

**UNREPORTED**  
**IN THE COURT OF SPECIAL APPEALS**  
**OF MARYLAND**

No. 140

September Term, 2015

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MARK LOMAX

v.

RICHARD GRAHAM, JR., WARDEN

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Meredith,  
Nazarian,  
Thieme, Raymond G., Jr.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Meredith, J.

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Filed: March 30, 2017

This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In this case, Mark Lomax, appellant, appeals from the denial of a petition for habeas corpus he filed in the Circuit Court for Allegany County. On June 22, 2009, Mr. Lomax was sentenced on two robbery charges as to which he had pleaded guilty in the Circuit Court for Baltimore City. On one offense, he was sentenced to 15 years, with 10 years suspended, and 3 years of supervised probation. On the second offense, he was sentenced to 5 years, all suspended, and 3 years of supervised probation. After Mr. Lomax was released on probation, he was charged with committing a violation of his probation, and, on November 29, 2011, the Circuit Court for Baltimore City ordered that he serve the 15 years that had previously been suspended.

In the meantime, however, Mr. Lomax was found guilty in the United States District Court for the District of Maryland on several counts related to multiple robberies that took place in August 2009; and, on November 8, 2011, the federal court imposed a sentence of 240 months. The Circuit Court for Baltimore City apparently believed that the federal sentence would have priority, and, on November 29, 2011, ordered Mr. Lomax to serve the previously suspended 15 years “consecutive” to the 240-month sentence he received in the United States District Court. But the United States Bureau of Prisons declined to take custody of Mr. Lomax, and he has remained in the custody of the State of Maryland. On August 22, 2014, Mr. Lomax, acting *pro se*, filed a petition for habeas corpus in the Circuit Court for Allegany County. The circuit court denied Mr. Lomax’s petition. This appeal followed.

## **QUESTIONS PRESENTED**

Mr. Lomax presents three questions for our review, which appear in his brief as follows:

- I. Was the trial court's denial of the Appellant Habeas corpus legally correct or "clearly erroneous" when the court was asked to decide if federal authorities deliberately waived jurisdiction and whether he is illegally confined in state custody?
- II. Whether federal authorities concept of primary jurisdiction – their "Memorandum" – supercedes clearly established Maryland Rules, statutory and common laws, and rules of Court's?
- III. Whether, at two critical juncture's throughout the proceeding's, federal authorities have deliberately waived jurisdiction over Appellant, and as a result, the federal sentence and detainer are now moot and void?

For the following reasons, we will affirm the judgment of the Circuit Court for Allegany County denying Mr. Lomax's petition for habeas corpus.

## **FACTUAL & PROCEDURAL BACKGROUND**

After receiving partially suspended sentences in the Circuit Court for Baltimore City on June 22, 2009, Mr. Lomax was arrested in August 2009 and charged with violating his probation. While incarcerated in Baltimore pending trial on the new state charges (which were eventually dismissed), Mr. Lomax was charged by federal authorities with robbery.

On June 16, 2011, Mr. Lomax was found guilty in the United States District Court for the District of Maryland on three counts of interference with commerce by robbery under 18 U.S.C. § 1951. On November 8, 2011, the United States District Court sentenced Mr. Lomax to a 240-month term of imprisonment in the United States Bureau of Prisons.

As a result of his convictions in the United States District Court, Mr. Lomax was found to be in violation of his probation by the Circuit Court for Baltimore City. On November 29, 2011, the circuit court committed Mr. Lomax to serve 10 years in the Department of Corrections in case no. 205234063. The circuit court also committed Mr. Lomax to serve 5 years in the Department of Corrections in case no. 205234065, to run consecutively to the 10 year sentence. The circuit court apparently assumed that the previously announced federal sentence would commence first, and directed that the 15-year commitment was to be consecutive to the sentence that had been imposed by the United States District Court. We infer that the circuit court judge also wished to make it clear that the time Mr. Lomax served on the federal sentence would not be credited against the 15-year sentence being imposed on account of his violation of probation. Mr. Lomax was received into the Department of Corrections's custody on November 29, 2011. The federal authorities concluded that the State of Maryland continued to have "primary" custody and declined to take custody of Mr. Lomax.

