UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1125

September Term, 2013

MICHAEL TALBERT

v.

STATE OF MARYLAND

Nazarian,
Reed,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: July 21, 2016

On January 22, 1999, appellant, Michael Talbert, entered a guilty plea to first degree murder and possession of a handgun in the Circuit Court for Baltimore City. *See* Md. Code Ann., Art. 27 § 407 (first degree murder); Art. 27 § 36B (handgun use in the commission of a felony or crime of violence). In exchange for his plea, appellant was sentenced to life imprisonment with all but thirty-five years suspended for first degree murder, and twenty years' imprisonment consecutively for the handgun violation. No period of probation was imposed. More than fourteen years later, on February 5, 2013, the circuit court *sua sponte* conducted a hearing to correct an illegal sentence, during which the court added five years' probation to appellant's sentence.

Following the addition of probation to his sentence, appellant noted an appeal raising one issue, which we slightly rephrase[1] as follows:

> I. Does the addition of probation to appellant's sentence violate his plea agreement, thereby creating an illegal sentence?

We answer the question in the affirmative, vacate the sentence and remand for a re-sentencing hearing.

FACTUAL AND PROCEDURAL BACKGROUND

On May 16, 1998, appellant was arrested and charged with several crimes, including first degree murder and use of a handgun in the commission of a crime of violence. On January 22, 1999, appellant entered a guilty plea in the circuit court to first degree murder

[1]Appellant phrased the question as follows:

> 1. Did adding probation to appellant's sentence violate his plea agreement, rendering the sentence illegal?

and the handgun charge, in exchange for receiving a sentence capped at life, with all but thirty-five years suspended, and any sentence for the handgun charge to run concurrently. On April 8, 1999, the circuit court, after reviewing the presentence investigation report and hearing evidence in mitigation, sentenced appellant to life, with all but thirty-five years suspended. Appellant was additionally sentenced to twenty years' imprisonment for the handgun violation, to be served concurrently with the life sentence. No period of probation was imposed.

On July 1, 1999, appellant filed a motion for modification of sentence, which the circuit court held *sub curia*. Between 2004 and 2007, the circuit court conducted three hearings on appellant's motion. At the first two hearings, the circuit court declined to rule on the motion and instead continued to hold it *sub curia*. At the third hearing, the circuit court denied appellant's request for modification.

On February 10, 2011, appellant filed a motion to correct an illegal sentence pursuant to Maryland Rule 4-345(a), which confers revisory power on courts to correct an illegal sentence at any time.[2] On August 1, 2011, the circuit court conducted a hearing on appellant's motion. At that hearing, the fact that appellant's split sentence[3] had not included any period of probation was raised for the first time. The circuit court stated its belief that

[2] Maryland Rule 4-345(a) states:

> **Illegal Sentence.** The court may correct an illegal sentence at any time.

[3] A split sentence is one that contains some portion of suspended time, in addition to executable time.

appellant's split sentence without probation for first degree murder was an illegal sentence under Maryland statutory law. The circuit court, however, concluded that adding probation on top of appellant's sentence would impermissibly lengthen his sentence, since his sentence had resulted from a plea bargain. The circuit court denied appellant's motion to correct an illegal sentence and permitted the sentence to remain intact as originally imposed, without correcting the illegality.

Appellant timely filed a notice of appeal, and on April 4, 2012, appellant filed his brief. Shortly thereafter, on June 26, 2012, while the appeal was pending, the Court of Appeals issued its decision in *Greco v. State*, 427 Md. 477 (2012). *Greco*, discussed in depth *infra*, held that a split sentence without probation for first degree murder is an illegal sentence that must be corrected by the imposition of probation.

After the issuance of *Greco*, the circuit court *sua sponte* ordered a hearing to correct the illegal sentence in appellant's case. The hearing was held on February 5, 2013. At the conclusion of the hearing, the circuit court maintained appellant's sentence of life, with all but thirty-five years suspended, and added five years' probation to commence upon appellant's release. Shortly thereafter, on February 20, 2013, appellant filed a motion for modification of sentence. On June 10, 2013, after a hearing, the circuit court denied appellant's motion.

On June 20, 2013, appellant filed a new motion to correct an illegal sentence. In his motion, appellant argued that the addition of probation to his sentence of life, suspend all but thirty-five years, violated his plea agreement, thus rendering the corrected sentence

illegal. On July 22, 2013, the circuit court denied appellant's motion to correct an illegal sentence without a hearing. Appellant filed a timely notice of appeal.

DISCUSSION

A. The Contentions of the Parties

Appellant contends that the holding of *Greco*, which concerned a defendant convicted by a jury, is not directly applicable to his case because he was convicted by admission of guilt as part of a plea agreement. Appellant asserts that *Greco*'s application to his case must be viewed in light of his decision to implicate himself in exchange for a lesser sentence. He argues that the imposition of any additional penalty to his agreed upon plea violates the established principle that a binding plea agreement becomes the statutory maximum penalty to which a defendant may be sentenced. Appellant contends that the addition of probation caused his sentence to exceed the "statutory maximum," i.e. the cap of his plea agreement. Appellant asserts that by exceeding the statutory maximum for his sentence, his sentence is rendered illegal.

