TIMOTHY MILTON BOONE	*	**IN THE**
	*	**COURT OF APPEALS**
	*	**OF MARYLAND**
v.		
	*	**Petition Docket No. 374 September Term, 2018**
	*	
		(No. 1573, Sept. Term, 2015
STATE OF MARYLAND	*	**Court of Special Appeals)**

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals filed in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, dismissed on the grounds of lateness.

/s/ Mary Ellen Barbera

Chief Judge

DATE: December 14, 2018

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Application for Leave to Appeal

No. 1573

September Term, 2015

POST-CONVICTION

TIMOTHY MILTON BOONE

v.

STATE OF MARYLAND

Krauser, C. J.,
Meredith,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

PER CURIAM

Filed: February 11, 2016

The application of Timothy Milton Boone for leave to appeal from a denial of petition for post-conviction relief, having been read and considered, is denied.

APPLICATION FOR LEAVE TO APPEAL DENIED.

ANY COSTS TO BE PAID BY APPLICANT.

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

THE STATE OF MARYLAND	*	
v.	*	
TIMOTHY MILTON BOONE *Defendant/Petitioner*	*	Case No. CT06-0037X
	*	

* * * * * * *

ORDER

This matter came before this Court on April 19, 2016 as a Motion to Reopen Post Conviction Proceedings. In Petitioner's motion, filed *pro se*, Petitioner presented three allegations of error based on ineffective assistance of counsel.

Having reviewed Petitioner's motion and all supporting documents, this Court finds that it is not in the interests of justice to reopen the Petitioner's post conviction case and that the allegations contained in Petitioner's Motion to Reopen are without merit. Therefore, it is this 2 day of Nov. 2017, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that Petitioner's Motion to Reopen a Closed Post Conviction Proceeding be, and hereby is, **DENIED.**

Michael R. Pearson

Judge Michael R. Pearson

Copies sent by Chambers on this 2 *day of* November, *2017:*

Timothy Milton Boone, #1641346
Patuxent Institution
7555 Waterloo Road
Jessup, MD 20794

Office of State's Attorney
Prince George's County
Upper Marlboro, MD 20772

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

TIMOTHY MILTON BOONE *
Petitioner *
*
v. * Case No. CT060037X
*
STATE OF MARYLAND *
Respondent *

MEMORANDUM OPINION

Petitioner, Timothy Milton Boone, filed a Pro-Se Petition for Post Conviction relief on March 26, 2009, supplemented by his attorney, Judith B. Jones on May 3, 2011, in accordance with Md. Code Annotated Criminal Procedure §7-101 et. seq. and Maryland Rules of Criminal Procedure 4-401-408. The State filed a timely response. Alana Gayle, Esquire appeared on behalf of the State and Judith B. Jones, Esquire appeared on behalf of the Petitioner.

At the hearing testimony was received from Petitioner. Following the consideration of arguments, the Petition was taken under advisement. For the reasons set forth herein, the Petition for Post Conviction Relief is denied.

FACTUAL AND PROCEDURAL HISTORY

On November 19, 2005, Petitioner was walking behind a group of townhouses in Temple Hills, Maryland at 6:15 pm when Officer Clarence Black responded to a call of a burglary in progress at the home of Angela Contee. When Officer Black reached the scene, he saw Petitioner coming around the corner and yelled for him to stop. Petitioner ran in the opposite direction toward a chain link fence. Officer Black saw a flash and heard a loud noise, and fired three rounds, striking Petitioner in the buttocks. TR 1-84. Petitioner fell to the ground and Officer Black saw a long barrel rifle lying near Petitioner.

Angela Contee had called 911 from her upstairs bedroom at 2754 Iverson Street to report that she hearing kicking and banging at her door and then glass breaking. She heard someone come up the stairs and she locked her bedroom door. The person turned the knob. Just as she heard sirens, the person left. TR 1-72. Ms. Contee testified she did not see who entered the home. TR 1-76.

Technicians found a black bag with a bottle of brandy, a 410 shotgun, a shotgun shell casing, some pieces of clothing and a partially smoked cigar behind the building. A shell was

also found in Petitioner's trousers. Petitioner's fingerprint was found on the brandy bottle. TR 2-29.

On November 23, 2005, four days after the incident, Detective David Morissette interviewed Petitioner in the hospital. Petitioner said he was cutting through an area behind the houses on his way to 7-Eleven when he found a gun. As he picked it up, someone yelled "freeze" and the gun went off toward the fence. He denied going into anyone's home. Petitioner was unable to sign the statement as he was hooked up to an intravenous drip in both arms and on pain medication.

On July 6, 2006 Petitioner was found guilty of Count Two – First Degree Assault, County Three – Second Degree Assault (merged into Count Two), and Count Five – First Degree Burglary. On August 4, 2006 Petitioner was sentenced to Division of Corrections on Count Two for a period of 25 years and Count Five for a period of 20 years, consecutive to Count Two. Petitioner was represented at trial and sentencing by Janet Hart.

An application for review of sentence was filed August 7, 2006. On December 26, 2006 the sentence was affirmed. A motion for reconsideration was filed September 19, 2006 and denied November 1, 2006.

An appeal was field and heard by the Court of Special Appeals. In an unreported opinion, the judgments were affirmed. See Boone, Timothy Milton v. State of Maryland, No. 1412, Sept. Term 2006. A petition for writ of certiorari was filed and denied.

On March 26, 2009, the Petitioner filed the present Petition for Post Conviction Relieft, pro se. Counsel supplemented this petition on May 3, 2011. The State filed an answer on May 16, 2011.

ALLEGATIONS OF ERROR

1) The State presented improper closing arguments.
2) The identification in this case was improper and insufficient to convict the Petitioner.
3) Trial counsel failed to object to the trial court declining to ask two importation questions on voir dire of the jury.
4) Trial counsel failed to argue in motion for judgment of acquittal that evidence was insufficient to support a conviction for First Degree Burglary.

STANDARD OF REVIEW

Pursuant to Section 7-102 of the Uniform Post Conviction Procedure Act (UPCPA), a petitioner may institute a proceeding in the Circuit Court for the county in which the conviction occurred to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction, nor in any other proceeding that the petitioner has taken to secure relief from his conviction. A post conviction petition "is not a substitute for and does not affect any remedy that is incident to the proceedings in the trial court or any remedy of direct review of the sentence or conviction." See § 7-107(a) UPCPA.

Prosecutorial Misconduct

A petitioner can be entitled to a new trial if he can show that he was denied a fair trial on account of prosecutorial misconduct. Prosecutorial misconduct may result in a denial of due process. To constitute a due process violation, the prosecutorial misconduct must be "'of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Bagley,* 473 U.S. 667, 676 (1985) (*quoting United States v. Agurs*, 427 U.S. 97, 108 (1976)). If the act of misconduct occurred during the trial in open court, the petitioner must raise the matter at trial. *State v. Tichnell*, 306 Md. 428, *cert denied*, 479 U.S. 995 (1986).

Ineffective Assistance of Counsel

A fundamental component of a defendant's Sixth Amendment rights under the United States Constitution is the right to the "effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759 (1970); *Strickland v. Washington*, 466 U.S. 668, 686 (1984). "The Court of Appeals [has] stated that the Sixth Amendment right to assistance of counsel accord criminal defendants a right to counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." *Strickland*, 466 U.S. at 680. The standard for judging a claim of ineffective assistance of counsel is "...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." *Strickland*, 466 U.S. at 686; *Harris v. State*, 303 Md. 685, 694, 496 A.2d 1074, 1078 (1985); *State v. Tichnell*, 306 Md. 428, 441, 509 A.2d 1179, 1185 (1986).

