



Baltimore County Bar Association
CONTINUING LEGAL EDUCATION PROGRAM
Criminal Post-Verdict Practice on
Both Sides of the Aisle
Wednesday, September 19, 2007

SPEAKER Prof. Byron Warnken

Program Chair Emmet Davitt, Esquire

DATE: Wednesday, September 19, 2007

TIME 8:00 - 9:00 a.m.

LOCATION Check-in at the Bar Office (County Courts Building)
 for program location

What every prosecutor and defense attorney should know about post-verdict proceedings, *e.g.*, preservation for appeal, post-conviction appeals, post conviction, and post-sentencing sentencing proceedings.

**CRIMINAL POST-VERDICT
PROCEEDINGS:
MOTIONS, APPEALS, POST
CONVICTION, & CORAM NOBIS**

**BALTIMORE COUNTY BAR
ASSOCIATION CONTINUING LEGAL
EDUCATION SEMINAR**

**PROFESSOR BYRON L. WARNKEN
UNIVERSITY OF BALTIMORE
SCHOOL OF LAW**

WEDNESDAY, SEPTEMBER 19, 2007

C. 2007. All rights reserved.

CRIMINAL POST-VERDICT PROCEEDINGS: MOTIONS, APPEALS, POST CONVICTION, & CORAM NOBIS

I. Post-trial, pre-appellate rulings impacting the verdict

A. Motions for new trial

1. **Standard motion for a new trial:** Although it rarely happens, the trial court may grant Defendant's motion for a new trial.
 - a. **When filed:** Defendant must file a motion for a new trial within ten days after the verdict. Md. Rule 4-331(a). If Defendant files an untimely motion for a new trial or files an untimely amendment to a timely file motion, the court may not consider the untimely file motion or untimely filed amendment under Md. Rule 4-331(a). However, the court may, in its discretion, in the interest of justice, treat Defendant's untimely motion for a new trial or untimely filed amendment to such a motion as a prematurely filed motion for a new trial based on newly discovered evidence. Campbell v. State, 373 Md. 637 (2003).
 - b. **Standard of review:** The standard for determining whether to grant a new trial is "the interest of justice." Id. The list of possible grounds for granting a new trial is open-ended but tightly circumscribed by the time requirements. Jackson v. State, 164 Md. App. 679 (2005); Love v. State, 95 Md. App. 420 (1993).
 - c. **Reversible error:** If the trial court recognizes that it committed reversible error during the trial, the granting of a motion for a new trial is in the interest of justice and will save the time and expense of an appeal, only to reach the same result.
 - d. **Verdict against the weight of the evidence:** The trial court may act as the "13th juror" and grant a new trial because the trial court believes that, although the prosecution satisfied its burden of production, the prosecution did not satisfy its burden of persuasion. Stated alternatively, if the verdict went against the weight of the evidence, it is in the interest of justice to grant a new trial. Mack v. State, 300 Md. 583, 601 (1984) (discretion to grant a new trial if the jury reaches an inconsistent verdict or a verdict contrary to the law or the jury instructions).
 - e. **Ineffective assistance of counsel:** Even rarer, but permissible, is the trial court granting a new trial, in the interest of justice, on a finding of ineffective assistance of counsel.
2. **Trial court's revisory power:** Even rarer than the rare grant of a ten-day motion for a new trial is a trial court exercising its revisory power after sentencing. Even if Defendant failed to file a ten-day motion for a new trial, or such a motion was filed and denied, Defendant may file a motion for a new trial under the trial court's revisory power.

- a. **Unjust or improper verdict:** Within 90 days after sentencing, Defendant may file a motion for a new trial, requesting the trial court to set aside the verdict because it is unjust or improper.
 - (1) **Circuit Court:** In the Circuit Court, Defendant may file this motion even if the defendant has noted an appeal to the Court of Special Appeals.
 - (2) **District Court.** In the District Court, the defendant may file this motion only if the defendant has not noted an appeal to the Circuit Court. Md. Rule 4-331(b).
- 3. **Newly discovered evidence.**
 - a. **Motion filed within one year:** Defendant may file a motion within one year after imposition of sentence or the date the mandate is issued by the COA or CSA, whichever is later.
 - b. **Due diligence requirement:** The court may grant a new trial or other appropriate relief, based on newly discovered evidence, provided that evidence could not have been discovered by due diligence in time to move for a new trial within the 90-day period. Md. Rule 4-331(c); Love v. State, 95 Md. 420 (1993); Bloodsworth v. State, 76 Md. App. 23, 45 (1988). Due diligence means that Defendant act both reasonably and in good faith to obtain the evidence under a totality of the circumstances and the facts known to Defendant. See Campbell v. State, 373 Md. 637 (2003).
 - c. **Sentence of death:** A motion may be filed at any time if a death sentence was imposed and the newly discovered evidence, if proven, would show that Defendant is innocent of the crime, an aggravating circumstance, or other condition of death penalty eligibility.
 - d. **DNA evidence:** A motion may be filed at any time, based on DNA identification testing or other generally accepted scientific techniques, if the results, if proven, would prove Defendant innocent of the crime. Md. Rule 4-331(c)(1)-(3).
 - e. **Standard of review:** The standard of review in a motion for new trial based on newly discovered evidence is whether there was a substantial or significant possibility that the verdict was affected. Yorke v. State, 315 Md. 578, 587 (1989); cf. Evans v. State, 382 Md. 248 (2004) (affirming a denial of a motion for new trial two decades after a first degree murder because there was no substantial or significant possibility that the jury’s verdict would have been different because there was no newly discovered evidence to substantially question whether Defendant was the “triggerman,” considering the overwhelming evidence of guilt).
 - f. **Materiality & credibility:** When a motion for new trial is based

on newly discovered evidence, materiality is the threshold question. Stevenson v. State, 299 Md. 297 (1984). Evidence that is merely cumulative or impeaching is not material. Campbell v. State, 373 Md. 637 (2003); Jackson v. State, 164 Md. App. 679 (2005)

g. **Example of newly discovered evidence**

- (1) **Not newly discovered evidence:** Mack v. State, 166 Md. App. 670 (2006) (Defendant intentionally concealed mental illness to avoid long-term incarceration); Gravely v. State, 164 Md. App. 76 (2005) (Defendant already had a hearing on prior motion for new trial, which he failed to appeal, and offered nothing new in subsequent motion); Miller v. State, 380 Md. 1 (2004) (three of seven COA judges consider disclosure of promise of leniency for testimony to be newly discovered evidence); Giddens v. State, 148 Md. App. 407 (2002) (new expert witness is not newly discovered evidence); Robeson v. State, 39 Md. 365 (1978) (cumulative evidence is not newly discovered evidence).
- (2) **Newly discovered evidence:** Newman v. State, 156 Md. App. 20 (2004) (co-conspirator asserting Fifth Amendment privilege against compelled self-incrimination by refusing to testify making post-trial statement about the crime).

4. **Fraud, mistake, or irregularity:** There is no time limit in the court's revisory power over the judgment based on fraud, mistake, or irregularity. Md. Rule 4-331(b).