Appellant argues that he is entitled to a probation-free sentence that does not exceed thirty-five years. He states that the "tension between the two illegalities"—the split sentence without probation for first degree murder and the corrected sentence with probation added on top of his plea agreement terms—"should be resolved in appellant's favor." In the alternative, appellant urges the court to order a resentencing that does not exceed thirty-five years total, if the court finds that some period of probation must be imposed in addition to a period of incarceration.

The State counters that appellant's original sentence was clearly illegal and required correction because a split sentence without probation is effectively a term-of-years sentence, which, under Maryland statutory law, is not permitted for a first degree murder conviction. The State further argues that the thirty-five years cap on appellant's sentence relates only to the immediately executable time of his sentence, and that appellant, in fact, agreed to a life sentence as his maximum punishment. Accordingly, adding probation to appellant's sentence, while maintaining the executable time at thirty-five years, does not violate the terms of his plea agreement.

Further, the State asserts that, pursuant to Maryland case law, sentencing courts have the right to impose a period of probation for any plea agreement that provides for a suspended sentence. The State further avers that appellant implicitly agreed to a period of probation when he accepted a suspended life sentence, since probation is necessary to provide an enforcement mechanism for the suspended portion of his sentence. Thus, according to the State, the circuit court appropriately corrected appellant's illegal sentence—and did not create a new illegality—when it added probation to appellant's period of incarceration.

In the alternative, the State argues that this Court should rescind the plea agreement should we find that probation was not a part of appellant's original sentence, because a defendant's consent to an illegal sentence does not transform an illegal sentence into a legal one. Thus, according to the State, there is no valid plea agreement in place in appellant's case.

B. Standard of Review

We apply the following standard of review to whether a sentence is illegal and requires correction under Rule 4-345(a):

> Rule 4–345(a) appellate review deals only with legal questions, not factual or procedural questions. Deference as to factfinding or to discretionary decisions is not involved. Once the outer boundary markers for a sentence are objectively established, the only question is whether the ultimate sentence itself is or is not inherently illegal. That is quintessentially a question of law calling for *de novo* appellate review.

Carlini v. State, 215 Md. App. 415, 443 (2013).

C. Analysis

i. Appellant's Original Sentence was Illegal and Matthews *Does Not Apply*

Here, appellant's original split sentence, like the split sentence in *Greco*, was illegal. The circuit court erred when, for first degree murder, it imposed a sentence of life, suspending all but thirty-five years, but did not impose some portion of probation. In so doing, appellant's sentence was effectively converted to an impermissible term-of-years sentence. It is clear from Md. Code Ann., Art. 27 § 407, now codified as Md. Code Ann., Crim. Law § 2-201, and *Greco*, that a term-of-years sentence is an illegal sentence for first degree murder.

In *Greco*, following conviction by a jury, the defendant was sentenced to life, all but fifty years suspended, with no period of probation, for first degree murder. 427 Md. at 486. On review, the Court of Appeals noted that while the failure to impose a period of probation in a split sentence does not necessarily render the sentence illegal, it does preclude it from "having the status of a split sentence." *Id.* at 505 (quoting *Cathcart v.*

State, 397 Md. 320, 330 (2007)). Thus, the Court of Appeals observed that Greco's split sentence without probation was effectively a term-of-years. *Id.* at 513.

The Maryland Code, however, enumerates the possible penalties upon conviction for first degree murder as: "(i) imprisonment for life without the possibility for parole; or (ii) imprisonment for life."[4] Md. Code Ann., Crim. Law § 2-201(b)(1). Therefore, based on these sentencing options, the *Greco* Court concluded as follows:

> Because the statutorily prescribed penalty for first degree murder is, at minimum, life imprisonment (although the court may exercise its discretion and suspend any portion thereof) *a fifty-year term-of-years sentence is illegal because it is not authorized by statute.*

427 Md. at 505 (emphasis added).

The Court of Appeals went on to hold that Greco's split sentence for first degree murder must include probation to be legal. *Id.* at 513. Accordingly, the Court remanded the case for resentencing and directed the circuit court to impose a sentence of life imprisonment, with all but fifty years suspended, to be followed by some period of probation. *Id.*

Having established that appellant's original sentence for first degree murder was illegal because it did not contain a period of probation, we now turn to whether its illegality was cured by consent. We hold that appellant's consent to the illegal sentence via his plea agreement did not transform the illegal sentence into a legal one. Indeed, Maryland case

[4] Appellant was convicted under Art. 27 § 407, which is presently codified at Crim. Law § 2-201. At the time of appellant's conviction, first degree murder was a capital offense, punishable by death. The State, however, did not seek the death penalty in appellant's case.

law is clear that a defendant cannot rightfully consent to an illegal sentence. In *White v. State*, the Court of Appeals declared that a "defendant cannot validate an illegal sentence or insulate it from appeal or collateral attack by consent or waiver." 322 Md. 738, 749 (1991). And again in *Holmes v. State*, the Court of Appeals stated without qualification that "[a] defendant cannot consent to an illegal sentence." 362 Md. 190, 196 (2000). In *Holmes*, the Court of Appeals also cited with approval cases from other jurisdictions supporting this point. *Id.* (citing *State v. Woody,* 613 N.W.2d 215, 218 (Iowa 2000) (stating that neither party may rely on a plea agreement to uphold an illegal sentence); *State v. Nemeth,* 519 A.2d 367, 368 (N.J. Super. Ct. App. Div. 1986) (holding that there can be no plea bargain to an illegal sentence); *McConnell v. State,* 12 S.W.3d 795, 799 (Tenn. 2000) (holding that, where plea bargain exceeded maximum sentence available, sentence was a nullity and cannot be waived)).

