APPENDIX

EDINSON H. RAMIREZ Petitioner	IN THE CIRCUIT COURT FOR CARROLL COUNTY
vs.	
STATE OF MARYLAND Respondent	CASE NO. 06-K-05-33033

MEMORANDUM OPINION AND ORDER OF COURT

INTRODUCTION

This matter is before the Court on the Defendant's, Edinson H. Ramirez's, Petition for Post-Conviction Relief filed pursuant to the Uniform Post Conviction Procedure Act ("Act") codified at Annotated Code of Maryland, Criminal Procedure Article, Title 7, *et seq.*, and the Maryland Rules of Procedure Rule 4-401, *et seq.* and the State's Response thereto. Following a hearing on the Petition for Post-Conviction Relief on February 3, 2015, the Court held the matter *sub curia.*

A post-conviction proceeding constitutes a collateral attack on a judgment of conviction in an underlying criminal case. Therefore, it is necessary to begin with a review of the record below.

FACTS AND PROCEDURAL BACKGROUND

The pertinent facts were summarized by this Court in a Memorandum Opinion issued relative to Petitioner's Application for Three Judge Panel Review of Sentence, and are repeated here. On October 11, 2004, police responded to 3112 Ridge Road in Westminster, Maryland, in response to a 911 report from Rodney Hidey. Mr. Hidey

reported that an armed robbery/home invasion occurred in his home and he had been shot by one of the suspects. When the police arrived, Mr. Hidey was being transported by ambulance to the hospital. Mr. Hidey was beaten and shot in the upper leg. Mrs. Linda Hidey indicated that she arrived home that night around 9:40 p.m. She relieved the babysitter who had been watching her three children. Two of the children were asleep in their rooms. Olivia, the Hidey's daughter, was asleep on the living room couch.

After the babysitter left the residence, two masked men entered the home through the garage door. Both of the masked men were armed and held Mrs. Hidey at gunpoint. One of the masked men carried a sawed-off shotgun and did not speak during this ordeal. The other masked man carried a small caliber revolver and did all the talking. The one suspect told her that they wanted her money and asked her where the safe was located. Mrs. Hidey was forced at gunpoint into the basement where the safe was located. During this ordeal, Mrs. Hidey was holding her daughter. Mrs. Hidey was unable to open the safe, so the masked men led her back upstairs by gunpoint. The one suspect told Mrs. Hidey that he would wait for Mr. Hidey to come home and if he did not open the safe, they would kill the entire family.

When Mr. Hidey got home, he was confronted by the two masked men. Mr. Hidey attempted to defend himself and was beaten by the suspects. The suspect who did all the talking pointed his gun at Mr. Hidey and threatened to kill the family if they did not cooperate. When they reached the basement, Mr. Hidey attempted to attack the suspect with the sawed-off shotgun. That suspect beat Mr. Hidey severely on the head and the upper body; the other masked man shot Mr. Hidey in the upper leg. As a result of the gunshot and the beatings, Mr. Hidey suffered serious injuries. Mr. Hidey was

eventually able to open the safe. After they opened the safe, the Hideys, along with their daughter Olivia were tied up by the two masked men. The suspects removed the contents of the safe which contained about $80,000 in cash. The suspects then fled the scene. After the suspects fled, Mr. Hidey was able to free himself and call 911.

On January 3, 2005, the police received information from Naomi Ruth Burkett. She advised the police that her husband, Jerry Burkett and the Petitioner had committed the armed robbery at the Hidey residence with her assistance. She identified the suspects and identified which weapons they carried the night of the armed robbery. She also gave the police details of the crimes and indicated that she drove the vehicle for them. Mrs. Burkett told the police that she purchased the gun and was involved in the planning of the robbery. She also indicated that the money taken from the safe at the Hidey residence was divided equally between her husband and the Petitioner.

On July 15, 2005, at the conclusion of a four day jury trial, the Defendant was convicted by the jury of two counts of armed robbery, two counts of robbery, one count of conspiracy to commit armed robbery, two counts of first degree assault, use of a handgun in the commission of a crime of violence, felony theft, first degree burglary, and possession of an unregistered rifle or shotgun. On November 17, 2005, Petitioner was sentenced to a total of ninety-five (95) years, to be served concurrently with any other outstanding or unserved sentence. Additionally, the Petitioner was ordered to pay restitution in the amount of Seventy Eight Thousand Four Hundred and Twenty Seven Dollars ($78,427.00).

The Petitioner appealed to the Court of Special Appeals raising a single question for review:

> Did an error occur when the alternate juror retired, along with the twelve regular jurors, to the jury room for deliberations and was that error aggravated by the trial court speciously obtaining testimony from the alternate juror as to what occurred in the jury room, ignoring other extrinsic and obvious evidence and finding that the defendant as not prejudiced? *Ramirez v. State*, 178 Md. Ct. Spec. App. 257, 261, 941 A.2d 1141, 1143 (2008).

In a reported opinion dated February 8, 2008, the Court of Special Appeals affirmed the ruling of the Circuit Court, concluding that "the trial court was not clearly erroneous in determining that jury deliberations had not yet begun while the alternate juror was present, and in any event, the State rebutted the presumption of prejudice." *Id.* at 292, at 1160.

At Petitioner's Request for a Three Judge Panel Review and the State's Response thereto, a Three Judge Panel convened and a hearing was held on August 22, 2013 to review the sentence imposed by the Honorable Thomas F. Stansfield. Following the hearing, in an Order dated January 8, 2014, the Panel denied the Petitioner's request for a modification of sentence.

On May 14, 2014, the Defendant filed a forty (40) page Petition for Post-Conviction Relief setting forth nine (9) Allegations of Error as follows[1]:

A. Trial Counsel Failed to Object to Maryland Rule Violation [*Renumbered as #1*]

B. Appellate Counsel Failed to Raise Maryland Rule 4-312(g) Violation as Plain Error [*Renumbered as #2*]

C. Trial Counsel Failed to Challenge for Cause and/or Use Peremptory Challenge on Biased Juror [*Renumbered as #3*]

[1] For ease of reference and clarity, the Court has re-ordered and re-numbered Petitioner's Allegations of Error 1-9 in the Analysis section of this Memorandum Opinion.

D. Appellate Counsel Failed to Raise Maryland Rule 4-312(h) Violation as Plain Error [*Renumbered as #4*]

E. Appellate Counsel Failed to File Petition (for Post-Conviction Relief) [*Renumbered as #5*]

F. Trial Court Abused His [sic] Discretion [*Renumbered as #6*]

G. Cumulative Effect [*Renumbered as #9*]

I. [sic] Ineffective Assistance of Appellate Counsel [*Renumbered as #8*]

G. [sic]Ineffective Assistance of Trial Counsel [*Renumbered as #7*]

The State filed a Response on May 15, 2014, arguing that none of the allegations raised by the Petitioner rise to the level of ineffective assistance of counsel as defined by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2053 (1984). A hearing on the Petition for Post-Conviction Relief was held on February 3, 2015. The Petitioner testified at the hearing regarding some of the claims raised in his Petition, but submitted on the contents of the Petition with respect to Claims 1, 2, 3, 4, 6, 7 and 8. No allegations of error raised in the Petition were abandoned at the hearing.