In order to prove a claim of ineffective assistance of counsel and obtain reversal of a conviction, the defendant must prove: 1) that counsel's performance was deficient, falling below an objective standard of reasonableness; and 2) that counsel's deficient performance prejudiced

his or her defense. Both prongs must be met on each issue for Petitioner to be successful on an ineffective assistance of counsel claim. *Bowers v. State*, 320 Md. 416, 424, 578 A.2d 734, 737 (1990); *Tichnell*, 306 Md. at 441, 509 A2.d at 1185; *Harris*, 303 Md. at 696, 496 A.2d at 1080; and *Strickland*, 466 U.S. at 687.

In *Bowers*, the Court of Appeals clarified the prejudice prong set forth by the Supreme Court in *Strickland*, stating that the test is whether there is a "substantial possibility" that had counsel performed efficiently, the outcome of the trial would have been different. This standard is more stringent than "preponderance of the evidence," but less stringent than "beyond a reasonable doubt." *Id.* 320 Md. at 426, 578 A.2d at 738. Both prongs of the Strickland test need to be established, thus if a court finds that a defendant has failed to satisfy one prong, the court need not consider the other.

DISCUSSION

1) The State presented improper closing arguments.

Petitioner argues that the State presented improper closing arguments when it informed the jurors that they could find Petitioner guilty of first degree burglary if they found that he had committed a breaking and entering of the dwelling with the intent to commit theft or with the intent to commit a crime of violence.

The State made the following comment during closing argument:

> What did we hear from Angela Contee about her house being broken into? That she was upstairs with her child, she was feeding her child, that she heard glass breaking, that she heard movement, entry into her house. She called 911. She's upstairs basically barricaded in her bedroom with her child. She hears the person who broke and entered come to her bedroom door and start kicking at her bedroom door. It wasn't a neighbor.
>
> It wasn't a friend. It wasn't a boyfriend. It was not a family member. It was someone who intended to break in and take from her or to break in and harm her.

The Court finds that this allegation was finally litigated. An allegation of error is finally litigated "when [the Court of appeals] or the Court of Special Appeals has rendered a decision on the merits thereof...on direct appeal." *Hunt v. State*, 345 Md. 122, 165, *cert denied*, 521 U.S. 1131 (1997). Here, the Court of Special Appeals decided this issue on its merits, holding that there was no abuse of discretion. Therefore, the Court finds that this issue may not be re-litigated by a post conviction petition.

Further, even if the issue had not been finally litigated, the Court finds that the trial court properly allowed these statements. "The prosecutor is allowed liberal freedom of speech and may make any comment [during closing argument] that is warranted by the evidence of inferences reasonably drawn therefrom." *Grandison v. State*, 341 Md. 175, 224 (1995). Reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Grandison*, 341 Md. at 244. The determination of whether the prosecutor's comments were prejudicial or simply rhetorical flourish lies without the sound discretion of the trial court. On review, an appellate court should not reverse the trial court unless that court clearly abused its discretion and prejudiced the accused." *Spain v. State*, 386 Md. 145, 158-59 (2005).

The Court finds that even if this statement improperly suggested the Petitioner had intent to cause physical harm, rather than just steal, this was not likely to cause the jury to convict the Petitioner on an improper ground. In addition, the Court instructed the jury that the closing argument is not evidence. Finally, the Petitioner defense was not that he lacked the requisite intent, but that he was not the person who broke into the house. Therefore, the Court finds that the trial court did not err in allowing the closing argument.

2) The identification in this case was improper and insufficient to convict.

Petitioner argues that the identification in this case was improper and insufficient to sustain a conviction. Officer Black, on being asked to give a description of the suspect, stated he was 5-8 to 5-10, average height, and dark clothes. Officer Black gave conflicting testimony in court and in an out-of-court statement as to whether Petitioner ever left his line of sight while he was fleeing the crime scene. Petitioner argues that the vague description and inconsistencies amount to an improper identification insufficient to convict Petitioner.

The Court finds that Petitioner waived this argument by failing to object to the identification prior to this post-conviction appeal. Crim. Proc. Art.,§7-106(b). Furthermore, the Court finds that this identification, despite the discrepancies, is sufficient to convict Petitioner.

3) Trial counsel failed to object to the trial court declining to ask two important questions on *vior dire* of the jury

Petitioner argues that the trial court erred in refusing to ask two questions during jury *voir dire*. Petitioner argues that the court should have asked:

13. Would you be inclined to give more or less weight to the testimony of a witness based solely on his or her occupation?

14. Specifically, would you be more inclined to believe a police officer solely because he or she is a police officer?

The Court did ask a question to the jury during *voir dire* that addressed the juror's inclination to believe a police officer's testimony because he or she is a police officer.

> Is there any member of the jury panel who would be either more inclined to either believe or disbelieve the testimony of any particular witness solely because of that witness's either occupation or status? By occupation, I mean what the witness does. Using a typical example, as a police officer, but it could be any type of profession. Status refers to what the witness is. For instance, a child, or – is there any person who would be more inclined to either believe or disbelieve a witness solely because of what the person does or what the person is? If so, please stand.

There were no affirmative answers to that question. Petitioner's counsel did not object to the above instructions. This issue was not reviewed by the Court of Special Appeals, since the issue was not preserved for appeal.

There are mandatory areas of inquiry during jury *voir dire*, including "(1) racial, ethnic and cultural bias, (2) religious bias, (3) predisposition as to the use of circumstantial evidence in capital cases, and (4) placement of undue weight on police officer's credibility." *Dingle v. State*, 361 Md. 1, 11, no. 8, 759 A.2d 819 (2000). The Court finds that the trial court's inquiry in *voir dire* into the jury's possible bias in favor of a police officer is sufficient. The Judge's question goes directly to the issue. The *voir dire* question specifically asked if a jury member would have a tendency to believe or disbelieve someone solely based on their occupation as a police officer. Therefore, the Court finds that there was no deficient performance by counsel in failing to object to the *voir dire* questions.

4) Trial counsel failed to argue in motion for judgment of acquittal that evidence was insufficient to support a conviction for First Degree Burglary.

Petitioner argues that he received ineffective assistance of counsel because his trial counsel failed to argue a motion for a judgment of acquittal that the evidence was insufficient to support a conviction for First Degree Burglary. Petitioner argues that while there was evidence that a burglary occurred, there was inadequate evidence to connect him to the burglary. Therefore, he

argues he was prejudiced when trial counsel failed to sufficiently argue for a judgment of acquittal.

Trial counsel moved for judgments of acquittal twice, after the State rested and at the conclusion of all evidence. Trial counsel specifically argued the motion as to all other counts in the case except for Burglary. While trial counsel did move for a judgment of acquittal on the charge of First Degree Burglary, the Court finds that the trial counsel did not state the reasons why his motion for judgment of acquittal should be granted as to the charge of First Degree Burglary. TR 2-32-36. Therefore, the court finds that trial counsel's motion for judgment of acquittal was insufficient on the charge of First Degree Burglary. *Fradin v. State*, 85 Md.App. 231, 244-45 (1991); *State v. Lyles*, 308 Md. 129, 135 (1986); *Parker v. State*, 72 Md.App. 610, 615 (1987).

