No. _____

In the Supreme Court of the United States

Nathaniel B. Appleby-El,

Petitioner

v.

State of Maryland,

Respondent

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

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Appendix

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UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 801

September Term, 2018

NATHANIEL B. APPLEBY-EL

v.

STATE OF MARYLAND

Meredith,*
Wright,*
Graeff,

JJ.

Opinion by Meredith, J.

Filed: November 19, 2020

*Meredith, Timothy E., J., and Wright, Alexander, Jr., J., now retired, participated in the hearing of this case while active members of this Court, and after being recalled pursuant to the Constitution, Article IV, Section 3A, they also participated in the decision and the preparation of this opinion.

In 1978, Nathaniel B. Appleby-El, appellant, was convicted by a jury sitting in the Circuit Court for Wicomico County of felonious homicide and related charges. In 2015, based upon the Court of Appeals's decision in *Unger v. State*, 427 Md. 383 (2012), this Court vacated Mr. Appleby-El's convictions and awarded him a new trial. *Nathaniel B. Appleby-El v. State*, No. 1068, September Term, 2014 (filed November 19, 2015) (unreported).

Mr. Appleby-El was retried in 2018 in the Circuit Court for Wicomico County on charges of first degree felony murder, robbery with a deadly weapon, and carrying a handgun. Following a three-day jury trial, he was convicted of all charges. The circuit court merged his convictions for sentencing purposes and sentenced Mr. Appleby-El to a term of life imprisonment (with credit for time served) for his conviction of first degree felony murder. He noted this direct appeal.

QUESTIONS PRESENTED

The questions for our review, as presented by Mr. Appleby-El, are the following:

1. Whether the Circuit Court erred by denying the Motion to Dismiss the Indictment?

2. Whether the Circuit Court erred by finding that a witness was unavailable?

3. Whether such extensive reliance on transcripts denied Mr. Appleby-El the right of confrontation, because doing so effectively prevented him from cross-examining them?

4. Whether the Circuit Court erred by admitting the alleged confession obtained by police?

5. Whether the Circuit Court erred by denying the motions for judgment of acquittal?

6. Whether the Circuit Court erred by denying Mr. Appleby-El's requested jury instructions?

For the reasons explained herein, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On December 23, 1977, taxi driver Charles Adkins, Jr. (hereinafter referred to as "victim" or "Mr. Adkins") was found dead inside his taxicab in Salisbury, Maryland. He died from a single gunshot wound to the head.

Mr. Appleby-El, who was eighteen years old at the time, and his friend Gerald Curtis were accused of Mr. Adkins's murder. They were charged by a criminal information filed in the Circuit Court for Wicomico County in February 1978, which alleged in pertinent part:

> CRIMINAL INFORMATION FOR:
>
> (1) Felonious Homicide
> (2) Robbery With Deadly Weapon
>
> * * *
>
> (4) Use of Handgun in Felony
> (5) Carrying Handgun
>
> * * *
>
> Richard D. Warren, State's Attorney in and for Wicomico County, State of Maryland, does inform and charge:

COUNT ONE

THAT Gerald Anthony Curtis and Nathaniel Benjamin Appleby, on or about the 23rd day of December, 1977, in the County aforesaid, did feloniously, willfully and of deliberately premediated [sic] malice aforethought, did kill and murder Charles Edwin Adkins, Jr., against the peace, government and dignity of the State.
Art. 27, Sec. 616 (Common Law)

COUNT TWO

THAT Gerald Anthony Curtis and Nathaniel Benjamin Appleby, on or about the 23rd day of December, 1977, in the County aforesaid, did unlawfully and feloniously, with a dangerous and deadly weapon, rob Charles Edwin Adkins, Jr. and violently steal from said person United States currency, a wallet, and a wristwatch, contrary to the form of the Act of Assembly in such cases made and provided, and against the peace, government and dignity of the State.
Art. 27, Sec. 488 (Common Law)

* * *

COUNT FOUR

THAT Gerald Anthony Curtis and Nathaniel Benjamin Appleby, on or about the 23rd day of December, 1977, in the County aforesaid, did unlawfully did use a handgun in the commission of a felony, contrary to the form of the Act of Assembly in such cases made and provided, and against the peace, government and dignity of the State.
Art. 27, Sec. 488 (Common Law)

COUNT FIVE

THAT Gerald Anthony Curtis and Nathaniel Benjamin Appleby, on or about the 23rd day of December, 1977, in the County aforesaid, did unlawfully carry a handgun upon his person, contrary to the form of the Act of Assembly in such cases made and provided, and against the peace, government and dignity of the State.
Art. 27, Sec. 36B (Common Law)

In May 1978, Mr. Appleby-El was tried before a jury. Following a two-day trial, the jury convicted Mr. Appleby-El of felonious homicide (count one) and carrying a handgun (count five). The jury acquitted Mr. Appleby-El of use of a handgun in the commission of a felony (count four). The jury did not announce any verdict with respect to robbery with a dangerous and deadly weapon (count two) because the trial court had instructed the jury that if they found Mr. Appleby-El guilty of felonious homicide (count one), then count two was merged into count one.

Mr. Appleby-El was sentenced to a term of life imprisonment for his conviction of felonious homicide (count one), and a concurrent three-year term of imprisonment for carrying a handgun (count five). This Court affirmed the judgments of the trial court in an unreported per curiam opinion filed on July 9, 1979.

Mr. Appleby-El's Post-Conviction Relief

In October 2013, Mr. Appleby-El, acting on his own behalf, filed a petition to reopen his post-conviction proceeding in light of the Court of Appeals's opinion in *Unger v. State*, 427 Md. 383 (2012). Although the circuit court denied his petition, this Court granted his application for leave to appeal, and in November 2015, we reversed the circuit court's denial of post-conviction relief, and remanded the case with the instructions to vacate his 1978 convictions and award him a new trial. *Nathaniel B. Appleby-El v. State*, No. 1068, September Term, 2014 (filed November 19, 2015) (unreported).

Mr. Appleby-El's Trial Post-*Unger*

Pre-Trial Motions

Trial was scheduled for April 9, 2018. On January 21, 2016, Mr. Appleby-El's attorney filed a pre-trial motion to dismiss the 1978 charging document pursuant to Rule 4-252, and alternatively, to suppress any in-court identification, illegally seized evidence, and/or confessions. That attorney's appearance was later struck, and the Office of the Public Defender entered its appearance. Counsel from the Office of the Public Defender filed a second pre-trial motion pursuant to Rule 4-252 to dismiss the 1978 charging document, and to suppress evidence.

On December 18, 2017, Mr. Appleby-El, acting on his own behalf, filed two pre-trial motions in which he (1) moved to dismiss the case for lack of subject matter jurisdiction, and (2) moved to exclude any and all "documentary evidence and/or transcribed testimony" from being introduced at his new trial. In his motion to dismiss, Mr. Appleby-El contended that retrying him pursuant to the 1978 charging document would produce a legally inconsistent verdict with respect to his charges of robbery with a deadly weapon (count two) and use of a firearm for commission of a crime of violence (count four) because he had been found not guilty of count four. In his motion to exclude any and all "documentary evidence and/or transcribed testimony," he argued that the introduction of any such evidence would greatly prejudice his case.

Yet another pre-trial motion to dismiss all charges was filed, "pursuant to Maryland Rule 2-322 [sic]," on February 16, 2018, by a newly-appointed attorney representing Mr.

Appleby-El. In this motion to dismiss, defense counsel set forth three arguments. First, he argued that retrying Mr. Appleby-El for use of a firearm in the commission of a crime of violence (count four) violated the Double Jeopardy Clause as the jury acquitted Mr. Appleby-El of that charge in 1978. Second, he asserted that, because of the acquittal of using a firearm in the commission of a felony, the State could not prosecute Mr. Appleby-El for robbery with a dangerous weapon. Further, because the elements of robbery with a dangerous weapon could not be met, the charge of felony murder should also be dismissed. He also asserted that retrying Mr. Appleby-El on the 1978 charging document could result in a legally inconsistent verdict, and the charges should be dismissed.

The circuit court denied all of the motions.

Motions in Limine

Mr. Appleby-El's second trial began on April 9, 2018. Prior to jury selection, the State announced that the only charges from the 1978 criminal information that it was proceeding on were first degree felony murder (count one), robbery with a dangerous weapon (count two), and carrying a handgun (count five). Defense counsel did not object to the prosecutor's announcement.

In addition, the State indicated that it intended to introduce the prior recorded trial testimony of certain witnesses who testified at Mr. Appleby-El's trial in 1978 but were now deceased. The trial court reminded the parties of the ruling entered on April 5, 2018, which denied Mr. Appleby-El's self-represented motion to exclude the trial transcripts of any former witnesses, and the court stated that it would be applying that ruling at trial.

Defense counsel nevertheless lodged a "renewed objection to prior testimony by any witness" on the basis that it violated Mr. Appleby-El's right to confront adverse witnesses and "that Mr. Appleby-El is entitled to effective cross-examination[.]" Defense counsel also asserted that he would "most likely be making[] continuing objections . . . to preserve the record." The trial court stated: "Your objection is noted for the record." But the court also confirmed its ruling with respect to the objection that Mr. Appleby-El himself had made. The court advised: "From here until the conclusion of this trial, Mr. Appleby-El, you are objecting to the introduction of testimony [of the] unavailable witnesses who testified back in 1978 or 1979," and "I will certainly give your attorney some latitude in continuing to make those objections."

One additional preliminary matter was addressed prior to opening statements. The State had informed the trial court that it was unable to locate and serve a trial subpoena upon Brian Deale, a State's witness who was sixteen years old when he testified at the first trial in 1978, and was still alive at the time of the second trial. Consequently, the State proposed to read the prior trial testimony of Brian Deale into the record pursuant to Maryland Rule 5-804(a)(5). Defense counsel objected on the basis that it was the State's burden under Maryland Rule 5-804 to show that it made reasonable and good faith efforts to procure Mr. Deale's attendance.

In response to defense counsel's objection, the court conducted a hearing to address whether the State made reasonable and good faith efforts to procure Mr. Deale. The State called Carsten Wendlandt, a special investigator for the Wicomico County State's

Attorney's Office. Mr. Wendlandt testified that he had been asked to personally serve a subpoena on Brian Deale, and he described his efforts to locate Mr. Deale.

Mr. Wendlandt said he read the transcripts from the first trial. In his attempt to locate Mr. Deale, he ran reports from various databases such as LexisNexis, Accurate for law enforcement, Peer to Peer, and Maryland Judiciary Case Search. From the trial transcripts, he learned that Mr. Deale was associated with a man named Larry Fields. He found several addresses associated with Mr. Deale's name, including an address that appeared to be shared with Mr. Fields.

Mr. Wendlandt first spoke with Mr. Fields in March 2018, approximately one month prior to the start of the second trial. Mr. Fields informed him that he had regular contact with Mr. Deale, but Mr. Deale did not have a fixed address. Mr. Fields told Mr. Wendlandt that Mr. Deale usually stayed with friends or family.

Mr. Wendlandt communicated with Mr. Fields "several times over the next several weeks." During the first week of April 2018, just days prior to the first day of the second trial, Mr. Fields contacted Mr. Wendlandt and informed Mr. Wendlandt that Mr. Deale had called him from Baltimore that same day (or the day before), and Mr. Deale told Mr. Fields that he was "aware of the court date and did not wish to cooperate with the State."

During the course of Mr. Wendlandt's investigation, he also visited two other residential addresses in an attempt to locate Mr. Deale. He went to a home located on "Hammond Street," where the resident at that address told him that the home was owned by Mr. Deale's sister. The resident also informed Mr. Wendlandt that Mr. Deale had never

resided at the Hammond Street home. The resident then referred Mr. Wendlandt to speak with Mr. Deale's sister, who lived in a home on "James Lane." Mr. Wendlandt visited the home on James Lane and spoke with Deale's sister, who told him that Mr. Fields would be the best person to know where he might find Mr. Deale.

Mr. Wendlandt also discovered that the District Court of Maryland for Worcester County had issued a bench warrant for Mr. Deale due to his failure to appear on February 16, 2018. Mr. Wendlandt spoke with the sheriff's office for that county and was informed that the bench warrant for Mr. Deale was still active. A copy of the bench warrant was admitted into evidence.

After hearing the testimony of Mr. Wendlandt and the arguments of the parties, the trial court found that Mr. Wendlandt's efforts to locate Mr. Deale constituted reasonable efforts made by the State, and the court found that Mr. Deale was an "unavailable witness" within the meaning of Rule 5-804. The State was therefore permitted to read into the record at the second trial the transcript of Mr. Deale's prior recorded trial testimony.

The State's Case-in-Chief

The State offered testimony of twelve witnesses in its case-in-chief. Of the twelve witnesses, four witnesses testified in person, and the prior recorded trial testimony of eight of the witnesses was read into the record.

Brian Deale's Prior Recorded Trial Testimony

The State first offered the prior testimony of Brian Deale. Over the objection of defense counsel, Mr. Deale's prior recorded trial testimony on direct examination was

read aloud to the jury by the State. The testimony on direct examination that was read addressed the following.

On December 24, 1977, between 11:00 a.m. and 12:00 p.m., Brian Deale (who was then sixteen years old) and his friend Pierre Smith were riding their bikes when they saw a car stopped on the side of a dirt lane. Mr. Deale stopped to peer inside the car and saw a man lying inside the car. Neither Mr. Deale nor Mr. Smith opened the car door. They continued riding their bikes toward the home of Larry Fields, who was their Boy Scout leader at the time. Once they arrived at Mr. Fields's home, they told him about the man that they had just seen in the car. All three (Deale, Pierre and Fields) then went back to the site of the car, and Mr. Fields notified the police.

After Mr. Deale's prior recorded trial testimony on direct examination was read, defense counsel did not read into the record the cross-examination portion of his testimony for reasons that we cannot discern from the record. Instead, defense counsel approached the bench and proffered questions that he claimed he would have asked Mr. Deale on cross-examination had he been Mr. Appleby-El's counsel at the 1978 trial. He proffered:

> [COUNSEL FOR MR. APPLEBY-EL]: This first thing I would have wanted to ask Mr. Deale was to get a more consistent answer as between when he arrived at the location beside 11:00 and 12 o'clock.
>
> I'd further go on to ask did Pierre Smith touch anything in the area? The reason for that question was because at the time, the State's Attorney only asked if Pierre Smith had opened the door. I believe it's important to ask that question because there could be evidence that was lying around. Pierre Smith, we don't know whether he had touched anything that might have been outside the car.

> I would also ask and get clarification on how the door was opened. What was obstructing the door from closing, if anything?
>
> Other than that, I would ask the witness because he was so young at the time, 16 years of age, whether he knew what the difference between a truth and a lie is.
>
> Had I been given the opportunity to cross-examine the witness, those would be the questions I'd be delving into.

The trial court responded:

> [THE COURT]: Your record obviously has been made by saying that.

