Circuit Court for Baltimore City
Case Nos. 104173062 - 63

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 936

September Term, 2017

STATE OF MARYLAND

v.

TRAVIS THANIEL

Eyler, Deborah S.,
Meredith,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: August 29, 2018

Appendix A.

In 2005, a jury, sitting in the Circuit Court for Baltimore City, convicted Travis Thaniel, appellee, of first-degree murder of Shawn Boston, attempted second-degree murder of Catherine Jones, and use of a handgun in the commission of a crime of violence. The court thereafter sentenced Thaniel to life imprisonment for first-degree murder and consecutive terms of thirty years for attempted second-degree murder and twenty years for use of a handgun in the commission of a crime of violence. A panel of this Court affirmed his convictions on direct appeal. *Thaniel v. State*, No. 1374, September Term, 2005 (filed Sept. 25, 2007), *cert. denied*, 402 Md. 354 (2007).

Thaniel subsequently filed a postconviction petition, raising claims of ineffective assistance of both trial and appellate counsel. The postconviction court granted his petition and ordered a new trial. The State thereafter filed an application for leave to appeal, which we granted and transferred the case to our appellate docket. The State now raises the following questions for our consideration:

I. Whether the postconviction court erred in concluding that trial counsel was ineffective in agreeing to close the courtroom during jury selection;

II. Whether the postconviction court erred in concluding that trial counsel was ineffective in failing to object when the trial court and counsel addressed a note from the jury in Thaniel's absence;

III. Whether the postconviction court erred in concluding that appellate counsel was ineffective in failing to raise on appeal an unpreserved claim that the trial court erred in addressing a note from the jury in Thaniel's absence; and

IV. Whether the postconviction court erred in concluding that the cumulative effect of trial counsel's alleged errors warranted postconviction relief.

We find merit in the State's contentions and shall vacate the postconviction court's order but remand, because the State has not challenged one of the postconviction court's rulings, by which it found that trial counsel had been ineffective in failing to file motions to modify sentence and for sentence review by a three-judge panel. Because that ruling stands, we shall direct that the postconviction court issue an order permitting Thaniel to file belated motions to modify sentence and for sentence review by a three-judge panel.

BACKGROUND

On February 6, 2004, Shawn "Peanut" Boston was driving his car through East Baltimore, accompanied by Catherine Jones, the mother of his son. *Thaniel v. State*, No. 1374, September Term, 2005, slip op. at 3, 4-5. At approximately 9:00 p.m., while they were stopped at a traffic light, Thaniel entered the vehicle and sat in the rear seat. *Id.* at 2, 5. "As they turned onto Eager Street, near her grandmother's residence, [Thaniel] said 'Man, you know what's up. Kick that shit out.'" *Id.* at 5. Boston muttered, "Aw, shit," stopped the car, took an item from beneath his seat, and handed it to Thaniel. *Id.* Thaniel then said, "this was for my man E," and, in Jones's words, "started shooting" Boston and Jones. *Id.*

Boston died from "multiple gunshot wounds." *Id.* at 3. Ms. Jones survived but was seriously injured and endured an extensive hospital stay. When police detectives first attempted to interview her about the shooting, seventeen days afterwards, she "could mouth words, but she could not talk." *Id.* She stated, at that time, that "she had not seen the shooter and that no one else" had been in the car with her, besides Boston. *Id.* She further stated that she was "scared and wanted protection." *Id.* at 3-4. Ultimately, Jones

decided to cooperate with the police, having decided that Thaniel "shouldn't get away with this because he tried to take my life, and he took my son's father['s] life." *Id.* at 5.

There were two other witnesses to the shooting, Latisha Privette and Jerome Wiggs. Privette had been a passenger in Wiggs's car on the night of the shooting. *Id.* at 2. As they turned onto Eager Street, she observed a man exiting the back of a vehicle and "shooting through" the driver's side window of the vehicle as he did so. *Id.* Although she could not see the shooter's face, she described him as "tall and dark skinned," wearing a ski cap, "with a thick build." *Id.* & n.4. Privette called 911 and told the operator what she had seen. *Id.* at 2.

Wiggs also observed the man shooting through the driver's side window of Boston's car. He described the shooter as wearing "baggy clothes" and a skull cap and "estimated that he [had] heard 'at least ten shots.'" *Id.* Wiggs stated that he then "got the hell out of there." *Id.* at 3.

In addition to the two eyewitnesses to the crime, a third person, Quante Bell, an acquaintance of Thaniel and Jones, gave a statement to police. In April of 2004, several months after Boston's murder, Bell had been arrested in an unrelated case. While being interrogated, he told Baltimore City Police Detective Raymond W. Laslett, the lead detective in the Boston case, that he had been privy to a conversation between his brother and Thaniel. According to Bell, Thaniel had told Bell's brother that he had shot Boston in the chest. (Later, at Thaniel's trial, Bell would disavow his statement, which was then introduced into evidence as a prior inconsistent statement.)

In June of 2004, a grand jury returned two indictments, charging Thaniel with a variety of offenses related to the February 6th shooting. The first indictment charged Thaniel with first-degree murder of Shawn Boston; use of a handgun in the commission of a crime of a felony or violence; and wearing, carrying, or transporting a handgun. The second charged him with attempted first- and second-degree murder of Catherine Jones; first- and second-degree assault of the same victim; use of a handgun in the commission of a crime of a felony or violence; and wearing, carrying, or transporting a handgun. In June of 2005, a trial was held on those charges.

As jury selection was about to begin, the following exchange, which forms the basis for one of Thaniel's ineffective assistance claims, took place:

> [Trial counsel had just been excused from being in the courtroom momentarily while the bailiff arranged for the venire to enter the courtroom.]
>
> THE CLERK: When you do this selection should I have all of them wait outside? We're going to use all 85 chairs.
>
> THE COURT: Oh, you mean for the -- when we select the jury?
>
> THE CLERK: Yeah.
>
> THE COURT: Are they -- are we going to need -- are we going to require all -- all the spaces in the courtroom?
>
> THE CLERK: To get them close up as possible so they [will] be able to hear their number.
>
> THE COURT: Well, they -- I can't clear the courtroom for jury selection. I'm not allowed to do that.
>
> THE CLERK: Oh, okay.

THE COURT: So I would suggest -- Mr. [prosecutor], and, Mr. [trial counsel], could you approach for a second again, please?

* * *

THE CLERK: Mr. [trial counsel]?

THE COURT: Mr. [trial counsel], could you approach for a minute, please?

* * *

(Counsel and the defendant approached the bench, and the following ensued:)

THE COURT: Okay.

The clerk's expressed some concern that there may be not enough room for all the -- especially the way the people are spread out now. Now, I -- I'm assuming that there are some people here on behalf of the defendant and there's some people here on behalf of the victim.

[TRIAL COUNSEL]: I don't know, Your Honor. I told my people yesterday, anticipating this problem, that nothing really of consequence is going to happen until the afternoon. So I'm not sure --

THE COURT: Do we have -- do you have people here that you recognize?

[TRIAL COUNSEL]: Anybody there?

THE COURT: People on behalf of the defendant?

[TRIAL COUNSEL]: Huh?

THE DEFENDANT: Yes. (Inaudible).

[TRIAL COUNSEL]: Yeah.

THE COURT: He heard that. Present in the courtroom? Well, what I would suggest -- I don't know who's who. I mean, **I was going to have everybody move to one section but I don't want people who are at enmity with one another sitting next to each other.**

[THE STATE]: **Right. I don't think that would be a good idea.**

THE COURT: So, --

[TRIAL COUNSEL]: I -- **I don't care if you send them outside, Judge. Because there's no room.**

THE COURT: **I can't on my motion clear the courtroom.**

[TRIAL COUNSEL]: I was going to ask that -- them to step out.

THE COURT: During jury selection?

