MANDATE

Court of Special Appeals

Maryland Relay Service
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No. 01802, September Term, 2013

Jermaine Blackwell
vs.
State of Maryland

JUDGMENT: April 24, 2014: Application for leave to appeal denied. Any costs to be paid by applicant. Per Curiam filed.

May 27, 2014: Mandate issued.

From the Circuit Court: for **BALTIMORE CITY**
000103041071
-103041073,75,76 P.C.#9864

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 **twenty-seventh** *day of* **May** **2014**

Clerk of the Court of Special Appeals

COSTS SHOWN ON THIS MANDATE ARE TO BE SETTLED BETWEEN COUNSEL AND NOT THROUGH THIS OFFICE.

Appendix A

JERMAINE BLACKWELL	*	IN THE
	*	CIRCUIT COURT
Petitioner	*	FOR
v.	*	BALTIMORE CITY
	*	
STATE OF MARYLAND	*	
	*	CASE NOS.: 103041071
Respondent	*	103041073
	*	103041075
	*	103041076
	*	P.C.P.A. NO.: 9864
	*	

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J. HOLLAND

MEMORANDUM OPINION AND ORDER

PROCEDUREAL HISTORY

Jermaine Blackwell (hereinafter, Petitioner) filed his Petition for Post Conviction Relief pursuant to the Maryland Criminal Procedures Code Annotated §7-101, et seq. and Maryland Rules 4-401 through 4-408. The relevant procedural history of this case is as follows:

On November 3, 2003, following a trial by jury, with the Honorable Lynn K. Stewart presiding, Petitioner was found guilty of felony murder, first degree burglary, conspiracy to rob, first degree assault, second degree assault and three counts of use of a handgun in a crime of violence. On December 16, 2003, the Court sentenced Petitioner to the Division of Corrections for Life for felony murder, twenty years consecutive for first degree burglary, twenty years consecutive for conspiracy to rob, twenty-five years consecutive for first degree assault, ten years consecutive for second degree assault, and twenty years consecutive for each of the handgun crime of violence counts. The total sentence was Life plus 135 years.

Petitioner filed an appeal to the Court of Special Appeals on January 6, 2004. He filed an Application for Review of Sentence by a three judge panel on January 16, 2004 and Motion for Reconsideration of Sentence on March 16, 2004. On March 31, 2005, the three judge review

Appendix B

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panel left Petitioner's sentence unchanged. On November 14, 2005, the Court of Special Appeals affirmed the judgment of the Circuit Court.

Petitioner filed a Petition for Writ of Certiorari on November 23, 2005. The Court of Appeals denied his petition for Writ of Certiorari on January 13, 2006. On February 27, 2007, Petitioner's first post conviction was filed and set before the Honorable Pamela White. On July 20, 2007, that petition was withdrawn without prejudice. The current petition was filed on July 9, 2012. Shortly thereafter, the Petitioner's 2004 Motion for Reconsideration was denied on July 26, 2012. A hearing on the post conviction petition was before the undersigned judge on February 12, 2013. Petitioner was present and represented by Ms. Judith Jones from the Office of the Public Defender. Ms. Traci Robison, an Assistant State's Attorney, represented the State.

ALLEGATIONS OF ERROR

Petitioner raises the following allegations of error:

1. Ineffective Assistance of Counsel: Failure to advise Petitioner of the Life suspend all but 20 or 25 years straight plea agreement offered by the Court.
2. Ineffective Assistance of Counsel: Failure to advise Petitioner of the potential outcome and consequences of pursuing trial.
3. Ineffective Assistance of Counsel: Failure to advise Petitioner that he could receive more than his sentencing guidelines of 20 to 30 years if he went to trial
4. Ineffective Assistance of Counsel[1]: Misadvising Petitioner to reject the plea offer of 30 years offered by the State

[1] Petitioner's Petition for Post Conviction Relief has three allegations of error. Petitioner's third allegation of error was separated into separate allegations in this opinion. The second allegation reads: "Trial Counsel rendered ineffective assistance by misinforming the petitioner that he could not receive more than his sentence guidelines of

5. Ineffective Assistance of Counsel: Failure to preserve the record or raise meritorious issues for appellate review.
6. Petitioner's sentence is presumptively unconstitutionally vindictive and violates the Eighth Amendment ban on cruel and unusual punishment.

DISCUSSION

I. Ineffective Assistance of Counsel

Petitioner raises six allegations of error: five are premised on ineffective assistance of counsel. The United States Supreme Court held, in *Strickland v. Washington*, that the Sixth Amendment right to counsel does not simply guarantee the presence of a lawyer; it guarantees the right to effective assistance of counsel. 466 U.S. 668, 686 (1984). The Supreme Court set forth a two prong test for measuring whether counsel rendered ineffective assistance in *Strickland. Id.* at 687. To establish ineffective assistance of counsel the petitioner must demonstrate that: 1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Id.*

The burden of proof is on the petitioner to establish ineffective assistance of counsel. *Bowers v. State*, 320 Md. 416, 424 (1990); *State v. Calhoun*, 306 Md. 692, 729 (1986). Maryland appellate courts have not explicitly defined the petitioner's burden of proof in post conviction cases; however the Court of Appeals has said that a *heavy* burden of proof rests upon the petitioner to prove *both* deficient performance and prejudice. *Harris v. State*, 303 Md. 685, 697 (1985); *State v. Tichnell*, 306 Md. 428, 442 (1986). To establish the deficiency prong, the petitioner must identify the acts or omissions of his counsel that are alleged to have not been the

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20 to 30 years if proceeding to trial and by advising him to reject the plea offer of 30 years being offered by the State."

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result of reasonable professional judgment, show that his counsel's representation fell below an objective standard of reasonableness and overcome the presumption that, under the circumstances, the challenged action could not be considered sound trial strategy. *See, Strickland,* 466 U.S. at 690. To establish the prejudice prong, the petitioner must demonstrate that "there is a reasonable probability that, but for the counsel's unprofessional errors, the result would have been different. *Id.* at 694.

Petitioner raises five claims of ineffective assistance of counsel. Four of the five allegations deal with petitioner's trial counsel's failure to properly advise the petitioner of plea offers and post trial consequences. Due to their interrelatedness, this Court has chosen to address these allegations together.

A. Ineffective Assistance of Counsel: Failure to advise and explain post trial consequences.

Petitioner alleges that his trial counsel, Ms. Bledsoe, failed to 1) advise him of the Life suspend all but 20 or 25 years straight plea offered by the Court; 2) failed to advise him of the potential outcome of and consequences of going to trial; 3) failed to advise him that he could receive more than his sentencing guidelines of 20 to 30 years if he went to trial and 4) advised him to reject the plea offer of 30 years offered by the State.

