No._____

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

Appendix to Petition for Writ of Certiorari

INDEX OF EXHIBITS

Circuit Court for Anne Arundel County
Case No. 02-K-09-000831

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3207 & 3209

September Term, 2018

STATE OF MARYLAND

v.

CHARLES BRANDON MARTIN

Fader, C.J.,
Graeff,
Eyler, James R.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: September 20, 2019

APPENDIX A

In 2010, appellee, Charles Brandon Martin, was convicted of attempted first-degree murder and sentenced to life in prison. On October 5, 2018, the Circuit Court for Anne Arundel County granted appellee's petition for postconviction relief and ordered that he be granted a new trial.

On appeal, the State presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the postconviction court err in ruling that the State committed a *Brady*[1] violation in failing to give the defense a forensic computer analysis report performed on appellee's computer?

2. Did the postconviction court err in ruling that appellee's trial counsel was ineffective in not objecting to compound questions posed during voir dire?

3. Did the postconviction court err in ruling that appellee's trial counsel was ineffective in failing to object to the State's closing argument?

Appellee filed a cross-appeal, in which he presents an additional question for our review, which we have rephrased slightly, as follows:

> Did the postconviction court err in concluding that appellee was not prejudiced by his trial counsel's failure to timely object to a Confrontation Clause violation?

For the reasons set forth below, we agree with the State's contentions of error, and therefore, we shall reverse the judgment of the circuit court.

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

FACTUAL AND PROCEDURAL BACKGROUND

The factual background of the underlying offense was summarized by this Court in its opinion on direct appeal of appellee's conviction. *Martin v. State*, 218 Md. App. 1, 8–14 (2014). We adopt this summary as follows:

> On October 27, 2008, Jodi Lynne Torok, the victim, was found at her home in Crofton, Maryland, with a gunshot wound to her head. Having survived that wound, the victim testified, at the trial below, that she had been in a romantic relationship with Martin, who was married to someone else, and that about eight or nine weeks before the shooting, she had become pregnant with his child. After the victim informed Martin of her condition, he angrily demanded that she obtain an abortion. Although she had, at first, agreed to do so, she later changed her mind and decided to have the baby. Upon informing Martin of her change of mind, the victim advised him of her intention "to go to court and take him for child support." Predictably, that advisement led to cooling of their relationship.
>
> Subsequently, on the day of the shooting, at about 3:00 p.m., the victim was talking on the phone, at her home, with a close friend, Blair Wolfe, when a man, purporting to be a salesman, knocked on her front door. She then ended the call to respond to the "salesman," but thereafter never called Ms. Wolfe back or answered any of Wolfe's subsequent telephone calls. Growing increasingly concerned but unable to take any action on her own,[5] Ms. Wolfe telephoned Jessica Higgs, the victim's roommate, and requested that she leave work and return home to make sure that the victim was safe. Upon arriving at the residence that she shared with the victim, Ms. Higgs found the front door unlocked and the victim lying on the foyer, unconscious and bleeding from a gunshot wound to her head. Higgs immediately called "911."
>
> When the first police officer arrived at the victim's residence, he secured the scene. Then, upon entering the residence, he found the victim, Ms. Torok, "laying in the doorway," "fully clothed," still breathing, but unresponsive. There were no signs of forcible entry or that the victim's personal property had been disturbed.

[5] At the time of this telephone call, Ms. Wolfe was living in Pittsburgh.

When paramedics arrived at the scene, they transported the victim to the Shock Trauma Center at the University of Maryland Hospital in Baltimore City, where she remained for nearly a month. As a result of the gunshot wound, the victim's pregnancy was terminated, and she suffered severe and disabling injuries. Neither during that time nor thereafter could she recall the events that took place, from the end of her telephone conversation with Ms. Wolfe on October 27th until Thanksgiving, one month later.

The evidence recovered by the police at the scene of the shooting included a Gatorade bottle, which appeared to be fashioned into a home-made silencer;[6] a spent projectile as well as a spent shell casing; and the victim's Blackberry cell phone.

Gatorade bottle/silencer

From the Gatorade bottle, police evidence technicians extracted "a human hair" of "Negroid origin"[7] and saliva from the mouth of the bottle. DNA testing of both linked the bottle to Martin.[8]

[6] The mouth of the Gatorade bottle was wrapped with two layers of tape, and at the bottom of the bottle was a hole. The tape exhibited a distinct, rectangular shape, a shape suggesting that the mouth of the bottle had been pressed against the barrel of a semi-automatic handgun. Furthermore, sooty residue lined the bottle's inside surface at the location of the hole, indicating that that opening at the bottom of the bottle had been made by an exiting bullet. It appeared, to police, to be a home-made silencer.

[7] Martin is an African–American male.

[8] Martin's mitochondrial DNA profile was the same as that derived from the hair strand. One of the State's expert witnesses testified at trial that only about 0.06 per cent of the population of North America shares the same mitochondrial DNA profile as that derived from the hair fragment found on the Gatorade bottle.

DNA testing of a swab of saliva taken from the mouth of the bottle revealed that it contained "a mixture of DNA from at least three individuals," at least one of whom was female and another a male. The test results excluded "approximately 94 percent of the Caucasian population," as well as "approximately 96 percent of the African–American population," but among

The victim testified that neither she nor [the victim's roommate] drank Gatorade, but that Martin did and often.[9] Martin's fondness for Gatorade was later confirmed by the officer who drove him to the Anne Arundel police station, who testified that, on the way to the station, he and [appellee] stopped at a convenience store, where Martin purchased a bottle of Gatorade to drink.

Granted immunity from prosecution for the shooting and possibly for other unrelated charges, Michael Bradley testified that, on the day of the shooting, he; his brother, Frank Bradley; Martin; and Jerry Burks, an acquaintance of Martin, were together at Maggie McFadden's house "about noon" and that he observed Frank Bradley carrying "some white ... medical tape" and a Gatorade bottle upstairs to McFadden's bedroom, where he was joined by Martin. Then, according to Michael Bradley, Martin and Burks left together, "approximately 1:30, 2:00" p.m., and returned after 3:00 p.m. but before 6:30 p.m. the same day.[10]

* * *

Ballistic evidence

The bullet recovered by police, a .380 caliber bullet, and the shell casing that was found, could have been fired, according to a State's expert witness, from a semi-automatic firearm. Such a firearm could have been manufactured by any one of sixteen different manufacturers, which was consistent with Martin's purchase, in 2003, of two .380 caliber semi-automatic handguns made by Bryco Arms, one of those sixteen manufacturers.[11] Moreover, Sheri Carter testified that, in September and October of 2008, the time period just

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[8] (continued)
the males, who could not be excluded, was Martin. And, among the females, who could not be excluded, was the victim, Jodi Torok.

[9] The victim stated that Martin drank Gatorade "a lot."

[10] The State's theory was that Burks was the shooter and that he had been solicited by Martin. Burks was tried separately, six months before Martin's trial, on charges that included attempted first- and second-degree murder and conspiracy to commit murder. He was acquitted by a jury on all counts. Five days before Martin's trial, the State moved in limine to "exclude from trial any evidence that Jerold Burks was acquitted of the charges" in that case,

before the shooting, she had observed Martin carrying a "small, silver, [black-handled], semi-automatic" handgun.

The firearm itself was never found. The testimony of Michael Bradley suggested why that was so. According to Michael Bradley, when Martin returned to McFadden's home the evening of the shooting, he saw Martin give a brown paper bag to Frank Bradley and tell Bradley to "get rid of this."

Victim's cell phone

Finally, the last of the four items found at the victim's residence was her Blackberry cell phone. Text messages extracted from that phone by police confirmed that Martin had exchanged several text messages with the victim on the day of the shooting.[12]

Martin's statement

The day after the shooting, Martin gave a statement to police. During the interrogation, Martin downplayed his relationship with Ms. Torok, the victim, telling detectives that he did not know her last name and that he was unsure where she lived, but he conceded that he had previously been to her house. And, although he was "highly doubt[ful]" that he was the father of the victim's baby, since they "hadn't had any contact," he admitted to police that he had agreed to provide money to her to "help her out." Finally, Martin claimed that, on the day of the shooting, he was at home with his wife and children until mid-day and that later he had visited "Frankie" and "Mike" Bradley, who were friends of his, arriving at "around" 1:00 p.m., staying with them until about 4:30 p.m., and then returning home.

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[10] (continued)
and, on the day trial commenced, the court granted that motion. Thereafter, the State nol prossed the conspiracy charge against Martin.

[11] The parties stipulated that, in 2004, one of those handguns "was transferred to another party."

[12] Police technicians used a device known as a universal memory exchanger ("UME"), that extracts the data stored on a cell phone, including text messages.

Martin, 218 Md. App. at 8–14 (footnote omitted).

Significant to one of the issues on appeal is the testimony of Sheri Carter, one of appellee's former girlfriends. Ms. Carter testified that appellee had kept a computer at her residence, and he got the computer "from a place that he used to work and [they] didn't have administrative rights so you couldn't make any changes to the computer because [they] didn't have the password log in."[2] In late September or early October 2008, she saw appellee "looking up gun silencers" on the computer. Appellee subsequently took the computer from her apartment, stating that they "had looked up so many crazy things on the internet," and he did not want it found if her apartment "got searched." Ms. Carter testified that appellee "said he got rid of it."[3]

On May 5, 2010, a jury in the Circuit Court for Anne Arundel County found appellee guilty of attempted first-degree murder.[4] On December 21, 2010, the circuit court

[2] This computer was referred to by the parties at the postconviction proceeding as the "CSM Computer[.]" CSM is an acronym for College of Southern Maryland, where Martin had previously worked as a basketball coach.

[3] At the conclusion of all the evidence at trial, the court gave the jury the following instruction:

> You have heard evidence that 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 any evidence in this case. If you find that the Defendant concealed evidence in this case then you must decide whether that conduct shows a consciousness of guilt.

[4] The jury acquitted appellee of solicitation to murder.

sentenced appellee to life in prison. This Court affirmed appellee's conviction on direct appeal, *Martin*, 218 Md. App. at 46, and the Court of Appeals and the United States Supreme Court denied appellee's petitions for writ of certiorari. *Martin v. State*, 440 Md. 463 (2014); *Martin v. Maryland*, 135 S. Ct. 2068 (2015).

On September 15, 2015, appellee, a self-represented litigant, filed a petition for postconviction relief. Appellee's mother subsequently filed a Maryland Public Information Act request, which resulted in the disclosure of several documents, including a document dated April 22, 2009, entitled "Anne Arundel County Police Department Criminal Investigation Division Computer Analysis and Technical Support Squad Lab Notes" ("Computer Analysis").

The Computer Analysis listed three desktops and two laptops that had been removed from appellee's home pursuant to an October 2008 search warrant. One of the computers was a "CSM laptop," which appellee testified at the postconviction hearing he received while working at the College of Southern Maryland. The Computer Analysis indicated that the computer had last been shut down in 2005.[5] It explained that a detective had run

[5] The Analysis provided, in pertinent part:

> The accounts used for this computer were "Administrator," "Laptop," and "Todd Downs." The Administrator account last logon indicated no data and a last password change of 4/26/05 at 05:43 hours. The Laptop account indicated a last login of 5/19/05 at 10:14 hours and no other account data. The account Todd Downs indicated a last login of 5/17/05 at 1100 hours, a password change of 4/26/05 at 1135 hours, and an incorrect password login of 4/26/05 at 1145 hours.

keyword searches on the laptop for the words "Handgun," "Gatorade," "silencer," "Contract murder," "Murder for hire," "Hardware," "Syria," "Homemade silencer," "hitman," and that these keyword searches produced "no data of investigative value."

This document was never provided to appellee prior to his trial. Following the discovery of this Computer Analysis, appellee supplemented his postconviction petition with assistance by counsel. He argued that the State violated *Brady* and committed prosecutorial misconduct by failing to turn over the Computer Analysis.

On June 23, 2017, the circuit court held a hearing on the postconviction petition. Regarding the alleged *Brady* violation, the parties stipulated that the State never received the Computer Analysis from the Anne Arundel County Police Department. The State argued that, because appellee knew the computer existed, the Computer Analysis did not constitute "*Brady* material," and therefore, there was no *Brady* violation.[6]

Appellee's postconviction counsel argued that the Computer Analysis "would have been important to the case, and if trial counsel had been made aware of it[,] it would have been used at trial" to establish "that Ms. Carter's testimony was inaccurate and unreliable." Appellee's trial counsel testified that the Computer Analysis would have helped him undermine Ms. Carter's testimony.

At his postconviction hearing, appellee presented for identification an affidavit from Todd Downs, which stated that Downs was employed by the College of Southern Maryland from 2001 to 2006 as technical support staff.

[6] The State also argued, a position it has abandoned on appeal, that the laptop mentioned in the Computer Analysis was not the same laptop discussed in Ms. Carter's testimony at trial, and therefore, there was "no evidentiary value to it."

On October 5, 2018, the postconviction court issued its memorandum opinion finding that the State had committed a *Brady* violation. The court stated that the Computer Analysis at issue was favorable to appellee because it could have been used to impeach Ms. Carter's testimony that she saw appellee use the CSM laptop to research gun silencers, and it "show[ed] that Petitioner did not conceal or destroy evidence, an issue for which a jury instruction was given." The court concluded that prejudice ensued as a result of the State's suppression of this favorable evidence because there was a "reasonable probability" that disclosure of the suppressed evidence "would have led to a different result in this case." In that regard, the court stated that "the essential link between [appellee] and the victim was the silencer[,]" and the "two strongest links connecting [appellee] to the silencer were the DNA evidence and Carter's testimony." The court found that the Computer Analysis "would have cast some reasonable doubt on the State's argument and Carter's testimony."

The court then addressed appellee's 13 separate claims of ineffective assistance of counsel. We will discuss those rulings, as relevant to this appeal, in the discussion that follows.

The circuit court ultimately granted the petition for postconviction relief and ordered that appellee be granted a new trial. This appeal followed.[7]

[7] On November 5, 2018, the State filed a timely application for leave to appeal the grant of postconviction relief. On November 15, 2018, appellee filed an application for leave to file a cross-appeal. This Court subsequently granted both the State's and appellee's applications, as well as the parties' joint motion to consolidate the appeals.

DISCUSSION

STANDARD OF REVIEW

The Court of Appeals has explained the relevant standard of review with respect to postconviction proceedings:

> We "will not disturb the factual findings of the post-conviction court unless they are clearly erroneous." *Wilson v. State*, 363 Md. 333, 348, 768, A.2d 675, 683 (2001). "Although reviewing factual determinations of the post-conviction court under a clearly erroneous standard, we make an independent determination of relevant law and its application to the facts." *State v. Adams,* 406 Md. 240, 255, 958 A.2d 295, 305 (2008), *cert. denied,* [556] U.S. [1133], 129 S. Ct. 1624, 173 L.Ed.2d 1005 (2009).

Arrington v. State, 411 Md. 524, 551–52 (2009). *Accord Ramirez v. State*, 464 Md. 532, 560 (2019).

I.

The State contends that the postconviction court erred in finding that it committed a *Brady* violation in failing to provide the defense with the Computer Analysis of the computers seized from appellee's home. It asserts that, given the overwhelming evidence that appellee orchestrated the shooting of the victim, there is not "a reasonable probability of a different outcome" if the evidence had been provided.

Appellee contends that the postconviction court correctly concluded that the State committed a *Brady* violation. He asserts that the Computer Analysis, which the State concedes was suppressed and favorable to his defense, was material because "trial counsel would have used it not only to impeach Carter, but also to cast doubt on the police investigation and to undermine the State's credibility (and thus, its entire case)."

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The Court of Appeals has explained:

> To establish a *Brady* violation, the defendant must establish (1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense—either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness—and (3) that the suppressed evidence is material.

Ware v. State, 348 Md. 19, 38 (1997). *Accord Yearby v. State*, 414 Md. 708, 717 (2010). Appellee bears the burdens of production and persuasion regarding the alleged *Brady* violation. *Yearby*, 414 Md. at 720.

As indicated, the first element of a *Brady* claim is that the State suppressed evidence. *Ware*, 348 Md. at 38. "Evidence will be deemed to be suppressed within the meaning of *Brady* if it is 'information which had been known to the prosecution but unknown to the defense.'" *Conyers v. State*, 367 Md. 571, 601 (quoting *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 557 (4th Cir. 1999)), *cert. denied*, 537 U.S. 942 (2002). Although the prosecutor apparently did not receive a copy of the Computer Analysis prior to trial, the disclosure obligation under *Brady* "exists even as to evidence 'known only to police investigators and not to the prosecution.'" *Smith v. State*, 233 Md. App. 372, 422 (2017) (quoting *Conyers*,

367 Md. at 602). The State concedes that the Computer Analysis "was suppressed within the meaning of *Brady*."[8,9]

The second element of a *Brady* claim is that the suppressed evidence is favorable to the defense. "Favorable evidence includes not only evidence that is directly exculpatory, but also evidence that can be used to impeach witnesses against the accused." *Ware*, 348 Md. at 41. The State concedes that the information in the suppressed Computer Analysis was favorable to appellee because it could have been used to impeach Ms. Carter's testimony that appellee used the computer to search for information regarding gun silencers.

We agree with the State's concessions that the Computer Analysis was suppressed and favorable to appellee. The Computer Analysis was not provided to appellee, and it could not have been found by appellee "through reasonable and diligent investigation." *Ware*, 348 Md. at 39. This is not an instance in which appellee "knew or should have known facts that would have allowed him to access the undisclosed evidence." *Id.* There was no indication prior to trial that the State had requested that the computers seized from appellee's home be analyzed for search terms. Indeed, that the Computer Analysis was never handed over to the State further supports appellee's position that he did not know,

[8] The State argues, however, that appellee cannot claim prejudice because he "knew or should have known that the computer was in police custody," and therefore, he could have pointed this out at trial to avoid a destruction of evidence jury instruction.

[9] In that regard, we note that, at the postconviction hearing, appellee testified that, when Ms. Carter testified about the laptop in question, he told his trial counsel that he "didn't destroy it."

nor should he have known, of the existence of the Computer Analysis. Thus, the evidence was suppressed. And it clearly was favorable because it could have been used to impeach Ms. Carter.

Thus, the only question that remains involves the third element, i.e., whether the Computer Analysis was material under *Brady*. We review the issue of materiality *de novo* and "independently evaluate the totality of the circumstances as evidenced by the entire record." *Id.* at 48.

Evidence is considered material if "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Conyers*, 367 Md. at 610–11 (quoting *Wilson v. State*, 363 Md. 333 (2001)) *cert. denied*, 537 U.S. 942 (2002). A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

The reasonable probability standard has been interpreted to mean a substantial possibility that the result of the trial would have been different. *Conyers*, 367 Md. at 611.[10] "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in

[10] The materiality standard for a *Brady* violation "is essentially the same test as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), in determining whether a defendant has been prejudiced by a constitutional violation affecting his right to a fair trial." *Yearby v. State*, 414 Md. 708, 718 (2010). This same test is used in assessing the impact of newly discovered evidence in the context of a motion for new trial. *Adams v. State*, 165 Md. App. 352, 434–35 (2005), *cert. denied*, 391 Md. 577 (2006).

the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109–10 (1976). *Accord Strickler v. Greene*, 527 U.S. 263, 289 (1999) (Although impeaching information, if known, might have changed the outcome of the trial, petitioner's burden was to show a reasonable probability that the result of the trial may have been different.); *State v. Syed*, 463 Md. 60, 87–88 (2019) (To show a reasonable probability of a different result, "'the likelihood of a different result must be substantial, not just conceivable.'") (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)), *petition for cert. filed*, No. 19-227 (Aug. 19, 2019)).

The State argues that the evidence was not material because the evidence against appellee was "so overwhelming that there is no reasonable probability of a different outcome even if Carter's testimony about internet searches is completely discounted." In contrast, appellee argues that Ms. Carter's testimony was critical, and if he had been able to show that the computer that the State argued he destroyed was in fact in police custody, as the Computer Analysis revealed, it could have "dealt a serious blow to the State's credibility, thereby creating doubt as to its entire case."

The parties assert that, in the situation 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. We agree. *See McGhie v. State*, 449 Md. 494, 511–13 (2016) (In the context of newly discovered evidence that would have impeached a State witness, the Court considered whether, if the witness' testimony was

excluded, there was a substantial possibility that the outcome of the trial would have been different.).[11]

Based upon our review of the record, we agree with the State that the Computer Analysis was not material. Even if defense counsel had been able to use the Computer Analysis to totally discredit Ms. Carter's testimony linking appellee to the silencer/Gatorade bottle, there was strong evidence of appellee's guilt.

As the circuit court noted, the evidence connecting appellee to the silencer/Gatorade bottle was a key component of the State's case. There was substantial evidence making that connection, however, even without Ms. Carter's testimony.

Initially, there was DNA evidence linking appellee to the Gatorade bottle. The Gatorade bottle, which the evidence indicated was used as a silencer for the gun used to shoot the victim, was wrapped in duct tape, with white medical tape underneath. A human hair fragment of "Negroid origin" was found on the white medical tape. A DNA expert testified that the mitochondrial DNA profile from the hair matched appellee's mitochondrial profile. The expert explained that, due to the unique nature of mitochondrial

[11] As the appellee notes, 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 (2002)). In that situation, the conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment." *Wilson v. State*, 363 Md. 333, 347 (2001) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1979)). There was no evidence in this case, however, that perjured, as opposed to possibly mistaken, testimony was given, or that the prosecution knew that perjured testimony was given. *See Conyers*, 367 Md. at 605 n.32 (Inadvertently false or mistaken testimony does not qualify as perjury.). Accordingly, this stricter standard is not applicable here.

DNA, individuals related through appellee's maternal line, such as siblings or distant relatives, could not be conclusively excluded, but appellee was in the 0.06 percent of North Americans who could have left that hair.

Moreover, DNA testing of saliva found on the mouth of the bottle indicated "a mixture of DNA from at least three individuals," at least one of whom was female and another a male. The test results excluded "approximately 94 percent of the Caucasian population," as well as "approximately 96 percent of the African–American population." Appellee could not be excluded as a contributor to the mixture.[12]

Michael Bradley's testimony also connected appellee to the Gatorade bottle. He testified that, on the day the victim was shot, he was at the home of his sister, Maggie McFadden, another of appellee's girlfriends. He saw appellee and his brother, Frank Bradley, going back and forth between Ms. McFadden's room and the kitchen with white medical tape and a Gatorade bottle. And the white medical tape found on the Gatorade bottle at the scene had the same characteristics, i.e., the same width, weave count, acetate fibers, and acrylic-based adhesive, as one of the rolls of tape seized from Ms. McFadden's home.

There also was evidence, albeit more attenuated, that connected appellee to the gun used to shoot the victim. The bullet found near the victim was from a .380 caliber semi-automatic handgun, and records from the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives showed that appellee previously had purchased two .380 caliber

[12] The victim also could not be excluded as a contributor to the saliva on the bottle.

semi-automatic handguns. One of these handguns was transferred to someone else in 2004, but appellee's other handgun was not found in any of the searches of the locations where appellee stayed. Supporting the State's theory that appellee's missing handgun was the one used to shoot the victim was Michael Bradley's testimony that, on the day of the crime, when appellee returned to Ms. McFadden's house between 3:00 and 6:30, appellee handed Frank Bradley a brown paper bag, telling Frank Bradley to "get rid of" it.[13]

Additionally, the State presented evidence that appellee had a motive to kill the victim. As noted by this Court on direct appeal, "[t]he victim had told Martin that she was pregnant with his child and had refused his request that she undergo an abortion. Were she to have his child, Martin would have had to contribute, much to his chagrin, to the support of that child, a point the victim impressed upon an enraged Martin." *Martin*, 218 Md. at 36.

Text messages recovered from the victim's phone also connected appellee to the crime. The morning of the shooting, appellee texted the victim to see what time she was working. The victim responded that she was "off," but appellee did not follow up on that text. At 5:11 p.m., after the shooting, appellee texted the victim: "I got some stuff with the

[13] Michael Bradley testified that, on October 27, 2008, the day of the shooting, appellee and Jerry Burks left Ms. McFadden's house at approximately 1:30–2:00 p.m. Michael Bradley went to go pick up his niece at 2:30 p.m. at a location "about 25 minutes to a half an hour" away. Frank Bradley was the only person in the house when Michael Bradley returned home from picking up his niece. Appellee and Mr. Burks returned to the house sometime after Michael Bradley did, but before Ms. McFadden got home around 6:30–6:45 p.m. The shooting was estimated to have occurred at approximately 3:00 p.m., based on the victim's phone conversation with Blair Wolfe. *Martin v. State*, 218 Md. App. 1, 9 (2014).

kids to about 7:00, so any time after. How much did you need?" A jury could infer that appellee was trying to make sure that the victim would be home when the shooter arrived and then texted again as an attempted cover.

Given all the evidence connecting appellee to the attempted murder, appellee has not met his burden of showing that, had the Computer Analysis been provided to appellee, there is a reasonable probability that the result of his trial would have been different.[14] Accordingly, the circuit court erred in finding that there was a *Brady* violation that required a new trial.

II.

The State's next contention involves the postconviction court's finding that trial counsel was ineffective in not objecting to compound questions posed during voir dire." The voir dire questions at issue are as follows:

> 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?
>
> * * *
>
> Have you or any member of your family or close friend ever been associated with, or in any way, involved with a group or organization whose

[14] We agree with appellee that if Ms. Carter's testimony had been discounted, the instruction regarding concealment of evidence may not have been given. That does not, however, change our analysis here, i.e., whether, given all the evidence, excluding Ms. Carter's testimony, there is a reasonable probability that the outcome of the trial would have been different. As indicated, the State presented strong evidence of appellee's guilt, even excluding Ms. Carter's testimony.

> mission it is to abolish legalized abortion? Does any member of the jury hold such strong views about abortion that if there is evidence in this case about abortion, you could not be fair and impartial?[15]

The postconviction court found that these voir dire questions were objectionable pursuant to *Dingle v. State*, 361 Md. 1 (2000), that there was no strategic reason for counsel not to have objected to them, and that counsel's failure to object was prejudicial to appellee.

The State contends that this ruling was improper for two reasons. First, it argues that the interpretation of *Dingle* has changed, and the court improperly assessed "counsel's performance based on law as it existed at the time of Martin's 2018 postconviction proceedings, rather than as it existed at the time of his 2010 trial." Second, the State asserts that the circuit court "erroneously applied a presumption of prejudice."

Appellee contends that the "post-conviction court correctly found that trial counsel was constitutionally ineffective for failing to object to two improper *voir dire* questions," which "improperly shifted the burden of determining prospective jurors' ability to be fair and impartial from the trial court to the individual venire person." Appellee argues that these questions were "prohibited under *Dingle* – both today and at the time of [his] trial[.]"

