APPENDIX

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APPENDIX A — OPINION OF THE COURT OF SPECIAL APPEALS OF MARYLAND, FILED AUGUST 31, 2017

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 2003
September Term, 2015

TAVON FULLWOOD,

v.

STATE OF MARYLAND.

Meredith
Friedman
Raker, Irma S.
(Senior Judge, specially assigned),
JJ.

Opinion by Raker, J.

August 31, 2017, Filed

Tavon Fullwood, appellant, was convicted by a jury in the Circuit Court for Baltimore County on April 19, 2002, of attempted first-degree murder, first-degree rape,

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* Judge Kathryn Grill Graeff did not participate, pursuant to Md. Rule 8-605.1, in the Court's decision to report this opinion.

first-degree sexual offense, and attempted sodomy. In this post-conviction appeal, appellant presents one question for our review:

> "Did the post-conviction court abuse its discretion in denying appellant's petition for post-conviction relief on the grounds that defense counsel did not provide ineffective assistance in failing to investigate and call an expert witness to testify regarding the evidence of sexual assault, and that this contention 'has been finally litigated on appeal?'"

We shall hold that defense counsel's failure to investigate and call an expert witness to testify regarding the evidence of sexual assault did not constitute ineffective assistance and shall affirm the judgment.

I.

Appellant was convicted by a jury on April 19, 2002, in the Circuit Court for Baltimore County of attempted first-degree murder, first-degree rape, first-degree sexual offense, and attempted sodomy. The court sentenced appellant to a term of life imprisonment for the attempted murder; a consecutive term of life imprisonment for the rape, with the balance suspended; a concurrent term of life imprisonment for the sexual offense; and a concurrent term of ten years' imprisonment for the attempted sodomy. Appellant filed a timely appeal to the Court of Special Appeals which affirmed the conviction in an unreported opinion on June 7, 2004. *Fullwood v. State*, September

Term 2002, No. 2197 (filed June 7, 2004). The Court of Appeals denied appellant's petition for writ of certiorari on September 21, 2004. On November 7, 2012, appellant filed a Petition for Post Conviction Relief. The State filed an Answer on December 3, 2013. Judge Ruth A. Jakubowski held the post-conviction hearing on December 19, 2013 and continued and concluded it on May 27, 2015. Judge Jakubowski denied the post-conviction Petition on September 3, 2015. Appellant filed a timely Application for Leave to Appeal and this Court granted appellant's Application on December 1, 2016.

Because appellant is arguing in this appeal that his counsel provided ineffective assistance by failing to investigate and call an expert witness to testify regarding the evidence of sexual assault, we set out the relevant factual background: On March 15, 2001, at around 3:00 a.m., Baltimore County Police found Ms. Luzer at her apartment. Police responded to a call from residents of the apartment located below Ms. Luzer. The neighbor testified she heard screams, woke up her boyfriend, and then called the police. She heard window blinds moving and thought she saw a person's shadow drop from above and flee. The boyfriend also heard screaming but thinks he saw two shadows fall past the apartment. Officers found Ms. Luzer naked and face down on her bed. She was covered in blood and had been stabbed several times in the chest, torso, and arms. While waiting for an ambulance to arrive, an officer administered first aid to Ms. Luzer and asked if she had been sexually assaulted. She said no. A detective on the scene requested that the sexual assault forensic examiner collect evidence.

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Police discovered potential blood stains along the handrail of the outside hallway which led from Ms. Luzer's apartment building to the apartment building where appellant's cousin, Melvin Fullwood, sometimes resided with his girlfriend, Chantal Veanie, and their three-year-old daughter. A detective questioned residents who lived adjacent to the handrail, including Melvin, who answered the door at Veanie's apartment. Because Melvin's statement was inconsistent with that of other neighbors, the detective sought a search warrant for Veanie's apartment. Veanie later consented to the search, and both she and Melvin cooperated with police. Based on the information they gave, an arrest warrant for appellant was issued and appellant turned himself in to police headquarters. Melvin and appellant's account of the night differ. Melvin recounted being at Veanie's apartment with appellant. Both Melvin and Veanie recall that appellant had an angry conversation with someone on the telephone shortly after Veanie returned home at 11:30 p.m. with her daughter, then appellant left the apartment, and returned between 2:45 and 3:00 a.m. Melvin answered the door and appellant entered screaming and yelling about being in a fight with "some guys" and Melvin saw blood on his hands. According to Melvin, appellant showered upstairs, they argued, appellant left, returned, and left again. Veanie and Melvin testified they did not clean the upstairs bathroom.

Soraya Sina, a Sexual Assault Forensic Examiner nurse (SAFE witness), testified that she examined Ms. Luzer in the Shock Trauma Unit.[1] The examination was

1. Ms. Sina was employed at Greater Baltimore Medical Center. Due to Ms. Luzer's unstable condition however, Ms. Sina examined Ms. Luzer in the Shock Trauma Unit of the hospital.

interrupted when Ms. Luzer's blood pressure dropped and she had to be rushed to surgery. Ms. Sina later continued the examination where she determined, and later testified at trial, that Ms. Luzer had contusions, tears, and abrasions to her vagina; tears and swelling around her anus; and bruising, blood, and a small laceration three to four inches inside her vaginal cavity. There was some blood and tearing on her hymen, but it was intact. Ms. Sina also conducted a "pubic combing" in an effort to collect trace evidence or semen. There were no condoms at the scene and no semen was detected on any of the items tested.