The parties stipulated as to the testimony of former appellate counsel, Nathan Peak, Esquire, who was employed by the Butler Legal Group for approximately six (6) months. Mr. Peak would have testified that he filed a brief on Petitioner's behalf with the Court of Special Appeals, but could not recall if he worked on the brief or just made minor edits to the document prior to its submission. Further, Mr. Peak would have testified that he did not recall speaking with the Petitioner and that he left the Butler Law Group prior to the issuance of the decision by the Court of Special Appeals.

The State called Laura Guadalupe Morton, Esq., trial counsel for the Petitioner,

who testified regarding her trial strategy and practice and, specifically, her jury selection strategy. Ms. Guadalupe Morton advised the Court that she met with the Petitioner prior to trial and litigated both Motions Hearings. She testified that prior to 2005, she had litigated at least twenty to twenty-five (20-25) jury trials and that she is fluent in Spanish. Prior to trial, Ms. Guadalupe Morton testified that she met with the Petitioner and the State's Attorney, reviewed the file, visited the crime scene, interviewed witnesses, obtained criminal background checks, and spoke with an alibi witness. She attested that she conversed with Petitioner in Spanish and discussed the case. Trial counsel testified regarding her client's involvement in the trial and the jury selection process and, specifically, that upon receiving the jury panel list the morning of trial she made a simple graph for note taking and met with the Petitioner to give him her impression of the panel.

Trial counsel addressed the issue of the number of jurors available for the panel and testified that there was a question as to whether there would be enough for a twelve (12) person jury with two (2) alternates and that the trial court directed the parties to proceed, and they would "see how it goes." Ms. Guadalupe Morton advised that the Petitioner was involved in the exercise of peremptory strikes allocated to the Defense. With respect to Juror No. 27, trial counsel recalled that there was something that indicated an incident in his background and there was a question as to his ability to be fair and impartial. Ms. Guadalupe Morton recalled requesting that Juror No. 27 be stricken for cause and that the trial court reserved on the decision to strike. Once trial began, Ms. Guadalupe Morton testified that Petitioner was involved in decisions. Trial counsel also testified that she recalled having contact with Petitioner's appellate

attorney, a young woman in a D.C. law office and, specifically, that she wrote a letter suggesting some potential issues to raise on appeal.

On cross-examination, Ms. Guadalupe Morton testified that there was no basis for her to object to the trial court's suggestion to wait until jury selection was underway to determine if the panel was of sufficient size to select a jury. With respect to Juror No. 27, Ms. Guadalupe Morton could not recall the specific objection she made, but recalled that there was something in the juror's background that made her question his ability to be impartial. Ms. Guadalupe Morton testified that she filed a Motion to Modify the Sentence with the trial court and asked the Court to hold the motion *sub curia* pending appeal. She testified that she thought she would have known that the Court may only hold a Motion for Modification for up to five (5) years, but could not recall any steps taken to request the Court to rule on the motion prior to the expiration of five (5) years.

The Court will include such additional facts below as are necessary to a resolution of the issues presented.

GENERALLY APPLICABLE LEGAL PRINCIPLES

Under the Act, a petitioner may make the following claims: (1) that a sentence or judgment was imposed in violation of the state or federal constitution; (2) that the court did not have jurisdiction to impose the sentence; (3) that the sentence exceeds the maximum authorized by law; or (4) that the sentence is subject to a collateral attack upon any other ground of alleged error which would be available under a writ of *habeas corpus*, writ of *coram nobis*, or other common law or statutory remedy. MD. CODE ANN., CRIM. PROC. § 7-102(a). Examples of claims for relief under the Act include: denial of right to counsel; constitutionally ineffective assistance of trial, appellate, or prior post-conviction

counsel; ineffective waiver of counsel; prosecutorial misconduct; invalid waiver of jury trial; prejudicial statements or conduct by the trial judge; ineffective plea of guilty; breach by State or judge of plea agreement; tainted jury; admission of evidence seized as a result of an unlawful arrest; use of perjured police testimony; admission of evidence seized as a result of an unlawful search; erroneous admission of confession; double jeopardy; denial of right to make closing argument.

A petitioner is not entitled to relief under the Act for any claim which has been finally litigated, i.e., on any claim where an appellate court has rendered a decision on the merits, unless the decision is clearly erroneous. Furthermore, claims may be deemed to have been waived by a prior failure to assert them. § 7-102(b),(2). If a claim is deemed to have been waived, it cannot be heard on post-conviction. Under § 7-106, an allegation of error is deemed waived when petitioner could have made, but intelligently and knowingly failed to make, such allegation on direct appeal unless the failure is excused because of special circumstances. A petitioner has the burden of proving such special circumstances. If the petitioner had a prior opportunity to raise an allegation of error but did not do so, then there is a rebuttable presumption that petitioner intelligently and knowingly failed to make the allegation. § 7-106(b),(2).

The Court of Appeals has held that the "intelligently and knowingly" standard of waiver does not apply to every constitutional right. *Curtis v. State*, 284 Md. App. 132, 149-50, 395 A.2d 464, 473, 475 (1978). If the allegation of error touches upon a fundamental constitutional right, waiver is measured by the "intelligent and knowing" standard. If the right is a non-fundamental right, however, waiver is determined by general legal principles and thus may be waived by tactical decision of counsel, inaction

of counsel, or procedural default. *See State v. Torres*, 86 Md. Ct. Spec. App. 560, 587 A.2d 582 (1991); *see also, Oken v. State*, 343 Md. App. 256, 681 A.2d 30 (1996).

A fundamental right has been defined by the Court of Special Appeals as follows:

> Fundamental rights have been defined as being, almost without exception, basic rights of a constitutional origin, whether federal or state, that has been guaranteed to a criminal defendant in order to preserve a fair trial and the reliability of the truth-determining process. *Wyche v. State*, 53 Md. App. 403, 406, 454 A.2d 378, 380 (1983).

Thus, fundamental constitutional rights include such things as the Sixth Amendment right to jury trial, the Fifth Amendment privilege against self-incrimination, the Fifth Amendment protection against double jeopardy, the Sixth Amendment right to counsel, and the Sixth Amendment right to confront witnesses, i.e., to be present at trial. *Torres*, 86 Md. Ct. Spec. App. at 568, 587 A.2d at 585. Non-fundamental rights include Defendant's failure to object to being tried in his jail clothing, jury instructions which were not given or were not objected to, failure to complain about the reasonable doubt standard used at trial, improprieties in the jury selection process or *Brady* violations. *See Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691 (1976); *Davis v. State*, 285 Md. App. 19, 400 A.2d 406 (1979); *State v. Rose*, 345 Md. App. 238, 691 A.2d 1314 (1997); *Hunt*, 345 Md. App. at 146, 691 A.2d at 1255. Under Maryland Rules 4-402, *et seq.*, and *Pfoff v. State*, 85 Md. Ct. Spec. App. 296, 583 A.2d 1097 (1991), the post-conviction court should identify each complaint made by the petitioner with sufficient particularity and precision so that the appellate and/or federal habeas corpus court can determine what was in fact litigated. The post-conviction court should also make clear both the ruling on each complaint and the reasons used to support that result. Under *Ross v. Warden*, if an allegation in the petition has been abandoned at the hearing, the hearing judge should so

state in the statement filed in the case. 1 Md. Ct. Spec. App. 46, 27 A.2d 42 (1967).

