post conviction defenders division
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MOTIONS TO SUPPRESS: WHEN SHOULD THEY BE LITIGATED?

BY MELISSA MCDONNELL

Maryland Rule 4-252(a) permits a criminal defendant to file a motion challenging an unlawful search, seizure, interception of wire or oral communication, or pretrial identification; or an unlawfully obtained admission, statement, or confession. The Fourth Amendment of the United States Constitution protects individuals from illegal searches and seizures. The Fifth Amendment protects individuals against forced self-incrimination. The Sixth Amendment guarantees the right to counsel. If the police or another State actor obtain evidence in violation of an individual's rights, that individual may ask the Court to stop the State from using that evidence against the individual in a criminal prosecution. This is litigated in Court through a motion to suppress evidence filed pursuant to Maryland Rule 4-252(a).

To protect individual's Constitutional rights, the police must obtain permission from the Court to search your home, your car, your bag, your body, your cell phone, or any other location in which you have a reasonable expectation of privacy. The police obtain permission by asking the Court to issue a warrant. The Court will issue a warrant if there is probable cause to believe that a crime has been committed and the search will yield evidence of that crime. "Probable cause" is an extremely low bar. The Court can rely on the representations made by the police officers, even if they contain hearsay or information that would not be admissible in a trial setting. If the police have a warrant to search your home or car, generally, the State can use any evidence obtained through that search, unless the police knowingly lied to the Court to get the warrant or the warrant was so deficient in probable cause that no reasonable police officer would rely on it.

If the police conducted a search without a warrant, this might be the type of situation where a

defendant may wish to litigate a motion to suppress the evidence obtained through the warrantless search. There are, however, numerous exceptions to the warrant requirement. Even if the police did not have a warrant, it is possible that, if the search fell within one of the exceptions to the warrant requirement, the State will be allowed to use the evidence.

Searches of cell phones, whether conducted by the officer physically seizing the phone and searching its contents or by using a cell site simulator, otherwise known as "Stingray" or "Hailstorm" to locate a cell phone, are a hot topic in Fourth Amendment law. If your phone was acting odd (battery draining, ringing for no reason) and then suddenly the police were up on you with no obvious reason as to how they found you, the police might have used the Stingray. This is something you should discuss with your attorney.

In many cases, witnesses are shown lineups or photo arrays to make identifications. The State may not use suggestive methods when showing a witness a lineup or an array. For example, the officer cannot suggest to the witness who to pick, the individuals in the array should generally have the same features, and "showup" identifications where a witness is shown a single person in police custody are disfavored. Even if the State uses suggestive methods, the Court will then examine the overall reliability of the identification. For example, did the witness know the person he or she identified prior to the incident in question? How long did the witness have to observe the individual? If the Court deems the identification reliable, the witness will be permitted to make an in-court identification. If the identification is too suggestive and otherwise unreliable, the witness will not be allowed to make an in-court identification.

Before obtaining a statement from a suspect who is in custody in a criminal case, the police must advise the suspect of his or her right to remain silent and his right to have an attorney present. The suspect may waive those rights and give a statement. If the suspect knowingly and voluntarily waives their right to silence and to an attorney, the State may use the statement at trial. Also, if the suspect was not in police custody when the statement was made (e.g., the suspect was free to leave the situation where the officer was asking questions), the State may use the statement. If the suspect say she does not want to talk or asks for an attorney, the police must break off their questioning. If the police continue to question, the State cannot use any statements made after the suspect tried to break off the interview. The Court will also consider the overall voluntariness of the statement, even if a proper warning is given. For example, the police cannot beat someone up to get a confession, or make threats, even if they gave a proper warning. They also cannot promise that what the suspect says is "off the record" or promise leniency or that they can go free if they just talk. The police may, however, lie about what type of evidence they have.

The following scenarios are not the proper subject of a motion to suppress: 1) The witness is lying. This is tested through cross-examination at trial; 2) This evidence makes me look guilty. Of course it does. The State wouldn't be using it against you if it didn't; 3) Evidence that was obtained by violating someone else's Constitutional rights. You do not have standing to challenge violations of other people's Constitutional rights. If the police coerced your co-defendant into giving a statement and now he took a deal to testify against you, that is subject for cross-examination at trial, not a motion to suppress.

Take a Photo of Your Courthouse!