The Court finds that while trial counsel failed to sufficiently argue for a motion for judgment of acquittal for First Degree Burglary, the Petitioner is not entitled to have the verdict overturned. When trial counsel fails to make a motion for judgment of acquittal, the Court must determine whether the evidence was sufficient to sustain a conviction. *Mosely v. State*, 378 Md. 548 (2003). A failure to make a motion for judgment of acquittal that has no chance of success is not ineffective assistance of counsel since it fails both prongs of the Strickland test. *US v. Carter,* 355 F.3d 920 (2004).

Burglary is the breaking and entering of a dwelling with the intent to commit theft therein. Md. Code, Criminal Law, §6-202. Proof of burglary does not require direct evidence, but can be inferred from circumstantial evidence. *Benton v. State*, 8 Md.App. 388 (1969). However, merely proving the defendant was at the scene prior to the burglary is insufficient evidence and will not survive a motion for judgment of acquittal. *Warfield v. State*, 315 Md. 474 (1988).

The Court finds that while there was no eyewitness evidence of Petitioner breaking into the victim's home, there was circumstantial evidence that he committed the offense. There was convincing evidence that the Petitioner was at the scene moments after the crime was committed, fled from the police when ordered to stop, shot at the police, was found with a shotgun lying next to his body, and there were shotgun shells at the scene. From that, a rational jury could infer that Petitioner committed the burglary. The Court finds that the evidence, though circumstantial, was sufficient to support a conviction for First Degree Burglary. Therefore, the Court finds that the

petitioner was not prejudiced because the motion would have been denied. *Mosely*, 378 Md. at 548.

Conclusion

Based upon consideration of Petitioner's request for Post Conviction Relief, the State's Answer thereto, the oral arguments presented, weighing the evidence and the credibility of the testimony presented during the Post Conviction hearing, the Court finds that Petitioner's request for a new trial is **DENIED**.

Judge Julia B. Weatherly

Date: Jan 27, 2012

Copies mailed to the following on this 27 day of January, 2012 to

Alana P. Gayle, Esq.
State's Attorney's Office

Judith B. Jones, Esq.
Office of the Public Defender
7500 Ritchie Highway, Suite 111
Glen Burnie, Maryland 21061

By: Ashley, Law Clerk to Judge Julia B. Weatherly

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

THE STATE OF MARYLAND	*	
	*	
v.		
TIMOTHY MILTON BOONE	*	Case No. CT06-0037
Defendant/Petitioner	*	

* * * * * * *

STATEMENT OF REASONS AND ORDER

Timothy Milton Boone ("Petitioner") filed a Motion to Reopen Post-Conviction *pro se* on April 19, 2016, pursuant to Md. Ann. Code, Crim. Proc. Art. § 7-101-104 and Md. Rule 4-401-408. The Petitioner asserts the following allegations of error:

1. Post-conviction counsel rendered ineffective assistance of counsel by failing to argue insufficient evidence existed to prove the first and second-degree assault charges.
2. Post-conviction counsel rendered ineffective assistance of counsel by failing to argue insufficient evidence existed to prove the first-degree burglary charge.

The Petitioner seeks a re-opening of his post-conviction hearing, a new hearing on the present petitioner, a new trial, or a new sentencing hearing. Should any of the relief be provided, the Petitioner asks that an attorney be appointed to represent him at the proceeding.

FACTUAL BACKGROUND

On November 19, 2005, Angela Contee and her child were eating dinner around 6:15 p.m. when they heard someone kicking and banging on the back door of their townhouse in Temple Hills, Maryland. When she heard glass break and footsteps coming up to the second floor, Ms. Contee took her child into the bedroom and locked the door. She called 911 and

reported seeing her bedroom door's doorknob turn. At that time, she began hearing sirens. She also heard the person in her home walk back downstairs and out of the house.

Officer Clarence Black of the Prince George's County Police Department responded to the 911 call of a burglary in progress at Ms. Contee's townhouse. While exiting his police cruiser, Officer Black saw a man come around the corner of the townhouse towards him. This man was later identified as the Petitioner, Timothy Boone. Officer Black yelled for the man to stop, but the man took off behind the row of townhouses. After a brief time, the man turned back to the officer. The officer then saw a "flash" and heard a gunshot. He removed his service weapon and fired three shots, one of which hit the Petitioner in the buttocks. Upon approaching the Petitioner, the officer noted a shotgun lying near his head. He called for backup and the Petitioner was subsequently arrested.

PROCEDURAL HISTORY

On January 5, 2006, the Petitioner was charged with committing the following crimes: (1) Attempted Murder; (2) First-Degree Assault; (3) Second-Degree Assault; (4) Use of a Handgun in the Commission of a Crime of Violence; and (5) First-Degree Burglary. The Petitioner was found guilty of first-degree assault, second-degree assault, and first-degree burglary on July 6, 2006, following a two-day jury trial before the Honorable Judge Dwight Jackson. The jury found him not guilty of attempted murder and the lesser-included offense of attempted second-degree murder. On August 4, 2006, the Petitioner was sentenced to 25 years imprisonment for the first-degree assault and a consecutive 20 years imprisonment for the first-degree burglary.

On August 7, 2006, the Petitioner filed an Application for Review of Sentence and a Notice of Appeal. He filed a Motion for Reconsideration of Sentence on September 19, 2006 that

at was denied on November 1, 2006. On December 26, 2006, his sentence was affirmed by the three-judge panel. The Court of Special Appeals affirmed his sentence and conviction on July 1, 2008. The Petitioner filed a writ of certiorari that was denied on October 14, 2008.

The Petitioner filed a Motion for Evaluation by the Department of Health and Mental Hygiene pursuant to Maryland Code § 8-505 on December 3, 2008. This motion was denied on January 12, 2009. On August 19, 2009, the Petitioner filed a Motion to Correct Illegal Sentence that was denied on October 23, 2009.

On March 26, 2009, the Petitioner filed a Petition for Post Conviction Relief. On December 29, 2010 and March 3, 2010 the Petitioner filed a Pro Se Supplemental Petition for Post Conviction Relief. The Petitioner filed a third Supplemental Petition for Post Conviction Relief through counsel on May 3, 2011. On November 22, 2011, a post conviction hearing was held, and on January 27, 2012, the court denied him post conviction relief. On February 23, 2012, the Petitioner filed an Application of Appeal and an Application for Leave to Appeal, both of which the Court of Special Appeals denied on December 19, 2012.

The Petitioner filed a Motion for Evaluation by the Department of Health and Mental Hygiene pursuant to Code § 8-505 on June 12, 2014 that was denied on September 19, 2014. He subsequently filed a Petition to Reopen Post Conviction Proceedings on June 11, 2015. This Petition was denied on July 23, 2015. On August 7, 2015, the Petitioner filed a Notice of Appeal that the Court of Special Appeals denied on February 11, 2016.

On April 19, 2016, the Petitioner filed the Motion to Reopen Post Conviction Proceedings presently before the court.

STANDARD OF REVIEW

A criminal defendant has the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759 (1970). When a claim is brought under this proviso, petitioner bears the burden of proving defective representation over the strong presumption to the contrary. *State v. Calhoun*, 306 Md. 692, 729 (1986), *cert denied,* 480 U.S. 910 (1987); *State v. Thomas*, 325 Md. 160, 171 (1992). To meet this burden, the petitioner must satisfy the two-prong test set forth in *Strickland v. Washington,* 446 U.S. 668 (1984). The test requires petitioner to show that 1) counsel's performance was defective, and 2) the deficiency prejudiced his case. *Id.* at 687. Both prongs must be satisfied in order for petitioner to prevail. *Harris v. State*, 303 Md. 685 (1984).