A.

Ineffective Assistance of Counsel Claims

The Court of Appeals has explained:

> The Sixth Amendment to the U.S. Constitution grants criminal defendants a right to effective assistance of counsel. *Strickland*, 466 U.S. at 685, 104 S.Ct. 2052. Under *Strickland*, to establish ineffective assistance of

[15] No prospective juror responded to these questions, and appellee did not challenge the propriety of these questions on appeal.

> counsel, a defendant must show that: (1) his attorney's performance was deficient; and (2) he was prejudiced as a result. *Id.* at 687, 104 S.Ct. 2052.
>
> As to the first prong, the defendant must show that his "counsel's representation fell below an objective standard of reasonableness, and that such action was not pursued as a form of trial strategy." *Coleman v. State*, 434 Md. 320, 331, 75 A.3d 916 (2013) (quoting *Strickland*, 466 U.S. at 687–89, 104 S.Ct. 2052) (internal quotation marks omitted). We have explained that "[p]revailing professional norms define what constitutes reasonably effective assistance, and all of the circumstances surrounding counsel's performance must be considered." *Mosley v. State*, 378 Md. 548, 557, 836 A.2d 678 (2003) (citation and internal quotation marks omitted). Accordingly, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

State v. Newton, 455 Md. 341, 355 (2017). "Our review of counsel's performance is 'highly deferential.'" *State v. Newton*, 230 Md. App. 241, 250 (2016) (quoting *Kulbicki v. State*, 440 Md. 33, 46 (2014)). Moreover, when a defendant alleges that counsel's performance was deficient, he or she "'must also show that counsel's actions were not the result of trial strategy.'" *Syed*, 463 Md. at 75 (quoting *Coleman v. State*, 434 Md. 320, 338 (2013)).

The second prong of an ineffective assistance of counsel claim "requires the defendant to show prejudice." *Syed*, 463 Md. at 86. "[T]he court does not presume the defendant suffered prejudice as a result of the deficient performance." *Id.* at 86–87.[16] "A

[16] The Court of Appeals recently noted that there are limited circumstances in which a presumption of prejudices applies:

showing of prejudice is present where 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *Strickland*, 466 U.S. at 694, a "'substantial or significant possibility that the verdict of the trier of fact would have been affected,'" *Syed*, 463 Md. at 86–87 (quoting *Bowers v. State*, 320 Md. 416, 426 (1990)). The "'likelihood of a different result must be substantial, not just conceivable.'" *Syed*, 463 Md. at 87–88 (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)).

B.

Voir Dire

"*Voir dire* (*i.e.*, the questioning of prospective jurors) 'is critical to' implementing the right to an impartial jury." *Pearson v. State*, 437 Md. 350, 356 (2014) (quoting *Washington v. State*, 425 Md. 306, 312 (2012)). The circuit "court has broad discretion in the conduct of voir dire, most especially with regard to the scope and the form of the questions propounded," and "it need not make any particular inquiry of the prospective

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> (1) the petitioner was actually denied the assistance of counsel; (2) the petitioner was constructively denied the assistance of counsel; or (3) the petitioner's counsel had an actual conflict of interest. Absent these three circumstances, the presumption of prejudice does not apply, and the petitioner must prove prejudice.

Ramirez v. State, 464 Md. 532, 573 (2019).

jurors unless that inquiry is directed toward revealing cause for disqualification." *Dingle*, 361 Md. at 13–14.

Here, the circuit court relied on *Dingle* in finding that counsel rendered ineffective assistance of counsel in failing to object to the voir dire questions at issue. In *Dingle*, the Court of Appeals held that it was improper to ask the venire compound questions regarding whether they had certain experiences or associations,[17] and if so, whether the experience or association "would affect [their] ability to be fair and impartial." *Id.* at 3–4. The trial court instructed the potential jurors that they did not need to respond to the question unless they answered both parts in the affirmative, i.e., that they had the experience or association and it would affect their ability to be fair and impartial. *Id.* at 4.

The Court of Appeals held that this voir dire procedure "usurped the court's responsibility" because "the trial judge is charged with the impaneling of the jury and must determine, in the final analysis, the fitness of the individual venire persons." *Id.* at 8–9. It explained:

> By upholding a voir dire inquiry in which a venire person is required to respond only if his or her answer is in the affirmative to both parts of a question directed at discovering the venire persons' experiences and associations and their effect on that venire person's qualification to serve as a juror, and producing information only about those who respond . . . [this]

[17] The voir dire questions at issue in *Dingle* asked

> whether the prospective jurors (1) had been the victim of a crime, (2) had been accused of a crime, (3) had been a witness in a criminal case, (4) had served as a juror in criminal case, (5) had belonged to a victim's rights group, (6) had attended law school, or (7) were associated with members of law enforcement.

Dingle, 361 Md. at 4 n.4.

> endorses a voir dire process that allows, if not requires, the individual venire person to decide his or her ability to be fair and impartial. Moreover, in those cases where the venire person has had the questioned experience or association, but believes he or she can be fair, the procedure followed in this case shifts from the trial judge to the venire responsibility to decide juror bias. Without information bearing on the relevant experiences or associations of the affected individual venire persons who were not required to respond, the court simply does not have the ability, and, therefore, is unable to evaluate whether such persons are capable of conducting themselves impartially. Moreover, the petitioner is deprived of the ability to challenge any of those persons for cause. Rather than advancing the purpose of voir dire, the form of the challenged inquiries in this case distorts and frustrates it.

Id. at 21.

Two years later, in *State v. Thomas*, 369 Md. 202, 204 (2002), the Court of Appeals held that the circuit court abused its discretion in refusing to ask the venire panel if any of them had "such strong feelings regarding violations of the narcotics laws that it would be difficult for [them] to fairly and impartially weigh the facts at a trial where narcotics violations have been alleged[.]" The Court indicated that, when the question includes the state of mind of a potential juror, a "two-part" question was not prohibited by *Dingle*. *Id.* at 204 n.1 ("When the inquiry is into the state of mind or attitude of the venire with regard to a particular crime or category of crimes, it is appropriate to phrase the question as was done in this case.").

In *State v. Shim*, 418 Md. 37, 54 (2011), the Court subsequently reasserted the position that a two-part question was proper in a question regarding strong feelings. The Court stated:

> Therefore, to the extent that this Court has not already done so, we recognize today that the potential for bias exists in most crimes, and thus we will

> require *voir dire* questions which are targeted at uncovering these biases. When requested by a defendant, and regardless of the crime, the court should ask the general question, **"Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts."**

(Emphasis added; alteration in original.)

In 2014, however, the Court of Appeals explicitly abrogated *Thomas*, *Shim*, and other cases that permitted two-part "strong feelings" voir dire questions. *Pearson*, 437 Md. at 363–64. The Court explained:

> Despite this Court's holding in *Shim,* 418 Md. at 54, 12 A.3d at 681, however, we conclude that, here, the "strong feelings" *voir dire* question (*i.e.,* "Does any member of the panel hold such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts of this trial where narcotics violations have been alleged?") was phrased improperly. We realize that the "strong feelings" *voir dire* question was phrased exactly as this Court mandated in *Shim,*418 Md. at 54, 12 A.3d at 681—"When requested by a defendant, and regardless of the crime, the [trial] court should ask the general question, 'Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts.'" (Brackets in original.)
>
> In retrospect, however, it is apparent that the phrasing of the "strong feelings" *voir dire* question in *Shim* clashed with existing precedent. *See State v. Green,* 367 Md. 61, 79, 785 A.2d 1275, 1285 (2001) ("[I]t is sometimes advisable to correct a decision . . . if it is found that the decision is clearly wrong and contrary to other established principles." (Citations and internal quotation marks omitted)). Specifically, the phrasing of the "strong feelings" *voir dire* question in *Shim* was at odds with *Dingle v. State,* 361 Md. 1, 21, 5, 759 A.2d 819, 830, 821 (2000), in which we held that the trial court abused its discretion in asking during *voir dire* such compound questions as:
>
> > Have you or any family member or close personal friend ever been a victim of a crime, and if your answer to that part of the question is yes, would that fact interfere with your ability to be fair and impartial in this

case in which the state alleges that the defendants have committed a crime?

* * *

Just like the phrasing of the *voir dire* questions in *Dingle, id.* at 5, 759 A.2d at 821, the phrasing of the "strong feelings" *voir dire* question in *Shim* "shifts from the trial [court] to the [prospective jurors] responsibility to decide [prospective] juror bias." *Dingle,* 361 Md. at 21, 759 A.2d at 830. In other words, as with the *voir dire* questions' phrasings in *Dingle, id.* at 5, 759 A.2d at 821, the phrasing of the "strong feelings" *voir dire* question in *Shim* required each prospective juror to evaluate his or her own potential bias. Specifically, under *Shim,* 418 Md. at 54, 12 A.3d at 681, each prospective juror decides whether his or her "strong feelings" (if any) about the crime with which the defendant is charged "would [make it] difficult for [the prospective juror] to fairly and impartially weigh the facts." That decision belongs to the trial court, not the prospective juror.

Thus, we hold that, on request, a trial court must ask during *voir dire:* "Do any of you have strong feelings about [the crime with which the defendant is charged]?" We abrogate language in *Shim,*418 Md. at 54, 12 A.3d at 681, to the extent that this Court required a trial court to phrase the "strong feelings" *voir dire* question in a way that shifted responsibility to decide a prospective juror's bias from the trial court to the prospective juror, *i.e.,* "'Does any member of the jury panel have **such** strong feelings about [the charges in this case] **that it would be difficult for you to fairly and impartially weigh the facts.**" *Shim,* 418 Md. at 54, 12 A.3d at 681 (emphasis added) (brackets in original).

To be clear, we amend this Court's holding in *Shim, id.* at 54, 12 A.3d at 681, only in the context of the phrasing of the "strong feelings" *voir dire* question in *Shim.* We reaffirm this Court's essential holding in *Shim* that, on request, a trial court must ask during *voir dire* whether any prospective juror has "strong feelings" about the crime with which the defendant is charged. *Id.* at 54, 12 A.3d at 681. We simply recognize that, in *Shim* and its parent cases, the "strong feelings" *voir dire* questions' phrasings were at odds with *Dingle,* 361 Md. at 21, 759 A.2d at 830. *See Thomas,* 369 Md. at 214, 204, 798 A.2d at 573, 567 (This Court held that the trial court abused its discretion in declining to ask a *voir dire* question that the defendant phrased as follows: "Does any member of the jury panel have such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts

> at a trial where narcotics violations have been alleged?" (Footnote omitted)); *Sweet v. State,* 371 Md. 1, 9–10, 806 A.2d 265, 270–71 (2002) (This Court held that the trial court abused its discretion in declining to ask a *voir dire* question that the defendant phrased as follows: "Do the charges [*i.e.,* child molestation] stir up strong emotional feelings in you that would affect your ability to be fair and impartial in this case?"). We note that, although *Thomas, Sweet,* and *Shim* postdate *Dingle,* in none of the three cases did this Court supersede *Dingle;* in *Thomas, Sweet,* and *Shim,* this Court did not address any issue regarding the "strong feelings" *voir dire* questions' phrasings.

Id. at 361–64.

Based on this case law, and the shift in 2014, we agree with the State that, at the time of appellee's trial in 2010, the case law permitted two-part "strong feelings" voir dire questions.[18] And it is clear that "'counsel must be judged upon *the situation as it existed at the time of trial.*'" *State v. Gross*, 134 Md. App. 528, 553 (2000) (quoting *State v. Calhoun*, 306 Md. 692, 735 (1986))), *aff'd*, 371 Md. 334 (2004). *Accord State v. Hunter*, 103 Md. App. 620, 623 ("At the time this case was tried, the instruction that the trial judge gave was consistent with what was thought at the time to be the proper thing to say. The law does not require lawyers to anticipate changes in the law. . . . Since at the time it was given the instruction was generally considered to be correct, counsel's failure to object to

[18] *Wimbush v. State*, 201 Md. App. 239 (2011), *cert. denied*, 424 Md. 293 (2012), also reflects the view that "strong feelings" compound questions were permissible. In *Wimbush*, this Court noted the distinction between "associations" and "state of mind" voir dire questions, citing *Thomas* for the conclusion that "state of mind" questions could be phrased as compound questions. *Id.* at 266–68 ("[T]wo years after *Dingle*, the Court of Appeals opined that not all compound questions are impermissible.").

the omission of [the phrase at issue] was not a deficient act."), *cert. denied*, 338 Md. 557 (1995).

Accordingly, the postconviction court erred in holding that trial counsel's performance was deficient based on the failure to object to the two-part strong feelings questions. Because appellee failed to satisfy the first prong of the ineffective assistance claim, we need not reach the prejudice prong. *Newton*, 455 Md at 356 ("*Strickland* also instructs that courts need not consider the performance prong and the prejudice prong in order, nor do they need to address both prongs in every case.").

III.

The State next contends that the "post conviction court erred in ruling that trial counsel was ineffective in failing to object to the State's closing argument." Appellee disagrees, asserting that "the post-conviction court correctly found that trial counsel was constitutionally ineffective for failing to object to the State's improper burden-shifting comments during closing argument."

A.

Background

1.

Trial

During its rebuttal closing argument, the State made several statements, two of which are at issue on appeal. One comment pertained to the defense theory that it was Ms. McFadden, not appellee, who planned the shooting of the victim. In support of that theory,

defense counsel during his closing argument attributed several statements to Ms. McFadden: "I had someone shot in the head"; "If people get in my way I know how to take care of them"; and "Heaven has no rage like love to hatred turned nor hell a fury like a woman scorned."

Counsel referred to Ms. McFadden as "a raving lunatic," "emotionally unstable, and intensely jealous." Counsel continued:

> Now in addition you don't just have the — I mean we know she told Sheri Carter that she had someone shot in the head. So when the State stands up and tells you there's no evidence that anybody else did it,[19] well, that's evidence, that's a statement by somebody that they did the crime, someone else—told someone else they did the crime that he's accused of.
>
> She said she brought a gun with her to the meeting with Sheri. She said she likes to beat people up.
>
> * * *
>
> Now just remember something here, we don't have to prove to you that Maggie engineered this shooting, that's not our burden of proof. Because, you know, under our system of justice as I mentioned, that doesn't go to us, that's on them. Okay? So we don't have to prove that Maggie did it, but they do have to prove that she didn't, and they certainly have not proved that in this case.
>
> * * *
>
> And I guess the point I'm trying to make is, I think that's what happened here with the State's investigation in this case. They were so focused on Brandon Martin and on developing evidence to charge him with this crime that when evidence came up suggesting that it was Maggie McFadden who had the motive and the reason and the absolute lunatic—the lunacy, the insanity to actually do something like this they ignored it, they

[19] In the prosecutor's initial closing argument, the prosecutor addressed the possibility that the victim was shot, not by appellee, but by a jealous girlfriend, stating: "There is no evidence of that."

did not pursue her. And I think that's what—that's what happened in this case.

* * *

Maybe—we haven't heard from Maggie McFadden. She played police and the prosecutors in this case like a violin. Conveniently going to Iraq for a year before they were able to serve her with a subpoena.

* * *

The—this is my last chance to address you because the State, again, they have the burden of proof . . . . There's some evidence, but is it beyond a reasonable doubt when they haven't even told you what he did or what he said? I don't think so.

In rebuttal, the State made two comments with which appellee takes issue. First, the State said:

> It was not really addressed, but the Defendant – by the Defense, I guess they didn't want you to really think about it, but they didn't address the fact that this Defendant did purchase the two .380 caliber handguns. One of them by stipulation was transferred; however, that still leaves one handgun unaccounted for, and that handgun is linked to the Defendant, and you can see the link between that missing handgun and this case, because it's a .380 caliber handgun, and by the way, the ballistics at the crime scene indicate that the projectile right near [the victim's] head that was located as well as a casing that popped off when the shot was fired are both .380 caliber. Again, a link to the Defendant. I guess they didn't want you to think about that when you went back to the jury room.

Additionally, the State said:

> They want to pretty much pin this case on Maggie. . . . [I]sn't that easy, doesn't it make it simple for the Defense to be, it's not my client, it's the girl who's not here?
>
> And really what evidence do we have that Maggie did it? We have that she—perhaps they proved that she's a rude person. Perhaps they proved that she has a big mouth and that she has bad manners. What else do they

prove to tie her to this crime? Nothing. We know that she was at work that day, so certainly she was not the shooter.[20]

2.

Postconviction Hearing

At the postconviction hearing, appellee's trial counsel was questioned as follows:

[The State]: But you're aware the State is not allowed to shift the burden on the defense. Is that a fair statement?

[Counsel]: Yes.

[The State]: Okay. And is it—would it be a correct statement that if you had heard any statements by the State shifting the burden you would have objected to those in closing; is that fair?

[Counsel]: If I perceived it.

In its memorandum opinion, the postconviction court concluded that the prosecutor's comments in rebuttal closing argument were impermissible burden shifting arguments. The court characterized the comments as (1) suggesting that the jury should accept evidence indirectly linking appellee to the gun because "[the Defense] didn't address the fact that [appellee] did purchase the two .380 caliber handguns"; and (2) appellee's "defense should be rejected because he did not 'prove [anything] to tie [McFadden] to this crime.'" The court found that trial counsel's failure to object to these "impermissible burden-shifting during closing arguments" constituted deficient conduct. It further concluded that trial counsel's lack of objection kept the circuit court from giving

[20] Michael Bradley testified that, when he woke up at 6:00 a.m. on the day of the shooting, Ms. McFadden had already gone to work.

a curative instruction contemporaneously with the improper statements the State made during closing argument, and therefore, trial counsel's failure to object was prejudicial to appellee and constituted ineffective assistance of counsel.

B.

Analysis

The State argues that the comments in closing "were proper comments on the evidence and [appellee's] closing argument and, in context, did not shift the burden of proof." Because the arguments were proper, trial counsel's failure to object did not constitute deficient performance. In any event, even if the arguments were improper, the State contends that the postconviction court erred in concluding that appellee was prejudiced by the failure of counsel to object to the closing argument.

Appellee contends that the State's burden shifting arguments were improper, and the circuit court properly found that counsel's failure to object resulted in ineffective assistance of counsel. He asserts that "defense counsel's proper comments on the evidence (or lack thereof) do not permit the State to improperly comment on the defendant's failure to refute the State's evidence—a burden which he does not have." Appellee argues that the postconviction court "properly concluded that [he] was prejudiced by trial counsel's failure" to object because, had counsel objected, "the trial court would have had the opportunity to cure the errors. Because he did not, there is a reasonable probability that at least one juror accepted the State's invitation to adopt its theory of the case only because [appellee] failed to refute it."

As the Court of Appeals has explained, the scope of closing argument is broad, and "it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence." *Mitchell v. State*, 408 Md. 368, 380 (2009). *Accord Degren v. State*, 352 Md. 400, 429 (1999) (Attorneys generally "are afforded great leeway in presenting closing arguments."). Closing argument not only permits the prosecutor to speak harshly on the accused's actions, *see Mitchell*, 408 Md. at 380, but it gives counsel the opportunity to "expose the deficiencies in his or her opponent's argument." *Henry v. State*, 324 Md. 204, 230 (1992), *cert. denied*, 503 U.S. 972 (1992).

"Despite the leeway afforded to counsel in closing argument," however, "'a defendant's right to a fair trial must be protected.'" *Sivells v. State*, 196 Md. App. 254, 270 (2010) (quoting *Lee v. State*, 405 Md. 148, 164 (2008)). One type of argument that prosecutors may not make is one that "tend[s] to shift the State's burden to prove all the elements of a crime beyond a reasonable doubt," *Lawson v. State*, 389 Md. 570, 546 (2011), and therefore, the State generally may not "draw the jury's attention to the failure of the defendant to call witnesses, because the argument shifts the burden of proof." *Wise v. State*, 132 Md. App. 127, 148, *cert. denied*, 360 Md. 276 (2000). "'[W]hat exceeds the limits of permissible comment or argument by counsel depends on the facts of each case.'" *Mitchell*, 408 Md. at 380 (quoting *Smith and Mack v. State*, 388 Md. 468, 488 (2005)).

We address first the State's comment regarding the handguns, i.e., that the defense "didn't address the fact that [appellee] did purchase the two .380 caliber handguns." The State contends that the comments "were a permissible comment on the evidence and a fair

response to defense counsel's extensive attack on the quality of the police investigation and the State's evidence," and in "context, it is clear that the prosecutor was referring to defense counsel's failure to address the evidence in closing argument, not the defense's failure to produce evidence at trial." We agree.

Throughout closing argument, appellee's counsel discussed that there was "no evidence as to anything that [appellee] said" and there was "no evidence as to anything that he did." Appellee's counsel criticized the police investigation in several ways.[21] In light of this closing argument, it was not improper for the prosecutor to note counsel's failure to address in closing argument the evidence that "this Defendant did purchase the two .380 caliber handguns," that one handgun was still "unaccounted for," and one could "see the link between that missing handgun and this case, because it's a .380 caliber handgun," and conclude by saying: "I guess they didn't want you to think about that when you went back to the jury room." Because the State's comments were not improper, counsel did not render deficient performance in failing to object to those comments.

The prosecutor's rebuttal argument regarding Ms. McFadden is a closer call. To be sure, defense counsel argued extensively that it was Ms. McFadden who shot the victim. In response, the State argued in its rebuttal closing argument:

> And really what evidence do we have that Maggie did it? We have that she—perhaps they proved that she's a rude person. Perhaps they proved

[21] Appellee's counsel stated in closing, among other things, that the State lost an audio interview with a witness, the Gatorade bottle was not tested for gunshot residue, and as indicated, that the State was "so focused" on appellee that they did not pursue Ms. McFadden, whom defense counsel referred to as an "absolute lunatic."

> that she has a big mouth and that she has bad manners. What else do they prove to tie her to this crime? Nothing. We know that she was at work that day, so certainly she was not the shooter.

The State argues that this comment, in context, did not impermissibly shift the burden of proof from the State to appellee, but rather, the State was merely "arguing that the evidence that [appellee] did produce did not support his theory that McFadden was involved in Torok's shooting." If the prosecution had merely stated, as it did in its initial closing argument, that there was "no evidence" that Ms. McFadden was involved in the shooting, that would have been proper. The prosecutor however, framed the comments as what did "they [the defense] prove to tie her to this crime? Nothing." This comment implicitly suggested that appellee was required to prove that Ms. McFadden did it. As such, it was improper, and we agree with the circuit court that trial counsel's failure to object was deficient conduct.

We disagree, however that these comments, and counsel's failure to object entitled appellee to a new trial. When an improper comment in closing argument is challenged on direct appeal, the Maryland appellate courts have made clear that "reversal is not automatically mandated." *Sivells*, 196 Md. App. at 288. *Accord Degren*, 352 Md. at 430. Rather, "reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Id.* (cleaned up). *Accord Spain v. State*, 386 Md. 145, 158 (2005). In assessing prejudice in this regard, we consider various factors: "including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the

evidence against the accused." *Warren v. State*, 205 Md. App. 93, 133 (quoting *Spain*, 386 Md. at 159), *cert. denied*, 427 Md. 611 (2012).

This case is not before us on direct appeal, but rather, it stems from a claim of ineffective assistance of counsel in a post-conviction proceeding. The issue remains, however, whether there was prejudice to appellee as a result of the improper remark. The one difference in this procedural posture is that appellee has the burden to show prejudice. *See Strickland*, 466 U.S. at 687.

Here, we are not persuaded that appellee has met his burden. As the State notes, the remarks at issue were a small part of the prosecutor's argument, amounting to several "short sentences in the beginning of a 21-page rebuttal closing argument." And the slight suggestion that the jury should consider appellee's failure to produce evidence was outweighed by the court's instructions and the closing arguments as a whole, which made clear that the burden of proof was on the State to prove appellee's guilt, and appellee had no burden to produce evidence.

Moreover, "[i]f the State has a strong case, the likelihood that an improper comment will influence the jury's verdict is reduced." *Sivells*, 196 Md. App. at 289. Here, as indicated, there was strong evidence of appellee's guilt.

Under these circumstances, appellee has failed to meet his burden to show prejudice as a result of the comments, i.e., that if counsel had objected to the comments and the court had given a curative instruction, there is a reasonable probability that the result of the trial

would have been different. Accordingly, the postconviction court erred in finding that appellee received ineffective assistance of counsel.

IV.

Appellee's cross-appeal involves trial counsel's failure to review the DNA discovery provided by the State, which made clear that the State's expert witness at trial, Dr. Terry Melton, had not conducted the DNA testing. As a result of the failure to review the discovery, counsel did not timely object on confrontation grounds to the expert testimony. The circuit court, in rejecting the claim of ineffective assistance of counsel in this regard, found that appellee failed to show prejudice "because had defense counsel made the objection, the two other technicians that conducted the DNA testing were available to testify at trial."

Appellee contends that the postconviction court's finding "was based on improper speculation not supported by the record." He asserts that the court improperly assumed that, if defense counsel had objected, the technicians who had conducted the DNA testing were available to testify and would have been permitted to do so, but "there was no proof that the witnesses were, in fact, available."

The State contends that appellee's argument "belies a misperception regarding the burden of proof in an ineffective assistance of counsel claim." It asserts that it was the appellee's burden to provide evidence that, "had counsel entered a timely objection, the technicians *would not* have been available to testify, that the trial court *would not* have permitted their testimony, or that, if permitted to testify, their testimony would have been

so unfavorable that the outcome of the trial would have been different." Because appellee failed to meet his burden of proof, the State maintains that the postconviction court "properly denied relief on this claim."

A.

Background

1.

Trial

During trial, Dr. Terry Melton, President and CEO of MITO Typing Technologies, an expert in mitochondrial DNA analysis and statistical interpretation, testified that her lab performed mitochondrial DNA testing on a hair extracted from tape that was found on the Gatorade bottle found at the scene of the crime. A comparison of the hair from the Gatorade bottle to a sample taken from appellee indicated that appellee and his maternal relatives could not be excluded as a contributor of the hair, and 99.94 percent of North Americans would not be expected to leave the hair that was found on the Gatorade bottle.[22] Appellee was in the 0.06 percent of people in North America who could have left the hair.[23]

During cross-examination, Dr. Melton testified that she did not physically test the samples in this case, and Bonnie Higgins and Michele Yon were the two technicians who worked with the samples. At that point, counsel for appellee objected to Dr. Melton's

[22] Mitochondrial DNA is passed through the maternal line.

[23] Dr. Melton noted that her lab ran tests comparing the hair found on the Gatorade bottle to two separate samples from appellee on two separate occasions. Both tests yielded the same result.

testimony and moved to strike it, arguing that appellee had the right to confront the technicians who actually did the testing on the hair sample.