Appellant testified in his own defense at the trial. He admitted to being in Ms. Luzer's apartment on the night of the attack. Appellant testified that he was at Veanie's apartment with Melvin and, after Veanie fell asleep with her daughter, Melvin asked him to come with him to what turned out to be the victim's apartment. Appellant said that he followed Melvin into Ms. Luzer's apartment and waited in the living room while Melvin went back into Ms. Luzer's bedroom. Appellant then heard muffled noises and screams and when he entered the bedroom, he saw Melvin on top of Ms. Luzer's naked body. Melvin stabbed Ms. Luzer, appellant wrestled with him for the knife, and then Melvin left the apartment by jumping out of the window. Appellant testified that he went to the kitchen to call 911 but decided not to call because he was covered in blood. Appellant heard someone at the door and because he thought it might be the police he left through the same window as Melvin. Appellant went back to Veanie's apartment where Melvin was showering upstairs, they argued, Melvin gave appellant clothes to change into, and he left.

DNA evidence from Ms. Luzer's apartment confirmed appellant's presence during the attack. No fingerprints were determined conclusively to belong to Melvin, although appellant testified that Melvin wore gloves. Multiple blood samples recovered from the upstairs bedroom of Veanie's apartment tested positive for Ms. Luzer's DNA. An empty can of Ajax cleaner was found in the upstairs bathroom by forensic examiners and they noticed a strong odor of cleaning solution as well.

The State advanced a theory of the case with rape as the motive for the attack and the attempted murder an effort to get rid of the witness. At trial the defense did not challenge the occurrence of a sexual assault but focused its defense on the theory that Melvin committed the crimes, not appellant.

The jury convicted appellant and appellant filed a direct appeal, which this Court affirmed in an unreported opinion filed on June 7, 2004. *Fullwood v. State*, September Term 2002, No. 2197 (filed June 7, 2004). Approximately ten years later, appellant filed a Petition for Post Conviction Relief. Appellant retained a SAFE expert with experience conducting, reviewing, and interpreting the results of SAFE examinations. After reviewing the State's SAFE witness's examination and testimony, the expert made several findings that questioned the credibility of the evidence. The expert was critical of the manner in which the examination had been done, questioned whether the photographs taken by Ms. Sina showed the injuries that Ms. Sina testified that she had observed, offered alternative explanations for why some of the indications

of injury may have been present, and questioned the interpretations drawn by Ms. Sina. Specfically, appellant's SAFE expert testified at the post-conviction hearing that Ms. Sina failed to photograph certain injuries and failed to include other injuries in her written report that she later testified to at trial. Additionally, appellant's expert testified that it was possible one of the injuries may have been caused by the insertion of the catheter at shock trauma, the Teledyne blue dye used during the examination may have been misapplied to certain areas that could lead to a false positive reading, and the positioning of the posterior fourchette was misidentified as being located at the five, six, and seven o'clock positions although the posterior fourchette is only at the six o'clock position. Appellant's SAFE expert acknowledged that she was unable to conclude definitively that the injuries described and documented by Ms. Sina had not occurred and certain conclusions were limited because she could only review photographs and could not conduct a live examination of the victim.

At the post-conviction hearing, appellant's counsel called as a witness Kenneth Ravenell, appellant's trial counsel. He testified that he did not conduct any pre-trial investigation into the sufficiency of the State's sex crime evidence. He acknowledged that Ms. Sina provided much of the State's evidence as to the sexual assault and "the bulk of the State's evidence and the rape case" depended on the credibility of the SAFE nurse. Trial counsel admitted if he had had similar testimony as the SAFE expert retained for the post-conviction hearing he "absolutely" would have presented it to the jury and there

was "no strategic reason" not to. Trial counsel explained how the evidence could be used to attack the credibility of the State's case by undermining the theory that rape was the motive for the attack. Trial counsel testified as to his belief that undermining the State on one issue can diminish its credibility on other issues.

On September 3, 2015, Judge Jakubowski denied the request for Post Conviction relief and held that appellant failed to overcome the presumption that trial counsel's failure to investigate and challenge the state's rape evidence was trial strategy. Judge Jakubowski provided a reasoned explanation for her ruling denying relief as to each of appellant's allegations of error including: 1) ineffective assistance of counsel for trial counsel's failure to challenge the rape evidence asserted by State witness, Soraya Sina; failure to investigate and cross-examine witness, Melvin Fullwood; failure to object to the introduction of the prejudicial mug shot into evidence; failure to test and present exculpatory DNA evidence at trial; failure to pursue and investigate Melvin Fullwood's confession; 2) trial counsel's conflict of interest stemming from his involvement with Melvin Fullwood in another case; and 3) cumulative ineffective assistance of counsel. Judge Jakubowski stated:

> "Petitioner has failed to overcome the presumption that trial counsel's actions were mere trial strategy, as required by the deficiency prong of the *Strickland* test. Petitioner presented insufficient evidence to indicate that the evidence and background of SAFE

> nurse, Sina, required further investigation. The Petitioner offers an inadequate basis as to how an expert witness called to refute Nurse Soraya would have been an effective trial strategy. Additionally, counsel testified at the Post Conviction hearing that the case centered around *who* had committed the crime. It should be noted that trial counsel was successful in establishing that Nurse Sina was a fact witness and not an expert witness. Challenging a prosecution witness and deciding not to call a witness are actions that are considered tactical in nature. Tactical defense decisions are within counsel's purview.
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> It should also be noted that the Petitioner testified at trial that Melvin Fullwood committed the assault and he saw him on top of the victim who was naked at the time. There is no dispute that the victim was brutally attacked and nearly died. Petitioner's claims that if expert testimony was available at trial to refute the rape charge that it would have removed motive and changed the outcome of the trial. This Court finds no merit or basis to this allegation after considering the testimony at the hearing, the trial transcript and the applicable law."