The "deficiency" prong requires petitioner to identify acts or omissions of counsel alleged not to have been the result of reasonable professional judgment; show that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment; and overcome the presumption that, under the circumstances, the challenged actions was sound trial strategy. *Strickland*, 466 U.S. at 690. In order to be deficient, counsel's actions must be "outside the wide range of professionally competent assistance." *Id.* As a caveat, the petitioner is not granted the benefit of hindsight, and counsel's performance is gauged at the time of the alleged deficiency. *Id.* at 441.

The "prejudice" prong requires petitioner to show that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 691. An error by counsel, even if professionally unreasonable, will not warrant setting aside a criminal conviction if the error had no effect on judgment. *Id.* at 694. A mere showing "that errors had *some* conceivable effect on the outcome of the proceedings" is not enough. *Id.* at 693 (*emphasis added).* The petitioner must therefore

establish a "reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.* at 694.

A court is required to make findings as to every allegation raised by a petition for post-conviction relief. *State v. Borchardt*, 396 Md. 586, 636 (2007). In post-conviction proceedings, the judge has clear responsibility to identify each complaint made by petitioner, to rule on each complaint, and to set forth reasons used to support result. Md.Rule 4-407(a); *Pfoff v. State,* 85 Md. App. 296 (1991). "Ordinarily, unless it certainly appears that an asserted ground for post-conviction relief has been either abandoned or a finding thereon waived by the petitioner or his counsel, the failure of the lower court to consider *all* of the contentions of a petitioner would require a remand for a finding on all questions raised." *Daniels v. Warden of Md. Penitentiary*, 222 Md. 606, 763 (1960).

ALLEGATIONS OF ERROR

Petitioner makes two allegations in the present motion to reopen based on ineffective assistance of post-conviction counsel. First, he claims that post-conviction counsel failed to argue insufficient evidence existed to prove the first and second-degree assault charges. Second, he argues that post-conviction counsel failed to argue insufficient evidence existed to prove the first-degree burglary charge.

DISCUSSION

Relief on both allegations should be denied. In his Petition for Post Conviction Relief dated March 2009, the Petitioner argued as issue #8 that insufficient evidence existed to support his conviction for first-degree burglary and assault. (pet. 2). Post conviction counsel Judith Jones amended this allegation in the supplemental petition filed in April 2011. The new allegation asserted that trial counsel rendered ineffective assistance of counsel for failing to argue the

motion for judgment of acquittal based on insufficient evidence to support a conviction for first-degree burglary. This alteration was confirmed at the post-conviction hearing. The following exchange occurred prior to the court hearing arguments:

> Court: Okay. Eight was insufficient evidence to prove the elements of first-degree assault and first-degree burglary beyond a reasonable doubt.
> Ms. Jones: Again, I rephrased that in the supplemental petition as ineffective assistance of counsel for failure to –
> Court: Arguing the motion for --
> Ms. Jones: -- to -- motion for judgment of acquittal especially on the burglary.
> Court: All right.
>
> Tr. Post Conviction H-6:3-11.

The Court confirmed with the Petitioner to assure that the issues were correct, to which the Petitioner answered in the affirmative. Tr. H-8:11-13. Subsequently, during the Petitioner's testimony, counsel again confirmed with him that he wanted to address the issues in this way.

> Ms. Jones: And have we agreed that these are the issues that we're going forward on –
> Petitioner: Yes, Ma'am.
> Ms. Jones: --that Judge Weatherly had pointed out and we've talked about this?
> Petitioner: Yes, ma'am.
> Ms. Jones: And you're agreeable to this?
> Petitioner: Yeah.
>
> Tr. H-12:20-25.

The Petitioner states that, while he agreed at the post conviction hearing to the re-phrasing of his allegations, he was relying on counsel's expertise and experience in the law.

The Petitioner now argues that his post conviction counsel rendered ineffective assistance because she failed to argue two points: that the evidence was insufficient to prove him guilty of first or second-degree assault and first-degree burglary.

A. Post Conviction Counsel Did Not Render Ineffective Assistance of Counsel for Failing to Argue the Assault Charges

As to the assault charges, the Petitioner points to the post conviction hearing transcript and contends that he tried to address this issue at the hearing but was cut off by post conviction counsel. Tr. H-1518-21. Then he reiterates that he was completely turned around while running from Officer Black and did not purposefully discharge the gun.

The Petitioner fails to argue how he was prejudiced by post conviction counsel's failure to argue insufficient evidence to support the assault charges. He merely points out that post conviction cut him off when he attempted to address the assault charges during the hearing. He does not include any supporting reasons or evidence that the court would have reached a different or just result had counsel made this argument.

The post conviction court made a specific finding that, although circumstantial, the evidence was sufficient to the Petitioner's burglary conviction. Op. 7. Given that the evidence was stronger for the assault charges than for the burglary charge, it is highly unlikely that the court would have found the evidence was insufficient if counsel had attempted to make the argument. Therefore, counsel's representation was not deficient, and the Petitioner was not prejudiced by the lack of argument. Relief on this ground should be DENIED.

B. Post Conviction Counsel was Effective in Arguing Insufficient Evidence to Support a Conviction of First-Degree Burglary

As to the burglary charges, the Petitioner admits that counsel addressed the insufficiency of evidence for this charge. However, he argues that she failed to point out which element was not proven. He contends that the victim did not properly identify him and that the evidence against him is circumstantial.

The facts do not support the Petitioner's allegation. Petitioner admits that post conviction counsel argued the insufficiency of evidence to support the first-degree burglary charge during his post conviction hearing. She specifically pointed out that the timing from the call to 911 to when the officer came upon the Petitioner was too short and that there was nothing of the victim on the Petitioner when he was arrested to link him to the burglary. Tr. H-22:5-25; H-23:1-10. The Court later found that the evidence against him on the burglary charge was sufficient even though it was circumstantial. The Petitioner fails to state how counsel's argument prejudiced him or denied him a just result.

Further, the amendments to the allegations of error in Petitioner's first Petition for Post Conviction Relief was likely a good strategic move by counsel. Under the "not a substitute" rule, a post conviction court is not a forum to litigate issues that can, and should, be litigated in other proceedings, either at trial or before. *Matthews v. Warden,* 223 Md. 649, 650-51 (1960). *See also Hazel v. State*, 226 Md. 254, 264 (196) *cert. denied,* 368 U.S. 1004 (1962); *Ross v. Warden*, 1 Md. App. 46, 52 (1967); *Hess v. State*, 4 Md. App. 508, 514 (1968). This rule is codified at Maryland Code § 7-107(a), which states that "[t]he remedy provided under this title is not a substitute for and does not affect any remedy that is incident to the proceedings in the trial court or any remedy of direct review of the sentence or conviction."

If post conviction counsel had not changed the allegation to reflect the ineffective assistance of trial counsel, the post conviction court would likely have employed the "not a substitute" rule to dismiss it altogether because an allegation of insufficient evidence could have been raised on appeal and is not appropriate to litigate on post conviction. This alteration to further the Petitioner's case was within the wide range of professional judgment afforded to

lawyers under the *Strickland* standard, particularly because counsel confirmed the Petitioner's agreement with this action multiple times during the post conviction hearing.

Based on the above reason, relief on these grounds should be DENIED.

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

TIMOTHY BOONE,

vs.

Case Number:
CR-000[illegible]X

STATE OF MARYLAND,

Defendant.

OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Hearing)

Upper Marlboro, Maryland

Friday, November 11, 2011

BEFORE:

HONORABLE, JUDGE JULIA B. WEATHERLY

APPEARANCES:

For the Plaintiff:

JUDITH JONES, ESQUIRE

For the Defendant:

ALANA GAYLE, ESQUIRE

Electronic Proceedings Transcribed by: Sheri Monroe

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P R O C E E D I N G S

(4:30 p.m.)