Live Testimony of Fields, Pollitt and Butler

The State's next witness was Larry Fields, who testified in person. He testified that Brian Deale, one of the Boy Scouts in his troop, had come to his house with Pierre Smith on the morning of December 24, 1977, and, as a result of what they told him, they drove to the location of a car with an apparently dead person inside. Mr. Fields then used his CB radio to report the discovery to the police. Neither Mr. Fields nor the boys touched the car or body while he was there.

The remaining witnesses called by the State on the first day of trial were Gary Pollitt and Harold Butler, both of whom testified in person. Mr. Pollitt was a retired Maryland State Trooper, who had responded to Mr. Fields's CB report on December 24, 1977. Trooper Pollitt testified that he had opened the passenger side door of the vehicle (which was a taxicab) to check on the welfare of the person slumped over in the front seat of the car. He checked the person's neck for a pulse but found none. He then secured the

scene and made certain no one else touched the vehicle or body until crime scene investigator Harold Butler arrived.

Harold Butler testified that he had been employed by the Maryland State Police as a Trooper from 1966 to 1987. On the morning of December 24, 1977, he had responded to a crime scene off of East Road in Salisbury. He observed a vehicle with a deceased white male lying across the front seat. Trooper Butler took photos around the scene, and took possession of a clipboard that was on the front seat of the vehicle. After the vehicle had been towed to a garage at the State Police barrack, Trooper Butler processed the vehicle. He found no wallet, no currency, and no watch. He attended the autopsy of the victim performed at the Office of the Chief Medical Examiner, and took custody of the victim's clothing. He did not recover any fingerprints. He testified that DNA testing was not available in 1977.

Vaughn Bounds's Prior Recorded Trial Testimony

On the second day of trial, the State offered the prior recorded trial testimony of Vaughn Bounds. Before any of the testimony was read to the jury, defense counsel renewed his objection to "any witness called today through transcript testimony." The trial court overruled the objection, and the direct examination portion of Mr. Bounds's testimony was read to the jury by the State. Mr. Bounds testified that he and Mr. Adkins had a business relationship, and that Mr. Adkins drove a car owned by Mr. Bounds as a taxi. Mr. Adkins kept a record showing where he picked up a customer, where he was taking the passenger, and how much he charged the customer.

Defense counsel read the cross-examination portion of Mr. Bounds's prior recorded trial testimony. On cross-examination, Mr. Bounds affirmed that he knew generally the procedures that Mr. Adkins followed when he recorded his trips and the fares he received from his customers. After defense counsel finished reading the former testimony of Mr. Bounds, defense counsel asked to approach the bench to proffer questions that he would have asked Mr. Bounds on cross-examination at the first trial. The trial court instructed counsel to wait and make his proffer outside the presence of the jury, and, when that opportunity came, defense counsel's proffer as to his proposed additional cross-examination of Mr. Bounds was as follows:

> [COUNSEL FOR MR. APPLEBY-EL]: The cross-exam questions I would have for Mr. Bounds had he been present and I would have been able to cross-examine him effectively, I would have asked him questions relating to the procedure on the clipboard, that clipboard being what I believe to be how the victim used the clipboard, what was the proper procedure in taking cabs, how it would be, any fares would be recorded, any addresses be recorded, things along that nature.
>
> I would also inquire as to Mr. Bounds's knowledge of the relationship between the victim and his wife, Lena Mae Adkins. The reason for that questioning, I would like to delve into the fact what we believe would be that they were separated at the time and I would like some clarity on – would have liked clarity as to their I'm not going to say custodial, but status of their marriage, if he was, in fact, living at the home with Lena Mae Adkins or Lena Mae Adkins was living with him.
>
> * * *
>
> [COUNSEL FOR MR. APPLEBY-EL]: I would also ask him more specifically if Mr. Adkins would have written down the location of where he was going on the clipboard, I forgot to mention that earlier.
>
> * * *

> [COUNSEL FOR MR. APPLEBY-EL]: And, Your Honor, I would also ask Mr. Bounds if he ever recalled Mr. Adkins wearing a black digital wristwatch and if that was something that he would wear or ever noticed Mr. Adkins wearing.

Clarence Hitchens's Prior Recorded Trial Testimony

The State next presented prior recorded trial testimony of Clarence Hitchens. The testimony that was read by the State indicated that Mr. Hitchens was a taxicab driver who was familiar with Mr. Adkins. Mr. Hitchens visited the Holloway Funeral Home on December 24, 1977, for the purpose of identifying the body, and he recognized the body as Mr. Adkins. There was no cross-examination of Mr. Hitchens at the first trial. Defense counsel proffered at the second trial that he would have wanted to cross-examine Mr. Hitchens as follows:

> [COUNSEL FOR MR. APPLEBY-EL]: . . . I would ask Mr. Hitchens whether he had known about the relationship with Lena Mae Adkins similar to the cross-examination I just indicated to the Court for Mr. Bounds.
>
> I further wished to ask him cross-examination questions again regarding the watch that Mr. Adkins was supposed to have worn.

Stipulation Regarding the Medical Examiner's Trial Testimony

The parties entered into a stipulation regarding the medical examiner who performed Mr. Adkins's autopsy. The stipulation, that was read to the jury, stated in pertinent part:

> [THE STATE]: Dr. Ann Dixon, if called to the stand to testify, would testify that on December 26, 1977, in the presence of Trooper H. L. Butler she performed an autopsy on the body of Charles Edwin Adkins, Jr. In external examination she found a medium caliber gunshot wound with the point of entrance being in the right temple immediately in front of the right ear. Dr. Dixon found the entrance wound to be surrounded by a one eighth rim of

abrasion and heavily soiled with black powder. She found soot and powder around the wound.

* * *

Dr. Dixon would further testify that there were no other wounds or signs of injury to the body of Charles Edwin Adkins, Jr.

* * *

Dr. Dixon would testify that her diagnosis was gunshot wound of the head with loose contact entrance in the right temple. She would testify that she is able to a reasonable degree of medical certainty to form an opinion as to the cause of death was a gunshot wound of the head.

The medical examiner's autopsy report was also received into evidence without objection.

Lena Mae Adkins's Prior Recorded Trial Testimony

The State's next presented prior recorded trial testimony of Lena Mae Adkins (the victim's wife). Before the testimony was read, defense counsel made the following objection:

> [COUNSEL FOR MR. APPLEBY-EL]: This is a different objection, Your Honor. Through investigations through the original trial, we're objecting to Lena Mae Adkins' testimony coming into evidence now. We're objecting for the fact that we believe that Vaughn Bounds, another deceased witness, would have testified, if called to the stand, that Lena Mae Adkins and . . . her husband, Charles Adkins, the victim in this case were actually separated at the time. It is our contention and our belief that Lena Mae Adkins perjured herself during the testimony of this examination in the original trial. And we believe that she would not have been able to identify the watch which we believe the State is going to try to offer into evidence now because of the separation. We don't believe that Lena Mae Adkins actually saw her husband on what I believe is going to be December 23rd. . . . We're making this objection to the fact that we believe it is unduly prejudicial, again in light of these facts, and that's why we're making this objection, Your Honor.

The trial court denied this objection, explaining:

> THE COURT: Well, those aren't facts, that was a proffer you just made, and certainly it would be potentially facts or evidence that you could introduce in your case based on the [pretrial] ruling of Judge Sarbanes. And certainly we don't know if Ms. Adkins were here and alive you could accuse her of perjury and she could say no, I'm telling you the truth and then it would just be a weight of the evidence. It wouldn't be a Court's ruling to exclude testimony based on what might have been perjury in the past, what might have been perjury today were she alive to testify. Certainly if you had proof positive that it was perjury and could present that to the Court, maybe at some pretrial motion the ruling of the Court would be different. But considering the posture we're in this morning, I'm denying your motion.

Defense counsel then asked to re-approach the bench to discuss the matter further, and the following occurred at the bench:

> [COUNSEL FOR MR. APPLEBY-EL]: We're making the objection that we believe and will proffer that the State is going to offer into evidence testimony of the existence of a watch and I believe the State's testimony is going to be, from reading the transcript, that Ms. Lena Mae Adkins identifies this watch as her husband's watch. We're objecting to that evidence coming in at trial. We're objecting to it coming in through testimony, we believe the watch is necessary. We believe that illegal procedures were used to seize the watch and we can delve into that a little bit more. But we believe that this is prejudicial because of the way that the watch was obtained from Mr. Appleby-El. And that's the objection that we're going to make. We believe it's inadmissible as it's prejudicial and for the other reasons I noted earlier at our previous bench conference.
>
> THE COURT: Were these issue[s] raised at a suppression hearing?
>
> [COUNSEL FOR MR. APPLEBY-EL]: No, Your Honor.
>
> THE COURT: Now is not the time to argue the illegal seizure of evidence.
> . . .
>
> * * *
>
> [COUNSEL FOR MR. APPLEBY-EL]: My issue is not the suppression of the watch, it's the testimony through transcript without the presence of the

> watch here to actually go through and look at the watch and for the jury to see it. That's an issue I think is confrontation issue two [sic] under *Crawford*, it dovetails with my original argument, but this is sort of unique with the watch with the identification.
>
> THE COURT: And I disagree. Given the nature and the procedure that we're following here and having heard testimony so far, whether it was a Rolex or Timex or an [i-]watch or Apple watch wouldn't be material for the jury's consideration, only the testimony which was that Ms. Adkins was shown an item and identified it as belonging to her husband.
>
> Other than that, again, what the item actually looks like is immaterial, from the Court's perspective, for consideration of the jury.

The State then read the direct examination portion of Ms. Adkins's prior recorded trial testimony, which addressed the following. The last time that Ms. Adkins saw her husband alive was on December 23, 1977 at 5:00 p.m. She recalled that he was wearing a black digital watch. She identified the watch shown to her by the prosecutor (marked as State's Exhibit 5) as the watch that belonged to her husband. Her identification of the watch was read aloud to the jury at the second trial over the objection of defense counsel. When asked if she knew whether her husband would have had any "money from his cab fares with him" on December 23, she said that "[h]e never showed me that because he said that was his and Vaughn Bounds' money."

Defense counsel then read the cross-examination portion of Ms. Adkins's prior recorded trial testimony to the jury. On cross-examination, Ms. Adkins insisted that she did not tell the police that the watch she recognized at trial "was similar" to her husband's, but she agreed with defense counsel that "[t]here's a lot of watches like that[.]"

Defense counsel proffered that he would have wanted to conduct additional cross-examination of Ms. Adkins as follows:

> [COUNSEL FOR MR. APPLEBY-EL]: [T]he cross-examination I would have for Lena Mae Adkins would relate to the status of their marriage and their living situation on the date of December 23, 24 and the previous days back up to December. It's our understanding that the two, Adkins and Lena Mae, had been separated. I would cross-examine her regarding if she actually did see him the night before the alleged incident. I would further cross-examine her regarding his wristwatch . . . .
>
> * * *
>
> Further, when is the last time she would have seen him that day.
>
> I would also ask how she would know his schedule. Further ask how she knew how Vaughn Bounds and Adkins separated their money between the two of them.
>
> That would be what I would ask Lena Mae Adkins.

James Sturgis's Prior Recorded Trial Testimony

The State read the direct examination portion of James Sturgis's testimony that addressed the following.

When the State showed Mr. Sturgis a wallet that had been marked as State's Exhibit 4, he testified that he recognized it to be a wallet that he had found in his backyard under the camper that was attached to the back of his pickup truck. He found the wallet the Saturday after Christmas, and he promptly took the wallet that he found to his mother. Mr. Sturgis also testified that the "Appleby family" lived behind his home near his backyard. Mr. Sturgis's description of the proximity of the Applebys' yard in relation to

the place in his backyard where he found the wallet was a vague "as far away from me to you," without specifying any measurement.

Defense counsel then read a portion of Mr. Sturgis's prior recorded trial testimony. On cross-examination, Mr. Sturgis testified that the wallet was "folded" when he found it, and it had a "medical card and license" inside. When asked if "[l]ots of people go through your backyard," Mr. Sturgis replied: "Not too many." When asked "Doesn't the road go right by your house," Mr. Sturgis replied: "No." But he then agreed with the cross-examiner when asked whether there is "a little bluff" by which people "crossed by your backyard."

Defense counsel proffered that he would have conducted additional cross-examination of Mr. Sturgis as follows:

> [COUNSEL FOR MR. APPLEBY-EL]: If I had been able to cross James Sturgis our contention right now and what we proffer to the Court is that Mr. Appleby was actually not a resident. This was testimony through James Sturgis that he knew the Applebys lived sort of down the road or their properties abutted one another. I would further ask for clarification on that subject because I think the witness refers to Reverend Appleby [*i.e.*, Mr. Appleby-El's father]. I don't think Mr. Nathaniel Appleby-El lived there at the time. Mr. Appleby-El has already indicated or proffered that he lived at Booth Street at that time and was not a resident of the property that abutted James Sturgis's home.

Mabel Watson's Prior Recorded Trial Testimony

The State next read the direct examination portion of the prior recorded trial testimony of Mabel Watson. The prior recorded trial testimony reflected that Ms. Watson was James Sturgis's foster mother, and that James had brought her the wallet he found in her backyard on "the Saturday before Christmas." When James brought her the wallet he

had found, she went through its contents to try to identify its owner. She said there was no money in the wallet, but there were a number of cards and a driver's license in the wallet. She ended up taking the wallet to the police station the following Monday morning. She identified State's Exhibit No. 4 as the wallet that was found in her backyard.

Mr. Appleby-El's attorney then read the cross-examination of Ms. Watson that occurred at the first trial in 1978. On cross-examination, Ms. Watson repeated that James brought the wallet to her on the Saturday *before* Christmas day, and that she took the wallet to a police station. Defense counsel proffered that he would have asked Ms. Watson the following questions:

> [COUNSEL FOR MR. APPLEBY-EL]: . . . I would have inquired to her what the status of the wallet was. What items were in the wallet. She indicated during her direct examination that there was no money recovered but I'd like to go through, if given the opportunity to delve into what she actually observed, what cards were there, what phone numbers she had tried to call as she indicated on direct examination and how the wallet came into her possession and if she had known with any certainty if anything had been removed prior to her having custody of the wallet.

Trooper Harold Gray's Prior Recorded Trial Testimony

The State next offered recorded testimony given by Trooper Harold Gray of the Maryland State Police at the 1978 trial. Trooper Gray testified that, on December 26, 1977, Mabel Watson turned in a wallet at the State Police barrack. The wallet contained personal cards referring to Charles Edwin Adkins, Jr. The wallet and cards were dusted for fingerprints, and then sealed in an evidence bag. Trooper Gray identified State's Exhibit No. 4 as the wallet that was turned in to him on December 26, 1977.