- C. **Form of motion:** A motion for new trial, pursuant to Md. Rule 4-331, must be in writing, stating the grounds. If based on newly discovered evidence, that evidence must be described. If a hearing is desired, a request for hearing must accompany the motion. Md. Rule 4-331(d)(1)-(4). Although Defendant must state grounds in detail, Defendant is not required to state all reasons. Wilson v. State, 334 Md. 469 (1994).
- D. **Hearing:** The court may hold a hearing on a motion for new trial. If based on newly discovered evidence, the court must hold a hearing, if requested by Defendant. Md. Rule 4-331(e).
- E. **Reason for granting new trial:** If the court grants a new trial, it must state its reasons on the record. Md. Rule 4-331(e).
- F. **Appellate review:** The standard of review of the court's decision to deny a motion for a new trial can be abuse of discretion or legal error. See Merritt v. State, 367 Md. 17 (2001) (rejecting the proposition that denial of a motion for new trial is only reviewable when the trial court fails to exercise discretion); Miller v. State, 380 Md. 1, 28 (2004); Jenkins v. State, 375 Md. 284(2003). There is less discretion available on a motion for new trial based on newly discovered evidence and virtually no discretion to refuse to consider newly discovered

evidence that has a direct bearing on whether a new trial should be granted. Jackson v. State, 164 Md. App. 679 (2005).

- II. **Post-trial release:** Post-trial release is discretionary because the presumption of innocence is gone. Md. Rules 4-342(j) & 4-349
- A. **When:** After the verdict, the court may grant release, pending sentencing and/or while the case is on appeal. Md. Rule 4-349(a).
- B. **Factors relevant to release:**
1. **Danger of flight or to community:** Defendant has the burden of establishing that Defendant will not flee or pose a danger to any individual or the community.
 2. **Conditions:** The court may set the same conditions on release similar to pretrial release conditions, as set out in Md. Rule 4-216 (e), including, committing Defendant to the custody of a designated person or organization for supervision, placing Defendant under supervision of probation officer, requiring Defendant to post a bail bond, subjecting the defendant to any other condition reasonably necessary to ensure the appearance of Defendant and protect the safety of the public, and imposing on the Defendant (for good cause shown) conditions reasonably necessary to stop or prevent victim or witness intimidation (as set forth in Md. Crim. Proc. Code Ann. § 9-304). The court may also impose different or greater conditions of release. Md. Rule 4-349(b)-(c); §4-216 (e).
 3. **No right to bail:** Defendant has no right to bail pending appeal, nor does a defendant have a right to a de novo hearing for habeas corpus relief. Hurley v. State, 59 Md. App. 323 (1984).
- C. **Amendment or revocation of release conditions** - Md. Rule 4-349(c) & (d)
1. **Amendment:** The trial court may impose different or greater release conditions.
 2. **Revocation:** The trial court may revoke the release conditions. If the court revokes the release conditions, or the court's amendment of the release conditions causes the defendant to be incarcerated, the court shall state its reasons on the record or in writing.
 3. **Discretionary power:** A trial judge possesses the discretionary power to reverse his decision granting a new trial when a lack of finality in the initial grant was apparent from the record. Johnson v. State, 38 Md. App. 100 (1977).
- D. **Sentence of imprisonment:** Sentence of imprisonment is stayed only if Defendant is released, pending appeal. Md. Crim. Proc. Code Ann. § 5-207; Md. Rule 4-349(b).
- E. **Prior bond:** When Defendant is found guilty in a circuit court and sentenced to imprisonment, the bond on which defendant was released prior to sentencing is terminated. If Defendant then appeals and the sentencing court requires a bond be

posted, the defendant must post a new bond. Md. Crim. Proc. Code Ann. § 5-207.

III. Appeal from District Court to Circuit Court - Md. Rules 7-101 to 7-116

A. Securing appellate review

1. **Method:** To obtain appellate review in Circuit Court, Defendant must file a notice of appeal and filing fee (waived if there is an affidavit of indigency), with the clerk of District Court. Md. Rules 1-325(a), 7-103.
2. **Timing:**
 - a. **After entry of judgment.** The notice of appeal shall be filed within 30 days after entry of the judgment (the sentencing). State v. Armstrong, 60 Md. App. 244, 252 (1984).
 - b. **If motion for new trial filed.** In a criminal action, when a timely motion for new trial is filed pursuant Rule 4-331(a), the notice of appeal shall be filed after later of (1) entry of judgment or (2) entry of notice withdrawing motion or the order denying the motion. Md. Rule 7-104(a) & (b)). Kirsner v. State, 296 Md. 567, 570 (1983) (filing a motion for new trial does not extend the 30-day period for filing an appeal; the ruling on a motion for new trial does not constitute a final judgment from which there is a right to appeal).
3. **Death of defendant**
 - a. **If defendant dies during the pendency of an appeal.** Md. Rules 8-401 and 2-241 provide for naming a substitute party (usually a personal representative) to carry on the appeal. Md. Rule 1-203(d) automatically suspends all time requirements applicable to the deceased party from the date of death to the earlier of 60 days after death or 15 days after the appointment of a personal representative by a court of competent jurisdiction.
 - (1) **Substitute party may elect to pursue appeal.** During that time, the substitute party may elect to pursue the appeal. If the substitute party does elect to pursue the appeal, counsel of record will remain in the case unless the substitute party obtains other counsel. Surland v. State, 392 Md. 17 (2006).
 - (2) **If no substitute party comes forward.** The appeal will be dismissed for lack of prosecution (rather than for mootness), and therefore, the conviction and judgment against the deceased Defendant will remain intact.
 - (3) **Attorney may not of own authority elect to pursue appeal.** An attorney has no authority to note an appeal on behalf of a dead client. Chmurny v. State, 392 Md. 159 (2006).
 - b. **If defendant dies after a verdict of guilty is rendered but before**

sentencing & subsequent appeal. There is no conviction and the verdicts and indictment against the deceased defendant will be vacated. Chmurny v. State, 392 Md. 159 (2006).

B. **Counsel:** Even if counsel in Circuit Court was same counsel as in District Court, counsel must enter appearance in Circuit Court because it is not transferred. Md. Rule 7-107. See Wilson v. State, 284 Md. 664, 669 (1979) (noting that the practice in Maryland has been for the accused to be permitted to have counsel both at trial and on direct appeal).

C. **Record**

1. **Transmittal of record:** The clerk of District Court shall transmit the record to Circuit Court within 60 days after the notice of appeal is filed. Md. Rule 7-108.

2. **Content of record** - Md. Rule 7-109(a)

a. **Certified copy of the docket entries**

b. **All original papers filed** (unless omitted by stipulation)

3. **Correction of record:** On motion of a party, or on the court's own initiative, an error or omission may be corrected by Circuit Court order. Md. Rule 7-109(d).

