# APPENDIX

# APPENDIX

## TABLE OF CONTENTS

**APPENDIX A**

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

---

No. 24-6086

---

CHARLES BRANDON MARTIN,

Petitioner - Appellee,

v.

JEFFREY NINES, Acting Warden; ATTORNEY GENERAL OF MARYLAND,

Respondents - Appellants.

---

Appeal from the United States District Court for the District of Maryland, at Baltimore. Julie R. Rubin, District Judge. (1:20-cv-02602-JRR)

---

Argued: September 24, 2024
Decided: January 16, 2025

---

Before NIEMEYER, GREGORY, and HEYTINS, Circuit Judges.

---

Affirmed by unpublished opinion. Judge Gregory wrote the opinion, in which Judge Heytens joined. Judge Niemeyer wrote a dissenting opinion.

---

**ARGUED:** Andrew John DiMiceli, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellants. Nicole Houston Welindt, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Palo Alto, California, for Appellee. **ON BRIEF:** Anthony G. Brown, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellants. Shay Dvoretzky, Parker Rider-Longmaid, Sylvia O. Tsakos, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Washington, D.C., for Appellee.

---

Unpublished opinions are not binding precedent in this circuit.

GREGORY, Circuit Judge:

This case concerns the habeas petition of Charles Brandon Martin, who is serving a life sentence for a conviction as an accessory before the fact to murder in the first degree. Martin challenges his conviction based on an undisclosed computer forensics report that substantially undermines the testimony of a key State witness. The court below found that the Maryland Court of Special Appeals (hereafter "state appellate court") engaged in an unreasonable application of clearly established Supreme Court precedent in finding the suppressed report to be immaterial under *Brady v. Maryland*. The district court then ordered Martin to be released within sixty days unless retried and convicted. The State of Maryland appealed, and this Court stayed the order of release pending appeal on May 20, 2024.

On review, we agree with the district court's determination that the state appellate court unreasonably applied clearly established Supreme Court precedent. We also find that the conditional release order was not an abuse of the district court's discretion. Accordingly, we affirm the judgment of the district court granting habeas relief.

I.

On October 27, 2008, Jodi Lynne Torok was found unconscious on her foyer floor after suffering a gunshot wound to the head. J.A. 727. At the time, she was two months pregnant. *Id.* Paramedics responded to the scene and took Torok to the hospital, where she would eventually survive. J.A. 728. Police recovered a .380-caliber projectile and shell casing, Torok's cell phone, and a Gatorade bottle from Torok's home. J.A. 728–30. The police found the casing and projectile near the front door, while the Gatorade bottle was "on the other side of the couch from where [Torok] was found." J.A. 1331, 1344–1345. The mouth of the Gatorade bottle was wrapped in layers of duct tape and white medical tape in a rectangular shape, and there was a hole in the bottom of the bottle surrounded by black soot. J.A. 728, 740, 2958, 2961, 2964.

Prosecutors theorized that Martin was responsible for the attempted murder, though not necessarily the shooter himself. *See* J.A. 728–29. Torok testified at trial that she had been in a relationship with Martin and had recently informed him that she was

pregnant.[1] J.A. 727. Martin had asked Torok to obtain an abortion, but she declined, informing Martin of her intent "to go to court and take him for child support." *Id.* Martin was married and dating two women beyond Torok, Sheri Carter and Maggie McFadden—both of whom are relevant in this case. *See* J.A. 2258–59. The State argued that, to protect his marriage and other relationships, Martin needed to ensure that Torok's pregnancy was not carried to term. *See id.*

The State also presented text messages that allegedly showed Martin was attempting to confirm Torok was at home. Martin asked Torok "What time do you work?", to which she responded: "I'm off." J.A. 1394–95. An hour later, Martin messaged "Hello." J.A. 1396. At 5:11 PM, roughly two hours after the shooting, Martin sent another message: "I got some stuff with the kids to about 7:00, so any time after. How much did you need?" J.A. 1397–98. These messages, in the State's view, provided clear evidence that Martin was involved in the shooting.

However, significant evidence countered the State's theory of motive. For example, Torok testified that she had been in a romantic relationship with another man, Emmanuel Quarterly [sic], who may have been the father. J.A. 1259. Martin had stated in a police interview that he highly doubted he was the father of Torok's child because she had a boyfriend. J.A. 2910. And even if Martin were the father, his wife testified that she was aware of Martin's relationships

---

[1] Torok lost all recollection of the day of the shooting and roughly the month thereafter, but she was able to testify to prior events. J.A. 728.

with other women and that he had two additional children outside of their marriage. J.A. 2190, 2210.

As the State's theory goes, Martin, upon learning of Torok's refusal to obtain an abortion, solicited his friend, Jerry Burks, to kill Torok and assisted Burks in the murder attempt by constructing himself, or helping Burks to construct, a silencer made from the Gatorade bottle found at the scene. J.A. 775. The State first tried Burks for the attempted murder, and a jury acquitted him on all counts. J.A. 729. After failing to secure a conviction of Burks, the State turned to Martin, charging him with (1) soliciting Burks to murder Torok and (2) as an accessory before the fact to attempted murder in the first degree.

A.

At trial, the State presented evidence from several relevant witnesses to show both that the Gatorade bottle was a silencer, that Martin constructed said silencer, and that Martin intended the silencer to be used to kill Torok. *See* J.A. 729–31. Several witnesses testified to forensic evidence linking Martin to the Gatorade bottle and shell casing found at the scene. David Exline, a forensic analyst, testified that he examined the medical tape from the mouth of the Gatorade bottle and discovered two hairs on the tape: one from a cat, the other a human. J.A. 1499–1504, 1526. Exline testified that the tape resembled tape found in the residence of Maggie McFadden, the location where Martin allegedly constructed the silencer. J.A. 1499–1504.

The human hair was then analyzed by Dr. Terry Melton, an expert in mitochondrial DNA testing. J.A. 728, 762. Dr. Melton explained that mitochondrial

DNA can show that someone is from the same maternal lineage, but it "can never say for sure this hair absolutely for sure came from this person." J.A. 1815. Dr. Melton testified that she could rule out 99.94% of North Americans as contributors to that DNA sample, but not Martin. J.A. 1833. Dr. Melton did acknowledge on cross-examination that this left roughly 180,000 Americans and 30,000 people in Maryland with the same mitochondrial DNA profile. J.A. 1945, 1947.

The State next called Anne Arundel County senior forensic chemist, Sarah Chenoweth, to testify about nuclear DNA testing performed on DNA found on the mouth of the bottle. This included DNA from "at least three individuals," including at least one male and one female. J.A. 1981. Chenoweth could not rule out Martin nor Torok as contributors to the DNA samples. J.A. 1997. She did, however, rule out three other individuals submitted for comparison. *Id.* However, the DNA was not compared to that of alternative suspects suggested by the Defense, including Sheri Carter, Emmanuel Quarterly [sic], Maggie McFadden, or Michael Bradley, the brother of McFadden. J.A. 2003.

Arnold Esposito, an expert in firearms and ammunition, J.A. 1587, then testified to the shell casing collected from the scene. He concluded that the gun used in the shooting could have come from any one of sixteen manufacturers, including Jennings. J.A. 1596–97. Reviewing a firearms tracing report, Esposito testified that Martin had purchased two .380 caliber Jennings firearms in 2003. J.A. 1599–1600.

The only source of testimony about Gatorade bottles being used as silencers came from Detective Richard Alban, who was called to testify about discovering the bottle at the scene. While not rendering any opinion as to whether the bottle was or was not a silencer, Detective Alban testified that the bottle reminded him of a makeshift silencer he'd seen in a Steven Seagal movie. J.A. 1336. He also testified to having watched YouTube videos in which plastic bottles were used to produce silencers. *Id.* Detective Alban acknowledged on cross that Gatorade bottles could be used to smoke marijuana. J.A. 1345. No other witness—expert or otherwise—testified to Detective Alban's speculation that a Gatorade bottle could be used as a silencer. While another detective at the scene testified to not smelling marijuana in the bottle, J.A. 1625, no testing was ever done to determine whether marijuana or gunshot residue was present inside. J.A. 1783.

B.

After presenting evidence that Martin's DNA was present on the Gatorade bottle and Detective Alban's view that the bottle was a silencer, the State called two key witnesses to link Martin to the creation of that Gatorade bottle silencer.

The State first called Michael Bradley, who testified that he may have seen Martin and Burks constructing the Gatorade-bottle silencer. For background, Bradley and his sister, Maggie McFadden, lived together with their other siblings, Frank and Dennis, as well as McFadden's daughter. J.A. 2011. Bradley knew Martin because Martin had been dating McFadden and frequently stayed over at

their home. J.A. 2008–11. Bradley had seen Martin with a handgun in McFadden's room in the year prior to the shooting. J.A. 2015–16.

Bradley testified that, on the day of the shooting, Frank, Burks, Martin, and himself were in the house smoking marijuana. J.A. 741–42. They "smoked five or six blunts that day," and Bradley was admittedly intoxicated. *Id.*; J.A. 2021–22. Bradley testified that he saw (1) Frank take white medical tape to the kitchen, (2) Martin and Frank go upstairs to McFadden's room, and (3) Frank come down to retrieve a Gatorade bottle from the kitchen and return upstairs. J.A. 2023–24. Martin and Burks then left the house. J.A. 2025. Bradley initially testified that when they returned, he did not see Martin and Frank have any conversation. J.A. 2038. But after further prodding from prosecutors, he changed his tune, recalling seeing Martin hand Frank a brown paper bag and instruct Frank to "get rid of this." J.A. 2039. Bradley never testified to seeing Martin with white medical tape or the Gatorade bottle.

On cross examination, Bradley's testimony was substantially impeached beyond just his intoxication. Bradley admitted that he received immunity from prosecution for Torok's shooting in exchange for his testimony. J.A. 2041. Further, Bradley received a benefit to his pending obstruction of justice charges in New Jersey, though it is unclear if Bradley realized that he received any benefit. J.A. 2047, 2053, 2297. Bradley admitted that the New Jersey charges stemmed from lying to the police. J.A. 2046. Bradley also admitted that he only testified because

McFadden asked him to because "she was involved" in the attempted murder. J.A. 2043.

The second key witness, and perhaps the most important, was Sheri Carter. Carter had been in a relationship with Martin for three years. J.A. 2061–62. She testified that Martin kept a computer at her house, and that in September or October of 2008, she saw Martin looking up gun silencers on that computer. J.A. 731. This computer was "unique" in that it came from Martin's employer, the College of Southern Maryland ("CSM"), and had many restrictive settings. J.A. 2065–66. This included the inability to modify system files or download new software without an administrator password. J.A. 2066. Carter testified that Martin "got rid of" the computer because they "had looked up so many crazy things on the internet that in case [her] apartment got searched he didn't want it found there." J.A. 731, 2066. She also testified that she had seen Martin with a handgun in September and October 2008. J.A. 729–730. Carter's testimony was the only testimony at trial linking Martin to silencers, and her testimony was unimpeached.

C.

The Defense presented multiple alternative theories of the case. To begin, Martin argued that the bottle was not a silencer but, rather, a marijuana smoking device. Thus, the presence of Martin's DNA on the bottle would not mean that he had any role in constructing the silencer, if it even was one. *See* J.A. 2299–2300. This theory was corroborated by the fact that Torok's DNA was found on the Gatorade bottle despite Torok's testimony that she never drank

Gatorade. J.A. 1262. The state's silencer theory failed to explain the presence of Torok's DNA, but the bottle's use as a smoking device would explain such presence.