Appellant's consent to the sentence originally imposed by the circuit court—life, with all but thirty-five years suspended and no probation—did not validate the illegal sentence. "[C]onsent is not determinative" of a sentence's legality "because consent does not transform an illegal sentence into a legal one." *Stachowski v. State*, 213 Md. App. 1, 26 (2013). Appellant and the State simply did not enter into a valid plea agreement when they agreed to the terms of appellant's deal. Thus, the parties and the circuit court could not be bound by appellant's plea agreement because, *ipso facto*, there was no valid plea agreement.

Appellant contends that his case is governed by *Matthews v. State*, 424 Md. 503 (2012). That case, however, is easily distinguishable because Matthews' plea agreement, which was consented to by the parties and exceeded by the circuit court, was a *valid* one.

In *Matthews*, the defendant pled guilty to attempted first degree murder, two counts of first degree assault, and unlawful use of a handgun in the commission of a felony or crime of violence. *Id.* at 506-07. In exchange for the defendant's pleas of guilt, the prosecution agreed that it would "'be asking for incarceration of forty-three years . . . . That cap is a cap as to actual and immediate incarceration at the time of initial disposition.'" *Id.* at 507. While the circuit court "'agreed to cap any sentence,'" it also advised the defendant that, "'theoretically I can give you anything from the mandatory minimum on the one count, which is five years without parole, up to the maximum of life imprisonment.'" *Id.* At sentencing, the prosecution requested that the circuit court sentence the defendant to life imprisonment with all but forty-three years suspended. *Id*. The circuit court, however, sentenced Matthews to a total of life imprisonment, with all but thirty years suspended, for all of his charges. *Id.*

On review, the Court of Appeals had to determine whether the cap of forty-three years imposed by the defendant's plea agreement meant forty-three years of executable time or forty-three years as a maximum total sentence. *See id.* at 520, 523. Because the meaning of the forty-three year cap was ambiguous, the Court of Appeals found that the ambiguity had to be "resolved in [the defendant's] favor." *Id.* at 525. The Court reversed and remanded the case for the defendant to be resentenced to a maximum of forty-three years' incarceration, including any suspended time. *See id.* Thus, on resentencing, the

defendant was to receive a total sentence of forty-three years, with all but thirty years suspended. *See id.* at 525-26.

In *Matthews*, the terms of the plea agreement under both interpretations—forty-three years as either the executable time or the maximum total sentence—theoretically constituted valid, legal sentencing options.[5] Therefore, the parties involved could have validly consented to either interpretation of the agreement. Because the plea agreement was valid in either case, it was binding on the circuit court. It was only because of its binding nature that the Court of Appeals addressed in whose favor the ambiguity should be resolved.

Unlike the plea agreement in *Matthews*, appellant's plea agreement was never a valid, enforceable agreement. Moreover, as noted *supra*, neither party may reasonably rely on a plea agreement to uphold an illegal sentence because consent does not transform an illegal sentence into a legal one. Thus, the circuit court was correct that appellant's original sentence was illegal and needed to be corrected. We shall now turn our attention to whether the modified sentence the court imposed—life, with all but thirty-five years suspended, to be followed by five years' probation—can be upheld under the applicable case law, or whether, based on the particular circumstances of this case, appellant is entitled to have the illegality of his original sentence corrected by alternative means.

[5] Attempted first degree murder is "subject to imprisonment not exceeding life." Md. Code Ann., Crim. Law § 2-205. Therefore, unlike first degree murder, attempted first degree murder does not carry a minimum statutorily prescribed penalty of life imprisonment.

ii. Fashioning the Appropriate Remedy

1. General Rule from *Rankin*

On June 21, 1999, Donald Rankin entered into a plea agreement with the State for conspiracy to commit a second degree sex offense. *See Rankin v. State*, 174 Md. App. 404, 406 (2007). The plea agreement called for "an active cap of no more than three years' [incarceration]." *Id.* Ultimately, despite the fact that the plea agreement form did not contain any explicit mention of probation, "[t]he trial court imposed a sentence of twenty years, with all but three years suspended, followed by a period of five years' probation." *Id.* at 407. No objections were raised to the probationary term at sentencing. *See id.* In fact, "[d]efense counsel told the trial court: 'Thank you, Your Honor. I [will] read his order for probation to him as we sit back at the chairs now, if I may.'" *Id.*