[TRIAL COUNSEL]: Yes. Just because I figured that you --

THE COURT: I'll do -- I'll do it. But can I do that?

[TRIAL COUNSEL]: I'll do it.

THE COURT: Is it -- is it --

THE CLERK: We usually do it, Your Honor.

THE COURT: **Does that in any way violate the defendant's constitutional rights?**

THE CLERK: No. We -- we usually do it when we have a large panel. We have (inaudible).

THE COURT: Yeah. You're all agreeing that it's not going to violate his rights for a public trial --

[THE STATE]: Well, I can only deal with --

[TRIAL COUNSEL]: **We have no objection. We have no objection.**

THE COURT: All right. Fine. I'll just ask them if they just could just step outside while we select the jury.

In fact, I might as well just excuse them until this afternoon because that's all we're going to do this morning.

* * *

THE COURT: All right. Ladies and Gentlemen, who -- those of you who are here as spectators in this case, I'm going to ask you, and this based upon an agreement between the State's Attorney and the defense attorney, to step outside.

The reason why I'm asking you to do this is because we have a large number of jurors coming over here to select a jury from, and I can't have -- I can't -- it's improper to leave the spectators and the jurors mixed up together in the -- in the audience of the courtroom.

So I'm going to ask you if you would please leave. And the -- we're not going to actually start the trial in this case, the actual trial until this afternoon. So we're not going to be actually doing anything other than jury selection between now and two o'clock.

So I am going to ask you, if you're not a witness in this case, to please leave the courtroom. And you're certainly welcome to come back at two o'clock and witness the trial.

Thank you very much.

(Emphasis added.)

Jury selection proceeded in the closed courtroom. Afterwards, the courtroom was reopened, as promised, and trial proceeded for three days.

After three hours of deliberation, the jury sent two notes to the trial judge, notes 3 and 4, which are the subject of another of Thaniel's postconviction claims. A bench

conference ensued between the judge and counsel for both sides, out of Thaniel's presence:

> THE COURT: I have two questions here. One [note 3] is simply that the jurors want to -- it says, "We the jury respectfully request that all trial attendees be held in the courtroom until we have had an opportunity to vacate the building, and give us ample time to make it to our transportation."
>
> And every single juror (inaudible).
>
> [TRIAL COUNSEL]: Right. Yeah, okay.
>
> [THE STATE]: **I heard there were some issues.**[1]
>
> THE COURT: **Oh, there were. There was a lot of tension here.**
>
> And then also [note 4] they have reached a verdict in the first count. They want to know whether -- well, I can't show it to you. I've never had this happen before. They've actually reached a verdict of guilty on the first count. They want to know whether they have to go on to the second count.
>
> [TRIAL COUNSEL]: (Inaudible).
>
> THE COURT: They want to know whether they need to reach a verdict on second degree. Which they really don't, because it merges.
>
> [TRIAL COUNSEL]: Right. Right.
>
> THE COURT: But the thing that I'm not sure of is whether they've reached a verdict on the other count -- the other charges which were submitted. And I have to find that out.

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[1] The Assistant State's Attorney present for deliberations was a substitute for the Assistant State's Attorney who had tried the case. Presumably, the former's remark reflected what he had been told by the latter.

> Let me just tell you this. I am not going to do this right now. I'm going to take a luncheon recess, **give everybody a chance to, you know, prepare.** And then we'll take the verdict at 2:00 -- do --
>
> [TRIAL COUNSEL]: **Prepare for what?**
>
> THE COURT: **Prepare for what's going to happen when the verdict is announced.**
>
> [TRIAL COUNSEL]: All right.
>
> THE COURT: **I mean I don't want to put anybody in danger here.**
>
> [TRIAL COUNSEL]: No, I understand. But why's it going to be better? I just want -- I just want to get it over with quite frankly.
>
> THE COURT: Well, I know you do.
>
> [TRIAL COUNSEL]: When's -- when's -- when's it going to be better at?
>
> THE COURT: Because the --
>
> [TRIAL COUNSEL]: -- better after lunch?
>
> THE COURT: Because -- well, I just feel more comfortable doing it.
>
> [TRIAL COUNSEL]: Judge?
>
> THE COURT: I have to -- the Sheriff -- **the Sheriff needs to be made aware of all of this. They need to be prepared.** I'm sorry. But that's what I'm going to do.

(Emphasis added.)

Further discussion ensued concerning the appropriate response to the jury's question about the form of the verdict. The court then recessed for lunch, at 12:30 p.m.,

intending for the jury to resume deliberations at 2:00 p.m., but less than half-an-hour later, the court reconvened to accept the jury's verdict. Before the jury had been brought in, the trial judge stated for the record that, given "the security issues involved here," Thaniel would "remain shackled" while the verdict was taken.

The jury found Thaniel guilty of first-degree murder of Shawn Boston, attempted second-degree murder of Catherine Jones, first- and second-degree assault of Jones, wearing, carrying, or transporting a handgun, and use of a handgun in the commission of a crime of violence. It acquitted Thaniel of attempted first-degree murder of Jones. After the jury had been polled and its verdict hearkened, the Sheriff escorted them out of the courtroom.

Sentencing was deferred so that a presentence investigation ("PSI") report could be prepared. Thaniel, as noted earlier, received the maximum sentence: an aggregate sentence of life imprisonment plus fifty years. The convictions for first- and second-degree assault of Jones and wearing, carrying, or transporting a handgun were merged for sentencing purposes.

Thaniel appealed, contending that the trial court had erred in admitting into evidence Jones's identification of him as the shooter and that it had further erred in admitting into evidence the audio recording of Bell's out-of-court statement to the police. In an unreported opinion, a panel of this Court rejected both claims and affirmed. *Thaniel v. State*, No. 1374, September Term, 2005.

In 2015, Thaniel filed a pro se postconviction petition, which was later supplemented, with the assistance of counsel. In the supplemental petition, Thaniel raised the following claims:

I. Ineffective assistance of trial counsel for failing to object to the lack of a unanimous verdict;

II. Ineffective assistance of trial counsel for failing to object when the trial court violated Maryland Rules 4-231(b) and 4-326(d), governing jury communications;

III. Ineffective assistance of trial counsel for waiving Thaniel's right to a public trial;

IV. Ineffective assistance of trial counsel for failure to file a motion for modification of sentence and an application for sentence review by a three-judge panel;

V. The cumulative effect of trial counsel's errors amounted to ineffective assistance; and

VI. Ineffective assistance of appellate counsel for failing to raise the issues of lack of unanimous verdict and violations of the rules governing jury communications.

Following a hearing on the supplemental petition, the postconviction court granted relief as to all but the first claim and ordered that Thaniel be awarded a new trial. Regarding the ineffective assistance claim related to jury communications, the postconviction court found that the juror notes at issue, notes 3 and 4, "pertained to the action," under Maryland Rule 4-326(d),[2] thereby triggering Maryland Rule 4-231(b),

[2] At the time of Thaniel's trial, Maryland Rule 4-326(d) provided:

> (d) **Communications with jury.** The court shall notify the defendant and the State's Attorney of the receipt of any

(continued)

which entitles a defendant to be "physically present at . . . every stage of the trial," with exceptions not relevant here.[3] The court further found that Thaniel had not been notified by trial counsel of his right to be present while the trial court addressed the issues raised in those notes. As for the fourth note, which asked whether the jury, having found Thaniel guilty of the flagship count, should consider lesser-included offenses, the

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(continued)

> communication from the jury pertaining to the action as promptly as practicable and in any event before responding to the communication. All such communications between the court and the jury shall be on the record in open court or shall be in writing and filed in the action.