Trooper Gray also testified that, on December 27, 1977, Mr. Appleby-El turned himself in to the police. When Mr. Appleby-El was placed in a holding cell at the Salisbury barrack, Trooper Gray searched him and recovered a watch that was in Mr. Appleby-El's "front pocket." Trooper Gray testified that Mr. Appleby-El told him that the watch belonged to his brother. Trooper Gray identified State's Exhibit No. 5 as the "Texas Instruments digital watch with a black wristband" that he found in Mr. Appleby-El's pocket on December 27.

Trooper Gray also testified that, on the evening of December 27, 1977, Nate Bingham turned in a ".32 caliber Iver Johnson" revolver. Trooper Gray identified a handgun as the .32 caliber revolver that was turned in to him by Mr. Bingham.

Defense counsel read Trooper Gray's prior recorded trial testimony on cross-examination. Trooper Gray affirmed that he recovered the watch from Mr. Appleby-El's person "as [he] normally" would. Trooper Gray said that Mr. Appleby-El did not try to hide the watch, and "[t]he only statement I think [Mr. Appleby-El made] at that time was that [the watch] belonged to his brother." Trooper Gray also stated that he did not show the watch to Mr. Adkins's widow, and he did not know what she had to say about the watch. With respect to the handgun that was turned in, Trooper Gray agreed that he "just held it in [his] possession[.]"

Defense counsel proffered that he would have cross-examined Trooper Gray as follows:

> [COUNSEL FOR MR. APPLEBY-EL]: Several issues that I would have asked him regarding what I would consider the search after Mr. Appleby-El

> came in. When Mr. Appleby came into the station, if it was true that the watch had actually just been in the lining of his jacket pocket and not in the pocket itself, indicating, Your Honor, that there was a cut in the pocket and it had just sort of fallen into the bottom.
>
> I would further ask Mr. Gray, Officer Gray, what he did when he recovered this watch, whether it was placed in an evidence bag, whether it was photographed, whether or not he had taken this watch in the state it was in to Lena Mae Adkins for her to identify. And in the event that he affirmatively did that, I would ask him what procedures he would use to safeguard any prejudicial effect of showing this watch to Lena Mae Adkins.
>
> . . . I'd further ask him if [the watch] was in an operational condition at the time that it was recovered. There has been no testimony as to that.
>
> * * *
>
> I would also ask Trooper Gray why out of all the other property that was recovered from Mr. Appleby-El that this was the property that was eventually used and secured by police. What did he know about the watch, if anybody had indicated to him at the time that there might be potential that a watch was missing from the alleged victim. I'd also ask at what time he moved this watch into any property locker, something for safe storage. I'd further just delve in general to how this watch, why he had a particular interest in this watch as opposed to any other property that was recovered from Mr. Appleby-El when he turned himself in.

Nathaniel Bingham's Prior Recorded Trial Testimony

The State next read prior recorded testimony of Nathaniel Bingham.[1] Mr. Bingham testified on direct examination that he had bought a handgun from Abe Hutley on December 24 at "around 6:15, 6:30." He identified State's Exhibit No. 6 as the gun that he bought from Abe Hutley, but later turned over to "Officer Gray and Officer Tuni."

[1] Mr. Bingham's name appears as "Nathaniel Bingham" and "Daniel Bingham" in the transcripts of the second trial. When asked to state his name at the 1978 trial, he said: "Nate Bingham."

Next, defense counsel read Mr. Bingham's prior recorded trial testimony on cross-examination. On cross-examination, Mr. Bingham said he paid "20 bucks" for the gun. Although he denied, at first, that he knew any other name for Abe Hutley, when defense counsel asked whether the person who sold him the gun is also "known as Abe Washington," Mr. Bingham said: "I guess so." He said that he bought the pistol for his own protection, and he did not think he would be able to obtain a permit because he had a 1973 conviction for petty larceny for which he received a suspended sentence.

Defense counsel's proffer at the second trial as to proposed cross-examination of Mr. Bingham was as follows:

> [COUNSEL FOR MR. APPLEBY-EL]: Mr. Bingham. What I would ask Mr. Bingham is just essentially . . . that he's not sure of the make, model, serial number of anything with the gun. Further, I'd also ask Mr. Bingham if he ever fired the gun, if the gun was operational to his knowledge.
>
> Those would be the questions that I would ask, just the identification of the gun itself and if it had anything identifiable with it.

Abe Hutley's Live Testimony

The State's next witness was Abe Hutley, who testified live at the second trial. He testified that he was well-acquainted with Mr. Appleby-El, both of them having grown up in Salisbury. In 1977, "I knew him well." Mr. Hutley testified that, "just a little bit before Christmas" in December 1977, he was at a popular hangout spot, "Midway Cab," when he observed Mr. Appleby-El "flash" a "handgun" that "was a revolver." "Wasn't doing a real bunch of waving about but it was about enough where anyone that was in there saw

it." At some point during that evening, Mr. Hutley took possession of the revolver without Mr. Appleby seeing him. Mr. Hutley explained on direct examination:

> [MR. HUTLEY]: He had a, to my knowledge, if my memory serves, he had a jacket and I believe he put the weapon into his jacket and took his jacket off and I think he put it in the corner. And as he put it in the corner, I believe he walked back to the pool table or something. That way I went over by where he had placed the jacket and I took the gun.
>
> [THE STATE]: You took the gun from his possession?
>
> [MR. HUTLEY]: Yes.

Mr. Hutley then testified that he went home with the gun without saying anything to Mr. Appleby-El. When asked why he took the gun, Mr. Hutley said: "It was there, something to take." The next day, he was trying to sell the gun when he ran across Nate Bingham and made a deal in which Mr. Hutley traded him the revolver in return for "two bags of marijuana."

On cross-examination, Mr. Hutley admitted that he also knew Mr. Appleby-El's brother, and that "[y]ou could confuse the two of them." He admitted that he sometimes went by the name Abe Washington. When he took the gun from Mr. Appleby-El's jacket, he did not have permission to do so, and he knew the gun did not belong to him. He left the gun with the owner of Wright's Market overnight as collateral, but retrieved the gun the following day. He conceded that he could not say "with 100 percent certainty that that same gun was returned" to him. The two bags of marijuana he received from Nate Bingham were worth about $40.

Trooper Douglas Lewis's Prior Recorded Trial Testimony

The State's last witness in its case-in-chief was Trooper Douglas Lewis via transcript. When Mr. Appleby-El's attorney renewed his objection to the admission of prior recorded trial testimony, the court stated:

> THE COURT: Your objection is noted, it's not needed. Your continuing objection has been – every time there's been a transcript witness the Court is reminded of your objection.

On direct examination at the 1978 trial, Trooper Lewis testified that, on December 28, 1977, after Mr. Appleby-El had turned himself in for his involvement in Mr. Adkins's death, Trooper Lewis conducted an interview. He advised Mr. Appleby-El of his *Miranda* rights by way of a written form, which was acknowledged and signed by Mr. Appleby-El. Trooper Lewis testified the following occurred after Mr. Appleby-El signed the *Miranda* waiver form:

> [TROOPER LEWIS]: He told me that he had, in fact, been in the taxicab and that he did ride along with the second person to [sic] the Trailways bus station and that the two of them took the taxicab to the Jersey Road area where the crime was committed.

According to Trooper Lewis, he provided *Miranda* warnings a second time, and Mr. Appleby-El then voluntarily agreed to dictate a statement to Trooper Lewis, who used a typewriter to personally transcribe Mr. Appleby-El's words. After Trooper Lewis finished typing the statement, he displayed the type-written statement to Mr. Appleby-El for his review, and gave him the opportunity to make any corrections. Although Mr. Appleby-El reviewed the typed statement, he declined to make any changes. After reading

the statement, Mr. Appleby-El initialed each page and signed the statement, which was dated December 28, 1977.

The typed statement was then marked as a State's Exhibit (No. 8 at the 1978 trial, but No. 9 at the second trial), and admitted over objection. Trooper Lewis then read to the jury the entire lengthy statement he had typed and Mr. Appleby-El had signed:

> [TROOPER LEWIS reading]: QUESTION: Suppose you tell us in your own words what you know of what happened on or about 12-23-77 with reference to the robbery and murder of Charles Edwin Adkins.
>
> ANSWER: Friday afternoon. It must have been about 12. I met Gerald at the cab stand and he told me that he was going to hit another cab. And I asked him when and he said tonight. And he told me to stay home awhile until he called. I hung around awhile and I said, hey, man, do you think that's the cool thing to do, and he said, yeah, I got the perfect scheme. I left after that and went home. I stayed there the rest of the evening until he called, which was somewhere between 7 and 8:00. Right after he called my sister called, and when she called I found out that she was at the same place. Well, when he called I found out that he was at the bus station. And my sister called from there and requested for somebody to come and pick her up. I told my family members that I was going to the mall and that they could drop me off at the bus station. I walked in the bus station and got my sister's luggage and put it in the truck. And they left. And I told them I'd be home soon.
>
> Then I walked back in the bus station and I saw Gerald was coming out of those double doors from the bathroom. And he asked me was I ready. And I asked him are you ready? And then we walked back in the bathroom. And he told me he had planned on killing the man after he robbed him. After that I begged him not to do that. So finally he agreed and said I won't. And then he walked out of the bathroom and sat in those chairs in the waiting lounge.
>
> After that I fell away from the bathroom door and went back in the bathroom to try to think about what I was getting ready to do. A short while later he came back in and told me that a cab had pulled up.

Then we walked out of the bathroom together, pulled our hoods up over our heads, and we walked on out and got in the cab. The cab driver was waiting to see if some other people were going to get in the cab and I hollered out the window and asked the people were they going to ride with us and they said no. So then the cab driver asked where to and he told him down Jersey Road. So the cab driver proceeded to Jersey Road.

When he got to the intersection of Morris Street and Jersey Road, Gerald told him to turn right up here on Keene Avenue. When he turned up on Keene Avenue, Gerald pulled out the pistol and pointed the pistol at the man's chest. And I could see his hands tightening up on it. I then grabbed him around the throat and the left wrist. I closed my eyes and I heard the shot go off. When I opened my eyes I looked at the driver and he was still sitting straight up in the seat with his hands still on the wheel. I thought for a minute that he hadn't been hit, but then after that he fell. I was still holding onto Gerald when the driver fell and his head rubbed across my arm and he fell in Gerald's lap. The next time I looked up we were about ready to hit another car that was on the side of the road. And Gerald grabbed the wheel and turned it to the right to keep from hitting the car that was on the side of the road.

While he was trying to get the man out of his lap, he let go of the wheel, then I pulled my right arm from around his neck. My right glove came off and I grabbed the wheel with my bare hand and guided the car around the curve. Then Gerald pushed the man down in the seat and sat on top of him and took over the driving. And then I sat in the floor of the car in the back trying not to be seen. I felt something warm run under me while I was sitting on the floor. I stuck my hand down in it and looked at it and knew it was blood. I reached up in the front seat and got my right glove and wiped my hand off with the glove and then Gerald proceeded to the end of Keene Avenue at Jersey Road. He pulled on out and turned up Morris Street and went on down until he got to the intersection of Morris Street and East Road. He made a right off of Morris Street onto East Road. I told him to stop the car and I got out And I watched him go on down to the dead end section of East Road. After he got so far down in there he stopped the car. I don't know whether he switched it off or not, but I could see the inside light of the car come on. I don't know whether he was out of the car or not, but he called my name twice and I walked down there a little ways until I got to a dirt road that runs from East Road to West Road. I stood there awhile looking and I walked on out the dirt road to West Road. Then walked around the block or two and then went back to the scene. Gerald was gone. I walked around to the passenger side of the car and opened the door and

looked at the man. And then felt the side of his throat hoping that he was still alive. Realizing he was gone, I stood there awhile rubbing the side of his head. Then afterwards I just eased the door back closed. Then I just walked off and walked around the block one time and then went home.

I changed my clothes there and wiped off my coat and put the clothes under the bed and walked in the bathroom because I was sick from the smell of blood. I threw up. Looked at myself in the mirror, then I realized by the way I looked that anybody in my family could tell that something was wrong. And I put on another coat and walked out the back door.

I met Gerald in my neighbor's yard and we walked from there together to Wright's store. When we got to Wright's store I told the man I want the shit, speaking of the pistol. He handed me a wallet and said your money is in there. I put the wallet in my back pocket and reached my hand back out to him so he'd know that I was talking about the pistol. He handed me the pistol. I put it in my coat pocket and we walked on up to the sub shop, not saying anything. When we got inside the sub shop I took my coat off and laid it on the counter and the pistol fell out of the pocket and I picked it up. And trying to forget I started playing with it, and I wasn't addressing anybody in the sub shop but I said out loud I'm tired of this shit. Then I put the pistol up to my own head, I was just joking, but when I did it everything that just happened started coming back to me. And I stood there awhile with the pistol still at my head just staring at the wall thinking about what had just happened.

And there was some girls in the sub shop that thought I would actually shoot myself and they ran out of the sub shop. And that's when I realized that my own hand was tightening up on the trigger. So I took the pistol down and put it in my coat pocket. And then Abe Washington who was sitting nearby asked me all that karate you know and you're carrying a pistol. And I told him that sometimes you never know.

And Andrea [sic] Taylor walked over to me and asked me what was up, and I told him, man, my head is just fucked up. And he asked me did I want to smoke a joint with him and I said yeah. We walked back into the bathroom and smoked a joint and came back out. And when I came back out I saw that my coat was out of place and I checked the pockets and the pistol was gone and so was Abe. And I asked everybody that was standing around in the sub shop did they take the pistol and they all said no. So then I knew that Abe must have done it. And I started yelling I'm going to fuck his shit up for that. And I played one game of pool and talked about the

pistol being stole awhile with a few people in there. And I said fuck it and put my coat on and walked out.

When I got about 50 yards from my house I remembered the wallet and I took it out and looked through it and there was nothing in it. And then I threw the wallet under a camper and went on in the house. I then went to bed and waited to hear from my girl.

The next morning I went down to the sub shop and I heard the news of the homicide come over the CB. I saw [S]tate [P]olice cars going by and another older man that was in there asked me to come on with him and let's go see what was happening. So I got in the car with him and we went down to the scene. When I got down to the scene I wanted to tell them what had happened, but I just couldn't do it in front of all those people that knew me that were down there at the scene. So I waited.

A few days later I was informed that the cops were looking for me. I started to run but I changed my mind and came on down to the police station. I went down to the city police barracks first and I told the officer in there that the cops were looking for me. He asked me my name, when I told him and he looked through the books that were on the counter and he said he didn't have anything on me. So I left from there and came to the State Police Barracks. And when I got here I told them who I was and that the cops were looking for me with all intentions of confessing to what had happened. But the way I was approached by the interrogating officer just made me mad as hell and then I refused to tell him anything or give him a statement.

Later on that night I was questioned by two other officers in a more civilized manner and then I agreed to tape the statement and it was arranged for the following morning. And as you can very well see, I took the statement.

That's the gist of the statement.

Q. Were any questions asked of him after that?

A. Yes.

Q. Would you read the questions and answers, please?

A. Question: When you were at the bus station, did any of your family see Gerald?

Answer: They didn't know him.

