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## RECENT DEVELOPMENT

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### ***FUSTER V. STATE: AN INDIGENT PETITIONER IS NOT ENTITLED TO COUNSEL FOR A POST CONVICTION PETITION AS THE DECISION IS WITHIN THE COURT'S DISCRETION.***

**By: Bradley T. Bald**

The Court of Appeals of Maryland held that Maryland Rule 4-707(b) does not entitle an indigent petitioner to counsel for purposes of a post conviction petition for DNA testing. *Fuster v. State*, 437 Md. 653, 657-58, 89 A.3d 1114, 1116 (2014). In addition, the court held that the circuit court did not abuse its discretion by failing to consider whether to appoint the petitioner counsel under section 8-201 of the Maryland Criminal Procedure Code. *Id.* The court further held that the circuit court used the correct legal standard in ruling on the petition. *Id.* Finally, the court held that the petitioner failed to preserve for appellate review whether the circuit court clearly erred in concluding that the State conducted a reasonable search for the victim's socks and shoes. *Id.*

On October 10, 2001, fifteen-year-old W.K. visited the dental office of David E. Fuster ("Fuster"). During the visit Fuster administered gas to W.K., causing her to drift in and out of consciousness. W.K. awoke several times to Fuster sexually massaging different parts of her body. W.K. also observed Fuster force her on top of him. The incident ended with W.K.'s bra undone, her shirt halfway up, and Fuster naked. Later that day, a sexual assault forensic nurse examiner examined W.K. The nurse testified that she placed "each piece of clothing . . . in a separate bag" and checked W.K. from "head to toe."

Fuster was convicted by a jury in the Circuit Court for Montgomery County of second-degree rape, child abuse, third-degree sexual offense, and second-degree assault. Fuster appealed his conviction to the Court of Special Appeals of Maryland which affirmed. Fuster then petitioned for a writ of certiorari, which the Court of Appeals of Maryland denied.

On November 3, 2010, Fuster filed a "Petition for DNA Testing – Post Conviction Review" ("the Petition") in the circuit court. In the Petition, Fuster requested that W.K.'s underpants, leg cuffs, socks, and shoes be tested using DNA analysis for Fuster's epithelial cells, but failed to request appointment of counsel. After two hearings, the circuit court denied the Petition and Fuster appealed. Prior to rendering a decision, the Court of Special Appeals of Maryland transferred the case to the Court of Appeals of Maryland on its own initiative.

The Court of Appeals of Maryland began its analysis by discussing how an appellate court interprets a Maryland Rule. *Fuster*, 437 Md. at 664, 89 A.3d at 1120. An appellate court interpret a Maryland Rule using the same

“canons of construction” that the court would use to interpret a statute. *Id.* (citing *Hoile v. State*, 404 Md. 591, 608, 948 A.2d, 30, 40, *cert. denied*, 555 U.S. 884 (2008)). More specifically, if a rule’s plain language is “unambiguous and clearly consistent with the [r]ule’s apparent purpose,” the court will apply its plain language. *Id.* at 664-65, 89 A.3d at 1120 (quoting *State v. Weems*, 429 Md. 329, 337, 55 A.3d 921, 926 (2012)). However, if a rule’s plain language is not consistent with the rule’s apparent purpose, the court will look for “rulemaking intent in other indicia” in light of the rule’s structure, relation to other laws, general purpose, and the “legal effect of various competing constructions.” *Fuster*, 437 Md. at 665, 89 A.3d at 1120 (quoting *State v. Johnson*, 415 Md. 413, 422, 2 A.3d 368, 373 (2010)).

Regarding the Petition, the court honed in on Rule 4-707(b)’s (“the Rule”) pertinent language: “If the court finds that a petitioner . . . is indigent, the court shall appoint counsel.” *Fuster*, 437 Md. at 665, 89 A.3d at 1120-21 (quoting Md. R. 4-707(b) (LexisNexis 2014) (emphasis added)). Pursuant to the Rule’s plain language, a trial court must appoint counsel for an indigent petitioner for a post conviction petition for DNA testing. *Id.* at 667, 89 A.3d at 1121. However, the court acknowledged that the Rule’s plain language is not clearly consistent with the court’s purpose in adopting the Rule. *Id.* at 666, 89 A.3d at 1121 (quoting *Weems*, 429 Md. at 337, 55 A.3d at 926). In implementing the Rule, the court relied heavily on its decision in *Simms v. State*. *Id.* at 666-67, 89 A.3d at 1121-1122 (See generally *Simms v. State*, 409 Md. 722, 976 A.2d 1012 (2009)). *Simms* established that the appointment of counsel for purposes of a petition is *discretionary* and within the inherent power of the court. *Id.* (citing *Simms*, 409 Md. at 756 n.5, 976 A.2d at 1015 n.5) (emphasis added)).