D. **Format of appeal:**

1. **De novo.** Appeal to Circuit Court is tried de novo, including appeals following guilty pleas and pleas of nolo contendere. Md. Rule 7-102(b). See Hardy v. State, 279 Md. 489, 496 (1977) (when criminal Defendant is appealing from a District Court judgment, Defendant has a right to a trial by jury in the circuit court de novo proceedings); State v. Jefferson, 319 Md. 674 (1990); Harper v. State, 312 Md. 396, 400 (1988); McDonald v. State, 314 Md. 271, 274 (1988) (Circuit Court's authority to review de novo, District Court's revocation of probation is extended to a de novo determination of disposition); Garrison v. State, 350 Md. 128, 138-39 (1998) (Defendant is entitled to an appeal de novo from District Court to Circuit Court); Preston v. State, 57 Md. App. 403, 406 (1984) (Defendant may waive appeal through inaction).

2. **District Court judgment:** District Court judgment shall remain in effect pending Circuit Court disposition. Md. Rule 7-112 (b).

3. **Charging document amendment:** The charging document may be amended under Md. Rule 4-204. Md. Rule 7-112(c).

IV. **Appeals in Court of Special Appeals and Court of Appeals** - Md. Rules 8-101 et seq.

A. **Parties**

1. **CSA:** The party appealing is the appellant, and the adverse party is the appellee. If the appellee also appeals, the appellee is the appellee/cross-appellant, and the appellant is the appellant/cross-appellee. Md. Rule 8-

111(a). For appeals from either juvenile court, the proceeding is captioned “In re _____,” using the juvenile’s first name and first initial of the juvenile’s last name. For appeals from grand jury criminal investigations, the proceeding is captioned “In re: Criminal Investigation No. _____ in the Circuit Court for _____.” In both the juvenile case and the grand jury case, secrecy of the last name and the content of the record is required. Md. Rule 8-121.

2. **COA:** When there has already been an appeal in the CSA, the party appealing is the petitioner, and the adverse party is the respondent. If the respondent also appeals, the respondent is the respondent/cross-petitioner, and the petitioner is the petitioner/cross-respondent. Md. Rule 8-412(b). If the appeal (a) has “bypassed” the CSA, or (b) is a death penalty case, the parties are appellant and appellee because it is a direct appeal and not a discretionary appeal.

B. **Counsel:** Unless stricken, a lower court appearance of counsel continues in the CSA and COA. Md. Rule 8-402(a).

C. **Scope of review** - Md. Rule 8-131(a)

1. **Jurisdiction:** A party may raise, at any time, the issue of the trial court’s subject matter jurisdiction, whether or not raised in, and decided by, the trial court. See Taylor v. State, 381 Md. 602 (2004) (ordinarily an appellate court will not decide issues not preserved at trial except for issues of jurisdiction of the trial court over the subject matter); Cordovi v. State, 63 Md. App. 455, 468 (1985) (a recognized exception to the general rule that an appellate court will not address issues not preserved at trial is when “a charging document, by its terms, is so defective that it deprives the trial court of jurisdiction”).
2. **Preserved issues:** The appellate court will usually not address non-jurisdictional issues unless raised in, and decided by, the trial court. See Squire v. State, 280 Md. 132 (1977) (appellate court will not hear a claim not preserved at trial); Graham v. State, 325 Md. 398 (1992) (on appeal, the reviewing court will not decide an issue unless it was raised or decided by the trial court, otherwise a failure to object constitutes a waiver); Sifrit, B. v. State, 383 Md. 116 (2004) (Defendant’s argument regarding denial of opportunity to present evidence of his wife’s ability to commit the crime alone was not preserved because the argument at trial on this issue was different than the argument on appeal).
 - a. **Motion for judgment of acquittal:** Defendant must renew the motion for judgment of acquittal at trial in order to preserve the sufficiency argument for appellate review. Ennis v. State, 306 Md. 579 (1986).
 - b. **Jury instructions:** To preserve an argument regarding jury instructions, it is not enough to merely request a specific instruction, but an objection must also be made immediately after

the instructions are given. Johnson v. State, 310 Md. 681 (1987). An issue as to supplemental jury instructions is preserved when counsel does not object to the initial instructions but objects to the supplemental instructions, so long as the supplemental instruction is the only issue raised on appeal. Dawkins v. State, 313 Md. 638, 642 (1988). See State v. Smullen, 380 Md. 233 (2004) (allegation regarding battered child syndrome and a self-defense jury instruction was not preserved at trial when counsel conceded that the instruction did not constitute a misstatement of the law but rather expressed concern only that it was cumulative).

- c. **Element of an offense:** In order to argue an element of the offense on appeal, Defendant must put on some evidence at trial to generate an issue with respect to that element in order to preserve it for appeal. Outmetzguine v. State, 335 Md. 20 (1993).
- d. **Double jeopardy:** To preserve a Double Jeopardy issue, Defendant must object to the grant of a mistrial at the first trial, and move to dismiss based on Double Jeopardy at the second trial. Taylor v. State, 381 Md. 602 (2004).

- 3. **Plain error:** The appellate court has discretion under Md. Rule 8-131(a) to consider unpreserved issues on appeal, so long as it does not create unfair prejudice to the parties or the court, if necessary and desirable to guide the trial court or to avoid plain error. Jones v. State, 379 Md. 704 (2004); Squire v. State, 280 Md. 132 (1977). Plain error is an error which vitally affects Defendant's right to a fair and impartial trial. Clagget v. State, 108 Md. App. 32, 40 (1996); Danna v. State, 91 Md. App. 443 (1992) (even when Defendant does not object to jury instructions, the CSA, in its plenary discretion, may take notice of the plain error and correct the instructional error because of the constitutional right to a unanimous verdict).

D. **Transcript:** Within ten days after filing the notice of appeal, Appellant must order the transcript, in writing, from the court stenographer. Md. Rule 8-411. See Griffin v. Illinois, 351 U.S. 12 (1956) (State is required to provide a transcript to indigent appellant for appellate review); but see State v. Miller, 337 Md. 71, 75-76 (1995) (indigent cannot receive a free transcript for appellate review unless appellant is represented or has sought and been refused representation by the Public Defender).

E. **Record**

- 1. **To the CSA:** Circuit Court clerk shall transmit the record to the CSA within 60 days after the notice of appeal is filed, unless the time is shortened or extended by the CSA. Md. Rule 8-412(a) & (d).
- 2. **To the COA - Md. Rule 8-412(b)**
 - a. **From the CSA:** Within 15 days after a writ of certiorari is issued to the CSA, the clerk of the CSA shall transmit the record to the