In support of his allegations Petitioner cites *Merzbacher v. Shearin*, 732 F. Supp. 2d 527 (2010), a United States District Court for the District of Maryland case which was recently reversed by the Fourth Circuit of the United States Court of Appeals.[2] In *Merzbacher*, the

[2] *Merzbacher v. Shearin*, 732 F. Supp. 2d. 527, 568 (D. Md. 2010), was reversed by *Merzabacher v. Shearin*, 706 F. 3d. 356 (4th Cir. 2013). The Fourth Circuit Court of Appeals found that state post-conviction court did not act unreasonably in finding that Merzbacher was not credible when he stated that he would have taken ten-year plea offer. Further, the state post-conviction court's determination that there was no reasonable probability that the offer would have been entered and accepted was not unreasonable.

petitioner was charged with committing a number of sexual abuse crimes—including rape, perverted practice, and carnal knowledge of a female child under the age of fourteen years. *Merzbacher v. Shearin*, 706 F. 3d 356, 359(2013). During a pre-trial conference, Merzbacher was offered and the then presiding trial judge agreed to be bound to a plea agreement of 10 years. *Id.* Merzbacher's attorneys failed to advise him of this offer and subsequently, after being convicted by a jury, Merzbacher was sentenced to four life sentences with an additional 10 year term to run concurrently. *Id.* at 360. At Merzbacher's post conviction hearing, both of his trial attorneys testified that they never informed Merzbacher of the plea offer. *Id.* The state circuit court denied Merzbarcher's petition for post conviction relief. *Id.* at 361. Merzbacher appealed the decision to the Court of Special Appeals in Maryland and his case was remanded to address two issues. *Id.* Once again, the Circuit Court denied post conviction relief. Merzbacher then sought federal habeas corpus relief in the US District Court of the District of Maryland. *Id.* at 361-362. The Federal District Court found that the defendant had met his burden in establishing that he had suffered a constitutional wrong and was entitled to relief. *Id.*

Petitioner avers, that like Merzbacher, the trial court mediated a beneficial plea agreement, the state was in agreement with the plea agreement and that he was not advised of the offer by his trial counsel. Unfortunately, Petitioner's case differs greatly from that of Merzbacher. Unlike Merzbacher's trial counsel, Petitioner's trial counsel has always maintained, prior to and under oath during Petitioner's post conviction hearing, that she advised Petitioner of the plea offer presented to him. Quite contrary to Merzbacher's counsel, Petitioner's trial counsel has always maintained that not only did she inform the petitioner of the plea offer; but that she explained the consequences Petitioner could face if he went to trial, and ultimately left the decision up to the petitioner as to whether to accept or reject the plea offer.

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Petitioner's argument that his attorney failed to communicate to him plea offers and the consequences of going to trial is not supported by the record. His arguments are further tarnished by the fact that he also claims that his trial counsel advised him to reject a plea offer by the State of 30 years. Examination of the record reveals the following colloquy which took place after the trial judge mediated an offer for the petitioner at the bench:

October 29, 2003, Trial Transcript, pages 2-12 to 2-13.

The Court: Life suspend all but 20 or 25. That's the best I can do.
Ms. Bledsoe: All right.
Mr. Yee: (Unintelligible)
The Court: Do you want to talk to them?
Mr. Cardin: Yes, if you don't mind.
Ms. Bledsoe: Yes.
The Court: You want me to leave the bench? You think it might be better or what—
Mr. Cardin: I think it probably would.
The Court: All right. Give me an all rise.
The Clerk: All rise.
(A recess was held while Defense Counsels discussed a plea with their clients.)
The Clerk: All rise. Court 11 will now resume its morning session. The Honorable Lynn K. Stewart presiding.
...

The Court: Thank you. You may be seated. How are we proceeding counsel?
Ms. Bledsoe: Your Honor, can I approach and ask one more question that will factor into this?
The Court: Yes, you may. Come on up Mr. Cardin, Mr. Yee.
(Whereupon, counsel approached the bench and the following ensued:)
Ms. Bledsoe: Your honor, this might be a completely inappropriate question. Please tell me if it is. But, I think it's important for my client to know (unintelligible) if in fact a jury would find him guilty is it this Court's inclination to (unintelligible) guidelines--
...

The Court: (Unintelligible) valid question for any individual who offered (unintelligible) plea. But, I will tell you exactly the way this Court is. The way this Court operates the guidelines are what they are, guidelines. The Court takes into consideration all of the evidence that is presented in the case. Participation level. Everything. And we use the guidelines-- we being the Court – we use the guidelines as simply that, guidelines. I have no strong (unintelligible) to him or against him. But, to answer your question. There are guidelines.
Ms. Bledsoe: That's the only answer I can give him (unintelligible).
The Court: I understand. They're merely guidelines.
Ms. Bledsoe: What they are.

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Mr. Cardin: It's a bit late. I would ask the Court that we would be continued until 2:00 o'clock. Both of these gentlemen are very seriously considering.

The Court: All right. I'm going to ask to take them back down...

The petitioner would like this Court to believe that after the judge mediated a plea for the petitioner, gave a brief recess so that the petitioner's attorney could speak with him in the courtroom without the presence of a judge, that upon the trial judge leaving the courtroom Petitioner's attorney did not inform him of the plea that was just negotiated at the bench. Further, the petitioner would like this Court to assign no significance to the fact that upon the conclusion of the brief recess to discuss the plea offers, Ms. Bledsoe asked to approach the bench to ask one more question that would factor into the petitioner accepting or rejecting the plea offer-- asking about the Court's inclination to follow sentencing guidelines. In light of Ms. Bledsoe's line of questioning, in light of the fact that the attorney for petitioner's co-defendant asked for a recess because, "Both of these gentlemen are very seriously considering" and considering Ms. Bledsoe's consistent testimony that she advised her client of the plea and post trial consequences, this Court cannot make such illogical conclusions.

Lastly, this Court finds that the petitioner lacks credibility. Petitioner's first few allegations are grounded in the fact that his trial counsel failed to communicate to him. However, his last allegation of ineffective assistance of counsel in his initial petition avers that Ms. Bledsoe advised Petitioner to reject the plea offer of 30 years. In one breath he is claiming that his attorney failed to communicate a plea offer to him, while in the next breath he is claiming that his attorney advised him to reject a plea offer. Petitioner cannot have it both ways. Petitioner's claim that his attorney failed to communicate to him, failed to advise him of plea offers and failed to communicate the consequences of proceeding to trial is seriously undermined by his

allegation that his attorney told him about his sentencing guidelines, told him about his appellate rights and advised him to reject a plea.

