No. 19-8326 ORIGINAL

In the

Supreme Court of the United States

Charles Brandon Martin,

Petitioner,

v.

State of Maryland,

Respondent.

On Petition for a Writ of Certiorari to the

Court of Special Appeals of Maryland

Petition for Writ of Certiorari

Charles Brandon Martin, Doc. #366-673

North Branch Correctional Facility

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Cumberland, Md 21502

QUESTIONS PRESENTED

When a *Brady* violation (*Brady v. Maryland*, 373 U.S. 83 (1963)) occurs, must the Court take into account the effects of the *Brady* violation, or simply evaluate the sufficiency or strength of the evidence, when deciding materiality?

When did compound *voir dire* questions that allow jurors to self-determine their ability to be fair and impartial become improper?

What is the proper materiality analysis to be used when the State shifts the burden of proof to the defendant during closing argument?

When a Confrontation Clause violation occurs, is it necessary for a defendant to prove that the proper witness was not available?

PARTIES TO THE PROCEEDINGS

Charles Brandon Martin, petitioner on review, was the appellee below.

The State of Maryland, respondent on review, was the appellant below.

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Charles Brandon Martin respectfully petitions for writ of certiorari to review the judgment of the Court of Special Appeals of Maryland.

Decisions Below

The Maryland Court of Appeals order denying writ of certiorari is not reported. (Pet. App. C). The Court of Special Appeals opinion is unreported, *State v. Martin*, 2019 MD at Lexis 807 (Pet. App. A). The opinion and order of the Circuit Court for Anne Arundel County is not reported. (Pet. App. B).

Jurisdiction

The Court of Special Appeals entered judgement on September 20, 2019. An order denying Petition for Writ of Certiorari was entered by the Maryland Court of Appeals on January 24, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment, U.S. Const. Amend. V, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment, U.S. Const. Amend. VI, provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment, U.S. Const. Amend. XIV, provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Petitioner, Charles Brandon Martin's conviction as an accessory before the fact to attempted first-degree murder was reversed by the Circuit Court for Anne Arundel County. After a hearing, the Circuit Court (through the Honorable Judge Ronald Silkworth) issued a thorough opinion granting post-conviction relief and ordering a new trial because of five separate issues.

The first issue, an egregious *Brady* violation, occurred when the State willfully suppressed a computer analysis which had both exculpatory and impeaching value. It would have been used to show that a State witness gave false testimony to the jury during trial. The materiality of this *Brady* violation was greatly compounded when the State requested, and, over the Petitioner's objection, was given a concealment/destruction of evidence instruction against the Petitioner to the jury. The evidence to which this instruction pertained was the very evidence withheld by the State in the *Brady* violation, to which the State concedes occurred.

The next two issues, to which the Circuit Court deemed warranted relief, were two compound questions during *voir dire* that allowed the jury to self-determine their ability to sit as a fair and impartial jury.

The last two issues occurred when the State made multiple improper burden-shifting arguments during closing. No curative instructions were given.

The Court of Special Appeals then granted the State's Application for Leave to Appeal to review the rulings of Judge Silkworth on the fore-mentioned issues and also an issue dealing with a Confrontation Clause Violation, which the Petitioner put forth in a conditional cross-appeal. The Court of Special Appeals, in an opinion

written by Judge Graeff, then ruled that Judge Silkworth was incorrect about all five of the issues to which he granted relief, but that he was correct on the one issue to which he denied relief.

An appellate court reviews actions of lower courts in order to correct mistakes or injustice and should not simply search for reasons to deny relief through a misapplication of this Court's binding precedent.

This petition is about straightforward legal issues: (1) the proper *Brady* materiality analysis, versus simply evaluating the strength of the case; (2) when did this type of compound *voir dire* question complained of become improper; (3) understanding when prejudice ensues from the State's improper burden-shifting arguments; (4) and lastly, understanding the defendant's burden of proof during a Confrontation Clause violation when the improper witness testifies. This Court should grant certiorari and reverse.

