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Recent Development: Preston v. State: Reasonable Protective Housing Provided to a State's Witness is Not a "Benefit" Within the Meaning of Maryland Criminal Pattern Jury Instruction 3:13

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RECENT DEVELOPMENT

PRESTON V. STATE: REASONABLE PROTECTIVE HOUSING PROVIDED TO A STATE'S WITNESS IS NOT A "BENEFIT" WITHIN THE MEANING OF MARYLAND CRIMINAL PATTERN JURY INSTRUCTION 3:13.

By: Andrew Middleman

The Court of Appeals of Maryland held that a "benefit," as used in Maryland Criminal Pattern Jury Instruction 3:13, is "something akin to" a direct, quid pro quo exchange for a State's witness's testimony. *Preston v. State*, 444 Md. 67, 85, 118 A.3d 902, 913 (2015). The court of appeals further held that reasonable protective housing provided to a State's witness, by itself, is not a "benefit." *Id.* at 85, 104, 118 A.3d at 913, 924. The court also concluded that moving a State's witness into protective housing, at State expense, was "not unreasonable." *Id.* Accordingly, the court affirmed the trial court's omission of a particularized witness credibility instruction that would have directed the jury to consider the housing accommodations a witness received. *Id.*

In March 2009, Nichelle Payton hosted a party at which Keon Barnes was shot and killed. Homicide detective Michael Moran interviewed Payton several times. Initially, Payton offered nothing more than her party guests' names.

Shortly thereafter, Dontae Preston, Petitioner, knocked on the door at Payton's home. Preston did not threaten or even communicate with Payton. Payton did not answer the door.

Then, in early April, Payton asked Moran to relocate her because she was afraid to stay in her home. But Moran urged Payton into another interview.

This time, though, Payton identified Preston in a photo array. Moran, moreover, recorded Payton's account of Barnes's death, namely that she heard gunshots and saw Preston leave the scene, but that she did not see anyone with a gun.

Moran asked the Baltimore City State's Attorney's Office to move Payton into protective housing only after Payton cooperated with his investigation. The State's Attorney's Office paid more than $13,000 for Payton's eight-month stay in protective housing. Meanwhile, the State charged Preston in the Circuit Court for Baltimore City with first-degree murder and related crimes.

At trial, defense counsel probed whether Payton withheld her statement until after she had assured her eventual relocation. Payton answered, "Correct. No." Defense counsel did not clarify Payton's apparently ambiguous response.

Moran, for his part, testified that he did not immediately submit the request for Payton's relocation because Payton had partially concealed her account of Barnes's death. Moran added that he waited to submit the request because, he explained, "It's a lot for someone to move their life."

In light of Payton's and Moran's testimony, defense counsel asked the circuit court to instruct the jury according to Maryland Criminal Pattern Jury Instruction 3:13 (2d ed. 2012 & Supp. 2013) ("MPJI-Cr"). MPJI-Cr 3:13, entitled "Witness Promised Benefit," directs the jury to cautiously consider the extent to which a "financial benefit" or "benefit" influences a State's witness's testimony.

The circuit court explained that the evidence was insufficient to show that Payton exchanged her testimony for a "financial benefit" or "benefit." As such, the circuit court rejected defense counsel's proposal in favor of MPJI-Cr 3:10, the standard witness credibility instruction. The jury found Preston guilty on all counts.

The Court of Special Appeals of Maryland affirmed. That court concluded that the circuit court did not abuse its discretion when it denied defense counsel's proposal.

The Court of Appeals of Maryland granted both Preston's and the State's petitions for writ of certiorari, which collectively presented five questions. The court, however, answered only one: whether reasonable protective housing is a "benefit" under MPJI-Cr 3:13.

The court of appeals purported to apply principles of statutory interpretation to interpret the term "benefit" under MPJI-Cr 3:13. *Preston*, 444 Md. at 83-84, 118 A.3d at 912. The court also turned to case law from Maryland and other jurisdictions for guidance. *Id.* at 85-103, 118 A.3d at 913-24. Ultimately, though, the court decided *Preston* solely on its facts. *Id.* at 83 n.18, 104, 118 A.3d at 912 n.18, 924.

