APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

Section I. All persons born or naturalized in the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any State deprive an person of life, liberty, or property within its jurisdiction the equal protection of the laws.

Circuit Court for Baltimore City
Case Nos. 198044053, 198044054, 198083006

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1416

September Term, 2019

MARK HOLLINGSWORTH

v.

STATE OF MARYLAND

Berger,
Nazarian,
Beachley,

JJ.

Opinion by Nazarian, J.

Filed: April 30, 2021

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Mark Hollingsworth shot and killed two people and seriously injured a third on January 18, 1998. He was convicted by a jury in the Circuit Court for Baltimore City of first-degree murder, second-degree murder, and first- and second-degree assault, as well as use of a handgun in commission of a felony or crime of violence, and wearing, carrying, or transporting a handgun. We affirmed the convictions on direct appeal.

Mr. Hollingsworth sought post-conviction relief, and after a series of hearings, the post-conviction courts denied it. On appeal, he argues that the State committed a *Brady*[1] violation, that his counsel was constitutionally ineffective, and that prosecutorial misconduct tainted his trial and convictions. We agree with the post-conviction court's decision to deny relief and affirm.

I. BACKGROUND

A. The Incident And Investigation

On the night of January 17–18, 1998, Mr. Hollingsworth was working as a disc jockey at a night club in Baltimore. The club became crowded and at 3:00 a.m., a fight broke out. Police arrived on the scene, and Mr. Hollingsworth was brought in for questioning, along with several others who were at the club that night.

Mr. Hollingsworth gave three statements to the police on January 18. His first statement was taken at 5:45 a.m.; as we explain later, this statement was suppressed prior to trial. Mr. Hollingsworth was kept at the police station all day and officers interviewed him a second time at 11:15 p.m. This statement was not recorded, but notes were taken by

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

the lead detectives.[2] Mr. Hollingsworth's third statement began at 11:57 p.m., and this time was recorded. The recording of the third interview was shown to the jury, and the transcript admitted into evidence.

The first statement was taken by an officer early in the morning, during the initial investigation of the incident. The officer interviewed several people, including Mr. Hollingsworth, who had been at the club when the shooting occurred. The officer took brief notes during this interview. In the course of this first statement, Mr. Hollingsworth told the officer that he was a disc jockey that night, and he saw that a fight broke out but didn't see the shooter or who was involved in the fight.

Mr. Hollingsworth gave his second statement to the lead detectives, James Shields and Mark Wiedefeld, who memorialized it only through their notes:

> Detective Shields's notes:
>
> Then a bunch of guys came into the club, talking about guns, one guy came straight at me with a black semi auto handgun. I get the gun away from him and started to shoot him—once in the stomach—I'm not sure.
>
> Detective Wiedefeld's notes:
>
> Bunch of boys came running. I shot boy I took gun from in stomach (1) time. Took shirt off, dropped gun I shot that I took from guy who came at me. Boys started coming in talking about guns. I was trying not to get killed. Me and Steve tried to stop it.

The third statement by Mr. Hollingsworth followed shortly after and was recorded. During this statement, Mr. Hollinsworth's story changed yet again. This time, he admitted

[2] These notes are referred to by Mr. Hollingsworth and the State as Exhibits 6 and 7. We will refer to the investigators' notes from the second interview as the "interview notes."

shooting one victim, shooting a second victim who was standing right behind the first, and running out of the building while continuing to shoot.

Before trial, the prosecutor held a meeting with defense counsel and made the record of the case available for defense counsel to investigate and review. Mr. Hollingsworth also moved to suppress his first and third statements to the officers, and the court held a hearing on the motion before trial. At the hearing, Detective Wiedefeld testified that he "spoke to [Mr. Hollingsworth], made some brief notes" before asking Mr. Hollingsworth if he would make another statement that Detective Wiedefeld could record. The circuit court suppressed the first statement, but declined to suppress the third statement, the one recorded at 11:57 p.m. The second statement and Detective Wiedefeld's notes were not at issue during the motions hearing.

B. Trial And Appeal

At trial, the defense argued self-defense and provocation. The defense's witnesses claimed to not have seen the shooter and denied seeing Mr. Hollingsworth with a gun. Mr. Hollingsworth did not testify.

The State offered several witnesses who testified about the scene at the club. The witnesses said that they saw Mr. Hollingsworth run through the club shooting and watched him shoot one of the victims in the back. Detective Wiedefeld testified for the State and detailed his investigation and Mr. Hollingsworth's statements. When the prosecutor asked Detective Wiedefeld to describe Mr. Hollingsworth's demeanor, he said that Mr. Hollingsworth was afraid, remorseful, and upset.

The jury found Mr. Hollingsworth guilty of first-degree murder, second-degree murder, first- and second-degree assault using a handgun, and wearing, carrying, or transporting a handgun. He was sentenced to life plus fifty years.

Mr. Hollingsworth appealed to this Court, and we affirmed his convictions.

C. Post-Conviction Relief And Application For Leave To Appeal

On May 21, 2009, Mr. Hollingsworth filed a petition for post-conviction relief. Five hearings were held to review his case, and in the end, relief was denied in a July 19, 2016 Statement of Reasons and Order.

Mr. Hollingsworth then filed a timely application for leave to appeal. We directed the case back to the post-conviction court to review one issue. A follow-up hearing was held on June 14, 2019, and relief on the issue was also denied. On October 9, 2019, this Court granted Mr. Hollingsworth's application for leave to appeal. We supply additional facts as needed below.

II. DISCUSSION

On appeal, Mr. Hollingsworth raises three arguments. He contends that (1) the State withheld *Brady* material from him, (2) his defense counsel rendered ineffective assistance, and (3) the prosecutor engaged in prosecutorial misconduct.[3]

[3] Mr. Hollingsworth framed his Questions Presented as follows:

> 1. Did the State violate *Brady v. Maryland*, 373 U.S. 83 (1963)?
>
> 2. Did defense counsel render ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984)?
>
> 3. Did the State engage in prosecutorial misconduct?

A post-conviction court's decision encompasses both findings of fact and conclusions of law. *Newton v. State*, 455 Md. 341, 351 (2017). We defer to the court's factual findings unless they were clearly erroneous. *Id.* "We then re-weigh the facts as accepted in order to determine the ultimate mixed question of law and fact . . . ." *Harris v. State*, 303 Md. 685, 698 (1985) (*citing Walker v. State*, 12 Md. App. 684, 691–95 (1971)). "A conclusion that a verdict generally or a finding of fact specifically is clearly erroneous is not a wild card that appellate courts may freely play." *State v. Brooks*, 148 Md. App. 374, 398 (2002).

> A finding of fact should never be held to have been clearly erroneous simply because its evidentiary predicate was weak, shaky, improbable or a "50-to-1 long shot." A holding of "clearly erroneous" is a determination, as a matter of law, that, even granting maximum credibility and maximum weight, there was no evidentiary basis whatsoever for the finding of fact. The concern is no with the frailty or improbably of the evidentiary base, but with the bedrock non-existence of an evidentiary base.

Brooks, 148 Md. App. at 399. "Under the 'clearly erroneous' standard, 'if there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous.'" *Johnson v. State*, 440 Md. 559, 568 (2014) (*quoting Washington v. State*, 424 Md. 632, 651 (2012)). A finding is clearly erroneous only when, considering the evidence in its entirety, we are left with a definite and firm conviction that a mistake has been committed. *See Kusi v. State*, 438 Md. 362, 383 (2014) (*quoting Goodwin v. Lumbermens Mut. Cas. Co.*, 199 Md. 121, 130 (1952)).

A. There Was No *Brady* Violation

Mr. Hollingsworth contends that the State violated its obligation, as articulated in *Brady v. Maryland*, to disclose exculpatory evidence when it withheld the investigators' interview notes that memorialized Mr. Hollingsworth's short interview with detectives before he gave the longer recorded statement. This withholding was material, he says, because it changed the defense's trial strategy and prevented defense counsel from making a vital objection during the State's closing argument. The State counters that no evidence exists to support that the State intentionally withheld the notes. We find no clear error in the post-conviction court's finding that the notes were available to defense counsel, and that finding resolves the *Brady* argument against Mr. Hollingsworth.

A *Brady* violation is a constitutional claim, based on the Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g.*, *United States v. Agurs*, 427 U.S. 97, 107 (1976). A *Brady* violation calls into question whether the State met its obligation and duty to disclose "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. 83, 87 (1963). This obligation applies whether or not the defense has requested the evidence. *Agurs*, 427 U.S. at 107.