STATEMENT

A. Factual Background.

On October 27, 2008, Jodi Lynne Torok, a friend of the Petitioner, was shot at her home in Crofton, Maryland. The State charged Petitioner with, *inter alia*, attempted first-degree murder and solicitation of the same murder. The State's theory changed multiple times throughout the trial. The State started during opening statement by saying Petitioner was guilty as an aider and abettor and also

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Transcript references are as follows: "Tr." refers to trial; "PC Tr." refers to the post-conviction hearing; "PC." Refers to the post-conviction opinion; "COSA" refers to the 2019 Court of Special Appeals of Maryland opinion.

as a solicitor. Then, during closing, the State shifted from aider and abettor to the theory that Petitioner had assisted the shooter in making a homemade silencer from a Gatorade bottle prior to the shooting and was therefore an accessory before the fact. Petitioner denied any involvement in the attempted murder of Ms. Torok and argued that the police failed to investigate other viable suspects, including one of his girlfriends, Margaret McFadden, who was jealous of the victim's relationship with Petitioner.

The State's case was purely circumstantial, and indeed the alleged triggerman was acquitted in a separate trial.[1] The case consisted principally of evidence that (1) Ms. Torok believed Petitioner was unhappy that she had recently chosen not to terminate a pregnancy for which he may have been responsible[2]; (2) DNA evidence from a Gatorade bottle allegedly used as a "homemade" silencer[3] – a "Negroid hair" that Petitioner could not be excluded from, and saliva from three individuals that established that an African American male had drank from the bottle[4]; and (3) crucially, testimony from another girlfriend, Sheri Carter, that she saw Petitioner researching silencers on a laptop computer that he kept at her home and that after police began investigating him, Ms. Carter said Petitioner removed the computer from her apartment and "got rid of it." (May 3, 2010 Tr. 142:17-19; 143:1-15, 144: 8-

[1] The State charged Jerold Burks with, *inter alia*, attempted first- and second-degree murder and conspiracy to commit murder of Ms. Torok. A jury acquitted him of all charges, in a trial that occurred before Petitioner's trial.

[2] Ms. Torok also had a boyfriend that was also black, who thought he was the father, and did not want her to keep the baby.

[3] There was no gunshot residue on the bottle.

[4] Ms. Torak also could not be excluded as a possible contributor, and the only fingerprints on the bottle were also Ms. Torok's.

15). Ms. Carter was considered such an "important witness," according to the State, that it "saved [her] for last." (April 28, 2010 Tr. 31:25-32:1).

Based on Ms. Carter's testimony, the trial court, over defense counsel's objection, instructed the jury: "You have heard evidence that the Defendant removed a computer from the house of Sheri Carter. Concealment of evidence is not enough by itself to establish guilt, but **may be considered as evidence of guilt.** Concealment of evidence may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether the Defendant concealed evidence in this case then you must decide whether that conduct shows a consciousness of guilt." (May 4, 2010 Tr. 23:8-17) (emphasis added).

During closing arguments, the State lead the jury to believe that it should accept the evidence indirectly linking Petitioner to the gun because "[the Defense] didn't address the fact that this Defendant did purchase the two .380 caliber handguns." (May 4, 2010 Tr. 92:18-23).

Also, during closing arguments, defense counsel argued that Ms. McFadden, not the Petitioner, had facilitated the shooting, and the State then asserted to the jury that Martin's defense should be rejected because he did not "prove [anything] to tie [McFadden] to this crime." (May 4, 2010 Tr. 94:11-15).

The jury convicted Petitioner of one count of Attempted First-Degree Murder as an accessory before the fact, but found him not guilty of solicitation of the same murder. Petitioner was then sentenced to life imprisonment.[5]

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[5] Petitioner's sentencing guidelines were 5-10 years.

B. Procedural History

The Maryland Court agreed with the prosecution that the evidence was not material because, even though it conceded that a *Brady* violation occurred, it felt as though the evidence against Petitioner was "so overwhelming that there is no reasonable probability of a different outcome even if Carter's testimony about internet search is completely discounted." (COSA, 14:10-11). The Court of Special Appeals Judge Graeff asserted that, in situations "where evidence that could have been used to impeach a witness is suppressed, the proper analysis is to assume that the jury would have discredited the witness' testimony and consider the other evidence to determine whether there is a reasonable probability of a different outcome." (COSA, 14:16-19). To support this the Court cites *McGhie v. State*, 449 Md. 494 (2016), a case dealing with newly discovered evidence that may have been able to be used to impeach a State's witness.

The Maryland Court then in a footnote pointed out that Petitioner had argued that "there is a stricter standard for materiality in those cases where 'the prosecution's case includes perjured testimony and... the prosecution knew, or should have known, of the perjury.' *Conyers v State*, 367 Md. 571, 610 (2002) (quoting *Wilson v. State*, 363 Md. 333, 346-47 (2001)). In these situations, the conviction 'must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgement.' *Wilson v. State*, 363 Md. 333, 347 (2001) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1979))." The Court then goes on to say that there was no evidence that perjured testimony was given during the Petitioner's trial and that

maybe the witness[6] may have simply been "mistaken" when giving this totally false testimony. The Maryland Court also claimed even if the testimony was perjured, the prosecution did not know it was perjury.

