

November 3, 2008

RE: *State v. Adams*, No. 38, Sept. Term, 2007

Dear Client:

As you have heard by now, the Court of Appeals of Maryland issued its decision a few weeks ago in *State v. Raymond Leon Adams*, 2008 WL 4570071 (Md. Oct. 15, 2008), which will have a major impact on the disposition of any post-conviction action that implicates “advisory only” jury instructions. Although Mr. Adams was represented in this appeal by the Office of the Public Defender, the law firm of Bennett & Bair, LLC filed an amicus curiae brief on behalf of Families Against Injustice in support of Mr. Adams, and has followed the issue very closely given the number of clients who are affected by the *Adams* case. I have been told that the Public Defender’s Office may ask the United States Supreme Court to review the decision, but it is highly unlikely that the Supreme Court will do so.

By way of history, the Court of Special Appeals of Maryland had held that such advisory only instructions—typically given in jury trials in the 1970’s—violated the Due Process Clause and that such claims were not waived by the failure of trial counsel to object to them. *See State v. Adams*, 171 Md. App. 668 (2006). Unfortunately, the Court of Appeals, by a four to three vote, reversed that decision and held that Mr. Adams waived his challenge to the advisory jury instructions by not objecting to them at trial and by not raising the issue on direct appeal. The Court also declined to excuse Mr. Adams’s waiver of the claim because, at the time of his trial, existing law provided a valid basis for an objection to the advisory instructions. Finally, the Court concluded that *Stevenson v. State*, 289 Md. 167 (1980), did not announce new law concerning advisory jury instructions, so there was no need to consider whether a new rule applied retroactively.

Given these holdings, *Adams* forecloses a direct attack on the advisory jury instructions in post conviction. In light of the Court of Appeals ruling, a post conviction court will conclude that, where there was no objection to the instructions at trial, the petitioner has thereby given up the right to argue that the instructions constituted a denial of due process of law. Likewise, a post conviction court would rely on *Adams* in refusing to excuse a waiver of the claim. Lastly, a post conviction court would reject a contention that a petitioner is entitled to the retroactive application of a new rule because *Adams* does not recognize a new standard concerning advisory jury instructions.

There is, however, one issue left open by the Court of Appeals, and this issue is potentially a winnable one for those petitioners with an “advisory only” claim. The Court in *Adams* did not address or decide the issue of whether a trial attorney was ineffective in failing to object to the advisory jury instructions. Furthermore, the majority opinion asserts that, based on a series of Maryland cases that were decided in the 1970’s, Mr. Adams “reasonably could have been expected to be aware that any instruction that he perceived as permitting the jury to disregard such clearly established constitutional law [the reasonable doubt standard] was improper.” *Adams*, 2008 WL 4570071, at *16. We believe that this finding in *Adams* supports a claim that trial lawyers who did not object to advisory only jury instructions in the 1970’s rendered ineffective assistance.

Consequently, we intend to continue to press for relief for our clients who were convicted in jury trials in the 1970’s and whose cases implicate advisory only jury instructions. Although some of our claims are now foreclosed in light of *Adams*, we still can proceed on a claim of ineffective assistance of trial counsel. In cases pending decision, we will be filing a supplemental pleading with the appropriate court arguing the point and requesting a hearing based on our theory of ineffective assistance of trial counsel. We also plan to continue to file Motions to Reopen Post-Conviction in appropriate advisory only cases and argue the claim of ineffective assistance of trial counsel.

I hope this has been helpful towards an explanation of *Adams* and the current state of advisory only jury instruction claims. Please feel free to pass on this letter to any interested person and to contact us if you have any questions about this matter.

Sincerely,

Gary E. Bair