The court excused the jury and proceeded to hear argument from the parties. The State argued that Dr. Melton's testimony was permissible under the Maryland Rules and Maryland statutory law,[24] stating that "an expert witness may express an opinion that's based in part on hearsay if the hearsay is the kind that's customarily relied on by experts in that particular calling." The State argued that Dr. Melton did all of the analysis and rendered conclusions as to the comparison of the hair samples, whereas the technicians who physically did the testing did not draw conclusions or truly analyze the samples. As such, the State argued that it had not violated appellee's right of confrontation.

The court responded:

> It sounds like they complied with the statute and the rule, but then it's all trumped by this case, *Melendez-Diaz* [v. Massachusetts, 557 U.S. 305 (2009)], which is similar – a similar situation to what you're describing in Massachusetts, I believe this was Massachusetts, where they had a statute and they were permitted to put in the certificates and Justice Scalia goes on and on about how the defendant has the right to have those people who did

[24] Specifically, the State cited Maryland Rule 5-703(a), which at the time appellee was charged and at the time of trial read as follows:

> **In general.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject the facts or data need not be admissible in evidence.

Additionally, the State cited Md. Code (2012 Repl. Vol.) § 10-915 of the Courts and Judicial Proceedings Article ("CJ"), which concerns the admissibility of DNA profile evidence. The State asserted that "a statute passed by the General Assembly bears a presumption of constitutionality."

> any of the work involved in determining – in coming up to the conclusion that was let into evidence in the case, he that [sic] has right to confront those people, and Scalia goes on to say "that there is no obligation on the part of the defendant to bring in those people." In other words, it's the State's obligation and the defendant need not do anything to bring those people in.
>
> Do you not feel that all of the compliance that you of course have expressed, and I agree that you've complied with the rule and the statute, is not trumped completely by this case?

The State argued that it had complied with all requirements for expert witness testimony under Maryland law, and therefore, there was no confrontation issue. In any event, the State asked the court if it could be permitted to bring in the technicians who had actually performed the DNA testing so that appellee could cross-examine them. Counsel for appellee objected, stating that appellee would be prejudiced by the technicians' appearance because they were not listed on the witness list and counsel had not had the opportunity to prepare for their testimony.

After a lunch break, the State returned and argued that *Melendez-Diaz* was distinguishable. The State contended that

> if we can find that the technicians' work was generally reliable and there [are] indications of that because of the checklists followed, the protocols that were followed and the contamination controls that were observed, that it is not a necessity that the State produce that person in order to render the conclusions of the ultimate expert, admissible.

Accordingly, the State asked that the court deny defense counsel's motion to strike Dr. Melton's testimony.

Counsel for appellee stated that reliability was not part of a confrontation analysis and argued that Dr. Melton's testimony fell squarely within the purview of *Melendez-Diaz*.

He proposed that the court order the State to bring the relevant witnesses in after counsel had a few days to prepare to cross-examine them.

After another break, the State argued that counsel for appellee had waived the issue by failing to timely object. The State asserted that "the Defense was not surprised by the fact that different technicians had their hand in, so to speak, doing some of the initial scientific data collection" because this fact was evident from the special discovery packet prepared for and turned over to appellee's counsel.

Counsel for appellee conceded that he had received a CD during discovery regarding the DNA testing on the Gatorade bottle hair. He stated that he did not attempt to look at the CD the State had given him because he was informed by his expert that he did not have the proper software to view it.

After establishing that the discovery CD provided to appellee's counsel contained documents that had been signed by technicians other than Dr. Melton, the court concluded that counsel for appellee had received notice that Dr. Melton did not perform the DNA testing. Accordingly, it found that counsel had waived the confrontation issue.

2.

Postconviction

At the June 23, 2017, postconviction hearing, appellee's counsel argued that trial counsel erred in not reviewing the discovery, and "but for the trial counsel's waiver of the confrontation clause issue[,] there was a strong probability that DNA evidence would have been excluded." He asserted that the surprise at trial that Dr. Melton was not the person

who did the testing, which led to the subsequent waiver of the confrontation clause issue, entitled appellee to a new trial based on ineffective assistance of counsel. Trial counsel testified that he had no strategic reason not to object timely to the DNA evidence, and he "didn't know the [confrontation] issue existed until the first couple of questions of cross-examination."

The State argued that the trial court never made a substantive determination regarding the confrontation clause issue, but rather, it simply concluded that the issue was waived. The State asserted that, at the time of trial, the *Melendez-Diaz* argument may not have prevailed. In any event, the State asserted that "the technicians were available and would have testified if the objection had been sustained," and therefore, there was no prejudice.

As indicated, the postconviction court agreed with the State that appellee did not receive ineffective assistance of counsel because trial counsel's failure to make a timely objection did not result in prejudice. The court concluded that there was no prejudice "because had defense counsel made the objection, the two other technicians that conducted the DNA testing were available to testify at trial."

B.

Analysis

We agree with the circuit court that appellee failed to prove prejudice. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the

ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). *Syed*, 463 Md. at 75 (The burden of proving prejudice is on the appellee.).

The record here indicates that the technicians were available to testify if the trial court determined that there was a violation of appellee's right to confrontation in their absence. The State asserted at trial, and reiterated during the postconviction hearing, that it was willing to bring in the technicians who had done the actual testing to testify at the trial.[25] Moreover, appellee's counsel suggested that a possible remedy would be to allow the technicians to testify, after granting him a continuance to prepare. If these witnesses had been permitted to testify, there would have been no confrontation issue regarding the admissibility of the testing, and therefore, no reasonable probability of a different result.

Appellee technically is correct that there was no evidence presented regarding whether these witnesses were available to testify. The record certainly suggests, however, that they were available. And it was appellee's burden to show that they were not available and the DNA evidence would have been excluded if defense counsel had timely objected. He failed to do so, and, therefore, the postconviction court properly concluded that appellee had not met his burden to show prejudice and was not denied effective assistance of counsel in this regard.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. COSTS TO BE PAID BY APPELLEE.

[25] Thus, this case does not, as suggested by appellee, involve a scenario where he was "required to guess at (and rebut) all the potential evidence that the State could have but did not present."

CHARLES MARTIN	*	IN THE
Petitioner	*	CIRCUIT COURT
v.	*	FOR
STATE OF MARYLAND	*	ANNE ARUNDEL COUNTY
Respondent	*	CASE NO.: 02-K-09-000831

* * * * * * * * * * * * *

MEMORANDUM OPINION

This matter came before this Court for a hearing based on Petitioner's Petition for Post-Conviction Relief. The Court heard arguments on June 23, 2017. At the close of the evidence and arguments, the Court held the matter *sub curia.* Upon consideration of the arguments of the parties and review of the evidence submitted, the Court presents its conclusions below.

BACKGROUND

On May 5, 2010, Charles Martin ("Petitioner") was found guilty in the Circuit Court for Anne Arundel County. The Honorable Judge Pamela North, presiding with a jury, sentenced Petitioner to life imprisonment after being found guilty of one count of Attempted First-Degree Murder as an accessory before the fact.

On September 15, 2015, Petitioner filed a Petition for Post-Conviction Relief pursuant to the Maryland Criminal Procedure Article, §§ 7-101 through 7-109 and Maryland Rules 4-401 through 4-408. This Petition was supplemented on October 15, 2015, and January 6, 2017. The State filed a response on June 22, 2017, and the Petitioner replied to that response on October 11, 2017.

STANDARD OF REVIEW

A petition for post conviction relief is governed by Maryland Rules §§ 4-401 through 4-408 and the Uniform Post Conviction Procedure Act as specified in the ANNOTATED CODE OF

APPENDIX B

MARYLAND, CRIMINAL PROCEDURE, Title 7 §§ 7-101 through 7-109, formerly Article 27, Section 645A of the Annotated Code of Maryland. "The purpose of the Post Conviction Procedure Act was to create a simple statutory procedure in place of the common law habeas corpus and coram nobis remedies for collateral attacks upon criminal convictions and sentences." *Jones v. State,* 114 Md. App. 471, 474 (1997). The Uniform Post Conviction Procedure Act is designed "to consolidate into one statutory procedure all the remedies previously available for collaterally challenging the validity of a criminal conviction or sentence." *Barr v. State*, 101 Md. App. 681, 687 (1994) (citing *Brady v. State*, 222 Md. 442 (1960) *aff'd*, 373 U.S. 83, 83 S. Ct. 1194 (1963); *State v. Zimmerman*, 261 Md. 11 (1971)).

"The Act provides a remedy primarily for challenging the legality of incarceration under judgment of conviction for a crime on the premise that it was imposed either (a) in violation of the Constitution of the United States or the Constitution or laws of this State, or (b) that the court was without jurisdiction to impose the sentence, or (c) that the sentence exceeds the maximum authorized by law, or (d) that the sentence is otherwise subject to collateral attack upon any ground of alleged error which would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy." *Creswell v. Director, Patuxent Inst.*, 2 Md. App. 142, 144 (1967). However, "a petitioner is entitled to relief under the Post Conviction Procedure Act only if his complaint (1) is substantively cognizable under the Act and (2) has not been previously and finally litigated or waived." *Pfoff v. State*, 85 Md. App. 296, 301 (1991) (quoting Ann. Code 1957, Md. Ann. Code Art. 27, § 645A, repealed by Uniform Post Conviction Procedure Act of 2001, ch. 10, § 2, Md. Code Ann. § 7-101 – 7-109 (2001)) (internal quotation marks omitted). "Because these are conditions precedent to relief, it is important that the petition address them with adequate precision to allow the court to rule upon them." *Id.*

A bald, unsupported allegation does not constitute a ground for post conviction relief. *Johnson v. Warden of Md. Penitentiary*, 244 Md. 695 (1966). Yet, a court conducting a post conviction hearing must make findings of fact upon all contentions raised by the petitioner. *Ferrell v. Warden of Md. Penitentiary*, 241 Md. 46, 49 (1965) (holding that the court should make findings of fact as to every claim); *Prevatte v. Director, Patuxent Inst.*, 5 Md. App. 406, 414 (1968).

On September 15, 2015, Petitioner filed a *pro se* Petition for Post-Conviction Relief pursuant to the Maryland Criminal Procedure Article, §§ 7-101 through 7-109 and Maryland Rules 4-401 through 4-408. Petitioner then obtained counsel and this Petition was supplemented on October 15, 2015, and January 6, 2017. The State filed a response on June 22, 2017, and the Petitioner replied to that response on October 11, 2017. Petitioner raises multiple and overlapping allegations of error before this Court. The Court regroups Petitioner's arguments into the following categories: (1) *Brady* Violations; (2) ineffective assistance of counsel; and (3) ineffective appellant counsel. The Court presents its findings below.

DISCUSSION

I. BRADY VIOLATIONS

A. Brady Violation by State Related to Petitioner's Laptop

Petitioner argues that there was a *Brady* violation by the State related to Petitioner's laptop. Petitioner alleges that the State violated the principles of *Brady v. Maryland*, 373 U.S. 83 (1983) and committed prosecutorial misconduct when it failed to turn over a document entitled Computer Analysis and Technical Support Squad Lab Notes ("Computer Analysis"), dated April

22, 2009, from the Anne Arundel County Police Department Criminal Investigation Division.[1] The Computer Analysis reflects that police had a "CSM" laptop in their custody. This laptop appears to be the same laptop that the State argued that Martin had taken from the house of one of Petitioner's girlfriends, Sheri Carter, to conceal evidence of his wrongdoing.

Carter testified that Petitioner kept his laptop at her apartment and that she saw him, in late September or early October 2008, researching gun silencers.[2] She also testified that Petitioner, during the first week of November 2008 – approximately one week after the shooting – removed the laptop from her home, telling her "that [they] had looked up so many crazy things on the internet that in case [Carter's] apartment got searched [Martin] didn't want it found there."[3] According to Carter, Martin said that he "got rid of" the laptop.[4] When asked what was unique about the laptop, Carter testified that Petitioner "had got it from a place he used to work and we didn't have administrative rights...you couldn't basically alter the computer."[5] The jury was instructed that it could consider Carter's testimony – the only evidence offered relating to Petitioner researching gun silencers or destroying evidence – about the laptop as evidence of Petitioner's guilt.[6]

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[1] Counsel for Petitioner obtained the Computer Analysis in 2016 through a Maryland Public Information Act request. The State concedes that this document was not turned over to Petitioner before or during his original trial.

[2] Transcript, May 3, 2010, 142:17-25.

[3] Transcript, May 3, 2010, 144:6-11.

[4] Transcript, May 3, 2010, 144:12-14.

[5] Transcript, May 3, 2010, 143:24-25, 144:1-5.

[6] The jury instruction read as follows:

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

The Computer Analysis lists a laptop computer with "CSM" as the registered owner and registered organization. "CSM" stands for the College of Southern Maryland, where Petitioner worked as a basketball coach. According to the Computer Analysis, the CSM laptop had accounts called "Administrator," "Laptop," and "Todd Downs,"[7] and that none of the accounts had been logged into since May 2005. Importantly, the Computer Analysis revealed that there were no searches for various terms relevant to the case and State's argument, including "handgun," "silencer," or "homemade silencer," contrary to Carter's testimony that Martin had used a work laptop to research homemade silencers. Further, the fact that there are separate "Administrator" and "Laptop" accounts suggest that there were administrative rights that the "Administrator" account had that the "Laptop" account did not. The State's evidence suggests as much.[8] This provides further evidence that the CSM computer in State custody is, or at least could be, the very laptop Carter testified about, as she said that the laptop was from one of Petitioner's employers, and that Petitioner did not have administrative rights in the computer.

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first decide whether the Defendant concealed any evidence in this case. If you find that the Defendant concealed evidence in this case then you must decide whether that conduct shows a consciousness of guilt.

Transcript, May 4, 2010, 23:8-17. The Court also instructed the jury, immediately following the concealment of evidence instruction, that it could consider whether the State lost evidence:

If you find that the State has lost evidence whose contents or quality are important to the issues in this case then you should weigh the explanation, if any, given for the loss of evidence. If you find that any such explanation is inadequate then you may draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the Defendant's guilt.

Transcript, May 4, 2010, 23:18-24.

[7] Todd Downs worked in technical support at the College of Southern Maryland from 2001 to 2006. Per his affidavit, Mr. Downs would install programs as requested on CSM computers, and would accomplish this by logging onto that computer under the account "Todd Downs." Def. Ex. J.

[8] A recent forensic analysis by the State on the CSM computer provides that the "Administrator" account is a "[b]uilt-in account for administering the computer." Pl. Ex. 2. No comparable statement was made in reference to the "Laptop" account.

Finally, although the Computer Analysis reflects that five (5) computers were seized from Petitioner's dwelling, only one (1) computer was connected to CSM or any employer of Petitioner.

The Petitioner contends (1) the Computer Analysis contradicts the State's evidence that Petitioner had concealed his laptop and undermined the testimony of a critical State's witness, Sheri Carter, (2) the State's failure to disclose this information violated Petitioner's constitutional right to due process, and (3) the State also committed prosecutorial misconduct by arguing that Petitioner had obstructed justice by getting rid of the computer when the computer was in police possession.

A true *Brady* violation has three components: (1) "[t]he evidence at issue must be favorable to the accused either because it is exculpatory, or because it is impeaching;" (2) "that evidence must have been suppressed by the State, either willfully or inadvertently;" and (3) "prejudice must have ensued." *Yearby v. State*, 414 Md. 708, 717 (2010). Of note is that "the burdens of production and persuasion regarding a *Brady* violation fall on the defendant." *Id.* at 720. Additionally, the Maryland Court of Appeals has noted that the prosecution cannot be said to have suppressed evidence for *Brady* purposes when the information allegedly withheld was available to the defendant though diligent and reasonable investigation. *Id.* at 723. The Court will consider the three components separately.

1. ***Was the evidence at issue favorable to the accused either because it was exculpatory or impeaching?***

The evidence at issue tends to (1) undermine the testimony of one of the State's key witnesses, Sheri Carter, and (2) show that Petitioner did not conceal or destroy evidence, an issue for which a jury instruction was given. As such, the evidence is both impeaching and exculpatory and thus is favorable to the Petitioner.

Carter testified that she saw the Petitioner researching gun silencers on his work computer at her house. At the time, Petitioner worked at the CSM and did not possess any other work computers. The Computer Analysis, which includes a thorough forensic analysis of the CSM computer, reveals that a forensic search of this CSM computer yielded negative search results for the words, handgun, Gatorade, silencer, and homemade silencer, amongst others. This information would have served to impeach Carter's testimony that she saw Petitioner using that CSM laptop to research gun silencers. Petitioner's trial counsel could have cross-examined Carter with the Computer Analysis in hand and challenged her veracity.

Carter further testified that Petitioner removed the laptop from her home in case her apartment got searched, and the State used her testimony to suggest that the Petitioner hid or destroyed evidence of his wrongdoing. The Court gave a jury instruction on concealment of evidence based solely on Carter's then uncontradicted testimony. However, the Computer Analysis, dated April 22, 2009, which was in the police file at the time but not produced to Petitioner before or during his initial criminal trial, lists a CSM computer as one of the items in police custody. The document suggests that the State had custody over the laptop that the State argued Petitioner had hidden or destroyed. This contradicts the State's evidence and is favorable to the Petitioner. The Computer Analysis was clearly exculpatory.

The State argues that any documentation regarding the CSM laptop has no evidentiary value, and thus is not material. The State reaches this conclusion by suggesting that because the Computer Analysis indicated that the CSM laptop was not logged into after 2005, and because Carter testified that she saw Petitioner use a CSM laptop in fall of 2008, that the laptop in police custody *cannot* be the laptop Carter testified regarding.

This argument is self-serving, requiring the Court to assume the veracity of Carter's testimony and to overlook the impeaching value of the Computer Analysis. The CSM laptop

reviewed in the Computer Analysis matches the description of the laptop testified to by Carter. Petitioner was denied the opportunity to cross-examine Carter regarding the results of the Computer Analysis, impeaching her testimony. In addition, the results of the Computer Analysis certainly would have been relevant to the factfinder's consideration of the concealment of evidence instruction and the judge's decision to allow that instruction to be given in the first place. This Court rejects the State's argument that the Computer Analysis had no evidentiary value.

*2. **Was the evidence suppressed by the State, either willfully or inadvertently?***

The State concedes that the Computer Analysis in question was not turned over to Petitioner before or during the trial. No explanation has been provided to justify the failure to turn this evidence over to Petitioner. The suppression was either willful or inadvertent, though likely willful. As such, the Computer Analysis was suppressed.

The State argues that Petitioner knew or should have known of the evidence Petitioner now claims was suppressed at the time of his initial trial, citing *State v. Yearby*. In *Yearby*, the Court provided the following:

> We previously have explained that, under *Brady* and its progeny, the defense is not relieved of its "obligation to investigate the case and prepare for trial." *Ware,* 348 Md. at 39, 702 A.2d at 708. *See Bagley,* 473 U.S. at 675, 105 S.Ct. at 3379-80, 87 L.Ed.2d at 489 (noting that *Brady's* "purpose is not to displace the adversary system as the primary means by which truth is uncovered, ... [and] [t]hus, the prosecutor is not required to deliver his entire file to defense counsel[.]"). Moreover, "[t]he prosecution cannot be said to have suppressed evidence for *Brady* purposes when the information allegedly suppressed was available to the defendant through reasonable and diligent investigation." *Ware,* 348 Md. at 39, 702 A.2d at 708. Finally, *Brady* "offers a defendant *no relief when the defendant knew or should have known facts permitting him or her to take advantage of the evidence in question or when a reasonable defendant would have found the evidence.*" *Id.* (emphasis in original).

Yearby v. State, 414 Md. 708, 723, 997 A.2d 144, 153 (2010)

The State argues that Petitioner was advised that a warrant return indicated that five (5) of his computers were seized by the police and that Petitioner knew that the State planned to present Carter as a witness to testify that she saw Petitioner in her home doing research related to silencers on a laptop and that he later destroyed the laptop.[9] The State argues that Petitioner "knew or should have known the evidence in the State's possession and, if [he] believed the computers recovered had evidentiary value, should have sought to investigate them further."[10] The State improperly characterizes what Petitioner is claiming to be *Brady* evidence.

The evidence that Petitioner characterizes as *Brady* evidence is not the CSM computer itself as the State suggests, but rather the Computer Analysis – a forensic report of the computers conducted several months before trial. While Petitioner could have, and maybe even should have, sought to obtain the computers in State custody, this did not relieve the State of providing any exculpatory evidence that it had in its possession, which included the Computer Analysis. The fact that Petitioner knew that the State had custody of his computers does not mean that the Petitioner knew that the State had forensically analyzed the computers, or that a report existed which, at a minimum, failed to corroborate a key State witness's testimony.

Indeed, this case is easily distinguishable from *Yearby*. In that case, Yearby was convicted of robbery and filed a motion for a new trial, arguing that the State had violated *Brady* when it failed to disclose that a detective had identified additional suspects for the crime underlying Yearby's conviction. Ruling against Yearby, the Court of Appeals held that Yearby knew, before trial, that the detective in question had been investigating several other robberies and that he had several other suspects. In addition, during trial, Yearby's re-cross examination of

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[9] Transcript, Oct. 13, 2009, 179:17-25.

[10] State's Supp. Response to Petition for Post Conviction Relief, 20 (filed June 22, 2017).

the detective revealed that Yearby knew of "at least one alleged suspect who 'look[ed] just like' him." *Yearby*, 414 Md. at 725, 997 A.2d at 154. Thus, the Court of Appeals found that Yearby had the information he alleged to be *Brady* evidence and had the chance to cross-examine the detective in question and others about whether there were other suspects. *Id.* The court held that on those facts, Yearby "knew of the allegedly suppressed material," and thus the alleged *Brady* evidence was not suppressed. *Id.* at 726, 997 A.2d at 154.

In contrast to *Yearby*, at no point before or during trial did the Petitioner in the case *sub judice* indicate an awareness that the State had conducted a forensic analysis of the seized computers, or that a report was produced which showed that none of Petitioner's computers, including the CSM computer, were used to look up "silencers" or any other keywords of investigative value. Even if Petitioner knew that the State had his computers in custody and that it planned to call a witness to testify about Petitioner's suspicious use of one computer, this does not lead to the conclusion that Petitioner was aware of the Computer Analysis, or that any reasonable defendant would have been aware of the Computer Analysis. Accordingly, the State suppressed the evidence in question.

3. Did prejudice ensue?

The standard for prejudice is whether there is a "reasonable probability" that disclosure of the suppressed evidence would have led to a different result. *Yearby v. State*, 414 Md. 708, 717–18 (2010) (internal citations omitted). A "reasonable probability" of a different result is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. *Id.* In this case, prejudice did ensue because it would have cast some reasonable doubt on the State's argument and Carter's testimony. Carter testified that the Petitioner hid or destroyed the laptop, and a jury instruction was given; however, the police had a laptop matching Carter's description in their custody. This could have made Ms. Carter's testimony, which the

State used as evidence of Petitioner's guilty, less credible, and may have created some reasonable doubt in the State's case. Importantly, Carter was the only witness to testify that she saw Petitioner using the CSM computer to research gun silencers or that Petitioner "got rid of" the laptop. Had this evidence been available, there is a reasonable probability that the jury would have decided this case differently, and a substantial probability that the jury instruction on concealment of evidence would not have been given. Therefore, the prejudice did ensure, and the suppression of the laptop amounted to a *Brady* violation.

The State could argue that the evidence presented at trial connecting Petitioner to the crime was so overwhelming that the suppression of the *Brady* material here did not prejudice Petitioner. On appeal from his trial, Petitioner alleged that the evidence was insufficient to sustain his conviction of attempted murder in the first degree as an accessory before the fact. *Martin v. State*, 218 Md. App. 1, 33, 96 A.3d 765, 785 (2014). In rejecting Petitioner's argument, the Court of Special Appeals held that "there was sufficient, indeed ample, evidence of Martin's guilt." *Martin*, 218 Md. App. at 36, 96 A.3d at 786. The Court found that Petitioner had the motive and opportunity to kill the victim, and that "forensic evidence linked Martin to the homemade silencer found at the crime scene." *Id.* Further, the Court found that

> the testimony of Sheri Carter, one of [Petitioner's] erstwhile girlfriends, if believed by the jury, established that: (1) shortly before the shooting, Martin used a computer to conduct internet research on how to assemble a homemade silencer; (2) on that same occasion, Martin took a pair of plastic surgical gloves from her home; (3) approximately one week after the shooting and shortly after Martin had been questioned by police, Martin took the computer from her apartment and "got rid of" it; and (4) during the two-month period immediately preceding the shooting, Martin was observed by Ms. Carter to be carrying a "small, silver, [black-handled], semi-automatic" handgun, a fact confirmed by records from the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives, which were introduced by the State. In fact, those records showed that, in 2003, Martin had purchased two .380 caliber handguns, which was the same caliber as the weapon used to shoot the victim.

Id. at 36-37, 96 A.3d at 786-87.

The essential link between Petitioner and the victim was the silencer. Indeed, the State asserted as much in its closing argument: "If you decide that [Petitioner] made that silencer and that silencer was intended to be used upon the victim then he is guilty."[11] The two strongest links connecting Petitioner to the silencer were the DNA evidence and Carter's testimony. In that context, it would have been significant for Petitioner to have questioned Carter about the inconsistencies between her testimony and the Computer Analysis. Carter's testimony provided an important connection between Petitioner and the silencer. In addition, her testimony provided the only evidence suggesting that Petitioner concealed or destroyed evidence, for which a jury instruction was given. Notwithstanding the other evidence presented by the State, there is a "reasonable probability" that disclosure of the Computer Analysis would have led to a different result in this case.

Having found a *Brady* violation as discussed herein, this Court will nevertheless review the remaining allegations to assist the trial court upon retrial.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner argues that he was denied effective assistance of counsel. Specifically, he presents thirteen (13) separate instances in which he contends counsel rendered ineffective assistance.[12] A petitioner may raise, for the first time, the issue of ineffectiveness of counsel at a

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[11] Transcript, May 4, 2010, 40:24-25, 41:1. The State made additional comments in its closing argument regarding Carter's testimony, including the following: "[I]s anyone surprised that Sheri Carter saw the Defendant researching silencers on the internet? Natural place to go. Is anyone surprised that the Defendant got rid of that computer after the police talked to him? No, because it fits perfectly with the evidence." Transcript, May 4, 2010, 37:12-16.