Martin also pointed to several others with motive to harm Torok due to Torok's pregnancy, including Quarterly [sic], who was potentially the father; McFadden and Sheri Carter, as Martin's disgruntled romantic partners; and Michael and Frank Bradley, who, again, were McFadden's brothers.

Chief among these alternate suspects was Maggie McFadden, whose erratic and threatening behavior toward other women in relationships with Martin made her a particularly compelling suspect. For example, Sheri Carter testified about volatile interactions she had with McFadden after McFadden learned of Carter's relationship with Martin. J.A. 2073. Carter testified that, in 2009, McFadden called her and asked to meet in person. J.A. 2072. During that meeting, McFadden told Carter that "she liked to beat people up" and "beat [Martin] up on a regular basis." J.A. 2074. McFadden expressed that "if people got in her way she, you know, knew how to take care of it." *Id.* She told Carter that she "had a gun on her and that she'd brought it for protection because she didn't know what [Carter] was like." J.A. 2073. She even bragged that "she'd had someone shot at one point." J.A. 2074. After this meeting, McFadden continued to threaten Carter on social media and made disparaging comments about her in emails to Carter's employer. J.A. 2087–88. Additional evidence also pointed to McFadden's involvement in the shooting, as McFadden's friend, Steve Burnette, had

lied to the police about his whereabouts during the shooting and "was never able to explain what he was doing" that day. J.A. 2292.

The Defense's theory that McFadden was responsible for the shooting was consistent with other evidence in the record that may otherwise have pointed toward Martin. For example, the State had presented evidence that Martin was an avid Gatorade drinker to link Martin to the alleged silencer, J.A. 729; however, Defense counsel highlighted that any bottle in McFadden's home would likely have had his DNA on it. Rather than demonstrating Martin's guilt, the presence of Martin's DNA on the bottle was entirely consistent with anyone with access to McFadden's home having committed the shooting.

The State's rebuttal to the McFadden theory was that it was far-fetched because McFadden's volatile and aggressive behavior would "draw attention" to her as a suspect. J.A. 2269. In their view, it was simply "not logical" that someone who would "threaten people and e-mail people and send nasty pictures to people," and who "had someone shot" in the past, could have been responsible for the attempt on Torok's life. *Id.*; J.A. 2074.

Finally, the Defense also criticized investigators' sloppy handling of the case. J.A. 2292–93. For example, the State had repeatedly "lost" pieces of potentially exculpatory evidence. This included street camera footage that would have showed whether Martin had driven toward Torok's house that day and a recording of a police interview in which Bradley endorsed Martin's stated alibi, in direct conflict with Bradley's trial testimony. *See* J.A. 1634, 2295.

Detectives also repeatedly failed to conduct DNA testing on any of the alternative suspects put forward by Martin, instead "focusing on [Martin] from the very first day of the investigation." J.A. 2292.

D.

Before the case was submitted to the jury on May 4, 2010, the State dismissed all counts except attempted first degree murder and solicitation, dropping the lesser included offenses to attempted murder. J.A. 317. At closing arguments, the State emphasized the importance of Carter's testimony in linking Martin to the use of the Gatorade bottle as a silencer. The Prosecution noted Carter's credibility, explaining that "the things that [Carter] says are very powerful and she is someone who is very sane and very normal but caught up in a bad situation." J.A. 2330. They asked:

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

J.A. 2262. The Prosecution used this testimony as evidence of Martin's "planning" of the attempted murder, arguing the research of silencers was evidence of his "intent to kill." J.A. 2276. And to demonstrate the importance of this testimony, the Prosecution summed up its case as follows: "If you decide that [Martin] made that silencer and that [the] silencer was intended to be used upon the victim then he is guilty." J.A. 2265–66.

Carter's testimony also yielded a jury instruction regarding the concealment of evidence. J.A. 731. The jury was instructed as follows:

> You have heard evidence that the Defendant removed a computer from the house of Sheri Carter. Concealment of evidence is not enough by itself to establish guilt but may be considered as evidence of guilt. Concealment of evidence may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether the Defendant concealed any evidence in this case. If you find that the Defendant concealed evidence in this case then you must decide whether that conduct shows a consciousness of guilt.

J.A. 2913. Crucially, this instruction allowed the jury to infer guilt from Martin's alleged decision to get "rid of" of the laptop due to his search history. J.A. 731. The only basis for this instruction was Carter's testimony, which even the State agreed was "highly damaging." J.A. 2423.

The jury found Martin guilty of attempted first degree murder but acquitted him on the solicitation charge. J.A. 731. Martin was sentenced to life imprisonment. J.A. 2533. Martin directly appealed to the Maryland intermediate appellate court, and the verdict was affirmed. J.A. 732. His petitions for certiorari to Maryland's highest court and the Supreme Court of the United States were denied. *Id.*

E.

After his conviction, Martin's mother sent a public records request to the police, which yielded a never-produced forensic computer report analyzing five computers belonging to Martin. J.A. 732, 2879–86. Martin filed a postconviction claim in state court under *Brady v. Maryland* based on the content of this suppressed report. J.A. 735.

The report indicated that Detective Regan requested forensic analysis of five computers seized from Martin's residence, one of which was the laptop from the College of Southern Maryland ("CSM") with its many restrictive settings. J.A. 2879–86. The computers were searched for various terms including "handgun," "Gatorade," "silencer," "contract murder," "murder for hire," "homemade silencer," and "hitman." J.A. 732–33. For the CSM laptop and three others, these search terms failed to return any results. *Id.*; *see also* J.A. 2879–86. No data could be obtained from the fifth computer. J.A. 2886.

At a postconviction hearing, Martin's trial counsel testified that the report would have undermined Carter's testimony because it showed that the CSM laptop was never used to research silencers, as Carter claimed. J.A. 733. Carter had testified in detail to the CSM laptop being the one that Martin specifically kept at her apartment, and this report directly contradicted her devastating testimony. J.A. 484–85. Further, the postconviction state court held that, given that the allegedly concealed laptop was in police custody, there is a substantial probability that the concealment of evidence jury instruction would not have been given. J.A. 489, 734.

At the same hearing, the State called Daniel Giambra of the Anne Arundel Police Department to testify to a second forensic analysis of the computer. See J.A. 2650–51. He testified that his analysis was limited, as the hard drive failed ten minutes into his analysis. J.A. 2661, 2666. However, based on those ten minutes with the computer, he formed the opinion that the computer had not been accessed since 2005, years prior to Torok's shooting. *Id.* This opinion was based only on the system files which, as both Martin and Carter testified, could only be modified by an administrator. *Id.*; J.A. 2065–66.

On October 5, 2018, the postconviction state circuit court ordered a new trial, finding that a *Brady* violation had occurred. J.A. 734. That court determined that law enforcement's failure to disclose the report was "likely willful." J.A. 486. The report was both exculpatory and impeaching because it undermined Sheri Carter's testimony and showed that Martin did not destroy evidence. J.A. 484–86. Because Carter's testimony was the only link between Martin and homemade silencers, and the only basis for the concealment of evidence jury instruction, the Court found the suppression of this evidence to be material. J.A. 734. The post-conviction court also noted that "[Maggie] McFadden had just as much of a motive, if not more, to get rid of [ ] Torok" than Martin did, particularly because Martin "already had . . . several other children out of wedlock" of which his wife was aware. J.A. 2440–41.

The state appellate court reversed, finding that the report was not material. J.A. 726. The court discussed the substantial evidence it considered

supportive of the verdict, including the DNA evidence on the Gatorade bottle, the similarity of the medical tape found on the bottle and in McFadden's home, the testimony of Michael Bradley, the firearms analysis, the evidence of Martin's motive, and text messages from Martin to the victim which the State argued were sent to confirm the victim was home at the time of the shooting. J.A. 739–43. While the state appellate court acknowledged that there would have been no basis for the concealment of evidence jury instruction given the report, the court nonetheless concluded that there was no reasonable probability that trial would have yielded a different result had the report not been hidden. *Id.*

Maryland's highest court and the Supreme Court of the United States again denied certiorari. J.A. 2893–94.

F.

Martin filed a petition for federal habeas relief under 28 U.S.C. § 2254. J.A. 2894. The petition was originally filed *pro se* and modified twice after attaining two sets of counsel. J.A. 2887. Martin asserted five claims[2] before the district court, including a claim that his conviction violated *Brady v.*

---

[2] The other claims asserted that (1) "trial counsel was ineffective because he failed to object to compound voir dire questions;" (2) "trial counsel was ineffective because he failed to object to the state's burden-shifting closing argument;" (3) "the trial court erred when it failed to require the state to provide a bill of particulars;" and (4) "the state denied Martin due process when it changed its theory of the case mid-trial." J.A. 2894.

*Maryland* because of the suppressed forensic laptop report. J.A. 2894.

The district court granted Martin's petition with respect to the *Brady* claim but denied all other claims. J.A. 2888. That court found that the state appellate court had engaged in a Brady analysis "contrary to" clearly established federal law and "imposed an unreasonable application of facts to the law" when it found that the suppressed computer report was immaterial. J.A. 2908; *see also* J.A. 2911. The court then issued a conditional order of release unless Martin was retried within sixty days and stayed its order for thirty days pending an appeal. J.A. 2921. The court revised and clarified this order on January 30, 2024. J.A. 2941.

The State filed a notice of appeal and sought an emergency stay pending appeal. The stay was granted on May 20, 2024, ECF No. 29, and argument in this case was heard on September 24, 2024.

II.

We review de novo the district court's grant of habeas relief under 28 U.S.C. § 2254(d), based on the state record. *Tucker v. Ozmint*, 350 F.3d 433, 438 (4th Cir. 2003). When a state court has adjudicated a petitioner's claim on the merits, we apply the standard of review set out in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides that federal courts may grant relief if an individual is held "in custody in violation of the Constitution." 28 U.S.C. § 2254. This standard is "highly deferential," *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997), and "intentionally difficult to meet."

*Woods v. Donald*, 575 U.S. 312, 316 (2015) (quotation marks omitted).

Under AEDPA, a federal court may not grant a writ of habeas corpus unless the state court's adjudication was either (1) "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States"; or (2) "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). "'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003).

"[A] state court's decision is 'contrary to' clearly established federal law 'if the state court applies a rule different from the governing law set forth in [the Supreme Court's] cases.'" *Appleby v. Warden, N. Reg'l Jail & Corr. Facility*, 595 F.3d 532, 535 (4th Cir. 2010) (quoting *Bell v. Cone*, 535 U.S[.] 685, 694 (2002)). A state court's decision involves an "unreasonable application" of clearly established federal law if it "correctly identifies the governing legal principle from [Supreme Court] decisions but unreasonably applies it to the facts of the particular case." *Id.* at 535–36 (quoting *Bell*, 535 U.S. at 694). A petitioner must show that the state courts' application of federal law was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement." *White v. Woodall*, 572 U.S. 415, 419–20 (2014) (quoting *Harrington v. Richter*, 562 U.S. 86, 103

(2011)). These well-established standards impose a "high bar for habeas relief." *Virginia v. LeBlanc*, 582 U.S. 91, 96 (2017).