Approximately one year after his release from incarceration, Rankin violated his probation by committing a new offense. *See id.* As a result, he was "sentenced to serve ten years of the suspended sentence to run consecutive to the new sentence imposed on the case forming the basis for [his] violation of probation." *Id.* In an effort to have the consequences of his probation violation overturned, Rankin appealed. *See id.* He argued that "the plea agreement did not include a period of probation and that the trial court's adding the probation to his sentence rendered the sentence illegal." *Id.* at 408. On appeal, we held that the specific circumstances of Rankin's case indicated that probation was, in fact, part of what he bargained for:

> In the case *sub judice,* it is clear that a probationary period was implicit in the terms of the plea agreement. Although the prosecutor did not specifically discuss probation, he told the

> trial court that the only sentencing limitation in the agreement was that the "active cap," *i.e.,* the executed portion of the sentence, was three years. The written agreement recited that there could be additional suspended time and that there was "no other sentencing limitation except that provided by law." Thus the agreement gave the trial court the authority to suspend part of the sentence and impose probation, which it did.
>
> * * *
>
> We also conclude that a reasonable person in appellant's position would interpret the plea agreement to include probation. During the sentencing hearing, appellant affirmed as much when the trial judge warned him that, if he violated probation, he would "run the risk of doing substantially all of the back up time." Appellant said that he understood. Neither appellant nor his counsel objected to the imposition of a probationary period or to any condition of probation. Indeed, at the end of the sentencing hearing, defense counsel said that he would read the order of probation to appellant.

Id. at 410-11.

The above holdings centered on the particularities of Rankin's sentencing hearing and written plea agreement. However, we also held, more broadly, that "because a period of probation must be attached to a suspended sentence, . . . the right to impose a period of probation is included in any plea agreement that provides for a suspended sentence." *Id.* at 411-12. "If we were to hold otherwise," we explained, "the imposition of a suspended sentence would be meaningless." *Id.* at 412. The application of this general rule shall determine whether the circuit court erred in unilaterally imposing a five year period of probation, or whether appellant is entitled to some other remedy to cure the illegality in his original sentence.

2. *Cathcart* is Not Inconsistent with *Rankin*

Appellant contends that *Cathcart v. State*, 397 Md. 320 (2007), stands for the proposition that probation is not implied in split sentences. He asserts that, to the extent *Rankin* may conflict with *Cathcart*, the latter governs because the decision was issued by the Court of Appeals. We disagree because there is no such conflict between the two cases. The Court of Appeals stated in *Cathcart* that if a court chooses to impose a split sentence on a defendant, "there must be a period of probation attached to the suspended part of the sentence." 397 Md. at 327. Therefore, appellant's interpretation of *Cathcart*, as it applies to his case, is misguided.

In *Cathcart*, the defendant was sentenced to ten years' imprisonment for first degree assault, as well as life imprisonment, with all but ten years suspended, consecutively, for false imprisonment. *Cathcart*, 397 Md. at 322. No period of probation was imposed for the life imprisonment sentence. *See id.* On appeal, the defendant argued to the Court of Appeals that his false imprisonment sentence was illegal both as cruel and unusual punishment and because the sentence effectively precluded parole for twenty years when combined with his assault sentence, which meant the trial court had usurped the authority of the parole commission. See i*d.* at 324-25.

The Court of Appeals concluded that Cathcart's sentence, which did not include the mandated probation, was converted to a term-of-years sentence by the omission. *See id.* at 330. That term-of-years sentence, however, was not illegal for false imprisonment, which is a common law offense. *See id.* at 322, 328-30. Therefore, Cathcart's sentence could stand. *See id.* at 330 (noting the defendant's sentence, as a term-of-years sentence, had none

of the attributes of a life sentence and therefore did not present the problems defendant complained of in his appeal). The Court also explained that

> [i]f the [sentencing] court has chosen not to impose a period of probation and thereby limited the period of incarceration to the unsuspended portion of the sentence, the effect of remanding the case for it to do so would be tantamount to allowing it to increase the sentence from that fixed number of years to a life sentence, and our jurisprudence does not allow for that.

Id.

Appellant's case is quite different. As explained *supra*, conversion of appellant's split sentence to a term-of-years sentence by the failure to include probation rendered his sentence illegal. That was not the case for the defendant in *Cathcart*. Appellant had to be sentenced to life imprisonment as his maximum sentence for first degree murder, and, pursuant to *Greco*, that maximum sentence had to be provided meaning through an enforcement mechanism—namely, probation.

The Court of Appeals determined that Cathcart's case would not be remanded for an increase in his sentence from a "fixed number of years to a life sentence." *Cathcart*, 397 Md. at 330. Cathcart's sentence was legal as a term-of-years sentence. Converting it from a term-of-years to an enforceable split sentence increased his penalty, but that increase was not required by statute since his offense was one at common law. Even in holding that Cathcart's case would not be remanded for the imposition of probation, the Court of Appeals recognized that in "most" of the out-of-jurisdiction cases it surveyed, appellate courts did, in fact, remand cases like Cathcart's for probation to be entered. *Id.* at 329-30. The Court noted it was not "choos[ing] that route." *Id.* at 330.