[12] Petitioner categorizes his allegations of ineffective assistance of counsel as follows: (1) Failure of defense counsel to object to testimony of DNA expert Terry Melton; (2) Failure to cross examine State's DNA expert at trial; (3) Ineffective assistance of counsel for failure to object to improper voir dire questions in jury selection; (4) Failure to voir dire potential jurors regarding racial bias; (5) Failure of defense counsel to seek suppression of defendant's statement to police; (6) Failure to request Mere Presence jury instruction; (7) Failure to call Steve Burnette as witness; (8) Failure to object to State's burden-shifting during rebuttal; (9) Failure to object to inconsistent verdict; (10) Failure to file Application for Review of Sentence by a three-judge panel; (11) *Brady* violation by State related

post-conviction hearing. *State v. Merchant*, 10 Md. App. 545, 550 (1970); *Strickland v. Washington,* 466 U.S. 668, 679 (1984). *Strickland* established a two-prong test to measure the effectiveness of counsel's representation. *Id.* The test requires a petitioner to (1) show that his counsel was objectively unreasonable and (2) demonstrate that counsel's representation was prejudicial. *Id.* However, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* at 697.

When applying the first prong, one seeking relief on a claim of ineffective assistance of counsel must show that counsel's assistance "fell below an objective standard of reasonableness." *Id.* at 687-88. This is a difficult task because there is a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* at 689. The second prong requires one to "affirmatively prove prejudice." *Id.* at 693. In this context, prejudice means "that there [was] a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The term "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.* In other words, to satisfy the second prong of *Strickland,* a defendant must show that, but for counsel's errors, there is a "substantial possibility" that the result of the proceedings would have been different. *Bowers v. State,* 320 Md. 416, 426-27, 578 A.2d 734, 739 (1990). The deficient performance inquiry includes a "context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins v. Smith,* 539 U.S. 510, 523 (2003) (internal citations omitted).

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to Martin's laptop; (12) Violation of Martin's due process rights when State changed its theory; and (13) Violation of Martin's right to be present during communications with jurors.

Further, a review of ineffective assistance of counsel claim requires a highly deferential scrutiny of counsel's performance. *See Strickland,* 466 U.S. at 689; *Walker,* 391 Md. at 246; *Oken v. State,* 343 Md. 256, 283 (1996). Courts should not second-guess decisions of counsel. Instead,

> [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.* Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Oken II, 343 Md. at 283-84 (quoting *Strickland,* 466 U.S. at 689) (emphasis added) (internal quotations omitted).

A. Failure of Defense Counsel to Object to Testimony of DNA Expert Terry Melton

Petitioner argues that defense counsel was ineffective by failing to timely object to the State's DNA expert's testimony. The trial court ultimately found that the objection was untimely and admitted the DNA evidence. Petitioner alleges that this error was grounded in a failure to adequately review discovery provided by the State. 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), but overruled defense counsel's objection only because it was untimely. However, the failure to make a timely objection did not result in prejudice, because had defense counsel made the objection, the two

other technicians that conducted the DNA testing were available to testify at trial. Therefore, Petitioner did not receive ineffective assistance of counsel.

Petitioner also argues that, if defense counsel had made a timely objection to Melton's testimony, it is likely that the State's most important piece of evidence against Petitioner would have been excluded. The State argued that the hair evidence showed "conclusively, beyond a reasonable doubt, that Petitioner was involved in the shooting." Petitioner contends that this evidence would have been excluded had defense counsel timely objected to Melton's testimony. However, Judge North did not decide as to whether the DNA evidence would be excluded based on the *Melendez-Diaz* ruling because in this case, there were witness available to testify regarding the evidence. Therefore, Petitioner was not denied effective assistance of counsel.

B. Failure to Cross Examine State's DNA Expert at Trial

Petitioner also argues that, if the post-conviction court were to find that the State's presentation of Melton alone did not pose a Confrontation Clause problem, then trial counsel should have cross-examined Melton about the reliability of the testing, including issues such as contamination. Petitioner indicates that trial counsel failed to complete his cross-examination and never challenged the reliability of the DNA evidence. According to Petitioner, if trial counsel had asked appropriate questions about the procedures and cautions the technicians implemented, Melton would not have been able to answer, and counsel could have better preserved the issue for appeal or future litigation. Petitioner states he did not wish to waive his Confrontation Clause rights at this critical juncture of the trial.

The decision whether to cross-examine a witness is within the discretion of the defense attorney. *Strickland*, 466 U.S at 689. The defendant needs to overcome the presumption that counsel's actions were not just part of their sound trial strategy. *Id.* Therefore, it is presumed that the defense attorney has made a reasonable tactical decision with regard to cross-

examination of witnesses. It is within the purview of trial counsel to determine the breadth of cross-examination. The Court does not find counsel's decisions here to have resulted in ineffective assistance of counsel.

C. Ineffective Assistance of Counsel for Failure to Object to Improper Voir Dire Questions in Jury Selection

The principal purpose of a voir dire is for the trial court "to ascertain the existence of cause for disqualification." *Dingle v. State*, 361 Md. 1, 10, 759 A.2d 819, 824 (2000). Voir dire questions should focus on the defendant's case to uncover any biases related to the crime. *Id.* It is the function of the trial judge to uncover these potential biases. *Id.* at 14-15, 759 A.2d at 826-27. When a voir dire question that is asked by the trial judge allows the venire person to decide if he or she can be fair, the burden "shifts from the trial judge to the venire['s] responsibility to decide juror bias." *Id.* at 21, 759 A.2d at 830. This procedure is improper because the trial court is to decide whether there is juror bias, and not the jurors themselves.

Petitioner argues that the court allowed the prospective jurors to self-determine their eligibility, and trial counsel never objected. Petitioner alleges two 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 any way, involved with a group or organization whose mission is 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.

Petitioner argues that asking compound questions such as these allow individual jurors to make their own determination of whether they can sufficiently put aside those feelings, follow the instructions of the Court, and act as unbiased jurors. When compound questions are posed to

the jurors, the burden falls on the juror to decide whether they can be fair and impartial, and not the trial court. Petitioner relies on *Dingle*, 361 Md. 1, 759 A.2d 819, and *Pearson v. State*, 437 Md. 350, 86 A.3d 1232 (2014) in making his assertions.

In contrast, the State argues that not all compound voir dire questions are impermissible under *Dingle*, and that the questions highlighted by Petitioner are permissible. The State asserts that the line between permissible and impermissible is drawn by the subject matter of the question, with compound questions concerning experiences or associations – such as in *Dingle* – being impermissible, and compound questions concerning states of mind or attitudes being permissible. In support of its assertion, the State relies on *Thomas v. State*, 369 Md. 202, 798 A.2d 566 (2002), *abrogated by Pearson*, 437 Md. 350, 86 A.3d 1232, and *Wimbish v. State*, 201 Md. App. 239, 29 A.3d 635 (2011). Notably, *Wimbish* relied on *Thomas* in reaching its holding on this issue.

In *Dingle*, the Court of Appeals held that it is impermissible to ask compound voir dire questions inquiring about the potential jurors' experiences and associations along with whether such experiences and associations may affect their ability to judge the case fairly. *Dingle*, 361 Md. at 21, 759 A.2d at 830. While the *Dingle* Court did not comment on whether similar questions concerning states of mind or attitudes were allowable, the *Thomas* Court remarked, in *dicta* – indeed, in a footnote – that *Dingle* did not preclude the use of compound questions when probing the jury about states of mind or attitude. *Thomas*, 369 Md. at 204, fn. 1, 798 A.2d at 567, fn. 1. The voir dire question at issue in *Thomas* read: "Does any member of the jury panel have **such strong feelings** regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts at a trial where narcotics violations have been alleged?" *Id.* at 204, 798 A.2d at 567 (emphasis added). Similarly, in *Wimbish*, the Court of Special Appeals, relying on *Thomas*, held that compound voir dire questions inquiring about the

prospective jurors' state of mind or attitude with respective to a particular crime "did not run afoul of *Dingle*." *Wimbish*, 201 Md. App. at 268, 29 A.3d at 651-52.

However, in *Pearson*, the Court of Appeals expressly abrogated certain cases, including *Thomas*, which endorsed asking whether any prospective juror "has 'strong feelings' about the crime with which the defendant is charged[,]" and then, in the same question, asking if such feelings would make it difficult for the juror to fairly and impartially assess the facts of the case. *Pearson*, 437 Md. at 363, 86 A.3d at 1239. *See also Collins v. State*, 452 Md. 614, 625, 158 A.3d 553, 560 (2017) ("In *Pearson*, we held that the trial judge committed reversible error in phrasing a 'strong feelings' question such that each juror was required to evaluate his or her own potential bias."). The *Pearson* Court ultimately held that, under *Dingle*, it is impermissible for trial judges to use compound voir dire questions with the language of "strong feelings" in relation to the crime defendant is charged with stands at odds with *Dingle*. *Id.* at 363, 86 A.3d at 1240.

The Court gleans from these cases that the State's argument rests on cases completely without precedential value in the context of voir dire questions. The State's distinction between compound voir dire questions concerning experiences and associations versus states of mind and attitudes does reflect the guidance offered by the Court of Appeals. Under the Court of Appeal's current interpretation of *Dingle*, the "strong feelings" questions in the case *sub judice* improperly shifted the burden of deciding whether each juror can perform their factfinding duty in a fair and impartial away from the judge and to the jurors themselves.[13] Therefore, the questions were

[13] Moreover, the second voir dire question highlighted by Petitioner concerned both professional associations ("Have you or any member of your family or close friend [sic] ever been associated with, or in any way, involved with a group or organization who mission it is to abolish legalized abortion?") and states of mind or attitudes ("Does any member of the jury hold such strong views about abortion..."), and as such, even under the State's argument, this question was improper.

objectionable. The Court must now determine whether counsel's failure to object constituted ineffective assistance.

The standard for determining ineffective counsel requires the defendant to show that (1) counsel's performance was deficient and (2) that the defendant was prejudiced due to the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687. The defendant must be so prejudiced by counsel's deficient performance, that it would deprive him of a fair trial. *Id.* It is not enough to show that the "errors had some conceivable effect on the outcome of the case" or that the errors simply "impaired the presentation of the defense" because any error would be able to meet that standard. *Id.* at 693. The burden is on the defense to show that "the counsel's deficient conduct, more likely than not altered the outcome of this case." *Id.* In this case, Petitioner's trial counsel failed to object to objectionable voir dire questions, each of which easily could have been broken down into sub-questions that would have avoided the problem altogether. There is no discernible strategic reason for counsel to have not objected to these voir dire questions. As such, counsel was deficient in failing to object.

Further, counsel's failure to object to questions precluded the judge from comprehensively investigating potential juror biases. "That potential failure forecloses further investigation into the venirepersons' states of mind, and makes proof of prejudice a virtual impossibility[,]" an "insurmountable burden" that the Court of Appeals has previously declined to impose on criminal defendants. *Wright v. State*, 411 Md. 503, 513-14, 983 A.2d 519, 525. Like in *Dingle*, where "the court asked compound questions, the structure of which likely concealed some positive responses," so too is the case here. *Collins*, 452 Md. at 626, 158 A.3d at 560 (citing *Dingle*, 361 Md. at 21, 759 A.2d at 830). Thus, counsel's deficient conduct in failing to object to the compound voir dire questions was prejudicial to Petitioner.

D. Failure to Voir Dire Potential Jurors Regarding Racial Bias

Petitioner claims that counsel's failure to voir dire potential jurors for racial bias constitutes ineffective assistance. Although a defendant accused of an interracial crime is entitled to have prospective jurors questioned about racial bias, the decision for whether to ask questions regarding racial bias is best left in the hands of the trial counsel. *Sexton v. French,* 163 F.3d 874, 886 (1998) (citing *Turner v. Murray*, 476 U.S. 28 (1986)). In this case, Petitioner's counsel decided to have a jury question regarding interracial dating, but not on racial bias. Jury question number 23 states:

> (23) "There will be testimony in this case regarding interracial dating. Is there any prospective juror who has such strong feelings against interracial dating that they would not be able to render a fair and impartial verdict?"

Taking into consideration the two-prong test in *Strickland,* the Petitioner's claim fails to meet the first prong because there was not deficient conduct of counsel since there was a jury question regarding racial bias.

E. Failure to Seek Suppression of Defendant's Statement to Police

Petitioner argues that defense counsel was ineffective for failing to seek suppression of Petitioner's pretrial custodial statement to the police. In that statement, Petitioner told police that he had been at McFadden's house on the day of the shooting. In Maryland, a defendant's confession is admissible for evidence against him only if it is (1) voluntary under Maryland common law, (2) voluntary under the Due Process Clause of the Fourteenth Amendment, and (3) follows Miranda Rights. *Jackson v. State,* 141 Md. App. 175, 186 (2001). Voluntariness in Maryland is defined as, "under the totality of all the attendant circumstances, the statement was given freely and voluntarily" and was not "a product of force, threats, or inducement by way of promise or advantage." *Id.* Petitioner alleges that the day he gave his statement to police, the police had been parked outside his home all day, met with Petitioner's wife on her way home

from work and prevented her from calling or answering calls from Petitioner, and entered Petitioner's house without permission and attempted to speak with Petitioner's children.

Whether or not these allegations are true, counsel's failure to seek suppression of Petitioner's statement to police was not prejudicial and may not have even been deficient. Counsel's actions are presumed to be part of sound trial strategy. *Strickland,* 466 U.S at 689. The allegations do not suggest that police threatened Petitioner or induced him with any promise, and there is no allegation that police used physical force against Petitioner. The allegations, if true, do suggest some troubling conduct on behalf of the police, but would likely have only gone to the weight the statement would have carried, and would not have resulted in its suppression. Further, Counsel's actions were not prejudicial because the evidence at trial still would have placed Petitioner at McFadden's house on the day of the shooting even without the statement he made. Therefore, Petitioner was not denied effective assistance of counsel.

F. Failure to Request Mere Presence Jury Instruction

Petitioner alleges that trial counsel provided ineffective counsel when he did not choose to request a jury instruction that that mere presence at the scene of the crime is insufficient to establish that person's participation in the crime. Petitioner also alleges that there is a reasonable probability that the outcome of the case would have been different with the jury instruction on mere presence. In *Bruce v. State*, 318 Md. 706, 731 (1990), the court found that there was no error in refusing to give such an instruction because there were other instructions on what is needed for a principal in the first or second degree that covered the issue of presence. In addition, following the *Strickland* standard, it is not enough to show that the "errors had some conceivable effect on the outcome of the case" because any error would be able to meet that standard. 466 U.S at 693. The substance of the mere presence instruction was already covered by the instructions regarding accessory before the fact. These explained that Defendant's

presence at the murder scene is not necessary to be convicted as an accessory before the fact. However, even if it is an error of counsel, Petitioner does not demonstrate that it was a prejudicial error, so it does not amount to an ineffective assistance of counsel.

G. Failure to Call Steve Burnette as a Witness

Petitioner alleges that trial counsel was ineffective by failing to call Steve Burnette as a witness. Judicial scrutiny of counsel's performance during trial must be highly deferential and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" *Strickland,* 466 U.S at 689. The defendant needs to overcome the presumption that counsel's actions were not just part of their sound trial strategy. *Id.* In addition, if there is an error by counsel, it must have also been prejudicial. *Id.* at 687.

Petitioner contends that had defense counsel called Burnette as a witness, the defense's theory would have been bolstered while casting doubt on the State's theory that Martin and Burks were responsible for the shootings. However, the Petitioner does not overcome the presumption that this decision was simply just part of trial counsel's sound trial strategy. Mr. Burnette had previously exercised his Fifth Amendment privilege at the trial of the co-defendant in this case, so it could be assumed that he would have done the same once again. In addition, Petitioner does not show how the decision not to call a defense witness is prejudicial to him, since it would only have a "conceivable effect" on the outcome of the case. Therefore, trial counsel's decision not to call Mr. Burnette as a witness does not rise to the level of ineffective assistance of counsel. *Id.* at 693.

H. Failure to Object to State's Burden-Shifting During Rebuttal

Petitioner alleges that trial counsel was constitutionally ineffective for failing to object to the State's impermissible burden-shifting during closing arguments. During closing arguments, the State attempted to lead the jury to believe that it should accept the evidence indirectly linking

Martin to the gun because "[the Defense] didn't address the fact that this Defendant did purchase the two .380 caliber handguns"[14] – the same caliber of the handgun used in the shooting. The State also asserted to the jury that Martin's defense should be rejected because he did not "prove [anything] to tie [McFadden] to this crime."[15] In a criminal trial, the state has the burden to prove the defendant's guilt. *Tilghman v. State*, 117 Md. App. 542, 555 (1997). The defendant does not have to testify, show, or prove anything, and in addition, guilt cannot be inferred by a defendant's silence. *Id.* In this case, Petitioner's counsel's conduct was deficient by not objecting to the state's arguments. The question of prejudice then rests on whether the trial judge adequately cured these improper comments by instructions or otherwise.

The jury instructions clearly and correctly advised the jury about the reasonable doubt standard,[16] the fact that the Defense did not have a burden,[17] and that closing arguments are not

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[14] Transcript, May 4, 2010, 92:18-23. The full quote reads as follows:

> It was not really addressed, but the Defendant – by the Defense, I guess they didn't want you to really think about it, but they didn't address the fact that this Defendant did purchase the two .380 caliber handguns. One of them by stipulation was transferred; however, that still leaves one handgun unaccounted for, and that handgun is linked to the Defendant, and you can see the link between that missing handgun and this case, because it's a .380 caliber handgun, and by the way, the ballistics at the crime scene indicate that the projectile right near [the victim's] head that was located as well as a casing that popped off when the shot was fired are both .380 caliber. Again, a link to the Defendant. I guess they didn't want you to think about that when you went back to the jury room.

Transcript, May 4, 2010, 92:19-25, 93:1-8.

[15] Transcript, May 4, 2010, 94:14-15. A fuller quote reads as follows:

> [The Defense] want[s] to pretty much pin this case on Maggie [McFadden].... And really what evidence to we have that Maggie did it? We have that she – perhaps they proved that she's a rude person. Perhaps they proved that she has a big mouth and that she has bad manners. What else do they prove to tie her to this crime? Nothing. We know that she was at work that day, so certainly she was not the shooter."

Transcript, May 4, 2010, 94:4, 11-16.

[16] The judge provided the following instruction:

evidence.[18] However, for jury instructions "to be sufficiently curative, the judge must instruct contemporaneously and specifically to address the issue such that the jury understands that the remarks are improper and are not evidence to be considered in reaching a verdict." *Lee v. State*, 405 Md. 148, 177–78, 950 A.2d 125, 142 (2008). In *Lee*, the defense objected, during the State's rebuttal closing argument, to an impermissible appeal to the prejudices of the jurors. When "the trial judge provided the jury with the model criminal pattern jury instructions before closing arguments[,]" and when, during the State's rebuttal argument, "the only curative instruction given by the trial judge was a repeat of the prior instructions given to the jury[,]" the Court of Appeals held that the instruction was neither contemporaneous nor specific.[19]

> A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs. However, if you are not satisfied of the Defendant's guilt to that extent then reasonable doubt exists and the Defendant must be found not guilty.

Transcript, May 4, 2010, 18:3-11.

[17] The judge provided the following instruction:

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

Transcript, May 4, 2010, 17:15-25, 18:1-2.

[18] The instruction was read as follows: "Opening statements and closing arguments of the lawyers are not evidence in the case, they are intended only to help you understand the evidence and to apply the law. Therefore, if your memory of the evidence differs from anything the lawyers or I may say you must rely on your own memory of the evidence." Transcript, May 4, 2010, 19:23-25, 20:1-3.

[19] *Cf. Miller v. State*, 380 Md. 1, 35–37, 843 A.2d 803, 823–24 (2004) (affirming the trial court's denial of a motion for a mistrial based on the State's comments when the court properly sustained the defense's objections, granted the defense's motion strike, and immediately directed the jury to disregard the problematic comments).

In the case *sub judice*, the judge gave what could have been an appropriate curative instruction before closing arguments, thus not contemporaneously with the allegedly improper remarks by the State in its rebuttal closing argument. Had the Petitioner's counsel objected to these burden-shifting remarks, the trial judge would have been given the opportunity to provide a contemporaneous instruction. Therefore, trial counsel's failure to object to the State's burden shifting argument was prejudicial.

I. Failure to Object to Inconsistent Verdict

Petitioner alleges that defense counsel was constitutionally ineffective for failing to object to the jury's inconsistent verdict. The Court of Special Appeals for this case found that if the inconsistent verdict issue had been under their review, then they would have found that there was no merit. *Martin v. State*, 218 Md. App. 1, 40 (2014). The Court of Special Appeals believes there is no inconsistent verdict issue; therefore, there is no issue regarding the ineffective assistance of counsel because it does not meet either prong of the *Strickland* test. This Court agrees.

J. Failure to File Application for Review of Sentence by a Three-Judge Panel

Petitioner alleges ineffective assistance of counsel because counsel failed to file an application for a review of sentence by a three-judge panel, per Petitioner's request. For conduct to arise to the level of ineffective counsel, the conduct of counsel must be (1) deficient and (2) prejudicial. *Strickland*, 466 U.S. at 687. In this case, Petitioner made multiple requests to counsel to file an application for review of sentence.[20] Therefore, counsel's conduct was deficient because it went against what Petitioner wanted him to do. It was also prejudicial because it denied Petitioner a hearing by a three-judge panel. In addition, there is no reason the

[20] Martin Test., June 23, 2017, 1:45:46 – 1:47:19 P.M.

application should not have been filed because there would either have been no change, or a sentence reduction since Petitioner received the maximum sentence. Therefore, counsel's failure to file an application for a sentence review by a three-judge panel constituted ineffective assistance of counsel and Petitioner should be allowed to file an application. However, in light of the remand for a new trial ordered in this case, this issue is moot.

K. Violation of Petitioner's Due Process Rights When State Changed its Theory

Petitioner claims that the State violated his due process rights when they changed their theory at the end of trial. The Court of Special Appeals has already addressed this issue and stated that:

> We further reject Martin's contention that, during trial, the State's theory "morphed into one that made [him] only an accessory before the fact," that is, as the Court of Appeals has put it, "one who is guilty of felony by reason of having aided, counseled, commanded or encouraged the commission thereof, without having been present either actually or constructively at the moment of perpetration." *State v. Ward*, 284 Md. 189, 197, 396 A.2d 1041 (1978), overruled on other grounds, *Lewis v. State*, 285 Md. 705, 714–16, 404 A.2d 1073 (1979). The State's opening statement alleged that Martin, Frank Bradley, and Jerry Burks had constructed the home-made silencer at Maggie McFadden's house, which clearly conveyed the State's belief that Martin was an accessory before the fact, a belief substantiated at trial by DNA evidence presented by the State connecting Martin to the homemade silencer.

Martin, 218 Md. App. at 33, 96 A.3d at 784. Therefore, the State argues, since the Court of Special Appeals rejected Petitioner's argument that the State changed its theory, Petitioner's due process rights have not been violated. This Court agrees.

L. Violation of Petitioner's Right to be Present During Communications with Jurors

On four different occasions during deliberations, jurors submitted written questions to the Court. Petitioner claims that the Court sent written responses in Martin's absence. Petitioner further asserts that he never waived his right to be present at this state of his trial; thus, his absence violated his rights in at least one of three possible ways: (1) Martin's due process rights

were violated because the questions in the jury notes implicated fundamental rights that required a knowing and intelligent waiver by Martin himself; (2) defense counsel was constitutionally ineffective because Martin wished to be present at every stage of his trial, and defense counsel improperly waived his presence through acquiescence or inaction; or (3) defense counsel was ineffective in failing to object to the court's improper responses to the jurors' substantive questions.

The State argues that the record clearly shows that if Petitioner was not present at any point when judge-jury communications took place, it was the result of counsel's waiver. As such, according to the State, the only argument available to Petitioner revolves around whether counsel's waiver of Petitioner's presence during the resolution of the jury notes constitutes ineffective assistant of counsel.

Pursuant to Md. Rule 4-231(b),[21] a defendant has a right to be present at every stage of the trial. That right extends to communications between judges and jurors. *Midgett v. State*, 216 Md. 26, 36–37, 139 A.2d 209, 214 (1958); *State v. Harris*, 428 Md. 700, 713, 53 A.3d 1171, 1178–79 (2012). This right, however, may be waived, and a criminal defendant can be bound by the waiver of his counsel, whether counsel waives such right affirmatively or through inaction. *Williams v. State*, 292 Md. 201, 219, 438 A.2d 1301, 1310 (1981). Further, "if the defendant himself does not affirmatively ask to be present at such occurrences or does not express an objection at the time, and if his attorney consents to his absence or says nothing regarding the matter, the right to be present will be deemed to have been waived." *Williams*, 292 Md. at 220, 438 A.2d at 1310.

[21] Md. Rule 4-231(b) contains the exact same language now as it did when Judge North heard this case in 2010.

The record does not make clear whether Petitioner was present when Judge North and the attorneys addressed each of the four jury notes. The record indicates that Petitioner was at least present in the courtroom when the first two jury notes were submitted to the judge on May 4, 2010, but does not elucidate how the jury notes were addressed by the judge and the parties, i.e., whether the notes were discussed during a bench conference, in the judge's chambers, etc. Regardless, the May 4, 2010, jury notes display the signatures of both the State and defense counsel. The Petitioner was also present when Judge North acknowledged at least one note in open court.[22]

The record does not, however, clarify whether the Petitioner was present or even in the courtroom for jury notes #3 and 4, although, once again, the attorneys both signed off on the notes.[23] Regardless, there is no evidence that Petitioner affirmatively indicated that he wanted to be present for any judge-jurors communications. While Leonard Stamm, Petitioner's trial

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[22] Judge North seems to respond to jury notes #1 and/or 2. Jury note #1 contains one (1) request for a court staff member to contact a family member about walking the juror's dog, and two (2) questions relating to whether the jurors could use or view certain evidence. Jury note #2 contains two (2) questions relating to evidence, and five (5) questions relating to purely personal matters. Judge North acknowledged one or both of those notes as follows:

> Ladies and gentlemen of the jury, we've received your note and I know that you've already received the response to the first two questions that I gave you. The remaining questions were all things of a personal nature. Perhaps you're all aware of what the other questions were, I'm not sure if you passed it around individually, but rather than doing that we were going to stop at 5 o'clock anyway, so I'm going to excuse you for the evening and you can take care of all those various things yourselves, okay, rather than us doing it for you. So we're going to ask you to stop deliberating at this point.

Transcript, May 4, 2010, 113:22-25, 114:1-7.

[23] These jury notes presented the following questions: "What is 'beyond mere preparation' meaning [sic]? (see judges [sic] instruction page 21) More specifically, what would define [sic] a 'substantial step' beyond mere preparation?" Judge North, in writing, directed the jurors that "You must apply the generally recognized meaning of those words." In addition, the jurors asked, "Is the final charge 'solicitation [of anyone] to commit murder' or 'solicitation of Jerold Burks to commit murder'? (page 25 specifically lists Jerold Burks, but the charge [sic] sheet does not list his name specifically)." (underlined text in original). Judge North, again in writing, answered: "The charge is solicitation of Jerold Burks to commit the crime of murder."

counsel, testified regarding this issue at the hearing on June 23, 2017, before this Court, the questioning on this topic was limited, and when asked about how "active" a client Petitioner was, Stamm answered that he could not recall.