Law Applicable To Ineffective Assistance of Counsel - The Two Prong Strickland Test

The Court of Appeals has stated that "the adversarial process found in a post-conviction proceeding generally is the preferable method in order to evaluate counsel's performance, as it reveals facts, evidence, and testimony that may be unavailable to an appellate court using only the original trial record." *Mosley v. State*, 378 Md. App. 548, 836 A.2d 678 (2003); *see also* MD. CODE (2001, 2005 Cum. Supp.), § 7-102 of the CRIM. PROC. Article; *Coleman v. State*, 434 Md. App. 320, 75 A.3d 916 (2013).

The standard for an ineffective assistance of counsel claim was articulated by the Supreme Court in *Strickland v. Washington*, in which the Court declared that "[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." 466 U.S. at 686, 104 S. Ct. at 2064. This claim has two components. First, the "defendant must show that counsel's performance was deficient," which is proven by showing that "counsel's representation fell below an objective standard of reasonableness," and that such action was not pursued as a form of trial strategy. *Id.* at 687-89, at 2064-65; *see also Oken*, 343 Md. App. at 283-84, 681 A.2d at 43-44. Second, "the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial; i.e. a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. In order to establish prejudice, a petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.* at 466 U.S. at 694, 104 S. Ct. at 2055; *Smith v. State*, 394 Md. App.

184, 209, 905 A.2d 315, 329-30 (2006) (emphasis supplied). A reasonable probability was defined in *Strickland* as a probability sufficient to undermine confidence in the outcome. *Strickland*, 66 U.S. at 694, 104 S. Ct. at 2055.

The Court of Appeals has noted that the standard to be used is whether there is a "substantial or significant possibility that the verdict of the trier of fact would have been affected." *Bowers v. State*, 320 Md. App. 416, 426, 578 A.2d 734, 739 (1990) (quoting *Yorke v. State*, 315 Md. App. 578, 588, 556 A.2d 230, 235 (1989); *see also Williams v. State*, 326 Md. App. 367, 375, 605 A.2d 103, 107 (1992). As noted in *Strickland*, "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland*, 466 U.S. at 698, 104 S. Ct. at 2070.

The law does not require an attorney to render perfect representation; some missteps are allowed. *Carter v. State*, 73 Md. Ct. Spec. App. 437, 440, 534 A.2d 1015, 1016 (1988). Further, to show deficient performance, the petitioner must also show that counsel's actions were not the result of trial strategy. *See Harris v. State*, 303 Md. App. 697, 496 A.2d 1080 (citations omitted) (explaining that to show deficient performance by counsel the defendant must "overcome the presumption that ... the challenged action might be considered sound trial strategy"). Counsel makes a strategic trial decision when it is founded "upon adequate investigation and preparation." *See State v. Borchardt*, 396 Md. App. 586, 604, 914 A.2d 1126, 1136 (2007) (noting that "[b]efore deciding to act, or not to act, counsel must make a rational and informed decision on strategy and tactics based upon adequate investigation and preparation").

The petitioner bears the heavy burden to prove that he was deprived of effective representation. *State v. Hardy*, 2 Md. App. 150, 156, 233 A.2d 365, 369 (1967); *State v.*

Calhoun, 306 Md. App. 692, 729, 511 A.2d 461, 479 (1986), *cert. denied*, 480 U.S. 910, 107 S. Ct. 1339 (1987); *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464 (1986); *Harris*, 303 Md. App. at 697, 496 A.2d at 1080. Moreover, there is a strong presumption that counsel rendered effective assistance. *State v. Thomas*, 325 Md. App. 160, 171, 599 A.2d 1171, 1176 (1992); *Bowers*, 320 Md. App. at 421, 578 A.2d at 736.

ANALYSIS OF PETITIONER'S CLAIMS

Allegation 1 (A): Trial Counsel Failed to Object to Maryland Rule Violation

The Petitioner argues that trial counsel was ineffective by failing to object to what the Petitioner contends was the trial court's violation of Maryland Rule 4-312(h).[2] Specifically, Petitioner contends that the trial judge failed to ensure a sufficient number of sworn jurors, including any alternates, after allowing for the exercise of peremptory challenges, and that his trial attorney should have objected to the trial court's error. Maryland Rule 4-312(f), Peremptory Challenges provides:

> Before the exercise of peremptory challenges, the trial judge shall designate those individuals on the jury list who remain qualified after examination. The number designated shall be sufficient to provide the required number of sworn jurors, including any alternates, after allowing for the exercise of peremptory challenges pursuant to Rule 4-313. The judge shall at the same time prescribe the order to be followed in selecting individuals from the list.

Facts: At the conclusion of *voir dire*, a total of six jurors were initially stricken for cause. (Tr. Vol. I p. 66). The court, trial counsel for the Petitioner, and the State, during a bench conference, examined the remaining panel for additional motions to strike for cause. Just prior to that review, the following discourse occurred:

THE COURT: How many have we stricken total?

[2] Petitioner incorrectly cites MD. RULE 4-312(g) in his Petition, but quotes Rule 4-312(h), see Petition p. 6.

THE CLERK: ....four, five, six.

THE CLERK: That's six stricken, total.

...

THE COURT: All right. And we have fifty-five on the panel. We need a total of thirty-five to be able to go forward.

THE CLERK: And, we have four absences. That brings us down to fifty-one.

...

THE CLERK: ...if they use all their strikes, we don't have any left over for alternates and we still have some causes here. ...Well - - and you have an alternate. We may not have enough, even if they don't use all their strikes.

THE COURT: All right. Let's go back over the cause ones and see where we are. (Tr. Vol. I p. 66-67.)

Upon completion of the court's consideration of requests for strikes for cause, the court denied Petitioner's trial counsel's motions to strike eight (8) jurors and granted motions to strike an additional three (3) jurors. (Tr. Vol. I p. 67-72). To summarize, a total of 55 jurors were summonsed, 4 of whom did not appear. Of the 51 jurors available, 9 were stricken for cause leaving 42 remaining jurors. The minimum number of jurors required to yield a 12 person jury, with 2 alternates, was 35.[3] Defense counsel made 19 motions to strike for cause, and of those, the court granted 9 and denied 10. The State did not use any strikes for cause. Trial counsel objected to the trial court's denial of her motions to strike. At the conclusion of the strikes for cause, the following transpired:

THE COURT: ...All right. Are we okay or where are we?

THE CLERK: Well, I don't know. One, two, three, four, five, six, seven, eight, nine strikes, if I'm counting it right.

THE COURT: If we run out, we can go with what we have and bring some more people in tomorrow.

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[3] Md. Code Courts & Jud. Proc. § 8-420(b) and MD. RULE 4-313 provide that in a criminal trial in which a defendant is subject, on any single count, to a sentence of at least 20 years, the defendant is entitled to 10 peremptory challenges and the State is entitled to 5. The defendant is also entitled to 2 additional strikes for the alternate jurors, and the State is entitled to 1.

THE CLERK: We have fifteen strikes. That brings us down...

MR. BARNES: We have for an alternate...

THE CLERK: ... - - just thirteen - - down, we're down to thirteen and eight alternates – eight for an alternate. All the strikes are used.

...

THE COURT: Let's see if we can go with one alternate rather than two and make it work.

THE CLERK: That brings us to thirteen. That's four, that that give us - - I'm down to nine, if I'm counting right.

MS. MORTON: Yep, the math is correct.

THE COURT: So, we don't have enough to do the - - to do the strikes?

THE CLERK: If all the strikes are used. Did you have any strikes for cause?

MS. CACERES [Interpreter]: I'm sorry, the question?

THE CLERK: He has only had five.

MS. MORTON: The question she asked was if he had any strikes for cause. The answer was no.

THE COURT: No.