This timely appeal followed.

Appendix A

II.

Before this Court, appellant argues that trial counsel rendered ineffective assistance in failing to investigate and call an expert witness to controvert the evidence of a sexual assault. Appellant argues that the court erred in denying post-conviction relief because trial counsel admitted there was no strategic reason for failing to investigate and challenge the rape evidence and *Strickland* requires trial counsel be reasonably informed, through investigation, before making a strategic decision. *See Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Appellant argues that trial counsel's focus on who committed the crimes, rather than whether the crimes actually occurred, did not justify the exclusion of a defense that could undermine the credibility of the sex crime evidence. By arguing that the defenses are not mutually exclusive, appellant asserts that counsel's decision not to consult with an expert before settling on a defense strategy was unreasonable and cannot be excused as a strategic decision. Finally, appellant argues there is a reasonable probability that the outcome of the proceeding would have been different if findings similar to those presented by the expert at the post-conviction hearing had been presented to the jury. Appellant argues this evidence would have created reasonable doubt as to whether a sexual assault occurred and would have undermined the State's theory of the case. Appellant also argues that the rape accusations had a prejudicial spillover effect on the attempted murder charge by tainting the jury's perception of appellant and making the jury more likely to convict on all counts.

Appellee argues that trial counsel's failure to investigate and challenge the rape evidence was an objectively reasonable trial strategy based on the defense's focus, not on the extent of what was done to the victim, but rather who committed the crimes against her. Appellee argues that defense counsel's strategy was reasonably aimed at presenting a credible narrative that implicated Melvin and since there was no question that a serious crime had occurred, the question of whether the victim had, as a matter of fact, been sexually assaulted was entirely peripheral. Appellee argues that the decision not to allocate resources to hire an expert was a reasonable decision because it would not effectively refute Ms. Sina's findings inasmuch as they were based mostly on her own recollections and observations and the exam was conducted under less than ideal circumstances because of the victim's critical medical condition. Appellee further argues that a defense expert would provide only inconclusive evidence and incremental impeachment value and therefore may not have been presented to the jury even if one was retained. Appellee argues that challenging the sexual assault evidence would have distracted the jury and may have backfired if interpreted by the jury as an attempt to sully the victim and diminish the horror that she experienced. The State argues that strategy is evidenced at trial since defense counsel was careful not to dispute the sexual assault in front of the jury but argued vigorously before the judge in motions for judgment of acquittal that the evidence, including perceived deficiencies in Ms. Sina's testimony, was not sufficient to support the sexual offenses.

III.

The right to effective assistance of counsel in a criminal trial is guaranteed by the Sixth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Strickland*, 466 U.S. at 669. It is black letter law in Maryland that a "post-conviction proceeding pursuant to the Maryland Uniform Post Conviction Procedure Act, Maryland Code § 7-102 of the Criminal Procedure Article (2001), is the most appropriate way to raise the claim of ineffective assistance of counsel." *Mosley v. State*, 378 Md. 548, 558-59, 836 A.2d 678, 684 (2003).

Strickland sets forth the legal standard for determining whether there was ineffective assistance of counsel with a two-pronged test including a "performance component" and a "prejudice component." *Barber v. State*, 231 Md. App. 490, 515, 153 A.3d 800, 813 (2017); *State v. Jones*, 138 Md. App. 178, 205, 771 A.2d 407, 423 (2001). A defendant must demonstrate that "under the circumstances, counsel's acts resulted from unreasonable professional judgment, meaning that 'counsel's representation fell below an objective standard of reasonableness . . . .'" *Jones*, 138 Md. App. at 206, 771 A.2d at 424 (internal citation omitted). "To establish the requisite degree of prejudice in Maryland, the defendant must demonstrate a 'substantial possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 207-08, 771 A.2d at 424 (internal citation omitted). Both prongs must be met to show "counsel's conduct so undermined the proper functioning of the adversarial process that the

trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

The standard of review of the lower court's determinations regarding issues of effective assistance of counsel "is a mixed question of law and fact." *Strickland*, 466 U.S. at 698. A reviewing court "will not disturb the factual findings of the post-conviction court unless they are clearly erroneous." *Jones*, 138 Md. App. at 209, 771 A.2d at 425. Nonetheless, "a reviewing court must make an independent analysis to determine the 'ultimate mixed question of law and fact . . . [i]n other words, the appellate court must exercise its own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any.'" *Id.*, 771 A.2d at 425 (internal citations omitted).

First, we examine whether trial counsel's decision not to investigate and call an expert witness to testify regarding the evidence of the sexual assault fell below an objective standard of reasonableness. This inquiry under the performance prong of the *Strickland* standard is highly deferential and a defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (internal citation omitted).