On August 22, 2014, Mr. Lomax filed a petition for habeas corpus in the Circuit Court for Allegany County. In his petition, Mr. Lomax posed the following questions to the circuit court:

1. Did the State judge have the authority to Order [Mr. Lomax's] sentence to be served consecutive?
2. When shall Petitioner begin to serve his consecutive sentence?
3. Is Petitioner illegally in State custody (Jurisdiction)[?] By the Feds [n]ot assuming custody (Jurisdiction) first, have they waived jurisdiction to the State?

On January 29, 2015, the State filed its answer to Mr. Lomax's petition. On February 5, 2015, the circuit court issued a memorandum and order denying Mr. Lomax's petition. The circuit court held that Mr. Lomax's confinement was "lawful and proper," and explained that, "[b]ecause the State has primary jurisdiction and, as such, federal authorities have declined to accept custody of [Mr. Lomax] to serve his federal sentence until after the completion of his state sentence, the Department of Corrections properly commenced [Mr. Lomax's] state sentence on the day it was imposed," *i.e.*, November 29, 2011.

Mr. Lomax timely noted this appeal.

### **STANDARD OF REVIEW**

We explained the applicable standard of appellate review that we apply to a circuit court's denial of a petition for habeas corpus relief in *Wilson v. Simms*, 157 Md. App. 82, 91 (2004):

We review the denial of an application for habeas corpus relief under the standard set forth in Maryland Rule 8-131(c). We will review the case on both the law and the evidence, and we will not set aside the judgment on the evidence unless clearly erroneous. *Id.* Additionally, we note that Maryland Rule 15-303(e)(3)(A) provides that the court shall grant the writ unless "the judge finds from the petition, any response, reply, document filed with the petition or with a response or reply, or public record that the individual confined or restrained is not entitled to any relief."

Maryland Rule 8-131(c) mandates: "When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses."

## DISCUSSION

Although Mr. Lomax has purported to present three issues for our review, the second and third are not properly before this Court. Mr. Lomax's second and third questions presented pertain to *federal* primary jurisdiction and whether the *federal* authorities have the right to incarcerate Mr. Lomax once he is released from the custody of the State pursuant to the United States District Court's sentencing on November 8, 2011. Construing Mr. Lomax's brief to this Court liberally, *see Simms v. State*, 409 Md. 722, 732 (2009), he appears to contend that the circuit court erred by not ruling that United States Bureau of Prisons was required to take immediate custody of Mr. Lomax once he was sentenced in November 2011, or, alternatively, that the Bureau of Prisons cannot take custody of him once he completes his sentence at the Department of Corrections.

Maryland Rule 15-302(a) provides that a petition for a writ of habeas corpus may be filed by an individual who claims to be "unlawfully confined or restrained." The Court of Appeals has explained that "[h]abeas corpus actions may be maintained where the relief available is the ordering of a proceeding or hearing which may lead to the petitioner's release." *Lomax v. Warden, Maryland Corr. Training Ctr.*, 356 Md. 569, 575 (1999); *see also Gluckstern v. Sutton*, 319 Md. 634, 663 (1990) (stating that "Maryland cases clearly hold that it is not inappropriate in a habeas corpus case to grant relief other than the release of the prisoner."). Mr. Lomax's second and third questions presented, pertaining to federal jurisdiction and federal sentencing, do not contemplate relief that would result in Mr. Lomax's release from the Maryland Department of Corrections. Mr. Lomax correctly

acknowledges this in his reply brief to this Court. Questions concerning whether the federal government may lawfully incarcerate Mr. Lomax are questions for the federal courts, as “no comment or order by a state judge can control the service of a federal sentence.” *State v. Parker*, 334 Md. 576, 602 n.12 (1994) (quoting *Lionel v. Day*, 430 F.Supp. 384, 386 (W.D.Okla.1976)). Therefore, because Mr. Lomax’s second and third questions presented are not properly before us, we will not address them further.<sup>1</sup>

Mr. Lomax’s first question presented is properly before us, and asks whether the circuit court erred in denying his petition for habeas corpus. Mr. Lomax contends that the State “relinquished primary jurisdiction over [him] in April, 2010,” rendering his incarceration illegal. According to Mr. Lomax, the April 2010 date was the point in time when the State dropped charges pertaining to the same robberies as to which he was eventually charged and convicted in the United States District Court proceeding. Mr. Lomax appears to contend that, once the State dismissed its charges for the robberies, the State relinquished primary jurisdiction over him, and could not thereafter retain custody of him even though he had violated the conditions of his probation.

