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Recent Development: Peterson v. State: Limitations on Defense Cross-Examination are Permitted When the Testimony Lacks a Factual Foundation, Is Overly Prejudicial, or Has Not Been Adequately Preserved

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RECENT DEVELOPMENT

PETERSON V. STATE: LIMITATIONS ON DEFENSE CROSS-EXAMINATION ARE PERMITTED WHEN THE TESTIMONY LACKS A FACTUAL FOUNDATION, IS OVERLY PREJUDICIAL, OR HAS NOT BEEN ADEQUATELY PRESERVED.

By: Meghan E. Ellis

The Court of Appeals of Maryland held that the defendant's right to confrontation was not violated when the defense was precluded from cross-examining a witness about hallucinations and his potential sentence prior to entering into a plea agreement. *Peterson v. State*, 444 Md. 105, 153-54, 118 A.3d 925, 952-53 (2015). The court found that the defendant failed to preserve the issue of a witness's expectation of benefit with respect to pending charges, and failed to show sufficient factual foundation for a cross-examination regarding the expectation. *Id.* at 138-39, 118 A.3d at 944. In addition, the court found that, although not protected by attorney-client privilege, exclusion of co-defendant's counsel's testimony was proper because of its prejudicial nature and limited probative value. *Id.* at 161-62, 118 A.3d at 957.

In March 2009, Calvin Rose ("Rose") introduced Jerrod Peterson ("Peterson"), who was looking to purchase ecstasy, to Domanique Gordon ("Gordon"). A week later, Gordon and his friend, James McLaurin ("McLaurin"), traveled to Rose's house with a bag of imitation ecstasy. Peterson and his acquaintance, Thomas Hughes ("Hughes") received a ride to Rose's house from Peterson's friend, Alexis Brown ("Brown").

Upon arrival, Peterson got into the back seat of Gordon's car while Hughes spoke to Rose outside. Peterson pulled out a gun and a struggle ensued between him, Gordon, and McLaurin. Peterson shot Gordon and McLaurin was also shot as he attempted to flee. Peterson and Hughes left the scene in Brown's car with the imitation ecstasy pills and money. Peterson and Hughes were arrested a day later and indicted for numerous offenses including felony murder.

Peterson was convicted of first-degree felony murder and several other lesser-included offenses in the Circuit Court for Prince George's County. He was sentenced to life in prison, with all but 85 years suspended, including a ten-year mandatory minimum. Peterson appealed his convictions to the Court of Special Appeals of Maryland, which affirmed the trial court.

Peterson petitioned for certiorari. The Court of Appeals of Maryland granted to consider: (1) whether the trial court's limitations on the cross-examination of Rose and Hughes violated Peterson's constitutional right of confrontation or otherwise constituted an abuse of its discretion; and (2) whether the trial court's determination of attorney-client privilege properly precluded Hughes' counsel from being summoned as a defense witness.

The court of appeals began its analysis by considering the policy reasons of the right to confront and the standard of review. *Peterson*, 444 Md. at 122, 118 A.3d at 934. The right to confront allows the defendant to cross-examine witnesses in order to determine their biases, interests, or motives. *Id.* The trial court may limit the scope of cross-examination for various reasons including eliminating harassment, prejudice, or confusion among the jury. *Id.* at 122-23, 118 A.3d at 935.

Peterson argued that the question of unconstitutional limits on cross-examination required a *de novo* standard of review based on “the exclusion of an area of inquiry.” *Peterson*, 444 Md. at 123, 118 A.3d at 935. The court rejected this argument instead of adopting an abuse of discretion standard because under Maryland Rule 5-611, a trial court may make a variety of judgments in the course of a witness examination. *Id.* at 124, 118 A.3d at 935. However, where there is an alleged violation of the Confrontation Clause, the court must consider the cumulative result of these judgments. *Id.* at 124, 118 A.3d at 935-36. The court also considered whether the defense properly preserved the issue for appeal. *Id.* at 124-25, 118 A.3d at 936.

In order to adequately preserve an issue for appeal, the petitioning party must show both prejudice and evidence that the issue was raised at trial. *Peterson*, 444 Md. at 125, 118 A.3d at 936; *see also* Md. Rule 5-103(a)(2). The court then applied this standard to the merits of Peterson’s claims. *Id.* at 126-27, 118 A.3d at 937. Specifically, the court addressed the trial court’s limitations on his cross-examination of Rose’s expectation of benefit with respect to charges pending against him. *Id.*

Pursuant to Maryland Rule 5-609, witnesses may be impeached with evidence of certain types of convictions; however, the statute is limited to final convictions. *Peterson*, 444 Md. at 134-35, 118 A.3d at 941-42. Cross-examination regarding pending charges is permissible with respect to whether or not a witness expects some benefit in exchange for his testimony. *Id.* at 135, 118 A.3d at 942; *see also* Md. Rule 5-616(a)(4). The court may limit the cross-examination if the testimony is overly prejudicial and not probative. *Id.* at 136, 118 A.3d at 942.

The court of appeals affirmed the trial court’s ruling that the pending charges were not admissible. *Peterson*, 444 Md. at 141, 118 A.3d at 945. As an initial matter, the court found that Peterson failed to preserve the issue on appeal. *Id.* The court also found that Peterson lacked a sufficient factual foundation for questions concerning an expectation of benefit, since pending charges alone are not adequate. *Id.* at 141, 118 A.3d at 945-46.

Peterson argued that his right to confrontation was limited with respect to his cross-examination of Hughes regarding the sentence Hughes faced prior to executing Hughes’ plea agreement. *Peterson*, 444 Md. at 149, 118 A.3d at 950. The trial court found that through cross-examination of Hughes, defense counsel elicited information including his maximum sentence under the plea agreement and his sentencing date. *Id.* at 152-53, 118 A.3d at 952. The court also found that knowing Hughes’ potential sentence would prejudice the jury and outweighed the probative value of the inquiry. *Id.* at 153, 118 A.3d at 952.

The Court of Appeals of Maryland found that the extensive cross-examination of Hughes constituted a sufficient level of inquiry under the Confrontation Clause. *Id.* at 154, 118 A.3d at 952-53. Additionally, the court of appeals determined that the trial court did not abuse its discretion in limiting the questions regarding hallucinations due to a lack of a factual predicate. *Id.* at 148-49, 118 A.3d at 949-50.

Finally, at trial, Peterson sought the testimony of Hughes' counsel, Bethany Skopp, ("Skopp") regarding the proffer session. *Peterson*, 444 Md. at 158, 118 A.3d at 955. The court of appeals held that the trial court had properly excluded Skopp's testimony, not on the assertion of attorney-client privilege, but on the grounds that the testimony sought was irrelevant or, in any event, outweighed by other considerations. *Id.* at 161, 118 A.3d at 957. The court further held that Skopp's testimony would have been cumulative of previous witness testimony and would not have cast doubt on Hughes' credibility. *Id.* at 162, 118 A.3d at 957.

In *Peterson*, the Court of Appeals of Maryland held that the trial court has broad discretion in limiting the defense's cross-examination. In assessing whether these limitations, in aggregate, violate the Confrontation Clause, the limitations will always be reviewed against previously admitted testimony and evidence. The court's ruling runs the risk of severely limiting defense cross-examinations. As a safeguard, Maryland practitioners should establish a factual basis on the record for all testimony and raise the issue of erroneous rulings to the trial court, thus adequately preserving any issue for appeal. If Maryland practitioners fail to do so, the defendant's constitutional right to confrontation may be jeopardized and may have a detrimental effect at the appellate stage.