III.

"Clearly established federal law, determined in *Brady v. Maryland*, . . . and its progeny, provides that a state violates a defendant's due process rights when it fails to disclose to the defendant prior to trial, 'evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 555 (4th Cir. 1999) (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). Prosecutors must "disclose [favorable] evidence . . . even though there has been no request [for it] by the accused," including evidence known only to police. *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999); *see also Kyles v. Whitley*, 514 U.S. 419, 438 (1995). This is because, in the American system, the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *U.S. v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

While prosecutors have a "broad duty of disclosure [,] . . . not every violation of that duty necessarily establishes that the outcome was unjust." *Strickler*, 527 U.S. at 281. A *Brady* violation, thus, has three critical elements. First, the evidence must be "favorable to the accused, either because it is exculpatory, or because it is impeaching." *Id.* at 281–82. Second, the evidence "must have been suppressed

by the State, either willfully or inadvertently." *Id.* at 282. Lastly, the withheld evidence must be "material" in that, were it not withheld, there is "a reasonable probability" that the jury would have reached "a different result." *Kyles*, 514 U.S. at 434.

As for materiality, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* Furthermore, this inquiry "is not a sufficiency of the evidence test[,]" and therefore "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would have been enough left to convict." *Id.* at 434–35. A court commits legal error if it rejects a *Brady* claim because "the remaining evidence is sufficient to support the jury's conclusions." *See Strickler*, 527 U.S. at 290.

IV.

The parties agree, both here and in the courts below, that the first two *Brady* elements are satisfied. *See* J.A. 2909; Resp. Br 7.[3] As for the first element,

---

[3] Despite conceding the first two elements in state court and continuing to concede that the report was impeachment evidence, the State now attempts to argue that the report is somehow unhelpful to Martin's defense because he could have theoretically been researching silencers on a different computer. *See* Reply Br. 14. But the State abandoned that argument before the state appellate court and the state appellate court accepted that concession. See JA 733 (noting that the State had "abandoned on appeal" any argument "that the laptop mentioned in the Computer Analysis was not the same laptop

the CSM report is both impeaching and exculpatory, both in how it undermines the testimony of Carter and in how it shows that Martin did not conceal evidence, where the laptop was in possession of police. For the second element, the evidence was undisputedly suppressed by the State. Thus, the dispute centers on materiality: whether the report "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434.

A.

As discussed above, the Prosecution's basic theory of the case was that Martin solicited Burks to murder Torok after learning she would not obtain an abortion, and he helped Burks in this attempted murder by constructing or helping construct a silencer made from a Gatorade bottle. Evidence at trial suggested that the Gatorade bottle was a silencer and linked Martin to the Gatorade bottle. But the only evidence connecting Martin to his potential construction of the Gatorade bottle for use as a silencer was Carter's testimony, which was severely undermined by the forensic computer report. The question before us is whether any reasonable jurist could have concluded that the suppression of this report was immaterial.

The state appellate court began by correctly summarizing the relevant Supreme Court precedent on materiality. J.A. 738–39. But after stating the proper rule, the Court instead applies a different rule entirely, concluding that even without Carter's

---

discussed in Ms. Carter's testimony"). We thus conclude that the State has forfeited any argument that Martin could have been researching silencers on a different computer.

testimony, there was still "strong evidence of [Martin's] guilt." J.A. 740–43. Despite repeating its conclusory statements that Martin "has not met his burden of showing that . . . there is a reasonable probability that the result of his trial would have been different," J.A. 743, the court's actual analysis goes to the sufficiency of the evidence, an approach that *Kyles* squarely rejected.

In *Kyles*, the Supreme Court explained that "[t]he possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict." *Kyles*, 514 U.S. at 435. Rather, the operative question is whether there is a reasonable probability that *one juror* would have changed their mind based on the undisclosed evidence. *Id.* The majority of the Court critiqued the dissent for applying the wrong standard, which appeared to "assume that [the petitioner] must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed." *Id.* at 435 n.8. The Court pointed to specific examples of the dissent's flawed analysis, including the dissent's statements that the "possibility that [an individual] planted evidence 'is perfectly consistent' with [petitioner's] guilt"; "[t]he jury could well have believed [portions of the defense theory] and yet have condemned petitioner because it could not believe that all four of the eyewitnesses were similarly mistaken"; "the *Brady* evidence would have left two prosecution witnesses 'totally untouched'"; and that "*Brady* evidence 'can be logically separated from the incriminating evidence that would have remained unaffected.'" *Id.* As the majority explained, the dissent stated the correct rule for materiality as being a reasonable probability of a

different result. However, in its listing of evidence that supported the verdict without analyzing the impact of the undisclosed evidence on the entire case, the dissent applied the rule as a sufficiency of the evidence standard. This, the majority emphasized, was legal error. *Id.*

The state appellate court makes the same error as the dissent in *Kyles*, resulting in an unreasonable application of clearly established Supreme Court precedent. *See id.* ("This rule is clear."). As appellate courts have summarized when applying this rule, we must "both add to the weight of the evidence on the defense side all of the undisclosed exculpatory evidence and subtract from the weight of the evidence on the Prosecution's side the force and effect of all the undisclosed impeachment evidence." *Juniper*, 876 F.3d at 568 (citations omitted). In contrast to a sufficiency of the evidence analysis, *Kyles* requires courts to "exhaustively examine[] the suppressed evidence as well as the evidence introduced at trial . . . then carefully assess[] what purposes the suppressed evidence might have served and how that evidence might have affected the jury's consideration of the evidence that was introduced." *Boss*, 263 F.3d at 745–46. The state appellate court did no such thing.

As the district court noted, rather than focusing on how the removal of Carter's testimony might have impacted the character of the entire case, the state appellate court focused on

> the evidence it considered supportive of the verdict, including the mitochondrial and nuclear DNA on the Gatorade bottle, the

> similar characteristics of the medical tape removed from the Gatorade bottle, the tape found during the search of Maggie McFadden's home, the testimony of Michael Bradley, the ballistic evidence showing Martin owned a gun that could have shot the recovered shell from the crime scene, the State's theory that Martin had a motive to kill the victim, and text messages from Martin to the victim the morning of the shooting the State argued were sent for the purpose of confirming the victim was home at the time of the shooting.

J.A. 2910. The state appellate court focused on the "substantial" evidence "connecting" Martin to the attempted murder and focused on how a jury "could infer" a nefarious nature to Martin's text messages. J.A. 740–43.

However, in contravention of what the law requires, the state appellate court never engaged with how the lack of evidence connecting Martin to silencers would severely weaken the Prosecution's case. This should have included an analysis of whether impeaching Carter's testimony would weaken the then-corroborative testimony of Michael Bradley—an admittedly intoxicated witness with substantial bias concerns and a pending obstruction of justice charge for lying to the police—and how such impeachment might instill greater belief in the Defense's theory that the Gatorade bottle was a smoking device, which at the time had been substantially undermined by Carter's testimony that Martin was researching homemade silencers. Nor did the court grapple with how the Prosecution relied on

and emphasized Carter's statements and reliability in closing arguments. The state appellate court also entirely discounted the impact of the jury instruction regarding Martin's concealment of evidence, despite agreeing that it may not have been given but for Carter's unimpeached testimony. J.A. 743 n.14. And, as the district court noted, the state appellate court disregarded or misconstrued key facts supporting its finding there was substantial evidence of Martin's guilt, including Torok's admission that her unborn child may have been fathered by Quarterly [sic], who she was seeing at the time, and Martin's police interview expressing similar doubt. J.A. 2910 n.5. By failing to consider how Carter's statements impacted the State's case as a whole, the state appellate court did not properly analyze "whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 434.

On appeal, the State incorrectly claims that *Kyles* is the wrong framework for our analysis. Rather, it argues that the state appellate court's opinion properly tracks the Supreme Court's analysis in *Strickler v. Greene*. There, the Court declined to find that evidence that impeached the testimony of an eyewitness was material where two other eyewitnesses also placed the defendant at the crime scene, and the offense of conviction "did not depend on proof" offered in that testimony. *Strickler*, 527 U.S. at 292–96. While the Court did list the overwhelming amount of evidence supporting the conviction, it did so in the context of demonstrating the strength of the prosecution's case, even had the witness's testimony been totally discredited. *Id. Strickler* never purported

to alter the materiality analysis. To the contrary, the Supreme Court reiterated that it would be legal error to find undisclosed evidence immaterial on the basis of "the remaining evidence [being] sufficient to support the jury's conclusions." *Id.* at 290. Thus, the State's argument is nothing more than an attempt to rewrite the "clear" rule established in *Kyles*, as was applied in *Strickler*, through selective quotes taken out of their broader context. Furthermore, *Strickler*'s facts also limit its applicability to the case now before us. As the Supreme Court explained, the remaining evidence in *Strickler* would have been untouched by impeachment of that witness's testimony, in stark contrast to the case now before us, where the Prosecution's other evidence would have been severely weakened by any impeachment of Carter. Further, the witness's testimony in *Strickler* was not the basis of a jury instruction, nor was it "relied upon by the prosecution at all during its closing argument." *Id.* at 295. These facts make *Strickler* a poor comparator and the State's argument unavailing.

Clearly established Supreme Court precedent requires a nuanced analysis of the impact of the suppressed evidence on both sides of the case. While the state appellate court stated the correct rule from *Kyles v. Whitley*, its application was unreasonable, as explained by the majority opinion in *Kyles* itself.

B.

In conducting our analysis of whether the state court unreasonably applied clearly established law, AEDPA requires us to consider whether the state court's application was an "error . . . beyond any possibility for fair minded disagreement." *White*, 572

U.S. at 419–20. To do so, "a habeas court must determine what arguments or theories supported, or [] could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Harrington*, 562 U.S. at 102. Considering all possible arguments and theories when applying *Kyles*, which we have established is the governing law, we now conclude that all fairminded jurists would agree that the undisclosed forensic computer report was material.

To begin, the forensic computer report was particularly valuable impeachment evidence because it provided the only means of undermining Carter's damaging testimony. As this Court has held, impeachment evidence is more likely to be material under *Brady* when it undermines evidence of an essential element of the offense, especially when it provides the only significant basis for impeachment of that evidence. *See United States v. Bartko*, 728 F.3d 327, 339 (4th Cir. 2013); *United States v. Parker*, 790 F.3d 550, 558 (4th Cir. 2015). While Carter's testimony was not the sole evidence for an essential element of Martin's conviction as an accessory before the fact to first degree murder, it was by far the strongest. Without Carter's testimony, the link between Martin and the construction of the alleged silencer is exceedingly weak. The presence of Martin's DNA on the Gatorade bottle is consistent with entirely innocuous explanations, such as simply drinking or smoking from it. And Bradley's testimony, the only other evidence linking Martin to the construction of the silencer, was already significantly

undermined by his own admitted intoxication, the substantial benefit he received in exchange for his testimony, his history of lying to the police, and his decision to testify only at McFadden's urging. Thus, Carter's testimony was crucial both for its own merit and in its bolstering of Bradley's testimony. Under clearly established precedent, any reasonable jurist would find this to weigh strongly in favor of the suppression of the report being material.