Upon consideration of the trial transcript, the testimony presented at the post conviction hearing, the credibility of petitioner's trial counsel and petitioner's lack of credibility, this Court finds that the sequence of events as presented by the petitioner are unsubstantiated. Consequently, relief on the abovementioned grounds is denied.

B. Ineffective Assistance of Counsel: Failure to Preserve the trial record

In Petitioner's supplemental petition, he alleges that his trial counsel rendered ineffective assistance of counsel because she failed to preserve the trial record or raise meritorious issues for appellate review. The petitioner contends that trial counsel should have lodged an objection to the sentencing court's sentence of life plus 135 years on the grounds of impermissible considerations/vindictiveness.

Petitioner's allegation is based on an assumption that his sentence was vindictive or impermissible on some grounds. However, it is undisputed that Petitioner's sentence is perfectly legal. Further, there is nothing in the record to indicate that Judge Stewart held any ill will towards the petitioner or considered anything impermissible. As stated before Petitioner's trial, Judge Stewart said she held "no strong (unintelligible) to him or against him." October 29, 2003, Trial Transcript, 2-13, Line 24-25. "A sentence within the statutory limits imposed after conviction of a criminal offense is within the discretion of the trial judge and will not be disturbed on appeal absent a showing that the trial judge was influenced by ill will, passion, prejudice or some other motive and not by a sense of public duty." *Boyd v. State*, 22 Md. App. 539, 553 (1974). Objecting to a sentence that is completely within the law, when the judge has

not indicated by actions or words any vindictiveness would have been frivolous. Consequently, Petitioner is denied post conviction relief on this ground.

II. Petitioner's sentence is presumptively unconstitutionally vindictive and violates the Eighth Amendment ban on cruel and unusual punishment.

Petitioner, in his supplemental petition, asserts that his sentence is presumptively unconstitutionally vindictive and violates the eighth amendment ban on cruel and unusual punishment for a number of reasons. In support of this allegation, Petitioner states that he relied on the trial court's statements that it used the guidelines and was not advised that the court could renege on its statement. Additionally, Petitioner asserts that the sentencing court failed to state its reasons for the sentence imposed, ignoring Maryland Rule 4-342(g). Further, petitioner argues that there is a presumption of unconstitutional vindictiveness in sentencing in cases in which pleas are rejected. Specifically, when the court is involved in the plea negotiation there is a presumption of vindictiveness if the court imposes a harsher sentence after a breakdown in negotiations. Lastly, Petitioner avers that his sentence of Life plus 135 years is equivalent to death by incarceration and violates the Eighth Amendment ban on cruel and unusual punishment.

Reliance on the Court's statement that it used the sentencing guidelines is not a claim upon which relief can be granted.

Petitioner, in his supplemental petition, is adamant that he relied on the sentencing court's statement that it used the guidelines. Petitioner states, "Just as it is fundamentally unfair to impose a sentence beyond that agreed upon by the Court pursuant to a plea, it is equally unfair to impose a sentence in extreme excess of the guidelines when the Court affirmatively stated it

would use the guidelines." However, that is a complete mischaracterization of the trial court's statement. The trial court said:

> The way this Court operates the guidelines are what they are, guidelines. The Court takes into consideration all of the evidence that is presented in the case. Participation level. Everything. And we use the guidelines – we being the court— we use the guidelines as simply that, guidelines. October 29, 2003, Trial Transcript, 2-13 to 2-14.

At no point did the court bind itself to sentencing within the guidelines. Contrary to the Petitioner's claim, the Court was very clear that *everything* would be considered during sentencing. Nothing is fundamentally unfair about the Court stating that it used the guidelines as guidelines.

Maryland Rule 4-342(g) does not require judges in all cases to give their reasons for the sentenced imposed.

Maryland Rule 4-243(g) states: "The court ordinarily shall state on the record its reasons for the sentence imposed." Petitioner contends that the court ignored Maryland Rule 4-243(g) by failing to list the reasons for Petitioner's sentence. Shortly thereafter, Petitioner admits that the rule does not require judges in all cases to give their reasons. The Court of Appeals has made clear that the lower court has broad discretion in sentencing. *Jones v. State*, 414 Md. 686, 693 (2010). Further, in *Brashear v. State*, 90 Md. App. 709 (1992), the Court of Special Appeals held that Maryland Rule 4-342(g), "does not require judges in all cases to give their reasons. All that the rule requires is that ordinarily a judge states his reasons on the record." Judge Stewart was not obligated to give her reasons in this case. Her decision not to provide her reasoning did not create reversible error.

The trial court did not vindictively sentence the petitioner

Petitioner alleges that his sentence is presumptively unconstitutionally vindictive. Specifically, Petitioner claims that when the court is involved in the plea negotiation, there is a presumption of vindictiveness if the court imposes a harsher sentence after a break down in negotiations. In support of this allegation, Petitioner cites multiple first cases from other circuits. Petitioner only cites one Maryland case, *Abdul-Maleek v. State*, 426 Md. 59 (2012); a case that is not on point with the matter before us. In *Abdul- Maleek*, the Circuit Court made an explicit reference to defendant's exercise of his *de novo* appeal right from his conviction for theft in District Court. The Court of Appeals found that the comment would have led a reasonable person to infer that the Circuit Court might have been motivated by impermissible considerations when sentencing the defendant for theft. Contrary to *Abdul-Maleek*, the judge in the petitioner's case stated that she had "no strong (unintelligible) to him or against him." October 29, 2003, Trial Transcript 2-14. Petitioner has failed to prove and the record does not demonstrate that Judge Stewart had any ill-will or malice towards the petitioner. Further, in *Abdul-Maleek*, the Court of Appeals held, "a judge should fashion a sentence based upon the facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background. The judge is accorded this broad latitude to best accomplish the objectives of sentencing-punishment, deterrence and rehabilitation." 426 Md. 59, 71. Judge Stewart stated that she considered "...all of the evidence that is presented...participation level...everything." Judge Stewart did exactly what the Court of Appeals asked judges to do in considering a sentence.

Petitioner's sentence does not violate the Eight Amendment's provision against cruel and unusual punishment.

Petitioner contends that his sentence violates the Eighth Amendment of the United States Constitution. Petitioner avers that a punishment that serves no legitimate penological purpose inflicts needless pain and suffering in violation of the Eighth Amendment. Lastly, Petitioner asserts that for such a young adult, his sentence is disproportionate in light of the co-defendant's plea, the lack of proof that he was the shooter and the trial court's affirmation of its use of the guidelines.