[3] At the time of Thaniel's trial, Maryland Rule 4-231 provided in pertinent part:

* * *

> (b) **Right to be present — Exceptions.** A defendant is entitled to be present at a preliminary hearing and every stage of the trial, except (1) at a conference or argument on a question of law; (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248; or (3) at a reduction of sentence pursuant to Rules 4-344 and 4-345.
>
> (c) **Waiver of right to be present.** The right to be present under section (b) of this Rule is waived by a defendant:
>
> > (1) who is voluntarily absent after the proceeding has commenced, whether or not informed by the court of the right to remain; or
> >
> > (2) who engages in conduct that justifies exclusion from the courtroom; or
> >
> > (3) who, personally or through counsel, agrees to or acquiesces in being absent.
>
> * * *

postconviction court found that Thaniel had not demonstrated prejudice. As for the third note, however, which "indicated a safety concern [by the jurors] with how courtroom attendees might react to the verdict," the postconviction court concluded that "it cannot say that the State has met its burden of showing, beyond a reasonable doubt, that the violation was harmless," and it granted relief as to that claim.

Regarding Thaniel's ineffective assistance claim based upon the closure of the courtroom during voir dire, the postconviction court found that "the total closure of the courtroom for the full day it took to conduct the voir dire process in [Thaniel's] case amounted to more than a *de minim[i]s* interference with [his] right to a public trial" and that trial counsel's "failure to have objected to the closure therefore deprived [Thaniel] of his right to effective assistance of counsel."

Regarding Thaniel's ineffective assistance claim based upon trial counsel's failure to file a motion for modification of sentence and an application for sentence review by a three-judge panel, the postconviction court granted relief but did not specify a remedy, presumably because it was ordering a new trial on the other claims. To the extent that the postconviction court ruled that Thaniel is entitled to relief on this claim, the State has not challenged that ruling.

As for Thaniel's claim based upon the cumulative effect of trial counsel's purported errors, the postconviction court concluded that, having found ineffective assistance as to the juror communications, the closure of the courtroom, and the failure to file post-trial motions for modification and sentence review, it found prejudice accruing from the cumulative effect of those errors. Finally, regarding Thaniel's claim of

ineffective assistance of appellate counsel, the postconviction court found that, because "the issue of the jury communications was meritorious," appellate counsel rendered ineffective assistance in failing to raise that issue in Thaniel's direct appeal.

The State filed a timely application for leave to appeal, contending that the postconviction court had erred in failing to apply the analytical framework of *Strickland v. Washington*, 466 U.S. 668 (1984), to the claims at issue. We granted that application and transferred the case to the regular appeals docket.

STANDARD OF REVIEW

The ultimate question of whether counsel was ineffective "is a mixed question of law and fact." *Newton v. State*, 455 Md. 341, 352 (2017) (citing *Harris v. State*, 303 Md. 685, 698 (1985)). We "defer to the factual findings of the postconviction court unless clearly erroneous," but we review its ultimate legal conclusions without deference, "'re-weigh[ing]' the facts in light of the law to determine whether a constitutional violation has occurred." *Id.*

DISCUSSION

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The right to the effective assistance of trial counsel is grounded in the Sixth Amendment, made applicable to the States through the Fourteenth Amendment. *Strickland v. Washington*, *supra*, 466 U.S. at 685-86. A claim of ineffective assistance of trial counsel comprises two elements: that counsel's performance was objectively unreasonable "under prevailing professional norms," *id.* at 688, and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." *Id.* at 694. The petitioner bears the burden of proof. *Id.* at 687.

"Judicial scrutiny of counsel's performance must be highly deferential," *id.* at 689; accordingly, a reviewing court begins with a "strong presumption" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689-90. We "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. It is the petitioner's burden to "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," whereupon a reviewing court "must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. "[I]neffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice," *id.* at 693, defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability," in turn, "is a probability sufficient to undermine confidence in the outcome." *Id.* That standard lies between, on the one hand, a showing "that the errors had some conceivable effect on the outcome of the proceeding," *id.* at 693, and, on the

other hand, a showing by a preponderance of the evidence that counsel's errors affected the outcome. *Id.* at 693-94.

Finally, because deficient performance and prejudice are elements of an ineffective assistance claim, both of which must be proven by a postconviction petitioner, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry" in a specific order "or even to address both components of the inquiry" if the petitioner "makes an insufficient showing on one." *Id.* at 697. "In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered" by the petitioner "as a result of the alleged deficiencies." *Id.* "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.*

Whether the postconviction court erred in finding trial counsel ineffective for agreeing to the closure of the courtroom during voir dire

The State challenges the postconviction court's conclusion that Thaniel's trial counsel was ineffective in agreeing to the closure of the courtroom during voir dire. According to the State, Thaniel failed to demonstrate either that his trial counsel had performed deficiently in doing so or that he had suffered prejudice as a result.[4] We agree.

[4] At the postconviction hearing, the State further contended that, because trial counsel had affirmatively stated that he did not object to the closure of the courtroom during voir dire, Thaniel's claim of ineffective assistance, based upon trial counsel's actions in that regard, had been waived. The postconviction court found that the direct claim, that the closure of the courtroom had violated Thaniel's right to a public trial, would have been waived had it been raised but that his ineffective assistance claim, based upon counsel's waiver of his right to public trial, had not been waived. The State does not challenge that ruling before us.

The postconviction court, without applying or even acknowledging the *Strickland* test, found that "the total closure of the courtroom for the full day it took to conduct the voir dire process" during Thaniel's trial "amounted to more than" a *de minimis* interference with his right to a public trial and that trial counsel's failure "to have objected to the closure therefore deprived" Thaniel of his right to effective assistance of counsel. The postconviction court erred in so ruling.

The decision of the Supreme Court in *Weaver v. Massachusetts*, 582 U.S. __, 137 S. Ct. 1899 (2017), rendered one month after the ruling of the postconviction court in the instant case, is dispositive of this claim. In that case, Weaver was standing trial for first-degree murder and unlawful possession of a handgun, and the pool of potential jurors was so large that it exceeded the capacity of the courtroom. *Id.* at 1905-06. "As all of the seats in the courtroom were occupied by the venire panel, an officer of the court excluded from the courtroom any member of the public who was not a potential juror." *Id.* at 1906. Accordingly, when Weaver's mother and her minister sought entry to the courtroom "to observe the two days of jury selection, they were turned away." *Id.*

When she subsequently informed trial counsel that she had been excluded from the courtroom, he "did not discuss the matter" with Weaver, nor did he object, because he "believed that a courtroom closure for [jury selection] was constitutional."[5] *Id.* Weaver

[5] Weaver's trial, like Thaniel's, had taken place prior to the decision of the Supreme Court in *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam), which, in the words of the *Weaver* Court, "made it clear that the public-trial right extends to jury selection as well as to other portions of trial." *Weaver v. Massachusetts*, 582 U.S. __, 137 S. Ct. 1899, 1906 (2017). In fact, prior to the decision in *Presley*, "Massachusetts (continued)

was thereafter convicted of both charges, the Commonwealth having presented "strong evidence of" his guilt, including a confession he had given to police. *Id.* The trial court imposed a sentence of life imprisonment for first-degree murder and an additional sentence for the handgun offense. *Id.*

Five years later, Weaver filed a motion for new trial,[6] raising, among other things, a claim that his trial counsel "had provided ineffective assistance by failing to object to the courtroom closure." *Id.* Following an evidentiary hearing, the Massachusetts trial court denied Weaver's motion, finding that, although trial counsel had performed deficiently, Weaver had failed to prove that he was thereby prejudiced. *Id.* On appeal, the Supreme Judicial Court of Massachusetts affirmed the trial court's denial of Weaver's new trial motion, holding that, although the closure of the courtroom during voir dire had been structural error, an ineffective assistance claim based upon an unpreserved structural error nonetheless required a showing of prejudice, which Weaver had failed to prove and, indeed, did not challenge on appeal. *Comm. v. Weaver*, 54 N.E.3d 495, 520-21 (Mass.

