UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0617

September Term, 2014

TROY ROBERT ALLEN

v.

STATE OF MARYLAND

Meredith,
Berger,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: October 7, 2015

Following a jury trial in the Circuit Court for Wicomico County, Troy Robert Allen ("Allen"), appellant, was convicted of sexual abuse of a minor by a household member, two counts of third-degree sex offense, three counts of second-degree assault, and one count of fourth-degree sex offense.[1] At sentencing, in response to Allen's motion for new trial, the trial court struck one of Allen's convictions for third degree sex offense, entering a finding of not guilty. The court sentenced Allen to twenty-five years' imprisonment, all but five years suspended, for sexual abuse of a minor; ten years' imprisonment, all suspended, for one count of third degree sex offense; ten years' imprisonment, all suspended, for one count of second degree assault; and one year imprisonment, suspended, for one count of fourth degree sex offense. All sentences were ordered to run consecutively. Allen's other convictions were merged for sentencing purposes. The court further ordered that Allen serve five years of supervised probation following his incarceration.

In his timely appeal**,** Allen raises three questions for our consideration, which we have rephrased as follows:

> 1. Whether the trial court abused its discretion when it refused to ask two of Allen's proposed *voir dire* questions.

[1] Before Allen's trial, the State entered a *nolle prosequi* in two of the original three counts of fourth degree sex offense. "A nolle prosequi, or nol pros, is an action taken by the State to dismiss pending charges when it determines that it does not intend to prosecute the defendant under a particular indictment." *State v. Huntley*, 411 Md. 288, 291 n. 4 (2009) (internal citation omitted). The trial court granted Allen's motion for judgment of acquittal on the counts alleging indecent exposure.

2. Whether the trial court committed plain error by allowing the prosecutor to engage in allegedly improper closing argument.

3. Whether the trial court erred when it ordered Allen to have no unsupervised contact with minors, including his infant son, as a condition of probation.

Discerning no reversible error or abuse of discretion, we shall affirm the judgments of the circuit court.

FACTUAL BACKGROUND

Since the fall of 2012, Allen resided in the home of M., with whom he was in a romantic relationship. M. was the natural mother of B., born March 2002.[2] M. and Allen had a son together, F., born March 2013.

On August 1, 2013, after viewing some images on Allen's cell phone, M. became concerned about Allen and asked him to leave her home. On August 4, 2013, when B. returned from a vacation with her father, M. had a conversation with B. and T. As a result of B.'s disclosures during that conversation, M. and T. called the police. B. told the responding officers that Allen had engaged her in several instances of inappropriate sexual

[2] M. was divorced from B.'s father, T. M. and T. shared custody of B. B. lived with M. on Sunday, Monday, Tuesday, and alternating Saturdays, and with her father the remainder of the time.

contact.[3] On August 7, 2013, B. participated in a videotaped interview by a social worker at the Child Advocacy Center.[4]

When confronted by M. about B.'s allegations, Allen said, "I will not go down like this." Allen also said that he was leaving town and threatened to kill himself. Allen was arrested on August 4, 2013.

DISCUSSION

I. Requested *Voir Dire* Questions

Prior to Allen's trial, both parties submitted lists of requested *voir dire* questions. After the trial court finished its questioning of the potential jurors, defense counsel requested that the court ask two additional questions, numbers 18 and 19 from his list of requested questions:

> 18. Are you unable or unwilling to apply the principle in this case that the defendant is to be found not guilty unless he is proven to be guilty beyond a reasonable doubt and to a moral certainty?
>
> * * *
>
> 19. Are you unable or unwilling to apply the principle in this case that just because an indictment is filed against the

[3] B. reported that Allen exposed his penis to her on multiple occasions, once touched her forearm with his penis, and twice touched her breast. Allen also told B. that he "was going to put his thing in her thing." B. reported only one of the instances to her mother because she was afraid that Allen would be angry.

[4] In addition to B.'s in-person testimony at Allen's trial, B.'s videotaped interview was admitted into evidence and played for the jury.

> defendant charging one or more offenses, that does not mean, nor is it any evidence that the defendant is guilty?