THE CLERK: I mean, we can try to seat 'em and see what happens,...

THE COURT: Well, we'll go as far as we can, and then if we can't seat them, what I plan to do...

THE CLERK: ...because what this ...

THE COURT: ...is bring in those that are still left. Tomorrow, we'll bring in another panel to try and Voir Dire them and then put the two to - - and then ...

THE CLERK: The two together.

THE COURT: ...go through to try to pick additional jurors. That's all I can think of to do. I can't see just postponing the whole trial if we can't get a jury. I mean, everybody's here and everybody's ready. I mean, if anybody wants to be heard on it with any bright ideas, let me know or - - or waiving any strikes, but I - - I'm

certain the Defendant doesn't want to and I doubt if the State does, so ...

MS. MORTON: And, just for the record, Your Honor, obviously the Defendant would object to all of the denials of the ...

THE COURT: Yeah, ...

Ms. MORTON: striking for cause.

THE COURT: ...I'm - - I'm certain, All right. Let's move forward and try and pick a jury and see where we go. (Tr. Vol. I pp. 74-76)

Ruling on Allegation No. 1: Petitioner argues that the trial court did not have enough qualified panel jurors remaining after strikes for cause to allow for the exercise of peremptory challenges. Petitioner's allegation of error is **denied.**

Maryland Rule 4-312(f) provides, that prior to beginning to accept peremptory challenges, the remaining jury panel shall be of sufficient size to provide the total number of jurors needed for the panel in addition to any alternates, if all peremptory strikes were used. In the instant case, 55 jurors were summonsed of whom 51 appeared for jury duty on Tuesday, July 12, 2005. Of the 51 potential jurors, 9 were stricken for cause by the trial court, leaving 42 qualified jurors. The court proceeded to attempt to seat a 12 person panel with one or two alternates. If all available peremptory challenges (18) were used, there would be 24 remaining jurors, 11 more than the 13 required. In fact, the panel was of sufficient size for the court to seat twelve (12) jurors plus two (2) alternates.

Petitioner's reliance on *Booze v. State* is misplaced. 347 Md. App. 51, 698 A.2d 1087 (1997). In *Booze*, the Court of Appeals held that a violation of Md. Rule 4-312(e) was reversible error where the trial court required the parties to begin exercising their peremptory strikes with a jury panel that, after the strikes for cause, was insufficient to

permit the parties to exercise the maximum number of peremptory strikes allowed under Md. Rule 4-313. *Id.* at 69, at 1096. The instant matter is distinguishable from *Booze* in that the remaining pool of qualified jurors exceeded the number of allowable peremptory strikes for a 12 person panel and 2 alternates. Accordingly, upon review of the record, the Court finds no violation from which trial counsel should have raised an objection and, therefore, relief on this allegation is denied.

Allegation No. 2 (B): Appellate Counsel Failed to Raise Maryland Rule 4-312(g) Violation as Plain Error

Petitioner argues that appellate counsel had a duty to raise as plain error, the trial court's abuse of discretion with respect to the jury selection process.

Facts: See above.

Ruling on Allegation No. 2: Relief on this allegation is denied. For the reasons set forth above, the Court finds that there was no basis for an objection under Maryland Rule 4-312(g) or (h), and, therefore, no error on the part of appellate counsel.

Allegation No. 3 (C): Trial Counsel Failed to Challenge for Cause and/or Use Peremptory Challenge on Biased Juror

Petitioner argues that trial counsel was ineffective in failing to (timely) request that Juror No. 27 be stricken for cause, or failing to utilize a peremptory challenge to strike Juror No. 27 as a result of his response to a question during the *voir dire* process, which indicated his potential bias.

Facts: During *voir dire*, the trial court asked the jury panel:

> Have you or any member of your family or close friends ever been victims of a crime, accused of a crime or a witness in a criminal case and that experience affects your ability to render a fair and impartial verdict (sic) (Tr. Vol. I p. 40)?

In response, Juror No. 27 approached the bench and the following colloquy took place:

THE COURT: Sir.

JUROR NO. 27: Juror 27.

THE COURT: What is your experience, please?

JUROR NO. 27: I had an apartment that was broken into about a year-and-a-half ago.

THE COURT: All right. Would that experience, in any way, affect your ability to render a fair and impartial verdict in this case?

JUROR NO. 27: I believe it would.

THE COURT: All right, thank you. (Tr. Vol. I p. 44).

Eleven (11) separate venire persons responded affirmatively to the above question and provided information about their respective experiences. (Tr. Vol. I pp. 40-45). Juror No. 27 did not provide an affirmative response to any other question during *voir dire*. (Tr. Vol. I pp. 12-56).

Prior to the jury being seated and sworn, no challenge for cause was made against Juror No. 27 by trial counsel, the State, or *sua sponte* by the trial court. (Tr. Vol. I. pp. 58-72). Likewise, no challenge was made to Juror No. 27 during the exercise of peremptory strikes, and Juror No. 27 was seated in the juror box. (Tr. Vol. I, p. 79). As neither Petitioner (Defendant) nor the State had exhausted their peremptory challenges, the Court inquired of counsel as to the acceptability of the jurors then seated in the box, and defense counsel exercised two peremptory strikes as to Jurors No. 31 and 32, but not as to Juror No. 27. After further inquiry, Jurors No. 37 and 42 were seated in the jury box. (Tr. Vol. I pp. 82-83). Petitioner's trial counsel then advised the Court that the jury was

acceptable to the defense. (Tr. Vol. I p. 84). Following the selection of the two alternate jurors, the remaining venire members of the panel were excused from the courtroom, and the jury was sworn. (Tr. Vol. I pp. 89-91).

Thereafter, defense counsel made the following motion:

> As to Juror No. 27, who is the young man that is seated in the yellow shirt, I would ask that he be stricken for cause. Upon the Court excusing the jurors, he just vehemently started shaking his head and just looked right at me with not a very pleasant face. I don't think he's happy about the fact that he's sitting on this jury, and I think that that would be sufficient to ask he be stricken for cause. (Tr. Vol. I p. 91).

The State deferred to the trial judge, and the following colloquy occurred:

> COURT: "I'm going to reserve on that. We have two alternates. We'll entertain that issue and see how he reacts during the course of the trial."
>
> DEFENSE COUNSEL: Thank you Your Honor.
>
> COURT: I'll leave it to the Defense to re-raise...the issue
>
> CLERK: [asks for clarification].
>
> COURT: I'll deny it at this time...
>
> DEFENSE COUNSEL: ...and he's gonna reserve on the issue
>
> COURT: The State is - I mean, the Defense is to bring it back up before the jury retires if there - they still wanna go and raise the issue. (Tr. Vol. I pp. 91-92).

Ruling on Allegation No. 3: Petitioner argues that there is more than a reasonable likelihood that Juror No. 27's past experiences unduly influenced his verdict and that the juror himself said that he believed his past experience would affect his ability to be impartial. Petitioner also asserts that trial counsel's performance in the jury selection process fell below an objective standard of reasonableness and was therefore constitutionally ineffective and deficient, and that trial counsel's failure to timely

challenge for cause or strike with a peremptory challenge allowed a biased juror, Juror No. 27, to be seated on the jury. Accordingly, relief on Petitioner's Allegation of Error No. 3 is denied.