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courts would often close courtrooms to the public during jury selection, in particular during murder trials." *Id.*

[6] In Massachusetts, a motion for new trial functions similarly to a postconviction petition in Maryland. See Mass.R.Crim.P. 30(a) (providing that "[a]ny person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts"); *id.* § (b) (providing that the "trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done").

2016) (citing *Comm. v. LaChance*, 17 N.E.3d 1101, 1104 (Mass. 2014)).[7] Weaver then petitioned the Supreme Court for certiorari to consider whether an ineffective assistance claim, based upon a procedurally defaulted structural error, requires a showing of prejudice, and the Court granted that petition. *Weaver v. Massachusetts*, 580 U.S. __, 137 S. Ct. 809 (2017).

The Supreme Court rendered a narrow decision, holding that, in the specific context "of trial counsel's failure to object to the closure of the courtroom during jury selection," *Weaver*, 137 S. Ct. at 1907, "*Strickland* prejudice is not shown automatically." *Id.* at 1911. "Instead," instructed the Court, "the burden is on the [petitioner] to show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes,[8] to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." *Id.* (internal citation omitted).

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[7] In *Commonwealth v. LaChance*, 17 N.E.3d 1101 (Mass. 2014), the Supreme Judicial Court had held that, "where the defendant has procedurally waived his Sixth Amendment public trial claim by not raising it at trial, and later raises the claim as one of ineffective assistance of counsel in a collateral attack on his conviction, the defendant is required to show prejudice from counsel's inadequate performance (that is, a substantial risk of a miscarriage of justice) and the presumption of prejudice that would otherwise apply to a preserved claim of structural error does not apply." *Id.* at 1104 (citations omitted).

[8] Weaver maintained that, because the *Strickland* Court instructed that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged," *Strickland v. Washington*, 466 U.S. 668, 696 (1984), it follows that, under "a proper interpretation of *Strickland*, even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair." *Weaver*, 137 S. Ct. at 1911. The *Weaver* Court therefore assumed without deciding that *Strickland* prejudice could be established either by showing that, but for trial counsel's deficient (continued)

The Supreme Court observed that Weaver had "offered no evidence or legal argument establishing prejudice in the sense of a reasonable probability of a different outcome but for counsel's failure to object." *Id.* at 1912-13. As for whether the closure of the courtroom during voir dire had rendered Weaver's trial "fundamentally unfair," the Court noted that "the courtroom [had] remained open during the evidentiary phase of the trial," that the decision to close the courtroom had been "made by court officers rather than the judge," that "there were many members of the venire who did not become jurors" but had observed the proceedings, and that the record had indicated no "basis for concern, other than the closure itself." *Id.* at 1913. Moreover, observed the Court, Weaver had failed to show "that the potential harms flowing from a courtroom closure," such as juror misconduct during voir dire or "misbehavior by the prosecutor, judge, or any other party," had "[come] to pass." *Id.* Therefore, the Court concluded, the violation had not "pervade[d] the whole trial or [led] to basic unfairness," and Weaver had failed to show that trial counsel's deficient performance had resulted in a fundamentally unfair trial. *Id.* The Court thus affirmed the judgment of the Supreme Judicial Court, denying Weaver's ineffective assistance claim. *Id.* at 1913-14.

The instant case is practically on all fours with *Weaver*. The only significant difference between the two cases is that here, unlike in *Weaver*, there was not even deficient attorney performance, which, in that case, the lower court had found, based

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(continued)
performance, there was a reasonable probability of a different outcome, *or* that trial counsel's deficient performance rendered the trial fundamentally unfair. *Id.*

upon trial counsel's "serious incompetency, inefficiency, or inattention," *id.* at 1907 (citations and quotations omitted), a finding that was not contested before the Supreme Court. In contrast with *Weaver*, where trial counsel had acquiesced in the courtroom closure because of ignorance of the law, in the instant case, the trial judge and trial counsel had affirmatively agreed to the courtroom closure under circumstances suggesting that trial counsel had a tactical reason for doing so. There was evidence in the record that the reason trial counsel had agreed to the closure was, at least in part, his desire to avoid a possible outbreak of violence between spectators sympathetic to his client and spectators sympathetic to the victim.[9] That distinction further weakens Thaniel's case in comparison with *Weaver*. *See, e.g.*, *Oken v. State*, 343 Md. 256, 283 (1996) (observing that a postconviction petitioner must "overcome the presumption that the challenged action might, under the circumstances, be considered sound trial strategy"), *cert. denied*, 519 U.S. 1079 (1997); *Robinson v. State*, 410 Md. 91, 104, 111 (2009) (declining to apply plain error review to unpreserved claim of public trial violation "under circumstances suggesting that the lack of objection might have been strategic, rather than inadvertent"). Thaniel has failed to rebut the presumption that trial counsel had agreed to the courtroom closure as a matter of trial strategy. We hold that trial counsel did not render deficient performance, given the evidence (which was later confirmed when the verdict was taken) that he sought to avoid an in-court confrontation between the families of his client and that of the murder victim.

[9] The postconviction court noted that the record "indicates concern about potential friction during trial between the families of the victim and the defendant."

In any event, Thaniel, like Weaver, has presented no evidence that, but for the decision of trial counsel to agree to the closure of the courtroom during voir dire, there is a reasonable probability that the outcome of his trial would have been different, nor has he presented any evidence that that decision rendered his trial fundamentally unfair. Indeed, it appears that the postconviction court treated this claim as if it had been a preserved claim of structural error in a direct appeal. Thaniel's claim was, in fact, nothing of the sort, and his total inability to show *Strickland* prejudice bars relief on this claim.

In passing, we note that Thaniel raises several arguments in support of the postconviction court's ruling, but none of them has any merit. Thaniel claims that he raised, in the postconviction court, a freestanding claim that the trial court's structural error in closing the courtroom during voir dire had violated his right to a public trial and that we should affirm the postconviction court's grant of relief on that ground. But he ignores that trial counsel had affirmatively waived that freestanding claim of structural error by agreeing to the closure of the courtroom, as the postconviction court correctly recognized.[10] *See Curtis v. State*, 284 Md. 132, 147 (1978) (observing that a "defendant may forego a broad spectrum of rights [indeed, all rights that do not require a knowing and voluntary waiver] which are deemed to fall within the category of tactical decisions by counsel or involve procedural defaults"); *accord State v. Rose*, 345 Md. 238, 248-50

[10] Thaniel concedes that the right to a public trial is not one of the fundamental rights that requires a knowing and voluntary waiver by the defendant. *Robinson v. State*, 410 Md. 91, 107 (2009).

(1997) (holding that a claim of a defective reasonable doubt jury instruction, an alleged structural error, had been waived through a procedural default). Thus, Thaniel's reliance upon cases such as *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam), *Longus v. State*, 416 Md. 433 (2010), and *Walker v. State*, 125 Md. App. 48 (1999), is misplaced because those cases were direct appeals where the error had been preserved. *See Presley*, 558 U.S. at 210-11; *Longus*, 416 Md. at 440-41 & n.3; *Walker*, 125 Md. App. at 62.

Nor is Thaniel correct in contending that *Weaver* should not be applied retroactively to this case. *Weaver* did not announce a fundamental change in the law but merely applied existing precedent (i.e., *Strickland*) to a previously unexamined circumstance, and, as such, is fully applicable to the instant case. *See State v. Daughtry*, 419 Md. 35, 77-78 (2011) (explaining that, where a judicial decision "sets forth and applies the rule of law that existed both before and after the date of the decision," the decision "applies retroactively in the same manner as most court decisions") (citations and quotations omitted).