THE COURT: This is the matter of Timothy Milton Boone v State of Maryland, CT-06-0037X.

This matter comes before the court today on Mr. Boone's petition for post-conviction relief.

Counsel, I'm going to try and articulate what I understood the issues to be and -- oh, I'm sorry, Counsel, could you put your appearance on the record?

MS. JONES: I'm Judith Jones, Office of the Public Defender on behalf of Mr. Boone, who's here to my right.

MS. GAYLE: Alana P. Gayle on behalf of the Respondent, State of Maryland.

THE COURT: All right. Excuse me I wanted to get that earlier.

We have -- in reviewing the petition and the supplemental petition have identified maybe 11 issues that we think are before the court today.

I'd like to articulate those and then Ms. Jones if you'll tell me whether there are any issues that are being waived at this time or if there's any additional issues so we know what we're addressing in this matter.

Based upon Mr. Boone's petitions, I believe

that he is raising the following allegations of error; 1, that the trial court erred in refusing to give his proposed voir dire questions?

MS. JONES: Correct and we will argue that.

THE COURT: Okay.

MS. JONES: Well, we'll argue that in the form of ineffective assistance of counsel.

THE COURT: All right. So rather than -- and I do believe --

MS. JONES: That would be in the supplemental petition.

THE COURT: -- we raise it -- right, I think we picked it up again in the supplemental. All right. So, one will be waived and you'll argue it, not as a trial court error but as a --

MS. JONES: Correct.

THE COURT: -- ineffective assistance of counsel. Two, trial court erred in instructing that jury that a first-degree burglary is the breaking and entering of a dwelling with intent to commit a crime of violence, that additional language was used as well as to commit a theft.

MS. JONES: Your Honor, I believe we'd have to waive that because it had been litigated on appeal.

THE COURT: Okay.

MS. JONES: And I believe the appellate opinion was attached.

THE COURT: I do too. Three, that the State presented improper closing arguments.

MS. JONES: We would leave that with the court.

THE COURT: All right. Four, that the trial judge improperly considered the petitioner's prior arrests but not convictions at sentencing.

MS. JONES: That, again, was litigated on appeal, so that would have to be waived, I'm afraid.

THE COURT: Okay. That the identification in this case was improper and insufficient to convict the Petitioner.

MS. JONES: We'll leave that with the court.

THE COURT: This one I'm going to need some help on. I think that the language is, developing an indictment was improper and insufficient to convict and I'm just not sure what that means.

MS. JONES: We can waive that Mr. Boone says.

THE COURT: Number 7, that the police violated the Petitioner's right against self-incrimination by questioning him at the hospital without giving Miranda rights or warning.

MS. JONES: Well, this was litigated at the

suppression hearing, so I think we would -- I think we'll have to waive that.

THE COURT: Okay. Eight was insufficient evidence to prove the elements of first-degree assault and first-degree burglary beyond a reasonable doubt.

MS. JONES: Again, I rephrased that in the supplemental petition as ineffective assistance of counsel for failure to --

THE COURT: Arguing the motion for --

MS. JONES: -- to -- motion for judgment of acquittal especially on the burglary.

THE COURT: All right.

MS. JONES: So, it's --

THE COURT: And then I have and I think these are the ones raised in the supplemental, ineffective assistance of counsel at sentencing --

MS. JONES: Well, Mr. Boone, just so we're clear. He filed a Pro Se Petition on March 26th, 2009, then he filed a Pro Se Supplement on or about December 29th, '09 and then he filed another Pro Se Supplement on March 3rd, 2010. So there were three Pro Se documents and then the one that I filed in April of 2011. So, I think -- I think we're all on the same page here.

THE COURT: All right. So, I have -- the

last three issues that I have are ineffective assistance of counsel at the sentencing for failure to object to the improper consideration of Petitioner's past prior charges that didn't result in convictions.

MS. JONES: Okay, I think that's from the Pro Se Petition.

THE COURT: It is.

MS. JONES: That, again, would have been litigated on appeal, so we'd have to waive that.

THE COURT: All right. And I have trial counsel failed to object to -- oh, the trial court's declining to ask two important questions on voir dire of the jury.

MS. JONES: That we'll be arguing as ineffective assistance of counsel.

THE COURT: Okay.

MS. JONES: Correct.

THE COURT: And ineffective assistance of counsel for failure to argue in the motion for judgment of acquittal, that the evidence was insufficient to support a conviction for first-degree burglary.

MS. JONES: Yes, and we'll be arguing that.

THE COURT: Okay.

MS. JONES: That's raised again in the supplemental petition that I wrote.

THE COURT: All right. Any other issues, then, Ms. Jones, for the court?

MS. JONES: No, Your Honor.

THE COURT: The court then has identified the two issues raised through counsel and the two issues improper -- the State's presentation of improper closing argument and the identification being improper and insufficient to convict the Petitioner as being the issues that are before the court and all other issues are away.

MS. JONES: Is that agreeable to you, Mr. Boone?

THE PETITIONER: Yes, ma'am.

MS. JONES: Okay. Your Honor, do I understand that you've read this with enough background of the case or would you like me to do a brief resertation of the facts?

THE COURT: Well, I think we've picked up what we can from the file, sometimes counsel knows more than we can glean, but --

MS. JONES: Okay. We'll just do a quick resertation then. This was an incident that occurred on November 19th, 2005 about 6:15 p.m. or so. Officer Clarence Black responded to a 911 call from a woman named Angela Conti (phonetic) who heard some glass

breaking downstairs in her apartment and she went upstairs and basically baracader herself in the bedroom, she thought she heard someone coming in. She called 911 and heard sirens and the intruder left. She never saw him. There was never any evidence -- apart from a broken window there was no evidence to tie Mr. Boone or, indeed, anybody to a break in.

Officer Black arrived very quickly and the officer saw a man coming from behind the back yards of this -- there were several townhouses in a row and he yelled for the man to stop and this man, who turned our to be Mr. Boone, ran in the opposite direction towards a fence.

Then Officer Black said he saw a flash and heard a noise so the officer fired and he hit Mr. Boone in the back. Officer Black saw a long rifle near Mr. Boone.

There were five evidence techs who came along there after and found Mr. Boone's print only on a brandy bottle inside a black bag. There was a shotgun shell and casing and a few bits of clothing and some other junk, basically, around in the back of these apartments -- a partly smoked cigar, behind the buildings. But there were no connections to Ms. Conti's house.

Now Mr. Boone was taken to the hospital because he was shot threw and had an exit wound in his stomach which is still troublesome to him.

Detective Morriset (phonetic) came and interviewed Mr. Boone at the hospital and Mr. Boone said that he found the gun around lying out there, someone yelled freeze -- the gun -- the gun that he -- some gun went off and then all of the sudden he was shot and he's maintained his innocence all this time.

And the interview in the hospital ended because Mr. Boone said, I'm in too much pain to continue and the nurses didn't come and they had called the nurses, this is all born out in the transcript.

The jury found Mr. Boone not-guilty of attempted first and second-degree murder of Mr. Black, but they did find him guilty of first-degree assault and first-degree burglary. And he was sentenced to 25 years for the assault plus 20 years for the burglary, so he got the maximum sentence on both counts and is serving 45 years now.

We've gone through the issues that we've been talking about today and I know, Mr. Boone, you had a few things that you'd like to address the court with. And if the State is okay with that? And does the State have any opening?