Appellant argues that trial counsel's decision not to pursue a line of defense challenging the sexual assault evidence cannot be considered a reasonable trial strategy because counsel testified at the post-conviction hearing that he had no strategic reason for his failure to investigate

the sufficiency of this evidence. While testimony at post-conviction hearings can help explain tactical decisions, "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. For this reason, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 690.

Trial counsel testified he could think of no strategic reason not to use expert testimony indicating the State's evidence presented by the SAFE nurse was not enough to conclude that a sexual assault had taken place, *if he had obtained it*. Trial counsel's testimony was not an explanation of tactical choices but a retrospective opinion on something he may have done in different circumstances, namely, if he had retained an expert. This speculation is susceptible to the same hindsight bias that courts caution against, particularly when accompanied with the present knowledge that the chosen strategy did not prevail. Most significantly, the performance inquiry therefore requires an *objective* evaluation of the reasonableness of counsel's conduct from "counsel's perspective at the time." *See id.* at 689.

Under this objective standard, appellant has failed to offer sufficient explanation as to why the chosen strategy, which focused on who committed the crime, rather than the particulars of the crime itself, was unreasonable. "[S]trategic choices made after less than

complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations." *Strickland*, 466 U.S. at 690-91. Appellant argues that pursuing both lines of defense would not be inconsistent. While pursuing multiple lines of defense may be an available strategic choice, the decision to pursue one strategy over the other may also be a reasonable strategic choice. "[W]hen you add a weak argument to a strong argument, you weaken, not strengthen. The sum in such a case is worth less than the best of its parts. . . . Your advocacy is never stronger than your weakest argument." Herbert J. Stern & Stephen A. Saltzburg, Trying Cases to Win in One Volume 40 (2013). An argument challenging the sexual assault may have been reasonably viewed as a weak argument and thus the strategic choice to focus squarely on a stronger argument challenging who committed the crimes was a reasonable trial strategy.

A review of the record and the circumstantial evidence of a sexual assault supports the presumption that it was reasonable to reserve argument challenging the sufficiency of the sexual assault evidence for motions for judgment of acquittal before the judge in order to present a more consistent and credible defense theory to the jury. This is especially reasonable due to the sensitivity of challenging the sexual assault when the victim clearly suffered extensive injuries, was found naked, and the defense's theory of the case placed Melvin sitting on top of her nude body. Further, and highly significant in our view, appellant testified at trial that he heard moaning prior to entering Ms. Luzer's bedroom and therefore attacking

the sexual assault evidence may have been considered inconsistent with appellant's testimony. Thus, appellant has failed to overcome the presumption that trial counsel's actions can be considered sound trial strategy.

Even if trial counsel's performance can be said to be deficient, appellant fails to meet his burden under the second prong of the *Strickland* test requiring prejudice be shown. Although the appellant need not show that the prejudice "more likely than not altered the outcome in the case," there must be a "substantial possibility" that but for the prejudice, the result of the proceeding would have been different. *Jones*, 138 Md. App. at 207-08, 771 A.2d at 424-25 (internal citations omitted). Given that the expert's testimony at the post-conviction hearing was inconclusive and admittedly based on an imperfect report due to the medical exigencies during the forensic exam, it is unlikely such testimony would have had a substantial effect on a jury. It is even more unlikely because of the circumstantial evidence pointing to a sexual assault and, additionally, the other undisputed life-threatening injuries suffered by the victim. Based on these facts and the evidence presented at trial, we cannot conclude that there was a substantial possibility that, but for trial counsel's failure to investigate and challenge the State's sexual assault evidence, the result of the proceeding would have been different. We hold that appellant was not denied effective assistance of counsel.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

APPENDIX B — OPINION AND ORDER OF THE CIRCUIT COURT FOR BALTIMORE COUNTY, DATED SEPTEMBER 3, 2015

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY

CASE NO: 03-K-01-1300

STATE OF MARYLAND

v.

TAVON FULLWOOD

OPINION AND ORDER OF COURT

Tavon Fullwood, Petitioner, filed a Petition for Post Conviction Relief on November 7, 2012. The State filed an Answer on November 26, 2013. Subsequently, Petitioner filed a Motion to Re-Raise Post-Conviction Issue, to which the State filed no response. The Petition was filed pursuant to Maryland Rule §4-401, and seeks relief under the Uniform Post Conviction Procedure Act. The first hearing was held on December 19, 2013 and was continued and concluded on May 27, 2015 before the Honorable Ruth A. Jakubowski. Petitioner was present for both hearings and represented by C. Justin Brown, and the State was represented by Assistant State's Attorney, John Cox. Testimony was taken, exhibits were admitted and reviewed, and arguments were heard. At the hearing, Petitioner raised the following allegations of error, as summarized below:

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1. Trial Counsel was ineffective for the following reasons:

    a. Trial counsel failed to challenge the rape evidence asserted by State witness, Soraya Sina;

    b. Trial counsel failed to test and present exculpatory DNA evidence at trial;

    c. Trial counsel failed to investigate and cross-examine witnesses, Melvin Fullwood

    d. Trial counsel failed to object to the introduction of the prejudicial mug shot into evidence;

2. Defense counsel had a conflict of interest stemming from his involvement with Melvin Fullwood in another case

3. Cumulative ineffective assistance of counsel

The petitioner withdrew several allegations at the time of the hearing.[1]

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1. The petitioner withdrew the following allegations at the post conviction hearing:

    1. Brady violation by the State related to rape evidence and general Brady violations

    2. Failure to investigate and cross-examine witness Cheri Luzer

Appendix B

Background Information

A jury trial was held from April 16 through April 19, 2002, before the Honorable J. William Hinkle on the following charges: Attempted First Degree Murder, First Degree Assault, Attempted First Degree Assault, First Degree Rape, Attempted First Degree Rape, Attempted Second Degree Rape, First Degree Sexual Offense, Attempted First Degree Sexual Offense, Second Degree Sexual Offense, Attempted Second Degree Sexual Offense, Sodomy, and Attempted Sodomy.