Having determined that the Rule’s plain language is not consistent with its apparent purpose, the court focused on rulemaking intent in other indicia. *Fuster*, 437 Md. at 667, 89 A.3d at 1122 (citing *Johnson*, 415 Md. at 422, 2 A.3d at 373 (2010)). The court referred to the 2009 Rules Committee Meetings on the Rule to establish its intent. *Fuster*, 437 Md. at 667-68, 89 A.3d at 1122. Based on the notes from those meetings, the court determined that the Committee intended that a trial court would have the discretion to appoint counsel for an indigent petitioner for the purpose of a post conviction petition for DNA testing. *Id.* at 668, 89 A.3d at 1122 (citing MD. RULE 4-707(b) RULE COMM. MEETING (2009)). Because the Committee’s motive was to give trial court’s such discretionary power, the court held that the Rule does not entitle an indigent petitioner to counsel. *Id.* at 669, 89 A.3d at 1123.

The Court of Appeals of Maryland then addressed *Fuster*’s contention that the circuit court abused its discretion by not considering whether to appoint him counsel. *Fuster*, 437 Md. at 669, 89 A.3d at 1123. According to the Rule, “If the court finds that a petitioner . . . has requested the appointment of counsel . . . the court shall appoint counsel . . . .” *Id.* (quoting Md. R. 4-707(b)). Based on this language, the court determined that the Rule

presumes a petitioner has requested counsel in the petition. *Id.* at 670, 89 A.3d at 1123. Because Fuster failed to request the appointment of counsel, the Court of Appeals of Maryland concluded that the circuit court did not abuse its discretion in not contemplating the appoint of counsel for Fuster. *Id.*

Next, the court addressed whether the circuit court applied the correct legal standard in ruling on the Petition. *Fuster*, 437 Md. at 671, 89 A.3d at 1123-24. A court will order DNA testing if it finds there to be a reasonable probability that DNA testing has the “potential to produce exculpatory or mitigating evidence.” *Id.* at 671, 89 A.3d at 1124 (quoting MD. CODE ANN., CRIM. PROC. § 8-201(d)(1)(i) (LexisNexis 2014)). Further, a petitioner may move for a new trial if he or she can show that the conviction was based on “unreliable scientific evidence and a substantial possibility exists that the petitioner would not have been convicted without the evidence.” *Fuster*, 437 Md. at 671, 89 A.3d at 1124 (quoting MD. CODE ANN., CRIM. PROC. § 8-201(c)). The court noted that the circuit court was well aware of where to use the two standards and correctly stated their uses during the hearing. *Fuster*, 437 Md. at 671-72, 89 A.3d at 1124. Therefore, the court concluded that the circuit court correctly used the substantial possibility standard in ruling on the Petition. *Id.* at 672, 89 A.3d at 1124.

Finally, the Court of Appeals of Maryland considered whether Fuster failed to preserve the issue of whether the circuit court erred in concluding that the State conducted a reasonable search for W.K.’s socks and shoes. *Fuster*, 437 Md. at 673, 89 A.3d at 1124. The court emphasized that Fuster not only failed to object to the State’s proffer that the State had never collected W.K.’s socks and shoes, but also conceded that the State had never collected those items. *Fuster*, 437 Md. at 673, 89 A.3d at 1125. A party neglects to preserve any issues with a trial court’s decision by intentionally “inviting” the court’s decision. *Id.* (citing *State v. Rich*, 415 Md. 567, 581, 3 A.3d 1210, 1218 (2010)). By conceding, Fuster invited the court to conclude that any search for W.K.’s socks and shoes would be “fruitless,” and therefore failed to preserve the issue for appellate review. *Id.*

In *Fuster*, the Court of Appeals of Maryland held that an indigent petitioner is not entitled to the appointment of counsel for a post conviction petition. Even though a rule’s apparent purpose may conflict with its plain language, the court clearly established that the appointment of counsel is within the trial court’s discretionary power. Nevertheless, such discretion will likely burden future indigent petitioners because the appointment of counsel is not guaranteed. The ruling not only gives deference to a court’s inherent power, but also alerts Maryland practitioners to be conscientious of post conviction legal standards.