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). *First*,

"[f]avorable evidence includes not only evidence that is directly exculpatory, but also evidence that can be used to impeach witnesses against the accused." *Ware v. State*, 348 Md. 19, 41 (1997) (*quoting Giglio v. United States*, 405 U.S. 150, 154 (1972)). *Second*, "suppression is inextricably intertwined with the timing of disclosure and the defendant's independent duty to investigate, especially in a situation where the defense 'was aware of the potentially exculpatory nature of the evidence as well as its existence.'" *Yearby v. State*, 414 Md. 708, 722–23 (2010) (*quoting* 6 Wayne R. LaFave et al., *Criminal Procedure* § 24.3(b), at 362 (3d. ed. 2007)). And *third*, prejudice can be likened to materiality and is analyzed by asking if there was a reasonable probability that the evidence would have produced a different result. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). "[T]he burdens of production and persuasion regarding a *Brady* violation fall on the defendant." *Yearby*, 414 Md. at 720 (*citing Diallo v. State*, 413 Md. 678, 704 (2010)). And the defendant's duty to investigate inheres when he knows or should have known that the exculpatory evidence exists. *See id.* at 723.

After hearing testimony from trial counsel on both sides, the post-conviction court found that the investigator's notes had in fact been available to defense counsel and the prosecutor:

> In this case, the incomplete notes that detectives took were known to [defense counsel], and she testified that she was aware of what Mr. Hollingsworth said before the tape started. Additionally, Detective Wiedefeld handed over the notes to [the State], and [defense counsel] subsequently reviewed the file containing the notes in [the State's] office while being afforded the opportunity to review all files and documents concerning the case. As [the prosecutor] testified, there would

> be no reason why she would not include the notes in the file for [defense counsel]'s review.
>
> Because [Mr. Hollingsworth] failed to establish that the statement was unknown to [defense counsel], there was no non-disclosure and, therefore, no Brady violation.

Moreover, defense counsel testified "that she was aware of what Mr. Hollingsworth said before the tape started."

Additionally, the prosecutor testified at the post-conviction hearing that she has a habit of being "very generous with discovery" and that she would not have "hid[den]" the interview notes:

> [POST-CONVICTION COUNSEL]: Exhibits No. 6[4] and No. 7,[5] do you know whether you disclosed those to defense counsel?
>
> [THE STATE]: If I had them I feel confident that I did.
>
> . . .
>
> [THE STATE]: It is my practice to be very generous with discovery. I wasn't trying to hide anything. There's nothing in the notes that – I mean I would have given them any way, but there's nothing in these notes that would hurt the State. I would give it because it's part of the statement. Notes taken by the

[4] Exhibit 6 is Detective Shields's notes:

> Then a bunch of guys came into the club, talking about guns, one guy came straight at me with a black semi auto handgun. I get the gun away from him and started to shoot him—once in the stomach—I'm not sure.

[5] Exhibit 7 is Detective Wiedefeld's notes:

> Bunch of boys came running. I shot boy I took gun from in stomach (1) time. Took shirt off, dropped gun I shot that I took from guy who came at me. Boys started coming in talking about guns. I was trying not to get killed. Me and Steve tried to stop it.

> detective as part of the statement. I wouldn't call it a statement per se like you refer to it, but –
>
> . . .
>
> [THE STATE]: Also, [defense counsel] did come to my office and we discussed the case, and normally when that would happen we would go through the entire file.

And at the post-conviction hearing, Detective Wiedefeld testified that his interview notes from the second statement were turned over to the State with all other evidence and documentation.

Defense counsel testified at the post-conviction hearing that she went through the file in the State's office and didn't find anything of particular value:

> [POST-CONVICTION COUNSEL]: Exhibit 6 and 7. Do you recall seeing Exhibits 6 and 7 or either 6 and 7, when you went through and reviewed the file at the meeting with [the State]?
>
> [DEFENSE COUNSEL]: I don't remember if I saw these. I can say that nothing significant came out of that open file, going through that file, there's nothing of significance. And I consider these two documents of significance. So I think if I had seen these two I definitely would have had her copy them and brought them up. Because it verified what he was telling me.

Because "[p]rosecutorial suppression of evidence is a predicate to a *Brady* claim," *Yearby*, 414 Md. at 722, Mr. Hollingsworth's claim here requires us to find clear error in the court's resolution of the conflicting testimony. And we can't: although the lawyers' memories differed, we cannot say that the trial court erred, let alone clearly, in finding that the evidence was not suppressed by the State, let alone willfully. Further, "no *Brady* violation exists when exculpatory evidence is available to the defendant from a source where a reasonable defendant would have looked." *Ware v. State*, 348 Md. 19, 39 (1997)

(*citing Barnes v. Thompson*, 58 F.3d 971, 975 (4th Cir. 1995)). The evidence from the post-conviction hearing supports a finding that the notes were contained in the State's file and that the prosecutor's practice of admitting defense counsel to her office to look through the case file afforded the defense an opportunity to find the notes. Assuming for the moment that the interview notes would have benefited Mr. Hollingsworth under the first prong of *Brady* analysis, we discern no clear error in the court's finding that they weren't withheld, and that conclusion precludes a finding that a *Brady* violation occurred.

B. Mr. Hollingsworth's Trial Counsel Was Not Ineffective

Second, Mr. Hollingsworth argues that even if the interview notes were available, defense counsel's failure to discover them and use them effectively at trial violated his Sixth Amendment right to effective assistance of counsel. The State counters, and the post-conviction court agreed, that defense counsel's choice not to use the notes could have been intentionally strategic. Under *Strickland*, a finding that defense counsel's performance was deficient isn't enough—we also would need to find a reasonable probability that the result of the proceeding would have been different and that wasn't the case here.

We review the post-conviction court's assessment of counsel's performance deferentially, and against an objective standard of reasonableness grounded in "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The standard of review for *Strickland* claims is a mixed question of law and fact. As with the *Brady* violation, we defer to the post-conviction court's findings of fact unless they're clearly erroneous. *See, e.g.*, *State v. Jones*, 138 Md. App. 178, 209 (2001). But we "must exercise

[] our own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any." *Id.* (*quoting Oken v. State*, 343 Md. 256, 285 (1996)). "The 'benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Id.* at 206 (*quoting Strickland*, 466 U.S. at 686).

Strickland articulated a two-prong test: *first*, counsel's performance must have been deficient, and *second*, counsel's failure must have caused the defendant prejudice. *Strickland*, 466 U.S. at 687. To satisfy the first prong, counsel's performance must have resulted in "unreasonable professional judgment, meaning that 'counsel's representation fell below an objective standard of reasonableness.'" *Jones*, 138 Md. App. at 206 (*quoting Strickland*, 466 U.S. at 694)). To meet the second prong, counsel's performance must have been so deficient that there is a reasonable probability "the result of the proceeding would have been different." *Id.* (*quoting Strickland*, 466 U.S. at 694)).

And in this case, as to the first prong, our analysis of counsel's judgment begins with the post-conviction court's factual finding that the interview notes were available to the defense before and at the time of trial. Mr. Hollingsworth claims that the interview notes would have benefitted his trial presentation in three specific ways: counsel should have used them to cross-examine the detective, counsel should have advised Mr. Hollingsworth to testify at trial, and counsel should have objected during the prosecutor's closing argument. He asserts that "there could have been no sound trial strategy in failing to take reasonable additional steps to discover the content[s] of the [interview] notes." The

State responds that Mr. Hollingsworth's argument overlooks two realistic possibilities: "(1) that [defense counsel] did not see the notes in discovery, but that was not ineffective assistance of counsel; or (2) that [defense counsel] knew about the notes and opted not to use them, which also was not ineffective assistance."

It is far from obvious that Mr. Hollingsworth's case would have gotten any stronger had counsel used the interview notes in the ways he argues on appeal. The most significant evidentiary addition from those notes was a new (and third) story about what happened, and it is difficult to understand how additional inconsistency could have helped his case. The post-conviction court found as much—assuming defense counsel knew of or had the interview notes, "to introduce an inconsistent statement as evidence would allow for the jury to infer that Mr. Hollingsworth was not truthful and that his self-defense claim was untrue." And "[b]ecause attempting to boost the credibility of a client is sound trial strategy, [defense counsel] was not ineffective for failing to introduce an additional inconsistent statement . . . ." The contrast is all the greater after defense counsel succeeded in getting the first recorded statement suppressed—with that statement out, defense counsel could, and did, portray Mr. Hollingsworth as a defendant with a consistent story who was willing to cooperate. Introducing the interview notes would have undermined that strategy, and the theoretical alternative—that defense counsel could have introduced Mr. Hollingsworth's first statement, which was suppressed, the interview notes, and the recorded statement—would only have compounded the inconsistency.