On April 19, 2002, the jury found the Petitioner guilty of the following charges: (1) Attempted First Degree Murder, (2) First Degree Rape, (3) First Degree Sexual Offense, and (4) Attempted Sodomy. On November 7, 2002, Petitioner received a life sentence for the Attempted First Degree Murder charge, a consecutive life sentence for the First Degree Rape charge, suspended, a concurrent life sentence for the First Degree Sexual Offense charge, suspended and a ten (10) year concurrent sentence for the Attempted Sodomy charge, suspended, to be followed by a five (5) year period of supervised probation upon his release. At trial, Petitioner was represented by Kenneth Ravenell, and the State was represented by Assistant State's Attorneys, Susan Hazlett and Dilip Paliath.

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3. Jury instructions issued by the court for which trial counsel should have objected

4. Ineffective assistance of appellate counsel.

Appendix B

Subsequent Proceedings

On November 19, 2002, Petitioner filed an appeal to the Court of Special Appeals which affirmed Petitioner's conviction in an unreported opinion on June 7, 2004. Certiorari was filed and denied by the Court of Appeals on September 21, 2004. On April 26, 2002, Petitioner filed a Motion to Compel DNA testing, which was granted by Judge Hinkel on June 6, 2002. On April 26, 2002, Petitioner filed a Motion for New Trial, which was denied by Judge Hinkel at the disposition hearing on November 7, 2002. On December 23, 2002, Petitioner filed a Motion for Modification of Sentence, to which the State filed an Answer on January 15, 2003. On December 27, 2002, Judge Hinkel held this motion sub curia.

On November 7, 2012, Petitioner filed a Petition for Post Conviction Relief. The State filed an Answer on December 3, 2013. The Post Conviction hearing was conducted on December 19, 2013 and continued and was concluded on May 27, 2015 before the Honorable Ruth A. Jakubowski, where Petitioner was represented by C. Justin Brown, and the State was represented by Assistant State's Attorney, John Cox. Subsequently, Petitioner filed a Motion to Re-Raise Post-Conviction Issue on April 30, 2015.

For efficiency purposes, this Court will consolidate like allegations and address them simultaneously.

Appendix B

Petitioner's First Allegation of Error

1. Petitioner was denied the right to effective assistance of trial counsel.

Petitioner's First Allegation of Error

1. Petitioner was denied the right to effective assistance of trial counsel.

Legal Standard - Ineffective Assistance of Counsel

To determine whether a defendant was denied his right to effective legal counsel, a court must evaluate Petitioner's claim according to a two-pronged test enumerated by the Supreme Court of the United States in *Strickland v. Washington,* 446 U.S. 668 (1984). Specifically, Petitioner must demonstrate that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the Petitioner. *Id.* at 687.

In establishing "deficiency," Petitioner bears the burden of (1) identifying the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment; (2) demonstrating that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment (i.e. that 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.*

In addition, Petitioner must demonstrate that counsel's performance was so deficient as to prejudice Petitioner. To satisfy the second prong, the Court of Appeals requires that Petitioner show a "substantial possibility" that, but for counsel's error(s), the result of the trial would have been different. *Bowers v. State,* 320 Md. 416 (1990). The Court will address each individual allegation in turn.

a. Trial counsel failed to challenge the rape evidence asserted by State witness, Soraya Silia.

Petitioner claims ineffective assistance of trial counsel, as counsel failed to investigate State's witness, Soraya Sina, the SAFE nurse who examined the victim. Sina testified at trial that, after examining the victim, it was evident that she had been raped. Petitioner claims that the victim's testimony conflicted with Sina's, as the victim claimed she had not been sexually assaulted. Thus, Petitioner claims that counsel should have further examined all rape evidence and photographs admitted at trial through Sina, and should have investigated Sina's background and techniques for collecting such evidence. Additionally, Petitioner alleges that counsel should have obtained an expert to determine whether the State's evidence supported a conclusion that the victim had been raped.

It is the State's position that Petitioner has failed to overcome the presumption that counsel acted within the wide range of tactical decisions in which he can decide which defenses to pursue and which to abandon. Further,

the State contends that Petitioner failed to demonstrate that counsel's actions were not trial strategy. Thus, the State alleges that Petitioner is not entitled to relief as to this ground.