Question: How far away was the pistol from Charles Adkins' head when it went off?

Answer: About three or four inches.

Question: Where did the gun come from that Gerald had?

Answer: It belonged to Samuel Layfield.

Question: How did you know Charles Adkins' name?

Answer: I saw it on some cards in his wallet and I heard it on TV.

Question: Was there anything else on these cards that would further identify this man?

Answer: I noticed his birth date and all and he was about 49. And his birth date was about March the 3rd. And I also remembered that some of the cards had junior on it.

Question: Can you describe the gloves you had on?

Answer: They were brown cotton gloves.

Question: What did you do with the gloves and clothing you wore?

Answer: The trousers and underwear I burned in my trash barrels and the gloves I think I put in my closet.

Question: For the record state Gerald's full name and address.

Answer: It's Gerald Curtis, he is 18 or 19, Morris Street, I don't know the number.

Question: Is there anything else you would like to tell us?

Answer: I was just trying hard as hell to keep the man alive.

Q. No other questions of Trooper Lewis.

On cross-examination, Trooper Lewis admitted that there was no stenographer present when he transcribed Mr. Appleby-El's statement. When asked whether he had "just paraphrased" what Mr. Appleby-El told him, Trooper Lewis answered: "No, sir. His words are verbatim. As he gave me the information I typed them exactly, exactly the words he told me." He further explained: "As I was typing along I would have him say a phrase at a time and as he did I would type it." Defense counsel then asked: "So you're saying this is word for word, no paraphrasing, huh, huh?" Trooper Lewis replied: "It's word for word as he told me, yes." Trooper Lewis said that the process of listening to and typing Mr. Appleby-El's statement took approximately two hours, from approximately 4:10 p.m. to 6:10 or 6:15 p.m.

Defense counsel at the second trial made the following proffer as to additional questions he would have asked Trooper Lewis on cross-examination:

> [COUNSEL FOR MR. APPLEBY-EL]: Had I been given the opportunity to cross-examine [Trooper] Douglas Lewis, not trying to delve out new evidence but during my cross-examination I would have been able to, and I think effectively after the exhibit was moved in, point out inconsistencies that I believe would be paramount in what the State has characterized as a confession. One of these statements, Your Honor, is that he continuously refers to this as a confession of robbery and this alleged homicide. But I would ask him certain things. Going to the first statement where Mr. Appleby indicates to Mr. Gerald Curtis, ["]hey, man, do you think that's a cool thing to do.["] Further, delve into the fact that Mr. Appleby-El actually went to the bus station to meet up with his sister. Further, I would re hit on the fact that after coming up on the statement that ["]I begged him not to do that and he finally agreed and said I won't.["] I think that's a very big issue

that would need to be brought out and fleshed out in front of the jury, what he thought he had meant when Mr. Appleby said that. To me that seems like Mr. Appleby-El was removing himself from this situation. So I wanted to delve into that.

Obviously as well I would have asked more questions about Gerald Curtis and the nature of Gerald Curtis's involvement in this investigation which was him being a co-defendant.

Further I would want to, through cross-examination, clarify because I think it's a little confusing and I'm going to read the whole statement, and it's not long. ["]I then grabbed him around the throat and the left wrist and closed my eyes and I heard the shot go off. When I opened my eyes I look at the driver and he was still sitting straight up in the seat with his hands on the wheel. I thought for a minute that he hadn't been hit, but then after that he fell. I was still holding onto Gerald when the driver fell.["]

I wanted an opportunity to make sure that the jury understood that it was not Mr. Appleby-El coming around holding the victim, he was actually holding Gerald Curtis, a potential co-defendant in the front seat. Further, I'd also ask where the position of Mr. Appleby-El[.] I think it was indicated he was in the back seat but I believe further explanation would be he was in the back left seat directly behind the driver.

Further I would ask him just questions regarding Mr. Appleby's statements when he tried to get the gun back from Gerald Curtis when these statements were made in proximity and time to the alleged gunshot with Mr. Adkins.

And with that, Your Honor, that would be the questions I would have for Mr. Curtis.

The Trial Court's Response to Defense Counsel's Proffers

As previously mentioned, the trial court received all of defense counsel's proffers as to his proposed supplemental cross-examination of Vaughn Bounds, Lena Mae Adkins, James Sturgis, Mabel Watson, Trooper Gray, Nate Bingham, and Trooper Lewis all at

once, outside the presence of the jury just before the court recessed for lunch. After hearing defense counsel's proffers, the trial court turned to Mr. Appleby-El and stated:

> THE COURT: Okay. So, Mr. Appleby-El, **what your attorney has just done is essentially laid his own game plan for this trial back in 1978 or '79** when all the witnesses would have been alive, the questions that he would hope to ask of those witnesses. **Whether or not those questions would be permitted, whether or not the answers would be appropriate are pure speculation at this point but what he was trying to do was point out the difference between how he would handle the case versus how [defense counsel in the first trial] handled the case back in the later seventies**; do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: It is of no effect on the bench today as we're hearing this case, and it's not something that will be made known to the jury, **it is simply your attorney indicating what he would have done had this case been with all live witnesses today**; do you understand that?
>
> THE DEFENDANT: Yes, sir.

(Emphasis added.)

Mr. Appleby-El's Motion for Judgment of Acquittal

At the close of the State's case-in-chief, Mr. Appleby-El made a motion for judgment of acquittal. In support of his motion for judgment of acquittal of first degree felony murder or felonious homicide, Mr. Appleby-El's attorney argued that the State did not present any evidence that any weapon was used other than a firearm, and Mr. Appleby-El had been acquitted in 1978 of using a firearm in a crime of violence. He elaborated: "[T]here was no other knife, no threat of force, no allegations that he used any other weapon than the gun that was talked about during this case. He's already been acquitted of that." He further argued that the charge of which Mr. Appleby-El was acquitted in

1978—use of a firearm in the commission of a crime of violence (count four)—was an essential element of the underlying felony of robbery with a dangerous weapon. He therefore argued that the felony murder charge as well as the charge of robbery with a dangerous weapon should be dismissed.

In further support of his motion for judgment of acquittal on the count charging robbery with a dangerous weapon, defense counsel argued that the State did not present evidence that the handgun used to allegedly murder the victim was operable, and counsel pointed out that the testimony received into evidence established that the handgun had been in the control and custody of several people over the course of 24 hours. Finally, he argued that Mr. Appleby-El's written statement indicated that he was "making a substantive step to remove himself from this potential robbery . . . tantamount to a voluntary abandonment . . . to stop the co-defendant." Defense counsel asserted: "I believe abandonment would be an affirmative defense."

With respect to the charge of carrying a handgun, defense counsel argued that there was insufficient evidence to prove that Mr. Appleby-El wore, carried, or transported a handgun within his reach and available for his immediate use with the deliberate purpose of injuring or killing another person. But he acknowledged that Mr. Appleby-El's written statement was evidence in which Mr. Appleby-El indicated that Mr. Curtis handed him the handgun.

The trial court denied his motion for judgment of acquittal as to all counts.

Mr. Appleby-El's Case-In-Chief

Mr. Appleby-El's Live Testimony

Mr. Appleby-El took the stand in his case-in-chief. He testified that he was with Gerald Curtis on December 23, 1977, when they got into Mr. Adkins's taxicab. According to Mr. Appleby-El, although Mr. Curtis had told him of his plan to "stick somebody up," Mr. Appleby-El tried to dissuade Curtis, and he believed that he had talked him out of robbing a cab driver. But, when Mr. Appleby-El got into a cab, planning to ride to his parents' home, Mr. Curtis unexpectedly got into the front passenger's seat, and told the cabbie to take them to the address of Curtis's girlfriend. Mr. Appleby-El claimed that, at that point, he did not know Gerald Curtis was carrying a handgun or that Mr. Curtis intended to use it. It was only when they were in the taxicab nearing the vicinity of Curtis's girlfriend's house that he saw Mr. Curtis was holding a handgun.

Mr. Appleby-El testified that, when he saw Mr. Curtis holding a handgun, he grabbed Mr. Curtis around the neck and grabbed Curtis's left wrist (the hand in which Mr. Curtis was holding the gun). Noting that Curtis is "a very little guy," Mr. Appleby-El claimed that he tried to pull Curtis into the rear seat. He further testified:

> [MR. APPLEBY-EL]: All I could think right then was stop this madness. I didn't really have a, a fully formed plan of action. Just stop this madness, this cannot happen. And I thought if I could get ahold of him, grab him and pull him back over the back seat, just pull him all the way into the back with me, then he would have no chance of doing anything, I got him then, you know, it's over, it's a wrap.
>
> And that's basically what I was thinking. But as I said, everything seemed to be happening in slow motion. Everything slowed down. And as I was pulling him up, I'm gonna tell you the truth . . .

THE COURT: Mr. [Defense Counsel], ask another question. We don't want to get into – elaborate discussions that's not based on a question, okay? Mr. Appleby-El.

[COUNSEL FOR MR. APPLEBY-EL]: As you were pulling Gerald Curtis, trying to pull him to the backseat, did you notice which way the gun was pointed?

[MR. APPLEBY-EL]: That's what I was about to say. Because in all actuality, I believe, to this day I believe [sic] that then, I related that to the officers, I believe it still, I believe it to this day, it was my action of pulling him up over the back of that seat that caused that gun to discharge.

I don't believe that he was intending to shoot this man -- I know he wasn't gonna shoot this man while we were driving down the road at that speed, you just don't do that. That would also qualify you as one of the dumbest criminals. Anything could have happened. We just could've crashed and burned and, and I don't think anybody's going to shoot the driver while he's driving down the road. That's so, so I'm satisfied in my mind that it was an accidental discharge --

[COUNSEL FOR MR. APPLEBY-EL]: By Mr. Curtis?

[MR. APPLEBY-EL]: -- of the gun, and I believe it was caused by the action that I took, when I grabbed him like that. Suddenly. He didn't expect it. When I yanked him up like that, and just as I pulled him up, pow, the gun went off. And I was still holding him up like this. And I looked at the driver, and the driver was like . . . he had been in the process of turning around, I guess to see what kind of kerfuffle was going on in the front seat next to him. Like I said, he had been looking left. And he was just in the process of turning around to see what was going on when the gun went off.

Mr. Appleby-El continued to testify at length about the events that occurred after the handgun went off inside the taxicab. He explained that Mr. Curtis somehow gained control of the moving vehicle after the driver had been shot in the head, and Curtis eventually parked the cab on East Road, not far from where Curtis's mother lived. Mr. Appleby-El described making his way to his own father's house, where he changed

clothes. He then went back out and "ran into Curtis again" near Wright's store. Mr. Curtis gave him the gun, and also handed him a billfold. He went to the Midway Cab sub shop, and, while there, shot some pool with Abe Hutley. He said the pistol did fall out of his jacket while there, and he put it in his coat pocket. He left the coat (with the gun) on the floor while going to smoke marijuana with another acquaintance, and, when he came back, the pistol was gone. A couple of days later, he heard that the police were looking for him. He appeared at the State Police barrack, and identified himself. He was arrested. In the coat he was wearing, the police found an old digital watch that had been his oldest brother's.

And he described giving a statement to Trooper Lewis. He recalled that "I would tell him what happened. He would say stop right there. And he would type. And then he would read it back to me what he had just typed, he would read it back to me." "[H]e would just read it back to me, and if there was anything that, that wasn't right or wasn't exactly what I said, I would correct it." "A couple times when he did that, he took it out of the [typewriter] and, and showed it to me and had me initial it right there where he had made the correction." Nevertheless, Mr. Appleby-El asserted that he did not review the completed statement because he "was beat down" at the end of a long day. Consequently, when defense counsel read a couple of phrases from the statement, Mr. Appleby-El claimed that he had "never said that. Those are not my words." "No, those are not my exact words, no." He explained "this is like a mock-up – a rough mock-up of what I actually said." But he also described the typed statement a "a fictionalized version of the

statement I gave and what actually happened, and what transpired between Curtis and myself."

On cross-examination, Mr. Appleby-El acknowledged that he and Mr. Curtis were longtime friends, who were "close enough" that "he felt comfortable calling . . . telling you he planned a robbery." And he knew that Mr. Curtis had been involved in other robberies and "knew it wasn't a joke." He confirmed that Mr. Curtis had given him the cab driver's wallet, and that he threw it under the camper on property next to his father's. He also confirmed that Mr. Curtis had handed him the pistol that was used in the robbery, and that Abe Hutley had taken it at the Midway pool hangout. He confirmed that, as he had said in his typed statement, Mr. Curtis had obtained the pistol from Samuel Layfield, and he testified that Samuel Layfield was the owner of a cab company. He described the gun that he received from Mr. Curtis as "a 32-caliber Iver Johnson revolver."

Mr. Appleby-El's Renewed Motion for Judgment of Acquittal

After the close of evidence, defense counsel renewed his motion for judgment of acquittal. He stated:

> [COUNSEL FOR MR. APPLEBY-EL]: I'll renew my same motion for judgment of acquittal, I think that the evidence that has been put forth is that Mr. Appleby took a substantive step to withdraw from this act, I don't think there's any evidence that has been put forward that indicates that Mr. Appleby knew or should have known what was going on.
>
> The evidence before the Court from both sides, is that Mr. Appleby made an affirmative and substantive step to try to stop Gerald Curtis from doing this action. Mr. Appleby has just gone on the stand and testified to this. It's in the State's case as well. It's uncontroverted at this point.

> I believe that this, essentially is an abandonment of any sort of criminal conduct when he takes a substantive step to withdraw from . . . any robbery.
>
> I would also just further add that the testimony of my client, he never indicated that he knew, or at the time he did not believe Mr. Curtis was making a robbery. He had tried to talk him out of it. He thought he had. I believe everything he said is reasonable. I will just renew my motion for judgment of acquittal on the same issues with that caveat.

The trial court denied his renewed motion for judgment of acquittal as to all counts.

The Jury's Verdict

The jury returned a verdict finding Mr. Appleby-El guilty of all three charges: first degree felony murder (count one), robbery with a deadly weapon (count two), and carrying a handgun (count five).

The circuit court sentenced Mr. Appleby-El to a term of life imprisonment for his conviction for first degree felony murder, with credit for time served, and merged his remaining convictions for sentencing purposes.

DISCUSSION

I. "Whether the Circuit Court erred by denying the Motion to Dismiss the Indictment?"

Mr. Appleby-El contends the circuit court erred in denying the pre-trial motion to dismiss all charges, filed by defense counsel on February 16, 2018. He argues that the jury's acquittal of use of a handgun in the commission of a crime of violence (count four) at his first trial in 1978 precluded him from being retried for felony murder (count one), robbery with a dangerous weapon (count two), and carrying a handgun (count five) at his second trial. He reasons that "the law requires a handgun for each of these three charges"

and "the only handgun . . . was the one that the jury had acquitted Mr. Appleby[-El] of using." He asserts that "there is no evidence of any other weapon."