The trial court declined to ask the requested *voir dire* questions, reasoning that both of these matters were "covered by instructions." Prior to closing arguments, the trial court instructed the jury:

> The defendant is presumed to be innocent of the charges. The presumption remains with the Defendant throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that he is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden remains with the State throughout trial. The defendant is not required to prove his innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence.

Allen contends that the trial court abused its discretion by refusing to ask the members of the venire the requested questions, which Allen asserts were "aimed at exposing disqualifying juror bias." Allen specifically identifies several jurors who "admitted . . . that they believed [Allen] was guilty[,]"[5] and suggests that the *voir dire* questions proposed by Allen "would have revealed additional jurors who felt similarly."

Voir dire (*i.e.*, the process of questioning prospective jurors) "is critical to implementing the right to an impartial jury" guaranteed by the United States and Maryland

[5] On the motion of defense counsel, the trial court struck for cause all of the jurors identified in Allen's brief, who indicated that they would have any trouble adhering to the presumption of innocence.

Constitutions.[6] *Pearson v. State*, 437 Md. 350, 356 (2014), *reconsideration denied*, April 17, 2014 (internal quotation omitted). Maryland courts employ "'limited *voir dire*[,]'" whereby "the sole purpose of *voir dire* 'is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification[.]'" *Pearson, supra*, 437 Md. at 356, (quoting *Washington v State*, 425 Md. 306 at 312-13 (2012)) (alterations in the original). The Court of Appeals has identified only "two broad areas of inquiry that may reveal cause for a juror's disqualification: (1) examination to determine whether the prospective juror meets the minimum statutory qualifications for jury service, and (2) examination to discover the juror's state of mind as to the matter in hand or any collateral matter reasonably liable to have undue influence over him." *Washington, supra,* 425 Md. at 313 (citing *Davis v. State*, 333 Md. 27, 35-36 (1993)).

This Court reviews a trial court's decision regarding whether to ask a requested *voir dire* question for abuse of discretion, based on the record of the *voir dire* process as a whole.

[6] U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."); Md. Decl. of Rts. Art. 21 ("That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.").

Pearson, *supra*, 437 Md. at 356 (citing *Washington*, 425 Md. at 314); *Curtin v. State*, 393 Md. 593, 160 (2006). A trial court does not abuse its discretion by refusing to ask *voir dire* questions that are not directed at a specific ground for disqualification, that merely fish for information to assist in the exercise of peremptory challenges, that probe the prospective juror's knowledge of the law, that ask a juror to make a specific commitment, or that address sentencing considerations. *Curtin*, *supra*, 393 Md. at 161-62.

The Court of Appeals's opinion in *Twining v. State*, 234 Md. 97 (1964), is dispositive of the *voir dire* issue raised by Allen. In *Twining*, the Court considered whether the trial court abused its discretion by refusing to ask prospective jurors whether they would give the defendant the benefits of the presumption of innocence and the burden of proof. *Id*. at 100. The Court of Appeals held that the trial court did not abuse its discretion, opining "[i]t is generally recognized that it is inappropriate to instruct on law at this stage of the case or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law." *Id*. The Court further noted that the principles stated in the requested *voir dire* questions were "fully and fairly covered in subsequent instructions to the jury." *Id*.

In his brief, Allen acknowledges that his arguments are inapposite to the Court of Appeals' holding in *Twining* and its progeny. He nonetheless urges us to conclude that *Twining* is not controlling because its holding is inconsistent with subsequent decisions that recognize a defendant's right to a *voir dire* question if the area of inquiry "entails potential biases or predispositions that prospective jurors may hold, which, if present, would hinder

their ability objectively to resolve the matter before them." In addition, he continues, the 1964 holding in *Twining* rested on the premise that jury instructions were advisory, which is no longer the law. We are not persuaded that the Court's holding in *Twining* is either inconsistent with more recent precedents or that it only applied when jury instructions were not binding.