For further evidence of the significance of Carter's testimony in the State's overall case against Martin, the Court need look no further than the Prosecution's closing argument. As the Supreme Court has held, suppressed evidence is material where it impeaches a witness whose testimony was "stress[ed]" by the prosecution and "uncorroborated by any other witness." *Banks*, 540 U.S. at 700; *see also Dennis v. Sec'y, Penn. Dep't of Corr.*, 834 F.3d 263, 298–99 (3d Cir. 2016) (en banc) (holding that a state court unreasonably applied *Brady* when it found that suppressed evidence that would have impeached testimony "emphasized" by the prosecution in closing was not material). Furthermore, the statements of prosecutors are especially probative, as "[t]he likely damage is best understood by taking the word of the prosecutor" in what they "contended during closing arguments." *Kyles*, 514 U.S. at 444.

Here, the Prosecution elevated Carter's testimony in its closing arguments, emphasizing her reliability and noting that "the things that [Carter] says are very powerful and she is someone who is very sane and very normal but caught up in a bad situation." J.A. 2330. The prosecutor also asked whether anyone was

"surprised that Sheri Carter saw the Defendant researching silencers on the internet." J.A. 2262. The Prosecution used this testimony as evidence of Martin's "planning" of the attempted murder, arguing the research of silencers was evidence of his "intent to kill." J.A. 2276. The Prosecution summed up its case as follows: "If you decide that [Martin] made [the] silencer and that the silencer was intended to be used upon the victim then he is guilty." J.A. 2265–66. Carter's testimony played a central role in the Prosecution's closing argument and entire case. Any reasonable jurist would be compelled to find that evidence that successfully impeaches Carter's testimony, at the time touted by the Prosecution as airtight, would be material.

Further, no fairminded jurist could accept the state appellate court's discounting of the concealment of evidence jury instruction simply due to the otherwise "strong evidence of [Martin's] guilt." J.A. 743. That instruction is impossible to square with the suppressed impeachment evidence that contradicts its factual basis, as the CSM report showed that Martin neither researched homemade silencers nor concealed evidence. As the district court correctly noted, the instruction "permitted the jury to infer consciousness of guilt as to all elements of the crime from Carter's testimony regarding destruction of the computer," J.A. 2913, which, again, the forensic report reveals never happened. The removal of this instruction alone may likely have caused one juror to change their mind, as such a fundamental change to the jury's instructions "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434.

We also consider the broader impact that impeaching Carter's testimony would have had on the entirety of each party's case. Such impeachment would have painted the Prosecution's case in an entirely different light. *Cf. Kyles*, 514 U.S. at 441–54; *see also Boss*, 263 F.3d at 745–46. As discussed above, Carter corroborated the testimony of an intoxicated, admitted liar who received a substantial benefit for his testimony, and her testimony also turned Detective Alban's "mere theory" seen in a movie and on YouTube into reality. *See* J.A. 2912–14. As a result, the forensic computer report, through undermining Carter's testimony, would have weakened the testimony of other State witnesses.

Additionally, impeaching Carter's testimony also would have likely pushed the jury toward the Defense. This Court has found that evidence exposing "that a major prosecution witness was testifying falsely" is "likely" to have made the jury "more sympathetic to [the defendant's] entire defense." *Monroe v. Angelone*, 323 F.3d 286, 315 (4th Cir. 2003). Carter's impeachment would have also strengthened the Defense's alternative explanations of the evidence: that the Gatorade bottle was a smoking device, not a silencer, and that Maggie McFadden was responsible for the attempted murder. J.A. 2004, 2072–74, 2087, 2299–2300. Carter's unimpeached testimony cut both arguments at their knees.

First, if Defense counsel had the opportunity at trial to use the forensic computer report to show that Martin had not been researching homemade silencers, it is far more plausible that a juror would believe that the Gatorade bottle served an alternative

purpose, thus explaining away Martin's DNA being present on the bottle. The bottle was found on the opposite side of the couch from where Torok was shot. J.A. 1344–45, 2955. The soot inside the bottle was never tested for gunshot or marijuana residue. J.A. 1783. And the bottle had saliva from three individuals, likely including Torok. J.A. 1997. The State never had an explanation for why Torok's saliva would be found inside the Gatorade bottle given that she never drank Gatorade. J.A. 1262, 1285. Martin did have an explanation—that it was because Torok and Martin had both used the bottle to smoke—but this argument was significantly undercut by Carter's testimony about silencers.[4] A juror may have rightly

---

[4] The State argues that the district court erred in rejecting the state appellate court's factual finding that the Gatorade bottle was a silencer. Pursuant to 28 U.S.C. § 2254(e)(1), "the federal court must assume the state court's factual determinations are correct unless there is clear and convincing evidence to the contrary." *Kelley v. Bohrer*, 93 F.4th 749, 755 (4th Cir. 2024).

The state appellate court wrote that "[t]he Gatorade bottle, which the evidence indicated was used as a silencer for the gun used to shoot the victim, was wrapped in duct tape, with white medical tape underneath" during a discussion of the entirety of the evidence that remained in the absence of Carter's testimony. J.A. 740. The State argues that this is a factual finding, and therefore the district court was required to accept this interpretation of the facts as binding. This is not so.

Habeas courts adopt the "best interpretation" of ambiguous legal or factual findings by state courts. *Kelley*, 93 F.4th at 756. Nothing in the court's discussion indicates that the state appellate court—which was sitting in an appellate posture—was making a factual finding. Further, the materiality analysis turns on what the jury may have concluded if the CSM report had not

questioned Detective Alban's uncorroborated silencer theory had Carter's testimony been impeached with the forensic computer report.

Second, with Carter's testimony called into question, it becomes far more likely that at least one juror would have had reasonable doubt as to whether the true culprit was Maggie McFadden. McFadden, who was also dating Martin at the time, demonstrated extremely erratic and violent behavior. *See* J.A. 2073. As the post-conviction circuit court noted, "McFadden had just as much of a motive, if not more, to get rid of Ms. Torok" than Martin, particularly because Martin "already had . . . several other children out of wedlock" of which his wife was aware and unbothered. J.A. 2440–41. The tape on the bottle was like that from McFadden's house, J.A. 741, and the gun like that seen in McFadden's room, J.A. 2015–16. The Defense's theory that McFadden attempted or solicited Torok's murder after learning Torok was pregnant with her lover's child is substantially stronger in the absence of a link between Martin and silencers. On these facts, any reasonable jurist would find the suppressed report to be material.

---

been suppressed. It would be, arguably, legally improper for the state appellate court to have made factual findings on the evidence while engaging in an inquiry into whether a juror may have come to a different conclusion as to Martin's guilt. Because federal courts are required to give state courts "the benefit of the doubt" and avoid finding legal errors or contradictions when unnecessary, *id.* at 757, we construe the state court's statement as an evidentiary description and not a misapplication of law.

* * *

Carter's testimony fundamentally altered the character of this case. It formed the entire basis for a devastating jury instruction, bolstered the State's weaker witnesses, and undermined the Defense's theories. Applying clearly established Supreme Court precedent to this record, no reasonable jurist could conclude that the suppression of the forensic computer report was immaterial. We therefore affirm the district court's grant of Martin's habeas petition.

V.

Turning now to the conditional order of release, the State challenges the district court's provision of only sixty days for retrial or release. District courts have "broad discretion in conditioning a judgment granting habeas relief." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). Courts of appeals "review the district court's formulation of an appropriate habeas corpus remedy for abuse of discretion." *Douglas v. Workman*, 560 F.3d 1156, 1176 (10th Cir. 2009); *see also Wolfe v. Clarke*, 718 F.3d 277, 284–85 (4th Cir. 2013). The "award of an unconditional writ does not, in and of itself, preclude the authorities from rearresting and retrying a successful habeas petitioner" after the deadline for release expires. *Id.* at 288–89.

The parties provide several cases to illustrate the spectrum of relief in similar habeas cases. The State cites to nearly a dozen cases[5] where courts provided

---

[5] *See, e.g.*, *Herrera v. Collins*, 506 U.S. 390, 403 (1993); *Luna v. Cambra*, 311 F.3d 928, 929 (9th Cir. 2002) (remanding "with instructions to issue the writ of habeas corpus, unless California elects, within 90 days of the issuance of the mandate,

their preferred form of relief: sixty days to decide to retry, or 120 days to complete retrial. *See* Opening Br. at 64–65. These are countered by Martin's similarly extensive number of cases,[6] in which courts provided the same form of relief selected by the district court here. *See* Resp. Br. at 61.

The State argues it is "self-evident that 60 days to retry a decade-old complex attempted murder case such as this is unreasonable," Reply Br. 26. But as conceded at oral argument, the State has provided no

---

to retry [petitioner]," adding that "[a]ny such retrial shall commence within a reasonable time thereafter"); *Norde v. Keane*, 294 F.3d 401, 403 (2d Cir. 2002) (remanding "with instructions to issue the writ unless within sixty days the State elects to retry" the petitioner); *Wilson v. Sec'y, Penn. Dept. of Corr.*, 782 F.3d 110, 117 (3d Cir. 2015) (180 days); *D'Ambrosio v. Bagley*, 656 F.3d 379, 385 (6th Cir. 2011) (180 days); *Woods v. Dugger*, 923 F.2d 1454, 1456 (11th Cir. 1991) (180 days to resentence petitioner); *accord Wansing v. Hargett*, 115 Fed. Appx. 27, 31 (10th Cir. 2004) ("Allowing 120 days for a retrial is a common practice.").

[6] *See, e.g.*, *Arroyo v. Jones*, 685 F.2d 35, 41 (2d Cir. 1982) (affirming district court "decision requiring the State to release or retry [petitioner] for attempted murder within sixty days"); *Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 260 (1978) (affirming 60-day conditional release order); *Foxworth v. Maloney*, 515 F.3d 1, 2 (1st Cir. 2008) (affirming 60-day conditional release order); *Whitehead v. Wainwright*, 609 F.2d 223, 224 (5th Cir. 1980) (affirming 60-day conditional release order but remanding due to unrelated legal error); *Engel v. Buchan*, 710 F.3d 698, 701 (7th Cir. 2013) (discussing 60-day conditional release order); *see also Jones v. Cunningham*, 313 F.2d 347, 353 (4th Cir. 1963) (reversing denial of habeas petition and directing district court to enter a 60-day conditional release order to be further stayed if the State chose to appeal to the Supreme Court).

case in which a district court's sixty-day conditional release order was reversed as an abuse of discretion. The State has failed to show that sixty days is so unreasonable as to constitute an abuse of the district court's broad discretion, especially in light of the many cases cited by Martin granting this exact form of relief.

Further, the State never moved for an extension in the district court, and this Court looks unfavorably upon the failure to do so. *See Wolfe*, 718 F.3d at 287. If it continues to maintain that sixty days is insufficient, the State will have the opportunity to seek an extension from the district court on remand.

Accordingly, we find that the conditional release order was not an abuse of the district court's discretion.

VI.

For the foregoing reasons, the judgment is

*AFFIRMED.*

NIEMEYER, Circuit Judge, dissenting:

A jury in Anne Arundel County, Maryland, convicted Charles Martin of the attempted murder of his pregnant girlfriend, allegedly because she refused to have an abortion. The girlfriend, Jodi Torok, told Martin that she would have the baby and sue him for child support. Under the State's theory, a confederate of Martin used Martin's .380 caliber handgun, which had been fitted with a silencer fabricated by Martin from a Gatorade bottle, and shot Torok in the head at Martin's instruction. The Gatorade bottle had been attached to the barrel of the gun through which the gun would fire, thus muffling its sound. Torok narrowly survived with her life.