The State disagrees, arguing that "[t]he circuit court correctly concluded that, even under current law, the verdict at Appleby-El's first trial was not legally inconsistent." The State further points out that "retrying him on the charges for which he was previously convicted did not violate the prohibition against double jeopardy."

Standard of Review

Although the dismissal of an indictment is normally reviewed for an abuse of discretion, *State v. Lee*, 178 Md. App. 478, 484 (2008), "where an order involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court's conclusions are 'legally correct' under a *de novo* standard of review." *Schisler v. State*, 394 Md. 519, 535 (2006).

Here, the circuit court entered a written opinion and order on April 5, 2018, denying defense counsel's motion to dismiss all charges, and stating:

> [T]he issue before us now becomes whether the verdicts of Defendant's 1978 trial were legally or factually inconsistent. The case of *Teixeira v. State*, 213 Md. App. 664 (2013) is especially instructive for the Court's task. In that case, the defendant was convicted of armed robbery, *inter alia*, but the jury acquitted him of use of a handgun in the commission of a crime of violence. *Teixeira*, 213 Md. App. at 667.
>
> * * *
>
> The jury in the Defendant's first trial could have decided that the armed robbery was committed with another dangerous weapon, other than a handgun. Though factually inconsistent it may be, no legal error can be assigned to the Trial Court for accepting these verdicts in concert. Moreover, it is not the place of the Court to question the trier-of-fact when

> no legal errors are present. In our judicial system, it is the jury who is the arbiter of fact, just as the judge is the arbiter of the law. The Court of Appeals in *McNeal* aptly evinced that, "To evaluate the considerations of the jury in reaching its verdict would involve pure speculation, or require a reviewing court to inquire into the details of the deliberations. This is not a task that courts should undertake." *McNeal* [*v. State*], 426 Md. [455,] at 473 [(2012)]. As such, and for whatever reason, the jury in Defendant's first trial found Defendant guilty of Armed Robbery, and acquitted him as to Use of a Handgun in the Commission of a Felony. As described above, these verdicts are not legally inconsistent, but could be construed as factually inconsistent. However, it is only a legally inconsistent verdict that triggers our intervention. Therefore, no inconsistent verdict was entered at the conclusion of the original trial. Thus, for the purposes of Defendant's Motion to Dismiss, this finding disposes of his claim. For the foregoing reasons, Defendant's Motion to Dismiss is denied.

Analysis

"[A] motion to dismiss the indictment will properly lie where there is some substantial defect on the face of the indictment, or in the indictment procedure, or where there is some specific statutory requirement pertaining to the indictment procedure which has not been followed. . . . [T]he motion to dismiss attacks the sufficiency of the indictment, not the sufficiency of the evidence." *State v. Hallihan*, 224 Md. App. 590, 610-11 (2015) (quoting *State v. Bailey*, 289 Md. 143, 150 (1980)). "Thus, where there are factual issues involved, a motion to dismiss on the grounds that the State's proof would fail is improper." *State v. Taylor*, 371 Md. 617, 645 (2002).

Mr. Appleby-El's argument in support of reversal is predicated on a factual question regarding the use of a weapon or handgun in this case. On a motion to dismiss the charging document, we are not concerned with whether the State has sufficient evidence to prove the alleged charges. *Taylor*, 371 Md. at 644-45. We are concerned

with whether the charging document charges a crime, whether there is a defect on the face of the charging document, or a defect in the charging procedure. *Hallihan*, 224 Md. App. at 610-11 (citing *State v. Taylor*, 371 Md. 617, 644-45 (2002)). As noted above, in the instant case, the charging document alleged:

> COUNT ONE
>
> THAT Gerald Anthony Curtis and Nathaniel Benjamin Appleby, on or about the 23rd day of December, 1977, in the County aforesaid, did feloniously, willfully and of deliberately premediated [sic] malice aforethought, did kill and murder Charles Edwin Adkins, Jr., against the peace, government and dignity of the State.
> Art. 27, Sec. 616 (Common Law)
>
> COUNT TWO
>
> THAT Gerald Anthony Curtis and Nathaniel Benjamin Appleby, on or about the 23rd day of December, 1977, in the County aforesaid, did unlawfully and feloniously, with a dangerous and deadly weapon, rob Charles Edwin Adkins, Jr. and violently steal from said person United States currency, a wallet, and a wristwatch, contrary to the form of the Act of Assembly in such cases made and provided, and against the peace, government and dignity of the State.
> Art. 27, Sec. 488 (Common Law)
>
> COUNT FIVE
>
> THAT Gerald Anthony Curtis and Nathaniel Benjamin Appleby, on or about the 23rd day of December, 1977, in the County aforesaid, did unlawfully carry a handgun upon his person, contrary to the form of the Act of Assembly in such cases made and provided, and against the peace, government and dignity of the State.
> Art. 27, Sec. 36B (Common Law)

The charging document was facially valid in this case because all essential elements of the crimes for which Mr. Appleby-El was re-tried at the second trial (felony

murder, robbery with a dangerous and deadly weapon, and carrying a handgun) were properly alleged in the charging document.

Moreover, we see no fatal inconsistency in the acquittal on the charge of "using" a handgun in commission of a felony and convictions of participating as an accomplice in an armed robbery as to which there was evidence that the other defendant, Mr. Curtis, wielded the firearm. The evidence further established that, after the cab driver was shot, Mr. Appleby-El took possession of the handgun and carried it on his person. In short, the jury's verdict was neither legally nor factually inconsistent. And, therefore, there was no impediment to retrying Mr. Appleby-El on the counts as to which he had been previously convicted.

Accordingly, the trial court did not err in denying the motion to dismiss.

II. "Whether the Circuit Court erred by finding that a witness was unavailable?"

Mr. Appleby-El contends the trial court erred in finding that Mr. Deale was an unavailable witness for purposes of Maryland Rule 5–804(a)(5). He asserts that trial court's finding that the State made good faith efforts to procure Mr. Deale for Mr. Appleby-El's second trial was untenable because the State did not attempt to subpoena Mr. Deale until approximately one month prior to Mr. Appleby-El's second trial. Moreover, he asserts, the State did not attempt to contact the Internal Revenue Service, the Maryland Comptroller, or the Motor Vehicle Administration, and the State's investigator did not search social media.

The State argues that the trial court acted within its discretion in concluding that the State made reasonable efforts to locate Mr. Deale. The State also contends that it would be harmless error even if this one minor witness's prior recorded trial testimony should not have been admitted. We agree with the State on both points.

Standard of Review

The standard of review for a trial court's decision that a witness is "unavailable" within the meaning of Rule 5-804 is for abuse of discretion. *Cross v. State*, 144 Md. App. 77, 88 (2002). There is an abuse of discretion "'where no reasonable person would take the view adopted by the [trial] court,'" or where the ruling is "'clearly against the logic and effect of facts and inferences before the court.'" *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (quoting *North v. North*, 102 Md. App. 1, 13 (1994)).

Analysis

Maryland Rule 5–804 permits a trial court to admit prior recorded trial testimony where the declarant is found to be unavailable. The rule provides for five circumstances under which unavailability may be found. One circumstance is: "the declarant . . . (5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance . . . by process or other reasonable means." Rule 5–804(a)(5). The Court of Appeals has stated that "other reasonable means" requires a showing of "efforts in good faith and due diligence to procure attendance." *State v. Breeden*, 333 Md. 212, 222 (1993). "The burden of establishing good faith and due diligence is on the prosecution." *Cross*, 144 Md. App. at 88. "The lengths to which [a party] must go to

produce a witness . . . is a question of reasonableness." *Breeden*, 333 Md. at 221 (quoting *Ohio v. Roberts*, 448 U.S. 56, 74 (1980)).

Here, the trial court heard testimony from Carsten Wendlandt, a special investigator for the State's Attorney's Office for Wicomico County, who was tasked with serving a subpoena on Brian Deale to testify at trial in the State's case. In an attempt to locate Mr. Deale, Mr. Wendlandt ran reports from LexisNexis, Accurate for law enforcement, Peer to Peer, and Maryland Judiciary Case Search. He learned that Mr. Deale did not have a fixed address and usually stayed with friends or family. He visited Mr. Deale's sister, who told him that Larry Fields would be, in her opinion, the best person to figure out how to locate Mr. Fields. But, by that point in time, Mr. Wendlandt had already spoken with Mr. Fields several times over the past several weeks, and Mr. Fields had informed him that Mr. Deale did not wish to cooperate with the State (which testimony came in without objection). Furthermore, during Mr. Wendlandt's investigation, he had also discovered that the District Court for Worcester County issued a bench warrant for Mr. Deale for failing to appear in February 2018, and that warrant remained open. Upon this record, we perceive no abuse of discretion in the trial court's conclusion that the State made diligent efforts in good faith in attempting to procure Mr. Deale, and that the witness was unavailable for purposes of Rule 5–804(b)(1).

But, even if we had been persuaded that the trial court erred in finding that Mr. Deale was unavailable, we would conclude that the admission of his recorded testimony from the 1978 trial was harmless beyond a reasonable doubt because it added nothing

material to the evidence against Mr. Appleby-El, and we can say without hesitation that Mr. Deale's previously-recorded trial testimony did not influence the jury's verdict in this case. *See DeVincentz v. State*, 460 Md. 518, 560-61 (2018).

III. "Whether [the State's] extensive reliance on transcripts [from the 1978 trial] denied Mr. Appleby-El the right of confrontation, because doing so effectively prevented him from cross-examining [the witnesses who previously testified]?"

Mr. Appleby-El asserts that he was denied his right to confront the witnesses against him because the State was permitted to introduce the previously recorded trial testimony of witnesses who had died during the 40-year interval between his two trials. With the exception of Mr. Deale, whose unavailability was addressed above, Mr. Appleby-El does not dispute that the witnesses were unavailable, and that their previously-given testimony falls within the hearsay exception covered by Maryland Rule 5-804(b)(1), which provides:

> **(b) Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) *Former Testimony.* **Testimony given as a witness in any action or proceeding** or in a deposition taken in compliance with law in the course of any action or proceeding, **if the party against whom the testimony is now offered**, or, in a civil action or proceeding, a predecessor in interest, **had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.**

(Emphasis added.)

This rule is compliant with the Confrontation Clause requirement recognized in *Crawford v. Washington*, 541 U.S. 36, 57 (2004), in which the Supreme Court held that prior trial testimony is admissible against a defendant "only if the defendant had an

adequate opportunity to cross-examine" the witness at the prior trial. (Citing, *inter alia*, *Mancusi v. Stubbs*, 408 U.S. 204, 213–216 (1972).)

The condition for admissibility set forth in Rule 5-804(b)(1)—requiring that the party against whom the prior testimony is offered must have had an opportunity to develop the testimony by examination—"'is generally satisfied when the defense [was] given a full and fair opportunity to probe and expose [the] infirmities [of the testimony] through cross-examination.'" *Williams v. State*, 416 Md. 670, 696 (2010) (quoting *United States v. Salim*, 855 F.2d 944, 954 (2d Cir. 1988)). As the Court of Appeals explained in *Williams*:

> A motive to develop testimony is sufficiently similar for purposes of Rule 804(b)(1) when the party now opposing the testimony would have had, at the time the testimony was given, **"an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue"** now before the court. *United States v. Carneglia*, 256 F.R.D. 366, quoting *United States v. DiNapoli*, 8F.3d 909, 914-15 (2d Cir. 1993).

416 Md. at 696 (emphasis added).

The State, relying on *Mancusi v. Stubbs*, 408 U.S. 204, argues in its brief that Mr. Appleby-El was provided an adequate *opportunity* to cross-examine each of the prior witnesses at his first trial. Furthermore, the State asserts that none of the questions proffered by Mr. Appleby-El's trial counsel at the second trial established any "new and significantly material line of cross-examination" not explored at his first trial. *Cf. Mancusi*, 408 U.S. at 215 ("counsel at the retrial did not in his proffer show any new and significantly material line of cross-examination that was not at least touched upon in the first trial"); *United States v. Richardson*, 781 F.3d 237, 245 (5th Cir. 2015) ("Nor, for that

matter, can we say that Richardson's proposed questions constitute a 'new and *significantly material* line of cross-examination that was not *at least touched upon* in the first trial,' *Mancusi*, 408 U.S. at 215, 92 S.Ct. 2308 (emphases added)."). The State asserts that defense counsel's proffered questions "largely involve areas of inquiry irrelevant to the disputed questions at trial." The State also observed: "Neither the Maryland Rules nor the Confrontation Clause require that the cross-examination from the first trial be identical to what counsel from the second trial would have asked in order for the prior testimony to be admissible."

But Mr. Appleby-El contends that his prior defense attorney did not take effective advantage of the opportunity to confront witnesses at the 1978 trial because the prior attorney failed to cross-examine the witnesses adequately. Arguing that the constitutional right to counsel means "effective assistance of counsel," Mr. Appleby-El's attorney at the 2018 trial proffered that he would have asked each of the prior witnesses additional questions on cross-examination.

We are not persuaded. As the State asserts in its brief: "The Maryland Rules and the Confrontation Clause require an adequate opportunity for prior cross-examination, they do not require that the opportunity be seized upon in exactly the way current defense counsel would have liked."

Although Mr. Appleby-El's defense counsel at the second trial did indeed proffer numerous questions that he would have attempted to ask those witnesses who testified at the first trial, Mr. Appleby-El's briefs in this Court have not explained how or why those

additional questions (if permitted) may have produced a different result. To the extent the questions represent an alternative or improved trial strategy, they do not prove ineffective assistance of prior counsel. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984). And we conclude that Mr. Appleby-El did not establish that he had an inadequate opportunity for cross-examination of the witnesses at the 1978 trial. *See Richardson*, 781 F.3d at 246.

IV. "Whether the Circuit Court erred by admitting the alleged confession obtained by police?"

Mr. Appleby-El next contends the trial court erred in admitting Mr. Appleby-El's written statement because it is "inherently incredible that the statement is in fact a verbatim statement of Mr. Appleby-El's words[]" and "the statement does not read like Mr. Appleby-El speaks."

The State disagrees, arguing that this "inherent incredibility" argument was not raised below and is therefore not preserved for appeal. But the State also argues that, in any case, the credibility of Mr. Appleby-El's written confession was an issue for the jury to consider.