At the hearing on Petitioner's Petition for Post-Conviction relief, Ms. Guadalupe Morton testified as to her experience conducting jury trials prior to representing the Petitioner and said that she had tried at least twenty to twenty- five (20-25) jury trials prior to 2005. Ms. Guadalupe Morton testified that prior to trial she described the jury selection process extensively to the Petitioner and that he was involved in the jury selection process on the day of trial. Ms. Guadalupe Morton testified that upon receipt of the jury panel list the morning of trial, she reviewed the list, made a graph for note-taking and met with her client to discuss the panel. During the jury selection process Ms. Guadalupe Morton requested that Jurors No. 18 and 43 be stricken for cause, as they were victims of prior burglaries; the Court denied both challenges for cause. Ms. Guadalupe Morton testified that there are many considerations that factor when she is analyzing potential jurors including, but not limited to, employment status, marital status, and even a "hunch" in some instances.

Of relevance here is Md. Rule 4-312(e), which provides:

> "**(e) Challenges for Cause.**—A party may challenge an individual juror for cause. A challenge for cause shall be made and determined before the jury is sworn, or thereafter for good cause shown (emphasis supplied)."

In the case *sub judice*, trial counsel moved to strike Juror No. 27 almost immediately after the jury was sworn, stating her reasons for the motion. Thus, to the extent that Petitioner claims that trial counsel's motion to strike Juror No. 27 for cause was untimely, the Court rejects that claim. The Court further finds that the Defendant

has not met his burden of demonstrating that that trial counsel's failure to challenge Juror No. 27 prior to the jury being impaneled was constitutionally deficient, or that even if that were the case, "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2055; *Smith*, 394 Md. App. at 209, 905 A.2d at 329-30. (emphasis supplied)

Prospective jurors are presumed to be unbiased, and the challenging party has the burden of proof to overcome that presumption. *Testo v. State*, 205 Md. Ct. Spec. App. 334, 45 A.3d 788 (2012), *cert. denied*, 428 Md. App. 545, 52 A.3d 979 (2012) (citing *Hunt*, 345 Md. App. at 146, 691 A.2d at 1255).

In *Testo*, 205 Md. App. at 371, the Court of Special Appeals affirmed the appellant's conviction despite defense counsel's failure to challenge for cause, or to exercise a peremptory challenge to a juror who responded affirmatively to the *voir dire* question—"[i]s there any member of this panel who thinks that [appellant] should be required to prove his innocence?" To like effect, see also *Morris v. State*, where the Court of Special Appeals (J. Moylan), held that the trial court did not abuse its discretion in murder prosecution by (1) "denying [a] murder defendant's motion to strike for cause prospective juror who stated that two of his brothers were 'gunned down in the street' and who indicated he might be biased against defendant, . . . [where the] juror ultimately stated he 'probably could' keep an open mind and be able to render a fair and impartial verdict based on the evidence in the case," or (2) denying the same "defendant's motion to strike for cause prospective juror who was a city police officer and who indicated an initial tilt in favor of prosecution, . . . [where] juror ultimately stated he would be able to render a fair and impartial verdict based on the evidence in the case." 153 Md. Ct. Spec.

App. 480, 501, 837 A.2d 248, 260, *cert. denied*, 380 Md. App. 618, 846 A.2d 402 (2003).

The Court of Special Appeals, in *Testo* noted that appellant failed to demonstrate that the juror was "actually or presumptively biased," particularly where, as in the case *sub judice*, the juror did not respond affirmatively to any other *voir dire* questions. *Testo*, 205 Md. Ct. Spec. App. at 370, 45 A.3d at 809. The Court also declined to consider defendant Testo's claim of ineffective assistance of counsel, noting that the "desirable procedure for presenting claims of ineffective assistance of counsel is through post-conviction proceedings." *Id* at 377-78, at 813 (citations omitted). Though the Court declined to consider the ineffective assistance of counsel claim, it commented that the record fails to establish that the juror in that case was actually or presumptively biased, suggesting that counsel's assistance was not ineffective. Finally, the Court of Special Appeals rejected Testo's argument that it was incumbent on the trial court to *sua sponte* ask follow-up questions of the juror at issue. The Court observed that, in *Alford v. State*, the court reviewed *Dingle v. State*, and "unambiguously held that the statement by the Court of Appeals in *Dingle*, that it is the task of the trial judge to impanel a fair and impartial jury, does not stand for the proposition that a trial court automatically commits reversible error in failing to, *sua sponte*, ask follow-up questions of a juror." *Testo*, 205 Md. Ct. Spec. App. at 372, 45 A.3d at 810 (citing *Alford v. State*, 202 Md. Ct. Spec. App. 582, 602-04, 33 A.3d 1004, 1015-17 (2011) (quoting *Dingle v. State*, 361 Md. App. 1, 14, 759 A.2d 819, 826 (2000)). The Court of Special Appeals determined that trial court's failure to "*sua sponte* ask further questions to the venire member" was not structural error, such as would require automatic reversal of defendant's second degree murder conviction after defendant failed to preserve issue of venire member's empanelment for appellate

review. *Testo*, 205 Md. Ct. Spec. App. at 377-78, 45 A.3d at 813.

Petitioner has not pointed the Court to any evidence in the record that Juror No. 27 showed bias in this case. The Petitioner instead has offered mere conjecture. This Court will not speculate that the outcome would have been different had Juror No. 27 not been on the jury. In the absence of any evidence of juror bias in the record, the Court will not presume that Juror No. 27 was biased, or that his presence on the jury altered or affected the result. Accordingly, Petitioner's Allegation of Error No. 3 is **denied.**

Allegation 4 (D): Appellate Counsel Failed to Raise Maryland Rule 4-312(h) Violation as Plain Error.

Facts: See above

Ruling on Allegation No. 4: For the reasons expressed above, with respect to Petitioner's Allegation of Error No. 3, appellate counsel committed no error in not raising trial counsel's failure to strike Juror No. 27, or the trial court's decision to retain Juror No. 27 on the jury. Therefore, Petitioner's Allegation of error No. 4 is **denied.**

Allegation 5 (E): Appellate Counsel Failed to File Petition [for Writ of Certiorari]

Facts: Petitioner contends that he hired the Butler Law Group to represent him during his entire appeal process, and such representation included the Butler Law Group's obligation to file a Petition for Certiorari on Petitioner's behalf, if necessary, with the Court of Appeals of Maryland. *Ergo*, Petitioner contends appellate counsel's representation was ineffective, in failing to file a Petition for Certiorari following the Court of Special Appeals decision and mandate which affirmed his conviction.

Appellate counsel filed a brief on Petitioner's behalf with the Court of Special Appeals on or about February 27, 2007. The Court of Special Appeals filed its reported

opinion dated February 8, 2008 and issued its mandate on March 10, 2008, denying Petitioner's request for relief and mailed copies of both to Petitioner's appellate counsel. Petitioner contends that he did not receive notification from appellate counsel that his appeal had been denied, and thus neither appellate counsel nor the Petitioner himself filed a timely Petition for Writ of Certiorari to the Court of Appeals. Nonetheless, Petitioner filed a Petition for Writ of Certiorari on April 13, 2009, more than 30 days after the Court of Special Appeals' mandate,[4] along with a motion for extension of time to file a supplement to the petition.

On September 14, 2009, the Court of Appeals denied Petitioner's Request for Writ of Certiorari as untimely, "without prejudice to file a post conviction pleading with respect to any asserted rights to file a belated certiorari petition."