We agree with the circuit court that the State’s current custody of Mr. Lomax is legal. The United States Court of Appeals for the Eight Circuit has succinctly summarized

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<sup>1</sup> Mr. Lomax also asserts that he should have received credit for the time he was incarcerated while awaiting his 2011 trial and the imposition of his sentence for the violation of probation. Because the resolution of that issue would not result in his release, that issue is not properly before us on a petition for habeas corpus.

the principle of primary jurisdiction, and the interplay between separate state and federal sentences imposed upon a defendant, as follows:

Pursuant to the doctrine of primary jurisdiction, service of a federal sentence generally commences when the United States takes primary jurisdiction and a prisoner is presented to serve his federal sentence, **not when the United States merely takes physical custody of a prisoner who is subject to another sovereign’s primary jurisdiction.** See *United States v. Hayes*, 535 F.3d 907, 909–10 (8th Cir. 2008); see also 18 U.S.C. § 3585(a) (“A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.”); *Binford v. United States*, 436 F.3d 1252, 1256 (10th Cir. 2006) (sentence begins when received into custody for purpose of serving sentence, not when received into custody at an earlier time on a writ for the purpose of adjudicating federal claims).

**The first sovereign to take physical custody of a defendant retains “primary jurisdiction” until releasing that jurisdiction.** See *United States v. Cole*, 416 F.3d 894, 897 (8th Cir. 2005) (“As between the state and federal sovereigns, primary jurisdiction over a person is generally determined by which one first obtains custody of, or arrests, the person.”). “Generally, a sovereign can only relinquish primary jurisdiction in one of four ways: 1) release on bail, 2) dismissal of charges, 3) parole, or 4) expiration of sentence.” *Id.*

*Elwell v. Fisher*, 716 F.3d 477, 481–82 (8th Cir. 2013) (emphasis added); see also *Gillis v. State*, 333 Md. 69, 73 (1993) (explaining that, “[u]nder the ‘dual sovereignty’ doctrine, separate sovereigns deriving their power from different sources are each entitled to punish an individual for the same conduct if that conduct violates each sovereignty’s laws.”).

The State continues to have primary jurisdiction over Mr. Lomax, and he is legally incarcerated for violating his probation and serving the balance of the previously suspended sentence that was imposed on June 22, 2009. Mr. Lomax was in the physical custody of the State at the beginning of the proceedings in the United States District Court, as Mr.



Lomax acknowledges in his brief to this Court. *See United States v. Cole*, 416 F.3d 894, 897 (8th Cir. 2005) (“As between the state and federal sovereigns, primary jurisdiction over a person is generally determined by which one first obtains custody of, or arrests, the person.”) Following his conviction in the United States District Court, Mr. Lomax was returned to the Department of Corrections’s custody on November 29, 2011, to begin serving the balance of his Maryland sentence. Mr. Lomax is not being unlawfully confined or restrained; “it is well established that ‘[a] court has a power to impose whatever sentence it deems fit as long as it does not offend the maximum and minimum penalties.’” *Parker, supra*, 334 Md. at 592–93 (quoting *Kaylor v. State*, 285 Md. 66, 70 (1979)) (alteration in original).

Therefore, because Mr. Lomax has not yet completed serving the sentences that were imposed by the Circuit Court for Baltimore City on November 29, 2011, he is not entitled to be released from custody of the Department of Corrections, and the Circuit Court for Allegany County did not err in denying his petition for habeas corpus

**JUDGMENT OF THE CIRCUIT COURT  
FOR ALLEGANY COUNTY AFFIRMED.  
COSTS TO BE PAID BY APPELLANT.**