Mr. Hollingsworth also contends that his statements to the detectives would have

bolstered his self-defense theory. "Counsel testified that had she been aware of the existence of [the interview notes], she would have cross-examined Wiedefeld with them, she would have advised [Mr. Hollingsworth] to testify, and she would have objected to the prosecutor's closing argument." But again, even if we assume that counsel was ineffective, it is difficult to see how the notes would have helped Mr. Hollingsworth, and even more, how the decision not to use the interview notes prejudiced him. For the notes to have the effect Mr. Hollingsworth claims for them here, the jury would have had to believe his otherwise uncorroborated description of threats from others (threats that weren't connected to his ultimate victims) notwithstanding his failure even to mention these threats in his recorded statement immediately after. Put another way, a prejudice finding depends on a jury being more likely to believe him *as a result of* his inconsistent statements to police, not in spite of them. We see no error in the post-conviction court's decision not to see it that way.

Regardless of whether Mr. Hollingsworth could succeed on the performance prong of the *Strickland* test, which, as we discuss above, he does not, we share the post-conviction court's skepticism that the outcome of the trial would have been different and that Mr. Hollingsworth was prejudiced by the absence of the interview notes in his trial presentation. *See Cirincione v. State*, 119 Md. App. 471, 486 (1998) ("In other words, we need not find deficiency of counsel in order to dispose of a claim on the grounds of a lack of prejudice." (*citing Strickland*, 466 U.S. at 697)). To establish prejudice, the defendant must show either: "(1) 'a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different'; or (2) that 'the result of the proceeding was fundamentally unfair or unreliable.'" *Newton v. State*, 455 Md. at 355 (*quoting Coleman v. State*, 434 Md. 320, 331 (2013)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. And because "[t]he likelihood of a different result must be substantial, not just conceivable," *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (*citing Strickland*, 466 U.S. at 693), we affirm the post-conviction court's denial of Mr. Hollingsworth's ineffective assistance claim.

C. There Was No Prosecutorial Misconduct Because There Wasn't a *Brady* Violation.

Third, Mr. Hollingsworth argues that the State engaged in prosecutorial misconduct at two specific points during his trial: *first*, when "the prosecutor allowed Wiedefeld's false testimony about the pre-tape statement to go uncorrected," and *second*, during the State's closing argument when the prosecutor "capitaliz[ed] on [Wiedefeld's false] testimony." Both arguments flow from the premise that the State committed a *Brady* violation, a premise we rejected above, and these prosecutorial misconduct theories fail as a result.

1. Detective Wiedefeld's testimony

The false testimony to which Mr. Hollingsworth alludes includes a statement by Detective Wiedefeld describing Mr. Hollingworth's remorsefulness:

> [PROSECUTOR]: Could you describe the defendant's demeanor during the interview, during the conversation you had prior to the taped interview?
>
> [DET. WIEDEFELD]: He was pretty upset. He was afraid. He was pretty remorseful. [He was] saying things like it was so

stupid, things to that effect.

Mr. Hollingsworth argues that this statement insinuates that his pre-taped statement, the one memorialized only in the interview notes, was inconsistent with the statement and tone in the taped interview. This is because, he says, the interview notes contain statements about threats from others and Mr. Hollingsworth's claim that he took the gun from someone else. By introducing only the recorded interview, Mr. Hollingsworth argues, the prosecutor let false testimony go uncorrected at trial.

The State responds, and the post-conviction court found, that the State had no affirmative obligation "to point out the absence of a reference in the taped statement to [Mr.] Hollingsworth's asserting before being taped that he got the gun from an assailant." Further, the post-conviction court found that in light of the evidence, even if the interview notes had been withheld, the outcome of the trial would not have been different.

2. Closing argument

In closing argument, the prosecutor characterized the recorded statement that had been admitted into evidence and played for the jury at trial as Mr. Hollingsworth's "entire statement on tape." Mr. Hollingsworth says the prosecutor's intent was to point out "important things" from this statement stated in Mr. Hollingsworth's "own words." Mr. Hollingsworth contends that the State's closing argument misled the jury because the prosecutor "never expressly drew a distinction" between the interview notes, which were not in evidence, and the taped statement, which was.

The State counters that Mr. Hollingsworth has misinterpreted the prosecutor's

statements and that the post-conviction court concluded correctly that a prosecutor is not required to "avoid commenting on the evidence that is *actually* before the jury and pointing out to the jury what is and what is not present in the very evidence that they are charged with analyzing." (emphasis in original).

The question, then, is whether the post-conviction court clearly erred in concluding that the prosecutor hadn't misled the jury. "'Reversal is required, however, only 'where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.'" *State v. Newton*, 230 Md. App. 241, 254 (2016) (*quoting Pickett v. State*, 222 Md. App. 322, 330 (2015)).

Closing arguments are important, but they're delivered by human beings in real time, and if every minor transgression was cause for reversible error only few verdicts would ever stand. *Lawson v. State*, 389 Md. 570, 589 (2005). And although we review allegations of prosecutorial misconduct closely, we don't leap lightly to the conclusion that misstatements, if any, were intentional or designed to mislead:

> Such arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646–47 (1974). For an appellate court to determine if there was prejudice to the defendant, we look at "the severity of the remarks,

the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain v. State*, 386 Md. 145, 159 (2005) (*citing United States v. Melendez*, 57 F.3d 238, 241 (2d Cir. 1995)).

The alleged misconduct here didn't prejudice Mr. Hollingsworth. Again, the argument is that the prosecutor painted a misleadingly incomplete picture of Mr. Hollingsworth's statements by referring in closing argument only to the statement that was admitted, and by failing to complete the picture with statements Mr. Hollingsworth made but weren't admitted (statements that, he claims, were withheld from his counsel altogether). Making arguments from evidence that wasn't in evidence would itself inject reversible error into the case. *See Jones v. State*, 217 Md. App. 676, 689–99 (2014). And Mr. Hollingsworth doesn't argue that the prosecutor mischaracterized the statement she referenced. In that regard, then, this stands in contrast to *Whack v. State*, where the prosecutor explicitly misrepresented expert testimony about DNA evidence that was vital to the defendant's conviction for second-degree murder. 433 Md. 728, 732–33 (2013). The prosecutor in that case went so far as to overemphasize the DNA evidence's statistical significance by asserting that "one in 172 is equal to one in 212 trillion in terms of probability." *Id.* at 745–46.

We agree with the post-conviction court that the prosecutor argued the evidence that was before the jury and that doing so here, where only one statement was in evidence, was not an act of misconduct. Nor was the prosecutor hiding the ball—the interview notes were available to the defense and hadn't been admitted at trial. Had there been a *Brady* violation,

the answer might well have been different—a prosecutor who withheld exculpatory evidence would mislead a jury by arguing that the only available statement inculpates the defendant. That's not what happened here: the post-conviction court found, and we have affirmed, that the interview notes weren't withheld and were available to the defense. The absence of a *Brady* violation means the decision not to use the notes was a tactical one, and the prosecutor's argument characterized the only admitted statement fairly. The post-conviction court did not err in denying relief on this basis.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY COSTS.

MARK HOLLINGSWORTH,	*	**IN THE**
Petitioner	*	**CIRCUIT COURT**
v.	*	**FOR**
STATE OF MARYLAND,	*	**BALTIMORE CITY**
Respondent	*	**CaseNo.: 198044053-54; 198083006**
	*	**PC No.: 10267**

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

STATEMENT OF REASONS AND ORDER OF COURT

On July 18, 1998, Mark Joseph Hollingsworth, petitioner, shot and killed Charles Hemingway and David Jones and seriously wounded Kenneth Tyler. A jury in the Circuit Court for Baltimore City, Judge Prevas presiding, convicted the Petitioner of first degree murder as to Hemingway, second degree murder as to Jones, first and second degree assault as to Tyler, as well as use of a handgun in the commission of a felony or crime of violence, and wearing, carrying, or transporting a handgun. Petitioner was sentenced to life imprisonment for the murder of Hemingway, a consecutive thirty-year term for the murder of Jones, a consecutive twenty-year sentence for the handgun-use conviction, and a concurrent twenty-year term for the first degree assault of Tyler. The remaining convictions merged for sentencing purposes. The petitioner's conviction was affirmed by the Court of Special Appeals in an unreported decision filed on February 23, 2000. *See Hollingsworth v. State*, No. 785, September Term 1999 (filed February 23, 2000).