We hope to feature in our newsletters a photo of every courthouse in the state. So far, we have featured photos of the Circuit Courts in Baltimore City, Talbot County, Worcester County, Harford County and the Courts of Appeal building. Take a photo of your courthouse and email it to us at pcdefenders@opd.state.md.us. Stay tuned to see if it appears in a future newsletter!

Public Defender Spotlight
Brendan Costigan

Brendan Costigan moved to Baltimore in 2000 to attend the Johns Hopkins University, graduating with honors in 2004 with a major in Political Science. From then until 2009, he held

public policy research and advocacy positions in the Office of the Governor of Illinois, the National Summer Learning Association in Baltimore, and the Southern Governors' Association in Washington, D.C. As a law student at the University of Maryland School of Law, he was a member of several student organizations, including the Maryland Public Interest Law Project, the Maryland Education Law Project, and the National Moot Court Team.

After law school, he served as a Legal Writing Fellow at the law school before joining the Post Conviction Defenders Division in the summer of 2014. In addition to investigating and presenting claims of ineffective assistance of counsel on post conviction, Brendan also represents clients in pursuing relief by seeking writs of actual innocence and has become the subject matter expert in Kopera litigation.

Recent Post Conviction Appellate Decisions

STATE v. JEFFREY D. EBB, Sr., No. 40 __ MD __ (2017)

The Court of Appeals, in a recent decision, reiterated the requirements for setting forth a valid claim of Actual Innocence under Md. Code Ann., Crim. Proc. §§ 8-301 et seq. and Md. Rule 4-332.

The Court of Appeals recently addressed the requirements for setting forth a valid claim of Actual Innocence under Md. Code Ann., Crim. Proc. §§ 8-301 et seq. and Md. Rule 4-332. The decision highlights two important aspects of Actual Innocence claims, and focuses on both pleading requirements and the type of evidence that may qualify an individual for relief. Although the decision suggests that the pleading requirements should not create artificial barriers, it also makes clear the importance of ensuring the petition includes all of the information required under the Rules. It also makes clear that an allegation that a material witness has recanted important testimony constitutes a viable claim of "newly discovered evidence," while outlining how a pleading can help a court understand why that revelation might impact the result of the original trial.

In *Ebb*, the defendant was convicted of two counts of felony murder in part on the testimony of Mr. House-Bowman, who testified at trial that Ebb had confessed his intention of committing a robbery and also identified Ebb as the perpetrator. Twenty years later, Ebb filed a Petition for Writ of Actual Innocence that was accompanied by a statement signed by House-Bowman that indicated he had "lied" during the trial to "save his niece" from prosecution. The Circuit Court dismissed the Petition, and the Court of Appeals subsequently reversed and remanded for additional proceedings.

Of particular note, the Court concluded that an allegation that a material witness has recanted their trial testimony provides a basis for an Actual Innocence Petition. The Court of Appeals rejected the State's claim that the recantation claim was itself "not evidence," and also rejected claims that the defendant failed to demonstrate that it was "newly discovered" by failing to detail in the pleading how the information was discovered. *Ebb* explained that the defendant's inclusion of the witness' statement that admitted to lying at trial was sufficient to give rise to an inference that, if granted a hearing, the defendant would be able to produce evidence regarding the specific "lies" the witness gave. Also, the Court concluded that it was not necessary for the defendant to detail when and how the recantation was discovered, noting that it would be "reasonable to infer that [the defendant] had no way of knowing that a witness who falsely implicated him under oath would later come forward and recant" until he actually did so.

The decision is notable for additional reasons, as the Court also considered whether the pleading set forth sufficient information to allow a court to conclude it was possible that the new evidence would have altered the outcome of the original trial. The Court noted how the Petition set forth the testimony the witness had given at trial, the State's reliance on that testimony in opening and closing argument, and how the newly discovered information could undermine the theory used to prosecute the case.

The Court ultimately did find one mistake in Ebb's pleading, as the Petition failed to affirmatively state that he was, in fact, innocent of the charges. Thus, although *Ebb* reversed the reasoning for the original dismissal by the Circuit Court, it also remanded the case with instructions to decide whether allowing Ebb an opportunity to amend his Petition to add such a statement would "do substantial justice."

Common Client Questions About Motions for Modification

by Alyssa Navarrete

"When can a motion for modification of sentence be filed?"