Petitioner has not proven that he made a request to counsel to be present when written questions were submitted, or that counsel did not act on that request. As such, on the limited record before this Court, it seems that Petitioner was bound to his trial counsel's silent waiver, and there is no indication that Petitioner's input on the questions in the jury notes would have changed how Petitioner's counsel responded to the questions. As such, this Court cannot find that trial counsel was deficient on this issue, or even if he was, that such deficiency was prejudicial to Petitioner. Nevertheless, this issue is now moot.

M. Failure to Request a Missing Witness Instruction

Petitioner argues that trial counsel provided ineffective assistance of counsel when he failed to request a missing witness instruction regarding Maggie McFadden. Petitioner argues that Ms. McFadden should have been called because she was on the State's witness list and because she had testified for the State prior to trial before a grand jury. Petitioner does not provide any additional reasons as to why his trial counsel declined or neglected to call Ms. McFadden as a witness, what she would have testified to, or how her absence from trial prejudiced Petitioner. Accordingly, this Court cannot find that counsel's representation ineffective here.

N. Failure to Object to "Facts Not in Evidence and Inferences Not Fairly Drawn Therefrom"

Petitioner argues that the trial judge, during trial, ruled that the word "silencer" could not be used to refer to the Gatorade bottle found at the scene of the crime. The State often called the Gatorade bottle a silencer, and Petitioner asserts that counsel failed to object to the use of the

word. Even if Petitioner's allegations are true, counsel's failure to object to the use of "silencer" was not deficient. Further even, if such conduct were found to be deficient, Petitioner has shown no prejudice.

O. Failure to Correctly Advise Petitioner Regarding Character Evidence

Petitioner argues that his trial lawyer advised Petitioner that if counsel put character witnesses on the stand, as Petitioner apparently wanted, that the State would be able to bring in prior acts of Petitioner, even though Petitioner did not have any prior convictions. Even assuming that counsel did in fact advise Petitioner as Petitioner alleges, counsel's decision not to put forward character witnesses was not necessarily deficient. As the State points out, any character witnesses offered by the Petitioner would have been subject to cross-examination about how well they knew Petitioner and the limitations of their knowledge about Petitioner. *See Poole v. State*, 295 Md. 167, 180-81, 453 A.2d 1218, 1226 (1983). Petitioner's trial counsel's decision not to offer character witnesses was not deficient based on the record before this Court. Even if it was, Petitioner has failed to articulate any prejudice.

P. Cumulative Effect of Trial Counsel's Instances of Ineffective Assistance

In sum, this Court has found that Petitioner's trial counsel provided ineffective assistance of counsel when counsel failed to (1) object to the two impermissible compound voir dire questions, (2) object to the State's burden-shifting during its rebuttal closing argument, and (3) file an application for a three-judge panel. However, because this Court has found that a *Brady* violation occurred in this case, the question of whether counsel's representation was cumulatively ineffective is moot.

CONCLUSION

For the reasons set forth in this Memorandum Opinion, the Court shall enter the Order attached hereto.

10/5/18

RONALD A. SILKWORTH, Judge
Circuit Court for Anne Arundel County

E-FILED
Court of Appeals
Suzanne C. Johnson,
Clerk of Court
1/24/2020 9:42 AM

CHARLES BRANDON MARTIN	*	**IN THE**
	*	**COURT OF APPEALS**
	*	**OF MARYLAND**
v.	*	**COA-PET-0357-2019**
	*	**CSA-REG-3207-2018** **CSA-REG-3209-2018**
	*	
STATE OF MARYLAND	*	**(No. 02-K-09-000831, Circuit Court for Anne Arundel County)**

ORDER

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

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

/s/ Mary Ellen Barbera
Chief Judge

DATE: January 24, 2020

APPENDIX C

ARNOLD DAVIS	*	IN THE CIRCUIT COURT
Petitioner,	*	FOR WICOMICO COUNTY
v.	*	STATE OF MARYLAND
	*	
STATE OF MARYLAND	*	CASE NO. 22-K-07-000196
	*	
Respondent.	*	
	*	

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OPINION AND ORDER

On August 27, 2007, the Petitioner, Arnold Davis, appeared as the defendant for a jury trial in the Circuit Court of Wicomico County, State of Maryland, with the Honorable W. Newton Jackson presiding. The Petitioner was represented by Arch McFadden, Esquire. The State of Maryland was represented by Sampson G. Vincent, Deputy State's Attorney of Wicomico County, State of Maryland. On August 28, 2007, the Petitioner was found guilty by jury of Count 5: second degree assault; Count 6: second degree assault; Count 7: second degree assault; Count 9: reckless endangerment; Count 10: reckless endangerment; Count 11: reckless endangerment; Count 12: reckless endangerment; Count 14: wear, carry, and transport handgun upon person; Count 15: use of a handgun during a felony or violent crime; Count 21: first degree assault; Count 22: second degree assault; Count 23: reckless endangerment; Count 24: wear, carry, and transport handgun upon person; and Count 25: use of a handgun during a felony or violent crime. On November 19, 2007, the Petitioner was sentenced to seventy-five (75) years and one (1) day under Counts 5, 6, 7, 10, 15, 21, and 25, with all other counts merging for purposes of sentencing.

On January 7, 2008, the Petitioner, through counsel, filed a Motion for Modification of Sentence. On February 29, 2008, a hearing was held on the Petitioner's Motion for Modification of Sentence, where the Motion for Modification was granted by the Honorable W. Newton Jackson. The Petitioner's sentence was modified, and he was resentenced to a period of sixty-two (62) years and one (1) day under Counts 5, 6, 7, 10, 15, 21, and 25.

APPENDIX D

On November 20, 2007, the Petitioner filed a Notice of Appeal to the Court of Special Appeals of the State of Maryland. On April 20, 2009, the Court of Special Appeals issued an unreported opinion affirming the judgment of the Circuit Court of Wicomico County, State of Maryland. On May 4, 2009, the Petitioner filed Writ of Certiorari to the Court of Appeals of the State of Maryland. The Court of Appeals denied the Writ on July 22, 2009. On March 29, 2010, the Petitioner filed a Petition for Writ of Actual Innocence. On October 7, 2010, a hearing was held on the Petitioner's Petition for Writ of Actual Innocence, to which this Court held the matter *sub curia* following said hearing. On October 26, 2010, this Court issued an opinion denying the Petition for Writ of Actual Innocence.

On March 14, 2014, the Petitioner filed a *pro se* Petition for Post-Conviction Relief. On March 28, 2014, the Petitioner filed a Motion to Withdraw his *pro se* Petition for Post-Conviction Relief, and on April 7, 2014, this Court issued an Order dismissing the Petitioner's *pro se* Petition for Post-Conviction Relief without prejudice.

On November 17, 2017, Nancy S. Forster, Esquire, entered her appearance on behalf of the Petitioner, and on that same day filed a Petition for Post-Conviction Relief. On December 13, 2017, the State of Maryland, through its Assistant State's Attorney for Wicomico County, James L. Britt, filed an Answer to the Petition for Post-Conviction Relief. On May 9, 2018, the Petitioner, through counsel, filed a Supplemental Petition for Post-Conviction Relief, and on May 21, 2019, the Petitioner, through counsel, filed a Second Supplemental Petition for Post-Conviction Relief. On March 26, 2019, Michael V. Calabrese, Assistant State's Attorney for Wicomico County, Maryland, entered his appearance on behalf of the State of Maryland. On May 22, 2019, the State filed a Supplemental Response to Petition for Post-Conviction Relief. On May 24, 2019, a Post-Conviction hearing was held before the Court, where the Petitioner was represented by Ms. Forster. The State of Maryland was represented by Michael V. Calabrese of the State's Attorney's Office for Wicomico County, Maryland. At the conclusion of the hearing, the Court held its ruling on the matter *sub curia*.

I. FACTS

On the evening of February 6, 2007, Ronald Robinson, Reginald Wallace, and the Petitioner forced their way into the home of Dawn Davis and Brandon Davis at 615 Homer Street, Salisbury, Maryland. At the time of the break-in, Dawn Davis, Brandon Davis,

Brandon Davis' sister, son, and niece were present in the home. Ronald Robinson and the Petitioner were both armed with pistols when they committed the break-in. When the three men entered the home, they said they wanted Brandon Davis' friend, Tavar Young. After Mr. Davis said that Mr. Young did not live at 615 Homer Street anymore, Mr. Davis was told to put his shoes on and to go with the intruders. Mr. Davis refused, after which he was punched and pistol whipped.

Mr. Davis was taken outside and put into a truck driven by another accomplice. The Petitioner, Mr. Wallace, and Mr. Robinson also got into the truck. In the meantime, Dawn Davis ran out of the house with her son and called the police. Corporal Jason King of the Salisbury Police Department responded. Corporal King saw the Petitioner fleeing and ordered him to stop. The Petitioner then reached for a gun in his pocket and fired one shot at Corporal King. Corporal King returned fire with two shots, one of which struck the Petitioner in his left hand. The Petitioner then fled into the nearby woods, after which he was found walking along North Park Drive by Trooper Mark Perdue. The Petitioner was then detained, placed into custody, and taken to the hospital where he was treated for his gunshot wound to his left hand. The Petitioner was charged and convicted by a jury of his peers, as described in the procedural history above.

II. ALLEGATIONS OF ERROR

The following allegations of error are now before the Court:

1. Trial Counsel rendered ineffective assistance of counsel for failing to properly investigate the State's case by failing to obtain and listen to a recorded statement of his co-defendant that was referenced in the discovery but not provided in the discovery package.
2. The Trial Court erred in asking *voir dire* questions in such a way that impermissibly shifted the burden of determining bias to the juror.
3. Trial Counsel rendered ineffective assistance of counsel for failing to object to the improper *voir dire* question that improperly shifted the burden of determining any bias directly to the juror.
4. The verdicts are inconsistent and Trial Counsel was ineffective for failing to object in a timely manner.
5. Trial Counsel rendered ineffective assistance of counsel for failing to file a second motion for modification of sentence and/or to inform the Petitioner of his right to do so after the initial sentence was modified by the Court.
6. The cumulative effect of the errors delineated above deny the Petitioner his constitutional right to the effective assistance of counsel as well as the right to a fair trial and sentencing.

III. STANDARD OF REVIEW

The Sixth and Fourteenth Amendments of the U.S. Constitution and Maryland Declaration of Rights guarantee a criminal defendant the right to effective assistance of counsel. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1968). There exists a strong presumption that counsel rendered effective assistance. *State v. Thomas*, 325 Md. 160, 171 (1992). A petitioner has the burden of proving ineffective assistance of counsel by showing: (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687.

As *Strickland* makes clear, defense counsel's performance is deficient if it falls below an objective standard of reasonableness under prevailing professional norms. *Id.* at 668. The petitioner is prejudiced when, but for counsel's errors, there was a "substantial" possibility that the result of the proceeding would have been different. *Bowers v. State*, 320 Md. 416, 426 (1990). A petitioner must establish both the deficient act and prejudice to the petitioner to prevail on a claim of ineffective assistance of counsel. If a petitioner fails to prove either prong, the ineffective assistance of counsel claim fails, and a court does not have to consider the other prong. *Strickland*, 466 U.S. at 696. The Court of Special of Appeals of Maryland has held that "when a post conviction court is asked to review an attorney's performance to determine whether that performance amounted to a deficient act, the reviewing court must be highly deferential to counsel." *Carter v. State*, 73 Md. App. 437, 440 (1988) (quoting *Strickland*, 466 U.S. at 689). The Court of Appeals of Maryland has stressed that an attorney performs deficiently if she makes a strategic decision that is not grounded in an adequate investigation of the facts. *See State v. Borchardt*, 396 Md. 586 (2007). The *Borchardt* Court explained that

> [e]ven though the standard of reasonableness spawns few hard-edged rules, nonetheless, before counsel makes a strategic decision, that decision must be founded upon adequate investigation and preparation. When we review and evaluate defense counsel's performance, we assess the reasonableness of counsel's decision and the reasonableness of the investigation underlying each decision. Before 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.

Id. at 604.

Thus, under *Strickland*, there is a strong presumption that counsel's performance was effective and that counsel's decisions were made in the exercise of reasonable professional judgment. *Schmitt v. State*, 140 Md. App. 1, 36 (2001).

IV. DISCUSSION

I. Trial Counsel rendered ineffective assistance of counsel for failing to properly investigate the State's case by failing to obtain and listen to a recorded statement of his co-defendant that was referenced in the discovery but not provided in the discovery package.

At the Post-Conviction hearing, the Petitioner, through counsel, withdrew this allegation of error. This allegation was the sole allegation in the Petition for Post-Conviction Relief filed on November 17, 2017. Since this allegation was the sole allegation in that Petition, it was importantly noted on the record that only this allegation was being withdrawn and not the Petition, as that Petition maintained the timeliness standard required under the Annotated Maryland Code of Criminal Procedure § 7-103(b).

II. The Trial Court erred in asking *voir dire* questions in such a way that impermissibly shifted the burden of determining bias to the juror.

At the Post-Conviction hearing, the Petitioner alleged that the Trial Court asked a requested *voir dire* question in such a way that impermissibly shifted the burden of determining juror bias to the juror rather than maintaining that determination with the Trial Court. The particular *voir dire* question was as follows: "The charges, as you may have heard, involve an allegation of attempted murder. Does the nature – and also kidnapping. Do the nature of the charges themselves, just alone, stir up such strong emotional feelings in you that you cannot be a fair and impartial juror in this case?" Trial Tr. 32 (August 27, 2007). Notably, the State argued that this particular allegation of error was waived because this allegation imputes error on the Trial Court and not on Trial Counsel. Thus, "the appropriate vehicle for such an averment is the direct appeal." State's Supp. Resp. to Pet. for Post-Conviction Relief 9.

This Court agrees with the State in that this allegation has been waived, and, therefore, denies relief under this allegation of error. We look to *State v. Torres* for guiding principles regarding waiver:

> [W]hen an allegation of error is raised in a post conviction case, the judge deciding the case should consider whether the allegation could have been raised before. If it could, the judge must then decide whether the allegation

> has been waived. In order to make this decision, he must first determine whether the allegation is premised upon a fundamental right or a non-fundamental right. If the right is a fundamental right, waiver, measured by the "intelligent and knowing" standard, must be proved. If the right is a non-fundamental right, however, the "intelligent and knowing" standard does not apply, and waiver is determined by general legal principles. The most significant of these principles is that the failure to exercise a prior opportunity to raise an allegation of error generally effects a waiver of the right to raise the matter at a later time.

86 Md. App. 560, 568 (1991). Importantly, if the right is waived, it cannot be litigated at a post-conviction proceeding. *Id.*

The *voir dire* question at issue here could have been raised at the Petitioner's trial. Therefore, this Court must determine whether the Petitioner has waived this allegation. As such, the question this Court must consider is whether there is a fundamental right to ask the "strong feelings" *voir dire* question at issue in this case. In *State v. Thomas*, 369 Md. 202, 214 (2002) (abrogated by *Pearson v. State*, 437 Md. 350 (2014)), as to the substance of the question, not whether the question must be asked), the Court of Appeals concluded that the "strong feelings" question must be asked by the trial judge when it is requested by a party to the case. According to *Oken v. State*, 343 Md. 256, 272 (1996), when a *voir dire* question must be requested to be asked by the trial judge, "a trial court does not have an affirmative obligation to" ask that *voir dire* question. In other words, the request must come before the trial judge is obligated to ask the question. "[B]ecause the right [to have the question asked] is triggered only upon request, it is subject to traditional procedural default and not the 'intelligently and knowingly' standard of waiver." *Id.* Thus, it stands that, since the "strong feelings" question must be requested, it is not a fundamental right. Therefore, ordinary waiver principles apply to the "strong feelings" question in this case, and a failure to raise this allegation of error at trial generally effects a waiver of the right to raise this matter at this post-conviction proceeding. This allegation of error is waived, and this Court denies the requested relief under this allegation of error.

III. Trial Counsel rendered ineffective assistance of counsel for failing to object to the improper *voir dire* question that improperly shifted the burden of determining any bias directly to the juror.

At the Post-Conviction hearing, the Petitioner alleged a similar allegation of error as propounded above; however, rather than placing the error on the Trial Court, the error is

instead placed firmly in the hands of Trial Counsel. While it may seem that this is the same allegation of error above, the important distinction is that this particular allegation is housed under the umbrella of ineffective assistance of counsel. Indeed, Maryland Courts have held that the most appropriate way to raise an ineffective assistance of counsel claim is through a post-conviction proceeding. *See Mosley v. State*, 378 Md. 548, 558-59 (2003).

Once again, this allegation of error involves the following *voir dire* question: "The charges, as you may have heard, involve an allegation of attempted murder. Does the nature – and also kidnapping. Do the nature of the charges themselves, just alone, stir up such strong emotional feelings in you that you cannot be a fair and impartial juror in this case?" Trial Tr. 32 (August 27, 2007). The Petitioner alleged that this question "directly violates the holding in *Dingle* [*v. State*, 361 Md. 1 (2000)] because it improperly shifted the burden of determining bias to the jurors." Supp. Pet. For Post Conviction Relief 6. The State, on the other hand, argued that, "[a]t the time of Petitioner's trial, [. . .] Trial Counsel[ ] applied the correct and controlling law with respect to the *voir dire* question asked." State's Supp. Resp. to Pet. For Postconviction Relief 13.

This Court agrees with the Petitioner. Unlike the allegation discussed previously, the Petitioner did not waive this allegation because the right to effective assistance of counsel is a fundamental right embodied in the Sixth Amendment of the United States Constitution and can only be waived through the knowing and voluntary standard. *Torres*, 86 Md. App. at 568. Here, the Petitioner did not knowingly and voluntarily waive his right to effective assistance of counsel. Therefore, we move on to analyze the merits of this allegation through the *Strickland* standard to determine if there was a deficient act by Trial Counsel that prejudiced the Petitioner.

We find that the Petitioner's Trial Counsel committed a deficient act by failing to object to the improper *voir dire* question propounded in this case. According to *Thomas*, 369 at 214 (abrogated by *Pearson*, 437 Md. at 350, on other grounds), on request, a trial court is required to ask the "strong feelings" question. However, regarding the form of a question,[1] a

[1] The State cites to *Thomas*, 369 Md. at 202, and *Sweet v. State*, 371 Md. 1 (2002), for the proposition that these cases held that it was reversible error to fail to ask a *voir dire* question inquiring if the prospective juror panel had such strong feelings regarding the criminal offenses such that it would affect their ability to fairly and impartially judge the merits of the case. However, while these cases held as such, *Thomas* and *Sweet* did not explicitly focus on the phrasing of the "strong feelings" question, and any phrasing that was mentioned in those cases was done so cursorily. *Dingle v. State*, 361 Md. 1 (2000), addresses the proper phrasing of asking a *voir dire* question, and thus is controlling in this case.

trial court cannot ask the "strong feelings" question as a compound question that includes asking whether a juror can be fair and impartial. *Dingle v. State*, 361 Md. 1, 10 (2000). When a juror is asked whether they have such strong feelings about a crime that makes them unable to be fair and impartial, that question places the ambit of control in the juror's possession, when in fact the decision on whether a juror can be fair and impartial should be decided by the trial court. *See Dingle*, 361 Md. at 10. This is precisely what happened in the Petitioner's case. The venire was asked a compound question involving strong feelings and whether they could be fair and impartial regarding those strong feelings. According to *Dingle*, that is an impermissible question, as the court "is unable to evaluate whether such persons are capable of conducting themselves impartially." *Id.* at 21. The question shifts the burden to the juror, and "[r]ather than advancing the purpose of *voir dire*, the form of the challenged [inquiry] in this case distorts and frustrates it." *Id.* The Court consequently finds that Trial Counsel committed a deficient act in failing to object to the propounded *voir dire* question.

It is important to note that much argument was devoted to *State v. Shim*, 418 Md. 37 (2011) and *Pearson*, 427 Md. at 350, during the Petitioner's post-conviction proceeding. In *State v. Shim*, the court held that a *voir dire* question nearly identical to that asked in the Petitioner's case was the correct way to ask the "strong feelings" question, whereas *Pearson* reversed *Shim* in light of the *Dingle* holding. Seemingly, these two cases appear to be pointedly relevant to the Petitioner's allegation of error. However, reference to these cases was misplaced, as can be seen through a simple timeline.

The Petitioner's trial was on August 27, 2007, *Dingle's* holding was announced in 2000, *Shim* was decided in 2011, and *Pearson* was decided in 2014. Thus, the precedent that bound Trial Counsel at the time of the Petitioner's trial came from *Dingle*, which states that it is reversible error to ask questions that shift, from the trial court to the prospective jurors, the responsibility to decide prospective juror bias. *Dingle*, 361 Md. at 21. Thus, Trial Counsel committed a deficient act in his failure to object to the *voir dire* question at issue in this case.

Our inquiry does not end here, however, as prejudice must be proven to find ineffective assistance of counsel. When dealing with an improper method of *voir dire*, there is a presumption of prejudice, as proof of prejudice is a "virtual impossibility." *Wright v. State*, 411 Md. 503, 513 (2009). Therefore, this Court finds that the Petitioner was prejudiced by his Trial Counsel's deficient act.

Out of an abundance of caution, this Court will address the tactical decision argument presented at the post-conviction proceeding. The State argued that the Trial Counsel's failure to challenge the "strong feelings" question was a tactical decision. *See State v. Matthews*, 58 Md. App. 243 (1984) (holding that if trial counsel has a sound tactical reason for his action, a court may not deem the action deficient). However, Trial Counsel could not actually point to any strategy that would have been helpful to the Petitioner by failing to object to the *Dingle* violation. This Court is convinced that there is no good reason for Trial Counsel's failure to object to the *Dingle* violation and finds that there is no cognizable tactical decision that the State could have relied upon as a defense to this allegation. Thus, for all the reasons set forth above, the Petitioner's requested relief is granted, and he shall be given a new trial.

IV. The verdicts are inconsistent, and Trial Counsel was ineffective for failing to object in a timely manner.

At the Post-Conviction hearing, the Petitioner argued that, since the Petitioner was found guilty of use of a handgun in a crime of violence and of second degree assault, as the predicate crime of violence, but was not found guilty of first degree assault, then the jury verdicts were legally inconsistent. The State, on the other hand, argued that the verdicts are not legally inconsistent, but merely factually inconsistent, which is currently allowable under Maryland law. The State also argued that the State of Maryland allowed inconsistent verdicts at the time of Petitioner's case, therefore no deficient act occurred because Petitioner's Trial Counsel was abiding by the law at the time when he did not object to the inconsistent verdict.

The Court finds in favor of the State regarding this allegation of error. While the Petitioner is indeed correct that inconsistent verdicts in criminal cases are at times eligible for relief, that was not the law at the time of Petitioner's trial in 2007. Indeed, *Price v. State*, 405 Md. 10 (2008) abrogated the allowance of inconsistent verdicts fairly recently. However, prior to 2008, inconsistent verdicts were tolerated by the courts of the State of Maryland. *See State v. Williams*, 397 Md. 172, 189 (2007); *Wright v. State*, 307 Md. 552, 576 (1986); *Shell v. State*, 307 Md. 46, 54 (1986); *Mack v. State*, 300 Md. 583, 601 (1984). As such, the Petitioner's trial was held on August 28, 2007, ten (10) months before the holding of *Price v. State* was announced.

Since the law at the time of the Petitioner's trial allowed for inconsistent verdicts, the Petitioner's Trial Counsel did not perform deficiently when he did not object to the inconsistent verdicts. Therefore, this Court finds in favor of the State regarding this allegation of error, and denies the relief requested under this allegation.

V. Trial Counsel was ineffective for failing to file a second motion for modification of sentence and/or inform Petitioner of his right to do so after the initial sentence was modified by the Court

At the Post-Conviction hearing, the Petitioner argued that, after a hearing on an initial motion for modification of sentence in which the Petitioner's sentence was subsequently modified, Trial Counsel rendered ineffective assistance of counsel by failing to properly inform the Petitioner of his right to file a second motion for modification of sentence and for failing to file a motion for modification. The Petitioner cited to the sentencing transcript as proof that the Petitioner was never informed on the record, by Trial Counsel or the Court, of his right to file a second motion for modification of sentence. The State argued that it was Trial Counsel's customary practice to inform his clients of their right to file a motion for modification of sentence, as Trial Counsel indicated at this post-conviction hearing, and the absence of such a conversation on the transcripts does not mean that Trial Counsel failed to inform the Petitioner of his rights. Indeed, the State argued additionally that since it was Trial Counsel's customary practice to tell his clients of their right to file a motion for modification of sentence, and no motion was filed, then the Petitioner did not ask his Trial Counsel to file a second motion for modification.

This Court agrees with the State and denies any relief under this allegation of error. If an attorney fails to file a motion for modification of sentence, whether a first or a second motion for modification, a petitioner may be entitled to post-conviction relief. If a defendant "asks his attorney to file a motion for modification of sentence, and the attorney fails to do so, the defendant is 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." *Matthews v. State*, 161 Md. App. 248, 252 (2005). Implicit in this statement of law is that the defendant must know that he has a right to file a motion for modification, because without that knowledge the defendant would not know to ask his counsel to file such a motion. Further, the above statement of law applies to a second motion for modification of sentence. *See Tolson v. State*, 201 Md. App. 512, 519 (2011).

While nothing was said in the sentencing hearing that the Petitioner could file a second motion for modification of sentence, Trial Counsel testified that, although he doesn't recall specifics of this case, he files motions for modification of sentence when asked by his clients, and he testified that it is his normal practice to inform his clients of their right to file a second motion for modification after an initial motion for modification is granted. We find no reason to disbelieve Trial Counsel and find his testimony to be credible. Therefore, this Court finds that the Petitioner was informed of his right to file a second motion for modification, and he did not request that a second motion for modification be filed. Thus, there is no deficient act, and any relief requested under this allegation of error is denied for failure to meet the first prong of the *Strickland* standard.

VI. The cumulative effect of the errors delineated above deny the Petitioner his constitutional right to the effective assistance of counsel as well as the right to a fair trial and sentencing.

In the Petitioner's Supplemental Petition for Post Conviction Relief, the Petitioner alleges that, "[i]n the event that no ground asserted, on its own, satisfies *Strickland's* two-prong standard for ineffective assistance of counsel, the court may consider whether all of these trial errors, when viewed in their entirety, deprived [the Petitioner] a fair trial." Supp. Pet. For Post Conviction Relief 10. The State did not make an argument regarding this allegation of error. However, this Court does not need to address this allegation of error, as the Petitioner stated both in his Supplemental Petition and at the post-conviction hearing that this allegation is merely a catchall allegation that should only be addressed "in the event that no ground asserted, on its own, satisfied *Strickland's* two-prong standard for ineffective assistance of counsel." *Id.* Since this Court has found in favor of the Petitioner regarding the third allegation of error listed in this opinion, we find that we do not need to address this allegation of error, and, therefore, deny the requested relief under this allegation of error.