On May 21, 2009, the present post-conviction petition was filed, followed by seven supplemental petitions and an additional six amended petitions under the Uniform Post Conviction Procedure Act ("UPCPA"). Md. Code Ann., Crim. Proc 7-104 (LexisNexis 2012). A hearing was

held before the Honorable John Addison Howard beginning on March 10, 2011 and continued for an additional four days, finally concluding on July 25, 2011. The Petitioner was present and represented by Mr. Jeffrey Ross of the Public Defender's Office, and Mr. Michael Leedy represented the State. The allegations of error raised by the Petitioner in the petitions and at the hearing will be discussed below.

FACTUAL BACKGROUND[1]

The events at issue occurred at approximately 3:00 a.m. on July 19, 1998, in and around a three-story building located at 915 West Baltimore Street in Baltimore. What follows is a statement of the case as detailed by the Court of Appeals.

According to Charles King, he and his son, Steven own the property at 915 West Baltimore Street. Steven had a bedroom on the second floor and Charles had a room on the third floor. The first floor was a partly built nightclub that the Kings were constructing (the "Club"). On the evening of Saturday, July 17, 1998, Steven was hosting "a party" at the Club.

Steven stated at trial that he instructed his brother to first search all of the party's attendees at the door. Evidently, the only individuals who were not checked for weapons were Charles and Steven King, Steven's brother, a friend of Steven's named Kevin Moses, and two men serving as disc jockeys: Vonzeal Bazemore ("Bo") and Petitioner. At least two trial witnesses testified that they, and people they were with, were patted down at the door.

Tyler testified that he had come to the Club with his brother as well as David Funderburk and two friends, Lynwood Nickleson and Jones. According to Tyler, during the party some guy started bumping into Nickleson on the dance floor and a fight ensued. Tyler claimed that appellant

[1] Taken from the unreported Court of Special Appeals opinion, Hollingsworth v. State (*Hollingsworth*), No. 785, September Term, 1999 (filed February 23, 2000).

was not involved in the fight. He overheard an attendee tell appellant to "get the gun" and subsequently saw appellant put a gun in his waistband.

As a result of the brawl, Steven King escorted Tyler, Jones, and Funderburk out of the Club. Jones decided to go back in, and Tyler accompanied him to try to calm him down. When they returned inside, Jones and Tyler approached Petitioner. Petitioner subsequently drew what appeared to Tyler to be a Glock nine-millimeter semiautomatic pistol and shot both Tyler and Jones. Tyler was shot once in the stomach and testified that after these shots were fired, Petitioner ran to the front of the Club and fired several more shots before retreating to the rear of the club. According to Tyler, Petitioner removed his shirt and wrapped it around the Glock. Tyler did not see any of the other attendees with a gun.

Sharon Curtis, Hemingway's girlfriend, testified that Jones and Hemingway were cousins. She stated that Hemingway was on the dance floor when a fight broke out, and she heard someone yell, "Get the gun from behind the bar." Ms. Curtis and many of the other guests ran out of the club. Subsequently, she heard four or five gunshots and watched several more people exit the club. After the Club's lights went out, she heard more gunshots, including those fired by a police officer standing outside the club. Sometime thereafter, Ms. Curtis saw Hemingway crawl out of the Club's front door. On the morning of January 18, 1998, Detective Daniel Fyffe of the Baltimore City Police Department happened to be driving past the 900 block of West Baltimore Street when he saw many people running from the Club. An unidentified woman told Fyffe that "[t]he guy has a gun." Fyffe then heard between five and seven rapid gunshots inside the club. An African American male between five feet seven inches tall, and wearing a plaid shirt, came to the front door of the Club and pointed a black, semiautomatic gun at Fyffe. The detective fired two shots at the man who then returned inside the Club. As Fyffe called for backup, he saw another African

American male crawl out of the front door and lay on the ground outside of the Club. Fyffe testified that he was not confident he could identify the man who had pointed the gun at him.

At about 3:00 a.m., Baltimore City Police Detective Mark Weidefeld responded to a call that multiple shots had been fired at the Club. When Wiedefeld arrived at the Club, he found between thirty and forty people milling about in the street. The group was being detained as potential witnesses.

When Wiedefeld entered the Club, he saw a twenty-five foot bar on his right. To the left, were sitting booths, tables, and chairs. A dance floor was located in the rear of the room, as well as a doorway that led to stairways to the basement and second-floor living quarters. Jones's body was at the far end of the bar. The other two victims had already been taken to the hospital.

Bazemore was interviewed by Detective Wiedefeld at 7:56 p.m. on the day of the shootings. Over defense counsel's objection, an audio recording of that interview was played for the jury. The following colloquy from the tape is relevant:

Steven King later saw Hollingsworth, who he called "Hollywood," at the police station, and noticed that he had a cut over his eye. Steven heard that "somebody hit him with a fist or a bottle or something." At the police station, appellant was advised of his Miranda rights. Beginning at 11:57 p.m. on January 18, 1998, Detective Wiedefeld interviewed him. The audio recording of that interview was played for the jury, and the transcript was introduced into evidence.

Petitioner states that he was "D.J.'n at the club" when a fight broke out between his "little brother" and a "group of guys..that was rough housing..." Then, according to Petitioner, "everbody just started fighting...then somebody came out of nowhere and hit me in the eye, busted by eye,...so I had a lot of blood in my eye." Petitioner acknowledged that he had a gun with him, and that "they knew I had a gun." He also claimed that he was telling those involved in the fight to

back up. Because he was "nervous" and "scared" for himself and for his brother, he shot two people who approached him with a chair. Petitioner "thought" he shot the first person in the stomach, and he then fired three shots at the person located behind the first victim. At that point, Petitioner turned, ran, and "just kept shooting." When Petitioner tried to exit the club, a police officer shot at him. He returned inside, threw down his plaid shirt, dropped the gun, and then mingled with the crowd.

In response to a query as to how many shots he fired, petitioner told police that he had never shot anyone before and that "I aint going to say it felt good or nothing but it just, I ain't never had no feeling like that and then when it happened it's like I couldn't stop." He also said "there were just too many guys and I was trying to get them out of my way." Further, he claimed that he did not "want to hurt nobody there." He reiterated that he was trying to protect himself and his little brother from being beaten to death by "about 12 of them trying to fight us two." He explained: It was just too many guys and I was trying to get them out of my way." Later, he added: I didn't want nothing like that to happen...when I was in that situation I was just thinking about myself...I just was trying to think about surviving."

As noted, Jones and Hemingway were fatally wounded. Jones died at the scene. According to Dr. Theodore King, an assistant Medical Examiner, Jones had been shot three times and died of multiple gunshot wounds, including one to the back of the head. The head wound revealed stippling, indicating that the shot had been fired from within eighteen inches. Hemingway died at 8:10 a.m. at the hospital as a result of six gunshot wounds. According to Dr. King, the first bullet entered Hemingway's abdomen, continued through to his third lumbar vertebra, and was recovered from the right side of his back. The wound caused a spinal cord injury that would have made it

difficult for Hemingway to move his lower extremities. Two of the other wounds were "consistent with defensive posturing." One additional wound was to the back of the left buttock.

Kimberly Fowler, a crime lab technician, found eight cartridge casings inside the club, along with a red plaid shirt. Two additional casings were found outside the club. Romano Thomas, another crime lab technician, testified that a Glock was recovered from a brown box in the rear of the club. The Glock had one round in its chamber and a magazine containing nine cartridges.

James Wagster, an expert firearms examiner, examined five handguns: two police glocks, another Glock admitted into evidence, a .357 caliber magnum revolver, and .35 caliber smith and wesson revolver. Steven King had testified that he owned a .357 revolver which he ordinarily kept in his room. On the morning of the shootings, however, he saw the gun next to a television set in the Club. Police found the gun, fully loaded, in that location and Wagster testified that the gun had not been recently fired. Charles King testified that a week or two after the shootings, he gave police a handgun that he found in the back of the club. Apparently, Charles King found the .38 revolver.