Standard of Review

Defense counsel's objection to the written statement at the second trial focused on the fact that Trooper Gray was not present to authenticate the written confession. Defense counsel stated:

> [COUNSEL FOR MR. APPLEBY-EL]: We're going to object on the same grounds, **the Trooper's not here to authenticate it. No reasonable confrontation regarding this evidence and I don't believe it's appropriate for this to come through transcript testimony.**

In ruling on the objection, the trial court, however, addressed the "voluntariness" of the confession to some extent:

> THE COURT: The general appropriateness argument, I can understand why you would make that argument but that's not founded in any legal conclusion or foundation.
>
> The transcript testimony clearly dealt with laying the foundation for the admission of what was State's Exhibit No. 8 back in 1978. That transcript that was read into the record now is received as testimony here in 2018 and supports the introduction of State's Exhibit No. 9. **As to the voluntariness of the statement, what the statement stands for, the weight that should be given to the statement, it all can be argued by counsel, but State's Exhibit No. 9 is received.**

Assuming preservation under Maryland Rule 8-131(a), the issue of whether a confession is voluntary constitutes a mixed question of law and fact. *Winder v. State,* 362 Md. 275, 310 (2001). The Court of Appeals has explained:

> If the trial court determines that the statement was not made voluntarily, it will declare it inadmissible. That completely resolves the issue; it never becomes one for the jury. If, on the other hand, the court finds the statement voluntary, it will admit it and its voluntariness then becomes an issue which the jury must ultimately resolve.

Hof v. State, 337 Md. 581, 605 (1995) (internal citations omitted).

Here, the trial court admitted the written statement and then instructed the jury that it was required to disregard the statement unless it found beyond a reasonable doubt that the statement was voluntarily made. The court further instructed: "If you find beyond a reasonable doubt that the statement was voluntary, give it such weight as you believe it deserves."

We observed in *Madrid v. State*, ___ Md. App. ___, 2020 WL 5835175, No. 1937, September Term, 2017 (filed October 1, 2020), slip op. at 14-15:

> [I]n *Gonzalez v. State*, 429 Md. 632, 647–48 (2012), the Court of Appeals described the standard for appellate review of the denial of a motion to suppress an incriminating statement as follows:
>
> > When reviewing the denial of a motion to suppress evidence, "we confine ourselves to what occurred at the suppression hearing. We view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion, here, the State." *Lee v. State,* 418 Md. 136, 148, 12 A.3d 1238 (2011) (citations and internal quotation marks omitted). "We defer to the motions court's factual findings and uphold them unless they are shown to be clearly erroneous." *Id.* (quoting *State v. Luckett,* 413 Md. 360, 375, n.3, 993 A.2d 25 (2010)). The credibility of the witnesses, the weight to be given to the evidence, and the reasonable inferences that may be drawn from the evidence come within the province of the suppression court. *Longshore v. State,* 399 Md. 486, 499, 924 A.2d 1129 (2007) ("Making factual determinations, *i.e.*[,] resolving conflicts in the evidence, and weighing the credibility of witnesses, is properly reserved for the fact finder. In performing this role, the fact finder has the discretion to decide which evidence to credit and which to reject." (internal citations omitted)). "We, however, make our own independent constitutional appraisal, by reviewing the relevant law and applying it to the facts and circumstances of this case." *Lee,* 418 Md. at 148–49, 12 A.3d 1238 (quoting *Luckett,* 413 Md. at 375, n.3, 993 A.2d 25).
>
> A criminal defendant's inculpatory statements to police cannot be used against him unless the dictates of the Fifth Amendment privilege against self-incrimination, as well as due process under the United States Constitution, the Maryland Declaration of Rights, and Maryland common law are satisfied.

Analysis

The Court of Appeals explained in *State v. Kidd*, 281 Md. 32, 33 (1977):

> In a criminal case, when the prosecution introduces an extrajudicial confession or admission[] given by the defendant to the authorities, the basic

> rule is that it must, upon proper challenge, establish by a preponderance of the evidence that the statement was obtained (1) voluntarily, and (2) in conformance with the dictates of *Miranda v. State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

(Footnote omitted.)

Under Maryland law, the test for voluntariness is "whether the confession was 'the product of an essentially free and unconstrained choice by its maker' or whether the defendant's will was 'overborne' by coercive police conduct." *State v. Tolbert*, 381 Md. 539, 558 (2004).

In assessing the voluntariness of the statement, courts look to "the totality of the circumstances." *Winder v. State*, 362 Md. 275, 307 (2001). Our appellate courts have observed that factors relevant to the totality of the circumstances standard include:

> ["]where the interrogation was conducted; its length; who was present; how it was conducted; its content; whether the defendant was given Miranda warnings; the mental and physical condition of the defendant; the age, background, experience, education, character, and intelligence of the defendant; when the defendant was taken before a court commissioner following arrest; and whether the defendant was physically mistreated, [or] physically intimidated or psychologically pressured.["]

Perez v. State, 168 Md. App. 248, 268 (2006) (quoting *Hof v. State*, 337 Md. 581, 596-97 (1995)). "Under Maryland common law, a confession is involuntary if it is the product of certain improper threats, promises, or inducements by the police." *Lee v. State,* 418 Md. 136, 161 (2011). *See generally Madrid*, ___ Md. App. ___, slip op. at 19-22.

Here, the record indicates that the written statement was Mr. Appleby-El's own statement, made in his individual capacity, and a product of free and unconstrained choice. Mr. Appleby-El turned himself in after he heard he was wanted by police, and there was

no suggestion that the police either threatened him or promised him some advantage if he made an inculpatory statement. He was eighteen years old at the time he voluntarily spoke with Trooper Lewis about the events that occurred on December 23, 1977. He was advised of his *Miranda* rights twice. He was advised once before he began to speak with Trooper Lewis via a written "*Miranda* form," which Mr. Appleby-El reviewed and signed. The "*Miranda* form" was received into evidence at the second trial as State's Exhibit No. 8. Trooper Lewis advised Mr. Appleby-El of his *Miranda* rights a second time before Mr. Appleby-El cooperated with Trooper Lewis to produce a typed document reflecting the oral statement. Trooper Lewis's prior recorded trial testimony indicated that Mr. Appleby-El dictated his verbal confession to Trooper Lewis while Trooper Lewis typed what was said. Mr. Appleby-El was given an opportunity to review the type-written statement, but he made no changes to the document before he initialed each page of the written statement. The process of preparing Mr. Appleby-El's written statement took approximately two hours.

At the second trial, counsel did not argue or offer evidence that Mr. Appleby-El's will was "overborne by coercive police conduct" or that he was "physically mistreated, [or] physically intimidated or psychologically pressured[.]" Under the totality of circumstances, we conclude that the statement was made voluntarily and in compliance with *Miranda*, and it was properly admitted in evidence at the second trial.

V. "Whether the Circuit Court erred by denying the motions for judgment of acquittal?"

Mr. Appleby-El contends that there was insufficient evidence to convict him of first degree felony murder and robbery with a dangerous and deadly weapon. In support of his argument pertaining to felony murder, he argues: "No one testified that Mr. Appleby and Mr. Curtis committed an armed robbery, which is a necessary element of felony murder." He also asserts that Mr. Appleby-El "did not know Gerald had a gun. . . . No reasonable mind could have found that Mr. Appleby committed or even attempted an armed robbery with Mr. Curtis."

The State disagrees, arguing that Mr. Appleby-El's written statement provided sufficient evidence from which "a reasonable jury could infer that Mr. Appleby-El and Mr. Curtis planned to rob the victim . . . and [therefore could rationally] convict Appleby-El of felony murder."

Standard of Review

The standard of review for a trial court's denial of a motion for judgment of acquittal is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (emphasis in original); *accord Savoy v. State*, 420 Md. 232, 246 (2011).

"[I]t is not the function of the appellate court to undertake a review of the record that would amount to a retrial of the case, . . . [n]or is it the function of the appellate court to determine the credibility of witnesses or the weight of the evidence." *Handy v. State*, 175 Md. App. 538, 562 (2007) (citations omitted). "It is 'the jury's task to resolve any

conflicts in the evidence and assess the credibility of witnesses.' In so doing, the jury 'can accept all, some, or none of the testimony of a particular witness.'" *Id.* (quoting *Allen v. State*, 158 Md. App. 194, 215 (2004)). *Id.* Therefore, "we defer to the fact finder's opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]" *Neal v. State*, 191 Md. App. 297, 314-15 (2010).

Analysis

In our view, the evidence was legally sufficient to support a finding of each element of robbery with a "dangerous and deadly weapon," as charged in the criminal information, and first degree felony murder beyond a reasonable doubt. According to Mr. Appleby-El's written statement, which was admitted into evidence through Trooper Lewis's testimony, Mr. Appleby-El stated: "I saw Gerald was coming out of those double doors from the bathroom. And he asked me was I ready. And I asked him are you ready? . . . Then we walked out of the bathroom together, pulled our hoods up over our heads, and we walked on out and got in the cab." When Mr. Appleby-El testified on the stand in his case-in-chief, he testified that he and Gerald Curtis were riding in the victim's taxicab when he noticed Mr. Curtis was holding a "pistol." He further testified that that pistol discharged a shot to the cab driver's head on December 23, 1977, causing the cab driver's death. Moreover, the stipulation regarding the medical examiner's testimony was evidence from which any rational jury could infer that the victim died from a single gunshot wound to the head on December 23, 1977. The prior recorded trial testimony of Trooper Gray established that, when Mr. Appleby-El turned himself in on December 27,

1977, Trooper Gray found a digital wristwatch with a black wrist band on Mr. Appleby-El's person. That wristwatch was identified by Ms. Adkins, the victim's wife, at trial as the watch that belonged to her husband. Mr. Appleby-El also admitted that Mr. Curtis handed him the victim's wallet and told him "your money is in there."

Mr. Appleby-El's argument—that we should find that portions of his written statement and testimony from the witness stand negate the requisite intent for the crimes charged because he was unaware of Gerald Curtis's intent to rob the victim with a handgun—goes to the weight of the evidence, not the legal sufficiency, and the jury was not obligated to accept his exculpatory description of the incident. "The prerogative of disbelief resides always in the fact finder." *Gilbert v. State*, 36 Md. App. 196, 209 (1977).

The evidence previously summarized in this opinion, viewed in the light most favorable to the State, was sufficient for a rational jury to infer that Mr. Appleby-El and his longtime friend Gerald Curtis were accomplices in the armed robbery of Mr. Adkins, and that they had a larcenous intent prior to, or concurrent with, the conduct that resulted in his death. *See Williams,* 397 Md. at 195 ("When two or more persons participate in a criminal offense, each is responsible for the commission of the offense. . . ."). The court instructed the jury on accomplice liability. There was evidence that, when Mr. Appleby-El gave Trooper Lewis a statement a few days after the incident, he related that Mr. Curtis had told him that he had "the perfect scheme" that entailed a plan to "hit another cab." When they were both at the bus station, Mr. Curtis "told [him] he had planned on killing the man after he robbed him." In addition, a rational trier of fact could also find that the

handgun Mr. Curtis possessed when he entered the cab was the dangerous weapon that was used to inflict a fatal injury upon Charles Adkins, Jr., on December 23, 1977. And a rational trier of fact could conclude that the shooting of Charles Adkins, Jr. was consistent with Mr. Curtis's original plan to rob a taxi driver. The driver's wallet was taken, and later discarded, by Mr. Appleby-El. Neither of the young men reported an accident to authorities. And Mr. Appleby-El took possession of the handgun after the shooting.

We perceive no error in denying the motions for judgment of acquittal.

VI. "Whether the Circuit Court erred by denying Mr. Appleby-El's requested jury instructions?"

Mr. Appleby-El contends that the trial court erred in refusing to give a "missing witness instruction" regarding Gerald Curtis because his name was mentioned at trial and the substance of the missing witness instruction was not fairly covered elsewhere in the court's instructions. He also contends that the trial court erred in giving an instruction on "homicide first degree premeditated A" and "robbery with a dangerous weapon" because, he argues, had the trial court "excluded all of the testimony by transcript," the evidence would be insufficient to generate those two instructions.

In response, the State argues that, with respect to the missing witness instruction, the trial court acted within its discretion in denying his request for such an instruction because Gerald Curtis was not shown to be "peculiarly available" to the State. Having argued that the trial court did not err in refusing to exclude the testimony by transcript, the State did not further address Mr. Appleby-El's argument that the trial court should not

have instructed the jury on “homicide first degree premeditated A” and “robbery with a dangerous weapon.”

Standard of Review

In *Cost v. State*, 417 Md. 360, 368–69 (2010), the Court of Appeals described the standard of appellate review of a trial court's refusal to give a requested jury instruction:

> We review whether a trial court abused its discretion in refusing to offer a jury instruction under well-defined standards. A trial court must give a requested jury instruction where "(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given." *Dickey v. State*, 404 Md. 187, 197–98, 946 A.2d 444, 450 (2008); *see also* Md. Rule 4–325(c). We review a trial court's decision whether to grant a jury instruction under an abuse of discretion standard. *See, e.g., Thompson v. State*, 393 Md. 291, 311, 901 A.2d 208, 220 (2006). On review, jury instructions
>
> > [M]ust be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate. Reversal is not required where the jury instructions, taken as a whole, sufficiently protect[ed] the defendant's rights and adequately covered the theory of the defense.
>
> *Fleming v. State*, 373 Md. 426, 433, 818 A.2d 1117, 1121 (2003). Thus, while the trial court has discretion, we will reverse the decision if we find that the defendant's rights were not adequately protected. *See, e.g., General v. State*, 367 Md. 475, 789 A.2d 102 (2002) (trial court abused its discretion in refusing to give a "mistake of fact" instruction); *Smith v. State*, 302 Md. 175, 486 A.2d 196 (1985) (trial court abused discretion in refusing to give an instruction on alibi).

Analysis

a. Missing Witness Instruction

The Court of Appeals has stated that a trial court does not commit an abuse of discretion by refusing to give a missing witness instruction, even when the factual predicate is established:

> [I]nstructions as to facts and factual inferences are normally not required. A missing witness instruction, which concerns an inference to be drawn from evidence—or the lack thereof—is of the latter variety. Thus, **a trial court has discretion not to give a missing witness instruction even if a party requests the instruction and the necessary predicate for such an instruction has been established. A trial court has no discretion to give a missing witness instruction where the facts do not support the inference.**

Harris v. State, 458 Md. 370, 405–06 (2018) (emphasis added).

"[T]he [adverse] inference cannot be drawn 'when the witness is not available, or where his testimony is unimportant or cumulative, or where he is equally available to both sides.'" *Robinson v. State*, 315 Md. 309, 321 (1989) (citing *Christensen v. State*, 274 Md. 133, 134 (1975) (quoting 1 Underhill, *Criminal Evidence* § 45 (rev. 6th ed. P. Herrick 1973))).

Here, defense counsel took exception to the court's refusal to give a missing witness instruction and stated:

> [COUNSEL FOR MR. APPLEBY-EL]: Your Honor, I have a couple exceptions, the first being the missing witness instruction. I would ask that be read.

The trial court denied defense counsel's request, reasoning:

> [THE COURT]: . . . [T]he Court finds that Mr. Curtis was not within the sole reach of one or the other party and there's been no indication that Mr. Curtis was a witness that was only available to the State and not produced[;] therefore the giving of the missing witness instruction would be inappropriate and has not been generated.