The critical evidence at trial linking Martin to the assault was the Gatorade bottle, which was found in Torok's apartment a few feet away from her as she lay unconscious on the floor. Its mouth was wrapped with tape pressed into the rectangular shape of a handgun's barrel, and the hole in the bottom of the bottle projected outward, as would be created by an exiting bullet. The bottle contained DNA matching Martin's and, according to eyewitness testimony, Martin participated in fabricating the silencer. The State asked the jury to find that Martin "was involved in the shooting of Jodi Torok because he helped make that silencer." And the jury so found.

After Martin was convicted, the state court sentenced him to life imprisonment.

Martin later filed a petition in state court for postconviction relief, arguing, among other things, that the State committed a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose to

him a police forensic computer analysis report, which indicated that the police had in their custody a laptop computer registered to "CSM" (College of Southern Maryland), where Martin was formerly employed. The report indicated that the police searched the laptop for incriminating evidence but found nothing of "investigative value." Martin claimed that this was important because the lack of relevant evidence on the computer contradicted the testimony of government witness Sheri Carter, who stated that she had seen Martin "looking up gun silencers" on a computer that he had gotten from a former employer and that Martin later took the computer from her apartment and told her that "he got rid of it." The forensic report indicated that when an analyst searched for the term "silencer" and other key terms on the CSM laptop in police possession, "no data of investigative value" was found. But the report also showed that the laptop subject to the report had "last shut down" on May 18, 2005, more than three years before Torok was shot. Nonetheless, the State conceded that the report should have been disclosed to Martin and had not been. It argued, however, that while the report may have provided potential impeachment evidence, the evidence was not material because even if Carter's testimony had been totally discredited, the other evidence of Martin's culpability was overwhelming. The state trial court, nonetheless, agreed with Martin and granted his petition for postconviction relief.

On the State's appeal, the Appellate Court of Maryland reviewed the postconviction court's ruling in detail and concluded that the undisclosed evidence was not material, thus reinstating the judgment of

conviction. *State v. Martin*, No. 3207, 2019 WL 4567473 (Md. Ct. Spec. App. Sept. 20, 2019). The court concluded that there was no reasonable probability that the result of the trial would have been different had the report been disclosed. First, it noted that the evidence indicated that the Gatorade bottle found near Torok had been used as a silencer, rather than as a smoking device, as Martin had theorized. *Id.* at *8. Most significantly, the State introduced the bottle itself into evidence, allowing the jury to see how the taped circular mouth of the bottle had been molded into the rectangular shape of a gun barrel and that the sides of the small hole in the bottom of the bottle projected outward, indicating that the hole had been formed by something passing through the bottle. And there was also the evidence that the bottle was recovered in Torok's apartment a few feet from where Torok was found lying, even though Torok's roommate testified (1) that neither she nor Torok drank Gatorade or kept it in the house; (2) that she and Torok had recently cleaned the apartment and would never have left trash lying around; and (3) that the bottle had not been there when she left for work that morning.

The Appellate Court of Maryland also recognized that "the silencer/Gatorade bottle" had been "wrapped in duct tape, with white medical tape underneath." *Martin*, 2019 WL 4567473, at *8. And on the white medical tape, investigators recovered a human hair fragment with a mitochondrial DNA profile that matched Martin's profile. Thus, as the Appellate Court explained, Martin "was in the 0.06 percent of North Americans who could have left [the] hair" recovered from in between the two layers of tape that

had been wrapped around the bottle's mouth. *Id.* The court also pointed to other evidence linking Martin to the bottle that was provided by Michael Bradley's testimony. Bradley stated that approximately two hours before the shooting, he saw his brother Frank go into the kitchen of their sister Maggie McFadden's house while holding some white medical tape; that he then saw Frank and Martin go upstairs to McFadden's bedroom; and that he then saw Frank run downstairs for a Gatorade bottle before returning to the bedroom, where Martin remained. *See id.* at *9. In addition, the Appellate Court noted that the white medical tape on the bottle had the exact same characteristics as a roll of tape recovered from McFadden's house, such that it could have come from that particular roll. *Id.* In addition, there was Bradley's testimony that Martin and Jerry Burks left the house shortly before 2:00 p.m. and that when they returned at some point later that afternoon, Martin handed Frank Bradley a brown paper bag and told him to "get rid of" it. *Id.* That testimony, in turn, gave extra meaning to the State's evidence that, at the time of the shooting, Martin owned a .380 caliber semi-automatic handgun, which was made by one of the manufacturers that could have made the .380 handgun that was used to shoot Torok, but that Martin's handgun was never found. *Id.*

After reviewing the collective import of all of this evidence, the Maryland Appellate Court reasonably concluded that Martin had not established that there was "a reasonable probability that the result of his trial would have been different" had the forensic computer report been disclosed to him before trial. *Martin*, 2019 WL 4567473, at *9.

Despite the Appellate Court's comprehensive decision analyzing the evidence in detail, the district court below disagreed with the state court's conclusion and conducted its own factual analysis. Indeed, rather than extending to the state court's decision the proper deference required by 28 U.S.C. § 2254, the district court misconstrued the state decision, reweighed the evidence in a manner that was contrary to the record and the state court's reasonable assessment of it, and found that the state court had failed to conduct a proper *Brady* analysis, even though it acknowledged that the state court correctly set forth the *Brady* principles. And even as the district court cited the § 2254 restrictions on its review of state proceedings, it nonetheless proceeded to violate those very restrictions.

The majority now affirms, pursuing the same erroneous course committed by the district court — conducting a de novo review of the evidence and making findings — rather than assessing whether the state court decision resulted from an "extreme malfunction" of the state judicial system such that all "fairminded jurists" would agree "that the state court's decision conflicted" with Supreme Court precedents. *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (cleaned up). While the majority opinion reasonably recognizes that the undisclosed forensic computer report could have been used to impeach Carter's testimony — a fact that was also acknowledged by the state court — the majority goes on to make its own finding, contrary to the evidence, that Carter's testimony "was by far the strongest" evidence inculpating Martin, disregarding the bottle. *Supra* at [27a]. It also states, again making its own

finding, that "Martin's DNA on the Gatorade bottle [was] consistent with entirely innocuous explanations, such as simply drinking or smoking from it," which are inconsistent with the evidence. *Id.* Resting on its own limited analysis of a few facts, the majority affirms the district court's grant of a new trial. And to do so, it had to overlook the many facts presented to the jury that the Maryland Appellate Court recognized as directly inculpating Martin, even without Carter's testimony. The majority's opinion simply does not recognize that *the bottle* was the best evidence linking Martin to the attempted murder and that the bottle had clearly been used as a silencer. One does not drink from or smoke with a bottle containing layers of tape. Moreover, the tape was multi-layered and shaped like the barrel of a .380 caliber handgun. The bottle also had a hole in its bottom created by something like a bullet fired *through* the bottle. And the bottle had Martin's DNA in between the layers of tape, directly indicating his involvement in the fabrication of the bottle as a silencer.

In short, the majority's opinion fails to heed the limitations imposed on it by 28 U.S.C. § 2254.

Section 2254 provides a most narrow review by federal courts of state court criminal proceedings, well honoring the distinct sovereignty of the States by authorizing interference only when the state process *clearly* tramples well-established federal constitutional rights. It provides that a federal court "shall not" grant a writ of habeas corpus "unless" the earlier State-court decision (1) "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) "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). And the Supreme Court has made emphatically clear that this standard is to be understood as "difficult to meet." *Harrington*, 562 U.S. at 102. For our system of dual sovereignty to retain its vitality, as the Supreme Court instructs, state courts must remain "the principal forum" in which "constitutional challenges to state convictions" are asserted and adjudicated. *Id.* at 103. Consequently, as the *Harrington* Court recognized, federal habeas review of state criminal convictions comes at a cost, as it "frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* (quoting *Calderon v. Thompson*, 523 U.S. 538, 555–56 (1998)). Indeed, as the Supreme Court has characterized it, a federal court's grant of habeas relief to a person convicted in State court "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Id.* (cleaned up). Thus, the Court has gone to great lengths in defining the limited circumstances for granting habeas pursuant to § 2254.

It has explained that federal habeas relief under § 2254 is extended to state prisoners only in those extraordinary cases where there has been an "extreme malfunction in the state criminal justice system." *Harrington*, 562 U.S. at 102 (cleaned up). To this end, "§ 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings," but in lieu of a total ban, it limits federal courts' authority to issue the writ

to cases where all "fairminded jurists" would agree "that the state court's decision conflicts with [the Supreme] Court's precedents." *Id.* Thus, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being 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 fairminded disagreement." *Id.* at 103 (emphasis added); *see also, e.g.*, *Mays v. Hines*, 592 U.S. 385, 391 (2021) (per curiam) ("The term 'unreasonable' [in § 2254(d)] refers not to 'ordinary error' or even to circumstances where the petitioner offers 'a strong case for relief,' but rather to 'extreme malfunctions in the state criminal justice system.' In other words, a federal court may intrude on a State's 'sovereign power to punish offenders' only when a decision 'was so lacking in justification beyond any possibility for fairminded disagreement[.]'" (cleaned up)).

The majority opinion has simply not honored these restrictions, as it has conducted a reanalysis of some of the facts, ignored others, and never deferred to those reasonably considered by the state court. While the Appellate Court of Maryland acknowledged that the undisclosed forensic report should have been disclosed to enable Martin to attempt to impeach Carter's testimony, it concluded that the *Brady* violation was not material — that there was not a reasonable probability that the outcome would have been different even if Carter's testimony *were entirely excluded*. This was a reasoned conclusion.

Moreover, for further context, it is far from clear that the jury would have taken the undisclosed report to prove that Carter was lying. Instead, it could have concluded that Martin had two different computers from the College of Southern Maryland, an older one that was in his home and a newer one that he had previously kept at Carter's apartment. Or it could have concluded that the laptop that the police recovered was the one Carter referenced in her testimony, but that the fact that the last dates shown were from 2005 indicated that its more recent data had been lost, including its data from the period shortly before the shooting. Either way, had the report been disclosed, it might well have had no impact on the jury's assessment of Carter's credibility.

In short, the Appellate Court of Maryland reasonably concluded that Martin failed to establish that there was "a reasonable probability that the result of his trial would have been different" had the forensic computer report been disclosed. *Martin*, 2019 WL 4567473, at *9. And even if that issue were debatable, the state court's holding still was not "so lacking in justification that [it] was an error . . . beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Yet, in a decision defying the established standards and bereft of judicial humility, the majority concludes that "no reasonable jurist could conclude that the suppression of the forensic computer report was immaterial." *Supra* at [33a].

I do not agree with this assessment, and therefore I respectfully dissent.

## APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

| | |
|---|---|
| CHARLES BRANDON MARTIN<br>Petitioner<br>v.<br>JEFFREY NINES and THE ATTORNEY GENERAL OF THE STATE OF MARYLAND<br>Respondents | Civil Action No. JRR-20-2602 |

**MEMORANDUM OPINION**

Petitioner Charles Brandon Martin filed the instant Petition For Writ of Habeas Corpus (ECF Nos. 1, 2, 21, 30; the "Petition") against Respondents Warden Jeffrey Nines and Maryland Attorney General. Respondents. The Petition was originally filed by Martin *pro se*. Following his engagement of counsel, Martin's retained counsel submitted a supplemental petition (ECF No. 2), which concedes that certain of Martin's claims in his *pro se* Petition were unexhausted and clarifies that Martin proceeds on only two claims for relief. ECF No. 21. On February 19, 2021, new/substitute counsel appeared on behalf of Martin. ECF No. 24. New counsel sought leave to file an amended brief, which asserts five claims for

relief, including the two claims in previous counsel's supplemental brief. ECF Nos. 25, 28. On April 19, 2021, the Court granted Martin leave to file his amended brief, limited to the five claims raised in the amended brief. ECF No. 29. These five claims, detailed below, are before the Court for disposition.[1]

No hearing is required. *See* Rule 8(a), *Rules Governing Section 2254 Cases in the United States District Courts* and Local Rule 105.6 (D. Md. 2021); *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 that follow, the Petition as to Claim One is GRANTED. A certificate of appealability shall not issue on the denial of Claims Two, Three, Four, and Five.

## I. BACKGROUND

### A. The Trial

Martin was charged on April 3, 2009, in Anne Arundel County, Maryland, in a ten-count indictment related to the attempted murder of Jodi Torok. ECF No. 5-2 at 73-77. On April 24, 2009, Martin filed a demand for a bill of particulars, seeking to find out, *inter alia*, whether the state intended to prove that he acted as a principle to the attempted first degree murder in the first or second degree. ECF No. 5-1 at 78-80. The trial court denied Martin's motion at a hearing on October 14, 2009, ruling there was no

---

[1] Pursuant to Order of April 24, 2023 (ECF No. 35), Respondents supplemented the record with Exhibit "E" from the postconviction hearing (ECF No. 36-1), which is discussed in detail, *infra*, in connection with Martin's Ground One for relief.

authority for the proposition that the state was required to advise the defense of its theory of the case in advance of trial. ECF No. 5-3 at 10-27.

A jury trial was held from April 27 through May 5, 2010. The Appellate Court of Maryland summarized the facts adduced at trial as follows:

> October 27, 2008, Jodi Lynne Torok, the victim, was found at her home in Crofton, Maryland, with a gunshot wound to her head. Having survived that wound, the victim testified, at the trial below, that she had been in a romantic relationship with Martin, who was married to someone else, and that about eight or nine weeks before the shooting, she had become pregnant with his child. After the victim informed Martin of her condition, he angrily demanded that she obtain an abortion. Although she had, at first, agreed to do so, she later changed her mind and decided to have the baby. Upon informing Martin of her change of mind, the victim advised him of her intention "to go to court and take him for child support." Predictably, that advisement led to cooling of their relationship.
>
> Subsequently, on the day of the shooting, at about 3:00 pm, the victim was talking on the phone, at her home, with a close friend, Blair Wolfe,[4] when a man, purporting to be a salesman, knocked on her front door. She then ended the call to respond to the "salesman," but thereafter never called Ms. Wolfe back or answered any of Wolfe's subsequent telephone calls. Growing increasingly concerned but

unable to take any action on her own,[5] Ms. Wolfe telephoned Jessica Higgs, the victim's roommate, and requested that she leave work and return home to make sure that the victim was safe. Upon arriving at the residence that she shared with the victim, Ms. Higgs found the front door unlocked and the victim lying on the foyer, unconscious and bleeding from a gunshot wound to her head. Higgs immediately called "911."

When the first police officer arrived at the victim's residence, he secured the scene. Then, upon entering the residence, he found the victim, Ms. Torok, "laying in the doorway," "fully clothed," still breathing, but unresponsive. There were no signs of forcible entry or that the victim's personal property had been disturbed.

When paramedics arrived at the scene, they transported the victim to the Shock Trauma Center at the University of Maryland Hospital in Baltimore City, where she remained for nearly a month. As a result of the gunshot wound, the victim's pregnancy was terminated, and she suffered severe and disabling injuries. Neither during that time nor thereafter could she recall the events that took place, from the end of her telephone conversation with Ms. Wolfe on October 27th until Thanksgiving, one month later. The evidence recovered by the police at the scene of the shooting included a Gatorade bottle, which appeared to be fashioned into a home-made silencer;[6] a spent

projectile as well as a spent shell casing; and the victim's Blackberry cell phone.

**Gatorade bottle/silencer**

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

The victim testified that neither she nor Ms. Higgs drank Gatorade, but that Martin did and often.[9] Martin's fondness for Gatorade was later confirmed by the officer who drove him to the Anne Arundel police station, who testified that, on the way to the station, he and Martin stopped at a convenience store, where Martin purchased a bottle of Gatorade to drink. Granted immunity from prosecution for the shooting and possibly for other unrelated charges, Michael Bradley testified that, on the day of the shooting, he; his brother, Frank Bradley; Martin; and Jerry Burks, an acquaintance of Martin, were together at Maggie McFadden's house "about noon" and that he observed Frank Bradley carrying "some white . . . medical tape" and a Gatorade bottle upstairs to McFadden's bedroom, where he was joined by Martin. Then, according to Michael Bradley, Martin and Burks left together, "approximately 1:30, 2:00" p.m., and returned after 3:00 pm. but before 6:30 pm. the same day.[10]

Finally, Sheri Carter, one of Martin's former girlfriends,[11] testified that Martin,

approximately one month before the shooting, while at her residence, used a computer to conduct internet research on how to assemble a home-made silencer. She further stated that, during the first week of November 2008, approximately one week after the shooting and shortly after Martin had been questioned by police, Martin took the computer from her apartment, telling her "that [they] had looked up so many crazy things on the internet that in case [Carter's] apartment got searched [Martin] didn't want it found there." Martin, in her words, then "got rid of" the computer.

**Ballistic evidence**

The bullet recovered by police, a .380 caliber bullet, and the shell casing that was found, could have been fired, according to a State's expert witness, from a semi—automatic firearm. Such a firearm could have been manufactured by any one of sixteen different manufacturers, which was consistent with Martin's purchase, in 2003, of two .380 caliber semi—automatic handguns made by Bryco Arms, one of those sixteen manufacturers."[12] Moreover, Sheri Carter testified that, in September and October of 2008, the time period just before the shooting, she had observed Martin carrying a "small, silver, [black-handled], semi-automatic" handgun. The firearm itself was never found. The testimony of Michael Bradley suggested why that was so. According to Michael Bradley, when Martin returned to McFadden's home the

evening of the shooting, he saw Martin give a brown paper bag to Frank Bradley and tell Bradley to "get rid of this."

**Victim 's cell phone**

Finally, the last of the four items found at the victim's residence was her Blackberry cell phone. Text messages extracted from that phone by police confirmed that Martin had exchanged several text messages with the victim on the day of the shooting.[13]

**Martin 's statement**

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

[4] At other parts of the record, her name is spelled "Blaire Wolfe." [The Appellate Court of Maryland] adopt[ed]

the spelling used in the State's discovery disclosure. Ms. Wolfe did not testify at Martin's trial.

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

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

Martin is an African-American male.

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

DNA testing of a swab of saliva taken from the mouth of the bottle revealed that it contained "a mixture of DNA

from at least three individuals," at least one of whom was female and another a male. The test results excluded "approximately 94 percent of the Caucasian population," as well as "approximately 96 percent of the African—American population," but among the males, who could not be excluded, was Martin. And, among the females, who could not be excluded, was the victim, Jodi Torok.

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

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

[11] In addition to his wife, Martin had at least three girlfriends with whom he maintained intimate relations.

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

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

ECF No. 5-1 at 211-217. Before the case was submitted to the jury on May 4, 2010, the state dismissed all counts, except attempted first degree murder and solicitation to commit murder. The jury found Martin guilty of attempted first degree murder, but not guilty of solicitation to commit murder. ECF No. 5-10 at 4. Martin was sentenced on December 21, 2010, to life imprisonment. ECF No. 5-13 at 84.

**B. Direct Appeal**

Martin noted a direct appeal to the Appellate Court of Maryland raising seven errors. Relevant to his federal habeas petition, Martin contended that the trial court erred by failing to provide him with a bill of particulars and that he was denied due process when the state changed its theory of the case mid-trial. Particularly, Martin argued that he was prejudiced by the denial of a bill of particulars because his defense was based on an alibi that became worthless when the state changed its theory to accessory before the fact during the trial. ECF 5-1 No. at 120. The Appellate Court of Maryland affirmed Martin's conviction on July 30, 2014. *Id.* at 209-259. Martin's petition for certiorari to the Supreme Court of Maryland was denied on November 20, 2014. *Id.* at 261-275; 284.

### C. Postconviction Proceedings

Martin filed a *pro se* petition for postconviction relief on September 18, 2015, which he amended on October 15, 2015. *Id.* at 285-307. Martin's counsel filed a supplemental petition on January 6, 2017. *Id.* at 308-334. Pertinent to these proceedings, Martin asserted: the state suppressed a laptop computer forensic report in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) (ECF No. 5-1 at 329-30); trial counsel was ineffective for failing to object to impermissible compound voir dire questions (*Id.* at 323-24); trial counsel was ineffective for failing to object to a burden-shifting argument in the state's closing (*Id.* at 327-28); and he was denied due process when the state changed its theory of the case mid-trial. *Id.* at 330-331.

The postconviction court held a hearing on June 23, 2017. ECF No. 5-14. Charles Brandon Martin, his trial counsel, Edward Stamm, and his mother, Doris Martin testified. The state called Detective Daniel Giambra of the Anne Arundel digital forensics unit, who examined the laptop related to Martin's *Brady* claim. The postconviction court issued an opinion on October 5, 2018, granting postconviction relief on three separate issues and ordering a new trial. ECF No. 5-1 at 372-403. The postconviction court found that the state suppressed exculpatory and impeaching evidence that undermined confidence in the outcome of the trial when it failed to produce a forensic report analyzing a laptop that was seized from Martin's residence. *Id.* at 374-79. The postconviction court also found that Martin's trial counsel was ineffective for failing to object to

impermissible compound voir dire questions and failing to object to the prosecution's burden shifting arguments during closing statements.[2] *Id.* at 387-90; 393-96.

The Appellate Court of Maryland granted the state's application for leave to appeal the postconviction court's order. *Id.* at 458-59. On September 20, 2019, the Appellate Court of Maryland reversed the trial court, *in toto*, finding that the *Brady* claim failed because the evidence was not material and the ineffective assistance of counsel claims failed because Martin could not show deficient performance or prejudice. *Id.* at 618-60. The Supreme Court of Maryland denied Martin's petition for certiorari on January 24, 2020. *Id.* at 707. The United States Supreme Court denied *certiorari* on June 1, 2020. *Id.* at 708-41; *Martin v. Maryland*, 140 S. Ct. 2836 (2020).

**D. The Federal Petition**

Martin filed his federal petition on September 9, 2020. ECF No. 1. As discussed above, five claims are before the Court: (1) the state violated *Brady v. Maryland* when it suppressed the forensic laptop report; (2) trial counsel was ineffective because he failed to object to compound voir dire questions; (3) trial counsel was ineffective because he failed to object to the state's burden-shifting closing argument; (4) the trial court erred when it failed to require the state to provide a bill of particulars; and (5) the state

---

[2] The trial court also found that Martin's trial counsel was ineffective for failing to file a motion to challenge his sentence before a three-judge panel but found the issue moot considering a new trial was granted. ECF No. 5-1 at 396-97.

denied Martin due process when it changed its theory of the case mid-trial.