This Court has considered Petitioner's arguments on this allegation in his Petition for Post Conviction Relief, as well as the trial testimony, exhibits, trial transcript, and the applicable case law. To render counsel ineffective, Petitioner must demonstrate that (1) counsel was defective and (2) counsel's defective performance prejudiced Petitioner. *Strickland,* at 694. *Strickland* creates a strong presumption that counsel's actions are trial strategy, affording counsel ample latitude regarding their trial tactics. *Id.* at 689. Further, decisions pertaining to investigations are generally considered "tactical decisions made in exercise of reasonable professional judgment." *State v. Tichnell,* 306 Md. 428, 443 (1986). .Also, an attorneys decision as to the calling of a particular witness is considered to be essentially tactical in nature. *Cirincione v. State,* 119 Md. App.471, 492 (1998) (citing *State v Lloyd* 48 Md App. 535,540 (1981)

The petitioner contends that the States' safe nurse, Ms. Sina exaggerated her credentials, used improper exam techniques and that the evidence presented was not sufficient to support her findings of injuries as a result of a sexual assault. Dr. Suzanne Ritolo, a witness called on behalf of the petitioner testified extensively about her review of Safe Nurse Sina examination results and report. She testified that she questioned Nurse Sina credentials, examination, documentation and conclusions.

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Trial counsel, when questioned about the Safe nurse's credentials and examination results, testified that the focus of the case was on "Who" did it and not what happened. Although trial counsel admitted that if he had information about improper techniques regarding the safe exam he would have followed up on this issue and that he may have hired an expert safe nurse, he said the defendant did not have the money to pursue this issues. He also admitted that this was not the focus of his trial strategy.

Here, Petitioner has failed to overcome the presumption that trial counsel's actions were mere trial strategy, as required by the deficiency prong of the *Strickland* test. Petitioner presented insufficient evidence to indicate that the evidence and background of SAFE nurse, Sina, required further investigation. The Petitioner offers an inadequate basis as to how an Expert witness called to refute Nurse Soraya would have been an effective trial strategy. Additionally, counsel testified at the Post Conviction hearing that the case centered around *who* had committed the crime. It should be noted that trial counsel was successful in establishing that Nurse Sina was a fact witness and not an expert witness. Challenging a prosecution witness and deciding not to call a witness are actions that are considered tactical in nature. Tactical defense decisions are within counsel's purview. Furthermore, Petitioner does. not meet his burden of proof as to how a different strategy relating to the Safe Nurse and challenging her findings would have changed the outcome of the trial. This Court did not find the testimony of Dr. Riotlo sufficient for the Petitioner

to meet his burden. Furthermore, Petitioner raised this claim relating to the sufficiency of the evidence to support a rape conviction in his Motion for a New Trial which was denied on its merits on November 7, 2002. Petitioner then appealed this issue to the Court of Special Appeals which denied this claim in an unreported opinion on June 7, 2004. It should also be noted that the Petitioner testified at trial that Melvin Fullwood committed the assault and he saw him on top of the victim who was naked at the time. There is no dispute that the victim was brutally attacked and nearly died. Petitioner's claims that if expert testimony was available at trial to refute the rape charge that it would have removed motive and changed the outcome of the trial. This Court finds no merit or basis to this allegation after considering the testimony at the hearing, the trial transcript and the applicable law.

This Court considered the testimony of trial counsel and all witnesses called on behalf of the petition, and finds that counsel's actions were part of his trial strategy. Petitioner fails to meet his burden, as he fails to establish both that counsel's challenged actions have prejudiced him, and that, absent counsel's actions, there is a "substantial possibility" that a different result would have transpired. This Court finds trial counsel strategy not to challenge the sexual assault piece of this crime was a sound tactical trial strategy. Thus, counsel's actions do not amount to ineffective assistance of counsel. Also, this issue has been finally litigated on appeal and cannot be raised again.

Accordingly, relief as to this allegation is **DENIED.**

b. Trial counsel failed to investigate and cross-examine witness, Melvin Fullwood

Petitioner claims ineffective assistance of trial counsel, alleging that counsel failed to fully investigate and cross-examine witness, Melvin Fullwood. Petitioner claims that trial counsel was unable to demonstrate and should have elicited that Melvin Fullwood was a drug dealer who had previous contacts with the victim, Cheri Luzer. Petitioner contends that, had counsel fully investigated and adequately cross-examined Melvin Fullwood, the jury would have concluded these facts and determined that Melvin Fullwood committed the offense, rather than Petitioner.

The State contends that Petitioner points to no articulable evidence that could have been produced and was not produced. Additionally, the State contends that Petitioner fails to assert how any additional evidence would have affected Petitioner's result. For these reasons, and because Petitioner fails to demonstrate that counsel's questioning tactics were improper regarding the aforementioned witnesses, the State claims that Petitioner is not entitled to relief on this allegation.

This Court has considered Petitioner's arguments on this allegation in his Petition for Post Conviction Relief, as well as the trial testimony, exhibits, trial transcript, and the applicable case law. As discussed *supra,* to render counsel ineffective, Petitioner must demonstrate that (1) counsel was defective and (2) counsel's defective performance prejudiced Petitioner. *Strickland,* at 694.

Strickland creates a strong presumption that counsel's actions are sound trial strategy, and decisions pertaining to investigations have been deemed "tactical decisions made in exercise of reasonable professional judgment." *State v. Tichnell,* 306 Md. 428, 443 (1986).