We also reject Thaniel's contention that the closure of the courtroom during voir dire rendered his trial fundamentally unfair. There is no evidence whatsoever that any specific juror would have been stricken had Thaniel's family and friends been allowed in the courtroom during voir dire. As in *Weaver*, "the courtroom remained open during the evidentiary phase of the trial," there were, presumably, "many members of the venire who did not become jurors" but had observed the proceedings, and the record indicates no "basis for concern, other than the closure itself." *Id.* at 1913. As in *Weaver*, Thaniel has failed to show "that the potential harms flowing from a courtroom closure," such as

juror misconduct during voir dire or "misbehavior by the prosecutor, judge, or any other party," had "[come] to pass," and we similarly conclude that the public trial violation did not "pervade the whole trial or lead to basic unfairness." *Id.* The purported prejudice he alleges that he suffered is purely speculative and provides no basis for vacating his convictions.

Whether the postconviction court erred in finding trial counsel ineffective for failing to object when the trial court and counsel addressed a juror's note in Thaniel's absence

The State challenges the postconviction court's conclusion that Thaniel's trial counsel was ineffective in failing to object when the trial court, in the presence of counsel for both parties, addressed a juror's note in Thaniel's absence. According to the State, the note on which the postconviction court granted relief, note 3, did not pertain to the action; trial counsel properly waived Thaniel's right to be present, under Rule 4-326(d); and, in any event, Thaniel failed to demonstrate prejudice. As for the latter two contentions, we agree.[11]

The postconviction court failed, in its analysis, to account for Rule 4-231(c), which, at the time of trial, provided:

> (c) **Waiver of right to be present.** The right to be present under section (b) of this Rule is waived by a defendant:
>
> (1) who is voluntarily absent after the proceeding has commenced, whether or not informed by the court of the right to remain; or

[11] We need not decide whether the juror note, requesting that the jury be discharged prior to the spectators being permitted to leave the courtroom, pertained to the action.

> (2) who engages in conduct that justifies exclusion from the courtroom; or
>
> (3) who, personally or through counsel, agrees to or acquiesces in being absent.

Clearly, trial counsel acquiesced in Thaniel's absence, as contemplated by the rule. Thaniel's presence, under those circumstances, was not subject to a knowing and voluntary waiver, as the postconviction court seemed to assume. The postconviction court failed to address the possibility that trial counsel's waiver of Thaniel's presence fell within "the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

Moreover, the postconviction court concluded that "it cannot say that the State has met its burden of showing, beyond a reasonable doubt, that the violation was harmless." In other words, the postconviction court applied the wrong legal standard in assessing prejudice. Under the correct standard, Thaniel, not the State, bore the burden to show that, but for trial counsel's alleged error in failing to object to Thaniel's absence from the bench conference, there was a reasonable probability that the result of the trial would have been different. *Strickland*, 466 U.S. at 694. Thaniel, however, utterly failed to demonstrate any prejudice accruing from his absence from the bench conference where the note was addressed.

Thaniel, nonetheless, insists that his fundamental right to be present was violated because his trial counsel failed to notify him of the juror notes and thereby thwarted his ability to be present when the court determined its course of action in response to those

notes. As the State points out, however, the cases upon which he relies, such as *Denicolis v. State*, 378 Md. 646 (2003); *Winder v. State*, 362 Md. 275 (2001); and *Stewart v. State*, 334 Md. 213 (1994), all were direct appeals where neither trial counsel nor the defendants had been notified of the juror notes at issue, and those cases therefore shed no light upon Thaniel's postconviction claim. Whereas those cases involved application of the harmless error standard of *Dorsey v. State*, 276 Md. 638, 659 (1976), to circumstances where no one on the defense side had been notified of the juror notes, the instant case involves the application of an entirely different and more difficult standard, the "reasonable probability" standard of *Strickland*, to a circumstance where trial counsel had been fully informed of the notes and had waived Thaniel's presence. As we explained in *Patterson v. State*, 229 Md. App. 630, 638-39 (2016), there is a "stark contrast" between the harmless error standard and the "substantial possibility" standard applicable in an actual innocence proceeding, the latter of which is, as the Court of Appeals has explicated, substantively identical to the *Strickland* prejudice standard. *See Bowers v. State*, 320 Md. 416, 426-27 (1990). Thaniel has not even attempted to meet his burden to show that, but for trial counsel's purported error, there is a reasonable probability that the result of his trial would have been different.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

There is a fundamental difference between the right to effective assistance of appellate counsel and the right to effective assistance of trial counsel—whereas the latter is a trial right, derived from the Sixth Amendment, *Strickland*, 466 U.S. at 684-86, the former derives from an amalgamation of the Due Process and Equal Protection Clauses

of the Fourteenth Amendment.[12] *Halbert v. Michigan*, 545 U.S. 605, 616-17 (2005) (observing that the right to appellate counsel is grounded in the Fourteenth Amendment); *Smith v. Robbins*, 528 U.S. 259, 276 (2000) (observing that the right to appellate counsel derives in part from the Equal Protection Clause and in part from the Due Process Clause). Nonetheless, that doctrinal distinction is of little practical significance, because a claim of either type of ineffective assistance of counsel is resolved under the same framework—the two-prong test of *Strickland*. *See Robbins*, 528 U.S. at 285 (observing that "the proper standard for evaluating" a claim that "appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in" *Strickland*) (citing *Smith v. Murray*, 477 U.S. 527, 535-36 (1986)); *Gross v. State*, 371 Md. 334, 349 (2002), noting that, "the same standards apply in assessing appellate counsel effectiveness" in either trial or appellate context) (citations omitted).

In applying the *Strickland* test to a claim of ineffective assistance of appellate counsel, a reviewing court, assessing the performance prong, must keep in mind that counsel is not required "to argue every possible issue on appeal." *Newton v. State*, 455 Md. 341, 363 (2017) (quoting *Gross*, 371 Md. at 350). Thus, appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them

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[12] The Supreme Court has iterated that "[t]he Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions." *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (citing *McKane v. Durston*, 153 U.S. 684, 687 (1894)). If a state *does* provide such review, however, it "may not 'bolt the door to equal justice' to indigent defendants." *Id.* (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring in judgment)).

in order to maximize the likelihood of success on appeal." *Id.* (quoting *Robbins*, 528 U.S. at 288).

"To satisfy the prejudice prong, the [petitioner] must establish to a reasonable probability that but for his counsel's failure to raise an issue, he would have prevailed on his appeal." *Id.* (citing *Robbins*, 528 U.S. at 286). As applicable to an ineffective assistance claim based upon the failure to raise an unpreserved issue, a petitioner would have prevailed on appeal only if the appellate court would have found plain error. *Id.* at 364.

Whether the postconviction court erred in finding appellate counsel ineffective for failing to raise an unpreserved claim in Thaniel's direct appeal

The State challenges the postconviction court's conclusion that Thaniel's appellate counsel was ineffective for failing to raise, in Thaniel's direct appeal, the unpreserved claim that the trial court had erred in addressing juror note 3 in Thaniel's absence. According to the State, the postconviction court "did not appear to appreciate that this claim was unpreserved" and that it could have been considered on appeal "only in the unlikely event that this Court [had] exercised its discretion to review for plain error." Given the unlikelihood that we would have done so, the State maintains that Thaniel failed to rebut the presumption that appellate counsel acted reasonably in declining to raise this issue. We agree.

A recent decision of the Court of Appeals, *Newton v. State*, 455 Md. 341, is instructive. In *Newton*, the Court of Appeals considered the question before us—whether appellate counsel could *ever* render ineffective assistance in failing to raise an

unpreserved issue—but it did not give a definitive answer. The *Newton* Court did, however, observe that it is "'rare' for the Court to find plain error," *id.* (quoting *Yates v. State*, 429 Md. 112, 131 (2012)), and cited examples in which it had done so, covering such matters as "serious errors" in jury instructions and a biased trial judge. *Id.* at 364-65 (citing cases). To that short list we could add a recent decision in our Court, *Hallowell v. State*, 235 Md. App. 484 (2018), in which we found plain error in giving a pattern jury instruction, but only because of an intervening change in the law. *Id.* at 504-06.[13] Because the error underlying Newton's ineffective assistance claim, the presence of an alternate juror during the deliberations, did not affect the defendant's substantial rights and would not have been deemed plain error on appeal, the Court concluded that Newton could not satisfy the prejudice prong of *Strickland*. *Newton*, 455 Md. at 366.