Maryland Rule 4-345 governs the Court's ability to revise and modify a sentence. This rule provides that in the case of illegality, fraud, mistake, or irregularity, a sentence can be modified and corrected at any time. In other words, if you believe your sentence is illegal, or if there was a mistake made when entering disposition, you can file a motion to address that mistake, irregularity, or illegality at any time.

Where there is no mistake, irregularity, or illegality, a person can still seek to have their sentence modified. This is governed by Maryland Rule 4-345(e): Modification Upon Motion. This rule allows any person convicted of a crime to seek to modify his or her sentence by filing a motion. The rule has three critical components: 1) this motion must be filed within 90 days of the person's sentencing date, 2) the court retains revisory power over the sentence for up to five years from the date of sentencing, and 3) the court cannot increase the sentence.

"Will the Court schedule a hearing on the motion for modification?"

Once the motion for modification is filed, it will be directed to the sentencing judge for review. The sentencing judge has three options available: 1) schedule a hearing to listen to arguments about why the sentence should be modified; 2) deny the motion without a hearing, or 3) hold the motion "*sub curia*" (meaning to hold the motion without making a decision one way or the other) for up to five years from the date of sentencing. In order to change a sentence, a hearing must be held to allow the Defendant, the State, and the Victims (if any) to address the Court with respect to what they believe is the most appropriate outcome. *See* Maryland Rule 4-345(f). Though a hearing must be held in order to change the sentence, the fact that the court schedules a hearing does not necessarily mean that the judge is inclined to modify your sentence. It simply means that the judge is willing to hear argument from all parties about why a sentence should be reduced or remain the same. It is important to keep in mind that there is no entitlement to a hearing-the Court has the power to deny a motion for modification without a hearing. If the Court denies the motion without a hearing, there is very little that can be done at that point, and the sentence will likely remain unchanged.

"What if a hearing is scheduled, and my sentence is modified at that time?"

If the Court schedules a hearing and modifies your sentence, new paperwork will be sent to DOC to update your commitment records. It might take DOC a day or two to make all of the updates and recalculate your sentence. DOC will recalculate your parole eligibility date (if applicable), and will apply any diminution credits you may have previously earned to your new sentence. Keep in mind that if your sentence is modified, this is considered a new sentencing event. That means that the 90 day period to file a motion for modification begins again from the date of your new sentencing. So, you should ask your attorney to file another motion for modification on your behalf.

"What if there was no motion for modification filed within 90 days of my sentencing date?"

In some cases, the failure of an attorney to file a timely motion for modification can constitute ineffective assistance of counsel. As mentioned above, motions for modification of sentence pursuant to Maryland Rule 4-345(e) must be filed within 90 days of sentencing. After those 90 days pass, the court loses the power to modify your sentence. However, if the failure to file the motion for modification occurred as a result of the actions (or inaction) of your trial attorney, you may be entitled to post conviction relief. If you think this circumstance applies to you, make sure you discuss this with your post conviction attorney. He or she can explain more specifically how this post conviction issue might apply to your particular case. If this issue is successfully raised in a post conviction proceeding, the relief available is the right to belatedly (meaning, outside of the 90 days) file a motion for modification of sentence.

"I filed a motion for modification within 90 days of my sentencing and it was denied. It has been a few years, should I file again?"

Unfortunately, you do not have the right to file multiple motions for modification of sentence. If a motion for modification was timely filed by your attorney, and was subsequently denied by the Judge, you cannot file another motion for modification.

"What's the difference between a motion for modification and an 8-505/8-507?"

As outlined above, a motion for modification of sentence is governed by Maryland Rule 4-345. In this motion, a defendant can present any information that might be useful or important to a judge in determining if a sentence should be modified. Motions pursuant to 8-505/8-507 refer to Sections 8-505 and 8-507 of the Health General Article of the Maryland Code. These motions are more specifically focused on obtaining drug and alcohol treatment, rather than reducing or changing a sentence. A motion under Section 8-505 is a motion to ask the court to order an evaluation of a defendant to determine his or her need for, and amenability to, drug treatment. A motion under Section 8-507 is filed after the evaluation pursuant to Section 8-505 is ordered and received by the Court. A motion under Section 8-507 asks the Court to place a defendant in drug and alcohol treatment based on the recommendations in the 8-505 evaluation. You should not assume that you will be getting treatment just because a judge orders an evaluation under Section 8-505. Even when an evaluation is ordered, and the defendant gets favorable recommendation for treatment from the evaluator, the judge can (and often does) still deny the 8-507. Unlike motions for modification, motions pursuant to Sections 8-505 and 8-507 can be filed at any time, regardless of whether they have previously been denied. The Office of the Public Defender will assist you with filing one motion under Sections 8-505/8-507. If you would like assistance, you should contact the local Public Defender's Office in the county or city where you were originally convicted.