Wagster testified that two of the nine-millimeter cartridges submitted to him were fired from Detective Fyffe's Glock, and the rest came from the non-police Glock in evidence. Wagster was also asked to examine four-.38/.357 caliber bullets found inside the club. Although he stated that those bullets appeared to match the .38 revolver, he was unable to say when they had been fired, how long they had been there, or when the .38 revolver had last been fired.

During the investigation, the police tested the hands of Jones, Hemingway, Tyler, Charles King, and Steven King for gunpowder residue. Tyler and the Kings tested positive. Daniel Vangelder, a crime lab forensic scientist, testified that a positive test for gunpowder residue can occur both on the shooter, a bystander to a shooting, and possibly someone who entered an enclosed area shortly after a gun was fired multiple times.

Several of the party's attendees were called as defense witnesses. Tiesha Kendricks testified that, during the fight, one of its participants yelled: "We're going to take this to the guns." Several of the fighters then left the club, returned, and rushed to the bar." Lonnie Byrd stated that the same individual who had threatened to "take it to the guns" left the Club briefly, returned inside, and told appellant that "they were not getting out of there alive." Byrd said that someone then hit appellant in the face with a gun. A struggle ensued and shots were fired. Robert Hall testified that the shootings began after one of the men initially started the fight and then left the club returned brandishing a gun. The assailant subsequently hit petitioner in the head with a gun.

Additional facts will be included as necessary.

DISCUSSION

In a post-conviction petition, the petitioner is required to set forth allegations of error that the petitioner believes entitle him to the relief requested. While petitioners are generally afforded wide latitude as to the substance of these allegations, there are certain categories of allegations that may not be raised in the context of a post-conviction. Allegations of error based upon issues that have been finally litigated, meaning that the allegation has been addressed on the merits in a prior proceeding, may not be re-litigated by way of a post-conviction petition. Crim. Proc. Art. §7-106(a). Nor may a petitioner raise an allegation of error in a post-conviction petition if the basis for the allegation has been waived; meaning that the petitioner could have made, but intelligently and knowingly failed to make, the allegation in a prior proceeding such as at the initial trial or on direct appeal. Crim. Proc. Art. §7-106(b).

The petitioner in a post-conviction proceeding bears the burden of proving the allegations made in the petition. *See e.g., State v. Hardy*, 2 Md. App. 150, 156 (1967) (stating a petitioner

bears the burden of proof in claims of ineffective assistance of counsel); *Lyde v. Warden, Md. Penitentiary*, 1 Md. App. 423, 428 (1967) (burden of proof in claims of prosecutorial misconduct by knowing use of perjury). The petitioner must establish the facts to support the allegation, *Cirincione v. State*, 119 Md. App. 471, 504, *cert. denied*, 350 Md. 275 (1998), and must demonstrate that the facts as established constitute a violation of an identified right, *see Baldwin v. Warden, Md. Penitentiary*, 243 Md. 326, 328 (1966) (rejecting Baldwin's claims that were merely statements that something did or did not occur, rather than identifying any rights that were allegedly violated). Where a petitioner fails to establish the requisite facts, the allegation may be denied for the reason that it is a bald allegation. *See Duff v. Warden*, 234 Md. 646, 648 (1964) (denying the allegations that "fail on their face to state a sufficient basis for post conviction relief," without remanding them).

Due to the volume of allegations of error, each will be addressed below under one of three categories.

I. Improper Questioning

Allegation One: Petitioner alleges that due process requires a finding that Judge Prevas' questioning of witnesses was improper during trial, rendering the trial unfair.

In support of this allegation, petitioner repeatedly references *Smith v. State*, 182 Md. App. 444, 478-480 (2008), and alleges the Court's finding that Judge Prevas' witness examination went too far in *Smith*, proves that Judge Prevas must have done the same thing in this case. However, this is an erroneous argument for a number of reasons.

First, *Smith* was decided well after the trial in this case. Second, in *Smith*, the Court of Appeals distinguished the very specific facts of that case from all prior cases where judges did not exceed the balance that they normally enjoy with respect to questioning witnesses, and it is

completely permissible for judges to question witnesses. *Smith v. State*, 182 Md. App. at 478-480. To merely state that because Judge Prevas abused his privilege at a later date in a different trial means that he must have done the same in a prior trial is an erroneous application of the law. Petitioner failed in his responsibility to establish that the questioning in the case before us was outside the scope of permissible questioning under the case law prior to *Smith.*

Further, Ms. Gering stated at the post-conviction hearing that she believed at the time of the trial that only some of the occasions warranted an objection, and the rest of the time she did not find that an objection was warranted. (TR 5/24/11 p. 25-30) Likewise, Mr. Peabody did not find that it would not have been successful on appeal, as he did not raise the issue.

For these reasons, relief on this ground is DENIED.

II. Brady Violations

In determining whether a defendant should be afforded post-conviction relief due to a *Brady* prosecutorial violation, this court looks to the materiality of the allegation to find if "there is a reasonable probability that... the result of the proceeding would have been different" had the prosecution sufficiently turned evidence over to the defense. *United States v. Bagley*, 473 U.S. 667, 682 (1985). In *Brady v. Maryland*, the Court held that suppression of evidence that may be favorable to the accused upon request, if requested, is a violation of the Due Process Clause if the evidence was material to the guilt or punishment, regardless of whether or not the State acted in bad faith. 373 U.S. 83 (1963). In *United States v. Bagley*, the Court cited *Strickland* to define "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." 473 U.S. 667 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). In contrast, the Court held that a Brady violation is not shown by demonstrating "that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could

reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 432 (1995).

Allegation Two: The State withheld the pre-taped portion of defendant's statement in violation of Brady.

Petitioner alleges that the State withheld the pre-taped portion of defendant's conversation with detectives in violation of Brady. However, Brady offers a defendant no relief when the defendant knew or should have known facts permitting him or her to take advantage of the evidence in question. In this case, the incomplete notes that detectives took were known to Ms. Gering, and she testified that she was aware of what Mr. Hollingsworth said before the tape started. Additionally, Detective Weidefeld handed over the notes to Ms. Handy, and Ms. Gering subsequently reviewed the file containing the notes in Ms. Handy's office while being afforded the opportunity to review all files and documents concerning the case. (TR 3/29/11 p. H-78) As Ms. Handy testified, there would be no reason why she would not include the notes in the file for Ms. Gering's review. (TR 3/29/11 p. H-78-88).

Because Petitioner failed to establish that the statement was unknown to Ms. Gering, there was no non-disclosure and, therefore, no Brady violation.

Relief on this ground is DENIED.

Allegation Three: The State withheld the Statement of Tiffany Jones in violation of Brady.

Counsel alleges a Brady violation for failure to disclose the statement of witness Tiffany Jones to Ms. Gering. Tiffany Jones said in her statement that she saw "Man-Man" with a gun. Although Ms. Gering could not remember eleven years later at the post conviction hearing, "Man-Man" was Robert Hall, a witness that was known to Ms. Gering.

For the same reasons stated above, relief on this ground is hereby DENIED.

Allegation Four: The State withheld the Statement of Officer Thomas in violation of Brady.

Petitioner alleges that the State withheld evidence in the form of a statement by Officer Thomas regarding the direction of the shooting. As Officer Thomas made clear from his testimony at trial, "in the doorway" referred to the direction of the shot, not the location of the shooter. In addition to the fact that Ms. Gering testified at the post-conviction hearing that she does think she saw this statement, there was no Brady violation because it was neither material nor favorable and counsel was not ineffective for failure to examine or investigate something that had she investigated, she would have heard exactly what Officer Thomas said in his testimony at the post-conviction hearing: that "in the doorway" referred to the direction of fire, not the location of the shooter. (TR 5/24/11 p. 18).

Thus, this allegation fails, as the statement was not material to the result. Relief on this ground is DENIED.

Allegation Five: The State violated Brady when it withheld the statement of Sharon Curtis.

Counsel first argues that there is an obvious connotation from Ms. Cutis's statement that Hemingway went back in to the club "aggressively" right before the shooting, however, the statement only contains the language "he was snatched back and went back at it." This does not appear to be a connotation that Charles Hemingway went back in aggressively and does not appear to be material to the result.

That being said, there additionally was no discovery violation or *Brady* violation because Ms. Gering had a chance to view the statement during the "open file" meeting in Ms. Handy's office. Petitioner failed to establish that Ms. Handy withheld these documents when Ms. Gering came in to review the file and evidence.

Therefore, this allegation is DENIED.

Allegation Six: The State withheld the statement of Brandy Williams in violation of Brady.