As noted, no adverse inference arises if the person who was not called as a witness was equally available to both sides. *Robinson*, 315 Md. at 321. Because the trial court found that there was no indication Gerald Curtis was available only to the State, we

perceive no abuse of discretion in the trial court's refusal to give the requested missing witness instruction.

b. <u>Instructions on first degree homicide and robbery</u>

Mr. Appleby-El's argument as to why the court erred in instructing the jury on first degree homicide "A" and robbery with a dangerous weapon boils down to two underlying legal propositions we have already rejected in previous sections of this opinion: (1) the 1978 acquittal on the count charging use of a handgun in the commission of a felony precluded him from being retried on the three remaining counts; and (2) there would have been insufficient evidence to support those instructions if the court had excluded all of the transcript evidence from the 1978 trial. The entire two-paragraph argument in his brief is as follows:

> Considering Mr. Appleby-El's argument that the not guilty finding for use of a handgun in the commission of a felony is inconsistent with the guilty finding for armed robbery and carrying a handgun, and if the armed robbery charge could not be prosecuted, then he could also not be prosecuted for first degree murder on the doctrine of felony murder, he took exception to those instructions. App. at 205-206. However, the Circuit Court refused to change them. App. at 206-208.
>
> Considering also Mr. Appleby-El's position that the Circuit Court should have excluded all of the testimony by transcript, then the instructions for robbery with a dangerous weapon, and first degree homicide "A," and to the use of the term first degree murder in the instruction for separate consideration of multiple counts were not fairly generated by the evidence. *Cost v. State*, 417 Md. 360, 368-369 (2010).

Because we have concluded, as explained previously in this opinion, that the trial court did not err in declining to hold that the acquittal on the use of a handgun count precluded retrial on the other three counts, and the trial court did not err in admitting the

transcript testimony from the 1978 trial, we need not address further this argument that the court erred in giving these two instructions.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

STATE OF MARYLAND	*	**IN THE CIRCUIT COURT**
	*	**FOR WICOMICO COUNTY**
v.		
	*	**STATE OF MARYLAND**
NATHANIEL B APPLEBY EL	*	**CASE NO. 22-K-78-09545B**

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

OPINION AND ORDER OF COURT

Nathaniel B Appleby El ("Defendant") filed a "Motion to Dismiss Indictment for Lack of Subject Matter Jurisdiction," "Motion to Exclude Any and All Documentary Evidence and/or Transcribed Testimony from Vacated Proceeding," "Motion to Invoke Hicks Rule," and a "Motion to Dismiss," all of which seek to dismiss, or otherwise dispose of, the instant prosecution wherein the State of Maryland ("State") has charged Defendant with First Degree Murder, and other related crimes.

PROCEDURAL BACKGROUND

In May of 1978, after a jury trial before this Court, Defendant was convicted of Count One: First Degree Murder, Count Two: Robbery with a Deadly Weapon, and Count Five: Carrying a Handgun. He was acquitted of Count Four: Use of a Handgun in the Commission of a Felony. Defendant was subsequently sentenced to life imprisonment under Count One. Moreover, in a separate proceeding in May of 1978, Defendant entered a plea of guilty to Count Three: Robbery with a Deadly Weapon, and was sentenced to sixteen (16) years of incarceration to run consecutive to the life sentence imposed under Count One. Thereafter, Defendant filed a notice of appeal on November 16, 1979 to the Court of Special Appeals. In a *per curiam* opinion filed in August of 1979, the Court of Special Appeals affirmed Defendant's convictions. After Defendant's writ of certiorari was denied by the Court of Appeals, he filed a petition for postconviction relief in 1996,

which was later denied. Further, Defendant filed an application for leave to appeal the denial of his petition for postconviction relief. That too was denied by the Court of Special Appeals in January of 1997. The case remained inactive until October 28, 2013 whereupon Defendant filed a *pro se* motion to re-open postconviction proceeding pursuant to section 7-104 of the Criminal Procedure Article of the Annotated Code of Maryland. Defendant's *pro se* motion was later supplemented, through counsel, in December of 2013. Consequently, Defendant's motion to re-open postconviction proceeding was addressed in an Opinion and Order filed by this Court on May 29, 2014. Therein, the Court held that it was not in the interests of justice to re-open Defendant's postconviction proceeding, and accordingly denied the motion to re-open.

In response, Defendant filed an application for leave to appeal on June 25, 2014, challenging the denial of his motion to re-open postconviction proceeding. In an unreported opinion filed on November 19, 2015, the Court of Special Appeals granted Defendant's application for leave to appeal. Based upon Defendant's "*Unger* claim," the Court of Special Appeals reversed the denial of Defendant's motion to re-open postconviction proceeding and remanded the case with instructions to the Court to undertake the following: grant the motion to re-open postconviction proceeding, vacate Defendant's convictions from the original trial, and award a new trial. As a result, Defendant's convictions were vacated and he was awarded a new trial before this Court.

Based on the awarding of a new trial, Defendant has filed numerous motions. On May 9, 2017, Defendant filed a *pro se* "Motion to Invoke Hicks Rule." Thereafter, on December 18, 2017, Defendant filed, *pro se*, a "Motion to Dismiss Indictment for Lack of Subject Matter Jurisdiction" and a "Motion to Exclude Any and All Documentary Evidence and/or Transcribed Testimony from Vacated Proceeding." Lastly, on February 16, 2018, Defendant filed, through counsel, a Motion

to Dismiss. The Court then scheduled all pending motions to be addressed at a hearing, which was held on March 16, 2018. At the hearing, Defendant was represented by Jan-Paul Lukas, Esq. and the State was represented by Assistant State's Attorney Ajene Turnbull, Esq. During the hearing, Defense Counsel stated that he and Defendant were not pursuing the "Motion to Invoke Hicks Rule." As a result, that motion was withdrawn. At the close of the hearing, the Court held the remaining motions *sub curia* to await disposition by way of a written opinion.

DISCUSSION

As previously mentioned, the instant case arrives before this Court by way of a Mandate from the Court of Special Appeals. The Court of Special Appeals vacated Defendant's convictions and remanded them for a new trial. Defendant has now brought the instant motions, all of which relate to the retrial. In the "Motion to Dismiss Indictment for Lack of Subject Matter Jurisdiction," Defendant seeks to dismiss the case in its entirety asserting insufficiency of the State's evidence. In Defendant's "Motion to Exclude Any and All Documentary Evidence and/or Transcribed Testimony from Vacated Proceeding," he seeks to forestall the State from admitting into evidence any testimony given at Defendant's first trial in 1978. Lastly, in the Motion to Dismiss filed by Defense Counsel, Defendant seeks to dismiss the charging document on the grounds that the verdicts entered in the first trial as to Count Four: Use of a Handgun in the Commission of a Felony and Count Two: Robbery with a Deadly Weapon are inconsistent. Because they are inconsistent, Defendant argues, these charges will be barred from retrial pursuant to the doctrine of double jeopardy. Addressing the motions successively, we now turn to Defendant's "Motion to Dismiss Indictment for Lack of Subject Matter Jurisdiction."

Preliminarily, and as a threshold matter, it behooves this Court to note that the State has objected to the *pro se* motions that Defendant has filed on the grounds that they are, *ipso facto*,

deficient. In support of that notion, the State cites to Maryland Rule 1-311. That rule governs the way in which pleadings and other papers must be signed. It provides that, "Every pleading and paper of a party represented by an attorney shall be signed by at least one attorney who has been admitted to practice law in this State . . ." Maryland Rule 1-311(a). In the event that a party fails to comply with this requirement, the Court has discretion to strike the filing "and the action may proceed as though the pleading or paper had not been filed." Maryland Rule 1-311(c). In short, if a party who is represented by counsel submits a filing, such as a motion, *pro se* or without the signature of their attorney of record, then the Court has the power and discretion to strike that filing unilaterally and without reservation. In the instant case, all of Defendant's *pro se* motions were filed at a time when he was represented by counsel. Due to this, the State has argued that under Maryland Rule 1-311, the Court should not consider those motions and strike their presence from the case entirely. Although this Court is imbued with the power to acquiesce in the State's request and strike Defendant's *pro se* motions, the Court will not choose to exercise its discretion in that fashion. We find it far more prescient, and in keeping with the spirit that affords every defendant a level playing field and equal access to justice, to leave no stone unturned in addressing the issues raised by Defendant.

We now consider the averments raised by Defendant in his "Motion to Dismiss Indictment for Lack of Subject Matter Jurisdiction." At the hearing, and under the auspices of that motion, Defense Counsel argued that there exists insufficient evidence to sustain a conviction against Defendant for Robbery with a Deadly Weapon. Defendant seeks to attack that conviction by stating that the only evidence that would give credence to a robbery conviction in the instant case exists as a signed statement made by Defendant. In the same vein, Defendant claims that there is also evidence to suggest that he withdrew from the crime of Robbery with a Deadly Weapon and

the fact of his withdrawal would operate to corrode the State's evidence for that charge. All of this, Defendant avers, will amount to a finding of insufficiency of the evidence as it relates to the charge of Robbery with a Deadly Weapon. As the determination of whether there is sufficient evidence that Defendant participated in a robbery or whether Defendant had actually withdrawn from the robbery is a question best entrusted to the trier-of-fact at trial, we need not delve too deep into the substance of that motion as the issue is necessarily premature at this stage in the proceedings.

Succinctly put, a pre-trial motion to dismiss is not the proper venue to argue insufficiency of the evidence. Moreover, even were it that this Court had the inclination to grant Defendant's motion to dismiss under the ambit of insufficiency of the evidence, prior case precedent would preclude us from doing so. The harbinger of Defendant's assertion lies in the case of *State v. Taylor*, 371 Md. 617 (2002). There, the Court of Appeals held that, "A motion to dismiss the charges in an indictment or criminal information is not directed to the sufficiency of the evidence, *i.e.*, the quality or quantity of the evidence that the State may produce at trial, but instead tests the legal sufficiency of the indictment on its face." *Id.* at 645. "In discussing the function and role of a motion to dismiss in our modern system of criminal justice," the Court of Appeals has said the following:

> In sum, a motion to dismiss the indictment will properly lie where there is some substantial defect on the face of the indictment, or in the indictment procedure, or where there is some specific statutory requirement pertaining to the indictment procedure which has not been followed. In the absence of statutory authority to the contrary, where the object of appellate review of a dismissal is to test a pre-trial ruling of the court dealing with the admissibility of evidence, appellate review of such pretrial ruling should be denied. *This is so because the motion to dismiss attacks the sufficiency of the indictment, not the sufficiency of the evidence.*

Id.

Consequently, "A pretrial motion to dismiss an indictment or information may not be predicated on insufficiency of the State's evidence because such an analysis necessarily requires consideration of the general issue. Thus, where there are factual issues involved, a motion to dismiss on the grounds that the State's proof would fail is improper." *Id.* The ruling in that case is dispositive as to Defendant's claim here. A motion to dismiss cannot stand as a substitute for a trial, requiring the State to produce evidence of its case-in-chief. It should be noted that the purpose "of an indictment is to provide notice to the accused of the charge against him and to guard against the possibility of unfair surprise during trial." *Thompson v. State*, 371 Md. 473, 488-89 (2002). In other words, an indictment or information exists in order to apprise a defendant of the elements of the charges against him so that he may properly prepare for trial. It does not exist, as Defendant claims, to provide all evidence of the State's case-in-chief, nor does it exist to supplant the trial process entirely.

At the hearing, the State argued that Defendant had effectively waived his right to bring this argument in front of the Court, claiming that Defendant never objected to, or raised on appeal, the issue of insufficiency of the evidence. This Court need not reach a decision regarding waiver because, as demonstrated above, the substance of Defendant's claim is erroneous. As of now, Defendant's "Motion to Dismiss Indictment for Lack of Subject Matter Jurisdiction," based upon insufficiency of the evidence is denied.

Defendant's next argument is delivered by way of his motion entitled "Motion to Exclude Any and All Documentary Evidence and/or Transcribed Testimony from Vacated Proceeding." There, and further elucidated by Defense Counsel in Court, Defendant avers that all prior recorded testimony from the first trial, which occurred in 1978, must be suppressed and excluded from the instant action. In buttressing this assertion, Defendant contends that were testimony from his first

trial admitted in the impending retrial, it would cause undue prejudice and necessarily poison the minds of the jury. In response, the State first intimated the need for the prior testimony in the instant retrial citing that since this case was first tried in 1978, a large portion of the State's witnesses who testified at the first trial are now deceased. As a result, the State averred that the foundation of the instant retrial will primarily rest upon transcripts and prior recorded testimony from the first trial. In closing, the State opined that prior sworn testimony is not prejudicial, and further that it exists as a hearsay exception capable of being admitted in trial. We agree.

Maryland Rule 8-501(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Coinciding with that definition, Maryland Rule 8-502 prohibits the admissibility of hearsay, "Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes . . . ." One such exception to the prohibition against hearsay lies within Maryland Rule 8-504, which governs hearsay exceptions when the declarant is unavailable. Of particular relevance to the instant issue, Maryland Rule 8-504(b)(1) controls former testimony and "allows for the admission of a prior statement made under oath by an unavailable witness so long as the party against whom the statement is offered had an 'opportunity' and 'similar motive' to develop the testimony of the witness when the prior statement was made, by direct, cross- or redirect examination." *See Dulyx v. State*, 425 Md. 273, 284-85 (2012). In reference to the predicate conditions necessary to admit former testimony at trial, the Court of Appeals in *Dulyx* further elucidated, "We have explained that 'an opportunity to develop the testimony is generally satisfied when the defense [was] given a full and fair opportunity to probe and expose [the] infirmities [of the testimony] through cross-examination.'" *Id*. at 285 (quoting *Williams v. State*, 416 Md. 670, 696 (2010) (internal citation omitted)). As such, when sworn testimony has been

given at a proceeding, it is admissible at any subsequent proceeding so long as the opposing party had an opportunity to explore, through cross-examination, the quality and substance of that testimony at the initial proceeding.

It should be noted that this rule of law is no mere statutory construction. Indeed, the principle of admitting prior sworn testimony is so ingrained into our nation's jurisprudence that it has occupied the realm of discussion in our highest court. This is evidenced by the holding in *Mattox v. U.S.*, 156 U.S. 237 (1895). There, the Supreme Court of the United States was confronted with the matter we currently face; namely, whether the testimony of a witness that testified at a prior trial, who had since perished by the time of the subsequent trial, may be admissible in the later trial. Writing for the Court in that case, Justice Brown held that the defendant was not prejudiced when the former testimony of a deceased witness was entered into evidence at the subsequent trial. The Supreme Court stated that, "The fact that one party has lost the power of contradicting his adversary's witness is really no greater hardship to him than the fact that his adversary has lost the opportunity of recalling his witness and explaining his testimony would be to him. There is quite as much danger of doing injustice to one party by admitting such testimony as to the other by excluding it." *Id*. at 250. Consequently, the Court went on to hold that "[t]here was no error" when the lower court admitted the prior testimony at the retrial. *Id*.

