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## RECENT DEVELOPMENT

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### **STATE v. SANTIAGO: IN THE ABSENCE OF A JURY POLL, A CRIMINAL DEFENDANT HAS AN UNWAIVABLE RIGHT TO HAVE THE COURT HEARKEN THE VERDICT.**

**By: Melissa Goldmeier**

The Court of Appeals of Maryland held that a defendant is entitled to a new trial when a jury is not polled and the verdict is not hearkened. *State v. Santiago*, 412 Md. 28, 985 A.2d 556 (2009). In so holding, the court expressly overturned its decision in *Glickman v. State*, and concluded that, though a criminal defendant may waive his right to have the court poll the jury, the processes of polling or hearkening the verdict are necessary to protect the integrity of the jury verdict, such that both may not be waived in the same case. *Santiago*, 412 Md. at 32, 41, 985 A.2d at 558, 563 (citing *Glickman*, 190 Md. 516, 527, 60 A.2d 216 (1948)).

On March 17, 2006, a jury sitting in the Circuit Court for Charles County convicted Isa Manuel Santiago (“Santiago”) of second-degree murder and the use of a handgun in the commission of a violent crime. When the jury returned to open court after deliberating, the court asked the foreperson to announce the jury’s verdict. In a departure from standard Maryland practice, the jury was not polled after the foreperson delivered the guilty verdict, nor was the verdict hearkened following its announcement. In other words, the court clerk did not ask each juror in open court whether he or she agreed with the verdict as it was announced by the foreperson. Santiago, who was present for the jury’s announcement, did not request that the court poll the jury, nor did he object to the fact that the verdict was not hearkened.

Following trial, Santiago filed a timely appeal to the Court of Special Appeals of Maryland, claiming that his rights were violated because the court discharged the jury without ever polling the jurors or hearkening their verdict. In response, the Court of Special Appeals of Maryland stated, in an unreported opinion, that criminal defendants have an unwaivable right to have the jury polled or the verdict hearkened. Accordingly, the Court of Special Appeals of Maryland held that the trial court’s failure to poll the jury or have the jurors

hearken to the verdict constituted reversible error, and that the defendant was entitled to a new trial. In response to this holding, the State petitioned the Court of Appeals of Maryland for writ of certiorari, which the court granted to determine whether a defendant is entitled to a new trial when he does not object at trial to the court's failure to poll the jury or hearken the verdict.

To answer this question, the court began by reviewing several Maryland cases for guidance. *Santiago*, 412 Md. at 34-39, 958 A.2d at 559-63. Turning to the leading case on the issue, *Givens v. State*, the court discussed how hearkening the verdict had been standard practice in Maryland for over one hundred years and, therefore, had historical significance. *Santiago*, 412 Md. at 31, 958 A.2d at 557 (citing *Givens*, 76 Md. 485, 25 A.2d 689 (1893)). Against this background, the court determined that hearkening the verdict had become so established that it was not a mere procedural formality, but rather, a matter of substance "essential to the process of properly recording a jury verdict." *Id.* at 36, 985 A.2d at 560 (citing *Givens*, 76 Md. at 486, 25 A.2d at 689).

In order to properly record a valid jury verdict, the court concluded that three different procedures are required: (1) the oral announcement of the verdict; (2) unanimity, established by polling the jury, which the defendant may waive; and (3) hearkening the verdict. *Id.* at 40, 985 A.2d at 562 (citing *Jones v. State*, 384 Md. 669, 682-84, 866 A.2d 151, 159-60 (2005)).

As to the third procedure, the court determined that polling the jury or hearkening the verdict, either of which may be the third step, provides the defendant with an additional constitutional safeguard because it gives the jurors the opportunity to openly disagree with the verdict as stated by the foreperson. *Id.* at 40, 985 A.2d at 562-63. This, the court held, is essential to protecting the defendant's constitutional right to a unanimous and final verdict. *Id.* at 38, 985 A.2d at 562. In *Santiago*, the trial court's failure to poll the jury or hearken the verdict violated *Santiago's* constitutional rights, making the verdict a nullity. *Id.* at 41-42, 958 A.2d at 563.

Unlike polling, hearkening the verdict has not been codified in Maryland. *Santiago*, 412 Md. at 40-41, 985 A.2d at 563 (citing Maryland Rule 4-327(e)). Despite this, the court noted that the long-standing, uniform practice of hearkening the verdict throughout the state has made it a part of the common law of Maryland. *Id.* (citing *Jones v. State*, 173 Md. App. 430 at 451, 920 A.2d at 13 (2007)). The court explained that, because polling the jury and hearkening the verdict both serve to secure the certainty and accuracy of the verdict, a

proper polling is acceptable as a substitute for hearkening. *Id.* at 41, 985 A.2d at 563 (citing *Smith v. State*, 299 Md. 158, 165 n.5, 472 A.2d, 988, 991 n.5 (1984)). Therefore, when the jury has been polled, the defendant's constitutional right to a unanimous and final verdict has been protected. *Id.* at 41, 985 A.2d at 563. In such a situation, a court's failure to hearken the verdict is excusable, and does not entitle the defendant to a new trial. *Id.*

The State contended that, notwithstanding the lower court's error, Santiago had waived any right to appeal. Relying on *Glickman v. State*, the State argued that Santiago failed to preserve this issue for appeal because he did not object at trial to the trial court's omissions of polling the jury and hearkening the verdict. *Santiago*, 412 Md. at 41, 985 A.2d at 563 (citing *Glickman*, 190 Md. 516, 60 A.2d 216). In considering the State's contention, the court acknowledged that the State's analysis of *Glickman* supported the State's proposition. *Id.* (citing *Glickman*, 190 Md. at 526, 60 A.2d at 220). Accordingly, the court expressly overruled and disavowed the language in *Glickman* that supported the notion that a criminal defendant could waive his or her right to have the court hearken the verdict when the court had not properly polled the jury. *Id.* (citing *Glickman*, 190 Md. at 526, 60 A.2d at 220). In so holding, the court dismissed the State's argument and reaffirmed the position it had taken in several other decisions: "in the absence of a demand for a poll . . . a hearkening is required for a proper rendition of the verdict." *Id.* (quoting *Smith*, 299 Md. 158, 166, 472 A.2d, 988, 991).

Judge Murphy, joined by Judge Harrell and Judge Adkins in dissent, took issue with the majority's conclusion that a jury verdict that is neither polled nor hearkened always constitutes reversible error. *Id.* at 42, 985 A.2d at 564 (Murphy, J., dissenting). Instead, the dissent argued that the defendant only had a right to an *opportunity* to poll or hearken the jury. *Id.* In *Santiago*, the dissent determined that the defendant had two opportunities to request that the jurors be polled or hearkened. *Santiago*, 412 Md. at 42, 985 A.2d at 564 (Murphy, J., dissenting). Accordingly, argued the dissent, his failure to take advantage of these opportunities constituted a waiver of his right to later appeal on these grounds. *Id.*

By holding that a criminal defendant is entitled to a new trial when the jury is not polled and the verdict is not hearkened, the Court of Appeals of Maryland bolstered a criminal defendant's constitutional right to a unanimous verdict. Specifically, the holding in *Santiago v. State* suggests that the court, not the defendant, will be responsible for ensuring that proper Maryland criminal procedure is followed, in

terms of ensuring that the jury is polled or the verdict is hearkened. For Maryland prosecutors seeking to avoid reversible error, this holding puts them on notice: a prosecutor's failure to correct the court when it does not poll the jury, nor hearken the verdict, will almost certainly result in a new trial.