Lastly, Petitioner claims the State violated Brady by withholding Brandy Williams statement that she heard people talking about getting guns, however, this allegation fails on several grounds. First of all, Ms. Gering was present and aware of this statement. Even if it does not fail on this ground, the statement was not material because there was no question that there were comments made about getting guns. State's witnesses Sharon Curtis and Kenneth Tyler both mentioned it at trial, as well as defense witnesses Taisha Kendricks and Loni Byrd. There is not one shred of evidence that anybody got a gun and came back into the club with one, so this statement was not favorable to the defense and there is no evidence that this statement could have possibly changed the outcome of the case.

Accordingly, all of Petitioner's Brady allegations fail for the above reasons and are hereby DENIED.

III. Prosecutorial Misconduct

A petitioner may be entitled to a new trial if he can demonstrate that he was denied a fair trial on account of prosecutorial misconduct. The Supreme Court has recognized that prosecutorial misconduct may "so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). To constitute a due process violation, the prosecutorial misconduct must be of significance to result in the denial of the defendant's right to a fair trial. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

Even if petitioner's claim is correct, a new trial is not automatically required whenever the combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict; a finding of materiality of the evidence is required. *Gigli v. US*, 405 US 150 at 154 (1972). In this case, in light of the overwhelming evidence

presented at trial, it is highly unlikely that even if the petitioner's claims that such evidence existed and was not seen until after the trial were true, it would not likely have changed the final verdict.

Allegation Seven: The State knowingly allowed Detective Weidefeld to perjure himself and failed to correct it, amounting to prosecutorial misconduct.

A review of the lengthy testimony of Detective Weidefeld at trial does not demonstrate any testimony that could be considered perjury on its face, and further, this assertion by petitioner boils down to the final analysis that he disagrees with or believes that other testimony contradicts that of Detective Weidefeld. If contradictions in testimony were alone the basis upon which to determine that a witness had perjured him or herself, it would be difficult to find any trial in which, if petitioner's standard was applied, that any contested testimony would not be perjured.

Relief on this ground is DENIED.

IV. Ineffective Assistance of Counsel:

A criminal defendant has the right not only to be represented by counsel, but also to have his counsel render effective assistance. *McMann v. Richardson*, 397 US 759 (1970). The benchmark for judging any claim of ineffectiveness must be whether counsels conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v. Washington*, 466 US at 686. To prevail on a claim of ineffectiveness of assistance, a petitioner must show that 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense. *Strickland* at 687.

In order to establish counsel was deficient, petitioner bears the burden of (1) identifying the acts or omissions of counsel that are alleged to have not been the result of reasonable professional judgment, (2) showing that counsel was not functioning as the counsel guaranteed by the sixth amendment (i.e. that considering all the circumstances, the representation fell below an

objective standard of reasonableness), and (3) overcoming the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.* at 690.

The sixth amendment does not require the best possible defense or that every attorney render a perfect defense. In order to be deficient, counsel's acts must be outside the wide range of professionally competent assistance. *Id.* at 690. Courts shall not, aided by hindsight, second-guess counsel's decisions. *Gilliam v. State*, 331 Md. 651, 666 (1993), *cert. denied*, 510 US 1077 (1994). Counsel's action must be judged based on both the facts known to counsel at the time the questioned action was taken and the law as it existed at the time the questioned action was taken. *State v. Thomas,* 325 Md. 160, 171 (1992); *Walker v. State*, 391 Md. 233, 246 (2006); *Wiggins v. State,* 352 Md. 580, 604, *cert. denied*, 528 US 832 (1999). Where counsel is required to choose between two or more courses of action, he will not be deemed to have committed a deficient act as long as the action he chooses is reasonable. *State v. Adams*, 171 Md. App. 669 (2006). Counsel's actions are assessed based on prevailing professional norms and must be presumed reasonable until proven otherwise. *Smith v. State*, 394 Md. 184, 207 (2006).

The second prong, the prejudice prong, requires that the petitioner show that the deficiency of counsel's performance prejudiced the defense. An error by counsel, even if professionally unreasonable, does not warrant setting aside a criminal conviction if the error had no effect on the judgment. *Strickland* at 691. It is not enough to show that some errors had some conceivable effect on the outcome or impaired the presentation of the defense, nor is the standard that counsel's deficient conduct more likely than not altered the outcome. *Harris v. State*, 303 Md. 685, 700 (1985). To establish prejudice, petitioner must show that there is a reasonable probability that but for counsel's unprofessional errors, the result would have been different. *Strickland* at 694. A

reasonable probability means that it was probably sufficient to undermine confidence in the outcome. *Id.*

Both prongs of *Strickland* must be established to make a claim of ineffective assistance of counsel. If either prong is not proven, the other need not even be considered. *Id.* at 696. For this reason, the hearing judge need not apply *Strickland* in any particular order and may deny relief without considering the other prong. *Oken v. State,* 343 md 256, 284 (1996), *Yoswick v. State*, 347 Md. 228, 245 (1997).

Allegation Eight: Counsel was ineffective for failure to move for dismissal based on petitioner's right to speedy trial.

Counsel was not deficient for choosing not to raise a speedy trial issue as petitioner indicates here, as attorneys have no duty to raise issues that they do not believe would have a chance of success. The standard for showing prejudice under *Strickland* is that there had to be a substantial probability that counsel would have prevailed in making a speedy trial argument. In this case, over five months of the fourteen-month delay in prosecution was with defense counsel's acquiescence. Petitioner suggests that one letter from defendant to his counsel shows that he asserted his right to a speedy trial, however, he failed to repeatedly assert this right at each of the postponements. Additionally, Petitioner suggests that prejudice was shown by the loss of witness Kia Lewis due to a postponement, however, the record does not reflect that Ms. Gering ever indicated that she had Kia Lewis available for trial and she testified at the post conviction hearing that she hired an investigator to secure the witness but was unable to locate her. (TR 5/24/11). Whether Mr. Hollingsworth believes Kia Lewis was available or not, Ms. Gering certainly was not aware of that, so there could not have been prejudice.

Thus, relief on this ground is DENIED.

Allegation Nine: Defense counsel rendered ineffective assistance for failing to conduct reasonable investigations related to firearms evidence.

Petitioner alleges that counsel failed to retain an expert to challenge that all the casings came from the same weapon, the nine-millimeter, and that the bullets underneath Mr. Jones were nine-millimeter as opposed to thirty-eight caliber. First, counsel's performance was not deficient, as defense counsel regularly does not retain experts if there is no indication they are needed, and there was no indication that they were needed here.

Counsel seems to make much of the fact that there were ten wounds but only eight casings and suggests those other wounds would have come from another weapon. This contention is flawed. There was no evidence indicating that a second weapon was fired by another shooter during the night in question, and counsel had no reason to believe a ballistics expert would be helpful to the defense.

Therefore, Ms. Gering's representation was reasonable and Petitioner's allegation of error is DENIED.

Allegation Ten: Counsel was ineffective for failing to move for suppression of petitioner's taped confession on fourth amendment grounds.

Ms. Gering's performance was not deficient and did not fall below an objective standard of reasonableness as judged against other attorneys of that time. Petitioner alleges that she should have made the argument and could have been successful, but fails to meet the *Strickland* performance prong or show that she was unreasonable as compared to other attorneys in not making a 4th Amendment argument. There is no reason to suggest that rounding up a bunch of potential witnesses and taking them down to the police station would devolve into an arrest, especially when the only detective present at the time, Detective Council, indicated in his

testimony that had Mr. Hollingsworth wanted to leave, he would have gotten his contact information and allowed him to leave. Additionally, at the time Mr. Hollingsworth's status changed from witness to suspect, he was advised of his *Miranda* rights and signed an explanation of rights form. (TR 3/10/11 p. H39-40).

Therefore, relief on this ground is DENIED.

Allegation Eleven: Defense counsel rendered ineffective assistance by failing to discover and use at trial the police notes and statement that petitioner saw someone coming at him with a gun.

Ms. Gering's decision not to use the aforementioned information in trial when defending Mr. Hollingsworth was not unreasonable. In light of the arguments Ms. Gering was making at the time she was trying the case, Ms. Gering was faced with multiple inconsistent statements and various eye witnesses against him stating that he was the shooter and the only one with a gun. To introduce an inconsistent statement as evidence would allow for the jury to infer that Mr. Hollingsworth was not truthful and that his self-defense claim was untrue. By getting the first statement suppressed, Ms. Gering was able to portray Mr. Hollingsworth as someone who wanted to cooperate with police and was afraid for his life, not someone who was changing his story and reluctant to disclose the truth from the beginning. Because attempting to boost the credibility of a client is sound trial strategy, Ms. Gering was not ineffective for failing to introduce an additional inconsistent statement, and relief on this ground is hereby DENIED.