## II. PROCEDURAL DEFAULT

Procedural default occurs when the petitioner failed to present the claim to the highest state court with jurisdiction to hear it, and the state courts would now find that the petitioner cannot assert that claim. *Mickens v. Taylor*, 240 F.3d 348, 356 (4th Cir. 2001); *Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998). A procedural default also may occur where a state court declines "to consider the merits [of a claim] on the basis of an adequate and independent state procedural rule." *Yeatts v. Angelone*, 166 F.3d 255, 260 (4th Cir. 1999); *see also Gray v. Zook*, 806 F.3d 783, 798 (4th Cir. 2015) ("When a petitioner fails to comply with state procedural rules and a state court dismisses a claim on those grounds, the claim is procedurally defaulted."). As the United States Court of Appeals for the Fourth Circuit has explained, "if a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the habeas petitioner has procedurally defaulted his federal habeas claim." *Breard*, 134 F.3d at 619 (citing *Coleman*, 501 U.S. at 731-32).

For a person convicted of a criminal offense in Maryland, exhaustion may be accomplished either on direct appeal or in post-conviction proceedings. To exhaust a claim on direct appeal in non-capital cases, a defendant must assert the claim in an appeal to the Appellate Court of Maryland and then to the Supreme Court of Maryland by way of a petition for a writ of

certiorari. *See* MD. CODE ANN., CTS. & JUD. PROC. §§ 12-201, 12-301. To exhaust a claim through post-conviction proceedings, a defendant must assert the claim in a petition filed in the Circuit Court in which the inmate was convicted within 10 years of the date of sentencing. See MD. CODE ANN., CRIM. PROC. §§ 7-101–7-103. After a decision on a post-conviction petition, further review is available through an application for leave to appeal filed with the Appellate Court of Maryland. *Id.* § 7-109. If the Appellate Court of Maryland denies the application, there is no further review available, and the claim is exhausted. MD. CODE ANN., CTS. & JUD. PROC. § 12-202).

A procedural default occurs when a habeas petitioner fails to exhaust such available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Breard*, 134 F.3d at 619 (quoting *Coleman*, 501 U.S. at 735 n.1). Maryland law does not permit a second and successive state petition for post-conviction relief. *See* MD. CODE ANN., CRIM. PROC. § 7-103(a).

Respondents contend that Martin's Claim Five, arguing that his due process rights were violated because the state changed its theory mid-trial, is procedurally defaulted. Respondents cite to language in the Appellate Court of Maryland's opinion on direct appeal noting that Martin did not argue that he was statutorily entitled to a bill of particulars on the charges for which he was acquitted or *nolle prossed*, including assault and reckless endangerment for the proposition that Claim Five was dismissed on

independent state grounds.[3] ECF No. 31 at 50-51. The ambiguous language cited by Respondents in the Appellate Court of Maryland's opinion does not qualify as an independent and adequate state ground sufficient to procedurally default Claim Five because it did not "clearly and expressly" dismiss the claim on state grounds. It appears as though the appeals court was acknowledging that Martin was not arguing a statutory entitlement to a bill of particulars because the charges entitling him to same had been dropped.

In any event, the record reflects that Martin's federal habeas claim was raised and addressed on direct appeal; namely that he was denied a bill of particulars on his *principle to attempted first degree murder* charge and he was denied due process because the state changed its theory of prosecution mid-trial. *Id.* at 230-242. Respondents' argument that this claim is unexhausted and procedurally defaulted

---

[3] Respondents rely on the Appellant Court of Maryland's statement, "Martin does not, however, rely upon Criminal Law § 3-206(b) or (d) and, in fact, makes no mention of those statutory subsections in either his initial or reply brief. Instead, his dispute with the State's response to his demand for a bill of particulars focuses specifically and only on the State's theory of his criminal agency with respect to the attempted murder charges. We further presume that that is because the assault and reckless endangerment charges were nol prossed by the State, or, as in the case of first-degree assault, subsumed into the greater offense, attempted first-degree murder. Moreover, the conspiracy charge was also [nolle] prossed and thus, despite being the focal point of much of the argument below, is no longer a part of this case. Furthermore, Martin was acquitted of the solicitation charge, extinguishing its relevance and removing it from further consideration."

is without merit; the Court will therefore address this claim on the merits.

## III. 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.

**IV. INEFFECTIVE ASSISTANCE OF COUNSEL**

The Sixth Amendment to the Constitution guarantees a criminal defendant the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see also Buck v. Davis*, 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 recently reiterated 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. Judicial scrutiny of counsel's performance must be "'highly deferential'" and not based on hindsight. *Stokes v. Stirling*, 10 F.4th 236, 246 (4th Cir. 2021) (citing *Strickland*, 466 U.S. at 689).

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.

## V. ANALYSIS

### A. Claim One- Violation of *Brady v. Maryland*

The state's theory at trial was that Martin was an accessory before the fact because he made or assisted in making a homemade gun silencer out of a Gatorade bottle that was used in the attempted murder of Jodi Torok. To prove its theory, the state offered testimony regarding law enforcement's discovery of the Gatorade bottle, lay testimony tying Martin to the fashioning of the Gatorade bottle as a silencer, and expert ballistics, DNA, and forensics testimony.

Sergeant Richard Alban testified that he discovered the Gatorade bottle at the crime scene near the couch. ECF No. 5-5 at 125-26. When the prosecutor asked Detective Alban what the bottle reminded him of, he responded:

> It -- in watching movies -- I like action movies - and I have seen a movie where Steven Seagal — I hate to—my wife would kill me for saying this—but had a bottle. He used a two-liter plastic bottle that he attached to the end of a weapon and he fired a projectile through it in order to—he was going around stealth. He was not trying to get caught by — there was a bunch of bad guys looking for him and he used the two-liter bottle to deaden the noise of the -- of his weapon being fired, and I also saw stuff on YouTube where they show you how to make silencers out of plastic bottles and other items.

*Id.* at 128.

On cross, defense counsel asked Sergeant Alban whether he was aware that Gatorade bottles could be used as marijuana bongs, and he acknowledged that it would not surprise him that a Google search on creating one would render 300,000 hits. *Id.* at 137. Detective Alban was the first witness at trial to suggest that the Gatorade bottle was a homemade silencer. No expert witness was called by the state to substantiate Alban's theory or confirm the possibility that the bottle could have been used in such a manner.

Anne Arundel County crime scene technician Rebecca Caliendo testified that she removed and examined duct tape from the mouth of the Gatorade

bottle. ECF No. 5-1 at 173-174. She conducted no testing on the bottle or the tape, including testing for gunshot residue or marijuana. *Id.* at 178. She did see something on the tape that appeared to be hair or fiber. *Id.* at 179. Anne Arundel crime scene technician Craig Robinson removed white tape from the Gatorade bottle and submitted it to David Exline at the RJ Lee Group lab for trace analysis. ECF No. 5-6 at 9-10. Robinson did not test the bottle for gunshot residue or marijuana. *Id.* at 28-29. Oral swabs, which were taken from Martin by Kimberly Morisette, were sent to RJ Lee Group and Mitotyping Technologies for analysis. *Id.* at 19; 64-67.

David Exline of RJ Lee Group testified as an expert in forensic examination. *Id.* at 72. He received two pieces of white medical tape on November 7, 2008. *Id.* at 84. Three fibrous trace materials were removed from the tape. *Id.* at 84. One was animal hair and one was human hair. *Id.* at 85-86. The human hair, 4 millimeters long, was transferred to Mitotyping Technologies for mitochondrial DNA testing on March 21, 2009. *Id.* at 91. Exline testified that the white tape found on the mouth of the Gatorade bottle had similar characteristics to the white tape located during execution of the search warrant of 2572 Interchrist [sic] Place, Waldorf Maryland (Maggie McFarland's [sic] residence). *Id.* at 97-101; ECF No. 5-6 at 129-130. Crime scene technician Jay Potter collected the white tape from a dresser drawer in a second-floor bedroom. *Id.*

Dr. Terry Melton of Mitotyping Technologies testified about the mitochondrial DNA testing that was performed on the hair received from RJ Lee

Group collected from the white medical tape. ECF No. 5-7 at 78-120; ECF No. 5-8 at 14-45. Dr. Melton was qualified as an expert in mitochondrial DNA and explained that nuclear DNA is found in the center of the cell and contains genetic information from both parents, whereas mitochondrial DNA is found outside of the nucleus of the cell and only contains genetic information from the maternal line. *Id.* at 94-96. Dr. Melton further explained, "when we say we have a mitochondrial DNA test going on we're looking to see if that person could have left that sample, but we can never say for sure they did leave that sample." *Id.* at 97.

Dr. Melton testified that she received the hair fragment and the saliva swab from Martin and was able to develop a mitochondrial DNA profile on both samples. *Id.* at 108-113. Dr. Melton concluded that the profiles were the same, meaning that Martin and his maternal relatives could not be excluded as the contributors of the hair located on the white medical tape. *Id.* at 113. Dr. Melton further added that 99.94% of North Americans would not have the mitochondrial DNA profile found in the samples. *Id.* at 114. On cross-examination, Dr. Melton acknowledged that 180,000 people in the United States would have the same profile and 30,000 people in Maryland. *Id.* at 24-25.

Anne Arundel County senior forensic chemist, Sarah Chenowith, testified about the nuclear DNA testing performed on the saliva found on the mouth of the Gatorade bottle. ECF No. 5-8 at 45-83. Chenowith found a DNA mixture on the mouth of the bottle that was from three individuals, including one female and

one male. *Id.* at 59. Chenowith testified that she could not rule out Martin as a contributor to the DNA on the bottle, but neither could she rule out the victim as a contributor. *Id.* at 73-75. She was, however, able to rule out five other individuals whose DNA was submitted for comparison. *Id.* at 75;80.

Arnold Esposito, an expert in firearms, ammunition, and toolmark identification, testified that he examined the shell casing collected from the crime scene. ECF No. 5-6 at 181-215. He concluded that the gun that fired the bullet could have come from sixteen different manufacturers, one of which was a .380 caliber Jennings. *Id.* at 194, 198. Esposito testified that Martin purchased two .380 Jennings firearms on March 14, 2003. *Id.* at 197-198.

Michael William Bradley testified that he knew Martin because Martin dated his sister Maggie McFadden. ECF No. 5-8 at 86-87. Bradley lived at Maggie's house with his brother, Frank Bradley, and Maggie's daughter, Nanna McFadden. *Id.* at 89. Bradley testified that in October of 2008, Martin frequently visited and stayed over at the house. *Id.* at 89. Around the fall of 2008, Bradley testified that he saw Martin with a handgun in Maggie's room. *Id.* at 91-96. Bradley testified that, the day of the shooting, he saw Martin enter the residence around noon, followed by Jerry Burks; and that Frank was in the house drinking somewhere. *Id.* at 97-99.