Newton is dispositive of Thaniel's claim of ineffective assistance of appellate counsel. Thaniel has utterly failed to show, or even suggest that, had appellate counsel raised this unpreserved issue, there was a reasonable probability that this Court would have granted plain error review. Indeed, given that trial counsel's waiver of Thaniel's presence was permitted under Rule 4-231(c), we hold that there was no error at all, let alone plain error.

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[13] See also *Unger v. State*, 427 Md. 383 (2012), which held that trial counsel's failure to object to advisory jury instructions, during a trial held prior to an intervening change in the law which rendered such instructions unconstitutional, *id.* at 417, "did not amount to deficient representation" under the *Strickland* performance prong. *Id.* at 411.

Cumulative Effect of Purported Errors

Having concluded that the postconviction court erred in granting relief as to all of Thaniel's claims, except those pertaining to modification of sentence and sentence review, we further hold that the postconviction court erred in finding prejudice accruing from the cumulative effect of trial counsel's purported errors.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO GRANT APPELLEE THE RIGHT TO FILE BELATED MOTIONS FOR MODIFICATION OF SENTENCE AND FOR SENTENCE REVIEW BY A THREE-JUDGE PANEL. COSTS ASSESSED TO APPELLEE.

TRAVIS THANIEL	*	**IN THE**
	*	
Petitioner	*	**CIRCUIT COURT**
	*	
vs.	*	**FOR**
	*	
STATE OF MARYLAND	*	**BALTIMORE CITY**
	*	
Respondent	*	**Case No.: 104173062-63**
	*	
	*	**PC No.: 11460**

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POST CONVICTION OPINION AND ORDER

PROCEDURAL HISTORY

In June 2005, Mr. Travis Thaniel (hereafter "Petitioner") was tried by jury before the Honorable Joseph P. McCurdy in the Circuit Court for Baltimore City. Petitioner was convicted of first-degree murder, attempted second-degree murder, use of a handgun in the commission of a crime of violence, as well as additional charges which merged for sentencing purposes. On August 16, 2005, Judge McCurdy sentenced Petitioner to life imprisonment for the first-degree murder, thirty years for the attempted second-degree murder, and twenty years for the use of a handgun in the commission of a crime of violence, all to run consecutively to each other and consecutively to any outstanding and unserved sentence. Upon the filing of a timely appeal, the Court of Special Appeals affirmed the judgment.

On July 2, 2015, Petitioner filed a *pro se* Petition for Post-Conviction Relief. Respondent filed a boilerplate response to the Petition on July 10, 2015. Through an attorney, Petitioner filed a Supplemental Petition for Post-Conviction Relief on May 12, 2016. On June 1, 2016 Respondent filed a response to the supplemental pleading. This Court held a post-conviction hearing on December 29, 2016.

App. 1

Appendix B.

FACTUAL BACKGROUND

On February 6, 2004, Shawn "Peanut" Boston drove through Baltimore City in a white Nissan Maxima with Catherine Jones, the mother of his son. At approximately 9:00pm, as they drove in the area of Kenwood Avenue and Madison Street, Petitioner entered the vehicle and sat in the rear seat. According to Ms. Jones' testimony, once the vehicle turned onto Eager Street, Petitioner said "Man, you know what's up. Kick that shit out." Mr. Boston took an item from under his seat and handed it to Petitioner. Ms. Jones recalled Petitioner saying "this was for my man E," and shooting Mr. Boston and Ms. Jones.

Mr. Boston did not survive his injuries. Ms. Jones was hospitalized in critical condition. Approximately two months later, Ms. Jones identified Petitioner from a photo array as the person who shot her and Mr. Boston that night.

Two eyewitnesses, Latisha Privette and Jerome Wiggs, called 911 on the night of the shooting. At Petitioner's trial, they each testified that they heard gunshots and saw a tall, dark-skinned man get out of a car and shoot into the driver's side of that car. Another witness, Quante Bell, was also called at trial. Although he denied having made any statement to the police, the State introduced an audio recording of Mr. Bell telling detectives that, following the incident, Petitioner came to Mr. Bell's brother's home and talked of shooting Mr. Boston in the chest.

On appeal, Petitioner challenged the trial court's admission of the pre-trial identification of Petitioner by Ms. Jones, and admission of Mr. Bell's recorded statement. The Court of Special Appeals affirmed the judgment.

ALLEGATIONS OF ERROR

In this post-conviction action Petitioner raises the following allegations of error, which have been reworded slightly, all claiming ineffective assistance of counsel:

(1) Trial counsel failed to object to the lack of a unanimous verdict when the foreperson was not included in the polling of the jury,
(2) Trial counsel failed to raise a violation of Rules 4-326(d) and 4-231(b), governing jury communications,
(3) Trial counsel waived Petitioner's right to a public trial,
(4) Trial counsel failed to file a motion for modification and failed to file an application for review by a three-judge panel,
(5) The cumulative effect of trial counsel's errors amounted to deficient assistance, and
(6) Appellate counsel failed to raise issues of lack of unanimous verdict and violations of rules governing jury communications.

Each allegation will be addressed separately.

STANDARD OF REVIEW

Ineffective assistance of counsel claims may properly be raised in post-conviction proceedings. *See Perry v. State*, 344 Md. 204, 227 (1996); *see also Davis v. State*, 285 Md. 19, 36 (1979) (citing *State v. Zimmerman*, 261 Md. 11, 24-25 (1971)). In order to establish such a claim, a petitioner must demonstrate that "(1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Bowers v. State*, 320 Md. 416, 424 (1990). The *Strickland* test, therefore, includes both a "performance component" and a "prejudice component." Unless both components are proven, an allegation of ineffective counsel will not prevail.

Under the first prong of the test, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. When making that assessment, a reviewing court is to afford substantial deference to the decisions of trial counsel. "[I]t is all too tempting for a defendant to second-guess

counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. Where counsel is required to choose between two or more courses of action, he will not be deemed to have committed a deficient act as long as the action he chooses is reasonable. *See Adams v. State*, 171 Md. App. 668 (2006), *aff'd in part, rev'd on other grounds*, 406 Md. 240, 296 (2008), *cert. denied*, 556 U.S. 1133 (2009). *See also Strickland*, 466 U.S. at 690 ("counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). Consequently, the burden of proof lies with a petitioner to overcome the "dual presumptions" that trial counsel's actions or inactions were attributed to trial strategy, and that the strategy was a sound one. *Cirincione v. State*, 119 Md. App. 471, 485 (1998).

With respect to the second prong of the *Strickland* test, "it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The Maryland Court of Appeals has interpreted the prejudice component to require a "substantial possibility" that the result would have been different. *State v. Thomas*, 325 Md. 160, 180 (1992) (citing *Bowers*, 320 Md. at 426-27). The focus upon the outcome of the proceeding reflects the fact that the essential concern underlying the *Strickland* inquiry is not whether counsel committed a professional error, but rather whether the accused received a fair trial.

> [T]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result . . . . Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Strickland, 466 U.S. at 686-89.

DISCUSSION

I. Trial counsel's failure to object to the lack of a unanimous verdict

Petitioner first alleges that, because the foreperson was not included in the polling of the jury that took place following the reading of the verdict, the verdict was not unanimous. Petition, p. 4-6 (citing *Smith v. State*, 299 Md. 158 (1984)). The State contends that nothing in *Smith* requires the foreperson to be polled. Rather, the opinion holds that it is the affirmation of the verdict by each of the *other* jurors that is needed.

> When the foreman has announced the verdict, it is sufficient if each of the *other* jurors when polled declares the verdict thus rendered by the foreman to be his verdict. This is the equivalent of a declaration of the part of each juror that defendant was guilty (or not guilty) as stated by the foreman. "And this is all the law requires."