ORDER

For the foregoing reasons, it is this 12th of August, 2019, by the Circuit Court for Wicomico County, State of Maryland, hereby

ORDERED, that the Petitioner's request for a new trial is hereby **GRANTED** for the reason's stated under the third allegation of error analysis of this opinion; and it is further,

ORDERED, that all other requests for relief from Petitioner's Petition, Supplemental Petition, and Second Supplemental Petition for Post-Conviction Relief are hereby **DENIED**.

08/12/2019 03:01:13 PM

Donald C. Davis

Donald C. Davis, Judge

DANNY BATTLE	*	**IN THE**
Petitioner,	*	**CIRCUIT COURT**
v.	*	**FOR BALTIMORE CITY**
STATE OF MARYLAND,	*	**CASE NO.: 108059020**
Respondent.	*	**PETITION NO: 11695**

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STATEMENT OF REASONS AND ORDER OF COURT

This matter comes before the Court for consideration of a Petition for Post Conviction Relief filed pursuant to Md. Code, Crim. Proc. § 7-101 *et seq.*

BACKGROUND

From July 28-31, 2009, Danny Battle (hereinafter "Petitioner") was tried by jury in the Circuit Court for Baltimore City before the Honorable David Young. On July 31, 2009, a jury found Petitioner guilty of first degree murder, use of a handgun in the commission of a crime of violence, and wearing, carrying or transporting a handgun. Judge Young sentenced Petitioner to life imprisonment for first degree murder, plus a consecutive sentence of 20 years for use of a handgun in the commission of a crime of violence (with the first five without the possibility of parole). The wear, carry, or transport charge merged.

Petitioner appealed the judgment, and the Court of Special Appeals affirmed on July 18, 2012.

Petitioner timely-filed the instant Petition for Post Conviction Relief, his first. A hearing on the instant petition was held before the undersigned judge on May 2, 2017. Petitioner was present and was represented by attorney Lisa J. Sansone. Assistant State's Attorney David Owens

represented the State. Trial counsel, attorney Margaret Mead and appellate counsel Celia Anderson Davis testified at the hearing.

ALLEGATIONS OF ERROR

Petitioner raised several allegations of ineffective assistance of counsel in his Petition. Specifically, Petitioner makes the following allegations of ineffective assistance of trial counsel: 1) failure to object to improper *voir dire*; 2) failure to object to inadmissible evidence; 3) failure to object to hearsay testimony; 4) giving a deficient opening statement and closing argument; 5) failure to request a curative instruction; 6) failure to recall Detective Jones as a witness; and 7) failure to move for a mistrial. Petitioner alleges ineffective assistance of appellate counsel as follows: 1) failure to raise meritorious issues on appeal. Finally, Petitioner argues that, if any individual error fails to warrant a new trial, the cumulative effect of all the errors warrants a new trial.

DISCUSSION

A. Standard of Review

A petitioner may, in the circuit court for the county in which his conviction took place, institute a proceeding to set aside or correct a judgment or sentence, provided that the alleged error has not been finally litigated or waived in the proceedings resulting in the conviction, or in any subsequent proceeding. Md. Code Ann., Crim. Proc., § 7-102(a). The Post Conviction Procedure Act does not create new grounds for granting relief. *Coleman v. State*, 221 Md. 30 (1959). Rather, it provides a trial level remedy for collaterally challenging the legality of incarceration on the premise(s) that the incarceration was imposed in violation of the United States or Maryland Constitutions; that the sentencing court lacked jurisdiction; that the sentence exceeded the legal maximum; or that the sentence is subject to collateral attack on any ground otherwise available

under a writ of *habeas corpus*, writ of *coram nobis*, or other common law or statutory remedies. *Davis v. State*, 285 Md. 19 (1979); *Wilson v. State*, 284 Md. 664 (1979), *aff'd in part, rev'd in part*, 44 Md. App. 1, *cert denied*, 446 U.S. 921 (1980); *Creswell v. Director, Patuxent Inst.*, 2 Md. App. 142 (1967).

The petitioner has the burden of proof in a post conviction proceeding and must prove facts to establish his allegations. *Cirincione v. State*, 119 Md. App. 471, 504, *cert denied*, 350 Md. 275 (1998); *State v. Hardy*, 2 Md. App. 150, 156 (1967). Maryland appellate courts have not defined the petitioner's burden except to say that it is "heavy." *Harris v. State*, 303 Md. 685, 697 (1985).

The hearing judge is the fact finder in a post conviction proceeding and must make factual findings upon all petitioner's contentions. *Farrell v. Warden*, 241 Md. 46 (1965); *Conley v. Warden*, 10 Md. App. 251 (1970).

B. **Ineffective Assistance of Counsel**

A criminal defendant has the right to not only be represented by counsel, but to have his counsel render effective assistance. *McMann v. Richardson*, 397 U.S. 759 (1970). The Supreme Court established the two-part test for measuring whether counsel rendered effective assistance in *Strickland v. Washington*, 466 U.S. 668 (1984). The test requires the petitioner show that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. In order to establish the first prong, the Supreme Court held that the petitioner bears the burden of: (1) identifying the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment; (2) showing that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment; and (3) overcoming the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.* at 690.

The second prong in the *Strickland* analysis, the "prejudice" component, requires the petitioner show that the deficiency in counsel's performance prejudiced his defense. 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 694. Both the deficient act and prejudice prongs must be proven to establish a claim of ineffective assistance of counsel. If either prong is not proven, the ineffective assistance of counsel claim fails, and the other prong need not be considered by the court. *Id.* at 696.

Trial counsel should not be deemed to have rendered ineffective assistance for failing to do frivolous or useless actions. *State v. Jourdan*, 22 Md. App. 648 (1974), *rev'd on other grounds*, 275 Md. 495 (1975). Indeed, trial counsel is not ineffective for doing things he or she has no reason to believe needed to be done. *Daley v. State*, 61 Md. App. 486 (1985). With these principles in mind, the court turns to Petitioner's specific allegation of ineffective assistance.

C. **Analysis**

1. **Failure to object to improper *voir dire*.**

Petitioner raises several arguments pertaining to *voir dire*. Specifically, Petitioner alleges that a) trial counsel failed to object to the trial judge's long series of questions; b) trial counsel failed to request a *voir dire* question regarding any strong feelings of jurors related to the charges; and c) trial counsel failed to object to multi-part questions that shifted the determination of juror bias to the jurors themselves.

a. **Failure to object to the trial judge's long series of *voir dire* questions**

Petitioner asserts that the trial judge asked a long series of questions, set forth above, after which only one juror responded in the affirmative. The transcript of the *voir dire* in the instant case reads, in pertinent part, as follows:

THE COURT: Is there a member of the panel who has ever been a witness for the prosecution in a criminal case? If so, was there anything about that experience that would lead you to feel that you may have some prejudice in this case, either for the prosecution or against the defendant?

Is there any member of this panel who has ever served as a member of a jury panel, state or federal, or have you ever served as a member of a Grand Jury panel, state or federal? If so, did anything occur during such jury service that might affect your ability to deal fairly and justly with the issues in this case, or which might in any way interfere with your ability to render a fair verdict in this case based solely on the evidence presented?

Is there any – is there any member of the panel who would be more likely to believe a witness for the prosecution because he or she is a prosecution witness?

Is there any member of this panel who has reservations about the rule of law which requires the State to prove its case beyond a reasonable doubt in order to justify a finding of guilt in a criminal case?

If selected it is your duty as a juror to decide the case solely on the evidence and on the law as explained to you. Is there any reason why any member of this panel cannot fully and impartially weigh the evidence in this case and render a verdict on that evidence and only that evidence, and if so, please stand.

(Transcript, July 28, 2009, 28-29)

This Court rejects Petitioner's analysis. It is evident from a review of the transcript, and as argued by the State, that the trial judge waited between questions to determine whether there affirmative responses. While a clearer record would have been established if the judge had punctuated his questions with "no affirmative responses" or something similar, clarity is found when the trial judge questioned Juror 776 at the bench, when the following transpired:

THE CLERK: 776

THE JUROR: Good Afternoon, Judge.

THE COURT: How are you doing? I asked if there was any reason whatsoever –

THE JUROR: Uh-huh.

THE COURT: — why any member of the panel could not be fair and impartial and you stood up.

THE JUROR: Yes.

THE COURT: What is the reason?

(Transcript, July 28, 2009, 72-73) Hence, the record establishes that the juror was responding to a single question, not to a series of questions as Petitioner alleges.

b. Failure to request a "strong feelings" question.

This Court also rejects Petitioner's analysis of what is commonly referred to as the "strong feelings" question. Petitioner argues that trial counsel failed to request and the trial court failed to ask about jurors' potential bias regarding the charges against Petitioner. However, taken as a whole, the trial court's *voir dire* adequately addressed the matter. The trial judge asked the following:

> THE COURT: Thank you. Is there any member of this panel who feels that you have such bias or prejudice towards a crime involving the use of a handgun or other assault weapon that you would feel you would not be able to be fair and impartial in this case?

(Transcript, July 28, 2009 at 27) The trial court began the *voir dire* process by advising the panel of the nature of the charges (*Id.* at 14) and later asked the panel whether there was any other reason why any juror could not be fair and impartial. (*Id.* at 29).

c. Failure to object to to object to multi-part questions that shifted the determination of juror bias to the jurors themselves.

Petitioner next argues that the trial judge asked improper, multi-part *voir dire* questions[1] in contravention of *Dingle v. State*, 361 Md. 1 (2000). This Court agrees. At the hearing on the

[1] Specifically, the following were improper, multi-part questions: 1) "Is there a member of the panel who has ever been a witness for the prosecution in a criminal case? If so, was there anything about that experience that would lead you to feel that you may have some prejudice in this case,

instant Petition, trial counsel could provide no reason for failing to object to such improper questions. It is clear that these *voir dire* questions were improper, as they shift the burden of determining one's ability to serve on a jury from the trial court to individual jurors. In *Dingle v. State*, 361 Md. 1 (2000), the Court of appeals made plain that such a question is improper:

> [I]n those cases where the venire person has had the questioned experience or association, but believes he or she can be fair, the procedure followed in this case shifts from the trial judge to the venire responsibility to decide juror bias. Without information bearing on the relevant experiences or associations of the affected individual venire persons who were not required to respond, the court simply does not have the ability, and, therefore, is unable to evaluate whether such persons are capable of conducting themselves impartially. Moreover, the petitioner is deprived of the ability to challenge any of those persons for cause. Rather than advancing the purpose of *voir dire*, the form of the challenged inquiries in this case distorts and frustrates it.

Id. at 21; *see Pearson v. State*, 437 Md. 350 (2014) (improper for court to ask each prospective juror to evaluate his or her own potential bias stemming from strong feelings about the crime(s) charged).

The Court finds that trial counsel's failure to object to the subject *voir dire* questions fell below an objectively reasonable standard of performance and therefore constituted ineffective assistance. Moreover, the Court finds that the prejudice prong of *Strickland, supra* has been satisfied. Prejudice is evident when looking to the Court of Appeals decision in *Wright v. State*, 411 Md. 503 (2009). There, the Court stated:

> Nor do we find persuasive the State's assertion that Wright was not prejudiced by the failure to conduct a proper *voir dire*. An incomplete *voir dire* necessarily means an incomplete investigation into potential juror

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either for the prosecution or against the defendant?"; and 2) "Is there any member of this panel who has ever served as a member of a jury panel, state or federal, or have you ever served as a member of a Grand Jury panel, state or federal? If so, did anything occur during such jury service that might affect your ability to deal fairly and justly with the issues in this case, or which might in any way interfere with your ability to render a fair verdict in this case based solely on the evidence presented?" (Transcript, July 28, 2009, 28-29)

> biases, which in turn leads to the very real possibility that the venire members failed to disclose relevant information. That potential failure forecloses further investigation into the venirepersons' states of mind, and makes proof of prejudice a virtual impossibility. *Cf. Williams v. State*, 394 Md. 98, 109–14, 904 A.2d 534, 540–43 (2006) (holding that a new trial was warranted where a juror did not properly disclose information during *voir dire* and there was no possibility of further investigating potential juror bias). Accepting the State's argument would require Wright to prove a negative-he would have to demonstrate that he was not prejudiced by a non-event (*i.e.*, a failure to disclose relevant information). We will not impose that insurmountable burden.

Id. at 513-14. The Court of Special Appeals has explained that "the applicable standard of review does not probe for actual prejudice. It presumes, when jury selection has been conducted by the method employed in *Wright* and in the case at bar, that there was prejudice..." *Height v. State*, 190 Md. App. 322, 330 (2010). Therefore, based on trial counsel's failure to object to the improper *voir dire* questions, the Court concludes that relief is warranted on this ground.

2. Failure to object to inadmissible evidence

Petitioner argues that trial counsel should have objected to questions regarding his juvenile probation and marijuana use as inadmissible prior bad acts evidence, citing *Ross v. State*, 276 Md. 664 (1976) and *Behrel v. Stat*, 151 Md. App. 64 (2003). At the hearing on the instant Petition, trial counsel explained that she did not want to emphasize her client's juvenile record by objecting and felt that it was strategically advantageous for the jury to hear the marijuana use testimony as the use took place together with the victim, thereby demonstrating comradery between defendant and victim as opposed to any type of animosity or motive to injure. In light of trial counsel's testimony, this Court concludes that Petitioner has failed to overcome the presumption that, under the circumstances, counsel's failure to object regarding his juvenile probation and marijuana use amounted to sound trial strategy. *Strickland*, *supra* at 690.

Petitioner argues that trial counsel was ineffective by failing to object to testimony that Petitioner had been arrested and incarcerated for the charges in the instant case. The Court agrees that trial counsel's performance fell below an objective standard of reasonableness when she did not object. However, the Court finds that Petitioner has failed to meet the prejudice prong of *Strickland, supra*. Specifically, this Court finds that the average layperson would assume that a person charged with murder would be arrested and detained at some point in time prior to trial.

Additionally, Petitioner argues that trial counsel should have objected to testimony that the family of the victim was upset and "screaming and hollering." Notably, trial counsel objected, Transcript, July 29, 2009 at 85-86. Even if there had been no objection, the Court finds no prejudice as the average juror would expect a family in shock from the violent loss of a loved one would be expressing themselves in this manner.

For the foregoing reasons, relief on this ground will be denied.

3. Failure to object to inadmissible hearsay

At trial, the State elicited hearsay testimony that placed Petitioner at the scene of the crime (Transcript, July 29, 2009 at 25, 40) and testimony that established Petitioner owned a jacket matching that worn by the perpetrator (*Id.* at 41). Trial counsel's failure to object fell below an objective standard of reasonableness. *Coleman v. State*, 434 Md. 320 (2013); *Perry v. State*, 357 Md. 37 (1999). It is clear that this testimony was damaging and highly prejudicial, especially in light of the fact that Petitioner's defense at trial included the argument that he was not at the witness's house on the day of the incident. Having found that both prongs of *Strickland* have been met, the Court concludes that relief is warranted on this ground.

4. Failure to give an adequate opening and closing statement

This Court finds Petitioner's arguments regarding opening statement and closing argument are wholly without merit. Trial counsel's explanation at the hearing on this matter made clear that her decisions on what to include and exclude from argument were pure trial strategy. With respect to opening, trial counsel explained that she *never* makes "promises" in opening statement. This makes good sense as the burden of proof is on the State and any reasonable defense attorney would not want to put herself in a position of creating an expectation in the jurors' minds that the defense case must actually meet expectations set in opening. Further, with respect to closing, while the word "motive" may not have been uttered, trial counsel testified that one of the themes in closing was that Petitioner had no ill will or reason to commit the crime. The Court finds that Petitioner has failed to meet the performance prong of *Strickland* and need not address the prejudice prong. Therefore, relief on this ground will be denied.

5. Failure to request a curative instruction

Petitioner alleges that trial counsel should have requested a curative instruction after the trial judge sustained an objection as follows:

> WITNESS: My daughter hooked up with me after her son died, and he like got through her, yeah, they were together about a year, nine months, something like that. I don't know exactly.
>
> STATE: When you say – I'm sorry, Brontray's son died?
>
> WITNESS: Her son got killed.
>
> TRIAL COUNSEL: Objection.
>
> COURT: Sustained.

(Transcript, July 29, 2009 at 8). There is absolutely nothing in the question or answer that connects the death of Brontray's to the Petitioner. The Court concludes that there was no reason for trial counsel to request a curative instruction and, therefore, her conduct was reasonable. As the

Petitioner has failed to establish deficient performance, the Court need not reach the prejudice prong of *Strickland*. Relief on this ground will be denied.

6. Failure to recall Detective Jones as a witness

Petitioner alleges that trial counsel was ineffective because she failed to call Detective Jones back to the stand to corroborate Defendant's alibi defense. While it would be ineffective performance for counsel to fail to subpoena an essential witness (trial counsel admitted at the hearing on this Petition that she failed to subpoena the detective and merely assumed he would be present), failing to subpoena a witness whose testimony would merely be cumulative is not ineffective. *Cirincione v. State*, 119 Md. App. 471, 489 (1998). Moreover, the Detective could not corroborate Petitioner's claim that he was elsewhere at the time of the crime. His testimony, at most, would have been that he followed up on Petitioner's claim of an alibi. This is not corroboration, it is diligent police investigation. The Court finds that the failure to present this testimony had no prejudicial effect and, therefore, relief on this ground will be denied.

7. Failure to move for a mistrial

Petitioner asserts that Juror number five failed to respond during the post-verdict polling of the jury. Petition cites the following transcript excerpt:

> CLERK: Juror number five, you have heard the verdict –
>
> DEFENDANT: Oh my god, come on, she knows me, she knows me.
>
> CLERK: Juror number five, you have heard the verdict read from the foreman was your verdict the same?
>
> CLERK: Juror number six, you heard the verdict read from the foreman was your verdict the same?
>
> JUROR: Yes.

(Transcript July 31, 2009 at 99).

The transcript of this portion of the trial is unclear. However, the Court finds it inconceivable that the Clerk would move on to the next juror without receiving any oral response from Juror number 5. Moreover, at the conclusion of the polling, the Clerk harkened the verdict and asked if it was the verdict of all the jurors. The transcript reflects that the jury, as a whole, responded in the affirmative. (Transcript, July 31, 2009 at 100). The Court infers that the affirmative response of all the jurors included Juror number 5. Relief on this ground will be denied.

8. **Failure of appellate counsel to raise numerous meritorious issues.**

Petitioner asserts that appellate counsel failed to raise the following issues on appeal: a) alleged error of trial court in allowing the State to inquire about the manner of death on re-direct examination of the medical examiner after failing to do so in direct; b) alleged error of trial court's denial of defense motion for mistrial after anonymous juror note stated that the juror knew Petitioner's family; c) alleged error of trial court in denying admission of Petitioner's prior consistent statement regarding his alibi.

In *State v. Gross*, 134 Md. App. 528 (2000), the Court of Special Appeals discussed the role of appellate counsel in determining which arguments to pursue on appeal:

> In *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986), the defendant's argument was that his lawyer had failed to raise a colorable issue and had, thereby, denied him effective assistance of appellate counsel. In rejecting that argument, the Supreme Court reaffirmed the role of appellate counsel in assessing the relative strengths and weaknesses of various arguments and in choosing, as a matter of tactics, which to push and which to ignore:
>
> > After conducting a vigorous defense at both the guilt and sentencing phases of the trial, counsel surveyed the extensive transcript, researched a number of claims, and decided that, under the current state of the law, 13 were worth pursuing on direct appeal. *This process of "winnowing out weaker arguments on appeal and focusing on" those more likely to prevail, far from being evidence of*

> *incompetence, is the hallmark of effective appellate advocacy.*
>
> 477 U.S. at 535–36, 106 S.Ct. 2661 (emphasis supplied).

Gross, 134 Md. App. at 557.

In the instant case, the Court concludes that appellate counsel's performance was not deficient, as there were clear reasons to refrain from raising the issues posited by Petitioner. Specifically, with respect to permitting the medical examiner to opine on redirect regarding the manner of death, the decision to permit the testimony was well within the trial judge's discretion. *Oken v. State*, 327 Md. 628 (1992). Further, the State could have moved to re-open the case if the oversight had been discovered later. This Court finds that the unlikely prospect of success on this issue provided appellate counsel ample reason to omit the argument from the brief on appeal.

This Court further finds no fault with appellate counsel's failure to raise what Petitioner describes as an "anonymous juror note" on appeal. Specifically, Petitioner alleges that a juror indicated in an anonymous note that he or she knew the Defendant's family. Petitioner further argues that the denial of mistrial based on the note was a viable appellate issue. As a matter of clarification, the transcript reflects that the note was, in fact, was made by Judge Young's staff when chambers received an anonymous call. (Transcript, 7/30/2009 at 107) After a lengthy discussion, Judge Young determined that manifest necessity for a mistrial did not exist and *voir dired* the jury as follows:

> Ladies and gentlemen of the jury, at this time I need to ask you as a jury a question. The question I would ask you is whether there is any reason whatsoever why any of you could not render a fair and impartial decision in this case based solely on the evidence and law presented to you during the course of the trial. If so, would you please stand and approach the bench.

(Transcript, 7/30/2009 at 115). There were no affirmative responses to the thus inquiry. This Court finds that the appellate court would likely leave the trial court's decision to deny a mistrial

to have been an appropriate exercise of discretion. Therefore, the unlikely prospect of success on this issue provided appellate counsel ample reason to omit the argument from the brief on appeal.

Finally, Petitioner argues that appellate counsel should have briefed the trial court's refusal to admit a prior consistent statement of Petitioner regarding his alibi. Petitioner sets forth no persuasive argument as to why the trial judge should have permitted the testimony or how the failure to admit the testimony constituted an abuse of discretion by the trial judge. *State v. Walker*, 345 Md. 293 (1997). As such, this Court finds that the unlikely prospect of success on this issue provided appellate counsel ample reason to omit the argument from the brief on appeal.

In sum, appellate counsel's performance did not fall below an objective standard of reasonableness and therefore the first prong of *Strickland* is not met. The Court need not reach the prejudice prong of *Strickland*. Relief on this ground will be denied.

9. Cumulative effect of errors.

The Court has concluded that trial counsel's failure to object to *voir dire* questions that required jurors to determine the question of bias themselves fell below an objectively reasonable standard of performance with prejudice to Petitioner. Further, the Court has found that failure to object to certain prejudicial hearsay testimony constitutes a second ground for relief. As the Court has found two discreet deficiencies to satisfy both prongs of *Strickland*, the "cumulative effect" of errors argument is inapplicable and relief on this ground will be denied.

D. Conclusion

The Court has concluded that trial counsel's failure to object to prejudicial hearsay testimony and *voir dire* questions that required jurors to determine the question of bias themselves warrant post conviction relief.

WHEREFORE, for the reasons stated above it is **ORDERED** by the Circuit Court for Baltimore City this 16th day of August, 2017, that the Post Conviction Petition in the above-captioned matter be, and hereby is, **GRANTED**; it is further

ORDERED that the convictions in the above-captioned matter be, and hereby are, **VACATED**; it is further

ORDERED that Petitioner's Request for a New Trial be, and hereby is **GRANTED**; it is further

ORDERED that Petitioner be remanded to the custody of the Division of Pre-Trial Detention and Services without bail pending a new trial.

JEFFREY GELLER - PART 10
JUDGE
THE JUDGES SIGNATURE APPEARS
ON THE ORIGINAL DOCUMENT
TRUE COPY
TEST
Marilyn Bentley
NTLEY, CLERK

CIRCUIT COURT FOR BALTIMORE CITY
1898

JONATHAN EVERETT	*	**IN THE**
Petitioner,	*	**CIRCUIT COURT**
v.	*	**FOR BALTIMORE CITY**
STATE OF MARYLAND,	*	**CASE NO.: 106292028**
Respondent.	*	**PETITION NO: 11344**

* * * * * * * * * * * * *

STATEMENT OF REASONS AND ORDER OF COURT

This matter comes before the Court for consideration of a Petition for Post Conviction Relief filed pursuant to Md. Code, Crim. Proc. § 7-101 *et seq.*

BACKGROUND

On August 13, 2007, Jonathan Everett (hereinafter "Petitioner") was tried by jury in the Circuit Court for Baltimore City with the Honorable Roger Brown presiding. On August 20, 2007 a jury found Petitioner guilty of first degree murder, conspiracy to commit first degree murder, use of a handgun in the commission of a crime of violence, and wearing, carrying or transporting a handgun. The State's case, *inter alia*, was that Petitioner borrowed the car of witness Ryan Spencer, drove to the 2100 block of Coco Lane in Baltimore City, and shot and killed Tionne White. Judge Brown sentenced Petitioner to two concurrent life sentences for the murder and conspiracy counts, and an additional concurrent twenty years (with the first five without the possibility of parole) for the handgun count.

Petitioner appealed the judgment, and the Court of Special Appeals affirmed on August 1, 2009.

Petitioner timely-filed the instant Petition for Post Conviction Relief, his first. A hearing on the instant petition was held before the undersigned judge on September 8, 2015. Petitioner was present and was represented by attorney Lisa J. Sansone. Assistant State's Attorney Robin Wherley represented the State. Trial counsel, attorney Margaret Meade, and Petitioner both testified at the hearing.

ALLEGATIONS OF ERROR

Petitioner raised several allegations of ineffective assistance of counsel in his Petition. Specifically, Petitioner alleges that trial counsel's performance constituted ineffective assistance of counsel by 1) failing to object to multi-part *voir dire* questions that allowed jurors to make a self-determination of bias; 2) failing to request a *voir dire* question regarding any anti-drug bias; 3) introducing evidence that the victim said that "Brock" shot him; 4) failing to establish that witness Ryan Spencer did not see Petitioner wearing gloves or wiping fingerprints off the car, in light of the fact that the absence of fingerprints was a critical fact in support of the defense that he was not driving the car; 5) failing to move into evidence Detective Naylor's report of a witness statement that described the shooters as dark skinned when Petitioner is not dark skinned; 6) failing to object to a rebuttal witness who had violated the trial court's sequestration order; 7) failing to move for a mistrial when a juror informed the court that she "wanted to scream"; 8) failing to convey plea offers to Petitioner; 9) failing to consult with Petitioner regarding his desire to testify before resting the defense case; 10) failing to file motion for modification of sentence when Petitioner requested that she do so; 11) failing to move to suppress evidence seized in a cell phone; and 12) failing to raise viable issues on appeal. Petitioner further argues that, if any individual error fails to warrant a new trial, the cumulative effect of all the errors warrants a new trial.

