in the polling. The Court further held that if a polling error occurred, then trial counsel must object to preserve the issue for appeal, and that it is not appropriately raised as a motion to correct an illegal sentence.

When is the sentence illegal?

In general, if the clerk does not hearken the verdict on the record and the jurors are not polled, the resulting sentence is illegal. When a jury is not polled and the verdict is not hearkened, the verdict of guilt cannot stand and any sentence apportioned thereto must be vacated as an illegal sentence. *State v. Kerwin Jones*, 384 Md. 669, 686 (2005)

In *Smith v. State*, 299 Md. 158, 165 (1984) the Court of Appeals held that either a polling of the jury or a hearkening of the verdict is required for the proper recordation of a verdict: "It is in the absence of a demand for a poll that a hearkening is required for the proper recordation of a verdict." *Id.* (citing *Smith*, 299 Md. at 166).

In *Tyshawn Jones v. State*, 173 Md.App. 430 (2007) the Court of Special Appeals ruled that either polling or hearkening is required for the proper recordation of a verdict, but not necessarily both. The failure to ensure that the jury was either polled or hearkened, however, was found to constitute plain error.

possible your conviction is subject to challenge in a post conviction claim.

What about if the jury is not unanimous?

There is another line of cases that consider when the jury is not unanimous. Generally, the record must show that at least one of the jurors who was polled did not agree with the other jurors on one or all counts.

In one of the first recorded cases on this issue, *Ford v. State*, 12 Md. 514 (1859), the jury was polled as to whether the defendant was guilty of first or second degree murder. The Foreman answered, "Guilty of murder in the first degree," but each of the remaining 11 jurors responded only "Guilty." *Id.* at 548. The Court of Appeals held that Ford's right to jury unanimity had been violated because it was impossible to know if the 11 jurors meant first or second degree murder.

In *Lattisaw v. State*, 329 Md. 339 (1993), in responding to the poll, one of the jurors said, "Yes, with reluctance." The Court of Appeals, mindful of "firmness of the unanimity requirement," reiterated that a juror's assent must be free and unqualified and that "a trial judge's duty to take corrective action must . . . apply when the verdict of an individual juror is ambiguous or defective, for it takes but one juror to threaten the constitutional requirement of a unanimous verdict." *Lattisaw* at 345-46. See also *Bishop v. State*, 341 Md. 288 (1996) (when a juror answered the poll with, "uhh, reluctantly, yes" the response was ambiguous and therefore the verdict not unanimous.)



Public Defender Spotlight

Judith Jones

Judith Jones joined the Office of the Public Defender Post Conviction Defender's Division in 2005 after her graduation from the Catholic University of America Columbus School of Law.

Prior to law school, Ms. Jones worked on juvenile justice and child welfare issues. She received a Masters degree in Health Administration from Antioch University, an advanced degree in Health Administration/Health Policy from George Washington University, and a Bachelor's Degree from the University of Denver. She served as a project director and research analyst on a number of federal contracts for the Department of Health and Human Services including a study of foster care, and for the Office of Juvenile Justice and Delinquency Prevention (Department of Justice).

In addition to her post conviction cases, Ms. Jones is also actively involved in the Youth Resentencing Project, which reviews cases of juveniles sentenced to life and life without parole. In addition, Ms. Jones handles a wide range of complex forensic, evidentiary, and constitutional issues.

When she's not in the office or in court she is enjoying travelling in foreign countries or walking her big Labrador Retriever Kevin.

Congratulations to Our 2016 Award Winners!

Tenacious Advocacy Award
James Johnston

Client-Centered Award
Karla Showalter

Post Conviction Attorney of the Year Award (Culture of Excellence)
Eli Braun



Recent Post Conviction Appellate Decisions

State of Maryland v. Tyshon Leteek Jones Court of Appeals overturned *Roary v. State*. Now, first-degree assault may not serve as a predicate offense for felony murder. The assault charge would merge into the homicide.

Dameron Smallwood v. State of Maryland Court of Appeals held that a petitioner who alleges "newly discovered evidence" that he should have been deemed not criminally responsible at his 1985 proceeding, cannot bring a claim under Md. Code, Criminal Procedure Article §8-301 because even if petitioner is deemed not criminally responsible, he is still guilty of the underlying crime, and therefore, not "actually innocent" as required by the statute.

J U V E N I L E U P D A T E

by James Johnston

PCD receives many calls and letters from clients and family members asking us how Maryland courts are reacting to the recent Supreme Court decisions that may impact juveniles sentenced to life without parole, life, and long term-of-year sentences.

We are also asked about legislation in Maryland or at the national level that could effect inmates who were sentenced for offenses which occurred as juveniles.

Here are a few frequently asked questions and answers about the "juvenile issue" -

Who is a "juvenile" and how is that determined?

The Supreme Court has used a person's 18th birthday as a "bright line" in all of its recent cases dealing with juveniles, including the *Montgomery*, *Miller*, *Graham*, and *Roper* cases. The age at the time of offense is what is important - not how old a person was on the trial date or at sentencing. So while scientists agree that the brain continues developing and maturing well into a person's early 20s, for now at least, the Supreme Court has set the day a person turns 18 years old as the cut-off date.

What's the status of the ACLU's lawsuit against the Maryland prison system and how does that impact juvenile lifers?

In April 2016, the ACLU filed a lawsuit in federal court against the Maryland state correctional system, including the Maryland Parole Commission. The lawsuit argues that Maryland's parole system does not offer a "meaningful opportunity for release" for juvenile lifers and seeks to have the governor removed from the lifer parole decision and to have the parole system reformed more generally. The lawsuit is still pending in federal court; Judge Hollander, who is hearing the case, on February 3, 2017 denied the state government's request to the dismiss the case.

What is your office doing about this issue?

We are representing individual clients who are challenging life without parole, life and long term-of-years sentences through post-conviction, motions to correct illegal sentence, and on appeal. We review each request for representation carefully and on a case-by-case basis. If you would like more information, please write to us.

What is the "juvenile issue"?

Unlike some post-conviction issues, like the jury instruction problem in the *Unger* case, there is no

one single "juvenile issue." Your ability to get back into court or receive a better chance at a parole hearing depends on your sentence, the facts of your case, and your prison record. Maryland's appellate courts have not yet decided if a Maryland life sentence - which requires the governor's approval for parole - is now illegal for juveniles under *Graham, Miller, and Montgomery*. Several cases with this issue are pending currently in the Court of Special Appeals. Once the Court of Special Appeals issues a decision in one or more of those cases, we will know better how Maryland courts will view that part of the "juvenile issue."

What is the Maryland General Assembly considering which might impact juvenile lifers and others?

Several bills are now pending in the Maryland legislature that could impact juvenile lifers. These include Senate Bill 196/House Bill 401, which would eliminate life without parole as a sentence for juveniles, and Senate Bill 694/House Bill 723, which would remove the governor from the parole process for all inmates serving life sentences. It is important to note that none of these bills have passed the House or Senate; currently, each is only a proposal. Only after the legislative session ends in early May will we know what passed, if anything, and what the final version of a bill may look like.

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