- brief shall not exceed 35 pages and shall have a yellow cover.
- b. **Brief of Appellee or Appellee/Cross-Appellant:** The brief of Appellee or Appellee/Cross-Appellant shall be filed within 30 days after the filing of the brief of Appellant. In the COA, this brief shall not exceed 50 pages and shall have a blue cover. In the CSA, this brief shall not exceed 35 pages and shall have a green cover.
 - c. **Reply brief of Appellant or reply brief of Appellant/brief of Cross-Appellee:** If the optional reply brief of Appellant is prepared, it shall be filed within 20 days after the filing of the brief of Appellee. In the COA, this brief shall not exceed 25 pages and shall have a tan cover. In the CSA, this brief shall not exceed 15 pages and shall have a red cover. If Appellant is also Cross-Appellee, the consolidated reply brief of Appellant/brief of Cross-Appellee shall be filed within 30 days after the filing of the brief of Appellee/Cross-Appellant. In the COA, this brief shall not exceed 50 pages and shall have a blue cover. In the CSA, this brief shall not exceed 35 pages and shall have a green cover.
 - d. **Cross-Appellant's reply brief:** If Appellee is also Cross-Appellant, and if the optional reply brief of Cross-Appellant is prepared, it shall be filed within 20 days after the filing of the brief of Cross-Appellee. This brief is tan in the COA and red in the CSA.
 - e. **Amicus briefs:** Individuals or entities wishing to participate as an amicus curiae, i.e., friend of the court, shall file a motion, identifying the interest of the amicus curiae, the reasons why an amicus curiae brief is desirable, and the issue(s) to be raised. If the motion is granted, the briefing rules are the same as for a party, except that amicus curiae briefs are gray in the COA and CSA.
 - f. **Extension of time:** The time for filing briefs may be extended by court order or stipulation of the parties, provided that briefs are filed at least 30 days before oral argument and reply briefs are filed at least ten days before oral argument.
2. **Number of briefs to be filed:** In the COA, 20 briefs shall be filed. In the CSA, 15 briefs shall be filed. Md. Rule 8-502(c).
 3. **Brief references:** References in the brief are R. for the record, T. for the transcript, E. for the record extract, App. for the appendix to the Appellant's brief, Apx. for the appendix to the Appellee's brief, and Rep. App. for the appendix to a reply brief. Md. Rule 8-503(b).
 4. **Content of brief:** A brief shall contain a table of contents, table of authorities, statement of the case, questions presented, statement of facts, argument, conclusion setting forth the relief sought, jury instructions, Circuit Court opinion at issue, and text of all pertinent non-case authority. Md. Rule 8-504(a).

I. **Oral argument**

1. **Number of counsel:** Oral argument may be presented by one or two counsel per side. Md. Rule 8-522(c).
2. **Scope of oral argument:** Oral argument is generally limited those issues presented in the brief. Md. Rule 8-522(f).
3. **Time limit:** The CSA no longer uses the standard time limit of 30 minutes per side but always uses the shortened time of 20 minutes per side. A party may request additional time for oral argument by letter sent no later than ten days prior to oral argument, but this is almost never granted. Appellant may reserve time for rebuttal (which is subtracted from the original 20 minutes), but the substance of the appeal should be completely presented during the original argument. Amicus curiae do not participate in oral argument, except with permission of the court, which is almost never granted. Md. Rules 8-511(c), 8-522(a)-(c).
4. **Oral argument on motions:** Unless directed by the court, oral argument on a motion to dismiss is not heard in advance of oral argument on the merits of the appeal. If the court does direct oral argument on a motion to dismiss, it is limited to 15 minutes per side. The court may permit briefs on the motion, which shall not exceed 25 pages in the COA and ten pages in the CSA. Md. Rule 8-603(e) & (f).
5. **Consideration on brief**
 - a. **Request by a party** - Md. Rule 8-523(a)
 - (1) **COA:** In the COA, there is a presumption against submission of brief, which requires permission of the court, following a written request, submitted at least 15 days prior to oral argument.
 - (2) **CSA:** In the CSA, there is no presumption against submission of brief, but court may require oral argument.
 - b. **Directed by CSA:** If all three judges of the panel to which a case has been assigned determine they would not be assisted by oral argument, they may direct the case to be submitted on brief. If the court so directs, a party may file a request for oral argument. Md. Rule 8-523(b).

J. **Dismissal of appeal**

1. **By Appellant:** Appellant may file a notice of dismissal at any time prior to the court's filing its opinion. Dismissal of the appeal does not dismiss a cross-appeal. Md. Rule 8-601.
2. **By appellate court:** On the court's own initiative, or on the motion of a party (including affidavits), filed within ten days after the record was or should have been filed, Appellant's brief was or should have been filed, or the case became moot, the court may dismiss an appeal. Md. Rule 8-

602(a).

- a. **Appeal not allowed by law**
- b. **Appeal not filed timely**
- c. **Record inadequate or filed untimely** (if Appellant's fault)
- d. **Brief of Appellant or record extract inadequate or filed untimely**
- e. **Case moot**

K. **Disposition of appeal:** The court shall dispose of the appeal in one or more of the following modes. Md. Rule 8-604. Delos v. State, 37 Md. App. 101, 107 (1977).

1. **Dismiss all or part of appeal:** See Thanos v. State, 332 Md. 511, 520 (1993) (when Defendant has waived his right to appeal by discharging his attorney, the attorney is without standing to file appeal); Cubbage v. State, 304 Md. 237, 235 (1985) (when Defendant has knowingly, voluntarily, and intelligently waived right of appeal, the appeal must be dismissed).
2. **Affirm all or part of judgment**
3. **Vacate or reverse all or part of judgment:** See Malik v. State, 152 Md. App. 305 (2003) (failure to give a jury instruction on lesser-included second degree murder required reversal of first degree murder and conspiracy to commit murder because the jury was left with the choice of first degree murder or letting Defendant go).
4. **Modify all or part of judgment**
5. **Remand case to lower court for further proceedings consistent with court's opinion or order:** See Southern v. State, 371 Md. 93, 104 (2002) (discussing the policy for remand and noting that it is best when "the purposes of justice will be advanced by permitting further proceedings"); McMillan v. State, 325 Md. 272 (remand is proper when the trial court has not addressed a question because of an error); Deloso v. State, 37 Md. App. 101, 112 (1977) (when an appellate court reviews the record and considers remand, it must evaluate the probability that the appellant might be convicted of the offense in a new trial and when there is no probability of guilt and there is insufficient evidence, a reversal is proper).

L. **Reconsideration:** A party may file a motion for reconsideration, not to exceed 15 pages, within 30 days after the court files its opinion. There shall be no answer to the motion, unless requested by the court, and there shall be no oral argument on the motion. The court's mandate shall not issue until the court has ruled on the motion for reconsideration. Md. Rule 8-605. See State v. Bundy, 52 Md. App. 456, 459 (1982) (State has 30 days from the entry of final judgment to file an appeal and filing a motion for reconsideration does not cause that period to stop running, therefore when the State files a motion for reconsideration and fails to file notice of appeal before the 30 day period expired, the State loses its right to

appeal).

M. **Mandate:** The mandate is the judgment of the court. Md. Rule 8-606(a) & (b).

1. **Voluntary dismissal:** Upon a voluntary dismissal, the mandate issues immediately.
2. **Other dispositions:** In all other cases in which no motion for reconsideration has been filed, the mandate shall issue 30 days after the court's opinion or order.
3. **Motion for reconsideration:** If a motion for reconsideration has been filed, the court's mandate shall not issue until the court has ruled on the motion for reconsideration.

V. **Appeal from Circuit Court to CSA** - Md. Rules 8-101 et seq.

A. **Appellate jurisdiction of right**

1. **Method:** To obtain appellate review in the CSA, Defendant must file a notice of appeal and the filing fee (waived if indigent) with the Circuit Court clerk. Md. Rule 8-201.
2. **Timing:** The notice of appeal shall be filed within 30 days after the sentencing or denial or withdrawal of a motion for a new trial. A notice of cross-appeal may be filed within ten days after the filing of the notice of appeal. Md. Rule 8-202(a), (b) & (e).