Smith, 299 Md. at n. 10 (emphasis added) (quoting *Biscoe v. State*, 68 Md. 294, 298-99 (1888)).

In *Colvin v. State*, the Court of Appeals held that there was no cognizable claim under Maryland Rule 4-345(a) where a jury foreperson who read the verdict in the case was not then individually polled. 450 Md. 718, 727 (2016). The Appellate Court explained that where the record merely reflects an improper polling process, something more (i.e. the lack of a proper hearkening of the jury to the verdict) is needed to make a substantive allegation of lack of juror unanimity. *Id.* at 728.

Nothing in the polling process in the present case indicated that the verdict was anything other than unanimous. Neither the trial court nor the attorneys objected before or after the verdict was entered. Furthermore, the verdict was ascertained through both polling and hearkening. *See State v. Santiago*, 412 Md. 28, 38–39 (2009) ("A verdict is not final 'until after the jury has expressed their assent in one of [two] ways,' by hearkening or by a poll.") (citing *Givens v. State*, 76 Md. 485, 487 (1893)). Consequently counsel's failure to object to the entry of the verdict did not constitute deficient representation, nor did it prejudice Petitioner in any way.

For the reasons stated, post-conviction relief is DENIED as to Petitioner's first claim.

II. Trial counsel's failure to raise a violation of Maryland Rules 4-326(d) and 4-231(b), governing jury communications and presence of the defendant

Petitioner argues that counsel rendered ineffective assistance by failing to object to the fact that, outside Petitioner's presence, the trial court and both attorneys discussed and responded to two notes submitted by the jury. Both of the notes at issue were given to the court at the same time. Transcript 6/22/05, p. 2. Petitioner's contention is that failing to notify him of receipt of the jury communications, and failing to allow him to have input regarding the court's response, was a violation of Maryland Rules 4-326(d) and 4-231, to which his lawyer should have objected.

Maryland Rule 4-326(d)(2) provides:

> (A) A court official or employee who receives any written or oral communication from the jury or a juror shall immediately notify the presiding judge of the communication.
>
> (B) The judge shall determine whether the communication pertains to the action. If the judge determines that the communication does not pertain to the action, the judge may respond as he or she deems appropriate.

> (C) If the judge determines that the communication pertains to the action, the judge shall promptly, and before responding to the communication, direct that the parties be notified of the communication and invite and consider, on the record, the parties' position on any response. The judge may respond to the communication in writing or orally in open court on the record.

Rule 4-231 reads: "A defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial, except (1) at a conference or argument on a question of law; (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248."

Additionally, the Court of Appeals has held that:

> [A]n accused in a criminal prosecution has the absolute right to be present at every stage of trial from the time the jury is impaneled until it reaches a verdict or is discharged, and that includes the right to be present when there shall be any communication whatsoever between the court and the jury [,] *unless* the record affirmatively shows that such communications were not prejudicial or had no tendency to influence the verdict of the jury.

State v. Hart, 449 Md. 246, 270 (2016) (citing *Denicolis*, 378 Md. at 656 (2003)).

This Court must thus determine whether the jury notes "pertain[ed] to the action," and if so, whether the trial judge properly notified the parties and considered their positions on how to respond. If the judge did not do so, this Court must determine whether that failure was prejudicial.

A communication "pertains to the action" under Maryland Rule 4-326(d) when it "implicate[s] the effectiveness of the juror's continued service" or concerns the juror's ability to perform his duty. *Gupta v. State*, 227 Md. App. 718, 733-34 (2016) (citing *State v. Harris*, 428 Md. 700 (2012)); *see also Grade v. State*, 431 Md. 85, 100 (2013). "Once error is established, the burden is on the State to show that it was harmless beyond a reasonable doubt." *State v. Denicolis*, 378 Md. 646, 658-59 (2003)).

In Petitioner's case, one of the notes in question (the third jury note) was a request from the jury that all court attendees be held in the courtroom following the reading of the verdict while the jurors vacated the building. Transcript 6/22/05, p. 2. The other note at issue (the fourth jury note) inquired as to how the jury should proceed with the remaining counts having reached a verdict of guilty on the top count of first-degree murder. *Id.* at 3. The trial judge stated on the record that the defendant, who was at the time "on his way" to the courtroom, was "not need[ed] [] yet" and should be "brought back" to the court's holding cell. *Id.* at 5, 7. Petitioner, therefore, was not in the courtroom while the notes were discussed.

Petitioner argues that notifying him of both notes was "mandatory, not discretionary" as they each pertained to the action. The State disagrees, positing that the third note was "simply a housekeeping request" and did not relate to the action, thus allowing the judge to respond as he deemed appropriate. With regard to the fourth note, the State argues that because the trial judge's response was to instruct the jury to "consider all of the counts," discussing it without Petitioner present did not prejudice him. Further, the argument continues, even if Petitioner's right to be present was violated, the harmless error principle prevents post-conviction relief on that ground.

This Court finds the third note to be far from equivalent to a mere housekeeping request. To the contrary, the note pertained to the action in that it indicated a safety concern with how courtroom attendees might react to the verdict. Such a concern could very well affect a juror's ability to perform his or her duty. The record is devoid of any indication whether the concern was with how those in attendance might react to a guilty verdict or how they might react to a not guilty verdict. This Court, therefore, cannot say that the State has met its burden of showing, beyond a reasonable doubt, that the violation was harmless.

The fourth note, which discussed the jury's verdict on the top count, certainly "pertained to the action" as it concerned the deliberative process. It is, however, difficult to conceive how that communication or the court's response could have impacted the jury's deliberations or verdict.

Accordingly, this Court finds that while Petitioner is not entitled to relief as a result of the contact concerning the fourth note, due to the circumstances of the third note, post-conviction relief is GRANTED as to Petitioner's second claim.

III. Trial counsel's waiver of Petitioner's right to a public trial

Petitioner's third allegation is that his trial counsel rendered ineffective assistance when he failed to object to the trial court's closing of the courtroom to the public during jury selection.

The Sixth Amendment to the United States Constitution provides a criminal defendant the right to a public trial. The right to a public trial, however, is not absolute. *Kelly v. State*, 195 Md. App. 403, 417 (2010) (citing *Robinson v. State*, 410 Md. 91, 102 (2009)). Where it is necessary 'to maintain order, to preserve the dignity of the court, and to meet the State's interests in safeguarding witnesses and protecting confidentiality,' the trial court may close a courtroom. *Kelly*, 195 Md. App. at 417 (citing *Markham v. State*, 189 Md. App. 140, 152 (2009)). In *Waller v. Georgia*, the United States Supreme Court held that denial of the right to a public trial is presumptively prejudicial unless a four-factor test is met:

> [(1)] [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; [(2)] the closure must be no broader than necessary to protect that interest; [(3)] the trial court must consider reasonable alternatives to closing the hearing; [(4)] and it must make findings adequate to support the closure.

467 U.S. 39, 48 (1984).

The Court emphasized the rarity of circumstances warranting such a closure. *Id.* at 45. Further, it is evident that "not every closure is of constitutional dimension. *Kelly*, 195 Md. App. at 421 (citing *Watters v. State*, 328 Md. 38, 46) (1992)). In other words, some closures amount to a mere *de minimus* closure, and others are much more substantial—implicating a defendant's public trial rights. *See id.* at 420-29. While length of time alone is not determinative, where a courtroom is closed to the public for less than an hour, many courts have found the closure to be *de minimus*. *See, e.g. id.* at 422 (citing *Peterson v. Williams*, 85 F.3d 39, at 41, 42 (2nd Cir. 1996); *United States v. Al-Smadi*, 15 F.3d 153, 154-55 (10th Cir. 1994)). In determining whether a closure is of constitutional dimension or merely *de minimus*, courts should consider not only length of time, but also the significance of the proceedings taking part in the courtroom during the courtroom closure, and the scope of the closure (partial or total). *Kelly*, 195 Md. App. at 424.