Ruling on Allegation No. 5: The Petitioner argues that appellate counsel rendered ineffective assistance to him, in failing to file a Petition for Writ of Certiorari with the Court of Appeals. Petitioner testified that his friend, Alan Heflen, paid the Butler Law Group the sum of two thousand five hundred dollars ($2,500.00) plus the cost of a transcript of the trial. He further argues that the Butler Legal Group was fully paid to represent the Petitioner throughout the entire appeal process; however, Petitioner did not present sufficient evidence to support this claim.[5] The Court finds insufficient evidence in the record to demonstrate that the Butler Legal Group was retained to file a

[4] Petitioner testified that his friend Alan Heflen paid Crystal Edwards, who was not affiliated with the Butler Legal Group the sum of $500 to file a Petition for Writ of Certiorari, but presents no supporting documentary evidence.

[5] Although Petitioner contends he retained the Butler Legal Group to represent him during the entire appeal process, no retainer or engagement letter was presented that adequately defined the scope of the contracted for services and certainly nothing that proved that the Butler Legal Group agreed to file a certiorari petition on his behalf.

Petition for Writ of Certiorari, and in the absence of such a contractual duty, the Court denies relief based on this allegation. Moreover, absent a contractual or other cognizable duty, the Court declines to find that Petitioner was denied ineffective assistance of counsel based simply on the fact that no certiorari petition was timely filed on his behalf.

As a matter of federal constitutional law, it is well settled that a petitioner has no constitutional right to counsel to pursue discretionary review by a state court, and therefore cannot claim that he was deprived of effective assistance of counsel by his retained counsel's failure to timely file an application for certiorari. *Wainwright v. Torna*, 455 U.S. 586, 102 S. Ct. 1300 (1982); *Ross v. Moffitt*, 417 U.S. 600, 610, 94 S. Ct. 2437, 2443 (1974) (noting that a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals or applications for review in this Court). Moreover, the right to counsel provisions of Maryland's Declaration of Rights are in *pari materia* with Sixth Amendment to the United States Constitution. *State v. Campbell*, 385 Md. App. 616, 626 n.3, 870 A.2d 217, 222-23 n.3 (2005).

For the foregoing reasons, Petitioner's Allegation of Error No. 5 is denied.

Allegation 6 (F): Trial Court Abused Its Discretion

Facts: Petitioner contends that the trial court abused its discretion when it failed to rule on his Motion for Modification of Sentence within five (5) years in accordance with Md. Rule 4-345(e) and that this failure entitles the Petitioner to relief in the form of allowing him to belatedly file a second Motion for Modification of Sentence. Petitioner cites no authority and the Court has found none addressing the exact situation here. Petitioner couches his argument in terms of a denial of a post-trial right, for which Petitioner ask this Court to grant

him a "belated Modification Upon Motion...or other relief justice requires."(Petition p. 24). Implicit in Petitioner's request for relief is that the trial court never ruled on his Motion for Modification of Sentence, which is incorrect. The Court denied the Motion, albeit belatedly. Presumably, Petitioner's argument, put more accurately, is that if this Court were to grant Petitioner the right to belatedly file another Motion for Modification of Sentence, that would allow the trial court another five years in which to rule on that Motion.[6]

Ruling On allegation No. 6:

The relevant chronology pertaining to Petitioner's Motion for Modification of Sentence is as follows:

- November 17, 2005 - Petitioner (Defendant) sentenced
- February 15, 2006 - Petitioner's (Defendant's) trial counsel filed Motion for Modification of Sentence in Circuit Court
- February 15, 2006 - Petitioner's (Defendant's) trial counsel filed Motion for Three Judge Panel Review of Sentence in Circuit Court
- February 8, 2008 - Court of Special Appeals affirmed
- March 10, 2008 - Court of Special Appeals issued mandate
- April 13, 2009 - Petitioner (Defendant) filed certiorari petition in Court of Appeals
- September 14, 2009 - Court of Appeals dismissed certiorari petition
- September 5, 2012 - Petitioner (Defendant) filed Request for Hearing on Motion

[6] In a somewhat analogous situation, the Court of Special Appeals determined that when a defendant in a criminal case asked his attorney to file a motion for modification of sentence, and the attorney failed to do so, the defendant was entitled to the post-conviction remedy of being allowed to "file a belated motion for modification of sentence, without the necessity of presenting any other evidence of prejudice," as it resulted in a loss of any opportunity to have a reconsideration of sentence hearing. *Matthews v. State*, 161 Md. App. 248, 249, 868 A.2d 895, 896 (2005).

for Modification of Sentence in Circuit Court

- September 5, 2012 – Petitioner (Defendant) filed Request for Hearing on Motion for Three Judge Panel Review(of Sentence) in Circuit Court
- September 12, 2012 – Circuit Court denied Petitioner's (Defendant's) Motion for Modification of Sentence without a hearing
- November 13, 2012 – Petitioner (Defendant) filed second Request for Hearing on Motion for Three Judge Panel Review (of Sentence)
- August 22, 2013 – Three Judge Panel Review hearing
- January 8, 2014 – Order Denying Defendant's Petition for (Three Judge Panel) Review (Of Sentence)

Maryland Rule 4-345(e) Modification Upon Motion provides that:

> (1) *Generally.* Upon a motion filed within 90 days after imposition of sentence (A) in the District Court, if an appeal has not been perfected or has been dismissed, and (B) in a circuit court, whether or not an appeal has been filed, the court has revisory power over the sentence except that it may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it may not increase the sentence.

Maryland Rule 4-345(e) provides:

> (f) *Open Court Hearing.* The court may modify, reduce, correct, or vacate a sentence only on the record in open court, after hearing from the defendant, the State, and from each victim or victim's representative who requests an opportunity to be heard. The defendant may waive the right to be present at the hearing. No hearing shall be held on a motion to modify or reduce the sentence until the court determines that the notice requirements in subsection (e)(2) of this Rule have been satisfied. If the court grants the motion, the court ordinarily shall prepare and file or dictate into the record a statement setting forth the reasons on which the ruling is based.

Clearly, the trial court did not rule on Petitioner's Motion for Modification

of Sentence within five years of the date sentence was imposed. The question then becomes whether the court's failure to rule on the Motion within five years entitles the Petitioner to post-conviction relief, and if so, what relief is appropriate. A second but related question is, what was the effect of the trial court's September 12, 2012 Order denying Petitioner's Motion for Modification of Sentence, which was entered 6 years and 10 months after Petitioner was sentenced?

Without question, an untimely motion for modification filed outside the 90 day filing deadline is ineffective, and the court has no authority to rule on it. *State v. Green*, 367 Md. App. 61, 76-80, 785 A.2d 1275, 1283-86 (2001); *State v. Karmand*, 183 Md. Ct. Spec. App. 480, 961 A.2d 1152 (2008). There has not been a reported opinion that this court is aware of that addresses the question of whether a trial court lacks the authority to rule on a timely filed Motion for Modification of Sentence if the court does not act upon the motion within five years. Nevertheless, the question can be answered by reading Md. Rule 4-345 (e),(1). As with statutes, "the words in the text of a rule [are construed] in accordance with their plain meaning," giving effect to the rule as a whole. *In re Charles K.*, 135 Md. Ct. Spec. App. 84, 97, 761 A.2d 978, 984 (2000). Furthermore, an inquiry ordinarily ceases, and it need not venture outside the text of the rule when construing a court rule, "if the words of the rule are plain and unambiguous." *Johnson v. State*, 360 Md. App. 250, 265, 757 A.2d 796, 804 (2000). The language of Md. Rule 4-345 (e),(1) clearly reads that the court "may not revise the sentence after the expiration of five years from the date the sentence originally was

imposed on the defendant and it may not increase the sentence" (emphasis supplied). In this case, the trial court did neither of these things.