The Maryland Court then goes on to list the circumstantial evidence it believed tied the Petitioner to the Gatorade bottle (that never tested positive for gunshot residue) that the State claimed was used as a silencer. Evidence that Petitioner purchased two guns years earlier; text messages between the victim and Petitioner that the State believed showed that Petitioner knew the victim would be home, even though Petitioner never asked if she would be home, and the victim never stated that she would be home.[7] The Maryland Court also repeated part of the prosecution's theory of why the Petitioner had motive to kill the victim.

Then after this, without mention of the jury instruction, the court simply concluded that because of this evidence presented against Petitioner, it felt as though he had not "met his burden of showing that," had the *Brady* material been provided to him, that there would have been "a reasonable probability that the result of his trial would have been different." (COSA, 18:5-6). The Maryland Court then ruled that the Circuit Court Judge Silkworth erred when he ruled that the State misconduct (*Brady* violation) required a new trial for Petitioner.

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[6] The witness Ms. Carter sent harassing emails and pictures to Petitioner's estranged wife because she was upset with him.

[7] Ms. Torok did state that she was "off" from work that day.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS WRONG AND CREATES A CLEAR SPLIT FROM STATE AND FEDERAL COURTS.

A. Brady Violation.

The Maryland courts are incorrect, it is clear that Ms. Carter's testimony was simply false, not mistaken, and it is also clear that the State knew the testimony was false. The lead detective, Michael Regan of the Anne Arundel County Police Department, who withheld the *Brady* material (the computer analysis), also interviewed Ms. Carter and was well aware that she was planning to repeat what she told him on the stand. Detective Regan had the computer forensically analyzed for the information that Ms. Carter had given him and knew that she not only lied about the computer being destroyed, but also about the searches she claimed were done on the computer; so the State was well aware that Ms. Carter's testimony was false: exchange between the post-conviction judge and the prosecutor:

> THE COURT: Don't you find it troubling that there's a forensic report being sought by someone in a case as important as this and somebody, there has to be a trail, paper, whatever, between who asked that this forensic office do this report? The computer was in the possession of the State. And once the report was done, who did that go to?
>
> MR. RUSSELL: I can answer all of those questions. The detective that was handling the case is the one who asked for the report to be done. He never turned it over. (June 23, 2017 PC Tr. 188:13-21).
>
> * * *
>
> THE COURT: But at least, from what you said, the there's a lead detective in this case who made a decision that is problematic.

> MR. RUSSELL: And I don't disagree with that. (June 23, 2017 PC Tr. 189:7-10).
>
> * * *
>
> THE COURT: Do you think Judge North would have given the instruction if she knew that this particular computer was in the possession of the police department and had a report on it? (June 23, 2017 PC Tr. 193:1-4).
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> * * *
>
> THE COURT: And the lead detective for the police knew it. (June 23, 2017 PC Tr. 195:15-25).
>
> * * *
>
> THE COURT: And the defense was not given the opportunity to use that information to show that she was lying. (June 23, 2017 PC Tr. 199:15-17).

The only way to get her testimony to the jury was to withhold this evidence from Petitioner. Therefore, the stricter standard for materiality should have been used (the *Napue/Agurs* standard from *United States v. Agurs*, 427 U.S. 97 (1976), and *Napue v. Illinois*, 360 U.S. 264 (1959)).

Even without the stricter standard, the evidence against the Petitioner was far from overwhelming. (PC. 10-12). This can be seen by the fact that he was found not guilty of solicitation to commit murder, which was the State's main theory. The trial judge even commented that "the verdict" was "inconsistent," and she also was unsure of what the jury convicted Petitioner of, questioning: "what did the jury convict him of?" (August 31, 2010 Tr. 27:11-12; 55-57). The trial judge also mentioned that she did not understand the motive and that "motive was the weakest part." (August 31,

2010 Tr. 77-78). The Maryland Court left out the fact that the prosecutor's main belief about motive was that Petitioner wanted the victim killed so that his wife would not find out about her. Petitioner's wife testified at the trial that she and Petitioner no longer lived together, and she not only knew that he had two children outside of their marriage, but also that he was seeing other women (Petitioner and his wife were separated). (May 3, 2010 Tr. 2067-68). The trial Judge, Pamala North, also believed that "Ms. McFadden had just as much of a motive, if not more."[8] (August 31, 2010 Tr. 77-78).

