

MARYLAND LAW RE: VACATING CONVICTIONS PURSUANT TO POST-CONVICTION AND *CORAM NOBIS* PETITIONS

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REVISED BY ROBERT W. BIDDLE, NATHANS & BIDDLE, LLP, MAY 2009
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The Maryland Post-Conviction Procedures Act (MPCPA) is codified at Md. Code of Crim. Proc. §§ 7-101 to 7-301; see Md. Rules 4-401 to 4-408. Under the MPCPA, a person can “seek to set aside or correct the judgment or sentence.”

“*Coram nobis*” is Latin for “in our presence.”

The seminal appellate case for the modern revival of this ancient equitable writ is *Skok v. State*, 361 Md. 52, 760 A.2d 647 (2000), and Md. Rules 15-1201 to 15-1207 (effective January 1, 2006) govern proceedings. The writ allows a challenge to convictions on “constitutional or fundamental grounds,” *Skok*, 361 Md. at 78, where a defendant is no longer in custody, parole, or probation, but is suffering from a significant collateral consequences of the conviction.

I. Purposes

- A. MPCPA: Protects a broad array of rights, places limits on collateral litigation, and is intended to unify the various collateral remedies by making the post-conviction process the primary means of asserting collateral claims. “Collateral Remedies in Criminal Cases in Maryland: An Assessment,” *Maryland Law Review*, Millemann (2005), at 1.
- B. *Coram Nobis*: In *Skok v. State*, 361 Md. 52 (2000), the Maryland Court of Appeals observed that due to the advent of recidivist statutes, changes in immigration laws, and an increase in collateral consequences, public policy dictates that people should have relief available well after the fact of a conviction so the Court broadened the scope of relief available under *coram nobis* petitions. *Also see, U.S. v. Morgan*, 346 U.S. 502 (1964).

II. Grounds under the MPCPA and *Coram Nobis* Petitions

- A. MPCPA: The sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of the State, the court lacked jurisdiction to impose the sentence, the sentence exceeds the maximum allowed by law, or the sentence is

subject to collateral attack on a ground or alleged error otherwise available under other remedies. Md. Code of Crim. Proc. §§ 7-102(a).

- B. *Coram Nobis*: Grounds must be of a “constitutional, jurisdictional or fundamental character.” *Skok*, 361 Md. at 661; see also *Moguel v. State*, 184 Md. App. 465, 966 A.2d 963 (2009)(“*Skok* expanded the [coram nobis writ] to permit challenges to criminal convictions based on errors of law”).
- C. **Examples where convictions ruled invalid:** *Parker v. State*, 160 Md. App. 672 (2005) (transcripts of guilty pleas did not reflect that defendant aware of charges or consequences of pleas or that pleas were voluntary); *State v. Hicks*, 139 Md. App. 1 (2001) (guilty plea not voluntary or intelligent where petitioner was not advised on burden of proof, standard of proof, presumption of innocence or elements of robbery, and in deciding to plead guilty he relied on an incomplete and invalid court medical services office report recommending against his reverse waiver motion seeking transfer to juvenile court).
- D. **Examples where convictions upheld:** *Moguel v. State*, 184 Md. App. 465, 966 A.2d 963 (2009)(laches held to properly bar *coram nobis* relief); *Rivera v. State*, 180 Md. App. 693, 952 A.2d 396 (2008)(trial court’s denial of *coram nobis* relief affirmed), *cert. granted*, 406 Md. 112, 956 A.2d 201 (2008)(argued Feb. 10, 2009); *Abrams v. State*, 176 Md. App. 600, 933 A.2d 887 (2007)((trial court’s denial of *coram nobis* relief affirmed); *Pitt v. State*, 144 Md. App. 49 (2001) (guilty plea knowing and voluntary and there is no requirement a defendant be advised of possible enhanced penalties due to his conviction, if in the future he commits further crimes); *State v. Priet*, 289 Md. 267, 290-92 (1981) (where guilty pleas of three defendants were upheld, despite claims they did not understand the nature of the offense to which they were pleading guilty, since “considering the record as a whole, the trial judge could fairly determine that the defendant understood the nature of the charge to which he pleaded.”); *Miller v. State*, 32 Md. App. 482, 488 (1976) (record revealed that defendant understood essential elements of crime when he pleaded guilty and although advice re: privilege against self-incrimination was “crude,” a “ritualistic litany” is not required so long as “the accused comprehends the nature of his decision to plead guilty and does so of a free will.)