In appellant's case, both statutory and case law require that his maximum sentence be enforceable as life imprisonment, rather than a term-of-years. Because appellant's sentence was illegal without probation, it had to be corrected, unlike *Cathcart*. This outcome is not inconsistent with *Cathcart* since, as noted, the Court in *Cathcart* stated clearly that a period of probation must be attached to a split sentence. Moreover, there is no tension between *Rankin* and *Cathcart* in appellant's case, as he asserts, because *Cathcart* did not contemplate a situation in which a split sentence was rendered illegal by conversion to term-of-years through the omission of probation. *Greco* addressed that situation, and *Greco*, read in conjunction with *Rankin*, establishes that the circuit court in appellant's case correctly recognized that appellant's original sentence was illegal.

3. Implied Exception to the General Rule Mandates a New Hearing

We shall explain that the present case fits into an exception to the general rule that probation is implied in any split sentence. We begin with a further discussion of the *Greco* case. The petitioner in *Greco* was convicted by a jury of first degree premeditated murder, first degree rape, and first degree felony murder. *See* 427 Md. at 482. For the first degree murder conviction, he was sentenced to life imprisonment, with all but fifty years suspended and no period of probation. *See id.* at 505. The petitioner in that case advanced a similar argument to the one being advanced by appellant: "that his life sentence for first degree murder . . . was converted by operation of law into a fifty year term-of-years sentence, pursuant to [the Court of Appeals'] holding in *Cathcart*." *Id.*

The Court of Appeals ultimately rejected Greco's argument, explaining:

> In sum, Petitioner's previously imposed sentence for first degree premeditated murder of life, suspend all but fifty years, was converted by operation of law into a term-of-years sentence of fifty years imprisonment. That converted sentence was not authorized by statute; therefore, it was illegal. On remand, the Circuit Court is limited by the maximum legal sentence that could have been imposed, with the illegality removed. That is, the Circuit Court must impose a sentence of life imprisonment, all but fifty years suspended, to be followed by some period of probation.

Id. at 513. Therefore, if the general rule applies in appellant's case, then the circuit court did not err where it followed in *Greco*'s footsteps and unilaterally tacked a probationary term onto the end of appellant's thirty-five years of executable time. Because both were effectively given term-of-years sentences for first degree murder, the only difference between Greco and appellant's cases is the manner in which they were found guilty: Greco was sentenced following a jury conviction, while appellant was sentenced pursuant to a plea agreement. In order to determine whether this difference should have any effect on our resolution of the present case, we must now turn our attention back to *Rankin*.

As indicated *supra*, this Court held in *Rankin* that "the right to impose a period of probation is included in any plea agreement that provides for a suspended sentence." 174 Md. App. at 411-12. What we must determine is whether that holding was meant to apply across the board, or whether we envisioned a circumstance in which an exception might apply. For the following reasons, we hold that an exception indeed applies, which precludes probation from being implied in appellant's sentence.

In support of our holding that the right to impose probation is implied when a plea agreement provides for a suspended sentence, we cited a variety of cases from other

jurisdictions. *See id.* at 412-14. One of those cases was *State v. Winer*, 69 Conn.App. 738, 796 A.2d 491, *cert. denied*, 261 Conn. 909, 806 A.2d 50 (2002). At the conclusion of our discussion of *Winer*, we indicated: "The court also opined that Winer's failure to object to the probation for a period of fourteen months made 'clear that [Winer] *contemplated* a period of probation when he entered into his plea agreement.'" *Rankin*, 174 Md. App. at 413 (quoting 69 Conn.App. at 753, 796 A.2d at 500) (emphasis added).

We also discussed *Gammarano v. United States*, 732 F.2d 273 (2nd Cir. 1984), in support of the general rule that probation is implied in any suspended sentence resulting from a plea agreement. In our discussion of *Gammarano*, as we did in our discussion of *Winer*, we pointed out that agreement with the probationary term—*i.e.*, contemplation of probation—was essential:

> The United States Court of Appeals for the Second Circuit concluded that the five-year period had not violated Gammarano's "reasonable expectation under the plea agreement," opining that " his inaction indicates that the probation term *satisfied his expectations under the plea agreement*."

Rankin, 174 Md. App. at 414 (quoting *Gammarano*, 732 F.2d at 276) (emphasis added).

Finally, after discussing the various cases from other jurisdictions that support the general rule, we indicated that "[Rankin's] conduct demonstrated both an *understanding* and an *agreement* to the imposition of a probationary period." *Rankin*, 174 Md. App. at 414. The same, however, is not true in appellant's case. There is absolutely no evidence that appellant contemplated a probationary term when he entered into his plea agreement and was subsequently sentenced in accordance with it. Therefore, we hold that probation

cannot be implied in appellant's sentence. Because appellant never contemplated, understood, or agreed to probation, this case fits into an exception to the general rule that, as we have just demonstrated, was implicitly discussed in *Rankin*.

The fact that probation cannot be implied in appellant's sentence does not negate the need to correct the sentence's illegality. In *Greco*, we held that in order to correct the illegality, "the Circuit Court must impose a sentence of life imprisonment, all but fifty years [(the executable time imposed in the original sentence)] suspended, to be followed by some period of probation." 427 Md. at 513. Because appellant never contemplated probation, the circuit court cannot cure the illegality in appellant's sentence by unilaterally imposing a period of probation. However, pursuant to *Greco*, the only way to make appellant's sentence legal would be to impose some period of probation to follow the thirty-five years of executable time from his original sentence. And, in turn, the only way that can happen in this case is with appellant's consent.