B. **Discretionary appellate jurisdiction**

1. **Method:** When there is no right of direct appeal from Circuit Court, sitting as the trial court, to the CSA, Defendant may file an application for leave to appeal in the CSA. Md. Rule 8-204. The CSA grants about 2% of the applications for leave to appeal that it receives. See Hernandez v. State, 108 Md. App. 354, 362-63 (1996) (applications may be denied for several reasons such as being untimely, lacking a statement of why the judgment should be changed, or lack of specificity in describing errors committed in the lower court); State v. Hernandez, 344 Md. 721 (1997) (when the CSA denies leave to appeal from a guilty plea, the merits of that appeal have not been finally litigated).
2. **Timing** - Md. Rule 8-204(b) & (d)
 - a. **30 days:** The following require an application for leave to appeal to be filed within 30 days after the entry of the judgment.
 - (1) **Guilty plea**
 - (2) **Post conviction proceeding:** This includes a motion to reopen a closed post conviction proceeding.
 - (3) **Habeas corpus proceeding**
 - (4) **Violation of probation**
 - b. **Ten days:** In a bail proceeding, an application for leave to appeal

must be filed within ten days after entry of the judgment.

3. **Content of application:** An application for leave to appeal shall contain a concise statement of the errors committed and reasons why the judgment should be reversed or modified. Md. Rule 8-204(b)(2). See Hernandez v. State, 108 Md. App. 354, 362-63 (1996) (applications may be denied for several reasons such as being untimely, lacking a statement of why the judgment should be reversed, or lack of specificity in describing errors committed in the lower court).
4. **Disposition of application:** Upon consideration of an application for leave to appeal, the court may: (1) deny the application; (2) grant the application and affirm or reverse; (3) remand with directions; or (4) schedule an appeal.

VI. Court of Appeals - Md. Rules 8-301 et seq.

A. Death penalty appellate jurisdiction

1. **Automatic appellate jurisdiction:** There is an automatic appeal from Circuit Court to the COA of both the finding of guilt and sentence in any case in which the death penalty is imposed. Md. Rules 8-301(a) & (b), 8-306(a) & (c).
 - a. **Timing:** Circuit Court clerk shall enter a notice of appeal within ten days after the later of the sentencing or denial or withdrawal of a motion for a new trial. Md. Rule 8-306(c).
 - b. **Transcript and record** - Md. Rules 8-306(c) & (d), 8-411
 - (1) **Request for transcript:** Within ten days after the notice of appeal, the Circuit Court clerk shall direct the court stenographer to prepare a transcript of both the trial and the sentencing.
 - (2) **Transmittal of record:** Within ten days after receipt of the transcript, the Circuit Court clerk shall transmit the record to the COA.
 - (3) **Cost of transcript and record:** The State shall pay the costs of the transcript and record.
 - c. **Oral argument:** Oral argument shall be conducted within 150 days after transmittal of Circuit Court record. Md. Rule 8-306(f).
2. **Discretionary appellate jurisdiction:** Subsequent to the grant or denial of post conviction relief, in any case in which the death penalty is imposed, a party may file an application for leave to appeal in the Court of Appeals, subject to the provisions of Md. Rule 8-204. If the application for leave to appeal is granted, oral argument shall be conducted within 150 days after transmittal of Circuit Court record. Md. Rule 8-306(a), (b), (e) & (f).

B. Discretionary appellate jurisdiction: When there is no right of appeal to the

COA, any party may file a petition for a writ of certiorari, along with the filing fee (waived if indigent). Md. Rules 8-301(a) & (b), 8-302(a)-(b), & 8-303(a). A writ is a written order issued by a court, commanding a specified act, which, in this case, would be the lower court bringing the case forward for consideration by the COA. Md. Rule 1-202(a).

1. **Timing**

a. **COA:** For a case in the CSA, a petition for a writ of certiorari shall be filed as follows:

(1) **Soonest:** A petition for a writ of certiorari may be filed no sooner than the filing of the notice of appeal to the CSA.

(2) **Latest:** A petition for a writ of certiorari must be filed no later than 15 days after the mandate of the CSA.

b. **Circuit Court:** For a case in Circuit Court, sitting as an appellate court from District Court, a petition for a writ of certiorari shall be filed as follows:

(1) **Soonest:** A petition for a writ of certiorari may be filed no sooner than immediately following the sentencing or denial or withdrawal of a motion for a new trial.

(2) **Latest:** A petition for a writ of certiorari must be filed no later than 30 days after sentencing or denial or withdrawal of a motion for a new trial.

2. **Content of petition:** Eight copies of the petition for a writ of certiorari, not to exceed 25 pages, shall be filed, containing procedural data, questions presented, reference to relevant legal authority, statement of facts, argument, docket entries, and opinion of the CSA or Circuit Court, as applicable.

3. **Response:** If a timely petition for a writ of certiorari is filed, another party, within 15 days after service, may also file a petition for a writ of certiorari, or file an answer stating why the petition for a writ of certiorari should be denied. Md. Rule 8-302(c), 8-303(d)).

4. **Disposition.** The COA grants less than 20% of the petitions for a writ of certiorari that it receives. Upon consideration of a Petition for a Writ of Certiorari, the Court may (a) deny the petition, or (b) grant the petition and thereafter schedule an appeal, dismiss the appeal, affirm the judgment, modify the judgment, or remand to the lower court.

VII. **State's right to appeal:** The State in a criminal case may appeal from a final judgment if the State alleges that the trial judge failed to impose the sentence specifically mandated by the Code, or from a final judgment granting a motion to dismiss, or quashing or dismissing a charging document. Md. Cts. & Jud. Proc. Code Ann. § 12-401(b). Mateen v. Saar, 376 Md. 385 (2003). The purpose of the State's statutory right to appeal is to insure that courts follow the legislative policy mandating or prohibiting certain sentences. State v. Griswald, 374 Md. 184 (2003).

- A. **Statutory right to appeal:** The State does not have a common law right to appeal, but it does have a statutory right to appeal. State v. Green, 367 Md. 61 (2001).
- B. **Motions to suppress:** The State has a right to appeal when the trial court dismisses an indictment pursuant to the defendant's motion to suppress evidence that was relied on by the grand jurors in returning the indictment. State v. Bailey, 289 Md. 143 (1980). The State has a limited right to appeal suppression orders subject to statutory requirements. State v. James, 87 Md. App. 39 (1991).
- C. **Acquittal:** An acquittal can never be appealed, regardless of the reason for the acquittal. State v. Stanley, 34 Md. App. 393 (1977).
- D. **Time restriction:** The State has 30 days from the entry of final judgment to file an appeal and filing a motion for reconsideration does not cause that period to stop running, therefore when the State files a motion for reconsideration and fails to file notice of appeal before the 30 day period expired, the State loses its right to appeal. State v. Bundy, 52 Md. App. 456, 459 (1982).
- E. **Motion to strike notice of intent to seek death penalty:** The State does not have a statutory right under Md. Cts. & Jud. Proc. Code Ann. § 12-302(c) to appeal from trial court's granting of Defendant's motion to strike the State's notice of intention to seek the death penalty and the COA could not issue a writ to permit appellate review beyond limitations set forth by statute. State v. Manck, 385 Md. 581 (2005).