THE COURT: We're doing opening right now.

MS. GAYLE: Yes.

MS. JONES: Yeah, okay.

MS. GAYLE: Basically, briefly, on opening Your Honor, the only thing the State would say that's under Stricklin v Washington (phonetic), the State would argue that it would be quite clear after hearing all testimony, argument, the Petitioner has failed to meet his burden of proof as to either prong under Stricklin v Washington and we reserve the rest for argument.

THE COURT: All right. And --

MS. JONES: Then I would like to call Mr. Boone.

THE COURT: All right. Mr. Boone, if you would come up to the witness stand, sir. You can bring any paperwork you need to refer to as part of your testimony, although you'll need to tell counsel if you're looking for a particular document.

Whereupon,

TIMOTHY BOONE,

the Petitioner, first having been duly sworn according to law, was examined and testified as follows:

BY MS. JONES:

Q Mr. Boone, how old are you now?

A Thirty-five.
Q Thirty-five. And how far did you go in school?
A Ninth grade.
Q And do you have any legal education?
A No, ma'am.
Q Now, have you -- you had some injuries; is that correct?
A Yes, ma'am.
Q Are they affecting your ability to read and write at this point?
A Off and on, sometimes they do and sometimes they don't.
Q Do your injuries have any affect on your ability to organize your thoughts?
A To a certain extent.
Q Okay. And you've filed several Pro Se Petitions, correct?
A Yes, ma'am.
Q And have we agreed that these are the issues that we're going forward on --
A Yes, ma'am.
Q -- that Judge Weatherly had pointed out and we've talked about this?
A Yes, ma'am.

Q And you're agreeable to this?

A Yeah.

Q And we've spoken on a few occasions?

A Yes, ma'am.

Q I did one video conference with you and then we just talked in the lock up?

A Yes, ma'am.

Q And we've written several times?

A Yes, ma'am.

Q Okay. Now, do you understand that this is your one chance at post-conviction?

A Yes, ma'am.

Q Okay. Now, is there anything then that you would like to address the court on either these issues and I know you had something that you'd like to address the court with, if you'd like to read your statement to her or tell her.

A Actually, it's very brief, it's not that long or anything. I just want to let the court know that I've been incarcerated over six years now and within that six years I have learned a lot in that six years. And one of the things that I've learned that if I ever should return back to society, because I don't know how this case will go, I don't know how the next case will go but if I ever should return back to society and see

a firearm laying anywhere I will most likely contact the police and let them know it was right there instead of me picking it up like I did in this case, because I ended up getting shot.

I'm at WCI ma'am, I've been suffering physically and mentally up there and I am medication. I take Elevil (phonetic) and a muscle relaxer and Norawton (phonetic) --

THE COURT: What do you take medication for, Mr. Boone?

THE WITNESS: For my pain and for depression I have from time to time.

I do understand that the nature of these charges that they are very serious and I'm sorry for what the court went through as well as the victim went through behind this incident. But I must continue to say that on November 19th, 2005, I did not shoot at Clarence Black. I did not try in any way. I was taking a short cut through some townhomes and I seen a firearm laying and I picked it up, I'm walking and I heard somebody say freeze. I didn't know who it was, so ran and threw the gun down and it discharged accidently. I never turned in the direction of Officer Clarence Black at all. And I believe that -- that's why I end up getting shot in the back and not in the

front.

I do believe that under first-degree assault charge I believe that the State has failed to prove the elements of each count for first-degree assault because Officer Clarence Black, he was not injured or anything like that. And he never even seen my hand on no weapon or anything, it was pitch dark out that and he has not described a weapon or anything.

And the distance there were between me and him was ten to 15 feet at the most and he said that I turned towards him and fired a shot. I never turned towards him and fired a shot. And the type of weapon that I found at the crime scene, it's like a shotgun about that long, right. So in order for you to turn around and try to fire at somebody with that type of weapon, you have to turn all the way around, like that.

BY MS. JONES:

Q Mr. Boone, I'm going to in a way cut you off at the moment and I apologize for that, but as I explained you understand that we're retrying the case now.

A I'm sorry.

Q So, basically what you're -- is it fair to say that you'd like to tell Judge Weatherly that you feel that you a, were innocent and b --

A Right. Okay. I'm sorry, I'm sorry, I'm sorry, I'm sorry.

Q That's really kind of the bottom line --

A Okay. Yeah, right. I just wanted to let the court --

Q Is that right?

A Yes, ma'am.

Q Is there anything else that you feel that you need to tell Judge Weatherly?

A No, ma'am. Just basically that I'm innocent, that I did not fire at Officer Clarence Black at all. I never made an attempt -- I never broke into Ms. Conti's house or nothing. I never went in there at all.

THE COURT: I think Ms. Jones may have some questions. Do you have any other questions for him?

MS. JONES: No, I don't actually.

THE COURT: All right. And Ms. Gayle, do you have any questions for Mr. Boone regarding his testimony?

CROSS-EXAMINATION,

BY MS. GAYLE:

Q Mr. Boone, good morning.

A Good morning.

Q You understand that a motion for

reconsideration was filed on your behalf, right?

A Yes, ma'am.

Q And that was before Judge Jackson, right?

A Yes, ma'am.

Q And the Judge Jackson denied that motion; is that correct?

A Yes, ma'am.

Q And you have written other letters to Judge Jackson also, correct?

A Yes, ma'am.

Q And that he was your trial judge; am I correct?

A Yes, ma'am.

Q Okay.

MS. GAYLE: Nothing further.

THE COURT: All right. Anything further then for Mr. Boone?

MS. JONES: No, but do you -- do you feel that you've told Judge Weatherly basically you feel she needs to know for post-conviction purposes?

THE WITNESS: Yes, ma'am.

MS. JONES: You sure?

THE WITNESS: Yes, ma'am.

MS. JONES: Okay. I don't want ever to cut you off.

THE WITNESS: Thank you.

MS. JONES: I think Judge Weatherly understands where we're going with --

THE WITNESS: Okay.

MS. JONES: Okay. Thank you.

THE COURT: Thank you. Mr. Boone, if you could have a seat with your attorney again, I'm going to let her make some legal arguments on your behalf.

THE WITNESS: Okay. Thank you, Ma'am.

(Witness is excused)

MS. JONES: Basically, Your Honor, it's written out in the supplemental petition that was filed on Mr. Boone's behalf and really we're basically talking about two issues.

The first was that trial counsel rendered ineffective assistance when she failed to object when the court declined to ask two important questions in voir dire of the jury.

Ms. Hart, Janet Hart, (phonetic) who had been trial counsel at the time requested two specific instructions, "Would you be inclined to give more or less weight to the testimony of a witness based solely on his or her occupation?" And specifically, "Would you be more inclined to believe a police officer solely because he or she is a police officer?"

Now, instead, Judge Jackson asked much more general questions. This is on Page 6 of the supplemental petition where he said -- he asked instead, "Is there any member of the jury panel who would either be more inclined to believe or disbelieve the testimony of any particular witness solely because of that witness's occupation or status? By occupation I mean, what the witness does. Using the typical example of a police officer, but it could be any type of profession. Status refers to what the witness is, for example, a child, et cetera, et cetera."

Now -- and then Judge Jackson also asked kind of a -- what he called a speak or forever hold your peace question, "Is there any reason why you shouldn't sit on the jury?" And a few people responded, but the problem with this is, the crux of this case was who was more believable, Officer Black or Mr. Boone? Because Ms. Conti -- the burglary piece was a separate incident from the assault. The assault had to do with Officer Black and Mr. Boone and who was more credible.