The Fifth and Fourteenth Amendments of the United States Constitution require that the State disclose certain types of evidence to a defendant. As this Court held in *Brady v. Maryland*, 373 U.S. 83 (1963), a due process violation occurs when the prosecution does not disclose evidence favorable to the accused when the evidence is material to guilt or punishment. A violation of *Brady* exists when: (1) the evidence is favorable to the accused because it is exculpatory or impeaching; (2) evidence was suppressed by the State (no matter if it was willful or inadvertent); (3) and the accused was prejudiced by this non-disclosure. The favorable evidence is "material" when there is a "reasonable probability" that if the evidence was disclosed, the results of the proceeding would have been different. *Cone v. Bell*, 556 U.S. 449 (2009). A "reasonable probability" as held in *United States v. Bagley*, 473 U.S. 667 (1985), is "a probability sufficient to undermine confidence in the outcome" of the proceedings. In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court said materiality (under *Bagley*) is

[8] Ms. McFadden was a girlfriend of the Petitioner that had also told a state witness she had someone shot, presumably talking about Ms. Torok, the victim.

evaluated in a distinct, cumulative, analysis with the "suppressed evidence considered collectively, *not item by item*." The Court takes into account the cumulative effect of the suppressed evidence with the other evidence, and should not simply look at the probative value of the evidence that was suppressed standing alone. Some circuits have also held that the bad faith (intent) of the government's suppression may suggest that the evidence is material. *See V.I. v Fahie*, 419 F.3d 249 (3d Cir. 2005). The prosecutor also must learn of and turnover to the accused any exculpatory and/or impeachment evidence that other state (or government) agents, especially agents or officers involved in the investigation, may possess. *See Youngblood v. West Virginia*, 547 U.S. 867 (2006); *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996), amended by 101 F.3d 1363 (11th Cir. 1996); *United States v. Price*, 566 F.3d 900 (9th Cir. 2009).

In this case, the Maryland Court has gone against multiple state and federal courts and is setting a dangerous and precarious standard for analyzing and deciding materiality of a *Brady* violation. Here, the Maryland Court agreed (as conceded to by the prosecution) that the computer analysis was suppressed and favorable to the Petitioner, but then held that it was not material. (COSA, 12-13, 15). While conducting the *Brady* materiality analysis, the Court excluded Ms. Carter's testimony, considered only the circumstantial evidence that the State believed connected Petitioner to the Gatorade bottle, and then concluded that Petitioner failed to sustain his burden of establishing that had he received the computer analysis[9]

[9] During the post-conviction hearing, trial counsel made clear that he would have used this evidence to impeach Ms. Carter's false testimony.

there would have been a reasonable probability that the outcome of the trial would have been different. *Id.* at 18. Without including it in its analysis, the court acknowledged in a brief footnote that "if Ms. Carter's testimony had been discounted, the jury instruction regarding concealment of evidence may not have been given," but then stated that this fact "does not ... change our analysis here" because "the State presented strong evidence of [Petitioner's] guilt, even excluding Ms. Carter's **testimony**." *Id.* at 18 n.14 (emphasis added). Even with the wording of this footnote, the Court is mistaken or, even worse, attempting to understate the basis for the improper concealment/destruction of evidence instruction. The Court says the instruction "**may not** have been given," but this is far from correct, as the instruction **would not** have been given because the evidence that the State claimed was destroyed by the Petitioner was in the State's possession the entire time. In fact, the lead Detective (Det. Michael Regan) on the case not only had the computer and had it analyzed, but he also knew what Ms. Carter was planning on saying during trial. (May 3, 2010 Tr. 157:18-22). The post-conviction judge understood all of this, which is why Judge Silkworth believed the State **willfully withheld** this exculpatory and impeachment evidence. (PC. 8:11-12). Without this *Brady* violation, the witness would not have been allowed to lie on the stand and no destruction of evidence instruction would have been given against Petitioner.