Here, Petitioner has failed to demonstrate that trial counsel's actions were more than mere trial strategy. Trial counsel conducted an effective cross-examination of Melvin Fullwood. In fact, the record indicates that Mr. Ravenell cross-examined Melvin Fullwood extensively. (TT, 4/17/2002, pp 226-247; TT, 4/18/2002, pp.7-41.) Counsel elicited information relating to Melvin Fullwood's prior drug conviction. Any allegation of a relationship between Melvin Fullwood and the victim is not supported by the evidence and is completely baseless.

Further, Petitioner presented no substantial facts or explanations as to why counsel should have conducted further investigation of any other witnesses, including Melvin Fullwood nor did Petitioner allude to any reason why counsel's cross-examination tactics were improper. Additionally, Petitioner failed to establish both that counsel's challenged actions have prejudiced him, and that, absent counsel's actions, there is a "substantial possibility" that a different result would have transpired. Thus, counsel's actions do not amount to ineffective assistance of counsel.

Accordingly, relief as to this allegation is **DENIED**.

c. Trial counsel failed to object to the introduction of the prejudicial mug shot into evidence.

Petitioner next alleges that counsel was· deficient for failing to object to the introduction of Petitioner's mug shot into evidence. No evidence was presented on this allegation at the Post conviction hearing. The photo was introduced to show that Petitioner was wearing a flannel jacket in the photo that was similar to the jacket recovered from the victim's apartment. Thus, Petitioner contends that counsel should have offered to stipulate to the fact that Petitioner wore a similar jacket to prevent the jury from being exposed to this "highly prejudicial photograph." (Petition, 11/7/2013, pg. 22.)

It is the State's position that Petitioner's allegation is bald, as Petitioner has provided no evidence that the photograph was a "mug shot." Further, the State contends that Petitioner failed to provide evidence that the jury was prejudiced by the introduction of this photograph. Furthermore, the State argued that the defendant did in fact stipulate to the introduction of the photograph. Thus, the State believes that Petitioner is entitled to no relief on this ground.

This Court has considered Petitioner's arguments on this allegation in his Petitions for Post Conviction Relief, as well as testimony, exhibits, the transcript, and the applicable case law. Petitioner has failed to demonstrate that trial counsel was deficient for failing to object to the admission of the aforementioned photograph. As argued

by the State, it appears that the introduction of the photograph was stipulated to. Further, Petitioner fails to demonstrate that, had counsel objected to the photograph, there is a "substantial possibility" that the outcome would have been different.

Accordingly, relief as to this allegation is **DENIED.**

d. Trial counsel failed to test and present exculpatory DNA evidence at trial

Petitioner next asserts that counsel was deficient for failing to present available exculpatory DNA evidence at trial. Specifically, the petitioner points to DNA evidence taken from blood found in the upstairs bathroom in Melvin Fullwood's apartment. It is Petitioners position that rather than produce this evidence at trial, defense counsel waited until after the trial and produced it in a Motion for New Trial. Petitioner contends that the additional DNA evidence would have raised doubt as to whether Tavon Fullwood committed the offense and would have helped to show that Melvin Fullwood had committed the offense.

It is the State's position that Petitioner fails to assert the specific exculpatory evidence he feels should have been turned over, and the manner in which said evidence was withheld. At the Post Conviction hearing no evidence was presented on this allegation. In fact the Petitioner, through trial counsel filed a Motion for DNA testing post trial which was granted by Judge Hinkel. Former assistant state's attorney, Susan Hazlett (now a District Court Judge in Harford County) who represented the State at the trial

of this case testified at the Post conviction hearing that all DNA testing had been produced to the defendant prior to trial. Additional DNA testing was performed following Judge Hinkel's post trial ruling. Judge Hinkel considered the evidence produced after conviction and found that the results and conclusions that could be drawn would not have affected the results. Thus, the State contends that Petitioner has not met his burden and has failed to provide sufficient facts to support his allegation.

This Court has considered Petitioner's arguments on this allegation in his Petition for Post Conviction Relief, as well as testimony, exhibits, the transcript, and the applicable case law. Further, Petitioner failed to establish that counsel's challenged actions have prejudiced Petitioner. In fact, Petitioner filed a Motion to Test the DNA after the conclusion of trial, and the trial judge granted said motion, ordering the State to pay the costs of testing. After reviewing the results of the ordered tests, Judge Hinkel found no basis for a new trial. For these reasons, counsel's actions do not amount to deficient representation and there is no basis for Petitioner's allegation of ineffective assistance of trial counsel on this issue.

Accordingly, relief as to this allegation is **DENIED**.

e. Trial counsel failed to pursue and investigate Melvin Fullwood's Confession.

Petitioner alleged at his Post Conviction hearing that counsel was deficient for failing to pursue and investigate

Melvin Fullwood's confession. Antonia Irvin testified that he spoke to Detective Tinchure about a conversation he had with Melvin Fullwood where he confessed to the crime. He claimed that Detective Tincher never followed up with him and he was never subpoenaed for trial. He also stated that he was afraid of Melvin Fullwood. There was a proffer presented by the State at the post conviction hearing that Detectives Tinchure and Marll would testify that they never had a conversation with Antonio Ervin that Melvin Fullwood confessed to the crime. This Court does not find Mr. Ervin's testimony credible. This Court considered his demeanor, inconsistencies in his statements and did not find Mr Ervin's to be truthful.