In subsequent cases, including several decided within the last decade, well after jury instructions were determined to be binding, our appellate courts have continued to rely on the Court of Appeals's holding in *Twining.* In *Marquardt v. State*, 164 Md. App. 95, 144 (2005), this Court began its discussion "by stating that this Court has not, nor could it, retreat from *Twining*. We have consistently held that *voir dire* need not include matters that will be dealt with in the jury instructions." In *State v. Logan*, 394 Md. 378, 398-99 (2006), the Court of Appeals cited *Twining* for the proposition that "it is 'generally recognized that it is inappropriate . . . to question the jury as to whether or not they would be disposed to follow or apply stated rules of law[.]'" Furthermore, in *McFadden v. State*, 197 Md. App. 238, 250 (2011), *disapproved of on other grounds by State v. Stringfellow*, 425 Md. 461 (2012), this Court reaffirmed the holdings in *Twining* and *Marquardt*, reiterating that "[i]t has been held inappropriate to question the jury [during *voir dire*] as to whether or not they would be

disposed to follow or apply stated rules of law because they are covered in subsequent instructions to the jury." (Internal quotation marks omitted).[7]

Because Allen's proposed questions 18 and 19 merely rephrased the trial court's subsequent instructions regarding the presumption of innocence and reasonable doubt, the questions were unnecessary and improper. We conclude, therefore, that the trial court did not abuse its discretion by declining to pose the requested *voir dire* questions to the venire.

II. Prosecutor's Improper Comments in Rebuttal Closing Argument

Toward the end of the State's rebuttal closing argument, the prosecutor made several comments that Allen now contends were improper. Allen asserts that the trial court erred by failing to curtail the prosecutor's improper and prejudicial statements. Allen characterizes the prosecutor's statements as egregious and improper, arguing that Allen was so prejudiced by these arguments that it is necessary to reverse his convictions. As we shall explain, this issue is unpreserved.

It is clear from the record, and Allen concedes, that defense counsel did not lodge any objections to the prosecutor's comments when they were made, nor after the prosecutor finished her argument. Because defense counsel raised no objection to the allegedly improper statements, there is no ruling of the circuit court before us to review. We must,

[7] Even were we so inclined to disagree with the principles set forth in *Twining* -- which we are not -- as this court noted in *Marquardt*, *supra*, 164 Md. App. at 144 (quoting *Baker v. State*, 157 Md. App. 600, 618 (2004), "'it is up to the Court of Appeals, not this Court, to decide, as Allen suggests, that the reasoning of *Twining* is "now outmoded."'"

therefore, conclude that Allen's current arguments were not properly preserved. *See* Md. Rule 8-131(a) ("[T]he appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court"); *Jones-Harris v. State*, 170 Md. App. 72, 102 (2006) (holding that complaints regarding improper remarks in closing arguments are waived if "the improper argument alleged was not brought to the attention of the trial judge either when the argument was made or immediately after the prosecutor's initial argument was completed").

Allen, nonetheless, urges this Court to exercise its discretion to undertake plain error review of the allegedly improper comments in the prosecutor's rebuttal closing argument. The power to decide issues not raised below is "solely within the court's discretion and is in no way mandatory." *Conyers v. State*, 354 Md. 132, 148 (1999) (citing *State v. Bell*, 334 Md. 178, 187-88 (1994)). This Court reserves such gratuitous exercises of discretion for those cases where the "'unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Smith v. State*, 64 Md. App. 625, 632 (1985) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)); *see also State v. Daughton*, 321 Md. 206, 211 (1990) (commenting that plain error is "error which vitally affects a defendant's right to a fair and impartial trial."). When considering whether to undertake plain error review, we consider the following: "the opportunity to use an unpreserved contention as a vehicle for illuminating an area of law; the egregiousness of the trial court's error; the impact of the error on the defendant; and the degree of lawyerly diligence or

dereliction." *Steward v. State*, 218 Md. App. 550, 566 (2014) (citing *Morris v. State*, 153 Md. App. 480, 518-24 (2003)).

Allen accurately points out that this court *may* undertake plain error review to evaluate whether "the cumulative effect of the prosecutor's remarks was likely to have improperly influenced the jury[.]" *Lawson v. State*, 389 Md 570, 604 (2005). Allen fails, however, to proffer any compelling reason for this Court to do so. *See, e.g., Morris v. State*, 153 Md. App. 480, 522–23 (2003) ("The failure we so often see when the 'plain error' exemption is invoked is the failure to realize the chasm of difference between due process and gratuitous process and the different mind sets that reviewing judges, in the exercise of their discretion, in all likelihood bring to bear on those two very different phenomena.").