This Court declines to address Petitioner's assertion that his sentence is cruel and usual for a young adult in light of his co-defendant's plea, the lack of proof he was the shooter and the trial court's affirmation that it took the guidelines into account. As the Petitioner correctly noted, he was not a minor at the time of the crime and the sentencing court was under no obligation to afford him the same considerations afforded to minors during sentencing. A co-defendant's sentence or plea is unrelated to the Petitioner's sentence and a disparity between the two affords the Petitioner no basis for relief under the post conviction procedure act. *See, Cothorn v. Wardern*, 221 Md. 581, 582 (1959). Additionally, a post conviction petition is not the appropriate avenue to address the sufficiency of evidence with regard to proving the Petitioner was the shooter. *See, Northington v. Warden*, 221 Md. 586, 587 (1959). Lastly, the issue regarding the trial court's use of the guidelines has already been discussed *ad nauseam*.

Remaining is an argument that can be summarized as follows: Petitioner's sentence violates the Eighth Amendment because a sentence of life plus 135 years serves no legitimate penological purpose.

In Petitioner's supplemental petition he notes that the United States Supreme Court has been careful not to dictate to the states the proper purposes of punishment in sentencing. *Ewing v. California*, 538 U.S. 11, 25 (2003). Petitioner correctly points out that the Supreme Court held that a, "sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation...Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts." Id.

Petitioner's argument that his sentence serves no penological purpose is unpersuasive. The case law cited by the Petitioner himself clearly establishes the Supreme Court's position that a sentence need not have just one justification. The State posits that deterrence is the main justification behind the Petitioner's sentence. We need not decide which justification is the main one behind Petitioner's sentence. It is sufficient to note that the Supreme Court has explained that there are many justifications for sentences.

The other cases cited by the petitioner to buttress his claim only highlight the fact that Petitioner's sentence is not excessive. In *Coker v. George*, 433 U.S. 584 (1977), a defendant was sentenced to death for rape. The Supreme Court held that the death sentence for such crime was unacceptable. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held that it was unconstitutional to sentence to death a mentally challenged person. Finally, in *Enmund v. Florida*, 458 U.S. 782 (1982), the Supreme Court held that the death sentence for an unplanned murder committed by a defendant's co-defendants and in which the defendant did absolutely nothing was unconstitutional.

The Court stated in *Ewing* that, "The Eight Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime. But outside the context of capital punishment, successful challenges to the proportionality of particular sentences are

exceedingly rare." *Ewing*, 538 U.S. 11, 21. If the Supreme Court was willing to find that under the three strike rule of California, a 25 to life sentence for the stealing of three golf clubs did not violate the 8th Amendment[3], we certainly will not find fault with a life sentence plus 135 years for planning and executing the robbery of a woman, carrying a gun, holding three people at gunpoint and killing another. Petitioner was convicted of committing a very serious and violent crime; his sentence reflects that.

Upon consideration of the reasons stated above post conviction relief on this ground is denied.

[3] Ewing v. California, 538 U.S. 11 (2003). Ewing was sentenced to 25 years to life under California's three strike law for stealing three golf clubs worth $399 a piece, while on parole. Ewing had been convicted previously of four serious or violent felonies. The State Court of Appeal affirmed his sentence, finding that his sentence was not grossly disproportionate under the Eighth Amendment. The court reasoned that enhanced sentences under the three strikes law served the State's legitimate goal of deterring and incapacitating repeat offenders. The State Supreme Court denied review and the Supreme Court of the United States upheld the conviction.

JERMAINE BLACKWELL	*	IN THE
	*	CIRCUIT COURT
Petitioner	*	FOR
v.	*	BALTIMORE CITY, PART 29
	*	
STATE OF MARYLAND	*	
	*	CASE NO.: 103041071
	*	103041073
	*	103041075
	*	103041076
Respondent	*	P.C.P.A. NO.: 9864
	*	

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ORDER

THE COURT, having considered the Petitioner's Petition for Post Conviction Relief, his Supplemental Petition and the Response thereto by the State's Attorney's Office, as well as the arguments given at the Post Conviction hearings on February 12, 2013, for the reasons stated in the accompanying memorandum opinion, it is this 4th day of October 2013 by the Circuit Court for Baltimore City, Part 29.

ORDERED that the petition for Post Conviction Relief be **DENIED**.

THE JUDGE'S SIGNATURE APPEARS ON THE ORIGINAL DOCUMENT

JUDGE
MARCELLA A. HOLLAND

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JERMAINE BLACKWELL	*	
Petitioner	*	
v	*	Civil Action No. RDB-14-1538
FRANK B. BISHOP, JR. and THE ATTORNEY GENERAL OF THE STATE OF MARYLAND	*	
Respondents	*	

***

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 28th day of January, 2022, by the United States District Court for the District of Maryland, hereby ORDERED that:

1. The Petition for Writ of Habeas Corpus IS DENIED;
2. A certificate of appealability SHALL NOT issue, however, Petitioner may still request that the United States Court of Appeals for the Fourth Circuit issue such a certificate;
3. The Clerk SHALL PROVIDE a copy of the foregoing Memorandum Opinion and a copy of this Order to Petitioner and to counsel for Respondent; and
4. The Clerk SHALL CLOSE this case.

RICHARD D. BENNETT
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JERMAINE BLACKWELL	*	
Petitioner	*	
v	*	Civil Action No. RDB-14-1538
FRANK B. BISHOP, JR. and THE ATTORNEY GENERAL OF THE STATE OF MARYLAND	*	
Respondents	*	

***

MEMORANDUM OPINION

In a supplemental answer to this Petition for Writ of Habeas Corpus, Respondents assert that the petition is time-barred and is nevertheless without merit. ECF 15. Petitioner Jermaine Blackwell has filed a Reply to the supplemental answer. ECF 18. The operative issues have been fully briefed; no hearing is necessary. *See* Rule 8(a), *Rules Governing Section 2254 Cases in the United States District Courts* and Local Rule 105.6 (D. Md. 2018); *see also Fisher v. Lee*, 215 F.3d 438, 455 (4th Cir. 2000) (petitioner not entitled to a hearing under 28 U.S.C. §2254(e)(2)). For the reasons stated below, the Petition shall be dismissed and a certificate of appealability shall not issue.

BACKGROUND

On January 13, 2003, Blackwell, his co-defendant Ronnie Burston, and three to four unidentified people, approached two individuals –Margaret Gray and Antonio Judkins -- who were standing on the 1300 block of Harlem Avenue in front of their apartment selling marijuana. ECF 15-2 at 111-12; ECF 15-3 at 7. When Ms. Gray determined she did not have the amount of marijuana Blackwell and his companions wanted to purchase, she walked in the apartment building and up the stairs where her apartment was located, to get more. ECF 15-2 at 112; ECF 15-3 at 7.