VIII. Interlocutory appeals

- A. **Collateral order doctrine:** An interlocutory appeal is applicable when an order is a final judgment or when it falls within the collateral order doctrine.
 - 1. **Factors:** Three factors must be present when applying the collateral order doctrine: (1) the matter to be reviewed must have been finally disposed of by the trial court, (2) the matter must be separate from the merits of the case, and (3) there must be a "risk of important loss if present review is not available" and holding that an order of removal was not appealable prior to final judgment because it does not satisfy these three factors. Parrot v. State, 301 Md. 411 (1984).
 - 2. **Trial court jurisdiction:** A trial court retains fundamental jurisdiction to hear and decide a case even if an interlocutory appeal has been filed and is pending. Kackour v. State, 70 Md. App. 625 (1987).
- B. **Competency to stand trial:** Competency to stand trial determination is immediately appealable. Jolley v. State, 282 Md. 353, 356-57 (1978).
- C. **Speedy trial:** Motion to dismiss based on speedy trial is not immediately appealable. Stewart v. State, 282 Md. 557, 564 (1978).
- D. **Double jeopardy:** Motion to dismiss based on double jeopardy is immediately appealable. Block v. State, 286 Md. 266, 267-68 (1979); Neal v. State, 272 Md. 323 (1974)); see Evans v. State, 301 Md. 45, 50 (1984); Bowling v. State, 298 Md. 396 (1984); Gray v. State, 36 Md. App. 708, 714 (1977) (denial of claim of

double jeopardy is immediately appealable but election of appeal must be made on the record prior to the beginning of the trial or the appeal is waived).

- E. **Contempt:** Any person may appeal from any contempt order, including an interlocutory order. Md. Cts. & Jud. Proc. Code Ann. § 12-304.

IX. Uniform Post Conviction Procedure Act - Md. Rules 4-401 to 4-408

- A. **Applicability:** The Uniform Post Conviction Procedure Act (UPCPA) applies to individuals who are incarcerated, on parole, or on probation. Md. Crim. Proc. Code Ann. §§ 7-101 & 7-301. If the individual is no longer incarcerated, on parole, or on probation, the individual may accomplish the same thing through a petition for a writ of error coram nobis, by demonstrating that which a post conviction petitioner must demonstrate, plus the fact that the individual is suffering, or will suffer, severe collateral consequences as a result of the conviction. Parker v. State, 160 Md. App. 672 (2005); Obomighie v. State, 170 Md. App. 708 (2006) (holding that once petitioner's term of probation ends, the circuit court no longer has jurisdiction under the UPCPA to grant post conviction relief despite that the petition was filed while the defendant was still on probation).

B. Petition for post conviction relief and motion to reopen closed post conviction proceedings

1. Statute of limitations

- a. **Non-death penalty post conviction proceedings:** For inmates sentenced after September 30, 1995, petitions for post conviction relief must be filed within ten years of the sentence imposition, unless the court rules otherwise for good cause shown. Md. Crim. Proc. Code Ann. § 7-103(b).
- b. **Death penalty post conviction proceedings:** For inmates sentenced to death, petitions for post conviction relief must be filed within 210 days (or later for good cause shown) after the final Supreme Court proceeding or the waiver of such proceeding. Md. Crim. Proc. Code Ann. § 7-201.
- c. **Motions to reopen closed post conviction proceedings:** There is no statute of limitations on filing motion(s) to reopen closed post conviction proceeding(s).

- 2. **Number of petitions:** From 1958 to 1986, inmates could file an unlimited number of petitions for post conviction relief. Since July 1, 1986 to October 1, 1995, inmates could file two petitions for post conviction relief. The two petition limit was judicially interpreted as no applying retroactively; regardless of the number of post conviction petitions filed before July 1, 1986, inmates had the right to file two post conviction petitions after the effective date of the 1986 amendment. Mason v. State, 309 Md. 215, 219 (1987). Since October 1, 1995, inmates have been limited to one petition for post conviction relief. The COA determined

that the 1995 amendment applies retroactively. Grayson v. State, 354 Md. 1, 9 (1999). Thereafter, inmates may file a motion to reopen a closed post conviction petition, if it is in the interests of justice. Md. Crim. Proc. Code Ann. §§ 7-102(a) & 7-104.

3. **Venue:** The petition shall be filed in the circuit court of the county where convicted. Md. Rules 4-401 & 4-402; Md. Crim. Proc. Code Ann. § 7-102(a). See Williams v. State, 292 Md. 201 (1981), McMannis v. State, 311 Md. 534 (1988) (jurisdiction is determined by where the defendant is “in custody” at the time of filing a post conviction petition. “In custody” entails confinement, probation, parole or detainer by the State of Maryland); accord Barrow v. State, 318 Md. 644 (defendant serving a Maryland sentence in another state is in Maryland’s custody for the purposes of jurisdiction under the Uniform Post Conviction Procedure Act).
4. **General petition provisions**
 - a. **Petitioner data:** The petition must include the inmate’s name, place of confinement, DOC #, and whether able to retain counsel and pay costs. Md. Rule 4-402 (a)(1).
 - b. **Offense data:** The petition must include the date and place of the crime, the offense(s) for which convicted, and the sentence(s) received. Md. Rule 4-402 (a)(2).
 - c. **Post conviction data:** The petition must include the alleged error(s), the facts, prior post conviction proceeding(s), and the results of prior post conviction proceeding(s), and the relief sought in the petition. Md. Rules 4-402(a)(3)-(c).
 - d. **Basis of allegation(s):** The inmate may allege that the sentence and/or judgment violates the United States Constitution, Maryland Constitution, or Maryland laws as long as the allegation being raised has neither been “finally litigated” or “waived”. Md. Crim. Proc. Code Ann. § 7-102. The inmate may argue that there was ineffective assistance of trial and/or appellate counsel. The UPCPA is a procedural act only, and it does not grant new substantive rights. Wilson v. State, 284 Md. 664 (1979).
 - e. **Amendment:** The petition may be freely amended.
 - f. **Response:** The State shall file a response within 15 days of notice of filing or later if the court permits. Md. Rule 4-404.
 - g. **Withdrawal:** The petition may be withdrawn, without prejudice, at any time before the date of the hearing, but only for good cause shown thereafter. Md. Rule 4-405.
5. **Limitations on what can be litigated**
 - a. **Cannot have been finally litigated:** An allegation becomes “finally litigated” when a ruling on the merits of the allegation has

been issued by the CSA or COA. Md. Crim. Proc. Code Ann. §§ 7-102 & 7-106(a); State v. Hernandez, 344 Md. 629 (1996) (issue is not finally litigated merely by being included in an application for leave to appeal that was denied).