III. Which one to use?

A. MPCPA: Applies to a person confined under a sentence or on probation or parole. Md. Code of Crim. Proc. §§ 7-101.

1. But, if more than **10 years** has passed since sentence other than death was imposed, a post-conviction petition is not allowed unless “extraordinary cause” is shown. Md. Code of Crim. Proc. §§ 7-103(b).

a. Statute of limitations **not retroactive** so 10 year filing period not apply to sentences imposed prior to the effective date of the limitation, Oct. 1, 1995. See *Grayson v. State*, 354 Md. 1, 15 (1999).

B. *Coram Nobis*: There must be no other “statutory or common law remedy” available so if a person is incarcerated or on probation or parole for the conviction, he must proceed under the MPCPA.

1. There is no statute of limitations for filing a *coram nobis* action, however laches may bar relief if too much time passes prior to filing *coram nobis* petition, see *Moguel supra*..

IV. Other requirement/limitations

A. MPCPA:

1. The alleged error has not been previously and finally litigated or waived in the proceeding resulting in the conviction or in any other proceeding that the person has taken to secure relief from the conviction. Md. Code of Crim. Proc. § 7-102(b)(2).

2. Only one post-conviction petition is generally permitted. Md. Code of Crim. Proc. § 7-103(a). However, a motion to reopen a previously completed post conviction action is permitted “in the interests of justice.” Md. Code of Crim. Proc. § 7-104. There is no limitation period on filing a motion to reopen. For discussion on the meaning and application of “interests of justice” standard, see “Collateral Remedies in Criminal Cases in Maryland: An Assessment,” *Maryland Law Review*, Millemann (2005), at 15.

B. *Coram Nobis*:

1. There is a presumption of regularity and the burden of proof is on the petitioner. *Skok*, 361 Md. at 78.
2. The petitioner must be facing “significant collateral consequences” from the conviction. *Id.*
 - a. See *State v. Hicks*, 139 Md. App. 1, 8-9, (2001) (holding that a possible increase in a pending federal sentencing as a result of state conviction was a “significant collateral consequence” for which *coram nobis* relief is appropriate).
3. Basic principles of waiver apply with the body of law under the MPCPA applicable (see below) and if the issue has already been litigated and there are no intervening changes in the law, the issue may not be relitigated. *Id.*

V. **Miscellaneous**

A. Where to file

1. MPCPA: In the Circuit Court for the County in which the conviction took place. Md. Code of Crim. Proc. § 7-102(a).
2. *Coram Nobis*: Same for convictions in Circuit Court; District Court convictions may be attacked in the district court. See Md. Rule 15-1202(a)(file petition “in the court where the conviction took place”).

B. Rights to counsel and hearing

1. MPCPA: Petitioner is entitled to counsel and hearing on the initial petition. No right to counsel and no right to a hearing on a motion to reopen a completed post conviction action. Md. Code of Crim. Proc. § 7-108.
2. *Coram Nobis*: No mechanism for appointment of counsel. Public Defender’s Office may take case. No hearing required.