Allen asserts that, in this close case, where the State's case "depended entirely on whether the jury believed B.," the State's remarks, "which among other things engendered sympathy for B. and vouched for her credibility," were "likely to have influenced the verdict [,]" and were, therefore, prejudicial. The mere fact that a comment made by the prosecutor was prejudicial, however, is not sufficient to compel this Court to undertake plain error review. *See, e.g., Morris v. State*, 153 Md. App. 480, 511-12 (2003) ("If every material (prejudicial) error were *ipso facto* entitled to notice under the 'plain error doctrine,' the preservation requirement would be rendered utterly meaningless . . . The fact that an error may have been *prejudicial* to the accused does not, of course, *ipso facto* guarantee that it will be noticed." (emphasis in original)). Allen fails to articulate how any error committed by

the trial court was either plain or material to his rights. Nor does Allen contend that his case presents any unique questions, the resolution of which would serve to guide other courts and practitioners in future cases. Plain error review is an extraordinary remedy, to be undertaken only in instances of "truly outraged innocence[.]" *Herring v. State*, 198 Md. App. 60, 87 (2011) (quoting *Jeffries v. State,* 113 Md. App. 322, 325–26 (1997)). In this case, the allegedly improper comments were not so egregious as to justify plain error review. We, therefore, decline to address the merits of this unpreserved issue.

III. Condition of Probation

At sentencing, the prosecutor requested that the court impose a condition of Allen's probation prohibiting any unsupervised contact with minors. Defense counsel objected, asserting that Allen should be able to have access to his son without the supervision of another adult and arguing that "[t]here's no reason for" the no contact provision insofar as it applied to Allen's son. The court disagreed and ordered that Allen have no unsupervised contact with minors during his five-year probationary period.

Allen asserts that, to the extent the no unsupervised contact condition relates to Allen's interactions with his own infant son, the condition constitutes an illegal sentence that must be vacated. In support of his argument, Allen avers that there was no evidence presented which would have indicated that Allen presented any danger to either his son or to other children related to him by blood. Allen contends, therefore, that there was no rational basis for the imposition of the no unsupervised contact condition, which, he

contends, unreasonably infringes on his fundamental right to parent his child. As we shall explain, we are unpersuaded by Allen's contentions.

In Maryland, trial courts are entrusted with broad discretion to determine and impose sentences upon an individual convicted of a criminal offense. *See, e.g., State v. Dopkowski*, 325 Md. 671, 679 (1992) (characterizing the discretion of the sentencing court as "virtually boundless" (quoting *Logan v. State*, 289 Md. 460, 480 (1981))). This Court has provided the following general guidance for sentencing courts:

> A judge is vested with very broad discretion in sentencing criminal defendants, and is accorded this broad latitude to best accomplish the objectives of sentencing—punishment, deterrence, and rehabilitation. A judge should fashion a sentence based upon the facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background. [A] trial judge may base the sentence on perceptions derived from the evidence presented at the trial, the demeanor and veracity of the defendant gleaned from his various court appearances, as well as the data acquired from such other sources as the presentence investigation or any personal knowledge the judge may have gained from living in the same community as the offender. A trial judge's discretion is limited only by constitutional standards and statutory limits. The ultimate determination must not be motivated by ill-will, prejudice, or other impermissible considerations.

Poe v. State, 341 Md. 523, 531- 32 (1996) (internal citations and quotation marks omitted).

The Maryland Code provides that "[o]n entering a judgment of conviction, the court may suspend the imposition or execution of sentence and place the defendant on probation on the conditions that the court considers proper." Md. Code (2001, 2008 Repl. Vol.) §6-221

of the Criminal Procedure Article ("Crim. Pro."). Moreover, a sentencing court "may pass orders and impose terms . . . relating to the residence or conduct of the defendant as may be deemed proper." Crim. Pro. §6-219(b) (2). While a sentencing court's discretion to determine and impose conditions of probation is broad, it is not limitless. *Bailey v. State*, 355 Md. 287, 294 (1999) (citations omitted). It is well established that:

> Whatever latitude the statutes repose in the trial judge, it remains, of course, fundamental that conditions of probation must be reasonable and have a rational basis. They must not be the product of arbitrariness or capriciousness. Moreover, the conditions imposed must be clear, definite and capable of being properly comprehended and understood not only by the individual upon whom they are imposed but by those responsible for their enforcement.