One of the men put a gun to Mr. Judkins' back and forced him up the stairs to the apartment. ECF 15-3 at 7. Once at the apartment door, they kicked the door in because the lock would not open, forced Mr. Judkins to lay on the floor, forced Ms. Gray into a bedroom, and robbed them. ECF 15-2 at 112-13; ECF 15-3 at 7. Mr. Judkins' brother James Randolph, who was also in the apartment, was heard engaging in a struggle in another room which ended with a fatal gunshot to Mr. Randolph's chest. ECF 15-2 at 110-14; ECF 15-3 at 98. Mr. Judkins identified Blackwell as the man who approached them on the street to buy marijuana and who initiated the forceful entry into their apartment. ECF 15-2 at 120-21. Additionally, Mr. Judkins and Ms. Gray testified that two men had guns, one of whom was Blackwell. ECF 15-2 at 125-26; ECF 15-3 at 7-9. The other gunman held a gun to Mr. Judkins' back while he laid on the kitchen floor. ECF 15-2 at 125-26.

After the gunshot Blackwell and the other intruders fled the apartment. ECF 15-2 at 114. Several uniformed police units were already in the area investigating an unrelated incident. *Id.* at 58-59. Blackwell and Burston were observed running into an alley at the back of the 700 block of Carrollton Avenue. *Id.* at 65. Officer Roy Hinman pursued the men, spotted Blackwell in the alley, ordered Blackwell to put his hands up and Blackwell complied. *Id.* When Officer Pedro Vargas arrived to assist Hinman in detaining Blackwell, Blackwell began resisting efforts to detain him, injuring Vargas and requiring several other officers to intervene. ECF 15-3 at 124-25; 132-33; 137-38. Officers assisting in Blackwell's arrest and Blackwell sustained injuries requiring medical attention as a result of the struggle. *Id.* at 125-26; 138, 140

Burston was located by Hinman in a nearby backyard and apprehended by Hinman. ECF 15-2 at 65. During his pursuit, Hinman heard a heavy object hit the ground and had observed Burston running with one hand in his jacket as if holding a weapon, leading him to believe that a gun had been dropped in the area. *Id.* at 64. A nine-millimeter handgun was recovered, and

forensic testing indicated it matched a cartridge found at the scene of Mr. Randolph's murder. *Id.* at 98-99.

Prior to trial, Blackwell and Burston were offered plea deals. The following colloquy took place at the bench, outside of the jury's presence:

> THE COURT: All right. Here's what the Court will offer on Burston. He can have the life suspend all but 25 or he can have 30. Blackwell – what were you offering on Blackwell?
>
> MR. YEE: I don't (unintelligible) my offer. I'd ask the Court –
>
> THE COURT: Are the as comparable?
>
> MR. YEE: I believe (unintelligible) he approached them and for him to be in charge.
>
> MS. BLEDSOE: And I would disagree with that.
>
> THE COURT: (Unintelligible).
>
> MS. BLEDSOE: (Unintelligible) record. He has one offense (unintelligible).
>
> THE COURT: He has one prior?
>
> MS. BLEDSOE: One prior.
>
> MR. YEE: He has one prior. Possession of (unintelligible).
>
> MS. BLEDSOE: Possession of (unintelligible).
>
> THE COURT: Wait a minute – wait a minute.
>
> MR. YEE: He's on probation (unintelligible) minor and probation. That's why his guidelines are the 30 on the second.
>
> THE COURT: (Unintelligible) Okay.
>
> MR. YEE: (Unintelligible).
>
> THE COURT: Life suspend all but 20 or 25. That's the best I can do.
>
> MS. BLEDSOE: All right.

ECF 15-2 at 14-15. Counsel for both Blackwell and Burston then left the bench to confer with their clients after the judge left the bench. *Id.* at 15. After the judge returned to the bench, Blackwell's counsel approached with a question:

> MS. BLEDSOE: Your honor this might be a completely inappropriate question. Please tell if it is. But, I think it's important for my client to know (unintelligible) if in fact a jury would find him guilty is it this Court's inclination to (unintelligible) guidelines –
>
> MR. YEE: I'd object to that (unintelligible) Your honor.
>
> THE COURT: (Unintelligible) valid question for any individual who offered (unintelligible) plea. But, I will tell you exactly the way this Court is. The way this Court operates the guidelines are what they are, guidelines. The Court takes into consideration all of the evidence that is presented in the case. Participation level. Everything. And we use the guidelines – we being the Court – we use the guidelines as simply that, guidelines. I have no strong (unintelligible) to him or against him. But, to answer your question. There are guidelines.
>
> MS. BLEDSOE: That's the only answer I can give him (unintelligible).
>
> THE COURT: I understand. They're merely guidelines.

ECF 15-2 at 15-16. After breaking for lunch and reconvening at 2:00 p.m., counsel returned to the courtroom and Ms. Bledsoe indicated that Blackwell would be going to trial. Burston took the plea deal. ECF 15-2 at 21; 22-40 (Burston's plea colloquy).

On November 3, 2003, after a five-day jury trial in the Circuit Court of Maryland for Baltimore City, Blackwell was found guilty of felony murder, first degree burglary, conspiracy to rob, first degree assault, second degree assault and three counts of use of a handgun in a crime of violence. ECF 15-1 at 162. On December 16, 2003, the court sentenced Blackwell to life for felony murder, twenty years consecutive for first degree burglary, twenty years consecutive for conspiracy to rob, twenty-five years consecutive for first degree assault, ten years consecutive for second degree assault, and twenty years consecutive for each of the handgun crime of violence counts. ECF 15-6 at 12-13. The total sentence imposed was life plus 135 years consecutive. *Id.*

The sentence imposed by the court exceeded that which was sought by the State's Attorney who asked for imposition of a life sentence with the remaining sentences concurrent to the life sentence. *Id.* at 7-8. The presiding judge made no statement regarding her rationale for imposing the lengthy sentence.

Blackwell filed a direct appeal challenging the motion court's finding that certain evidence was admissible and alleging that the evidence was obtained during an illegal stop or arrest. ECF 15-1 at 130. The Maryland Court of Special Appeals affirmed Blackwell's convictions in an unreported opinion issued on October 13, 2005. *Id.* at 129-142. The mandate issued on November 14, 2005. *Id.* at 143. Blackwell's petition for writ of certiorari to the Maryland Court of Appeals was denied on January 12, 2006. *Id.* at 144.