Accordingly, we vacate the period of probation that was unilaterally imposed by the circuit court. We also remand this case back to the circuit court with instructions to hold a new hearing for purposes of correcting the illegality in appellant's sentence. If appellant agrees with the State to some period of probation to follow his thirty-five years of active incarceration, then his sentence will have been properly corrected. However, if that does not happen, then appellant shall have the right to withdraw his plea agreement in favor of a new trial. We explain.

4. Alternative Remedy Shall be Withdrawal of the Plea Agreement

We now must address what appellant's remedy shall be in the event that no agreement is reached regarding a probationary term to follow the executable time of thirty-five years in the original sentence. We shall hold while specific performance—*i.e.*, a thirty-five year term-of-years sentence—is not an appropriate remedy, appellant shall have the option to withdraw his plea agreement in favor of a new trial.

Specific performance is most often a remedy when a party has breached the plea agreement or when a party has substantially relied on the agreement. *See Parker*, 334 Md. 576, 598 (1994). "Specific performance becomes problematic, however, when the original promise upon which the defendant has relied cannot legally be fulfilled." *Id.* at 599. In such cases, "[m]any jurisdictions follow the rule that, in general, the proper remedy for a plea bargain based on an illegal sentence is to allow the defendant the opportunity to withdraw the guilty plea." *Id.* There is, however, "ample authority supporting the election of specific performance" where there is a violation of sentencing provisions or a prosecutor has exceeded his or her authority. *Id.* at 600. The proper resolution, then, depends on the facts of the case and the jurisdiction. *See generally id.* at 599-607.

Based on our survey of the cases cited in *Parker*, as well as others, and our review of the record in appellant's case, we conclude that appellant is not entitled to specific performance of the terms of his original plea bargain. As indicated *surpa*, under Maryland law, a "defendant cannot validate an illegal sentence or insulate it from appeal or collateral attack by consent or waiver." *White*, 322 Md. at 749. Therefore, although a court in another jurisdiction may reach a different conclusion, the law in Maryland is such that consent does

not validate an illegal sentence. Appellant's original sentence was illegal. Without probation, his original sentence was for a term of years despite the statutory mandate that first degree murder be punished by life imprisonment. It follows that in Maryland, specific performance is inappropriate because "the original promise upon which [appellant] has relied cannot legally be fulfilled." *Parker*, 334 Md. at 599.

Nevertheless, "the proper remedy for a plea bargain based on an illegal sentence is to allow the defendant the opportunity to withdraw the guilty plea." *Id.* Therefore, should the appellant not agree to a period of probation to follow his thirty-five years of executable time,[6] then he shall have the right to withdraw his plea in favor of a new trial.

iii. Length of Potentially Agreed-To Probationary Term

Finally, having found that appellant, in order to correct his illegal sentence, may consent to serve probation after the thirty-five years of executable time imposed in his original sentence, this Court must determine whether any length of probation up to the statutory maximum of five years would be improper. For the following reasons, we hold that any length of probation up to the statutory maximum would be permissible.[7]

[6] By agreeing to a modified sentence of life imprisonment, with all but thirty-five years suspended, to be followed by some period of probation, appellant's sentence would effectively be corrected in the same manner in which the illegal sentence was corrected in *Greco*. However, because this case involved the added element of a plea agreement with no contemplation of probation whatsoever, the court cannot unilaterally impose probation in the present case without appellant's consent.

[7] The analysis that follows applies to the scenario where, at the resentencing hearing, appellant consents to a modified sentence of life, with all but thirty-five years suspended, to be followed by five years' probation. Our analysis shall establish that any probationary term up to the statutory maximum would be permissible. As such, a shorter probationary term would also be permissible.

Trial judges have "very broad discretion in sentencing." *Abdul-Maleek v. State*, 426 Md. 59, 71 (2012) (internal quotation marks omitted) (citing *Jones v. State*, 414 Md. 686, 693 (2010)). Judges are "accorded this broad latitude to best accomplish the objectives of sentencing—punishment, deterrence, and rehabilitation." *Poe v. State*, 341 Md. 523, 531 (1996) (internal quotation marks omitted) (citing *State v. Dopkowski*, 325 Md. 671, 679 (1992)). Because of the broad latitude afforded judges at sentencing, appellate courts will only review a sentence on three grounds: "(1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations; and (3) whether the sentence is within statutory limits." *Abdul-Maleek*, 426 Md. at 71.

1. Statutory Grounds

Of these three grounds, we address first whether a five year probationary term to follow the thirty-five years of active incarceration imposed in appellant's original sentence would, if agreed to, be within the statutory limits. Pursuant to Md. Code, Art. 27 § 641A—effective at the time of appellant's conviction and now codified at Md. Code Ann., Crim. Proc. ("CP") § 6-222—a circuit court may impose probation for a period not longer than five years when it imposes a sentence that is suspended in part.[8] Therefore, a five year probationary term would clearly be within the statutory limits.