C. Notification of victim

1. MPCPA: Required under Md. Code of Crim. Proc. § 7-105.
2. *Coram Nobis*: Required by Md. Rule 15-1206(b).

VI. Waiver Issue

- A. The same waiver principles that apply to the Md. Code of Crim. Proc. § 7-106, apply to *coram nobis* petitions. See *Holmes*, 401 Md. 442- 443 (“the waiver standards embodied in the Post Conviction Act do apply” in *coram nobis* proceedings”); *Skok*, 361 Md. at 79.
- B. Md. Crim. Proc. § 7-106 requirements:
1. (b)(1)(i): An allegation of error is waived when a petitioner could have made but “**intelligently and knowingly**” failed to make the **allegation** before or at trial, on direct appeal whether or not an appeal was taken, in an application for leave to appeal after a guilty plea, in a habeas corpus or *coram nobis* proceeding begun by petitioner, in a prior post-conviction petition, or in any other proceeding begun by petitioner. See *Holmes*, 401 Md. at 431 (“We shall hold that a presumption that an individual waives his right to file a petition for writ of error *coram nobis* arises if the individual, after entering a guilty plea, and having been informed of his right to file a petition for leave to appeal, does not file an application for leave to appeal”).
 2. (b)(1)(ii): Failure to make an allegation of error shall be excused if “**special circumstances**” exist and petitioner has the **burden** of proving “special circumstances.” Ineffective assistance of counsel claims are the most common special circumstance raised in post conviction and *coram nobis* proceedings. See discussion below.
 3. (b)(2): There is a **rebuttable presumption** the petitioner “intelligently and knowingly” failed to make an allegation. See *Holmes*, 401 Md. 429 (presumption not rebutted).
 4. (c)(2): An allegation is not considered waived if a higher court holds that a procedural or substantive standard not previously recognized is constitutionally required and is retroactive and affects the validity of petitioner’s conviction.

C. Distinction between “**fundamental rights**” and “**non-fundamental rights.**”

1. In MPCPA or *coram nobis* actions, “fundamental rights” may be waived only where petitioner “intelligently and knowingly” effects the waiver, and “non-fundamental rights” will be deemed waived merely be a showing that the defendant had an opportunity to raise an issue in a prior proceeding but failed to do so (and in the latter instance, personal knowledge on the part of the defendant of the right is *not* required). See *McElroy v. State*, 329 Md. 136 (1993); *State v. Gutierrez*, 153 Md. App. 462 (2003).
2. “**Fundamental rights**” are: Basic rights of constitutional origin that have been guaranteed a defendant in order to preserve a fair trial and reliability of the truth-finding process. *Gutierrez*, 153 Md. App. at 471. Examples include: the right to counsel, including the right to effective assistance of counsel, the right to trial by jury, the right to enter a “knowing and intelligent” guilty plea, the privilege against self-incrimination, the right to be free of double jeopardy. the right of confrontation, and the right to a speedy trial. *Davis v. State*, 285 Md. 19, 33-34 (1979); *Wyche v. State*, 53 Md. App. 403, 406 (1983).
3. Examples of “**non-fundamental rights**” include the right to be free from a non-consensual search or seizure that is otherwise precluded by the Fourth Amendment, the constitutional right not to be tried in jail clothes, the right to a grand jury that is free of an unconstitutional discriminatory racial composition, the right to sufficiency of *voir dire*, and the right to jury instruction on intent. See *State v. Rose*, 345 Md. 238, 248-49 (1997); *Davis*, 285 Md. at 33-34; *Cirincione v. State*, 119 Md. App. 471, 516-17 (1998).

D. When will a waiver of a fundamental right be found to be “**knowing and intelligent**”?

1. *Gutierrez*, 153 Md. App. at 472: A waiver is “intelligently and knowingly” made when it is “an intentional relinquishment or abandonment of a known right or privilege” AND:
 - a. The record *expressly* reflects the defendant had a basic understanding of the nature of the right; and
 - b. The record *expressly* reflects acknowledgment that the relinquishment or abandonment of the right was made or agreed to by petitioner.
2. The “failure of counsel or an unknowing petitioner to raise” an issue

is not enough to constitute a waiver. *Curtis v. State*, 284 Md. 132, 139 (1978).

E. Circumstances under which courts have found that a fundamental right has been **“knowingly and intelligently” waived**:

1. Where record of guilty plea reveals that the trial judge advised the defendant of his right to apply for leave to appeal the conviction on voluntariness grounds or any other grounds, and the defendant did not appeal (or did appeal and did not raise the allegation of error at issue), waiver found since defendants did not testify and rebut presumption of a “intelligent and knowing” waiver; *Holmes v. State*, 401 Md. 429, 932 A.2d 698, (Md. 2007); *McElroy*, 329 Md. at 146-49, 617 A.2d at 1073-75; *Gutierrez*, 153 Md. App. at 475, 837 A.2d at 245; see also *State v. Hernandez*, 344 Md. 721, 727-28, 690 A.2d 526, 529 (Md. 1997) (acknowledging holding of *McElroy*).
2. It is important to note that in neither *Holmes*, *McElroy*, *Gutierrez*, did the defendants present any evidence to rebut the presumption of “intelligent and knowing” waiver. In neither of these cases did the defendants provide any explanation for why the trial judge’s advisement of their appellate rights was not sufficient. To avoid the result in *Holmes*, *McElroy* and *Gutierrez*, it is vital that defendants offer some evidence, either through an affidavit or testimony, that offers an explanation for why the waiver was not “intelligent and knowing.” One explanation might be that the client was not aware that he had any issue to appeal until the filing of the post-conviction or *coram nobis* petition. Therefore, he could not have “knowingly and intelligently” waived his right to appeal this issue. This claim can be buttressed by showing that the petitioner has limited cognitive abilities due to low I.Q., brain damage, etc., or diminished capacity that affected his ability “intelligently and knowingly” waive an issue. Of course, the best way to get around the waiver problem is to assert an ineffective assistance of counsel claim as discussed below.

F. Circumstances under which the courts have found that waiver was **not “knowing and intelligent”**:

1. Defendant with low IQ and brain damage due to alcoholism did not “knowingly and intelligently” waive issue of ineffective assistance of counsel where he previously failed to raise it. *Curtis v. State*, 284 Md. at 150-51.
2. Defendant did not waive where he was not advised in any of the proceedings about his right to file an application for leave to appeal

on voluntariness of plea or any other grounds. *Parker v. State*, 160 Md. App. 672, 866 A.2d 885 (Md. Ct. Spec. App. 2005).

G. Excusing waiver - “Special Circumstances”

1. If a petitioner has waived his right to raise either a fundamental or a non-fundamental error under circumstances described above, “special circumstances” will still excuse the waiver. See *Cirincione*, 119 Md. at 515; *Curtis*, 284 Md. at 140.
 - a. **Example: Mental illness/brain damage.** In *Washington v. Warden*, 243 Md. 316 (1966), the Court found special circumstances where the post- conviction petitioner had not raised an issue in an earlier post- conviction proceeding because he was suffering from a mental illness which prevented him from assisting his counsel.
2. Courts have not clearly defined the meaning of “special circumstances” with respect to the waiver of fundamental errors. However, for non-fundamental errors, the courts have held that special circumstances are to be determined by applying the “**plain error**” standard, under which waiver will *not* be found if the “error is material and affects the right of the defendant to a fair trial.” *Walker v. State*, 343 Md. 629, 649 (1996); see also *Cirincione*, 119 Md. App. at 515-17.
3. **Ineffective assistance of counsel.** Although in *Curtis*, the Maryland Court of Appeals suggested that defendant’s failure to previously raise a Sixth Amendment ineffective assistance of counsel claim was not a “knowing and intelligent” waiver, the Maryland courts have also repeatedly held that ineffective assistance of counsel is a “special circumstance” which always excuses a waiver. See *O’Connor v. Warden*, 6 Md. App. 590, 594-95 (1969); *Sample v. Warden*, 6 Md. App. 103, 107 (1969). Therefore, ineffective assistance of counsel claims should *always* be raised. It is on this grounds that most post-conviction petitions are granted.

VII. Is there a right to appeal?

A. MPCPA: Yes

1. Qualified right to appeal - Must file a motion for leave to appeal and in non-capital cases, the Court of Special Appeals has sole

jurisdiction and can grant or deny the motion and Court of Appeals may not review that judgment; however, if appeal is granted, Court of Appeals can review its decision on the merits through its *certiorari* power. Md. Code of Crim. Proc. § 7-109.

B. *Coram Nobis*: Yes

1. Broad right to appeal under general appeals statute. *Skok*, 361 Md. at 65-66; see also *Md. Rule 15-1207(d)*(final order). Note that in *Rivera, cert. granted and argued*, 406 Md. 112, 956 A.2d 201 (2009), the State is challenging *Abrams v. State*, 176 Md. App. 600 (2007), and contending that where a defendant obtains a PBJ that *coram nobis* relief is not allowed because, it contends, that PBJ's do not result in convictions.