On July 9, 2012[1] Blackwell filed a post-conviction petition raising claims of ineffective assistance of counsel in connection with counsel's advice about going to trial or accepting the plea offer. ECF 15-1 at 145-57. After a hearing held on February 12, 2013, Blackwell's petition was denied. ECF 15-7 (post-conviction transcript); ECF 15-1 at 162-76. Blackwell filed an application for leave to appeal the denial of post-conviction relief with the Maryland Court of Special Appeals. ECF 15-1 at 177-82 (Application for Leave to Appeal); 183-93 (Amended Application); 194-200 (Supplemental Application). On April 24, 2014, the Court of Special Appeals denied the application. *Id.* at 201-202. The mandate issued on May 27, 2014. *Id.* at 203.

In his petition filed with this Court, Blackwell asserts he was denied his Sixth Amendment Right to effective assistance of counsel during trial, in his attorney misinforming him of what he should face if he chose to go to trial and not accept the plea offer of life suspend all but 20 years

[1] As discussed *infra*, Blackwell also filed a motion for modification of sentence which was docketed by the Circuit Court for Baltimore City on March 16, 2004 and remained pending until July 25, 2012 when it was denied. ECF 15-1 at 126-28; 161.

or straight 25 years and for not making clear the potential consequences of going to trial. ECF 1 at 6. Blackwell asserts that counsel advised him that he wouldn't be hurt if he went to trial and admitted she did not think he would get a sentence greater than that which was offered before trial. *Id.* at 8.

STANDARD OF REVIEW

An application for writ of habeas corpus may be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). The federal habeas statute at 28 U.S.C. § 2254 sets forth a "highly deferential standard for evaluating state-court rulings." *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997); *see also Bell v. Cone*, 543 U.S. 447 (2005). The standard is "difficult to meet," and requires courts to give state-court decisions the benefit of the doubt. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted); *see also White v Woodall,* 572 U.S.415, 419-20 (2014), quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (state prisoner must show state court ruling on claim presented in federal court was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement.").

A federal court may not grant a writ of habeas corpus unless the state's adjudication on the merits: 1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States"; or 2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state adjudication is contrary to clearly established federal law under § 2254(d)(1) where the state court 1) "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or 2)

"confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court]." *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

Under the "unreasonable application" analysis under 2254(d)(1), a "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Thus, "an unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 785 (internal quotation marks omitted).

Further under § 2254(d)(2), "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). "[E]ven if reasonable minds reviewing the record might disagree about the finding in question," a federal habeas court may not conclude that the state court decision was based on an unreasonable determination of the facts. *Id.* "[A] federal habeas court may not issue the writ simply because [it] concludes in its independent judgment that the relevant state-court decision applied established federal law erroneously or incorrectly." *Renico v. Lett,* 559 U.S 766, 773 (2010).

The habeas statute provides that "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "Where the state court conducted an evidentiary hearing and explained its reasoning with some care, it should be particularly difficult to establish clear and convincing evidence of error on the state court's part." *Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010). This is especially true where state courts have

"resolved issues like witness credibility, which are 'factual determinations' for purposes of Section 2254(e)(1)." *Id.* at 379.

ANALYSIS

A. Timeliness of the Petition

Under the provisions of 28 U.S.C. § 2244, the one-year limitation period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). However, under § 2244(d)(2), "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

"[T]he one year limitation period is also subject to equitable tolling in 'those rare instances where' due to circumstances external to the party's own conduct 'it would be unconscionable to enforce the limitation against the party.'" *Hill v. Braxton*, 277 F.3d 701, 704 (4th Cir. 2002), citing *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000). To be entitled to equitable tolling, a

petitioner must establish that either some wrongful conduct by Respondents contributed to his delay in filing his petition or that circumstances beyond his control caused the delay. *See Harris*, 209 F.3d at 330. "[A]ny resort to equity must be reserved for those rare instances where . . . it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Id.* The Fourth Circuit has made it clear that, prior to dismissing a pro se petition for writ of habeas corpus, "a district court should furnish notice that simply warns the pro se petitioner that his . . . action will be dismissed as untimely unless the petitioner can demonstrate that the petition was filed within the proper time period." *Hill*, 277 F.3d at 708.

In a Memorandum Opinion and Order issued on September 4, 2014, Blackwell's Petition for Writ of Habeas Corpus was dismissed as untimely. ECF 9 and 10. This Court found that Blackwell's one-year limitations period under 28 U.S.C. § 2244(d) began to run on April 13, 2006 and was tolled on February 27, 2007, the date he filed his first post-conviction petition in the Circuit Court for Baltimore City. ECF 9 at 3. The limitation period began to run again on July 21, 2007, when Blackwell voluntarily withdrew his post-conviction petition. *Id.* Blackwell filed another post-conviction petition on July 9, 2012, well after the remaining portion of the one-year limitations period expired. *Id.*

Blackwell argued at the time that a motion for modification of sentence filed on his behalf on March 16, 2004 and denied on July 26, 2012, operated to toll the limitations period pursuant to 28 U.S.C. § 2244(d). ECF 1 at 3; ECF 9 at 4. Because the state of the law at that time was that motions filed pursuant to Maryland Rule 4-345 did not toll the limitations period, this Court found that Blackwell's petition was untimely. ECF 9 at 4, citing *Roberts v. Maryland,* Civ. No. JKB–11–1227, 2013 WL 5882786, at *2–4 (D. Md. Oct. 28, 2013); *Tasker v. State,* Civ. No. AW–11–1869, 2013 WL 425040, at *7 (D. Md. Jan. 31, 2013) *aff'd,* 517 F. Appx. 172 (4th Cir. 2013), reh'g

denied June 3, 2013 (finding *Tasker* waived Fourth Circuit review of issue by failing to include it in appellate brief).

On April 17, 2019, the United States Court of Appeals for the Fourth Circuit issued its opinion in *Mitchell v. Green*, 922 F.3d 187 (4th Cir. 2019) holding that a motion for reconsideration of sentence filed pursuant to Md. Rule 4-345 tolls the one-year filing period under § 2244(d). *Id.* at 195-98. Blackwell then filed another § 2254 petition[2] which this Court construed as a motion filed pursuant to Fed. R. Civ. P. 60(b)(6) seeking relief from the judgment issued by this Court on September 4, 2014. ECF 11 at 2-3. In granting the motion, this Court adopted the reasoning relied upon by the Honorable Deborah K. Chasanow:

> Here, unlike in *Gonzalez* [*v. Crosby*, 545 U.S. 524 (2005)] and *Moses* [*v. Joyner*, 815 F.3d 163 (4th Cir. 2016)], the decision in *Mitchell v. Green* overturned an unbroken line of cases in this district that, until the attorney representing Mr. Mitchell thoroughly briefed the issue, appeared beyond question. The Fourth Circuit had considered two cases that appeared to raise the issue, but resolved them without reaching the point. Petitioner cannot be faulted for not seeking a certificate of appealability under the circumstances. As soon as the Fourth Circuit decided *Mitchell v. Green*, he sought relief from the judgment. Respondent concedes that he acted in a timely fashion.