[8] CP § 6-222 provides, in relevant part:

(a) A circuit court or the District Court may:

(continued...)

2. Constitutional Grounds

Examining next whether a five year probationary term would constitute cruel and unusual punishment or otherwise violate constitutional provisions, we find that there would be no such constitutional violation. Appellant only briefly addresses this issue in his argument, suggesting that "due process, the rule of lenity, and fundamental fairness" permit the specific enforcement of his plea agreement, despite its inherent illegality. Appellant cites three cases in support of his contention, but we are not persuaded by his argument or the cases upon which he relies.

Appellant first argues, quoting *United States v. Lanier*, 520 U.S. 259 (1997), that "'due process bars courts from applying novel construction of a criminal statute' when no 'prior judicial decision has fairly disclosed to be within its scope [sic].'" *Id.* at 266. The full quote from *Lanier*, however, better aids our analysis by presenting with more clarity the Supreme Court's meaning. The Supreme Court stated, in full: "[A]lthough clarity at

> (1) impose a sentence for a specified time and provide that a lesser time be served in confinement;
>
> (2) suspend the remainder of the sentence; and
>
> (3)(i) order probation for a time longer than the sentence but, subject to subsections (b) and (c) of this section, not longer than:
>
> 1. 5 years if the probation is ordered by a circuit court; or
>
> 2. 3 years if the probation is ordered by the District Court[.]

the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to *conduct* that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.* (internal citations omitted) (emphasis added). The *Lanier* case is no way instructive to this court on the issue of whether or not appellant's plea bargain must include probation to be enforceable. *Lanier* deals with the novel application of criminal statutes to *conduct*. The criminality of appellant's conduct is not at issue in this case. Instead, the only issue is how to correct an illegal sentence. Therefore, *Lanier* does not apply.

Appellant next cites *Monoker v. State*, 321 Md. 214 (1990), as authority for the applicability of the rule of lenity to his case. Under the rule of lenity, "an ambiguous penal statute" must be "strictly construed against the State and in favor of the defendant." *Gardner v. State*, 344 Md. 642, 651 (1997). "Originally formulated by the United States Supreme Court as a principle of statutory construction, the rule provides that doubt or ambiguity as to whether the legislature intended that there be multiple punishments for the same act or transaction 'will be resolved against turning a single transaction into multiple offenses.'" *White v. State*, 318 Md. 740, 744 (1990) (quoting *Simpson v. United States*, 435 U.S. 6, 15 (1978)).

Importantly, "'[t]his policy of lenity means that the Court will not interpret a . . . criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what [the legislature] intended.'" *White*, 318 Md. at 744 (quoting *Simpson*, 435 U.S. at 15) (alterations in original) (internal

citations omitted). Where a statute is not ambiguous, "the rule of lenity has no application." *Gardner*, 344 Md. at 656.

Appellant has failed to explain how, exactly, the rule of lenity applies to his case. He has not identified a statutory ambiguity that the rule would properly correct, and we have not identified any ambiguity in the statutes applicable to appellant's case. Moreover, should appellant agree to a term of probation—even up to the five year maximum—the circuit court would be acting in accordance with appellant's consent, not guessing as to the intent of the legislature. Therefore, we hold that the rule of lenity does not apply.

Finally, appellant quotes *Robinson v. Lee*, 317 Md. 371 (1989), in support of his contention that fundamental fairness demands enforcement of his illegal sentence. Robinson states: "fundamental fairness dictates that the defendant understand clearly what debt he must pay society for his transgressions. If there is doubt as to the penalty, then the law directs that his punishment must be construed to favor a milder penalty over a harsher one." *Id.* at 379-80.

This Court is cognizant of the importance of plea deals to the administration of our justice system. The Court of Appeals has explained that plea agreements "eliminate many of the risks, uncertainties and practical burdens of trial, permit the judiciary and prosecution to concentrate their resources on those cases in which they are most needed, and further law enforcement by permitting the State to exchange leniency for information and assistance." *Cuffley v. State*, 416 Md. 568, 577 (2010) (quoting *State v. Brockman*, 277 Md. 687, 693 (1976)). Thus, "plea bargains, when properly utilized, aid the administration of justice and, within reason, should be encouraged." *Brockman*, 277 Md. at 693.

In the present case, appellant contends, on the one hand, that it would be unfair to require his original plea bargain—which called for a sentence of life, with all but thirty-five years suspended and no probation—to be altered in any way. But on the other hand, the State would not be receiving the full benefit of its bargain if appellant's maximum sentence was rendered meaningless. *See Parker*, 334 Md. at 603. A sentence of life imprisonment without a mechanism for enforcement deprives the State of its opportunity to request, from a court, some portion of the suspended time of appellant's sentence should appellant reoffend after release. *Cf. id.* (noting that unconditional release of defendant who pled guilty to his involvement in a robbery homicide deprived the State of a benefit of its bargain. "[B]ecause parole is a matter of grace and not of right," the Court of Appeals explained, "[the defendant] certainly possessed no vested expectation that he would be paroled." (internal citations omitted)).