Now, if you're leaving in people on the jury and not asking very specifically about do you believe a police officer more than you would anybody else, particularly the Defendant, that's really problematic and there's case law that supports.

And I would also add that this was raised on appeal, but the Court of Special Appeals declined to review it because it was not preserved, so that's problematic right there.

There are several cases that support this, there's Davis v State, which is 333 MD 27. It says general questions aren't adequate to substitute -- aren't an adequate substitute to illicit juror bias. Langley v State, 281 MD 337 from 1977, where the Court of Appeals found reversible error in refusing to inquire if one would give more credit to a police officer.

And Langley also said -- stood for the fact that if anyone said they would give more credit to a police officer, specifically, that was already prejudicing the trial. And, unfortunately, in this case because the objection wasn't renewed in the questions that Judge Jackson asked, never got to that particular point.

And then Dingle v State, 361 MD 1 from 2000, said that one of the areas of mandatory inquiry include the placement of undue weight on a police officer's credibility.

And the fact that this case turned on the police officer's credibility -- Officer Black was the

only person out there. There were two people there, Mr. Boone and Officer Black, so there was nobody else that witnessed this. So that kind of a lack of that question for voir dire and the fact that Ms. Hart didn't renew her objection and the issue did not -- could not be raised on appeal -- it was just missed basically because it wasn't objected to, that became really problematic and prejudiced the -- and very likely prejudiced the outcome of the case and failure to preserve a meritorious issue for appeal under State v Gross, for ineffective assistance of counsel.

The second major issue that came up was ineffective assistance of counsel for failure to argue a motion for judgment of acquittal regarding the first-degree burglary.

Now, the trial tended to fixate mostly on whether Mr. Boone shot at Officer Black or -- and we know that Officer Black shot at Mr. Boone because he ended up in the hospital. Maryland Rule 4:324(a) requires that a motion for judgment of acquittal should be stated with particularity with all reasons why the motion should be granted and if not, the Court of Special Appeals won't review it.

And here we'll cite to the Toll v State case, Fredon v State, State v Lyles, these, again, are all in

the petition.

Counsel argued everything but burglary and this is -- in the trial transcript it's Pages 2-33 to 2-35, but she never made -- argued -- never argued about the first-degree burglary. And according to the facts of the case, the facts that were in evidence, putting Mr. Boone at Ms. Conti's apartment is extremely scant, there was nothing to put him there. All we have is one broken window, which could have been broken by anybody, there was just nothing else there.

And the timing of the 911 call when the intruder got to Ms. Conti's bedroom, she made this call and the arrival of Officer Black doesn't really work because the victim lived several units down from where Officer Black came to see Mr. Boone eventually walking along -- there wasn't enough time for him, basically the timing isn't right.

It didn't give the intruder enough time to get downstairs and back outside and go several buildings down where Officer Black found Mr. Boone.

It was out there too quickly for anybody to have gotten downstairs and out and do all of that, so the timing is a little bit off.

And there's nothing to show that he took anything from Ms. Conti, I mean, nothing was taken and

the prejudice here is an additional 20 years for a charge of burglary without giving Mr. Boone a chance of Judge Jackson, perhaps, granting a motion of judgment of acquittal on sufficiency of the evidence or if he didn't grant that for it to go for appellate review.

And we can't necessarily that the Court of Special Appeals would have overturned that ruling by Judge Jackson, but Mr. Boone missed that chance because there was no objection -- there was no argument for a motion for judgment of acquittal on that.

And those are, basically, the two major arguments here and we put the accompanying -- I'm sorry, some of the evidence that was attached to this that came from his statements and from Officer Black and all that were attached. And the case, I'm sorry, that I was looking for was Testerman v State from 2006, that there was ineffective assistance of trial counsel if trial counsel failed to preserve a record for appeal.

That by not making -- in Testerman, the Defense counsel didn't make a proper motion for judgment of acquittal on one of the counts that wasn't supported by the evidence and failure to preserve on the record remains a viable theory of ineffective assistance of counsel.

So, therefore, we would ask on those two issues, there was prejudice at the beginning with the jury, we're led to -- there was never enough discussion in the voir dire of whether any of the jurors would be prejudice by believing the testimony of a police officer and secondly on the burglary issue. Those are two distinct issues here that cause prejudice to Mr. Boone and for those reasons we would, respectfully, request a new trial.

THE COURT: All right. Ms. Gayle.

MS. GAYLE: Thank you, Your Honor. First of all, as to the issue regarding the voir dire questions the State would argue that if you look at what Judge Jackson gave, the instruction that he gave, that that instruction was sufficient to raise issues for the jury as to whether -- the proposed jury, as to whether or not they had any particular bias.

Ms. Hart asked to have two questions propounded to the jury. Judge Jackson decided not to propound the two questions, but decided to propound one question which had in that -- in the one question the essence of what Ms. Hart was asking for.

Now, Your Honor, the State also would refer Your Honor to Langley v State. In Langley v State, the court says that there is no particular inquiry that a

judge must make, there are no particular words that a judge must make when asking the questions of the jury.

And this was quoting Bryant v State at 207 MD 565, "A trial court can exercise his or her discretion. The trial court should adopt the questions to the needs of each case in the effort to secure an impartial jury."

In this particular case, Your Honor, Judge Jackson, in his discretion, formed the question in such a way that he conveyed the essence of Ms. Hart's question but in his own terminology and there is no case law that says that what Judge Jackson did was incorrect, therefore, Ms. Hart would not have been incorrect for failing -- would not have been ineffective for failing to object.

Furthermore, Your Honor, the State would, again, point Your Honor to Langley at the end. Now, Petitioner quote part of the paragraph at the end, but the last sentence says, "However, in the words of Brown, we suggest that the phrasing of the court's inquiry should include whether any juror would tend to give any more or less credence merely because of the occupation or category of the perspective witness."

And if you look at what Judge Jackson said, "Is there any member of the jury panel who'd be more

inclined to either believe or disbelieve the testimony of any particular witness, solely because of that witness's either occupation or status?" And then gives as an example a police officer.

So, the State would argue that -- using the same case that Petitioner has used that what Judge Jackson did was proper, following the court's instructions and therefore Ms. Hart was not ineffective for failing to object because what Judge Jackson was saying was not objectionable.

Now, as to the second issue. First of all, Your Honor, in looking at the motion for judgment of acquittal Ms. Hart says from the very onset that -- I believe it was that the State had failed to meet its burden of proof in its prime facie case.

In other words, as to all of the counts that were in front of the jury, that's how she starts off.

Now, there is -- the case law on that is this, Your Honor. The State would point Your Honor to first of all, Mosely v State at 378 MD 548, a 2003 case. That case says that in this particular case where you have a motion for judgment of acquittal, where counsel has somehow been defective and the defectiveness in this case, Petitioner is saying that Ms. Hart failed to articulate her objections as to that

count.

That the approach approved by the Court of Appeals is that the -- the post-conviction court is to review the evidence and to decide whether or not it was sufficient.

In other words, if the evidence was sufficient the allegation can be denied on the grounds that the Petitioner was not prejudiced because a sufficiency allegation would have been denied had the Appellate Court addressed it on its merits.

The State would also point Your Honor to Morgan v State, 134 MD App. 113, a 2000 case, which --

THE COURT: Please give me those citations -- I don't think those are in your response, are they?

MS. GAYLE: Probably not.

THE COURT: All right. Can I have that citation then, again? Morgan v State --

MS. GAYLE: Morgan v State, 134 MD App. 113, 2000 case.