Allegation Twelve: Defense counsel rendered ineffective assistance for failing to use Officer Thomas's, Tiffany Jones, Brandy Williams, and Curtis' statements at trial.

For the reasons stated above in the section discussing these particular statements under the *Brady* analysis, this evidence was not favorable as is indicated by petitioner. Counsel's

MARK HOLLINGSWORTH,	*	**IN THE**
Petitioner	*	**CIRCUIT COURT**
v.	*	**FOR**
STATE OF MARYLAND,	*	**BALTIMORE CITY**
Respondent	*	**Case No.: 198044053-54; 198083006**
	*	**PC No.: 10267**

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

ORDER

Upon full and fair consideration of the Petitioner's Petition for Post Conviction Relief, and for the reasons set forth in the attached Memorandum, it is this 19th day of July, 2016;

ORDERED, that the above-captioned Petition for Petition for Post Conviction Relief be, and the same is hereby, **DENIED**.

JUDGE
THE JUDGE'S SIGNATURE APPEARS ON
THE ORIGINAL DOCUMENT.

cc: Office of the Public Defender
Office of the State's Attorney

performance was not deficient for not using the statements, and no prejudice was caused. There is no suggestion as to what counsel could have or should have done differently with these very limited statements.

Thus, relief on this ground is DENIED.

Allegation Thirteen: Defense counsel rendered ineffective assistance for failing to conduct reasonable investigations related to the shooting by Officer Fyffe and by failing to cross examine the state's witness regarding shooting of Officer Fyffe.

Ms. Gering's failure to conduct investigations related to a possible incident where Officer Fyffe at some other time was reported to have hit someone while shooting, as indicated on a mobile run sheet, did not render ineffective assistance of counsel because it was not relevant and was not helpful to her trial strategy. There was no indication at all that Officer Fyffe had actually ever struck someone as the mobile run sheet says, and counsel was not ineffective for not following up and it certainly caused no prejudice.

Relief on this ground is DENIED.

Allegation Fourteen: Defense counsel rendered ineffective assistance for failing to investigate and question witness whether there had been previous shootings at the scene.

It is argued that counsel was ineffective for failing to investigate whether there had been prior shootings at the scene of the crime. Counsel in the post conviction hearing called Mr. King as a witness to ask him whether there had been prior shootings at that location to which Mr. King indicated that there had not been. (TR 3/10/11 p. H-5-14). It is unclear how this would be helpful to the defense because even if another gun had been fired that night, which it was not, this would not have helped Mr. Hollingsworth's self-defense claim. There was no suggestion by Mr. Hollingsworth in any of his statements or by any other witness that there was another gun when

Mark Hollingsworth shot David Jones. There was only one gun that night, and no witness ever saw a gun other than the one that ended up in Mark Hollingsworth's hands.

Relief on this ground is DENIED.

Allegation Fifteen: Defense counsel rendered ineffective assistance for failing to make a proper and compete objection to improper impeachment of a defense witness.

Counsel's performance was simply not deficient on this matter. Trial counsel is not ineffective for failing to object to admissible evidence or to pursue claims that have no merit. *Harris v. State,* 303 Md. 685 (1985). Even if she should have objected, there is no prejudice because the State either laid the proper foundation or could have laid the proper foundation. There is no suggestion that the state could not have laid the proper foundation, and petitioner even admits in one of the petitions that the impeachment would have been proper if the proper foundation had been laid. There is no suggestion that the proper foundation had not been laid or would not be properly laid even if there was an objection.

Relief on this ground is hereby DENIED.

Allegation Sixteen: Defense counsel rendered ineffective assistance for failing to request an instruction on hot-blooded response, imperfect defense of others, and instruction that petitioner did not forfeit his right to self-defense by arming himself in advance of attack.

With regard to an instruction on hot-blooded response and an instruction that arming oneself prior to a shooting does not result in forfeiture of a self-defense claim, asserting factually inconsistent defenses is widely considered to be poor criminal defense tactic because it undermines the defendant's credibility by suggesting to the jury that the defense is merely throwing out possible scenarios in the hope that one will stick instead of giving a truthful account of what

happened. These two instructions would result in factually different scenarios being presented to the jury and the decision not to request them amounts to a tactical decision by Ms. Gering.

An instruction on imperfect defense of others would also conflict with Ms. Gering's defense strategy at the time of trial which was a self-defense claim. Additionally, Ms. Gering was unable on multiple occasions throughout her testimony in the post conviction hearing to point to any evidence at all that would generate a defense of others instruction. (TR 5/24/11).

Therefore, counsel was not deficient and relief on this ground is DENIED.

Allegation Seventeen: Defense counsel rendered ineffective assistance for failing to call Kia Lewis as a witness.

Defense counsel was not ineffective for failing to call Kia Lewis as a witness at trial when Kia Lewis was missing and could not be located. Ms. Gering testified that she sent out an investigator and the investigator was not able to track down Ms. Lewis, and there does not appear to be more that Ms. Gering could have done other than what she did to secure the witness. (TR 5/24/11 p. 6-84) Petitioner does not explain what Ms. Gering could have done to locate Kia Lewis, other than what she did. She certainly was not deficient for not doing any more than that.

Relief on this ground is DENIED.

Allegation Eighteen: The aggregate of errors constitutes ineffective assistance of counsel.

Petitioner contends that the above referenced allegations create a cumulative effect that entitles him to post conviction relief. The Court of Appeals has ruled that the cumulative effects of numerous errors may constitute an independent reason for ruling that counsel's representation was ineffective. *Bowers v. State*, 320 Md. 416, 437 (1990). Here, none of petitioner's allegations amount to error on trial counsel's behalf. Therefore, this is not a case where the cumulative effect of numerous interrelated errors in aggregate amount to inadequate representation. This is more a

case of the mathematical law that twenty times nothing is still nothing. *See Gilliam v. State*, 331 Md. 651, 686 (1993).

Relief on this ground is hereby DENIED.

Allegation Nineteen: Appellate counsel was ineffective for failing to appeal court's improper questioning of witness.

Petitioner alleges that appellate counsel's failure to raise the claim was so deficient that it fell below a reasonable attorney standard for purposes of the Sixth Amendment's protection for effective assistance of counsel. Although the record was preserved by Ms. Gering's objections during trial to Judge Prevas's questioning, the law at the time did not reflect that raising this issue on appeal would have been successful. Thus, appellate counsel's decision not to raise this issue on appeal was a result of a deliberate, tactical decision based on the nature of state law at that time and does not constitute ineffective assistance of counsel.

Relief on this ground is DENIED.

IN THE CIRCUIT COURT FOR BALTIMORE CITY

MARK HOLLINGSWORTH

Petitioner *

vs.

* Case No. 198044053-54
198083006

STATE OF MARYLAND * PC No.: 10267

Respondent

* *

SUPPLEMENTAL STATEMENT OF REASONS ON REMANDED ISSUE

This case was remanded from the Court of Special Appeals to the Circuit Court for Baltimore City with instructions to issue a ruling on one of applicant's contentions that did not receive a specific resolution in the Circuit Court's *Statement of Reasons and Order of Court* ("Statement") dated July 19, 2016 which denied applicant's petition for post-conviction relief after considering and resolving nineteen other allegations of error presented by the Petitioner.

The contention that remains is one presented in the Petitioner's Application for Leave to Appeal which the Court of Special Appeals describes as follows:

"Did the prosecutor make improper statements during closing argument requiring reversal, when the prosecutor told the jury that Petitioner never told the police that one of the victims had a gun, even though the prosecutor was aware of detectives' pre-tape notes verifying that Petitioner told police that one of the victims had a gun?"

See item # 5 in the Application for Leave to Appeal (Post Conviction) No.1407, September Term, 2016.

The limited remand issue was referred to the undersigned for resolution. By agreement, the parties filed memoranda on this issue pursuant to the order of this Court of January 24, 2019 and a hearing was held on May 15, 2019 in which the parties presented further argument based on the record and the memoranda already on file in this matter. No additional testimony was heard at the May 15 hearing.