- b. **Cannot have been waived:** To proceed with a post conviction petition, the allegation the inmate seeks to raise cannot have been waived by failing to raise the issue earlier. The petition must demonstrate non-waiver. Md. Crim. Proc. Code Ann. § 7-102(b). The petition shall include a statement of facts and special circumstances to show that the allegations of error have not been waived. Md. Rule 4-402(a)(7).
 - (1) **Knowing and intelligent waiver:** For fundamental rights, a knowing and intelligent waiver is required.
 - (2) **Waiver through inaction:** For non-fundamental rights, waiver operates through inaction. Failure to raise the allegation creates a presumption of a knowing and intelligent waiver, which can be excused by special circumstances. See State v. Gutierrez, 153 Md. App 462 (2003), State v. Romulus, 315 Md. 526, 539-40 (1989).
 - (3) **Special circumstances:** Waiver of an allegation of error shall be excused if special circumstances exist. The petitioner has the burden of proving that special circumstances exist. Walker v. State, 343 Md. 629 (1996) (claim of error with jury instructions does not require a knowing and intelligent waiver), Wyche v. State, 53 Md. App. 403 (1983) (fundamental rights require a knowing, intelligent and voluntary waiver; non-fundamental rights may be waived by inaction), State v. Torres, 86 Md. App. 560 (1991) (judge determines if the error alleged involves a fundamental error or not).
- 6. **Ineffective assistance of counsel:** A collateral proceeding is usually the first opportunity to litigate serious attorney error of trial counsel.
 - a. **Post conviction proceeding is usually the first opportunity:** Post conviction proceedings are the appropriate forum for raising ineffective assistance of counsel claims. Perry v. State, 344 Md. 204, 227 (1996); Davis v. State, 285 Md. 19, 36 (1979), Bratt v. State, 62 Md. App. 535 (1985). The issue of a defendant's trial counsel's incompetence could not have been litigated in the defendant's conviction and sentencing proceeding because ineffective assistance of counsel could not have been resolved in the very proceeding in which counsel was ineffective. Ware v. State, 360 Md. 650, 706 (2000); Walker v. State, 338 Md. 253, 262, cert. denied, 516 U.S. 898 (1995); Curtis v. State, 284 Md. 132, 137 n.1 (1978) (counsel cannot raise his or her own

ineffectiveness). Because competency of trial counsel cannot be litigated at trial, “competency of counsel may be raised for the first time under post conviction procedures.” Davis v. State, 285 Md. 19, 36 (1979); Flansburg v. State, 103 Md. App 394 (1995) (if defendant is entitled to counsel, he/she is entitled to *effective* counsel); Mosley v. State, 378 Md. 548 (2003).

- b. **Strickland two-prong test:** Under Strickland v. Washington, 466 U.S. 668 (1984), ineffective assistance of counsel requires a two-prong analysis. See State v. Harris, 303 Md. 685 (1985). To establish ineffective assistance of counsel, a petitioner must demonstrate (1) that, under the “performance prong,” counsel’s performance was deficient, i.e., counsel committed serious attorney error, and (2) that, under the “prejudice prong,” counsel’s deficient performance prejudiced the defense. Wiggins v. State, 352 Md. 580, 602 (1999); Oken v. State, 343 Md. 256, 283 (1996); Williams v. State, 326 Md. 367, 373 (1992).
- (1) **Objective standard of reasonableness:** To meet the requirements under the “performance prong” and demonstrate “serious attorney error,” a petitioner must show that the acts or omissions of counsel were the result of unreasonable professional judgment and that counsel’s performance fell below an objective standard of reasonableness considering prevailing professional norms. Cirincione v. State, 119 Md. App. 471, 484 (1998).
 - (2) **Performance component:** The “performance component” requires a “show[ing] that counsel’s performance was deficient, [and] counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment.” Strickland, 466 U.S. at 687.
 - (3) **Prejudice component:** To meet the requirements under the “prejudice prong,” a defendant must show a “substantial or significant possibility” that, but for the serious attorney error, the result would have been different. Bowers v. State, 320 Md. 416, 426 (1990). Only in narrowly-defined instances, such as the complete breakdown of the adversarial process, may prejudice be presumed. United States v. Cronic, 466 U.S. 648 (1984). See Walker v. State, 391 Md. 233 (2006) (holding that defense counsel’s conduct at trial in light of the defendant’s absconding trial did not fall within the narrow Cronic exception warranting a presumption of prejudice); State v. Peterson, 158 Md. App. 558 (2004).
- c. **Failure to file motion for modification or reduction of sentence:** When counsel fails to file a motion for modification

after the defendant requests counsel to do so, the defendant is entitled to the post-conviction remedy of being allowed to file a belated motion for modification of sentence. Further, the defendant need not present any other evidence of prejudice to satisfy Strickland because deficient act was prejudicial because it resulted in the loss of opportunity to have a reconsideration of sentence hearing. Matthews v. State, 161 Md. App. 248 (2005).

7. **DNA:** In homicide and sexual offense cases in which criminal agency is an issue, the defendant may file a petition for DNA testing of evidence in a proper chain of custody, not previously tested under the method requested, which is accepted within the relevant scientific community, if there is a reasonable probability of exculpatory evidence relevant to a claim of wrongful conviction. The State shall preserve evidence that it has reason to believe contains DNA material for the length of the sentence. The court shall dismiss the petition if the results are unfavorable to the petitioner. If the results are favorable to the defendant, the court shall initiate a post conviction proceeding or reopen a closed post conviction proceeding. Md. Crim. Proc. Code Ann. § 8-201.
8. **Not finally litigated or waived:** An issue is not finally litigated or waived if the Supreme Court or a Maryland appellate court holds that the United States Constitution or Maryland Constitution imposes a procedural or substantive standard not previously recognized, which was intended to apply retroactively. Md. Crim. Proc. Code Ann. § 7-106(c). Waiver in the context of due process violations must be intelligently and knowingly made, or the petitioner must prove special circumstances as to why petitioner failed to allege the error in prior proceedings. See Harris v. State, 160 Md. App. 78 (2004) (clarifying that the “knowing and intelligent” standard for waiver does not apply to tactical decisions made by a competent attorney or to legitimate procedural requirements, as in such situations, the definition of “waiver” is governed by case law, statutes, or rules).

C. **Hearing**

1. **Post conviction petition** – Md. Rule 4-406; Md. Crim. Proc. Code Ann. § 7-204(a)
 - a. **Non-death penalty cases:** Petitioner is entitled to a prompt hearing on the petition for post conviction relief.
 - b. **Death penalty cases:** Petitioner is entitled to a hearing within 90 days after the petition is filed.
2. **Motion to reopen:** Petitioner is not entitled (it is discretionary) to a hearing on a motion to reopen a closed post conviction proceeding. Offutt v. State, 44 Md. App. 670 (1980) (when the record is unclear, the complete facts can be brought out in post conviction procedures). A post conviction court is not required to provide a detailed supporting statement

or memorandum when ruling on a motion to reopen a closed post conviction proceeding. Gray v. State, 388 Md. 366 (2005).

3. **Presence at hearing:** The inmate has the right to be present at any hearing. Md. Crim. Proc. Code Ann. 7-108(a); Md. Rule 4-406.

4. **Counsel**

a. **Post conviction petition:** If indigent, the inmate is entitled to counsel at State's expense. Md. Crim. Proc. Code Ann. § 7-108(a).

b. **Motion to reopen**

(1) **No right to counsel:** Granting counsel for indigent inmate is discretionary. Md. Crim. Proc. Code Ann. § 7-108(b)(1).