Watson v. State, 17 Md. App. 263, 274 (1973) (citation omitted). A sentencing court's imposition of a condition that does not conform to these requirements constitutes an abuse of discretion and results in an illegal sentence.

We have clearly articulated that "[c]riminal courts may order supervised visitation or otherwise limit contact between parent and child" in cases such as this case, "when the juvenile or equity court has not assumed jurisdiction." *Smith v. State*, 80 Md. App. 371, 376, n.4 (1989).[8] Indeed, we have previously upheld the validity of no contact conditions

[8] In *Smith, supra*, a sentencing judge imposed a condition of probation which prohibited the defendant from seeking to regain custody of her children without first obtaining approval from the sentencing judge. 80 Md. App. at 373. Her children, who had been declared Children in Need of Assistance, were in the care of the Department of Social Services and under the jurisdiction of the juvenile court. Accordingly, we held that the (continued...)

prohibiting probationers from associating with members of their family, including their spouses and children.

We addressed a probation condition which limited contact with a family member in *Lambert v. State*, 209 Md. App. 600, 606-07 (2013), *cert. granted*, 432 Md. 211 (2013), *dismissed as moot* (Jan. 13, 2014). In *Lambert*, the sentencing court imposed a condition of probation which prohibited direct contact between appellant and his wife, the domestic violence victim. *Id.* at 604. The wife expressed her desire to reconcile with the appellant. *Id.* The appellant argued that the condition of probation was an illegal sentence which unconstitutionally impinged upon his rights to marriage. *Id.* We affirmed the trial court's imposition of the condition, commenting that "[b]y perpetrating an act of domestic violence against his wife, appellant subordinated his rights to the State's interests in punishment, deterrence, and rehabilitation." *Id.* at 606-07.[9]

The Court of Appeals upheld a similar condition of probation in *State v. Griswold*, 374 Md. 184 (2003). The Court commented that a condition prohibiting a defendant, who was convicted of sexually abusing his niece and another child, from having any unsupervised

[8] (...continued)
condition of probation was improper because "jurisdiction over the children rest[ed] exclusively with the juvenile court." *Id.* at 374 n. 1.

[9] We further commented that even if the standard were strict scrutiny, the three-year prohibition on contact was not excessive, "given the necessity to advance the State's compelling interest in securing [the wife's] safety from yet another incident of domestic violence at the hands of appellant." *Id.* at 607.

contact with any children under eighteen years of age, was "not illegal." *Id.* at 188. In *Douglas v. State*, 130 Md. App. 666, 675-76 (2000), we upheld a condition of probation which prohibited a defendant, during the five-year term of his probation, from having any contact with his victim/girlfriend, who was the mother of the defendant's child. We were unpersuaded by the defendant's contention that the condition impermissibly curtailed his ability to see his son, who remained in the custody of his mother. *Id.*

In support of his argument, Allen cites several cases decided by the United States Federal Circuit Courts that appear to be factually similar to Allen's case.[10] Critically, the

[10] In the cited cases, various federal courts have held that "where a condition of supervised release interferes with [the right of familial association], compelling circumstances must be present to justify the condition." *U.S. v. Lonjose*, 663 F.3d 1292, 1303 (10th Cir. 2011) (citing *U.S. v. Smith*, 606 F.3d 1270, 1284 (10th Cir. 2010)). The *Lonjose* court opined that when a condition of supervised release interferes with a defendant's fundamental right of familial association, "compelling circumstances must be present to justify the condition." *Id*. at 1302-03. The court explained that a trial court "abuses its discretion where it imposes such a condition in the absence of a record that unambiguously supports a finding that the defendant is a danger to his own family members." *Id*. (internal citation omitted).