ECF 11 at 3 quoting *Savoy v. Bishop*, DKC-13-751, ECF 40 at 3.

After granting Blackwell relief from judgment, the Court required Respondents to file a Supplemental Answer addressing the merits of Blackwell's claims. ECF 11. As noted, Respondents contend that Blackwell's petition is still untimely because his motion for modification of sentence was filed one day late. ECF 15.

Respondents reason that Blackwell's convictions became final on direct appeal on Wednesday April 12, 2006, the last day he could have filed a petition for writ of certiorari in the

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[2] The petition was written on pre-printed forms for filing a 2254 habeas petition and was docketed as a new case. *See Blackwell v. Bishop, et al.*, Civil Action RDB-19-2307 (D. Md. 2019). That civil case was closed after this Court granted Blackwell's Rule 60(b) motion.

United States Supreme Court. ECF 15 at 14-15. They further assert that *Mitchell* held that a motion for modification of sentence qualifies as "collateral review" within the meaning of 28 U.S.C. § 2244(d)(2) but remind the Court that an application for collateral review must be properly filed to toll the limitations period. *Id.* at 16. In Respondents' view, Blackwell's motion for modification of sentence was not properly filed because Md. Rule 4-345 required, and still requires, that such a motion be filed within 90 days after a sentence is imposed. *Id.* at 20. Here, Blackwell was sentenced on December 16, 2003, making his motion for modification of sentence due on or before March 15, 2004. *Id.* at 21. Blackwell's motion was docketed on March 16, 2004, according to the record submitted by Respondents. *Id.*

The record before this Court includes a computerized print-out of docket entries in Blackwell's case showing a motion for modification was docketed on March 16, 2004 (ECF 15-1 at 10) and a copy of the actual motion with the cover letter sent by Blackwell's attorney to the Baltimore City Circuit Court which is dated March 9, 2004 (ECF 15-1 at 126-28). Notably, counsel's office address is on North Calvert Street, the same street the court is located. ECF 15-1 at 128 (cover letter). There is no indication on the letter whether it was delivered by mail or it was placed in a night drop box and the record contains no verification from Blackwell's trial counsel regarding the manner in which the motion was delivered. Further, Respondents have not provided a date-stamped copy of the motion[3] and the computer printout of the docket entries may or may not accurately reflect the date the motion was delivered to (as opposed to docketed by) the clerk's office. *See Hackney v. State*, 184 A.3d 414, 417 (Md. Ct. of App. 2018) (discussing meaning of "filed"), *see also Mole' v. Jutton*, 846 A.2d 1035 (Md. Ct. of App. 2004) (clerk received notice of

[3] Illustrative of the point is Judge Stewart's order denying Blackwell's motion for modification of sentence which the judge dated July 25, 2012 but is date-stamped "received" on July 26, 2012. ECF 15-1 at 161. Other documents in the State Record bear the Clerk's date-stamp; the motion for modification does not.

appeal when it arrived at the post office box because the clerk's office had set up the post office box for its own convenience). Given the relative weakness of the evidence presented to establish the motion was not properly filed as well as the brief, and the one-day delay involved, this Court declines to dismiss the petition as untimely and instead considers the merits of the claims raised by Blackwell.

B. Ineffective Assistance of Counsel

The Sixth Amendment to the Constitution guarantees a criminal defendant the effective assistance of counsel. *Strickland*, 466 U.S. at 686; *see also Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759, 775 (2017). To mount a successful challenge based on a Sixth Amendment claim of ineffective assistance of counsel, a petitioner must satisfy the two-pronged test set forth in *Strickland*, 466 U.S. at 687-88. *See Williams*, 529 U.S. at 390. First, the petitioner must show that counsel's performance was deficient. Second, the petitioner must show that he was prejudiced by the deficient performance. *Strickland*, 466 U.S. at 687; *see Buck*, 137 S. Ct. at 775.

With regard to the first prong, the petitioner must demonstrate that his attorney's performance fell "below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688; *see Harrington*, 562 U.S. at 104. The central question is whether "an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington*, 562 U.S. at 88 (quoting *Strickland*, 466 U.S. at 690). The Supreme Court has explained that the "first prong sets a high bar." *Buck*, 137 S. Ct. at 775. Notably, a "lawyer has discharged his constitutional responsibility so long as his decisions fall within the 'wide range of professionally competent assistance.'" *Id.* (citation omitted). The standard for assessing such competence is "highly deferential" and has a "strong presumption that

counsel's conduct falls within a wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 669.

Second, the petitioner must show that his attorney's deficient performance "prejudiced [his] defense." *Id.* at 687. To satisfy the "prejudice prong," a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see also Buck*, 137 S. Ct. at 776. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceedings. *Strickland*, 466 U.S. at 687. A strong presumption of adequacy attaches to counsel's conduct, so strong in fact that a petitioner alleging ineffective assistance of counsel must show that the proceeding was rendered fundamentally unfair by counsel's affirmative omissions or errors. *Id.* at 696. Thus, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. A petitioner is not entitled to post-conviction relief based on prejudice where the record establishes that it is "not reasonably likely that [the alleged error] would have made any difference in light of all the other evidence of guilt." *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010).