Overturning Guilty Pleas: Just Because You Can, Doesn't Mean You Should

by Eli Braun

Seeing dinosaurs for the first time, one scientist in the movie *Jurassic Park* exclaimed: "It's the most beautiful thing I ever saw." Another scientist (played by Jeff Goldblum) had a different take: "Your scientists were so preoccupied with whether they could that they didn't stop to think if they should." We know what happened next: The dinosaurs got loose. People died.

For many people, there was a good reason to plead guilty. Maybe you got a benefit out of the deal-an agreement on the sentencing range, or a recommendation for a particular sentence, or a dismissal of other charges for which you could have received consecutive sentences.

But this benefit may have come at a cost. In exchange for the benefit, you gave up certain rights, including the right to a trial, the right against self-incrimination, and even the right to appeal. You gave up the right to challenge legal and factual weaknesses in the State's case.

So reversing a guilty plea is difficult and, in most cases, impossible. Before you plead guilty, you're asked a series of questions designed to make sure you know what you're getting and giving up. These questions also serve to protect the guilty plea itself, to make sure it can't be undone. Occasionally, though, we find a way forward-a way to get you back to Square One.

What happens next? A new trial, with everything back on the table. The State can bring back the charges, including charges that were dismissed. The judge can sentence you to more time, even if you're only re-convicted of the same thing. As the saying goes, be careful what you wish for.

The key case is *Sweetwine v. State*, 288 Md. 199 (1980). Mr. Sweetwine was charged with armed robbery and robbery, pled guilty to robbery, and was sentenced to 6 years in prison. The State dismissed the armed robbery charge as part of the plea agreement. But Mr. Sweetine then got his guilty plea overturned. The State re-prosecuted him on the entire indictment and he was convicted a second time, this time of armed robbery. He was sentenced to 20 years in prison. He appealed-and lost.

The Court of Appeals considered "whether, after petitioner's first conviction for simple robbery was reversed . . . he could be retried for and given a greater sentence for armed robbery." It answered: Yes. Neither double jeopardy nor due process prevented the longer sentence.

Mr. Sweetwine is not alone. The Post Conviction Defenders sometimes receive letters from people who took the same risk. We hear: "I was convicted again and now I've got more time."

(The rules are different for people who went to trial. If you were convicted after a trial and you get your conviction or sentence overturned, you ordinarily cannot receive a longer sentence the second time around. For more on this topic, see *North Carolina v. Pearce*, 395 U.S. 711 (1969), and Md. Code, Courts and Judicial Proceedings, § 12-702.)

At the Post Conviction Defenders, you direct the goals of our representation. So if you want to reverse your guilty plea and you have a meritorious claim, we will bring it for you. We will fight for you. But you should ask yourself: Do I want a new trial, knowing I could get more time? As *Jurassic Park* warned: Just because you can, doesn't mean that you should.

Our Staff

Initia Lettau, Chief
James Nichols, Deputy Chief
Jennifer Caffrey, Supervisor
Eli Braun, Supervisor

Brendan Costigan, APD
Brianna Ford, APD
Bethan Haaga, APD
Norman Handwerger, APD
Gabriela Kahrl, APD
Rachel Krane, APD
James Johnston, APD
Judith Jones, APD
Matthew Lynn, APD
Melissa McDonnell, APD
Alyssa Navarrete, APD
Natalie Novak, APD
Karla Showalter, APD
Scott Whitney, APD

Sheila Sloan, Office Manager
Brittney Bennett, Secretary
Rudy Hill, Law Clerk

Brady Litigation Team
Eli Braun
Brianna Ford
Matthew Lynn

Extradition
Norman Handwerger

Immigration Unit
Gabriela Kahrl

Parole Revocation Unit (DOC)
Karla Showalter

Youth Resentencing Project
Jay Johnston
Judith Jones

Unger Litigation Team
James Nichols
Scott Whitney

FOLLOW US:

Post Conviction Defenders Division | 217 E. Redwood Street, Suite 1020, Baltimore, MD 21202 | 410.209.8600 | pcdefenders@opd.state.md.us | www.opd.state.md.us