THE COURT: Thank you.

MS. GAYLE: Which stands for the same proposition, Your Honor, that -- when that type of allegation is raised in a post-conviction, that that is the proper review that the post-conviction court should give.

Now, Your Honor, in this particular case the State would argue if you look at the transcripts, when you look at the discussions that the court felt that there was sufficient evidence for this issue to go to the jury.

But, more important -- well, I won't say more importantly, but Your Honor, in looking at whether or not there was sufficient evidence the State would like to point out a few things to Your Honor.

First of all, the testimony was that the Defendant -- excuse me, the victim heard a breaking of glass. The police also so that breaking glass. The witness was able to hear someone coming into her apartment. That the person came upstairs to the apartment where the victim was. That the victim heard the person kicking on the door. That the person used a name that the woman didn't recognize in a voice she didn't recognize and that all of these go into the elements of whether or not there was burglary.

In addition to that -- well, I -- that would go as to some of the evidence of the breaking and entering. And then as to whether or not it was this particular Defendant, the victim makes a call to dispatch, at some point the call goes to the officer, Officer Black, in this case, goes to the scene, sees an

individual who's later identified as the Defendant. That person is in the vicinity of the townhouses, that person then runs from the police. The officer sees what he believes to be a gun firing and then fires back.

Now, clearly, all of this is circumstantial, but the State would argue that it was sufficient circumstantial evidence to go to the jury on the issue of burglary in the first-degree. And was also sufficient as to whatever theory of burglary and that if Ms. Hart had made this specific particularized objection, that it would have been denied and that the issue -- this count would have and did, in fact, go to the jury.

Oh, and Your Honor, let me give you one more case and this was another one that was not cited and that stands for the proposition that proof may not -- that proof may not be direct but may be inferred from the circumstances and that would be as to the issue of burglary in the first-degree and that's Benton v State, B-E-N-T-O-N v State, 8 MD App. 388, 1969.

And I have one more, Your Honor, that someone was kind enough to give me and that is a Federal case which stands for the proposition that failure to make a motion for judgment of acquittal that had no sense of

-- no chance of success, fails both prongs of Strickland. "First, counsel cannot be said to be deficient for failing to take frivolous action and second, failing to make a motion with no chance of success could not possibly prejudice the outcome." That's United States v Carter, 355 Fed. 3d. 920, that's a 6th Circuit case from 2004.

And that would be the State's argument.

THE COURT: Ms. Jones.

MS. JONES: Yes, ma'am. The State first argues that Judge Jackson's voir dire instruction was sufficient, but given the facts of the case it was not sufficient.

The first turns on the credibility of a police officer, that was the only other person that was out there at that time. What his voir dire question did is dilute the importance of the police officer and the prejudice that could have occurred if a juror would tend to believe the credibility of a police officer over other testimony.

Now, Ms. Hart knew to ask about these questions. She put them into her requested voir dire questions. She just neglected to object for the record when Judge Jackson gave his questions, she said oh okay and kind of dropped the ball on that.

This was a very important issue and she knew what the -- she knew ahead of time. She's a very competent -- in general, apart from these issues that we're raising today, knew what the issues were in this case, but she didn't think to object and just went along with this -- rather what I would argue, diluted voir dire questions.

Now, the second issue is regarding sufficiency of the evidence and no one is saying here that there wasn't a break in. Ms. Conti, heard glass breaking, heard someone come up the stairs, thought somebody came to her room, called the police. We're not saying -- that's not the point. The point is and the State concedes, the evidence against Mr. Boone was completely circumstantial, there was nothing to connect him to that break in.

The point of -- the Court of Special Appeals is to review cases where insufficiency of the evidence is raised and denied by the trial court. That's the whole point of Appellate review, but if something isn't preserved, the Court of Special Appeals can't review it. This is why we come back again for post-conviction and say, look this -- Mr. Boone was denied a step in the process. He didn't have a chance to have other people at the Court of Special Appeals renew his case.

And it certainly was not frivolous to make a motion for judgment of acquittal on a charge that's based completely on circumstantial evidence. If ten people came out in the course of that trial and said, I saw Mr. Boone or I saw the Defendant break this window and go into the house, that's a different story, that might be frivolous. In this case there was nothing that put Mr. Boone at Ms. Conti's house, apart from Officer Black saying I saw him in the vicinity. The vicinity is very nice but there's many people that could have been in the vicinity, we don't know there was no testimony about other people. But certainly this is not a frivolous motion to make to acquit Mr. Boone of burglary in the first-degree based on the evidence here. So we would take issue with that.

The point that we're trying to make here is, by not making your objections and preserving these issues, the Defendant, unfortunately, has to skip a whole basis of review, a whole chance of somebody that's looking at the record a little bit more quietly and going, wait a minute, this isn't right, we do agree. But if something isn't preserved the Court of Special Appeals won't look at it.

And for those reasons, we would ask the court to grant Mr. Boone a new trial. Thank you.

THE COURT: Thank you, Ms. Jones.

The court is going to take this matter under advisement, continue to consider the issues now clearly focused on today and the cases that have been cited by counsel. We will render our opinion by way of a written memorandum and I usually send that out to the Defendant as well as counsel -- or to the Petitioner, as well as counsel to the Petitioner. I don't do that with any lack of faith that Ms. Jones wouldn't send out a copy.

MS. JONES: No, we appreciate that because sometimes things just don't show up where they're supposed to show up.

THE COURT: Oh, good. I --

MS. JONES: I always appreciate somebody --

THE COURT: All right.

MS. JONES: But, I would certainly -- when I get it I would always send it with a letter to my client.

THE COURT: It's just to make sure that he has that and then you folks can talk.

MS. GAYLE: The State appreciates that too, because there have been some slip ups.

THE COURT: Counsel, as always, your arguments are helpful and well organized, I appreciate

that. Mr. Boone, we'll try and get this out to you, I know you're anxious for some resolution, but give me a little time. We really work on these hard, I don't want to skip over anything just because we're trying to get it to you in a short time. And we do have a short week this week, so it will probably be a little bit later than that.

THE PETITIONER: Yes, ma'am. Thank you.

THE COURT: All right.

THE PETITIONER: Thank you.

THE COURT: All right, sir. Take care of yourself and Counsel, we'll look forward to your next opportunity to appear in court.

(At 5:14 p.m., proceeding concluded.)

REPORTER'S CERTIFICATE

This is to certify that the proceedings in the matter of Timothy Boone v State of Maryland, Case No. 06-0037X, heard in the Circuit Court for Prince George's County on November 22, 2011, was electronically recorded.

I hereby certify that the proceedings, transcribed by me to the best of my ability, in complete and accurate manner, constitute the official transcript thereof.

In witness whereof, I have hereunto subscribed my name this 28th day of September, 2013.

Sheri Monroe, CET**00435

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

TIMOTHY MILTON BOONE, Petitioner,	*	
v.	*	CIVIL NO. CCB-13-1116
STATE OF MARYLAND, et al., Respondent.	*	
	***	

ORDER

For reasons set out in the foregoing Memorandum, it is this 14th day of May, 2015, by the United States District Court for the District of Maryland, hereby ORDERED that:

1. The Petition for Writ of Habeas Corpus IS DENIED;
2. A Certificate of Appealability will NOT ISSUE;
3. The Clerk SHALL CLOSE this case; and
4. The Clerk SHALL TRANSMIT a copy of this Order and the foregoing Memorandum to Petitioner and to counsel for Respondents.

/S/
Catherine C. Blake
United States District Judge

Additional material from this filing is available in the Clerk's Office.