In evaluating whether the petitioner has satisfied the two-pronged test set forth in *Strickland*, a court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697. Nor must a court address both components if one is dispositive. *Jones v. Clarke*, 783 F.3d 987, 991 (4th Cir. 2015). This is because failure to satisfy either prong is fatal to a petitioner's claim. As a result, "there is no reason for a court . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

Where, as here, ineffective assistance of counsel is alleged in the context of counsel's role in the decision whether to accept a plea offer, the Supreme Court has held that to satisfy *Strickland*'s prejudice prong[4] a habeas petitioner must show: (1) that "but for the ineffective advice of counsel there is a reasonable probability that [a] plea offer would have been presented to the court"; (2) that "the court would have accepted its terms"; and (3) "that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v. Cooper*, 566 U.S. 156, 164 (2012). Satisfying the deficient performance prong requires a showing that counsel's advice fell below the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). The Fourth Circuit recognized "a difference between a bad prediction within an accurate description of the law and gross misinformation about the law itself." *Ostrander v. Green*, 46 F.3d 347, 355 (4th Cir. 1995) *overturned on other grounds by O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996) (en banc). Thus, if counsel "simply underestimates the sentence, there may not be ineffective assistance" but where counsel misstates the statutory maximum or minimum sentence, counsel has failed to "apprise [herself] of the applicable law and provide [her] client[] with a reasonably accurate description of the law" which is deficient performance. *Ostrander*, 46 F.3d at 355 citing *United States v. Lambey*, 974 F.2d 1389 1394 (4th Cir. 1992) *see also Christian v. Ballard*, 792 F.3d 427, 448-49 (4th Cir. 2015) (finding no deficient performance where petitioner's interpretation of what counsel advised was at the crux of his ineffective assistance of counsel claim); *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979) (deficient performance found where counsel provided grossly inaccurate information regarding parole eligibility date); *Ross v. Wolfe*, 942 F.Supp.2d 573, 582 (D. Md. 2013) (finding deficient performance where counsel included

[4] In *Lafler* the parties conceded that counsel's performance fell below an acceptable standard. 566 U.S. at 163.

"gross misinformation" regarding eligibility for Patuxent placement and "intentional misrepresentation" regarding prosecutor's expectations).

The post-conviction court based its analysis in part on a misstatement of Blackwell's claims. The court did not acknowledge Blackwell's withdrawal of two of the claims asserted in his petition:

> Petitioner alleges that his trial counsel, Ms. Bledsoe, failed to 1) advise him of the Life suspend all but 20 or 25 years straight plea offered by the Court; 2) failed to advise him of the potential outcome of and consequences of going to trial; 3) failed to advise him that he could receive more than his sentencing guidelines of 20 to 30 years if he went to trial and 4) advised him to reject the plea offer of 30 years offered by the State.

ECF 15-1 at 165. At the post-conviction hearing, however, Blackwell withdrew the first and fourth claims. ECF 15-7 at 11. Respondent concedes that the post-conviction court "did not acknowledge that Blackwell had withdrawn the allegation" that counsel failed to inform him of the plea offer "and yet based its rejection of all of his ineffective assistance claims wholly on his lack of credibility for having made the allegation, it is unclear whether the post conviction court's credibility finding properly accounted for the record before it, including Blackwell's withdrawal of the claim." ECF 15 at 41. Indeed, the post-conviction court stated in pertinent part that:

> The petitioner would like this Court to believe that after the judge mediated a plea for the petitioner, gave a brief recess so that the petitioner's attorney could speak with him in the courtroom without the presence of a judge, that upon the trial judge leaving the courtroom Petitioner's attorney did not inform him of the plea that was just negotiated at the bench. Further, the petitioner would like this Court to assign no significance to the fact that upon the conclusion of the brief recess to discuss the plea offers, Ms. Bledsoe asked to approach the bench to ask one more question that would factor into the petitioner accepting or rejecting the plea offer- asking about the Court's inclination to follow sentencing guidelines. In light of Ms. Bledsoe's line of questioning, in light of the fact that the attorney for petitioner's co-defendant asked for a recess because, "Both of these gentlemen are very seriously considering" and considering Ms. Bledsoe's consistent testimony that she advised her client of the plea and post trial consequences, this Court cannot make such illogical conclusions.

Additionally, much of what Blackwell told the post-conviction court was based on his interpretation of what his attorney had said. *See* ECF 15-7 at 16 (Blackwell stating he "believed [counsel] meant that I wouldn't get hurt regardless" because he could not be sentenced beyond the guidelines). A criminal defendant's interpretation of advice provided by counsel, as opposed to counsel's gross misstatement of the law, cannot form the basis of a successful ineffective assistance of counsel claim. Blackwell's trial attorney denied telling him that he could not be sentenced beyond the guidelines as that was not her practice in consulting with criminal defendant clients. ECF 15-7 at 31-32. This is not a case where Blackwell was "grossly misinformed" and "relie[d] upon that misinformation" to form his decision to go to trial. *Strader*, 611 F.2d at 65. Blackwell undermined any notion that he was misguided by misinformation provided to him by counsel when he admitted at the post-conviction hearing that he wanted to go to trial to prove his innocence. ECF 15-7 at 18-19. As such, he has failed to overcome the presumption that counsel rendered constitutionally adequate assistance. *See Harrington*, 562 U.S. at 104 (requiring application of "a strong presumption that counsel's representation was within the wide range of reasonable professional assistance").

For these reasons, Blackwell's Petition for Writ of Habeas Corpus must be denied.

CERTIFICATE OF APPEALABILITY

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U. S.C. § 2253(c)(2); *see Buck*, 137 S.Ct. at 773. The petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (citation and internal quotation marks omitted), or that "the issues presented are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Because this Court finds that there has been no substantial showing of the denial of a constitutional right, a certificate of appealability shall be denied. *See* 28 U.S.C. § 2253(c)(2). Hill may still request that the United States Court of Appeals for the Fourth Circuit issue such a certificate. *See Lyons v. Lee*, 316 F.3d 528, 532 (4th Cir. 2003) (considering whether to grant a certificate of appealability after the district court declined to issue one).

A separate Order follows.

JANUARY 28, 2022
Date

RICHARD D. BENNETT
UNITED STATES DISTRICT JUDGE

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6155

JERMAINE BLACKWELL,

Petitioner - Appellant,

v.

FRANK B. BISHOP, JR., Warden; DOUGLAS F. GANSLER, Attorney General,

Respondents - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, Senior District Judge. (1:14-cv-01538-RDB)

Submitted: April 26, 2022 Decided: April 29, 2022

Before AGEE and THACKER, Circuit Judges, and FLOYD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Jermaine Blackwell, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jermaine Blackwell seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2254 petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Blackwell has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: April 29, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6155
(1:14-cv-01538-RDB)

JERMAINE BLACKWELL

Petitioner - Appellant

v.

FRANK B. BISHOP, JR., Warden; DOUGLAS F. GANSLER, Attorney General

Respondents - Appellees

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: April 29, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6155, Jermaine Blackwell v. Frank Bishop, Jr.
1:14-cv-01538-RDB

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

FILED: May 23, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6155
(1:14-cv-01538-RDB)

JERMAINE BLACKWELL

Petitioner - Appellant

v.

FRANK B. BISHOP, JR., Warden; DOUGLAS F. GANSLER, Attorney General

Respondents - Appellees

MANDATE

The judgment of this court, entered May 23, 2022, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

APPENDIX D