Despite the fact that jury selection often involves the questioning of jurors in a manner that is inaudible to the public, the right to a public trial undoubtedly extends to the *voir dire* process. *See generally Presley v. Georgia*, 558 U.S. 209 (2010); *see also Kelly*, 195 Md. App. at 426. In *Kelly*, the exclusion of the public from the courtroom did not last for the entire jury selection process. 195 Md. App. at 426. Rather, the appellant's family was excluded for the morning session only. *Id.* Considering this factor, as well as significance of the proceedings (voir dire) and scope of closure (only family members were excluded), the appellate court found the closure to be *de minimus*. *Id.* at 427.

In Petitioner's case, prior to trial, the court clerk noted that all eighty-five chairs in the courtroom would be needed for jurors. Transcript 6/14/05, p.6. Additionally, the record indicates concern about potential friction during trial between the families of the victim and the defendant. *Id.* at 8. Without any indication that Petitioner was aware that he had a

constitutional right to a public trial, his attorney suggested that Petitioner's supporters stay out of the courtroom. *Id.* at 8-9. The judge asked if proceeding in that manner would violate the defendant's constitutional rights. *Id.* at 9. The courtroom clerk promptly replied that there would be no violation of defendant's rights and that "[they] usually do it when [they] have a large panel." *Id.* Trial counsel for Petitioner stated that he had no objection. *Id.* The public, including the defendant's family, was thereafter excluded from the courtroom for the entire day that it took to select the jury.

A review of the record does not reflect that the trial court in Petitioner's case analyzed the *Waller* factors. The State concedes that closing a courtroom without having complied with *Waller* "carries a presumption of prejudice to the defendant and therefore requires appropriate relief." Response to Supp. Petition, p. 7 (citing *Watters v. State*, 328 Md. 38) (1992)). However, the State argues that because it was the Petitioner's own attorney who requested that the courtroom be closed, and because that attorney also affirmatively stated the defense had no objection to it being done, Petitioner waived his right to a public trial.

The trial court's failure to have analyzed the *Waller* factors on the record without objection of the defense would have constituted a waiver if Petitioner was seeking post-conviction relief based upon the court's improper closing of the courtroom. However, the issue before this Court is whether Petitioner's attorney's failure to object constituted ineffective assistance of counsel. Because the basis of Petitioner's claim is his lawyer's failure to have objected, that very failure cannot be considered waiver of the claim. Furthermore, there is no indication that Petitioner was adequately informed about his fundamental right to a public trial, and therefore the closing of the courtroom violated that right. Accordingly, there is no evidence that Petitioner knowingly waived his right.

This Court finds that the total closure of the courtroom for the full day it took to conduct the voir dire process in Petitioner's case amounted to more than a *de minimus* interference with Petitioner's right to a public trial. The failure of counsel to have objected to the closure therefore deprived Petitioner of his right to effective assistance of counsel

For the reasons stated, post-conviction relief is GRANTED as to Petitioner's third claim.

IV. Trial counsel's failure to file a motion for modification and an application for review by a three-judge panel

Petitioner's fourth allegation is that his trial attorney rendered ineffective assistance by failing to file a motion for modification or reduction of sentence, and by failing to file an application for review by a three-judge panel.

The Court of Appeals in *State v. Flansburg* held that when a defendant directsp his lawyer to file a motion for modification of sentence, failure to file the motion renders assistance of counsel ineffective. 345 Md. 694, 705 (1997). Nine years after *Flansburg*, the Court of Special Appeals went a step further and held that because a motion for modification cannot result in an increase of sentence, absent an "express directive from appellee not to file a motion for modification, there [is] no conceivable reason why [the motion] would not [be] filed." *State v. Adams*, 171 Md. App. 668, 716 (2006), *aff'd in part, rev'd in part*, 406 Md. 240 (2008). Thus failure to file the motion, even in the absence of a request to do so, is ineffective assistance of counsel. *Id.* Moreover, the Court of Special Appeals has held that failing to file a motion for reconsideration "is prejudicial because it results in a loss of any opportunity to have a reconsideration of sentence hearing." *Matthews v. State*, 161 Md. App. 248, 252 (2005).

On the other hand, a Rule 4-344 application for sentence review may generally result in an increase of the trial court's sentence and its filing would therefore ordinarily require an express directive from the defendant. Nevertheless, in Petitioner's case the trial judge had already imposed the maximum sentence. Thus, like a Rule 4-345 motion for modification, there was no reason to not have filed for sentence review on behalf of Petitioner.

At his post-conviction hearing, Petitioner introduced a letter dated August 17, 2005, in which he requested his trial counsel to file both a motion for modification or reduction of sentence and an application for review of sentence. Trial counsel testified that he only vaguely remembered Petitioner's trial. He further stated that while it was his usual practice to file the post-trial motions, he does not specifically recall doing so in Petitioner's case. Nor does he recall receiving the letter. He conceded however that it was "entirely possible" that he received the letter yet did not file the motions. He simply had no recollection.

Based upon the evidence presented, this Court finds that trial counsel rendered ineffective assistance by failing to have filed the post-trial motions despite Petitioner's express request that he do so. For the reasons stated, post-conviction relief is GRANTED as to Petitioner's fourth claim.

V. Cumulative effect of trial counsel's alleged errors

Petitioner argues that even if no individual aspect of his trial counsel's representation fell below the minimum standards required under the Sixth Amendment, the cumulative effect of his attorney's entire performance nonetheless resulted in a denial of effective assistance of counsel. *Bowers v. State*, 320 Md. 416 (1990). The assertion is that the alleged deficiencies together, if not individually, prejudiced Petitioner to such a degree that post-conviction relief is warranted.

Having found Petitioner's trial counsel ineffective for failing to raise the violations of Maryland Rules 4-326(d) and 4-231(b), failing to object to the violation of Petitioner's right to a public trial, and failing to file a motion to modify the sentence and an application for sentence review, the Court agrees with Petitioner and post-conviction relief is GRANTED as to Petitioner's fourth claim.

VI. Appellate counsel's failure to raise issues of lack of unanimous verdict and violations of rules governing jury communications and presence of the defendant

Petitioner alleges that appellate counsel was ineffective because he failed to raise the issues of the unanimity of the jury verdict and the court's communications with the jury outside of his presence. For the reasons stated in the discussion of Petitioner's claim I, above, the issue of the unanimity of the jury verdict was without merit and appellate counsel was therefore not ineffective for failing to have raised it on appeal. However, for the reasons stated in the discussion of Petitioner's claim II, above, the issue of the jury communications was meritorious and appellate counsel's representation was deficient for having failed to raise it on appeal.

Post-conviction relief is therefore GRANTED as to Petitioner's sixth claim.

CONCLUSION

For the reasons stated herein, the Petition for Post-Conviction Relief is **GRANTED.**

MARCUS Z. SHAR – PART 20
JUDGE
THE JUDGE'S SIGNATURE APPEARS ON THE ORIGINAL DOCUMENT.
Judge Marcus Z. Shar

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Marilyn Bentley
5-11-17 MARILYN BENTLEY, CLERK

CIRCUIT COURT FOR BALT... 1983

TRAVES THANIEL	*	**IN THE**
	*	**COURT OF APPEALS**
	*	**OF MARYLAND**
v.	*	**Petition Docket No. 340 September Term, 2018**
	*	
STATE OF MARYLAND	*	**(No. 936, Sept. Term, 2017 Court of Special Appeals)**

ORDER

Upon consideration of the petitions for a writ of certiorari to the Court of Special Appeals, the supplement, and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petitions and the supplement be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Mary Ellen Barbera

Chief Judge

DATE: December 14, 2018

Appendix C.