The Maryland Court should have taken into account the role the jury instruction on destruction of evidence against Petitioner played when analyzing materiality, since the Maryland Court itself has said "[A]n inference arises from the

suppression of evidence by a litigant that this evidence would be unfavorable to his cause." *Maszczenski v. Myers*, 212 Md. 346, 355 (1957). Other courts have also stated their belief that such an instruction **substantially compounds the risk of unfair prejudice** to a party. *See Morris v. Union Pac. R.R.*, 373 F.3d 896, 903 (8th Cir. 2004) ("The adverse inference instruction, **when not warranted**, creates a substantial danger of unfair prejudice."); *Lansdale v. UPS Supply Chain Sols., Inc.*, 2019 WL 3306146 (D. Minn. July 23, 2019) (refusing requests to give spoliation instruction in light of substantial potential for unfair prejudice). "[I]ntructions not supported by the evidence have the capacity to lead the jury away from the evidence actually presented." *Anderson v. Litzenberg*, 115 Md. App. 549, 559 (1997). "The destruction or alteration of evidence by a party gives rise to the inferences or presumptions unfavorable to the spoliator," including "an inference that the evidence would have been unfavorable to his cause." *Id.* at 560.

In Petitioner's case, if the State had turned over the computer analysis, the evidence would not have supported a concealment of evidence instruction. The jury was therefore not only distracted by a completely circumstantial case the State presented, but was also permitted to consider evidence that was patently false and, consequently, draw an adverse inference against Petitioner. The jury heard incomplete and incorrect evidence against Petitioner, and the prejudice Petitioner suffered as a result was immeasurable. It is clear that the Maryland Court erred when it failed to take this prejudice into account while conducting its *Brady* materiality analysis.

The Maryland Court omitted a crucial part of the materiality analysis that leads to the inescapable conclusion that Petitioner was prejudiced by the State's failure to turn over the computer analysis: Ms. Carter's testimony and the destruction of evidence instruction were highly significant to the State's case.

The State itself underscored the significance of Ms. Carter's testimony, stating that she was an "important witness," so important that the State "saved [her] for last." (April 28, 2010 Tr. 31:25-32:1). With all witnesses, the defendant must be "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness" to satisfy his constitutional right to cross-examine a witness. *Davis v. Alaska*, 415 U.S. 308, 318 (1974). Because Petitioner was unable to impeach Ms. Carter with the computer analysis, the jury did not hear crucial facts bearing on her credibility – and his right to cross-examination was not satisfied. The prejudice Petitioner suffered is immeasurable because of the substantial impact that this impeachment evidence would have had on the jury's assessment of Ms. Carter's credibility, especially given the significance the State placed on her testimony and the central role it played in the case. Simply excluding her testimony from the evidence, as the appellate court did here, fails to take this prejudice into account, and is contrary to precedent.

This prejudice was compounded by the prejudice from the destruction of evidence instruction. In its closing arguments, the State emphasized Ms. Carter's testimony that Petitioner was searching for silencers on the internet and that he "got

rid of the computer after the police talked to him" because this "fits precisely with the evidence." (May 4, 2010 Tr. 37:12-16). In its rebuttal closing, the State again invoked Petitioner's alleged destruction of evidence, asserting that he "got rid of the computer because there was probably something on it that would have brought the police's attention to the fact that he had something to do with this murder – or attempted murder." (May 4, 2010 Tr. 100:12-17; 106:20-25). If the State had produced the computer analysis, as they were constitutionally required to do, it would not have been able to make these statements, nor would the jury have considered whether Petitioner destroyed the laptop and would not have been told that it could be considered evidence of his guilt. Concluding that if the trial court had not given the instruction, it would not "change [its] analysis" because "the State presented strong evidence of [Petitioner's] guilt" completely disregards the prejudicial effect of the instruction and the State's statements, especially given the significance the State placed on Petitioner's alleged destruction of evidence.

This is not the first and only time the Maryland Courts have misunderstood this court's prejudice teachings. *See Dionas v. State*, 436 Md. 97, 105-07, 113 (2013) (noting that the Court of Special Appeals "relied primarily on the strength of the State's case, discounting, to a large degree, the jury's behavior during deliberations").

The Maryland Court of Special Appeals failed to consider the prejudicial impact of the *Brady* violation on the whole trial (and evidence), the harm suffered from the destruction of evidence instruction, and also ignored existing precedent, which violated Petitioner's due process rights. This Court should grant certiorari to remedy

the confusion that exists when it comes to the proper standard courts should use while analyzing the materiality of a *Brady* violation.