(2) **Post convicting post conviction counsel:** A post conviction petitioner has a right to reopen a petition upon a showing that petitioner's post conviction counsel rendered ineffective assistance during the post-conviction proceedings. U.S.C.A Const. Amend. 6, Stovall v. State 144 Md. App. 711 (2002).

5. **Judge:** The hearing judge on the petition shall not be the trial judge, unless the parties agree otherwise. Md. Rule 4-406, Pfaff v. State, Md. App. 296 (1991).

6. **Evidence:** The rules of evidence are relaxed and the evidence may include, with the court's permission, affidavit, deposition, testimony, or other forms of evidence. Md. Rule 4-406.

D. **Disposition:** In post conviction proceedings, the court shall make a written order (including on the record, if transcribed) as to each alleged error, which shall be provided to the petitioner, the petitioner's counsel, and the State. In a death penalty case, the court must issue its written decision within 90 days of the hearing. If the court fails to issue an opinion timely, a party may file a Petition for a Writ of Mandamus in the Court of Appeals. Md. Rule 4-407; Md. Crim. Proc. Code Ann. § 7-204. An order declining to reopen a closed post conviction need not be accompanied by an opinion.

E. **Appeal:** The non-prevailing party may make application for leave to appeal to the CSA. Md. Rule 4-408; Md. Crim. Proc. Code Ann. § 7-109(a). The COA lacks certiorari jurisdiction over a decision of the CSA granting or denying an Application for Leave to Appeal.

X. **State habeas corpus petition**

A. **Who may petition:** Anyone committed, detained, confined, or restrained for any offense under color of law. Md. Cts. & Jud. Proc. Code Ann. § 3-702. See Lomax v. Warden, Maryland Correctional Training Center, 356 Md. 569 (1999) (habeas corpus actions are appropriate when the relief sought is release, but also when the relief sought is a proceeding or hearing which may lead to the petitioner's

release); Pollock v. Patuxent Institution Board of Review, 358 Md. 656, 668-69 (2000) (holding that the relief sought through a habeas corpus petition is not limited to the release of a prisoner, it can also cause a new parole hearing to be ordered (citing Gluckstern v. Sutton, 319 Md. 634 (1990))).

- B. **Where to file petition:** A habeas corpus petition may be filed with any judge of any Circuit Court or appellate court, who must immediately resolve petition or refer the petition to Circuit Court in which the petitioner was convicted (but cannot be heard by trial judge). Md. Cts. & Jud. Proc. Code Ann. §§ 3-701 & 3-702.
- C. **Disposition of petition:** With a determination that Petitioner is being held unlawfully or that Petitioner is being held under an unconstitutional law, Petitioner is released. Md. Cts. & Jud. Proc. Code Ann. §§ 3-704 & 3-706.

XI. **Writ of error coram nobis** - Md. Rule 15-1201 et. seq.

- A. **Applicability:** A petition for a writ of error coram nobis may be filed by anyone is not incarcerated and not on parole or probation, who is faced with a significant collateral consequence of his or her conviction, and who can legitimately challenge the conviction on constitutional or fundamental grounds. Parker v. State, 160 Md. App. 672 (2005); Whether on the basis of error of fact or error of law, the burden of proof is on the petitioner to show that the grounds for challenging the criminal conviction are of a constitutional, jurisdictional, or fundamental character; that the petitioner is suffering or facing significant collateral consequences from the conviction; and that there is no other statutory or common law remedy then available. Id.
- B. **Commencing action:** An action for a writ of error of coram nobis is commenced by filing a petition in the court in which the conviction occurred. Md. Rule 15-1202(a). Skok v. State, 361 Md. 52, 78 (2000); Jones v. State, 114 Md. App. 471 (1997) (although the UPCPA was intended to provide a statutory avenue for post conviction relief, the writ of error coram nobis remains available as a means of mounting collateral attack).
- C. **Content of petition:** The petition shall include the identity of the petitioner, place and date of trial, offense subject of the conviction, and the sentence imposed. The petition shall also include a statement of all previous proceedings, results of those proceedings, facts that would have resulted in the entry of a different judgment, the allegations of error upon which the petition is based, a statement that the allegations of error have not been waived, the significant collateral consequences resulting from the conviction, the unavailability of appeal, post conviction relief, or other remedies, and a demand for relief. The petition shall also include a concise argument with citation to authorities. Md. Rule 15-1202 (a)-(b). See Ruby v. State, 353 Md. 100, 106 (1999) (writ of error coram nobis is a common law tool used to correct factual errors made by the court and that it can be used collaterally to challenge a criminal judgment). See also Parker v. State, 160 Md. App. 672 (2005) (Petitioner alleged sufficient cause of action for coram nobis relief when (a) Petitioner's guilty and nolo contendere

pleas were not entered into knowingly and voluntarily, (b) Petitioner did not waive claims on which he sought coram nobis relief, and (c) Petitioner alleged significant collateral consequences in the form of a lengthier federal sentence based on prior convictions, and remanding the case for a determination by the coram nobis court as to whether the significant collateral consequences requirement was met in light of Petitioner's subsequent federal conviction and sentence).

- D. **Amending petition:** Amendment of the petition shall be free allowed "when justice so permits." Md. Rule 15-1202(e).
- E. **Notice of petition:** The clerk of the court shall promptly notify the State's Attorney upon the filing of a petition for writ of coram nobis. Md. Rule 15-1203.
- F. **State's response:** The State shall file a response to the petition within 30 days after receiving notice, or within the time ordered by the court. Md. Rule 15-1204.
- G. **Hearing:** A court may exercise its discretion to hold a hearing on the petition for writ of coram nobis. A court may deny the petition without a hearing but may only grant it with a hearing. The court may allow evidence to be presented, and in the interest of justice may decline to require a strict application of the rules of evidence, with the exception of rules pertaining to the competency of witnesses. Md. Rule 15-1205(a).
- H. **Victim's rights:** The State's Attorney shall provide notice to each victim or victim's representative who has filed a Crime Victim Notification Request, pursuant to Md. Crim. Proc. Code Ann. § 11-104 or submitted a written request to the State's Attorney to be notified of subsequent proceedings, pursuant to Md. Crim. Proc. Code Ann. § 11-503. The court may allow the testimony of a victim or victim's representative if relevant. Md. Rule 15-1206
- I. **Authority to issue:** District Court judge may issue a writ of error coram nobis. Md. Cts. & Jud. Proc. § 1-609.
- J. **Statement and order of the court:** The court shall prepare for the record a statement detailing each ground on which the petition is based, the federal and state rights involved, and the court's ruling and reason for the ruling as to each ground. An order granting or denying relief shall accompany this statement. If the order is in favor the petition, the court may specify other arrangements, such as re-arraignment, custody, bail, discharge, correction of sentence, and other matters as necessary and proper. The order, when entered by the clerk, constitutes a final judgment. Md. Rule 15-1207.
- K. **Appeal:** Both the State and the defendant have the right to directly appeal a decision on a Petition for a Writ of Error Coram Nobis. State v. Hicks, 139 Md. App. 1 (2001).