The plain meaning of the text of Md. Rule 4-345 (e),(1), is that the court may not revise or increase a defendant's sentence more than five years after the sentence is imposed. Nothing in the text of the rule prevents the court from denying a motion for modification more than five years after the imposition of sentence. Such a construction of the rule is in keeping not only with the clear meaning of the text, but also with what this Court understands was the purpose of the 2004 rule change that added the five year limitation.

Md. Rule 4-345 did not always impose a time limit within which the court may revise a sentence. The rule change was adopted by the Court of Appeals on May 11, 2004. Though this Court has found little in the way of history behind the adoption of the rule change, the Standing Committee on Rules of Practice and Procedure, Letter Report, Rule 4–345, of February 17, 2004, does not suggest that the Court of Appeals intended to limit the time within which a trial court must deny a motion for modification of sentence. The Rules Committee and the Court of Appeals seemed to be more concerned with setting a limit on the time a trial court has to increase or decrease a sentence. Otherwise, it stands to reason that when the Court of Appeals revised the Rule, it would have used the words, "the court may not act on a motion for modification after five years from the date sentence was impose," rather than adopting the language of the current Rule.

In the case *sub judice*, the trial court did not revise the Petitioner's sentence. Rather, by denying the Petitioner's Motion for Modification of Sentence, the trial

judge left the sentence unchanged. In doing so, the trial court complied with Md. Rule 4-345. Accordingly, Petitioner's Allegation of Error No. 6 is denied.[7]

Allegation 7 (G #2) Ineffective Assistance of Trial Counsel

Facts: Petitioner raises the following additional allegations of error:

1. That "trial counsel rendered ineffective assistance when she failed to make timely objections to prejudicial hearsay statements" made by Larry Fincham (Petition p. 31). Petitioner asserts that said statements were prejudicial and false. Further, trial counsel's failure to object to such statements resulted in the inability to preserve this issue for appellate review. Petitioner believes that had the issues been preserved for appeal, there is a "substantial possibility" that one or more of his convictions would have been overturned.

Some of the offending testimony, according to Petitioner, was elicited through Larry Franklin Fincham, who was called as a witness by the State (Tr. Vol. II, p. 68). Mr. Fincham testified that he was an acquaintance of the Petitioner, with whom he had done some odds jobs in the past (Tr. Vol. II, pp. 74-76). More critically, for purposes of this case, Mr. Fincham gave incriminating testimony against Petitioner, testifying, among other things, that he heard Petitioner and a co-conspirator, Jerry Burkett, planning the crime, and that Fincham drove Petitioner and Burkett to the victim's residence and picked them up a short time later (Tr. Vol. II. pp. 90-100). Petitioner decries trial counsel's failure to object to Fincham's testimony that he heard Petitioner and Mr. Burkett say:

A. He kept – kept banging on his steering wheel when – in his vehicle, "I

[7] The Court is also cognizant that the Petitioner was afforded the opportunity for post-sentencing relief in the form of a three judge panel review of his sentence.

need money, I need money. I know there's money there. I know it's there, I need it," and Burkett says "Well, how can you be sure of that?" he said he knew - Fernandez [Petitioner] says he knew the man had that kind of money in his house."

Q. [Prosecutor]. And do you know why he said he needed the money?

A. No, I do not. He said he was hurting for money, that's all I know. (Tr. Vol. II, p. 104).

Q. Okay. Did you ever talk to him [Petitioner] about those walkie-talkies?

A. He was telling - I and Jerry - he was telling him that he had two walkie-talkies so they can communicate back and forth so if law enforcement was to come that they could get away and contact one another. (Tr. Vol. II, p. 110).

Petitioner also takes issue with trial counsel's failure to object to testimony elicited through Naomi Ruth Burkett, wife of Jerry Burkett, who was also called as a state's witness. Ms. Burkett was asked about a conversation that she heard between Petitioner, Mr. Burkett, and Mr. Fincham at her apartment concerning the robbery. She testified as follows:

A. That's right, they came to my apartment, had coffee, all three of them.

Q. Who's all three of 'em? You gotta say their names.

A. Edinson, Jerry, and Larry Fincham.

Q. Okay. And, what, if anything did they talk about?

A. They were talking about robbing this place and they didn't do it because the security - the people weren't home and there was security on the whole building.

Q. Did you know what place they were talking about?

A. No, I figured it was a build - a business because Edinson had worked there.

Q. How'd you know he's worked there?

A. He said he worked there and put a safe in the building.

Q. And, had Edinson before that said anything about money?

A. Yeah, he always said he needed money. "I need money," he always used to say.

Q. And, did he say anything about money and the place where he put the safe in?

A. Yeah, he said they knew – he knew that they had a lot of money there. (Tr. Vol. II pp. 199-200).

Later, when being asked to describe what occurred when she and her husband drove to Petitioner's residence the day of the robbery, Ms. Burkett testified:

Q. And, then, what happened?

A. Then they said they didn't have a driver to...

Q. Who said it?

A. Edinson said he couldn't get a driver. (Tr. Vol. II pp. 212).

Q. Okay. And, about forty-five minutes later or so, did you hear from them?

A. Yes.

Q. How did you hear from 'em?

A. From the walkie-talkie. They said, "Hurry up, pick us up."

Q. Now, who said that?

A. Edinson. (Tr. Vol. II, pp. 219).

Ruling on Allegation No. 7:

It is ineffective assistance for trial counsel to fail to object, on account of ignorance of the law, to prejudicial inadmissible evidence. *Perry v. State*, 357 Md. App. 37, 52, 741 A.2d 1162, 1170 (1999). While trial counsel is obliged to correct

any errors made by the court which could harm the defense, *Whitney v. State*, 158 Md. Ct. Spec. App. 519, 527, 857 A.2d 625, 630 (2004), counsel is not required to object to correct rulings. *Jones v. State*, 379 Md. App. 704, 711, 843 A.2d 778, 782 (2004). Nor is trial counsel required to object to every possible trial judge error. Trial counsel is ineffective for failing to object to rulings only where there is a "reasonable possibility of success" on appeal. *Gross v. State*, 371 Md. App. 334, 350, 356, 809 A.2d 627 636, 640 (2002). Also, failure to make a particular objection, when that objection was already made and overruled, is not ineffective assistance. *Id.* at 355, at 639.

The short answer in this case is that the evidence that Petitioner finds objectionable, while no doubt prejudicial to his case, was not inadmissible. The statements attributed to Petitioner by Mr. Fincham and Ms. Burkett were clearly admissible as exceptions to the rule against hearsay because they constituted declarations against interest. Md. Rule 5-804(b),(3); *see generally State v. Standifur*, 310 Md. App. 3, 9-15, 526 A.2d 955, 958-61 (1987) (discussing the rule and its application). Furthermore, the statements also were admissible as statements of a party opponent, under Md. Rule 5-803(a),(1),(5), and fell within the co-conspirator exception to the hearsay rule. Md. Rule 5-803(a),(5) permits the introduction of a statement by a co-conspirator of a party even if the statement is hearsay where the co-conspirator made the statement "during the course and in furtherance of the conspiracy." The trial court so ruled in response to an earlier objection from trial counsel seeking to exclude statements attributed to Mr. Burkett by Mr. Fincham. Once the court made its ruling, trial counsel was not required to continue to

object to statements that the court previously determined to be admissible. *See Gross v. State, supra.*

For the foregoing reasons, this allegation of error is **denied.**

2. That trial counsel rendered ineffective assistance when she failed to object to prejudicial statements about evidence of tools and a tool bags characterized as "burglar's tools" from the State's witness Larry Fincham. Specifically, Petitioner takes aim at trial counsel's failure to object to the following:

> Q. All right. Was anything said about the bag?
>
> A. Fernandez said he had left the bag and the tools there. Fernandez wanted to go back the next night to get the tools and the bag and Burkett had said, "You're crazy for doing that, 'cause if you go back there to get the tools, you're gonna get caught." (Tr. Vol. II, p. 99).