B. Improper Compound *Voir Dire* Question[s].

The Sixth Amendment requires that the jury guaranteed to the defendant be impartial. The trial court is responsible for ensuring that the defendant receives an impartial jury. *United States v. Littlejohn*, 489 F.3d 1335, 1344-45 (D.C. Cir 2007), states that it is an abuse of discretion when the court asked compound *voir dire* questions in which jurors were instructed not to indicate whether they or their family members or friends had worked in law enforcement unless they believed they could not be impartial and other questions inadequate to ensure defendant had opportunity to uncover potentially serious sources of bias. Jury selection procedures implicate due process, the Sixth Amendment, and equal protection principles. A defendant may challenge the jury selection process on the grounds that it violated fundamental fairness under the Due Process Clauses. The trial court must conduct a *voir dire* examination of prospective jurors in order to review potential bias. The Sixth Amendment guarantees that "the defense always must be given a full and fair opportunity to expose bias or prejudice on the part of the veniremen." *Morford v. United States*, 339 U.S. 258 (1950); *see also Rosales-Lopez v. United States*, 451 U.S. 182 (1981) (reversing conviction because the defendant had been denied "the opportunity to prove actual bias."); *United States v. Orenuga*, 430 F.3d 1158, 1162 (D.C. Cir. 2005) ("This guarantee includes the right to be tried by jurors who are capable of putting aside their personal impressions.").

During Petitioner's trial there were two *voir dire* questions that were asked that were improper.[10] The questions were of the compound variety; they were two part questions that allowed the potential jury members to self-assess their own ability to be fair and impartial, which should properly be done by the trial court. The way the two-part questions were phrased allowed the potential jurors that held these beliefs to not identify themselves if they felt they could be fair and impartial, which violates Petitioner's constitutional right to an impartial jury. There is no dispute, between the State, the court or the Petitioner about the impropriety of these two *voir dire* questions. The issue here is **when** did these questions become improper?

The D.C. Courts in 2007 ruled on this in *United States v. Littlejohn*, 489 F.3d 1335 (2007), and the Maryland courts ruled very clearly on this issue in 2000 with *Dingle v. State*, 361 Md. 1 (2000). The issue in this case is that after the post-conviction court ruled that it was ineffective assistance of counsel for the trial lawyer to not object to these two improper *voir dire* questions, the Court of Special Appeals of Maryland then reversed that decision after stating that these type of *voir dire* question were proper in 2010. The problem with the Maryland Court's ruling on this issue is that not only is it clearly incorrect, it will also effect other court rulings within

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[10] Improper *voir dire* questions:

(1) "There will be testimony in this case regarding interracial dating. Is there any prospective juror who has such strong feelings against interracial dating that, that juror would not be able to render a fair and impartial verdict in this case?" There were no positive responses to the question.

(2) "Have you or any member of your family or close friend(s) ever been associated with, or in anyway, involved with a group or organization whose mission of the jury to abolish legalized abortion? Does any member of the jury hold such strong views about abortion that if there is evidence in the case about abortion, you could not be fair and impartial?" There were no positive responses to the question.

Maryland[11] along with other state and federal courts. The case the Maryland Court used to overturn the post-conviction court's decision was *Thomas v. State*, 369 Md. 202 (2002). The problem with the court's use of *Thomas* is that it did not create new case law. *Thomas* did mention in a footnote that not all compound *voir dire* question are always improper without explaining why it believed this, but the final conclusion of the *Thomas* ruling was that the court said it would continue the views of *Dingle*.

Petitioner prays that this Court will make clear when these type of question became improper to clear up not only the confusion caused by the Maryland Court, but also because the Maryland Court used *dicta* as case law, and if we can now disregard well settled case law in favor of footnotes and unnecessary comments, where will we end up? Case law would no longer carry any weight. This Court should grant certiorari and reverse.

C. Improper Burden-Shifting.

The prosecutor may not make material misstatements of law or fact. *United States v. Cruz*, 797 F.2d 90 (2d Cir. 1986) (prosecutor's statement that "defense ... has to convince you" has held to be improper because it implied a burden shift); *United States v. Ebron*, 683 F.3d 105 (5th Cir. 2012) (appellate courts are to consider the magnitude of a statement's prejudice, the effect of any curative instruction, and the strength of the evidence against a defendant); *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010) (appellate courts consider whether conduct and remarks

[11] See Opinion & Order at 6-9, *Davis v. State*, No. 22-L-000196 (Cir. Ct. Wicomico Cty. Aug. 12, 2019); Statement of Reasons & Order of the Court at 6-8, *Battle v. State*, No. 108059020 (Cir. Ct. Balt. Cty. Aug. 16, 2017); Statement of Reasons & Order of Court at 5-7, *Everett v. State*, No. 106292028 (Cir. Ct. Balt. Cty. Oct. 23, 2015). These three cases can be found in Petitioner's appendix. (Pet. App. D).

