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Recent Developments: Denicolis v. State: Failure to Notify Defendant and Counsel of Jury Note Requesting Clarification of Definition of Solicitation Is a Violation of Maryland Rule 4-326(c)

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Denicolis v. State:
Failure to Notify Defendant and Counsel of Jury Note Requesting Clarification of Definition of Solicitation is a Violation of Maryland Rule 4-326(c)

By: Victoria Z. Sulerzyski

The Court of Appeals of Maryland held a failure to notify defendant and counsel of a jury note requesting clarification of the definition of solicitation is a violation of Maryland Rule 4-326(c). *Denicolis v. State*, 378 Md. 646, 837 A.2d 944 (2003). In so holding, the court emphasized the Maryland Rules require communication between a jury and a judge shall be communicated to a defendant and his or her counsel. *Id.*

In 2000, Christopher A. Denicolis (Denicolis) and two co-defendants were awaiting trial for several armed robberies. Judge Dana Levitz of the Circuit Court for Baltimore County sentenced the co-defendants to twenty years in prison. After the co-defendants were sentenced, Denicolis approached his cellmate, Kenneth Moroz (Moroz), and solicited the murder of Judge Levitz and prosecutor Mickey Norman. Moroz agreed to commit the murders and a price was negotiated. Later, seeking relief for himself, Moroz told police that Denicolis had solicited him to murder the judge and prosecutor. Moroz obtained a recording of their discussions regarding the details of the murders, wherein Denicolis stated he was not completely set on killing Mr. Norman, but Judge Levitz remained his primary target. Denicolis was

charged by criminal information with two counts of solicitation to commit murder. Neither count identified an intended victim.

Denicolis filed an Omnibus Motion pursuant to Maryland Rule 4-252 arguing the charges be dismissed because of defects in the institution of the prosecution and in the charging documents. However, the motion was silent as to the specific defects. The motion was denied and the trial began.

The court, in its preliminary jury instructions, stated the State alleged the petitioner solicited an individual to murder Judge Dana M. Levitz on or about January 11, 2001, while he was incarcerated. The judge said nothing about solicitation for Mickey Norman's murder or the allegations of Count I of the indictment. Similarly, in opening statements, the prosecutor stated Denicolis was only being charged with solicitation to murder Judge Levitz and was silent on the alleged solicitation to murder Mickey Norman. Not until the judge instructed the jury at the end of the evidence stage was the alleged solicitation to murder Mickey Norman mentioned. No objection was made on the record by the defense, and no exceptions were made.

The jury passed four notes to the judge. The note in question concerned a clarification of solicitation. The note

was in the record, but the record was silent as to whether the court responded to the note. There was no date-stamp on the exhibit. Counsel was unaware of the note until after the verdict and sentencing, when appellate counsel discovered it in the record.

On appeal, the Court of Special Appeals of Maryland held the record was silent with respect to the jury note and Denicolis had failed to establish that error was committed. The Court of Appeals of Maryland granted certiorari to determine whether the court erred in failing to notify Denicolis and counsel of the jury note.

The court began its discussion by stating the requirements of Maryland Rule 4-326(c). This rule "requires a trial court to notify the defendant and the State's Attorney of the receipt of any communication from the jury pertaining to the action before responding to the communication." *Id.* at 656, 837 A.2d at 950. Further, the rule specifies, "all such communications between the court and jury shall be on the record in open court or shall be in writing and filed in the action." *Id.* The rule partially preserves a defendant's constitutional and common-law right to be present at every critical stage of trial. *Id.*

Maryland law requires a criminal defendant to be present

during communications between the jury and judge. *Id.* The court referred to *Midgett v. State*, 216 Md. 26, 36-37, 139 A.2d 209, 214 (1958), where it held a defendant has the right to be present "when there shall be any communication whatsoever between the court and the jury[,] *unless* the record affirmatively shows that such communications were not prejudicial or had no tendency to influence the verdict of the jury." *Id.*

Appellants have a responsibility to provide a sufficient factual record for the appellate court to determine whether clear error occurred. *Id.* at 657, 837 A.2d at 951. However, Denicolis was incapable of producing such a record because the record was silent as to the jury note. *Id.* Appellant and his counsel were not informed about the jury note until after the verdict was rendered and sentence imposed. *Id.* at 657-58, 837 A.2d at 951. Even though the record was silent on whether the trial judge responded to the jury note without consultation, the court determined the record was sufficient enough to determine an error had occurred. *Id.* at 658, 837 A.2d at 951.

The court further reasoned once error is established, it becomes the State's burden to show, beyond a reasonable doubt, that it was a harmless error. *Id.* at 658-59, 837 A.2d at 952. Here, the State failed to meet its burden. *Id.* The court referred to its holding in *Taylor v. State*, 352 Md. 338, 351, 722 A.2d 65, 71 (1998), in which it stated "even an ambiguous record cannot support a harmless error argument, and if an ambiguous record is insufficient, so, surely, is a silent record." *Id.* at 659, 837 A.2d at 952. Accordingly, the court reversed and remanded. *Id.*

Denicolis raised a second issue on appeal. *Id.* at 649, 837 A.2d at 947. The court concluded the issue was not properly preserved, but did address the issue of whether the trial court erred when the criminal information failed to meet the constitutional requirement of informing the defendant of charges against him as guidance to the trial court on remand. *Id.* at 655, 837 A.2d at 950.

The complaint did not specify by name the targets of the solicited murders. *Id.* at 659, 837 A.2d at 952. Appellant argued there was confusion since the two intended victims were not specifically named in the indictment, and Maryland Rule 4-202(a) requires the complaint specifically and concisely name potential solicitation victims. *Id.* The court stated the rule does not require a victim to be specifically named and discussed the rule's legislative intent. *Id.* at 662, 837 A.2d at 953-54.

The holding in *Denicolis v. State* makes it clear that a failure to notify a defendant and counsel of a jury note is a violation of the Maryland Rules. Furthermore, the court emphasized Maryland Rule 4-326(c) requires any communication between a jury and a judge shall be communicated to defendant, his or her counsel, and the State's Attorney prior to responding to a jury's question. The court of appeals also provided guidance to criminal law practitioners that Maryland Rule 4-202(a) does not require a victim to be specifically named in an indictment for solicitation to commit murder.