For the reasons expressed above, with regard to Petitioner's allegation of error G. 1., this allegation of error is **denied.** Additionally, trial counsel had previously objected to Mr. Fincham's characterization of the tools as "burglar tools." The trial court twice sustained counsel's objection, and struck the reference to burglar tools. (Tr. Vol. II pp. 83-84).

3. That trial counsel failed to object to a green bag (State's Exhibit No. 37), being admitted into evidence. (Tr. Vol. III, p. 23). The green bag was admitted through the testimony of a criminal investigator, assigned to the Maryland State Police Trooper, Crime Scene Unit. Petitioner argues that even if relevant, the bag should have been excluded under Md. Rule 5-403, on the basis that any probative value was outweighed by the highly prejudicial impact to the Petitioner. Petitioner posits that trial counsel knew there was no evidence linking the tools, green bag, or a weapon found to the

Petitioner. The Court concludes that is simply untrue. Mr. Fincham, when describing events surrounding what he surmised was the planning of the robbery, testified that he saw Mr. Burkett put the tools and masks into a duffel bag (Tr. Vol. II, p. 85-86). He also identified the green bag (State's Exhibit No. 37) as the same bag that he saw Mr. Burkett, a co-conspirator of the Petitioner, had in his possession. (Tr. Vol. II p. 93). He further identified the tools as the same tools he saw Mr. Burkett wiping down (Tr. Vol. II p. 107). Now, while the jury was certainly free to disbelieve Mr. Fincham's testimony, it certainly cannot be truthfully said that there was no evidence connecting the bag or the tools to the Petitioner. To the contrary, the evidence, if believed by the jury, was highly probative of Petitioner's guilt.

For the foregoing reasons, this allegation of error is **denied.**

Allegation 8 (I) : Ineffective Assistance of Appellate Counsel

Facts: Petitioner argues that appellate counsel was ineffective in failing to raise insufficiency of the evidence on appeal. More specifically, Petitioner contends that the evidence at trial consisted only of testimony from co-conspirators, and a person may not be convicted solely on the uncorroborated testimony of a co-conspirator.

Ruling on Allegation No. 8: This allegation of error is **denied.**

Maryland law has long held that in order to sustain a conviction of an adult based upon the testimony of an accomplice, that testimony must be corroborated by some independent evidence. *Williams*, 364 Md. at 179, 771 A.2d at 1093 ("The longstanding law in Maryland is that a conviction may not rest on the uncorroborated testimony of an accomplice."). Not much in the way of evidence is required to corroborate the testimony of an accomplice. *Brown v. State*, 281 Md. at 244, 246, 378 A.2d at 1107, 1108 (1977).

In the instant case, the evidence presented to the jury consisted of more than simply the uncorroborated testimony of Mr. Burkett and Mr. Fincham. Without detailing the entire panoply of evidence produced by the State, a review of the record reveals that there was overwhelming circumstantial evidence in this case from which a reasonable jury could conclude that the Petitioner committed the offenses of which this jury ultimately convicted him. In addition to the physical evidence, Mrs. Hidey described one of the masked gunman as having had a similar build and physical appearance to the Petitioner who had worked for the Hideys in 1999 (Tr. Vol. I p. 169), as well as the fact that the gunman knew the house contained a safe. The jury also heard testimony from David Santana, a long-time friend of the Petitioner. Mr. Santana testified that he received a telephone call from the Petitioner on December 3, 2004, during which the Petitioner asked Mr. Santana to drive to a location hear Harpers Ferry, West Virginia to retrieve a box containing money that the Petitioner had buried in a hole in the ground at that location. Mr. Santana testified that he in fact drove to the location where the Petitioner directed, and found just under $10,000.00 in cash in the very spot the Petitioner said it would be (Tr. Vol. pp. 143-148).

Accordingly, the Petitioner's Allegation of Error No. 8 is **denied.**

Allegation 9 (G): Cumulative Effect

Facts: Petitioner argues that the cumulative effect of trial and appellate counsel's errors entitles him to post-conviction relief. Specifically, Petitioner argues trial counsel failed to (1) object to two (2) alleged Maryland Rule violations; (2) failed to "reasonably use a peremptory challenge" (Petition for post-conviction p. 25); (3) failed to raise these issues on direct appeal; and (4) failed to submit a timely petition for certiorari to the Court of

Appeals, which resulted in a denial of petitioner's right to a constitutionally fair trial and effective appellate review. (Petition for post-conviction p. 25).

Ruling on Allegation No. 9: This allegation of error is **denied.**

As it relates to the claim of ineffective assistance of counsel, it is true that the cumulative effect of errors may constitute an independent reason for finding ineffective assistance of counsel. *Bowers*, 320 Md. App. at 416, 426, 578 A.2d at 734, 739. The Court of Special Appeals Court has explained that, in a post-conviction proceeding concerning the assistance of counsel:

> [E]ven when no single aspect of the representation falls below the minimum ... standards required under the Sixth Amendment, the cumulative effect of counsel's entire performance may still result in a denial of effective assistance.... [T]his cumulative effect may be applied to either prong of the Strickland test. That is, numerous non-deficient errors may cumulatively amount to a deficiency, ... or numerous non-prejudicial deficiencies may cumulatively cause prejudice....

Cirincione v. State, 119 Md. Ct. Spec. App. 471, 506, 705 A.2d 96, 112-13 *cert. denied*, 350 Md. 275, 711 A.2d 868 (1998).

It is equally true, however, that there must be "errors" to cumulate. If there are no errors, the court is dealing only with a compilation of zeros and, as the Court observed in *Gilliam v. State*, *Oken v. State*, and *State v. Borchardt*, a sum of zeros is zero. *Gilliam v. State*, 331 Md. App. 651, 686, 629 A.2d 685, 703 (1993), *cert. denied*, 510 U.S. 1077, 114 S. Ct. 891 (1994); *Oken*, 343 Md. App. at 284, 681 A.2d at 43; *Borchardt*, 396 Md. App. at 634, 914 A.2d at 1154. In this case, the Court has found that Petitioner's trial counsel committed no errors. Therefore, Petitioner's Allegation of Error No. 9 is **denied.**

CONCLUSION

Based upon the Court's review of the record, transcripts of trial testimony, arguments of counsel, each of Petitioner's claims for relief, and for the reasons set forth in the preceding Memorandum Opinion, it is therefore, by the Court, this 29th day of October, 2015,

ORDERED, that all allegations contained in the Petition for Post-Conviction be, and the same are hereby, denied; and it is further

ORDERED, that the sentence imposed by the trial judge shall remain in full force and effect.

FRED S. HECKER, JUDGE
CIRCUIT COURT FOR CARROLL COUNTY

ENTERED NOV 02 2015