were prejudicial, extensive, and deliberate and whether evidence against a defendant was strong). *United States v. Perlaza*, 439 F.3d 1149 (9th Cir 2006) (reversing conviction because prosecutor's improper remarks during trial had cumulative effect that "substantially impaired the defendant's right to a fair trial," evidence against defendant was not overwhelming, and curative instructions were insufficient to protect defendant from substantial prejudice). *United States v. Sandoval-Gonzalez*, 642 F.3d 717 (9th Cir. 2011) (prosecutor's improper suggestion that there was "presumption of guilt" not harmless because it shifted the burden of proof to the defendant and the trial court took no curative action). "A prosecutor's improper closing argument may so infect the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Lighty*, 616 F.3d 321, 359 (4th Cir. 2010) (quoting *United States v. Wilson*, 135 F.3d 291, 297 (4th Cir. 1998)).

During closing argument of Petitioner's trial, the State made two statements that the post-conviction court deemed improper because they shifted the burden of proof to the Petitioner. The Petitioner's trial counsel failed to object, and it was deemed that he provided ineffective assistance for this failure because, had he objected, the trial judge could have given a curative instruction contemporaneously, and this failure prejudiced the Petitioner.

Petitioner believes that both the burden-shifting statements made by the Prosecution during closing arguments were improper and warrant reversal of his conviction as the post-conviction court ruled[12]; but the only statement that is at issue

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[12] (PC:24-25)

now will be when the State said "what else do they **prove** to tie her to the crime?" (May 4, 2010 Tr. 94: 11-16). It is undisputed that this statement was improper (both the post-conviction court and the Court of Special Appeals agree), but the Maryland Court once again uses a flawed analysis while determining prejudice.

Defense counsel "argued extensively" that Ms. McFadden, not Petitioner, was involved in arranging Ms. Torok's shooting, and therefore any statement that the burden was on Petitioner to "prove" that she murdered Ms. Torak is highly prejudicial, especially given that there was no contemporaneous curative instruction. Without such an instruction, a juror could construe the State's comments to mean that to generate reasonable doubt the burden was on Petitioner to produce evidence of Ms. McFadden's involvement, rather than the burden being on the State to prove its case against Petitioner. Because the improper argument was during rebuttal, the only recourse defendant had to counter it was to object, which did not happen here. No instruction on the ultimate burden of proof could cure that prejudice, as other courts agreed. Thus, Petitioner's Constitutional rights were violated.

The question here is a simple but very important one: what is the proper analysis for prejudice after this type of misconduct by the State? Most jurisdictions take many things into account while conducting the prejudice analysis as has been shown above. The Maryland courts on the other hand seem to only pay attention to the evidence the prosecution has presented. In this case there were no contemporaneous jury instructions given to combat the burden-shift, and the issue(s) the prosecutor was commenting on was very important to the Petitioner's defense.

Petitioner prays that the court will make clear, what the proper analysis is to determine prejudice in instances such as these. The Court should grant certiorari and reverse.

D. Confrontation Clause Violation

The Sixth Amendment's Confrontation Clause provides a criminal defendant the right to directly confront adverse witnesses, the right to cross-examine adverse witnesses, and the right to be present at any stage of the trial that would enable the defendant to effectively cross-examine adverse witnesses. The Confrontation Clause's guarantees' serve to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in an adversarial proceeding. When cross-examining a witness, the defendant must be permitted to test both the witness's credibility and the witness's knowledge of the material facts in the case. Defendant waives the right to cross-examine by failing to make a timely objection to a Confrontation Clause violation. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court distinguished between "testimonial" and "nontestimonial" hearsay evidence, holding that the admission of a testimonial hearsay statement violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. A violation of the Confrontation Clause is subject to harmless error analysis.

During Petitioner's trial, the trial court determined that his counsel did not make a timely objection to the State's DNA expert's (Dr. Melton) testimony, and the trial court ultimately admitted the DNA evidence. The trial court determined that

Melton's testimony would have been barred under *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (holding that forensic lab reports constitute testimonial statements and are inadmissible against a defendant unless the person who did the testing is subject to cross-examination), had counsel's objection been timely. (PC: 14). Petitioner argued during a post-conviction hearing that trial counsel's failure to object to the State presenting the wrong witness (the lab manager, instead of the proper technicians), constituted ineffective assistance of counsel. The post-conviction court agreed that the Petitioner's rights were violated by trial counsel's errors, but ruled that Petitioner was not prejudiced because of its belief that the proper witnesses were available to testify if trial counsel's objection would have been timely. It is clear from the trial transcripts and the State's witness list that not only were the two proper technicians not available to testify, they were not physically in the State and were not even on the State's witness list. (April 30, 2010 Tr. 139:5-7; 178:7-9). The prosecution did not seem to be aware that they were using the wrong witness until the objection was made. The post-conviction court erred in its determination that had the objection been timely the proper witness would have simply been called.