MPJI-Cr 3:13 has no formal or functional legislative history, because the Maryland Pattern Jury Instructions are not statutory in nature. *Preston*, 444 Md. at 83 & n.19, 118 A.3d at 912 & n.19. Unsurprisingly, then, the court of appeals could not interpret the term "benefit" from MPJI-Cr 3:13's legislative materials. *Id.* The court was similarly unable to glean an unambiguous definition of "benefit" from that word's plain meaning. *Id.* at 84, 118 A.3d at 912-13.

Maryland case law, moreover, proved equally unhelpful. *Preston*, 444 Md. at 85-88, 118 A.3d at 913-15. The court of appeals examined five cases in which the State induced a witness to testify. *Id.* (citing *Harris v. State*, 407 Md. 503, 966 A.2d 925 (2009); *Dickey v. State*, 404 Md. 187, 946 A.2d 444 (2008); *Ware v. State*, 348 Md. 19, 702 A.2d 699 (1997); *Riggins v. State*, 152 Md. App. 181, 843 A.2d 115 (2004); *Stouffer v. State*, 118 Md. App. 590, 703 A.2d 861 (1997), *aff'd in part & rev'd in part*, 352 Md. 97, 721 A.2d 207 (1998)). Those cases, however, carried little precedential value, because either the particular inducement was not at issue, or the inducement was too dissimilar to State-financed protective housing. *Preston*, 444 Md. at 85-88, 118 A.3d at 913-15 (citations omitted).

Additionally, the court of appeals examined a litany of out-of-state and federal cases. *Preston*, 444 Md. at 90-103, 118 A.3d at 916-24 (citations omitted). The court dismissed seven out-of-state cases as unpersuasive,

because none involved relocation as the sole inducement provided to a witness. *Id.* at 92-102, 118 A.3d at 917-23 (citations omitted).

Similarly, the court of appeals quickly dispensed with four federal cases in which a State's witness exchanged testimony for a package of inducements. *Preston*, 444 Md. at 101-02, 118 A.3d at 923 (citations omitted). The court deemed another eight federal cases "unpersuasive," "unhelpful," or irrelevant. *Id.* at 90-91, 98-102, 118 A.3d at 916-17, 921-23 (citations omitted). As such, the court necessarily decided *Preston* on its facts. *Id.* at 104, 118 A.3d at 924.

The court of appeals concluded that Payton's eight-month stay in protective housing, for which the State paid less than $14,000, was "not unreasonable" in these circumstances. *Preston*, 444 Md. at 104, 118 A.3d at 924. Yet, the court offered little support for its conclusion, other than to explain that, as Moran put it, "It's a lot for someone to move their life." *Id.*

In *Preston*, the Court of Appeals of Maryland held that a "benefit," under Maryland Criminal Pattern Jury Instruction 3:13, is *something akin to* a plea agreement, prosecutorial immunity, a monetary reward, or another form of a direct, quid pro quo exchange for a State's witness's testimony. 444 Md. at 85, 118 A.3d at 913 (emphasis added). The court of appeals, moreover, held that reasonable protective housing is not a "benefit." *Id.* at 85, 104, 118 A.3d at 913, 924.

Read together, *Preston* implies that *unreasonable* protective housing is "something akin to" a direct, quid pro quo exchange for a State's witness's testimony, and therefore is a "benefit" under MPJI-Cr 3:13. *Cf. Preston*, 444 Md. at 85, 104, 118 A.3d at 913, 924. But the court of appeals explicitly declined to define the scope of "reasonable protective housing." *Id.* at 103-04, 118 A.3d at 924. Instead, the court suggested that a State's witness's protective housing arrangements require "some rough correlation" to her ordinary living situation. *Id.* at 104, 118 A.3d at 924.

These holdings, and their resulting inferences, are too flimsy and too ambiguous for *Preston* to carry any modicum of precedential or practical value. First, *Preston* leaves open the possibility that protective housing, by itself, would be unreasonable only if the State were to spend some amount of money indefinitely greater than $14,000. *Cf. Preston*, 444 Md. at 104 & n.31, 118 A.3d at 924 & n.31.

Moreover, the court noticeably failed to apply its "rough correlation" test to Payton's home and her protective housing. Indeed, *Preston* conspicuously lacks any quantitative or qualitative comparison between the two. Consequently, the "rough correlation" test is nothing more than a blind, aimless inquiry into the reasonableness of a State's witness's protective housing.

Preston quietly suggests, therefore, that its holdings are limited to these facts. To be sure, no case of precedential or practical value can turn on dubious legal tests, like "something akin to" or "some rough correlation."