The holding in *Mattox* has withstood the winds of time, remaining unchanged until this day. In fact, more recent precedent suggests that the State need not even aver that the respective witness is unavailable in order to admit that witness' prior testimony at a later trial. In *California v. Green*, 399 U.S. 149 (1970), the Supreme Court once more undertook the issue of prior sworn testimony and its constitutionality with respect to the Confrontation Clause. In that case, the defendant was arrested and prosecuted for the sale of a controlled dangerous substance. The State

came to prosecute the defendant solely by virtue of a testifying informant. As a result, the fate of the State's case was necessarily interwoven with the testimony of that singular witness. The State's witness became reticent to testify in accordance with his previous interviews with the State. When confronted with this obstacle on the day of the trial, the State chose to read aloud onto the record, and likewise enter into substantive evidence, the former statements of their witness, which had been garnered at a preliminary hearing. *Id*. at 152. The defendant was convicted on the strength of those former statements, and he subsequently appealed his conviction.

After recounting the historical precedent that existed up until that point in time, including *Mattox*, the Supreme Court held that prior sworn testimony may be used even when the witness is available, and indeed, sitting on the witness stand testifying at trial. In support of this, the Supreme Court proclaimed the following:

> But as a constitutional matter, it is untenable to construe the Confrontation Clause to permit the use of prior testimony to prove the State's case where the declarant never appears, but to bar that testimony where the declarant is present at the trial, exposed to the defendant and the trier of fact, and subject to cross-examination. As in the case where the witness is physically unproducible, the State here has made every effort to introduce its evidence through the live testimony of the witness; it produced [the witness] at trial, swore him as a witness, and tendered him for cross-examination. Whether [the witness] then testified in a manner consistent or inconsistent with his preliminary hearing testimony, claimed a loss of memory, claimed his privilege against compulsory self-incrimination, or simply refused to answer, nothing in the Confrontation Clause prohibited the State from also relying on his prior testimony to prove its case against [the defendant].

Green, 399 U.S. at 166-68.

Thus, it would appear that there is no proscription from entering into evidence at trial the former sworn testimony of a witness. Indeed, the only prerequisite requirement for the State to introduce such testimony is that it be reliable. The case of *Mancusi v. Stubbs*, 408 U.S. 204 (1972) further stands for this proposition. The holding there establishes that testimony from the first trial may be introduced at a retrial if it "bore sufficient indicia of reliability and afforded the trier of

fact a satisfactory basis for evaluating the truth of the prior statement." *Id.* at 216. In that case, the Supreme Court stated that since there was an adequate opportunity for the defendant's first lawyer to cross-examine the witness, whose testimony the State sought to admit at the retrial, and that counsel had indeed availed himself of that opportunity, the transcript of the witness was reliable. As such, the State was free to read that transcript into the record, and there was no error in its admission at the retrial. The facts of the instant case are nearly identical to the line of precedent cited herein. In the instant matter, Defendant was "given a full and fair opportunity to probe and expose [the] infirmities," *Dulyx*, 425 Md. at 285, of the prior testimony the State now endeavors to admit at Defendant's current retrial. As such, the prior testimony bears "sufficient indicia of reliability" and will afford "the trier of fact a satisfactory basis for evaluating the truth of the prior statement[s]." *Mancusi*, 408 U.S. at 216. Thus, it can fairly be stated that no prejudice exists when former sworn testimony is admitted at a later trial. For the foregoing reasons, Defendant's "Motion to Exclude Any and All Documentary Evidence and/or Transcribed Testimony from Vacated Proceeding" is denied.

Defendant's final motion is his Motion to Dismiss. The crux of Defendant's argument is a claim of inconsistent verdicts. In his first trial, Defendant was found guilty, *inter alia*, of Armed Robbery, and he was acquitted of Use of a Handgun in the Commission of a Felony. As the instant posture of the case is brought via remand by the Court of Special Appeals, Defendant's convictions have been vacated and the State is currently proceeding upon only those vacated convictions.[1] In that light, the State is proceeding on the previously vacated Armed Robbery charge, but will not be seeking to prosecute Defendant for Use of a Handgun in the Commission of a Felony. Rightly

[1] The vacated convictions were Count One: First Degree Murder, Count Two: Robbery with a Deadly Weapon, and Count Five: Carrying a Handgun.

so, as the doctrine of double jeopardy, specifically *autrefois acquit*, would necessarily preclude the prosecution of that charge as it resulted in an acquittal.

Defendant contends that in his original trial, a finding of guilty for Armed Robbery, but not for Use of a Handgun in the Commission of a Felony resulted in an inconsistent verdict. Defendant contends that since the jury did not find him guilty of Use of a Handgun in the Commission of a Felony, the jury could not have found him guilty of Armed Robbery. Defendant then contends that if the Armed Robbery charge could not be prosecuted he could also not be prosecuted for First Degree Murder on the doctrine of Felony Murder since the felony was Armed Robbery. In effect, the entire indictment would fall. It now becomes necessary to analyze whether diverging dispositions as to the crimes of Use of a Handgun in the Commission of a Felony and Armed Robbery produce an inconsistent verdict. If they are inconsistent, then double jeopardy would preclude the State from pursuing the Armed Robbery charge in the instant retrial.

The jurisprudential history regarding inconsistent jury verdicts has been characterized by stark uniformity up until very recently. Indeed, the Court's fountainhead approach when confronted with an issue of inconsistent jury verdicts was one of utter acceptance. Maryland followed this construction of law until the Court of Appeals decided *Price v. State*, 405 Md. 10 (2008). It was then that "Maryland parted ways with the Supreme Court's long-standing jurisprudence allowing inconsistent jury verdicts." *McNeal v. State*, 426 Md. 455, 462 (2012). The Court in *Price* went on to hold that "inconsistent jury verdicts should no longer be permitted in criminal cases." *Id*. at 465. However, the Court's prohibition in *Price* was by no means absolute. To the contrary, the ruling in *Price* laid the foundation necessary for a more comprehensive discussion regarding inconsistent jury verdicts to occur.

The fledgling incarnation of that discussion was formed in the concurring opinion in *Price*, which acted as a harbinger of things to come. "The *Price* concurring opinion urged that the Court's opinion should be read as applying only to legally inconsistent verdicts, but not factually inconsistent verdicts." *Id*. Authoring the concurrence, Judge Harrell stated that "[t]he feature distinguishing a factually inconsistent verdict from a legally inconsistent verdict is that a factually inconsistent verdict is illogical merely. By contrast, a legally inconsistent verdict occurs where a jury acts contrary to a trial judge's proper instruction regarding the law." *Id*. at 465-66 (quoting *Price*, 405 Md. at 35). Judge Harrell then implored that "Maryland should join New York, Florida, Missouri, and Rhode Island which prohibit legally inconsistent verdicts, but allow factually inconsistent verdicts to stand." *Id*. at 466. It would take only four years for Judge Harrell's advisements to become the law of the land in Maryland.

Indeed, the *Price* concurrence's endorsement was adopted and ratified by the Court of Appeals in *McNeal*. There, the Court held the following:

> Today, in adopting the urgings in the *Price* concurring opinion as to factually inconsistent verdicts, we reaffirm the historic role of the jury as the sole fact-finding body in a criminal jury trial. In the case at bar, the jury was instructed properly that they alone had the authority to decide the facts, but must follow the judge's instructions on the law. This Court has long held that a trial judge must not interfere or influence the jury's fact-finding task. *See Butler v. State,* 392 Md. 169, 183–84, 896 A.2d 359, 367–68 (2006) (noting the many ways a trial judge could influence impermissibly the jury's fact-finding mission); *Gore v. State,* 309 Md. 203, 210–11, 522 A.2d 1338, 1341 (1987) (reversing a conviction after a trial court, in its jury instructions, commented on the sufficiency of the evidence in a way that may have influenced the jurors); *Dempsey v. State,* 277 Md. 134, 149, 355 A.2d 455, 463 (1976) (warning that because of their position of authority within the courtroom, trial judges should not comment on the "existence or not of any fact, which should be left to the finding of the jury....").

McNeal, 426 Md. at 472.

As such, an inconsistent verdict requiring reversal is one that is legally inconsistent. Conversely, a decision by a trier-of-fact that is merely factually inconsistent will properly stand,

even though it may be illogical. With these guiding principles in hand, the issue before us now becomes whether the verdicts of Defendant's 1978 trial were legally or factually inconsistent. The case of *Teixeira v. State*, 213 Md. App. 664 (2013) is especially instructive for the Court's task. In that case, the defendant was convicted of armed robbery, *inter alia*, but the jury acquitted him of use of a handgun in the commission of a crime of violence. *Teixeira*, 213 Md. App. at 667. After recounting the jurisprudence of inconsistent jury verdicts within Maryland, the Court of Special Appeals in *Teixeira* then elucidated the rule for determining a legally inconsistent verdict. The *Teixeira* Court stated that, "In *McNeal*, the Court instructed that a legally inconsistent verdict is one where the jury acts contrary to the instructions of the trial judge with regard to the proper application of the law. Verdicts where a defendant is convicted of one charge, but acquitted of another charge that is an essential element of the first charge, are inconsistent as a matter of law." 213 Md. App. at 679-80 (internal quotation omitted).

Applying this standard to the defendant in *Teixeira*, the Court held that "[n]either offense requires the use of a 'handgun,'" and that "there is no lesser included offense or predicate crime involved," in either Armed Robbery or the Use of a Handgun in the Commission of a Felony. *Id*. at 681. The Court of Special Appeals went on to say that the jury found verdicts that, on their face, appear to be factually inconsistent "for reasons known but to the jury." *Id*. Nonetheless, though factually inconsistent such a verdict may be, it is not legally inconsistent. In support of that notion, the Court stated that, "As to the handgun use charge, the jurors could well have decided that [the defendant] had not employed a handgun that met the definition of 'firearm,' but instead another dangerous weapon…" *Id.* at 681-82. Concluding their analysis, the Court further found that, "Use of a handgun that meets the statutory criteria is a sufficient, but not necessary predicate for a conviction of … armed robbery." *Id.* at 682. As such, the Court definitively found that it is not a

legally inconsistent verdict for a jury to convict a defendant of Armed Robbery and acquit the same defendant, in the same case, for Use of a Handgun in the Commission of a Felony.

The jury in Defendant's first trial could have decided that the armed robbery was committed with another dangerous weapon, other than a handgun. Though factually inconsistent it may be, no legal error can be assigned to the Trial Court for accepting these verdicts in concert. Moreover, it is not the place of the Court to question the trier-of-fact when no legal errors are present. In our judicial system, it is the jury who is the arbiter of fact, just as the judge is the arbiter of law. The Court of Appeals in *McNeal* aptly evinced that, "To evaluate the considerations of the jury in reaching its verdict would involve pure speculation, or require a reviewing court to inquire into the details of the deliberations. This is not a task that courts should undertake." *McNeal*, 426 Md. at 473. As such, and for whatever reason, the jury in Defendant's first trial found Defendant guilty of Armed Robbery, and acquitted him as to Use of a Handgun in the Commission of a Felony. As described above, these verdicts are not legally inconsistent, but could be construed as factually inconsistent. However, it is only a legally inconsistent verdict that triggers our intervention. Therefore, no inconsistent verdict was entered at the conclusion of Defendant's original trial. Thus, for the purposes of Defendant's Motion to Dismiss, this finding disposes of his claim. For the foregoing reasons, Defendant's Motion to Dismiss is denied.

CONCLUSION

For the foregoing reasons, it is this 5th of April, 2018, by the Circuit Court for Wicomico County, State of Maryland, hereby

ORDERED, that Defendant's "Motion to Dismiss Indictment for Lack of Subject Matter Jurisdiction" is **DENIED**; and it is further

ORDERED, that Defendant's "Motion to Exclude Any and All Documentary Evidence and/or Transcribed Testimony from Vacated Proceeding" is **DENIED**; and it is further

ORDERED, that Defendant's Motion to Dismiss is **DENIED**.

04/05/2018 04:55:38 PM

JUDGE S. James Sarbanes

E-FILED
Court of Appeals
Suzanne C. Johnson,
Clerk of Court
3/1/2021 2:35 PM

NATHANIEL B. APPLEBY-EL	*	**IN THE**
	*	**COURT OF APPEALS**
	*	**OF MARYLAND**
	*	**Petition Docket No. 428**
v.		**September Term, 2020**
	*	
		(No. 801, Sept. Term, 2018
	*	**Court of Special Appeals)**
	*	**(No. 22-K-78-09545B, Circuit**
STATE OF MARYLAND		**Court for Wicomico County)**

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above-captioned case, it is this 1st day of March, 2021

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

CIRCUIT COURT OF MARYLAND FOR WICOMICO COUNTY
101 North Division Street, P.O. Box 198
Salisbury, Maryland 21801
Main: 410-543-6551 Fax: 410-546-8590

Case Number: **22-K-78-09545B**
Tracking Number:
Other Reference Numbers:
Date Sentence Imposed: **06/11/2018**

STATE OF MARYLAND VS NATHANIEL B APPLEBY EL
Nathaniel B Appleby-El
D.O.B. 03/30/1959 **SID#** **FBI#** **Inmate # 145-911**

COMMITMENT RECORD

To: Division of Corrections
YOU ARE DIRECTED to receive the above named Defendant who has been sentenced and is hereby committed to your custody by **JUDGE Beau Oglesby.** The Defendant has been found guilty as to:

Count/Offense No.: 1 Citation Charge: First Degree Murder Art./Sec: 27.410 CJIS Code: 3-0912
Sentence: Life Art.: Sec:
Additional sentencing information: 14,776 days credit per Judge Oglesby. Court finds Count 1 a crime of violence.

Count/Offense No.: 3 Citation Charge: Robbery with Deadly Weapon Art./Sec: 27.488 CJIS Code:
Sentence: 16Y 0M 0D Consecutive to Count/Offense No.:1 Art.: Sec:
Additional sentencing information: Per Judge Oglesby, Count 3 remains as originally imposed on 5/19/1978 as Count 3 was not remanded by COSA.

The total time to be served **is Life plus 16 years** , to begin on 12/27/1977 , to run:
[X] concurrent with any other outstanding or unserved sentence.
[ ] consecutive to the last sentence to expire of all outstanding and unserved Maryland sentences.
[ ] consecutive to the sentence imposed in Case No. _____.
The defendant has been awarded **14,776 days** credit for time served prior to and not including date of sentence (Criminal Procedure Article § 6-218).

[ ] Commitment is for execution of previously suspended sentence after Defendant was found in violation of probation.
[X] This commitment supersedes commitment issued on: 5/19/1978

ATTACHMENTS HERETO INCLUDE:
PSI; Sentencing Guidelines
Other: **Counts 2 and 5 merge with Count 1.**

Restitution of To: By: _____
Date
Order ☐ attached ☐ to follow

Appeal bond set at $0.00

Truly taken from the record of this Court.
Witness my Hand and the Seal of said Court
this date: 6/12/18 _____
Date
Mansbauer
Clerk/Judge