The issue that is now before this Court stems from the fact that the Court of Special Appeals of Maryland, when ruling on the Confrontation Clause issue, found that it was the Petitioner's "burden to show that [the two technicians] were not available and the DNA evidence would have been excluded if defense counsel had timely objected." (COSA: 42). The Maryland courts are incorrect; the State, not the Petitioner, is responsible for the availability of the State's witnesses. *United States*

v. Matus-Zayas, 655 F.3d 1092 (9th Cir. 2011) (finding good-faith effort not established because the "government failed to present any evidence at trial to establish that efforts were made to prove witness's presence"); *see also Crawford v. Washington*, 541 U.S. 36 (2004); *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). It was improper for the Court to put this burden on the Petitioner when a straightforward application of the *Strickland v. Washington*, 466 U.S. 668 (1984), standard simply required that he demonstrate to a reasonable probability that the outcome of the trial would have been different. The DNA evidence also would have been excluded, or at least Dr. Melton's testimony about it would have been excluded, had trial counsel made a timely objection, and that requires no speculation. *See Sussman v. Jenkins*, 636 F.3d 329 (7th Cir. 2011) (granting relief because counsel's errors prejudiced defendant by violating the Confrontation Clause). The Maryland Court also made an error when it misunderstood the trial transcript and claimed that a statement clearly made by the prosecution was made by Petitioner's trial counsel. The Court of Special Appeals errored when it said "Moreover, appellee's counsel suggested that a possible remedy would be to allow the technicians to testify, after granting him a continuance to prepare (COSA: 42). Trial counsel said he would not agree to this plan. The transcripts show that it was Mr. Chase of the prosecution speaking, not the Petitioner's trial counsel. (April 30, 2010 Tr. 166-167; 138-139).

The trial judge quoted Justice Scalia when speaking about who the burden is on to provide the proper witness: "that there is no obligation on the part of the

defendant to bring in those people." In other words, it is the State's obligation and the defendant need not do anything to bring those people in. (April 30, 2010 Tr. 133:2-15). It was also said that "Melendez-Diaz makes clear... a confrontation problem, the State has the total obligation of providing those witnesses..., you can't shift the burden to the defendant." (April 30, 2010 Tr. 176:12-17).

Petitioner asks this court to make clear that when a Confrontation Clause violation occurs, what must the defendant prove? And must it be shown that the proper witnesses were not available or simply that the wrong witness was used? The Maryland Court's ruling not only goes against this Court's rulings but also at least two other federal circuit rulings. Petitioner asks that certiorari be granted and for reversal of the Maryland Court's ruling.

II. IMPORTANCE OF THE QUESTION[S] PRESENTED.

The question[s] presented is important for the following reasons:

First, the standard for *Brady* materiality should be uniform among the state and federal courts. These violations requiring a new trial should not be dependent upon the jurisdiction in which the defendant is presented.

State and Federal Courts have adopted a consistent approach. Maryland departed from that approach. This court's intervention is warranted to resolve the split.

III. THIS CASE IS A CLEAN VEHICLE TO ADDRESS THE QUESTION[S] PRESENTED.

Both the Maryland post-conviction court and multiple state and federal courts followed the majority approach to hold that Martin is entitled to a new trial.

Numerous federal and state court decisions, including in markedly similar cases, support that conclusion.

The Court of Special Appeals of Maryland departed from the majority approach and found no prejudice despite the egregious *Brady* violation that deprived him his right to a fair trial, and multiple errors by Martin's trial counsel that denied him effective assistance of counsel. Both of these rights are constitutionally guaranteed.

There are no vehicle problems to reaching the question[s] at issue which has been briefed and argued throughout multiple state courts. Martin should have the constitutional rights guaranteed to him, to place all evidence in front of a fair and impartial jury while being provided effective assistance of counsel, and the Court of Special Appeals of Maryland should not go against lower courts and other court rulings to deny this right. The court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished via U.S. mail to the Maryland Attorney General, 200 St. Paul Place, Baltimore, MD 21202, on April 14, 2020.

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