DISCUSSION

A. Standard of Review

A petitioner may, in the circuit court for the county in which his conviction took place, institute a proceeding to set aside or correct a judgment or sentence, provided that the alleged error has not been finally litigated or waived in the proceedings resulting in the conviction, or in any subsequent proceeding. Md. Code Ann., Crim. Proc., § 7-102(a). The Post Conviction Procedure Act does not create new grounds for granting relief. *Coleman v. State*, 221 Md. 30 (1959). Rather, it provides a trial level remedy for collaterally challenging the legality of incarceration on the premise(s) that the incarceration was imposed in violation of the United States or Maryland Constitutions; that the sentencing court lacked jurisdiction; that the sentence exceeded the legal maximum; or that the sentence is subject to collateral attack on any ground otherwise available under a writ of *habeas corpus*, writ of *coram nobis*, or other common law or statutory remedies. *Davis v. State*, 285 Md. 19 (1979); *Wilson v. State*, 284 Md. 664 (1979), *aff'd in part, rev'd in part*, 44 Md. App. 1, *cert denied*, 446 U.S. 921 (1980); *Creswell v. Director, Patuxent Inst.*, 2 Md. App. 142 (1967).

The petitioner has the burden of proof in a post conviction proceeding and must prove facts to establish his allegations. *Cirincione v. State*, 119 Md. App. 471, 504, *cert denied*, 350 Md. 275 (1998); *State v. Hardy*, 2 Md. App. 150, 156 (1967). Maryland appellate courts have not defined the petitioner's burden except to say that it is "heavy." *Harris v. State*, 303 Md. 685, 697 (1985).

The hearing judge is the fact finder in a post conviction proceeding and must make factual findings upon all petitioner's contentions. *Farrell v. Warden*, 241 Md. 46 (1965); *Conley v. Warden*, 10 Md. App. 251 (1970).

B. Ineffective Assistance of Counsel

A criminal defendant has the right to not only be represented by counsel, but to have his counsel render effective assistance. *McMann v. Richardson*, 397 U.S. 759 (1970). The Supreme Court established the two-part test for measuring whether counsel rendered effective assistance in *Strickland v. Washington*, 466 U.S. 668 (1984). The test requires the petitioner show that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. In order to establish the first prong, the Supreme Court held that the petitioner bears the burden of: (1) identifying the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment; (2) showing that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment; and (3) overcoming the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.* at 690.

The second prong in the *Strickland* analysis, the "prejudice" component, requires the petitioner show that the deficiency in counsel's performance prejudiced his defense. 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 694. Both the deficient act and prejudice prongs must be proven to establish a claim of ineffective assistance of counsel. If either prong is not proven, the ineffective assistance of counsel claim fails, and the other prong need not be considered by the court. *Id.* at 696.

Trial counsel should not be deemed to have rendered ineffective assistance for failing to do frivolous or useless actions. *State v. Jourdan*, 22 Md. App. 648 (1974), *rev'd on other grounds*, 275 Md. 495 (1975). Indeed, trial counsel is not ineffective for doing things he or she has no

reason to believe needed to be done. *Daley v. State*, 61 Md. App. 486 (1985). With these principles in mind, the court turns to Petitioner's specific allegation of ineffective assistance.

C. Analysis

1. **Failure to object to multi-part voir dire questions that allowed jurors to make a self-determination of bias.**

During *voir dire* in the instant case, the trial court asked the following:

> The next question that I ask of you will be asked in four parts . . . Have you or any member of your immediate family ever been the victims of crime, accused of committing a crime, convicted of a crime, or have any opinions with regard to handguns and the use of handguns that would make it – or any position with regards to handguns that would make it difficult for you to render a fair and impartial verdict in this case based solely on the evidence you hear in this courtroom?

(Tr. 8/13/07 at 136-37)

The Court agrees with Petitioner that the *voir dire* question was improper, as it shifts the burden of determining one's ability to serve on a jury from the trial court to individual jurors. In *Dingle v. State*, 361 Md. 1 (2000), the Court of appeals made plain that such a question is improper:

> [I]n those cases where the venire person has had the questioned experience or association, but believes he or she can be fair, the procedure followed in this case shifts from the trial judge to the venire responsibility to decide juror bias. Without information bearing on the relevant experiences or associations of the affected individual venire persons who were not required to respond, the court simply does not have the ability, and, therefore, is unable to evaluate whether such persons are capable of conducting themselves impartially. Moreover, the petitioner is deprived of the ability to challenge any of those persons for cause. Rather than advancing the purpose of *voir dire*, the form of the challenged inquiries in this case distorts and frustrates it.

Id. at 21; *see Pearson v. State*, 437 Md. 350 (2014) (improper for court to ask each prospective juror to evaluate his or her own potential bias stemming from strong feelings about the crime(s) charged).

The Court finds that trial counsel's failure to object to the subject *voir dire* question fell below an objectively reasonable standard of performance and therefore constituted ineffective assistance. Moreover, the Court finds that the prejudice prong of *Strickland, supra* has been satisfied. Prejudice is evident when looking to the Court of Appeals decision in *Wright v. State*, 411 Md. 503 (2009). There, the Court stated:

> Nor do we find persuasive the State's assertion that Wright was not prejudiced by the failure to conduct a proper *voir dire*. An incomplete *voir dire* necessarily means an incomplete investigation into potential juror biases, which in turn leads to the very real possibility that the venire members failed to disclose relevant information. That potential failure forecloses further investigation into the venirepersons' states of mind, and makes proof of prejudice a virtual impossibility. *Cf. Williams v. State*, 394 Md. 98, 109–14, 904 A.2d 534, 540–43 (2006) (holding that a new trial was warranted where a juror did not properly disclose information during *voir dire* and there was no possibility of further investigating potential juror bias). Accepting the State's argument would require Wright to prove a negative-he would have to demonstrate that he was not prejudiced by a non-event (*i.e.*, a failure to disclose relevant information). We will not impose that insurmountable burden.

Id. at 513-14. The Court of Special Appeals has explained that "the applicable standard of review does not probe for actual prejudice. It presumes, when jury selection has been conducted by the method employed in *Wright* and in the case at bar, that there was prejudice..." *Height v. State*, 190 Md. App. 322, 330 (2010). Therefore, based on trial counsel's failure to object to the improper *voir dire* question, the Court concludes that relief is warranted on this ground.

2. **Failure to request a *voir dire* question regarding any anti-drug bias.**

Petitioner argues that trial counsel should have requested a *voir dire* question regarding "drug bias" asserting that a biased juror might discredit the testimony of Mr. Davidson, the sole witness for the defense who had admitted to selling drugs. The Court finds that this conclusion is pure conjecture and that counsel's failure to request such a *voir dire* question was objectively reasonable. Therefore, the Court concludes that Petitioner failed to establish the deficient

performance prong of *Strickland* and will not consider any prejudice associated with this allegation.

3. Counsel introduced evidence that the victim said "Brock" shot him.

Petitioner argues that trial counsel was ineffective because her cross-examination of a detective elicited testimony that the victim stated "Brock" (Petitioner's middle name/nickname) had shot him. At the hearing on the instant petition, trial counsel offered a reasonable explanation that her strategy was to demonstrate during cross-examination that the name was supplied by the police themselves; the strategy simply "backfired." Where counsel has a valid tactical reason for his or her actions, those actions do not constitute ineffective assistance of counsel. *State v. Matthews*, 58 Md. App. 243, 247 (1984). Moreover, trial counsel should not be faulted for reasonable miscalculations of strategy or lack of foresight. *Harrington v. Richter*, 562 U.S. 86, 110 (2011). The Court concludes that, although the trial strategy "backfired," it was nonetheless strategy that did not fall below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. Having concluded that Petitioner failed to establish the deficient performance prong of *Strickland*, the Court will not consider any prejudice associated with this allegation.

4. Failure to establish that witness Ryan Spencer did not see Petitioner wearing gloves or wiping fingerprints off the car.

Petitioner's defense at trial, *inter alia*, was that he never borrowed the car that was involved in the shooting. In support of this position, the defense pointed to a lack of Petitioner's fingerprints in or about the vehicle. As such, Petitioner argues that it was crucial for counsel to elicit testimony to show that Petitioner was never seen wearing gloves or wiping prints off of the vehicle.

The Court views this as purely a matter of trial strategy. It is well within the purview of trial counsel to determine which avenues of attack are most likely to succeed. Furthermore, there

is no way to discern what, if any, effect such testimony would have on a jury. Trial counsel is granted wide latitude in his or her choice of trial strategies. *Harrington*, 562 U.S. at 107. The Court finds, therefore, that trial counsel's performance was not deficient in this regard. As Petitioner has failed to establish that trial counsel's performance was ineffective with respect to this allegation, the Court need not consider any attendant prejudice.

5. Failure to move for the introduction of Detective Naylor's report into evidence.

Petitioner alleges that trial counsel was ineffective because a police report contained a witness statement describing the shooters in a way that was inconsistent with Petitioner's appearance. The Court has concluded that the report constitutes inadmissible hearsay and that the prior statements within the report fail to meet the requirements of Md. Rule 5-802.1. Therefore, trial counsel's failure to move for the report to be admitted into evidence did not constitute ineffective assistance of counsel. Simply put, trial counsel's failure to engage in a futile action does not constitute ineffective assistance of counsel. *See Gilliam v. State*, 331 Md. 651, 671 (1993)(failure to investigate alternative theory of defense in favor of "the best and probably the only legitimate defense" was not ineffective); *Lindsey v. Smith*, 820 F.2d 1137, 1152 (11th Cir.1987) (failure to pursue futile strategy not ineffective assistance);

6. Failure to object to the State calling a rebuttal witness who had violated the Court's sequestration order.

At trial, the State called Ryan Spencer as a rebuttal witness. Specifically, he was called to refute testimony regarding his conduct as a drug dealer. At the post conviction hearing, the Court heard testimony from trial counsel who indicated that Mr. Spencer was speaking outside the courtroom with other witnesses and about his testimony. Furthermore, she acknowledged that she should have put her objection on the record and only failed to do so because "it was clear that the

judge was going to let it in" based on a conversation in chambers. The Court finds that trial counsel's failure to object was deficient. The Court further finds that the failure to object and place this matter on the record prejudiced Petitioner, as it permitted the State to substantially weaken the defense and it precluded Petitioner from raising the issue on direct appeal. *See Gross v. State*, 371 Md. 334, 350 (2002) (failing to preserve a claim that would have had a substantial possibility of resulting in a reversal of petitioner's conviction constitutes ineffective assistance of counsel). Therefore, relief on this ground is warranted.

7. **Failure to move for a mistrial when a juror informed the court that she "wanted to scream."**

During the course of deliberations, the jury submitted several questions to the trial judge in the form of handwritten notes. Written on the reverse side of one note was the phrase "I want to scream." While the Court agrees that a better practice would have been for counsel to ask the trial judge to *voir dire* the jury as to any problems related to the note, this Court concludes that trial counsel's performance was objectively reasonable. The law does not guarantee perfect assistance of counsel, only a "reasonably competent attorney." *Harrington*, 562 U.S. at 110. Moreover, it is purely speculative that the jury note meant that the jury was prepared to acquit petitioner and were persuaded otherwise. The instant case is distinguishable from other cases in which there was significant risk of a rushed decision. *See State v. Harris*, 428 Md. 700, 721 (2012) (juror informed that her grandmother died); *Benjamin v. State*, 131 Md. App. 527, 540-45 (2000) (juror specifically asked to leave, stating she could not take it anymore, and did not participate in deliberations).

8. **Failure to convey plea offers to Petitioner.**

Petitioner alleges that trial counsel failed to convey two plea offers to him, one made by the prosecutor and one made by the trial judge. Of the various allegations of ineffective assistance,

the Court views this as the most egregious. Having considered the testimony of Petitioner, which the Court finds to be credible, in conjunction with the testimony of trial counsel, it is evident that two plea offers were never conveyed to Petitioner. Trial counsel, who had very specific memories of this trial and stated, with respect to the trial judge's offer of 10 years, "I don't know if I conveyed it." As to the State's offer of 20-25 years, trial counsel indicated that it was probably made as the parties were sent to trial but "doesn't recall discussing the plea with [Petitioner]." Trial counsel had specific memories of discussing a possible plea with Petitioner's family, but not with Petitioner himself. Although the State cross-examined Petitioner in an effort to demonstrate that his position on the plea offers was self-serving, the Court was unmoved by that line of questioning. Having paid close attention to the manner in which Petitioner testified, the Court deems the testimony credible. This coupled with trial counsel's testimony establishes that the plea offers were not conveyed.

The Court of Appeals, in *Williams v. State*, 326 Md. 367, 378 (1992), stated that "[a] trial attorney performs deficiently when he or she does not disclose to the client that the state has made a plea offer." *Id.* at 378; *see also* Md. Rules of Professional Conduct, Rules 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered. . . ."; 1.4 ("[a] lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . [and] keep the client reasonably informed about the status of the matter). Based upon the clear state of the law and professional standards pertaining to plea offers, this Court finds that Petitioner has met the performance prong of *Strickland*. This Court concludes that, "but for the deficient performance by counsel, there is a substantial possibility that the defendant would have accepted the plea agreement." *Williams*, 326 Md. at 374-75. The prejudice to Petitioner in this instance is readily

evident. Had he accepted the trial court's offer he would have been released by now. Instead he is serving a life sentence. The Court will grant relief on this ground.

9. **Failure to consult with Petitioner regarding his desire to testify before resting the defense case.**

The Court views this allegation in a similar manner as the failure to convey plea offers. Petitioner's credible testimony, coupled with trial counsel's testimony and the failure to put Petitioner's election to testify or remain silent on the record, leads the Court to conclude that trial counsel failed to consult with Petitioner as to his desire to testify prior to resting the defense case. Petitioner, who had no prior convictions at the time of trial, testified that as the jury was deliberating he was left confused as to why he never had the opportunity to testify. Trial counsel testified that she prepared Petitioner to testify, believed he would be a good witness, and could think of no reason why she did not call him to testify.

Maryland's appellate courts have stressed the importance of the right to testify in one's own defense and the non-delegable nature of the election to testify or remain silent:

> That a criminal defendant has a fundamental constitutional right to testify in his or her own defense is a concept "deeply entrenched in our modern system of jurisprudence." *Jordan*, 323 Md. at 155, 591 A.2d at 876 (citing *Rock v. Arkansas*, 483 U.S. 44, 49–50, 107 S.Ct. 2704, 2708, 97 L.Ed.2d 37, 44–45 (1987)). The right stems from three constitutional sources: the Fourteenth Amendment due process guarantee of a fair trial, which necessarily entitles a defendant "an opportunity to be heard in his defense"; the Sixth Amendment right to compulsory process, which necessarily includes a defendant's right to testify on his or her own behalf; and the Fifth Amendment guarantee against compelled self-incrimination, which is "fulfilled only when an accused is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Rock*, 483 U.S. at 51–53, 107 S.Ct. at 2709–10, 97 L.Ed.2d at 46 (internal quotation marks and citations omitted).

Dallas v. State, 413 Md. 569, 582 (2010).

Unlike many strategic decisions left to trial counsel, only a defendant may make the election to testify or remain silent. *Jones v. Barnes*, 463 U.S. 745,751 (1983); *see also Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)(trial counsel may not waive defendant's right to testify).

The Court finds that trial counsel's failure to advise Petitioner of his right to testify or remain silent prior to resting the defense case was ineffective, as it fell below an objectively reasonable standard of performance. Moreover, counsel's deficient performance led to the deprivation of a fundamental right, which is clearly prejudicial to Petitioner. Further still, in a case where the State could not present a positive identification of Petitioner as the shooter or a motive for him to commit the shooting, Petitioner's defense was prejudiced by the fact that his counsel negligently failed to call him to testify or advise him of that right prior to resting the defense case. The Court will grant relief on this ground.

10. Failure to file motion for modification of sentence when Petitioner requested that she do so.

Trial counsel admits that she or her office "dropped the ball" with respect to filing a motion for modification of sentence. Had this been the only allegation of deficient performance, the Court would afford Petitioner the opportunity to file a belated motion. *State v. Flansburg*, 345 Md. 694 (1997) (requiring that trial counsel file a motion to reconsider sentence when asked to do so by a defendant). This issue, however, is moot based on the relief that the Court is granting on other grounds herein.

11. Failure to move to suppress evidence seized in a cell phone.

Petitioner has failed to establish the predicate facts upon which this allegation is based. Therefore, relief will not be granted based on this alleged deficiency of trial counsel

12. Failure to raise viable issues on appeal.

Petitioner alleges that appellate counsel failed to appeal the trial court's rulings on objections during the State's closing argument and the trial court's ruling as to the introduction of Mr. Spencer's prior drug arrests.

In *State v. Gross*, 134 Md. App. 528 (2000), the Court of Special Appeals discussed the role of appellate counsel in determining which arguments to pursue on appeal:

> In *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986), the defendant's argument was that his lawyer had failed to raise a colorable issue and had, thereby, denied him effective assistance of appellate counsel. In rejecting that argument, the Supreme Court reaffirmed the role of appellate counsel in assessing the relative strengths and weaknesses of various arguments and in choosing, as a matter of tactics, which to push and which to ignore:
>
> > After conducting a vigorous defense at both the guilt and sentencing phases of the trial, counsel surveyed the extensive transcript, researched a number of claims, and decided that, under the current state of the law, 13 were worth pursuing on direct appeal. *This process of "winnowing out weaker arguments on appeal and focusing on" those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.*
>
> 477 U.S. at 535–36, 106 S.Ct. 2661 (emphasis supplied).

Gross, 134 Md. App. at 557.

In the instant case, the Court concludes that appellate counsel's performance was not deficient, as there were clear reasons to refrain from raising the issues posited by Petitioner. Specifically, Petitioner argues that appellate counsel should have challenged the trial court's ruling on objections when the prosecutor argued 1) that the jury should infer that the victim state that "Brock" shot him; 2) that he was surprised that the defense chose to call certain witnesses instead of remaining silent; 3) that the jury "best believe they (other witnesses) would have been in here testifying because we would have bought them in here."; 4) that the State's witness' tattoos were

innocent by showing the jury the prosecutor's own tattoos. For each of these objections, an appellate attorney reviewing the record would be faced with established law that attorneys are given wide berth as to what they may say in closing argument. While a "prosecutor should make no remarks calculated to unfairly prejudice the jury against the defendant. . . . the fact that a remark made by the prosecutor in argument to the jury was improper does not necessarily compel the conviction be set aside . . . unless it appears that the jury was actually misled or likely to have been misled or influenced to the prejudice of the accused by the remarks of the State's Attorney." *Wilhelm v. State*, 272 Md. 404, 415-16 (1974) (citations omitted). Given these legal principles, it was entirely reasonable for appellate counsel to refrain from raising the closing argument on appeal in favor of other issues. Furthermore, with respect to the issue of witness Spencer's prior drug arrests, this Court concludes that the issue is without merit, as the arrest is not admissible to impeach or show character of a witness. Md. Rule 5-608(b); *Pantazes v. State*, 376 Md. 661, 686-87 (2003). Counsel is not ineffective for failing to object to pursue motions that have no merit. *State v. Puvey*, 129 Md. 1, 8-11, *cert. denied*, 480 U.S. 910 (1987). In sum, appellate counsel's performance did not fall below an objective standard of reasonableness and therefore the first prong of *Strickland* is not met.

13. Cumulative effect of errors.

The Court has concluded that trial counsel's failure to object to *voir dire* questions that required jurors to determine the question of bias themselves, trial counsel's failure to object to the State calling a rebuttal witness seen violating the sequestration order, trial counsel's failure to advise Petitioner of his right to testify before resting the defense case, and trial counsel's failure to communicate plea offers all fell below an objectively reasonable standard of performance and that each deficiency carried with it prejudice to Petitioner. The Maryland Court of Appeals held that

the cumulative effect of numerous errors by counsel also constitutes ineffective assistance. *Bowers v. State*, 320 Md. 416, 436 (1990). Even if this Court had concluded that the prejudice prong of *Strickland* had not been met as to the individual areas of deficient performance, the court finds that trial counsel's deficient performance pervaded virtually every aspect of trial – settlement negotiations, jury selection, and the substantive presentation of a defense. Therefore, even if these deficiencies were not prejudicial on their own, the cumulative effect was to prejudice Petitioner so greatly as to deny him his constitutional right to effective assistance of counsel.

D. Conclusion

The Court has concluded that trial counsel's failure to object to *voir dire* questions that required jurors to determine the question of bias themselves, trial counsel's failure to object to the State calling a rebuttal witness seen violating the sequestration order, trial counsel's failure to advise Petitioner of his right to testify or remain silent prior to resting the defense case, and trial counsel's failure to communicate plea offers to Petitioner each warrant post conviction relief.

WHEREFORE, for the reasons stated above it is **ORDERED** by the Circuit Court for Baltimore City this 23RD day of October, 2015, that the Post Conviction Petition in the above-captioned matter be, and hereby is, **GRANTED**; it is further

ORDERED that the convictions in the above-captioned matter be, and hereby are, **VACATED**; it is further

ORDERED that Petitioner's Request for a New Trial be, and hereby is **GRANTED**; it is further

ORDERED that Petitioner be remanded to the custody of the Division of Pre-Trial Detention and Services without bail pending a new trial.

Judge Jeffrey M. Geller
Judge's Signature Appears on Original Document
Circuit Court for Baltimore City

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND,

vs.

Case Number:
02-K-09-000831

CHARLES BRANDON MARTIN,

Defendant.
_____/

OFFICIAL TRANSCRIPT OF PROCEEDINGS

TRIAL TO THE COURT

Anne Arundel, Maryland

Wednesday, April 28, 2010

BEFORE:

HONORABLE PAMELA L. NORTH

APPEARANCES:

For the Plaintiff:

ANASTASIA PRIGGE, ESQUIRE
CRIGHTON CHASE, ESQUIRE

For the Defendant:

LEONARD STAMM, ESQUIRE
JOHANNA LESHNER, ESQUIRE

Electronic Proceedings Transcribed by: Erica L. Van Ostrand

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APPENDIX E

Frankie comes back with white, medical-style tape, which obviously is very important for what the police found at the crime scene. Mike, at this point, is like, "What's going on?" And he was told to mind his own business, and Mike, at this point, he just kind of stays out of it. And so, meanwhile, Charles Brandon Martin and Gerald Burkes left the house around noonish sometime. We will establish the date through the witnesses. They leave the house.

Hours go by. Mike goes to school, picks the daughter back up from school, and he comes home, and Charles Brandon Martin, the defendant, as well as Gerald Burkes, aren't back, but late in the afternoon, around 5:00-ish, they come back, and Gerald Burkes is quite hopped up. He knows that. But to be honest, Michael doesn't really talk to the defendant very much because he doesn't really like him. He feels that his sister has been used by him. He's seen that he is kind of a player, and just candidly, tries to avoid him as much as he could, given that they had a fair amount of contact because it was Maggie's house. Michael will also tell you that when Brandon came back, that there was a paper bag, that, that paper bag was given to Frankie, and Frankie was told, "Get rid of it."

So, that provides a lot of important information about the case. But we're not done. There's still another important witness to talk about, the important witness that

was saved for the last -- her name is Sheri Carter and Sheri Carter is what we call girlfriend number three.

Now, Sheri Carter was very much in love with the defendant, Brandon, and she thought they were going to get married and she obviously had no idea about the wife, and at least the two other girlfriends, and she's like a working, regular girl, and you know, she recognizes that in hindsight, these flags were up that the defendant was, kind of, in, he was out. He had periods where he was a little bit unaccounted for. He was a little bit mysterious about where he lived. She thought it was weird that they always stayed at her place. But she was in love and she also, at that time, was in a building (Indiscernible) so she worked all the time, so she didn't really have a lot of free time to sit and try to figure out why these things were not working out.

And we talked early on about the defendant having made some mistakes, which now include not knowing much about ballistics, or perhaps not realizing that he left not one, but two DNA samples behind.

But I think what the crux of the issue is that the defendant, being a very manipulative person who is used to having all these lives and worlds, it all depended on his ability to manipulate and control all these women, and it all worked fine until that balance was disrupted and then he

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND,

vs.

Case Number:
02-K-09-000831

CHARLES BRANDON MARTIN,

Defendant.
_____/

OFFICIAL TRANSCRIPT OF PROCEEDINGS

TRIAL TO THE COURT
DAY 4

Anne Arundel, Maryland

Friday, April 30, 2010

BEFORE:

HONORABLE PAMELA L. NORTH,

And a Jury.

APPEARANCES:

For the State:

ANASTASIA PRIGGE, ESQUIRE
CRIGHTON CHASE, ESQUIRE

For the Defendant:

LEONARD STAMM, ESQUIRE
JOHANNA LESHNER, ESQUIRE

Electronic Proceedings Transcribed by: Dawn South and Sheri Monroe

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MR. STAMM: Okay, sure.

THE COURT: It sounds like they complied with the statute and the rule, but then it's all trumped by this case, Melendez Diaz, which is similar -- a similar situation to what you're describing in Massachusetts, I believe this was Massachusetts, where they had a statute and they were permitted to put in the certificates and Justice Scalia goes on and on about how the defendant has the right to have those people who did any of the work involved in determining -- in coming up to the conclusion that was let into evidence in the case, he that has right to confront those people, and Scalia goes on to say "that there is no obligation on the part of the defendant to bring in those people." In other words it's the State's obligation and the defendant need not do anything to bring those people in.

Do you not feel that all of the compliance that you of course have expressed, and I agree that you've complied with the rule and the statute, is not trumped completely by this case?

MR. CHASE: Well, first there's -- yeah, I haven't really read that case -- but first I think when we have a statute that sets forth a procedural approach that we should presume that the assembly -- General Assembly knew what they were doing when they did that, in that they provided the mechanism by which we can bring this evidence

State that these people are just technicians, these people are not accusatory witnesses, they're simply technicians doing scientific work, and Scalia goes on to say that that makes them no less witnesses, they still -- the defendant still has the right to confrontation.

There's a wonderful analysis in here about whether the testimony is -- or the evidence I should say is testimonial. He talks about whether it's to be used at trial. I think it all fits squarely with what we have here.

So it seems to me that it's barred by the Melendez Diaz decision, which of course in my mind would trump any statute or rule in Maryland that -- but it's not trumping anything, let me just make that clear.

It does appear that the State complied with the rule and the statute, but that doesn't mean that the State would not also have to comply with the Melendez Diaz decision, and I feel like it goes squarely to the issue that we have here and that this witness would not be able to -- well, I should put it differently -- the Defendant had a right to see each person in the courtroom who did any of the analysis on the DNA testing.

Mr. Stamm, what was it that you wanted to say?

MR. STAMM: Nothing now.