Looking first to the purpose of probation to aid our analysis, we have stated that probation "is designed to serve both society and the offender." *Christian v. State*, 62 Md. App. 296, 304 (1985) (citing *Roberts v. United States*, 320 U.S. 264, 273 (1943) (Frankfurter, J., dissenting)). Furthermore,

> [i]t provides a period of grace "to aid in the rehabilitation of a penitent offender . . . ." Its chief purpose is "to promote the reformation and rehabilitation of the criminal . . . ."

Christian, 62 Md. App. at 304 (internal citations omitted). We have explained that probation is, at its essence, "an act of clemency bestowed *by the court." Callahan v. State, 215 Md. App. 146, 156 (2013) (quoting Simms v. State, 65 Md. App. 685, 689 (1986) (emphasis added in Simms), cert. granted, 437 Md. 422 (2014))*.

Indeed, the Court of Appeals noted that probation "releases a convicted person into the community instead of sending the criminal to jail or prison," and as such, it is "not an entitlement" but a "matter of grace." *Stouffer v. Pearson*, 390 Md. 36, 57 n.19 (2005) (citing *Kaylor v. State*, 285 Md. 66, 75 (1979)). We have also explained the five year limit on probation: "The policy behind Maryland's probation statutes is that rehabilitation, if it is to be achieved at all, will be achieved within a five year period." *Caitlin v. State*, 81 Md. App. 634, 642 (1990). We further clarified that "[i]t can hardly be said [] that the underlying principles of probation would be served during the time when a probationer is incarcerated and beyond the reach of probationary supervision. Furthermore, the legislature did not intend that a term of imprisonment and a term of probation be simultaneously served." *Id.* (finding that periods during which defendant was imprisoned for violating his probation tolled probationary period to extent of duration of imprisonment).

To be sure, if appellant agrees to probation, his liberty will be affected by the requirements of that split sentence enforcement mechanism. He will be required to report to an agent at regular intervals; he may be asked to provide proof of employment or of his efforts to find employment; he may be screened for drug or alcohol addictions and offered treatment if a need is determined; and he will be required to comply with other conditions that are customary under "standard probation."

By imposing probation, the justice system is, in essence, requiring appellant to act in a law-abiding manner, and it is providing a temporary oversight mechanism to both verify compliance and assist with appellant's reintegration into society. Probation is "in substance and effect a bargain made by the people, through legislation and the courts, with

the malefactor that he may be free as long as he conducts himself in a manner consonant with established communal standards and the safety of society." *Scott v. State*, 238 Md. 265, 275 (1965). Appellant is being asked, during probation, to act as an upright citizen and to bear both verification of, and assistance with, his compliance with the law. Without a doubt, probation touches upon a defendant's liberty far less than incarceration does.

Probation is overwhelmingly intended to assist appellant's rehabilitation and reintegration into society, concomitant with the protection of the public's interest. Accordingly, imposition of probation—up to five years—in order to effect the full meaning of appellant's maximum sentence, and to protect the benefit of the State's bargain, would not violate principles of fundamental fairness. Appellant pled guilty to first degree murder, which demanded a sentence of life imprisonment.

3. Impermissible Considerations by the Sentencing Judge

Lastly, the third ground on which sentences are reviewed is whether the sentencing judge was motivated by ill-will, prejudice, or other impermissible considerations. On remand, the circuit court shall either: (1) attach a period of probation agreed to by appellant to the end of his original thirty-five years of active incarceration; or (2) conduct a new trial, if appellant elects to withdraw his guilty plea. Therefore, because we are vacating the five years of probation previously imposed due to lack of contemplation by appellant—and because any increase in appellant's sentence under his plea agreement shall be based on his consent—ill-will, prejudice, or other impermissible considerations by the sentencing judge is not a concern on remand.

CONCLUSION

A sentence other than life imprisonment is illegal for first degree murder. Therefore, appellant's original sentence of life, with all but thirty-five years suspended and no probation, was illegal and needed correction. Generally, a sentence like appellant's could be corrected by adding probation to the otherwise legal portion of the sentence (*i.e.*, by adding probation to follow the thirty-five years of executable time previously imposed) because probation is ordinarily implied in any split sentence. However, because there was absolutely no contemplation of probation before appellant was sentenced pursuant to the terms of his plea agreement, this case represents an exception to the general rule.

Therefore, we vacate the five year probationary term that the circuit court previously imposed without appellant's consent. We also remand this case with the following instructions: (1) First, a hearing shall be conducted at which appellant shall be given the opportunity to agree, either with the State or the court, to some period of probation to follow the thirty-five years of executable time originally imposed pursuant to the plea agreement; and (2) If no agreement regarding probation is reached at the hearing, then appellant shall have the right to withdraw his guilty plea in favor of a new trial.[9] If appellant elects to withdraw his guilty plea and is subsequently convicted at the conclusion of his new trial, then the sentence he is eligible to receive upon his conviction shall not be limited by the

[9] Inherent in the appellant withdrawing his guilty plea is the possibility that he might enter into a new plea agreement with the State prior to the commencement of his new trial.

terms of his original guilty plea in the same manner in which a court is limited when merely correcting the illegality in a previously imposed sentence without a new trial.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS VACATED. CASE REMANDED FOR ADDITIONAL PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.