Allen finds further support for his assertions in *U.S. v. Bear*, 769 F.3d 1221, 1229 (10th Cir. 2014) ("When a defendant has committed a sex offense against children or vulnerable victims, general restrictions on contact with children ordinarily do not involve a greater deprivation of liberty than reasonably necessary. But restrictions on a defendant's contact with his own children are subject to stricter scrutiny." (internal citation omitted)), and *U.S. v. Wolf Child*, 699 F.3d 1082, 1093 (9th Cir. 2012) (striking a condition prohibiting defendant, who pled guilty to attempting to have sex with an unrelated sixteen-year-old girl, from residing with any child under the age of eighteen, including his own daughters, reasoning that "there is no evidence in the record regarding the nature of the particular offense or its relationship to the condition that restricts his ability to reside with or be in the company of his own daughters").

federal cases cited by Allen are not controlling upon this Court. *See, e.g., French v. Hines*, 182 Md. App. 201, 262 n. 21 (2008) ("The courts of this State . . . are not bound by the holdings of a federal district court or of a federal court of appeals."). Insofar as federal cases suggest that a sentencing court must find evidence in the record that "unambiguously supports a finding" that an individual defendant "is a danger to his own family members" prior to imposing any condition that interferes with access to a defendant's children, *Lonjose*, *supra*, 663 F.3d at 1303, they are directly at odds with Maryland's approach to limiting the custody and visitation rights of individuals who have previously abused or neglected a child.

In juvenile and family law cases, Maryland courts are obliged by statute to take measures to protect children from abuse at the hands of a parent who has previously abused any other child. Section 9-101 of the Family Law Article explicitly prohibits a court "in any custody or visitation proceeding," from granting custody or unsupervised visitation to any party who has abused or neglected a child "unless the court specifically finds that there is no likelihood of further abuse or neglect by the party[.]" Md. Code (1984, 2012 Rep. Vol.) §9-101 of the Family Law Article ("Fam."). Thus, pursuant to Fam. §9-101, an individual who has abused or neglected **any** child has **no** right to **any** unsupervised visitation unless he or she is able to persuade the court that there is no likelihood of further abuse or neglect.[11]

[11] While we acknowledge that the case before us for review is a criminal case, not a custody proceeding, the fact that it would be unlikely that Allen would be awarded unsupervised visitation in a custody or visitation proceeding is additional persuasive evidence that the condition imposed by the sentencing court in this case was not unreasonable.

Id. *See also Baldwin v. Baynard*, 215 Md. App. 82, 107 (2013) ("Section 9–101(b) of the Family Law Article . . . precludes custody or unsupervised visitation absent a specific finding by the circuit court that there is no likelihood of further child abuse or neglect by the party.").[12]

This provision applies regardless of whether the child abused or neglected was the child whose custody or visitation is currently in issue. *See e.g. In re Adoption No. 12612*, 353 Md. 209, 234 (1999) ("[I]t is a matter of assuring that the party responsible for abusing or neglecting a child in the past will not abuse or neglect the child or children whose custody or visitation is within the court's control, whether or not they were the ones subjected to the previous abuse or neglect. The focus is not on a particular child but on the party guilty of the previous abuse or neglect.").

When a parent has previously been found to have abused or neglected a child, it is the policy of Maryland courts to take the default position of denying a parent unsupervised contact with his or her children. The federal cases cited by Allen apparently require specific findings that a particular defendant poses a specific risk to family members before interfering with an individual's familial relationships. To the extent that federal cases require such

[12] Indeed, Fam. § 9-101 precludes custody or unsupervised visitation even when a person has been found to have abused or neglected a child by only a *preponderance of the evidence*. *Baldwin*, *supra*, 215 Md. App. at 106 ("The preponderance of the evidence standard applies when the court determines whether reasonable grounds exist" to believe that a child has been abused or neglected by a party.). In the present case, Allen was found to have sexually abused B. *beyond a reasonable doubt.*

findings, they are inconsistent with the laws of Maryland as they relate to access to children by parents who have been found to have abused or neglected a child.

