

Thursday, October 16, 2008

**Criminal juries may not make up the governing law.**

Â Bill of RightsÂ (From public domain.)Â Around fourteen years ago, at the post conviction/habeas corpus stage, I won a retrial in a Maryland trial court for a man convictedÂ of burglary for breaking into his grandmother's house with the intent to rape her, and of raping her. I then defended my client for the retrial; and ultimately reachedÂ a guilty plea agreement involving a plea to the rape count, a dismissal of the remaining count, and no prosecutorial opposition to a release from further executed incarceration time. On the day my client entered a guilty plea anew, the judge released him from any further prison time, without requiring probation.Â Â Without question, if my client committed the crime for which he was convicted, it was heinous beyond heinous.Â At the same time, the circumstances that led to his jury conviction and countless thousands of other Maryland convictions flew in the face of theÂ most basic federal Constitutional rightÂ not to be convicted without a jury finding of proof of guiltÂ beyond a reasonable doubt. Â Â Specifically, before 1980, countless Maryland judges (including the judge who presided at my foregoing client'sÂ original trial)Â -- if not all of them --Â advised juries in criminal casesÂ that the judges' instructions to the jury about the law were purely advisory and that the juries were free to disregard said instructions, on the basis of the following provision of the Maryland Declaration of Rights: "Art. 23. In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."Â Read literally, the foregoing Article 23 could cut both ways. It could lead a jury to convict a defendant in contravention of the obligation under the federal Constitution that no conviction take place without proof beyond a reasonable doubt. On the flip side, read literally, Article 23 could embolden a jury to acquit/exercise jury nullificationÂ even if it concluded a crime had been committed. Keep in mind that Maryland has a particularly long and deepÂ history of racism and segregation, thus having enabled juries all the more under Article 23 to convict based onÂ non-white status alone and to acquit white people who committed crimes against non-white people. Keep in mind further that at least right up to the 1920's (if not later), women had no right to serve on juries in Maryland. As to non-whites serving on juries, who knowsÂ when Maryland courts stopped excluding them through the front doorÂ and back door (it seems that the U.S. Supreme Court may have waited until 1935 in the Scottsboro Men case (why did evenÂ Chief Justice Hughes referÂ to them as "boys", in the opening paragraph of the 1935 opinion, no less?) to prohibit systematic exclusion of non-whites from juries)?Â Â Not until the early 1980's did Maryland's highest court put full brakes on judges' telling jurors that they could disregard the judges' instructions on the law. *Stevenson v. Maryland*, 289 Md. 167, 423 A.2d 558 (1980); *Montgomery v. Maryland*, 292 Md. 84, 437 A.2d 654 (1981). Â Consequently, at the habeas corpus/post conviction stage, is a Maryland convict entitled to a new trial if his or her jury was advised that it was free to disregard the judge's instructions on the law? A prosecutor might reply that the issue has been waived if the defendant did not enter a timely objection to the jury instruction at the time it was given. The defendant could reply that defense counsel was ineffective under the Constitution's Sixth and Fourteenth Amendments for failing to object to the jury instruction. The prosecutor might then reply that the defense counsel's not objecting was not ineffective if the trial took place before the foregoing early 1980's *Stevenson*Â and *Montgomery* cases were available to cue the trial lawyer to object. The defense might reply that those early 1980's cases retroactively changed the application of Article 23 of Maryland's Declaration of Rights, thus entitling the defendant to a retrial.Â Judges considering such a question would likely wonder about the floodgates to retrials that would be opened by agreeing with the latter argument (with plenty of witnesses long-dead by now). Of course, such a concern should not enter the decisionmaking process of a judge. Â On October 15, 2008, a 4-3 majority of Maryland's highest court closed any such possible floodgate-opening by determining that *Stevenson*Â and *Montgomery* merely clarified the law, and did not change it, thus foreclosing the possibility of any retroactivity. Praised be Judges Eldridge, Bell, and Battaglia for dissenting. *Maryland v. Adams*, \_\_\_ Md. \_\_ (Oct. 15, 2008). Â As to my client convicted of raping his grandmother, to my best recollection, he was convicted before the foregoing *Stevenson* and *Montgomery* opinions were issued. Neither the prosecutor nor post conviction hearing judge called me on that. I was not as fortunate in another county with the same post-conviction argument about a conviction rendered pre-*Stevenson* and *Montgomery*. Without judicial or gubernatorial intervention, my latter client will live out the rest of his days in prison, convicted unconstitutionally of robbery and felony murder,Â due to aÂ gross violation of his rights by the trial judge having advised the jury that it was free to disregardÂ his jury instructions. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00