THE COURT: Okay.

MR. CHASE: Well, I'm not certain that we've -- I mean, I -- you know, this obviously has been news to everybody, and I mean, I would like a little time to look at the DNA notice requirements. I mean, I'm just looking at the index here and it says, "DNA profiles evidence sub admissibility," the statute we just looked at. So I don't know if I'm --

THE COURT: Okay.

MR. CHASE: -- necessarily --

THE COURT: Then fine, I'll let you have over lunchtime and if you want to tell me anything different after lunch --

MR. CHASE: Okay.

THE COURT: -- that's fine. I would just point out --

MS. PRIGGE: Can we have the case cite?

THE COURT: -- to the State that this issue just came up two weeks ago in the trial that Ms. Litus (phonetic) had, the same Melendez Diaz issue was in Ms. Litus' case.

MR. CHASE: Okay. Well, what -- so I mean I would assume Mr. Stamm would, you know, object, but is the Court inclined to allow us to bring in this technician so that she can be confronted since they've had the technical specifications and the --

I guess the fall back position is, if you're inclined to have those techs come in, you know, we can --

THE COURT: I'd like to read that case that you have there.

MR. CHASE: Certainly.

THE COURT: Let me just say and then Mr. Stamm I'll hear from you, but then I'm going to read that case. Would you agree, State, that if I make the wrong call on this, this case will be reversed?

If you get a conviction and I rule for you and not him and I'm wrong, it's going to be reversed. There's no question.

MR. STAMM: Well, sure, I mean -- but that's, you know, --

THE COURT: It's a significant enough issue.

MR. STAMM: Agreed. I think that if -- I think that that's always a possibility. I mean, I don't think that we -- I know you don't make decisions based on your concern that another court will disagree, you do what you think it right and let the chips fall where they may.

THE COURT: No, that's -- and that's what I said to my law clerk earlier, absolutely not. But I'm just trying to point out --

MR. STAMM: Well, I'll tell you one thing that --

THE COURT: -- sometimes it's one of those things where the State, I wonder if you really want what you're asking for.

MR. STAMM: Fair question. You know, I'll tell you one way that it you absolutely won't get reversed if you just say, listen you've got to get those techs in here next week and I'll give Mr. Stamm a few days to prepare to look at their CDs and he can cross them until they're blue in the face and then the confrontation issue is cured. It's within your discretion there's no way that will be disturbed on appeal and, you know, we'll all be able to move on with our lives.

MR. CHASE: If I may approach, I'll give you this case.

THE COURT: Thank you. All right, Mr. Stamm, do you want to say anything before I step down and read the case?

MR. STAMM: Yeah. You know, I heard Mr. Chase mention reliability --

THE COURT: I know and I'm --

MR. STAMM: -- and that is like poison if you're trying to argue --

THE COURT: Well, it's like apples and oranges.

MR. STAMM: Just think, if I was teaching

that a defense attorney would be put on notice by the fact that you gave them a CD with the raw data or whatever else is on there?

MS. PRIGGE: Yes. I think they're responsible for understanding what we give to them and if they don't then they're -- it's on them to come back and say, help me out with the format. If they're satisfied that their expert has reviewed the important issues, that's between them --

THE COURT: But then your argument seems to imply, though, that Mr. Stamm would have some obligation to raise this, where Melendez Diaz makes clear there should be no burden shifting here. If it's a confrontation problem the State has the total obligation of providing those witnesses to be confronted in the courtroom by a Defendant. And you can't shift the burden to the Defendant to say, you know, I want these witnesses here.

MS. PRIGGE: We're not. What happened in Melendez Diaz was a piece of paper saying this is cocaine with a little stamp on it was sent to the defense. That's totally different than what we did. We sent them all the raw data, granted it was in a certain technical format. If they can't read the technical format then I think they do need to say, can you give us in a different method? Fine, sure.

preparation and his consultation with his expert and wonder if he could have done it differently or should have done it differently. The fact is, he had our witness list and he had our discovery and the DNA. His expert would have been easily able to say who did what and here's you should prepare your cross-examination of. Here's the --

THE COURT: But you don't have those people on your witness list, why should he prepare his cross-examination?

MR. CHASE: No, I think he should have prepared his argument. If they knew that -- and they did, because they were given this information, they knew that technicians did work on extracting the profile and they weren't on our witness list, then they should have raised that before Dr. Melton started talking and said, hold on a minute, you guys have a problem here, you don't have these people on your witness list and this trial has started.

And I'm not hearing you ask for any postponements so, she can't give a conclusion because you're not giving a complete story. That didn't happen and he knew who they were.

THE COURT: Okay. And what was the manner in which he would have known that? You're saying it would have been on the CD?

MR. CHASE: The CD contained -- now, it's

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND,

vs.

Case Number:
02-K-09-000831

CHARLES BRANDON MARTIN,

Defendant.
_____/

OFFICIAL TRANSCRIPT OF PROCEEDINGS

TRIAL TO THE COURT
DAY 5

Anne Arundel, Maryland

Monday, May 3, 2010

BEFORE:

HONORABLE PAMELA L. NORTH,

and a Jury.

APPEARANCES:

For the State:

ANASTASIA PRIGGE, ESQUIRE
CRIGHTON CHASE, ESQUIRE

For the Defendant:

LEONARD STAMM, ESQUIRE
JOHANNA LESHNER, ESQUIRE

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wrong.

Q What do you mean by that?

A I mean whenever we had like talks about the future he always made it seem like it was -- you know, that I was paranoid or, you know, tried to put blame on me for like overreacting to things or something like that.

Q What was your hope for where it was going to go?

A I mean I thought we'd eventually get married.

Q Were you aware of his marital status when you dated him?

A No, I never knew him to be married.

Q Ms. Carter, did you have a computer at your apartment during the time you were dating Mr. Martin?

A Yes.

Q Did Mr. Martin also keep a computer at your house?

A Yes.

Q Did you ever see Mr. Martin -- and I want to back up a little bit and say -- I want to refer you right around the end of September, early October of 2008 at your apartment in Alexandria. Did you ever see Mr. Martin looking anything up on the computer that you thought was unusual?

MR. STAMM: Objection.

THE COURT: Overruled.

THE WITNESS: He was looking up gun silencers.

BY MR. CHASE:

Q Did you see that?

A Yes. We had a conversation about it.

Q What did you say? What was the conversation?

A We were at -- I think we were watching Law and Order on TV and we had a conversation about how they were illegal and only policemen were allowed to buy them, and I remember it because I didn't know that at the time.

Q Did you ask him why he was looking at silencers?

A No.

Q What was his reaction when you asked him about what he was looking at on the internet that day?

A He didn't like it when I looked over his shoulder and looked at what he was looking up online and generally he would tell me kind of like to stop looking over what he was doing.

Q Do you still have the computer that he was using that day to look at silencers on the internet?

A No.

Q Was that his computer or your computer?

A It was his computer.

Q Did you ever use it?

A Yes.

Q What was unique about that computer?

A It was -- he told me that he had got it from a

place that he used to work and we didn't have administrative rights so you couldn't make any changes to the computer because we didn't have the password log in. So you couldn't download anything, you couldn't basically alter the computer.

Q What happened to that computer?

A He took it from my apartment.

Q Did you ask him about that?

A Yes. He said that we had looked up so many crazy things on the internet that in case my apartment got searched he didn't want it found there.

Q Did he say what he did with it?

A He said he got rid of it.

Q When was this?

A It was the first week in November 2008.

Q Ma'am, did you ever see Mr. Martin with any guns?

A Yes, he used to carry one.

MR. STAMM: Objection. Objection, can we approach?

THE COURT: Yes.

MR. STAMM: I move to strike that.

THE COURT: All right.

(Counsel approached the bench, and the following occurred:)

MR. STAMM: This is totally -- this is other

Q And when did you learn more?
A A friend of mine in Colorado who's from --
MR. STAMM: Objection.
THE COURT: Sustained.
BY MR. CHASE:
Q Okay, without telling us anything that someone else said, did you -- how did you find out about that there was more details involved in Ms. Torok -- or excuse me -- into the investigation?
A An article was e-mailed to me.
Q What kind of article?
A It was his arrest -- I guess he had been arrested the day before and it was just a statement that someone had been arrested with his picture from the Annapolis paper.
Q An article in what?
A It was from the Annapolis Capitol paper.
Q And after that did you contact anybody?
A I called Detective Regan.
Q And did you meet with him?
A Yes, he came to my apartment in Alexandria.
Q Did you tell him everything that you could think of at that time?
A Yes.
Q Now, ma'am, how did you feel when you found out Mr. Martin in fact was married with children and in fact

A He's six.
Q He's six now. So he would have been four then?
A Yes.
Q All right. And who else?
A Charlice Brianna (phonetic) she's four now.
Q Okay, so she was two then?
A Yes.
Q And who's your third child?
A Carson Riel (phonetic) and she's almost three, so --
Q Okay, so she was just almost one then. And the then you were also pregnant at the time?
A Yes.
Q All right. And -- now what was the status of your marriage with Brandon in the fall of 2008?
A He wasn't living at the house. He came Monday through Friday in the mornings to watch the kids while I went to work. He left on Friday and didn't see him again until Monday. So I mean not good.
Q Okay. And when would you leave for work normally?
A Anywhere between 5:30 in the morning to 6:30 on a good day.
Q Okay. And that was after Brandon came home?
A Yes.
Q All right. Now do you know what he did when he

wasn't at home?

A I mean, I didn't ask for details, but yes.

Q Okay. What'd you think he was doing?

A You know, normally he'd be at the gym.

MR. CHASE: Objection.

BY MR. STAMM:

Q Okay. And --

THE COURT: Did you object?

MR. CHASE: We'd object, Your Honor.

THE COURT: Okay.

MR. STAMM: That's fine, I withdraw the question.

MR. CHASE: Thank you.

THE COURT: All right.

BY MR. STAMM:

Q Did -- how did you feel about your relationship at that time?

A I mean we had a lot of problems. I kind of hoped that we were still working things out.

Q Okay. And did you know whether he had any other children outside of the marriage?

A Yes.

Q Okay. How many?

A Two.

Q All right. And now back on Monday, October 27, 2008 what -- how many cars did you have?

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND,

vs.

Case Number:
02-K-09-000831

CHARLES BRANDON MARTIN,

Defendant.
_____/

OFFICIAL TRANSCRIPT OF PROCEEDINGS

TRIAL TO THE COURT
DAY 6

Anne Arundel, Maryland

Tuesday, May 4, 2010

BEFORE:

HONORABLE PAMELA L. NORTH,

and a Jury.

APPEARANCES:

For the State:

ANASTASIA PRIGGE, ESQUIRE
CRIGHTON CHASE, ESQUIRE

For the Defendant:

LEONARD STAMM, ESQUIRE
JOHANNA LESHNER, ESQUIRE

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testimony of those witnesses in whole or in part, but you may not use the earlier statement for any purpose other than to assist you in making that decision.

You have heard evidence that Michael Bradley has been convicted of a crime. You may consider this evidence in deciding whether the witness is telling the truth, but for no other purpose.

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 any evidence in this case. If you find that the Defendant concealed evidence in this case then you must decide whether that conduct shows a consciousness of guilt.

If you find that the State has lost evidence whose contents or quality are important to the issues in this case then you should weigh the explanation, if any, given for the loss of the evidence. If you find that any such explanation is inadequate then you may draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the Defendant's guilt.

Intent is a state of mind and ordinarily cannot be

said the bottle reminded him of something he had seen in a Steven Seagal movie. He said Seagal wanted to get some bad guys and he had to keep it quite so he used an empty bottle taped to the end of a gun used as a silencer. And you know it totally makes sense. It's a clever idea.

The sergeant also told you that it's his job to stay current with trends in crime and techniques, so he reads, he attends conferences, and he researches on the internet. He told you that he had seen YouTube videos of people making and using bottle silencers. Everything is on the internet.

So is anyone surprised that Sheri Carter saw the Defendant researching silencers on the internet? Natural place to go. Is anyone surprised that the Defendant got rid of that computer after the police talked to him? No, because it fits precisely with the evidence.

The Defendant was very careful when he put that silencer together. He probably wore the gloves he took from Sheri's house, but he wasn't careful enough, and he couldn't account for everything. He didn't expect the silencer to pop off the end of the gun. He didn't except the shooter to leave it at the scene, but he did, and we got it.

And you know we looked at that silencer very, very closely, and it gave up its secrets. The white tape from the silencer, here it is, you'll get to look at it back in

the shooting that he was with him talking about rehab, okay, so that evidence was preserved in a slightly different way, but it was still preserved.

Secondly, they talk about the Crofton Library tape. Well, that was half a mile to a mile away from Jodi's house, which is a significant difference. And the police, when they're looking at the tape in real-time they can look, they see their cars, and they can see -- it's hard to even to distinguish the make and the model of the cars. Perhaps some of the cars that are a little bit more distinct or unusual you can understand or capture the make our the model, but the vast bulk of the cars you're going to that was a truck, that was an SUV, that was a sedan, and that's about it.

So that is not an item of very important evidentiary value, so I don't think you need to get hung up on that for any time at all.

In addition in this case some other things that they want to -- we just wanted to clear up. It was not really addressed, but the Defendant -- by the Defense, I guess they didn't want you to really think about it, but they didn't address the fact that this Defendant did purchase the two .380 caliber handguns. One of them by stipulation was transferred; however, that still leaves one handgun unaccounted for, and that handgun is linked to the

event. That window of time is wide open, and the Defendant by all accounts had the ability to participate in this crime.

They want to pretty much pin this case on Maggie. Well, first of all that's pretty much a common defense trick so we would just ask you when you go back to that room to think carefully. Sure pick the person who's not there to blame it on. And isn't that easy, doesn't it make it simple for the Defense to be, it's not my client, it's the girl who's not here?

And really what evidence do we have that Maggie did it? We have that she -- perhaps they proved that she's a rude person. Perhaps they proved that she has a big mouth and that she has bad manners. What else do they prove to tie her to this crime? Nothing. We know that she was at work that day, so certainly she was not the shooter.

And you know, I love it when they sand up and say these things like she's so awful, she's terrible. Well, you're right, you know what he said one thing, we didn't pick her, but guess what, it's the Defendant's girlfriend, he's the one with the link with her so how they can stand up and say oh, she's just awful, well, really the link goes back to him, so take that for what it's worth.

In addition even if you get this -- and I'm saying for argument sake only, okay, we're not suggesting that

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND,

vs.

Case Number:
02-K-09-000831

CHARLES BRANDON MARTIN,

Defendant.
_____/

OFFICIAL TRANSCRIPT OF PROCEEDINGS

DEFENDANT'S MOTION FOR NEW TRIAL

Anne Arundel, Maryland

Tuesday, August 31, 2010

BEFORE:

HONORABLE PAMELA L. NORTH

APPEARANCES:

For the State:

ANASTASIA PRIGGE, ESQUIRE
CRIGHTON CHASE, ESQUIRE

For the Defendant:

LEONARD STAMM, ESQUIRE
JOHANNA LESHNER, ESQUIRE

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argument, but we thought perhaps they were going to try and call him to establish that Mr. Martin went to Crofton.

THE COURT: Uh-huh.

MR. STAMM: And you know, they didn't do that, and they -- you know, and they -- that's certainly the tactical choice they can make. I guess my problem is that we came into the case trying to prove he never went to Crofton --

THE COURT: Uh-huh.

MR. STAMM: -- and then we proved it and somehow he was still convicted any way.

THE COURT: So do you think that you have an interesting issue on appeal of a inconsistent verdict?

MR. STAMM: Well, that's -- that's between the solicitation acquittal --

THE COURT: Uh-huh.

MR. STAMM: -- because -- yes, I think it -- I think that is something that is -- and I guess I should raise that. I didn't make a motion for a -- I didn't -- I didn't raise that at the time that the jury was still seated --

THE COURT: Uh-huh.

MR. STAMM: -- that it was -- I didn't object based on an inconsistent verdict at the time they rendered the verdict, but I --

THE COURT: So it might be waived.

everything we knew. So they actually had time to leave Charles County, go do that shooting in Anne Arundel County, and come back.

THE COURT: Uh-huh.

MS. PRIGGE: So no, I don't think -- I think that we were unable to prove that one assertion that we were hoping to make that he aided and abetted by driving him there, but everything else we proved, and we never tried to intimate or imply that Charles County was not an important part of this entire chain or sequence of events.

THE COURT: Okay. And I don't want to interrupt you, but so what is your theory that the -- what did the jury convict him of?

MS. PRIGGE: They convicted him of accessory --

THE COURT: I mean, I know which count --

MS. PRIGGE: -- before the fact.

THE COURT: -- but I'm just saying -- you just believe that they -- what actions do you think they used as a basis for that?

MS. PRIGGE: The fact that he told Frank Bradley to get him to Gatorade bottle and the medical --

THE COURT: But why would he be found not guilty of solicitation?

MS. PRIGGE: Well, I mean, we never -- for all we know the jury could have believed that Charles Brandon

Martin was the one who went up and pulled the trigger, other than it came out that a white guy -- a white guy did it.

THE COURT: So it's very unlikely that they would think that he did it, wouldn't you agree? I mean the only testimony in the case is it's a white guy.

MS. PRIGGE: But even if we didn't convict him of soliciting, who's to say -- we didn't -- they didn't necessarily not believe it, I mean you didn't prove your case is not the same as we did prove our case with respect that he was involved with accessory before the fact.

THE COURT: Right.

MS. PRIGGE: We did not prove it with respect to solicitation, but that doesn't mean they don't believe that the two of them weren't up to no good when they went. I mean it's just that they couldn't make a finding to a legal degree of certainty.

THE COURT: But what acts should the jury possibly believe that Martin did to convict as an accessory before the fact?

MS. PRIGGE: Make a silencer.

THE COURT: Make a silencer but not --

MS. PRIGGE: Provide a handgun.

THE COURT: But in light of that they didn't find it to be so. So the jurors would have had to believe that someone else wanted her killed, not Mr. Martin --

MS. PRIGGE: No, they probably did believe that Charles Brandon Martin wanted her killed, which would be --

THE COURT: Well, then why wouldn't they convict on solicitation?

MS. PRIGGE: Because we didn't necessarily prove who killed -- who actually pulled the trigger. But it doesn't matter --

THE COURT: Okay, but why is that necessary?

MS. PRIGGE: What?

THE COURT: To solicit do you have to prove who pulled the trigger?

MS. PRIGGE: In that case we did because the indictment said with Jerry Burks. We had --

THE COURT: Okay.

MS. PRIGGE: -- to prove that Jerry Burks solicited the murder, and I think we couldn't get there.

THE COURT: Okay.

MS. PRIGGE: I mean we're also forgetting a lot of the other little pieces which I outlined in the sufficient to, that --

THE COURT: No, I'm not really even -- I understand that, I just was asking you more of a legal question.

MS. PRIGGE: Okay.

THE COURT: So that -- you're making an excellent

would say there's no question in the Court's view any way that there was sufficient evidence from which the jurors could conclude that he was in fact guilty of the crime that he was convicted of.

The State is correct, there are tons of little pieces of evidence when taken together that could create a circumstantial and direct case against the Defendant. Some of the evidence in the case like the DNA that came in is some direct evidence, it's not conclusive evidence, of course it isn't because it doesn't say that the Defendant was the person who left the DNA, but it's some evidence from which they could conclude that it could have been the Defendant.

Then when you take it together with all of the other pieces of evidence in the case -- and I think there were many, including the Bradley brother's testimony, the fact that he looked up the silencers on the internet, the fact that he had a handgun that would be consistent with the weapon, the fact that the State is alleging a motive.

I will concede however from my humble viewpoint, which I know is not the important viewpoint here, I thought motive was the weakest part of the State's case believe it or not, because it had seemed to me that Margaret McFadden had just as much of a motive, if not more, to get rid of Ms. Torok. Because Mr. Martin had already had -- it looks

like if my memory is correct -- several other children out of wedlock. He's married to his wife who presumably was pregnant, he had two other kids which she knew about, and so this is -- we're going down the same road he's been down several times before, so what's another pregnancy, what's another girlfriend in a long stream of infidelities by Mr. Martin? Why would that all of a sudden create a motive for him to kill this one particular girlfriend who was going to have this particular baby?

That's never occurred -- I've never understood why that's a very good motive. It'd be different in the context of someone else's marriage, in the context of another marriage where there's been no infidelity, no other children out there, perhaps it's a huge deal, you know, that you're going to have a baby with somebody else, but in the context of Mr. Martin's life it just didn't seem like it was any big deal to me, so I didn't see it as a strong motive.

I thought the more compelling motive might be Ms. McFadden, but that's not to suggest there was no motive.

And again, I said this is only my opinion and that's not worth anything in this case, the jurors may have concluded that that was an excellent motive and that that's probably it, he was so incensed by the fact that she was going have a baby by him and he didn't want the baby, he didn't want to pay child support that that's why he set it

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I hereby certify that the proceedings in the matter of State of Maryland versus Charles Brandon Martin, 02-K-09-000831, heard in the Circuit Court for Anne Arundel County, Maryland, on August 31, 2010, were recorded by means of electronic sound recording.

I further certify that, to the best of my knowledge and belief, page numbers 1 through 85 constitute a complete and accurate transcript of the proceedings as transcribed by me.

I further certify that I am neither a relative to nor an employee of any attorney or party herein, and that I have no interest in the outcome of the case.

In witness whereof, I have affixed my signature this 1st day of February, 2011.

Dawn South

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND,

vs. Case Number: 02-K-09-000831

CHARLES BRANDON MARTIN,

Defendant/Petitioner.
_____/

OFFICIAL TRANSCRIPT OF PROCEEDINGS

POST-CONVICTION HEARING

Annapolis, Maryland

Friday, June 23, 2017

BEFORE:

HONORABLE RONALD A. SILKWORTH, Judge

APPEARANCES:

For the State:

DAVID L. RUSSELL, ESQUIRE

For the Defendant:

C. JUSTIN BROWN, ESQUIRE
CHRISTOPHER NIETO, ESQUIRE

Electronic Proceedings Transcribed by: Dawn South and Nicole Kittleson

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APPENDIX F

to me if we let the State addresses those two issues, so.

MR. BROWN: Okay, Your Honor.

MR. RUSSELL: Thank you, Your Honor.

So, Your Honor, you are where I was about three weeks ago. The State actually, as I said, as Petitioner has pointed out, we went through everything. I literally -- every single page of every document that is in the State's file to determine if we had this piece of paper and we don't. That, I could say for certain.

Now, why we don't, I could speculate that it wasn't turned over to us. Now, I wasn't the prosecutor who handled it, but I depend on that prosecutor to --

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. He wrote a report that simply said there was no -- no. (Indiscernible - 4:02:45). Sorry. What the State had is the evidence -- well, obviously, we have the warrant, but we have evidence logs and those evidence logs don't demonstrate

what those things are.

So let me kind of back up to where I was three weeks ago, which is --

THE COURT: But at least, from what you said -- excuse me. I'm sorry.

MR. RUSSELL: It's okay.

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, Your Honor. That part I don't disagree with, but, he -- like I said, let me back you up to where I was, because what we're doing at that point was just trying to make sure we crossed our T's and dotted our I's before we figured out what are we going to do about this. Because I agree, when you first look at this, you're having the same reaction that everyone who has first looked at this has had. But in doing the -- crossing the T's and dotting the I's, one of the last things that we wanted to do was say, can we say for certain that this is that computer that she's talking about, because we need to know that.

THE COURT: Can you say for certain it's not?

MR. RUSSELL: And that's what we're arguing. We feel like --

THE COURT: What other Gateway computer was there

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?

MR. RUSSELL: But that's the question, Your Honor, is this computer in the possession of the police? And I will tell you this, Your Honor, it's there. The burden is on the Petitioner to prove it's there, that is the computer. It's not on the State. It's on them to prove a *Brady* violation occurred.

THE COURT: Well, he -- the Defendant testified he believed that that computer was a computer he got from his former employer and that that computer is the one that is -- has what apparently is known as a CMS, or CSM, or whatever.

MR. RUSSELL: And that he didn't tell his attorney. If he knew that that was the computer that doesn't make any sense that he would not say anything while she's testifying that he got rid of this computer and they're discussing a concealment of the evidence instruction and the State is suggesting he got rid of it, but he knows the entire time --

THE COURT: Did the --

MR. RUSSELL: -- that it's his computer?

THE COURT: -- defense oppose the instruction?

MR. RUSSELL: I'm sure they opposed the

dispute about whether, if it is, it was gotten rid of, because there it is.

MR. RUSSELL: But you only get to that point if you know whether it's the same computer.

THE COURT: Well, wouldn't that have had some tremendous impact if you're on the defense side in terms of Ms. Carter's credibility? You said he got rid of it, if that's what she implied, and led the State to get an instruction that he got rid of it, yet it's found in his -- the State should have known that a computer that was found by the police and is listed right on the search warrant return.

MR. RUSSELL: Correct, and so should Mr. Stamm, which gets to my next point.

THE COURT: And the lead detective for the police knew it, knew that, and ordered a forensic. And the forensic showed that that computer was opened until after 2005, which means it couldn't possibly have been used by Mr. Martin having taken it to Ms. Carter's apartment and sat there and done something.

MR. RUSSELL: But I believe --

THE COURT: It wasn't even opened.

MR. RUSSELL: But I believe Mr. Martin testified that he had a computer that he took to her house and used. So there is a computer. And what you're suggesting, Your

can get that in anyway, but let's say he cross-examines her, she can be on redirect asked, this computer you're talking about, when did this happen? She would say, 2008, and then we could then put on, this computer was not used in 2008, so this can't be the computer.

And again, on top of that, Your Honor --

THE COURT: Wait a minute. It couldn't be the computer or she could be lying about the whole thing.

MR. RUSSELL: Right, but I believe --

THE COURT: You excluded the possibility --

MR. RUSSELL: -- Mr. Martin testified that he --

THE COURT: -- that Ms. Carter was lying.

MR. RUSSELL: That's a possibility, Your Honor, but --

THE COURT: And the defense was not given the opportunity to use that information to show that she was lying. That's --

MR. RUSSELL: That's --

THE COURT: Wait a minute. The defense could have -- actually, if they -- the Defense could have brought in the computer and showed, this is the one you're talking about, right? Yeah, that's the one I'm talking about. That's exactly the one. It's got C, whatever it is and then the forensic evidence would have had great importance.

MR. RUSSELL: I agree, Your Honor, but the problem

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I further certify that to the best of my knowledge and belief, page numbers 1 through 222 constitute a complete and accurate transcript of the proceedings as transcribed by me.

I further certify that I am neither a relative to nor an employee of any attorney or party herein, and that I have no interest in the outcome of the case.

In witness whereof, I have affixed my signature this 26th day of February, 2019.

Geoffrey Hunt, CVR-CM

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