Furthermore, in this case, the challenged probation condition imposed upon Allen by the sentencing court did not prohibit Allen from associating with his son, but merely prohibited Allen from associating with his son without the supervision of another responsible adult. *See Douglas*, 130 Md. App. at 675 (noting that the no-contact provision was not a blanket prohibition of contact with the child, and concluding that the "no contact" provision was not rendered illegal "simply because appellant may need an intermediary to effect visitation with the child."). Thus, the condition was narrowly tailored to serve the dual goals of allowing Allen to maintain his relationship with his son during his post-incarceration rehabilitation and protecting Allen's son from any potential abuse.

Moreover, though Allen, as a registered sex offender, will be subject to supervision for the rest of his life pursuant to the terms of Crim. Pro. §11-723,[13] the term of the

[13] The conditions of lifetime sexual offender supervision may include:

> (i) monitoring through global positioning satellite tracking or equivalent technology;
>
> (ii) where appropriate and feasible, restricting a person from living in proximity to or loitering near schools, family child care homes, child care centers, and other places used primarily by minors;

(continued...)

challenged condition restricting his unsupervised access to his son is limited to only the five-year period of Allen's active probation. Thus, it is properly limited to be no more restrictive than necessary to serve "the objectives of sentencing—punishment, deterrence, and rehabilitation[.]" *Poe, supra*, 341 Md. at 531.

A condition of probation that abridges a fundamental right is not necessarily illegal. We have explained:

> [A] condition to the granting of probation which compels a defendant to give up a fundamental or constitutional right is not

[13] (...continued)

> (iii) restricting a person from obtaining employment or from participating in an activity that would bring the person into contact with minors;
>
> (iv) requiring a person to participate in a sexual offender treatment program;
>
> (v) prohibiting a person from using illicit drugs or alcohol;
>
> (vi) authorizing a parole and probation agent to access the person's personal computer to check for material relating to sexual relations with minors;
>
> (vii) requiring a person to take regular polygraph examinations;
>
> (viii) prohibiting a person from contacting specific individuals or categories of individuals; and
>
> (ix) any other conditions deemed appropriate by the sentencing court or juvenile court.

Crim. Pro. §11-723(d)(3).

> in and of itself unconstitutional or invalid. [A] court will not strike down conditions of release, even if they implicate fundamental rights, if such conditions are reasonably related to the ends of rehabilitation and protection of the public from recidivism. Such a condition cannot stand [only] if it is not related to the crime of which defendant has been convicted and if it has no reasonable relation to future criminality.

Henson v. State, 212 Md. App. 314, 327-28, *cert. denied*, 434 Md. 314 (2013) (internal citations and quotations omitted). In Maryland, probation is characterized as "a matter of grace, not an entitlement." *Wink v. State*, 76 Md. App. 677, 682 (1988), *aff'd*, 317 Md. 330 (1989); *see also Hudgins v. State*, 292 Md. 342, 347 (1982) ("[A]fter guilt has been established, the granting of probation is a matter of grace and an act of clemency bestowed by the court." (citing *Scott v. State*, 238 Md. 265, 275 (1965))). In this case, the circuit court suspended forty-one years of incarceration to which Allen was sentenced, in favor of imposing a five-year period of supervised probation. The sentencing court could have required Allen to serve all forty-one years of his sentence. Certainly, if Allen were imprisoned, he would not be permitted to have unsupervised access to his son. Indeed, Allen's contact with his son would be much more severely limited during a lengthy term of incarceration than during a five-year period of probation during which visitation must be supervised.

Under the circumstances, we are persuaded that the probation condition imposed by the sentencing court was sufficiently related to the crime for which Allen was convicted, *i.e.* sexual assault of a child residing in his household. We conclude, therefore, that the condition

imposed on Allen prohibiting him from having unsupervised contact with minors was not illegal and that the sentencing court did not abuse its discretion by imposing this condition on his probation.[14]

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[14] In this opinion, we take no position whatsoever as to whether Allen *should* be granted supervised visitation in a custody or juvenile proceeding. Pursuant to Fam. § 9-101(b), "[u]nless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child." Whether a supervised visitation arrangement would assure the safety and well-being of the child is an issue to be decided by a different court in a different proceeding.