The Petitioner also testified that he sent four letters (Exhibits 4a-d) to trial counsel advising him of Melvin's confession to Antonio Ervin. Mr Ravenell testified that he has no recollection of seeing the letters despite Petitioner's claims that he sent them to him. He further testified that he reviewed his file, which did not contain any letters. In addition, he testified that he keeps all letters sent to him and that he had no knowledge about Antonio Ervin or any conversation he had with Melvin Fullwood. Mr Ravenell further testified that he had no information that Melvin Fullwood confessed to someone prior to trial. It is the State's position that Petitioner has not met this burden and has failed to provide sufficient facts to support his allegation.

This Court has considered Petitioner's arguments on this allegation in his Petition for Post Conviction Relief, as well as testimony, exhibits, the transcript, and the

applicable case law. Petitioner failed to raise this issue in his Petition for Post Conviction Relief, and only raised this issue at the Post Conviction hearing. Here, Petitioner failed to overcome this presumption and failed to establish that cousel's challenged actions have prejudiced Petitioner. Further, as indicated *supra,* decisions pertaining to investigations are generally considered "tactical decisions made in exercise of reasonable professional judgment." *Tichnell,* at 443. Additionally, it is this Court's opinion that Petitioner's testimony regarding this allegation was not credible. This Court found Mr Ravenell's testimony on this issue credible. This Court finds that there would be no reason for Mr. Ravenell not to pursue witnesses who claimed that Melvin Fullwood had confessed this crime to them if he knew about it since that was his defense. Petitioner's allegation has no basis or support and counsel's actions do not amount to deficient representation or ineffective assistance of counsel.

Accordingly, relief as to this allegation is **DENIED.**

Petitioner's Second Allegation of Error

2. Petitioner's right were violated by trial counsel's conflict of interest stemming from his involvement with Melvin Fullwood, in another case.

Petitioner next contends that counsel had a conflict of interest stemming from his prior involvement with Melvin Fullwood in another case regarding an incident relating to drug trafficking in Houston, Texas. At the Post Conviction

hearing, Petitioner testified that he specifically discussed this potential conflict with counsel, as Petitioner felt that the Houston case had some overlap with Petitioner's current case. Petitioner contends that counsel's prior representation of David Harris, a criminal defendant in a 2001 federal case, United State v. Harris, BEL-01-115 who may have been associated with the Melvin Fullwood presents a conflict of interest. It is the State's position that this allegation is bald and vague, as Petitioner provides no evidence that counsel's supposed conflict compromised his ability to question Melvin Fullwood or adequately represent the Petitioner. It is the States contention that there was no link between the case at bar and the drug trafficking case that occurred in Houston. Further, the State pointed out that, during the Houston case, Mr. Ravenell did not represent Melvin Fullwood, and therefore no conflict of interest exists. As· such, the State contends that Petitioner can be afforded no relief on this ground.

Melvin Fullwood was not a defendant in the federal case and was not represented by Mr. Ravenell. He testified that he had no knowledge of Melvin Fullwood in the Harris Federal case cited by the Petitioner as a conflict of interest. At the Post Conviction hearing, Mr. Ravenell testified that he had no recollection of Petitioner discussing the Houston case with him or Melvin

This Court has considered Petitioner's arguments on this allegation in his Petition for Post Conviction Relief, as well as testimony, exhibits, the transcript, and the applicable case law. Petitioner failed to demonstrate that trial counsel had a conflict of interest that prevented him from adequately questioning Melvin Fullwood or

representing the Petitioner at trial. Thus, there is no basis for Post Conviction relief on this issue.

Accordingly, relief as to this allegation is **DENIED**.

Petitioner's Third Allegation of Error

The Petitioner alleges cumulative ineffective assistance of counsel.

This court has previously addressed the allegations as it relates to ineffective assistance of counsel The petitioner has failed to meet his burden of proof in this post conviction proceeding. His allegations either alone or cumulatively do not reach the standard as previously addressed.

For all of the reasons stated above, it is this 3 day of September, 2015, by the Circuit Court for Baltimore County, ORDERED that the Petitioner, Tavon Fullwood's Petition for Post Conviction Relief is **DENIED**.

/s/_____
Ruth A. Jakubowski
Judge

9/3/15_____
Date

Appendix B

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY

CASE NO: 03-K-01-1300

STATE OF MARYLAND

v.

TAVON FULLWOOD

ORDER

This matter came before the Court as a Petition for Post Conviction Relief. A hearing was held on December 13, 2013 and May 27, 2015, at which time Petitioner was present and represented by counsel, C. Justin Brown, and the State was represented by Assistant State's Attorney, John Cox. Based upon this Court's review of the record, testimony, exhibits, arguments of counsel, and all relevant case law, and for the reasons stated in its memorandum opinion, it is this 3 day of September, 2015, by the Circuit Court for Baltimore County, Maryland,

ORDERED that the request for Post Conviction relief be **DENIED.**

/s/_____
Ruth A. Jakubowski
Judge

9/13/15_____
Date

APPENDIX C — ORDER OF THE COURT OF APPEALS OF MARYLAND, DATED DECEMBER 15, 2017

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 328
September Term, 2017

(No. 2003, Sept. Term, 2015
Court of Special Appeals)

TAVON FULLWOOD

v.

STATE OF MARYLAND

ORDER

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

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

/s/
Mary Ellen Barbera
Chief Judge

DATE: December 15, 2017