The background and history of this case are fully set forth in the prior Statement of Reasons and Order of Court filed on July 19, 2016. The findings and conclusions reached on the other issues decided in that Statement inform the resolution of this issue and the Court discerns no reason to revisit the issues already decided by the post-conviction court even were it not limited by the narrow remand order in this case.

Petitioner's contention is that the prosecutor in final argument made numerous statements about what Petitioner did or did not say to the police detectives even though the prosecutor knew that there were indications in the detectives' pre-interview notes of what Petitioner apparently told them that may have differed from the assertions that were in the Petitioner's statement which the jury was considering. These primarily concern whether Petitioner in his pre-recorded interview told the police at some point that someone else other than the petitioner had a gun at the time of the event[1].

The "multiple comments" by the prosecutor which the Petitioner finds to be in error are set out in Petitioner's Post Hearing Memorandum at pages 5 to 7.

Petitioner grounds his argument largely on a Court of Special Appeals case, *Curry v. State*, 54 Md. App. 250 (1983), in which a judgment was reversed and a new trial was ordered because of prosecutorial errors that in the opinion of the court did not provide the appellant a "fair trial". *Id.* at 259.

In *Curry*, there were two state witnesses who were "crucial to the prosecution's largely circumstantial case". Id at 253. A pre-trial hearing had established that both witnesses had significant histories of juvenile offenses. One was still on probation at the time of trial and the other had an aggravated assault charge pending at the time of trial.

[1] In the July 19, 2016 Statement, the Court has already determined that defense counsel knew of the notes from the detectives and that they had been disclosed to the defense. The Court concluded there was no non-disclosure of the notes and there was no *Brady* violation by the State. See page 10 of the Statement.

Despite these facts being firmly established in the pre-trial record, the prosecutor during closing argument indicated that one of the witnesses had "no criminal record" and there was "absolutely nothing to show he is not a good person or not a truthful person." *Id.*

The other witness was described by the prosecutor as a person who worked with "aged, senior citizens." And said "Does that sound like the type of fellow who would come in here and lie". *Id* at 254. The prosecutor also said:

Based on these young men's backgrounds, the fact they have kept an exemplary life themselves, I believe it is more than a reasonable explanation."

The State agreed that portions of the prosecutor's argument were"improper" but asserted that the remarks did not mandate a reversal.

In reversing the convictions, the Court of Special Appeals found that "the credibility and veracity of the State's two youthful witnesses was the keystone which holds the State's case together." *Id* at 257. The Court found that comments by prosecutors on the reputation or credibility of witnesses is prejudicial conduct. *Id* at 258. It found in the specific circumstances of the case, the representations by the prosecutor were deceiving to the jury and that saying that the two witnesses had lead "exemplary" lives was a "gross misstatement of fact designed to evince the trustworthiness of the witnesses and thus bolster the State's circumstantial case." *Id*. The Court also relied In requiring reversal, on the fact that the prosecutor had referred to the Defendant not having testified. The Court found that improper and condemned it. *Id* at 259.

While Petitioner believes that this case indicates that his convictions should be reversed because of what the prosecutor said (or didn't say) in the final argument, the State has a different view. It contends that Petitioner is finding in the case "holdings" that simply do not exist. See *State's Answer to Post-Hearing Memorandum* at page 1. The State contends that *Curry* was decided on the basis that the State was vouching for the witnesses and asking the jury to make unreasonable inferences from the lack of any admitted impeachable evidence. See Memorandum at page 2. These errors are not present in Petitioner's case.

This Court agrees with the State that *Curry* does not control the result here. The Court of Special Appeals opinion seems to be largely limited to the specific facts of that case and the melded rationale of improper vouching for crucial witnesses and improper references to the failure of the Defendant to testify. It hardly stands for a broad proposition that a prosecutor can

never argue based on the admitted record before the jury that certain things are not present in the record presented for the jury to consider when the prosecutor may have some indication that the referenced items could have been adduced.

The Petitioner argues that once the prosecutor knows that the Defendant may have said something that does not appear in the statement actually given in his admitted statement, the prosecutor can not point out its absence to the jury in the statement that the jury has before it. The prosecutor here did have indication that the Defendant in his pre-statement interview may have indicated that another person had a gun at the time of the melee, but the prosecutor, so knowing, is not obligated to avoid commenting on the evidence that is *actually* before the jury and pointing out to the jury what is and what is not present in the very evidence that they are charged with analyzing.

The Petitioner points out many places where the prosecutor says that petitioner "didn't say anything about them having guns." It would have perhaps been more prudent for the prosecutor to say something along the line of: "In the statement of the Defendant you have before you, the Defendant didn't say anything about them having guns." However, the mere fact that an argument could have been more precisely stated, does not mean that the failure to do so in a trial setting amounts to an error that should lead to a reversal and new trial.[2]

In the context of the specific facts found in this post conviction, the Court does not find that relief on the grounds alleged has been shown and should be granted.

Relief on this ground is DENIED. An order will be entered.

Judge Dennis M. Sweeney, Part 81
Signature Appears on Original Document

Dennis M. Sweeney
Senior Circuit Court Judge

[2] The State argues alternate grounds in the State's Answer to Post-Hearing Memorandum at pages 3 to 6 to support a denial of the relief requested. While it is not necessary to discuss such issues given this ruling, the Court generally agrees with the points made particularly given the prior findings and rulings on the 19 issues already adjudicated in this post conviction.

IN THE CIRCUIT COURT FOR BALTIMORE CITY

MARK HOLLINGSWORTH

Petitioner

vs.

STATE OF MARYLAND

Respondent

Case No. 198044053-54
198083006
PC No.: 10267

* *

ORDER

For the reasons stated in the Supplemental Statement of Reasons on Remanded Issue, it is ordered this 14th day of June, 2019 that as to the remanded issue the Petitioner claim for relief is DENIED and it is further ordered that the Petition for Post Conviction Relief be, and the same is hereby DENIED.

Judge Dennis M. Sweeney, Part 81
Signature Appears on Original Document

Dennis M. Sweeney
Senior Circuit Court Judge

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

Mark Hollingsworth,	*	
Appellant	*	No. 1416, September Term 2019
v.	*	CSA-REG-1416-2019
	*	Circuit Court No. 198044053, 198083006, 198044054
State of Maryland,	*	
Appellee	*	
	*	
	*	

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

MANDATE

On the 30th day of April, 2021, it was ordered and adjudged by the Court of Special Appeals:

Judgments of the Circuit Court for Baltimore City affirmed. Appellant to pay costs.

STATE OF MARYLAND, Sct.:
I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this 2nd day of June, 2021.

Gregory Hilton

Gregory Hilton, Clerk
Court of Special Appeals

MANDATE - STATEMENT OF COSTS
Court of Special Appeals of Maryland

CSA-REG-1416-2019

Mark Hollingsworth v. State of Maryland

Appellant			
	Mark Hollingsworth	Notice of Appeal	50.00
		Brief	417.60
		Reply Brief	40.32
		RPIF	11.00
		Appellant Total	**518.92**
Appellee			
	State of Maryland	Brief	101.76
		Appellee Total	**101.76**
		Total Costs	**620.68**

STATE OF MARYLAND, ss:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals this 2nd day of June, 2021.

Greg Hilton
Clerk of the Court of Special Appeals of Maryland

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

MARK HOLLINGSWORTH	*	**IN THE**
	*	**COURT OF APPEALS**
	*	**OF MARYLAND**
v.	*	**Petition Docket No. 141 September Term, 2021**
	*	**(No. 1416, Sept. Term, 2019**
	*	**Court of Special Appeals)**
	*	**(Nos. 198044053, 198044054 & 198083006, Circuit Court**
STATE OF MARYLAND	*	**for Baltimore City)**

O R D E R

Upon consideration of the "Motion to Reconsider Denial of Petition for Writ of Certiorari" filed in the above-captioned case, it is this 22nd day of October, 2021

ORDERED, by the Court of Appeals of Maryland, that the above pleading be, and it is hereby, DENIED.

/s/ Joseph M. Getty
Chief Judge

MARK HOLLINGSWORTH	*	**IN THE**
	*	**COURT OF APPEALS**
	*	**OF MARYLAND**
v.	*	**Petition Docket No. 141 September Term, 2021**
	*	**(No. 1416, Sept. Term, 2019**
	*	**Court of Special Appeals)**
	*	**(Nos. 198044053, 198044054 & 198083006, Circuit Court**
STATE OF MARYLAND	*	**for Baltimore City)**

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above-captioned case, it is this 26th day of August, 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