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# Recent Developments: Holmes v. State: A Defendant Not Incarcerated or on Parole or Probation Who Pleads Guilty but Does Not File Application for Leave to Appeal Waives the Right to Challenge the Conviction and Sentence through Coram Nobis

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## RECENT DEVELOPMENT

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### **HOLMES V. STATE: A DEFENDANT NOT INCARCERATED OR ON PAROLE OR PROBATION WHO PLEADS GUILTY BUT DOES NOT FILE APPLICATION FOR LEAVE TO APPEAL WAIVES THE RIGHT TO CHALLENGE THE CONVICTION AND SENTENCE THROUGH *CORAM NOBIS*.**

**By: George Mowell**

The Court of Appeals of Maryland held that an individual who enters a guilty plea, but does not file an application for leave to appeal the resulting conviction and sentence, waives the right to contest the conviction and sentence through a petition for a writ of error *coram nobis*. *Holmes v. State*, 401 Md. 429, 932 A.2d 698 (2007). More specifically, the Court held that the defendant was informed of and understood his right to file an application for leave to appeal, and because he did not do so a rebuttable presumption arose that he waived his right to challenge his conviction later through a *coram nobis* proceeding. *Id.* at 474-75, 932 A.2d at 725.

In 1992, Lendro Thomas, also known as Darrell Holmes ("Holmes"), pled guilty to robbery with a deadly weapon in the Circuit Court for Baltimore City. Holmes was informed by the trial judge that, as part of his plea agreement, he was forfeiting his right to a direct appeal from his conviction and sentence, but Holmes retained the right to file an application for leave to appeal. Holmes accepted the agreement, did not file an application for leave to appeal his conviction to the Court of Special Appeals of Maryland, and served his sentence of three years, two of those years suspended in lieu of probation.

In 2004, Holmes was convicted of several unrelated drug and weapon offenses in the United States District Court for the District of Maryland. In an effort to avoid the tougher "repeat offender" Federal Sentencing Guidelines, Holmes filed a petition of error *coram nobis* in the Circuit Court for Baltimore City, challenging his 1992 conviction and sentence. Holmes alleged that his guilty plea was neither knowing nor voluntary, and his conviction should be vacated based on five defects: he was given a group plea with four other defendants at the

same time; was never informed of the charges against him; was not informed of the maximum penalty he faced; was not asked if he wanted to plead guilty, but instead was instructed to do so; and was not told of his right to a speedy and public trial.

The circuit court rejected all of the alleged defects except Holmes' contention that he was never informed of the charges against him. Ultimately, the court denied the petition because Holmes intelligently and knowingly waived his right to challenge his conviction in a writ of error *coram nobis* proceeding by failing to file an application for leave to appeal his original conviction and sentence. The Court of Special Appeals of Maryland affirmed the decision of the trial court, and the Court of Appeals of Maryland granted Holmes' writ of certiorari.

Initially, Holmes argued that the Post Conviction Procedure Act, specifically section 7-106 of the Maryland Criminal Procedure Article ("section 7-106"), provides a rebuttable presumption that an individual waives his or her right to challenge the conviction only if the individual actually files an application for leave to appeal and fails to allege error. *Holmes*, 401 Md. at 446-47, 932 A.2d at 708-09. Holmes stated that the General Assembly did not include a provision in section 7-106(b) addressing the effect of failing to file an application for leave to appeal on *coram nobis* relief, as it did when it addressed direct appeals. *Holmes*, 401 Md. at 447, 932 A.2d at 709. The legislature, therefore, could not have intended Holmes' action to be a waiver. *Id.* at 447, 932 A.2d at 709. Holmes further argued that failure to file is not a waiver under the Post Conviction Procedure Act. *Holmes*, 401 Md. at 447, 932 A.2d at 709. Finally, Holmes contended that even if his actions at trial constituted a waiver, "special circumstances" justified his failure to file an application for leave to appeal. *Id.* at 447-48, 932 A.2d at 709.

The Court of Appeals of Maryland began analyzing Holmes' arguments by examining its prior holding in *Skok v. State*, 361 Md. 52, 760 A.2d 647 (2000). *Holmes*, 401 Md. at 448-49, 932 A.2d at 709-10. The Court determined that a writ of *coram nobis* serves to not only correct "errors of fact that affect the validity or regularity" of legal proceedings, but also to correct errors of a "constitutional or fundamental" nature for a defendant not incarcerated and not on parole or probation who is faced with serious collateral consequences of his conviction. *Id.* at 452, 932 A.2d at 711-12 (quoting *Skok*, 361 Md. at 75, 760 A.2d at 659). The purpose of the writ is not to challenge already-determined facts, but to bring before the court facts: 1) that were not addressed at trial; 2) that are material to the proceedings; and

3) would have prevented the judgment if they had been known by the Court at that time. *Id.* at 450, 932 A.2d at 711.

The crux of Holmes' argument was that his 1992 conviction had a substantial collateral consequence of which he was unaware at the time he entered into the plea agreement. *Id.* at 453, 932 A.2d at 712. More specifically, Holmes asserted that he did not make a knowing and intelligent waiver of his right to file an application for leave to appeal because he alleged that he "did not knowingly and intelligently enter his guilty plea." *Id.* at 468, 932 A.2d at 721. Holmes argued that he was not informed of the possible sentencing ramifications his 1992 plea agreement would have on any later convictions. *Id.* at 468, 932 A.2d at 721. Further, he argued that he was not informed of the nature of the charges against him. *Id.* at 468, 932 A.2d at 721.

In dismissing this argument, the Court examined *McElroy v. State*, 329 Md. 136, 617 A.2d 1068 (1993), finding that the proper examination was whether the defendant attempted to rebut the presumption that he waived his right to challenge the *coram nobis* proceeding. *Holmes*, 401 Md. at 470-73, 932 A.2d at 722-24. The Court found that Holmes failed to raise the issue in an application for leave to appeal, that he therefore failed to rebut the presumption. *Id.* at 471-74, 932 A.2d at 723-25. Furthermore, special circumstances did not exist to justify his failure. *Id.* at 471, 932 A.2d at 723. Holmes was informed that he could note an appeal to the Court of Special Appeals of Maryland, and Holmes assured the trial judge that he understood that right to appeal. *Id.* at 471, 932 A.2d at 723.

Furthermore, the Court noted that the doctrine of *coram nobis* is an "extraordinary remedy," to be used only in special, warranted circumstances. *Id.* at 473, 932 A.2d at 724. Because Holmes was informed of his right to file an application for leave to appeal to challenge his guilty plea, he indicated he understood his rights, and he failed to assert those rights, the Court held that Holmes presumptively waived his right to challenge his conviction through a *coram nobis* proceeding. *Id.* at 474-75, 932 A.2d at 725.

The majority opinion in *Holmes* requires a criminal to first file an application for leave to appeal *before* he or she learns of any collateral consequences of accepting a plea or risk waiving *coram nobis* relief. This begs the question, as noted by the dissent: "If a person must first file an application for leave to appeal or a petition for post-conviction relief, will a writ of error *coram nobis* ever be appropriate?" *Id.* at 475, 932 A.2d at 726 (Raker, J., dissenting).

This case presents a tough lesson for criminal defense attorneys, particularly the overworked public defenders. It would seem contrary to public policy to add another burden on the courts by encouraging all defense lawyers to file a motion for leave to appeal, or seek error where there is none, as a preventative measure. Certainly, while this is a tough lesson for attorneys, it is an even harsher lesson for criminal defendants who accept lesser plea agreements without knowledge of future collateral consequences.