Bradley testified that they all sat around smoking marijuana; that Frank, Jerry Burks, and Martin were in the house; and that he saw Jerry and Martin in the kitchen rolling blunts. *Id.* at 100. They smoked five or six blunts that day; "[w]e just kept smoking and

smoking." *Id.* He also testified that he saw Frank come down the steps with white medical tape, and that he saw Frank and Brandon go upstairs to Maggie's room; and then saw Frank run back upstairs with a Gatorade bottle. *Id.* at 100-101. When he saw Frank with the Gatorade bottle, Martin was in Maggie's room and Frank went into Maggie's room with the bottle. *Id.* Bradley further testified that later, Burks and Martin left, and when they returned, Bradley saw Martin hand Burks a brown paper bag and said, "get rid of this." *Id.* at 116-117. Bradley never testified that he saw Martin with either the white medical tape or the Gatorade bottle.

On cross-examination Bradley admitted that he received an immunity agreement from the State of Maryland in exchange for his testimony. *Id.* at 117. The agreement dropped his fugitive from justice warrant and immunized him from any criminal liability in connection with Jodi Torok's attempted murder. *Id.* at 118-119. While it is unclear from Bradley's testimony whether he understood this term, the agreement provided a benefit to Bradley on pending obstruction of justice charges in New Jersey. *Id.* at 127-135. Bradley also admitted on cross-examination that he pled guilty to obstruction of justice because he lied to the police. *Id.* at 123.

Sherri Carter testified that she engaged in an intimate relationship with Martin for three years, starting in December of 2005, and that she never knew Martin was married. *Id.* at 140-42. Carter testified further that Martin kept a computer at her house while they were dating and that she saw Martin looking up gun silencers on the computer

around the end of September, beginning of October in 2008. *Id.* Carter described the interaction as follows:

> A: We were at -- I think we were watching Law and Order on TV and we had a conversation about how they were illegal and only policemen were allowed to buy them, and I remember it because I didn't know that at the time.
>
> Q: Did you ask him why he was looking at silencers?
>
> A: No.
>
> Q: What was his reaction when you asked him about what he was looking at on the internet that day?
>
> A: He didn't like it when I looked over his shoulder and looked at what he was looking up online and generally he would tell me kind of like to stop looking over what he was doing.
>
> Q: Do you still have the computer that he was using that day to look at silencers on the internet?
>
> A: No.
>
> Q: Was that his computer or your computer?
>
> A: It was his computer.
>
> Q: Did you ever use it?
>
> A: Yes.
>
> Q: What was unique about that computer?

A: It was — he told me that he had got it from a place that he used to work and we didn't have administrative rights so you couldn't make any changes to the computer because we didn't have the password log in. So you couldn't download anything, you couldn't basically alter the computer.

Q: What happened to that computer?

A: He took it from my apartment.

Q: Did you ask him about that?

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

Q: Did he say what he did with it?

A: He said he got rid of it.

Q: When was this?

A: It was the first week in November 2008.

*Id.* at 143-144.

Physical evidence presented at trial tied Martin to the Gatorade bottle; however, the only trial evidence that established that Martin intended to fashion a Gatorade bottle into a homemade silencer was Sherri Carter's internet search testimony. Carter's testimony is the only evidence suggesting that the Gatorade bottle was, in fact, used as homemade silencer in the attempted murder of Jodi Torok.

After Martin's conviction for attempted first degree murder based on accessory before the fact, his

mother, Dorris Martin, sent a public records request to the police for their entire file. ECF No. 5-14 at 83-84. The request yielded a never produced computer forensics report. ECF No. 36-1. Martin based his postconviction *Brady v. Maryland* claim on the content of this document.

At the postconviction hearing, held on June 23, 2017, Charles Brandon Martin testified that his former employer, the College of Southern Maryland (CSM), gave him one laptop, and that during the time he knew Sherri Carter, he used it. ECF No. 5-14 at 98-99. Martin testified further that he never saw the computer forensic report received in the public record request before trial. *Id.* The report was entered in evidence as Exhibit "E."

Exhibit "E" shows that lead investigator Detective Mike Regan requested forensic analysis of five computers seized from Martin's residence. Detective J.M. Knisley conducted the analysis and prepared the report. Of the five computers seized, three were desktops and two were laptops. ECF No. 36-1. A Gateway laptop was examined, showing the registered owner as "CSM" and the last login of May 19, 2005. *Id.* at 5-6. The report indicates analysis yielded negative results for the following search terms: "handgun," "Gatorade," "silencer," "contract murder," "murder for hire," "homemade silencer," and "hitman."[4]

---

[4] Other search terms, whose relevance is not immediately apparent, were also negative. Term searches were run on four of the computers, including the Gateway laptop. It is unclear why a term search was not conducted on the Dell laptop. The report

Trial counsel, Leonard Stamm, testified at the hearing that he compared the search warrant inventory and confirmed that a Gateway laptop had been seized from Martin's house. *Id.* at 40-41. Stamm testified further that the forensic report indicates that the laptop was owned by CSM. Sheri Carter testified that Martin used a CSM laptop to research use of a Gatorade bottle as a silencer. *Id.* at 42-43. Stamm testified that the computer forensic report would have undermined Sheri Carter's testimony because it shows that the CSM laptop was never used to research using a Gatorade bottle as a silencer. *Id.* at 42. Stamm also testified that if the computer analysis report had been produced, he would have had grounds to object to the state's jury instruction about concealment of evidence suggesting consciousness of guilt. *Id.* at 43-44.

The state called Daniel Giambra of the Anne Arundel police department digital forensics unit to testify. *Id.* at 109-164. Giambra was contacted one week before the hearing to conduct a second forensic analysis of the computer and produce a report. *Id.* at 118,121; ECF No. 5-1 at 358-360. No evidence was introduced as to why the state did not call the author of Exhibit "E," Detective J.M. Knisley, or why a second analysis of the computer had any bearing on the state's failure to produce Exhibit "E" prior to trial. The hard drive of the computer failed ten minutes into Giambra's analysis. ECF No. 5-14. In the ten minutes he was able to analyze the computer, he determined

---

indicates that the data on the Dell laptop had "no investigative value." ECF No. 36-1 at 8.

that the hard drive was last accessed on May 19, 2005. *Id.* at 122. Giambra testified that, in his opinion, the computer was not used in 2008. *Id.* at 125.

No evidence was introduced at the hearing regarding why the original forensic report was not produced to the defense (Exhibit "E"). During argument following testimony, the state's attorney advised the postconviction judge that Detective Regan asked that the report be created, but never turned the report over to the prosecution. *Id.* at 188-89.

The postconviction court issued an opinion on October 5, 2018, ECF No. 5-1 at 372-403, finding that a *Brady* violation had occurred, concluding that the evidence was both exculpatory and impeaching because it undermined Sheri Carter's testimony and showed that Martin did not destroy evidence. *Id.* at 377-379. The postconviction court determined that the state conceded the evidence was suppressed and the suppression was likely "willful." *Id.* at 379-81. The postconviction court also found there was a reasonable probability of a different outcome had the evidence been produced. *Id.* at 381-383. The opinion discussed the impact of Carter's testimony, acknowledging that she was the only witness that saw Martin researching homemade gun silencers. Reasoning that materiality of the suppressed document was based on the fact that the essential link between Martin and the victim was the silencer, the opinion quotes from the state's closing argument: "If you decide that [Martin] made that silencer and that silencer was intended to be used upon the victim then he is guilty." *Id.* at 382-83. The postconviction court

also concluded there would have been no jury instruction on concealment of evidence had the forensic report been produced. *Id.* at 382.

The postconviction court ordered a new trial based on the *Brady* violation. *Id.* at 403. The Appellate Court of Maryland reversed the postconviction court and reinstated Martin's conviction. As discussed below, however, the Appellate Court of Maryland employed a *Brady* analysis contrary to applicable federal law and, in the opinion of the court, imposed an unreasonable application of the facts to the law.

*Brady v. Maryland* instructs, "the suppression by the prosecution of evidence favorable to an accused" violates due process where the evidence is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). For a court to find a *Brady* violation, it must determine that the evidence was 1) favorable to the accused, 2) suppressed by the prosecution (either willfully or inadvertently), and 3) material. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). Evidence that is favorable to the accused includes both exculpatory (whether requested by defendant or not) and impeachment evidence. *Id.*; *see United States v. Bagley*, 473 U.S. 667, 676 (1985) (holding that the *Brady* rule includes impeachment evidence).

The touchstone of materiality is a "concern that the suppressed evidence might have affected the outcome of the trial." *United States v. Agurs*, 427 U.S. 97, 104 (1976). Accordingly, an individual alleging a *Brady* violation must demonstrate that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding

would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Although this analysis can entail an examination of the nature and strength of the prosecution's case, the materiality test is not an evaluation of the sufficiency of the non-suppressed evidence; nor does it require the defendant to prove, by a preponderance of the evidence, that he would have been acquitted if the suppressed evidence had been disclosed. *See Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995). The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler v. Greene*, 527 U.S. 263, 290 (1999), quoting *Kyles*, 514 U.S. at 435.

On appeal, the State conceded, and the Appellate Court of Maryland agreed, the information in the suppressed computer forensic report was favorable to Martin because it could have been used to impeach Ms. Carter's testimony that Martin used the computer to search for information regarding gun silencers. ECF No. 5-1 at 630.

The Appellate Court of Maryland discussed the evidence it considered supportive of the verdict, including the mitochondrial and nuclear DNA on the Gatorade bottle, the similar characteristics of the medical tape removed from the Gatorade bottle, the tape found during the search of Maggie McFadden's home, the testimony of Michael Bradley, the ballistic

evidence showing Martin owned a gun that could have shot the recovered shell from the crime scene, the state's theory that Martin had a motive to kill the victim,[5] and text messages from Martin to the victim the morning of the shooting the state argued were sent for the purpose of confirming the victim was home at the time of the shooting.

As an initial matter, the Court notes that the Appellate Court of Maryland's recitation of Michael Bradley's testimony, by clear and convicting [sic] evidence, is inconsistent with his trial testimony:

> He saw [Martin] and his brother, Frank Bradley, going back and forth between Ms. McFadden's room and the kitchen with white medical tape and a Gatorade bottle.

ECF No. 5-1 at 634. The trial record reflects that Michael Bradley did not testify he saw Martin with white medical tape or a Gatorade bottle. Bradley

---

[5] Worth mentioning is the Appellate Court of Maryland's omission of relevant facts related to the state's theory of motive. On both direct appeal and postconviction appeal, the court placed weight on the state's theory that Martin had a motive to kill Torok because she was carrying his child and refused to have an abortion. However, in both opinions, the Appellate Court of Maryland omitted to mention that Jodi Torok testified on cross-examination that the child may have been fathered by another man she was seeing at the time, Emmanuel Quartley [sic]. ECF No. 5-5 at 51. Quartley [sic] also testified at trial that he was in a romantic relationship with Torok, they had unprotected sex, and he was aware the child may have been his. Id. at 113-114. During the police interview played for the jury, Martin stated that Torok mentioned the pregnancy to him but he "highly doubted" that he was the father because she had a boyfriend, and denying they had any "contact." ECF No. 5-6 at 162.

testified that Martin was in an upstairs bedroom when he saw Frank Bradley go up and down the stairs with the tape and the bottle. ECF No. 5-8 at 101.

Despite the Supreme Court's direction to the contrary, the Appellate Court of Maryland did not engage in a proper sufficiency of the evidence inquiry and did not consider the elements of the crime in assessing materiality. The Appellate Court of Maryland did not consider how the computer forensic report placed the facts of the case in a different light, which had the effect of undermining confidence in the verdict, particularly given the prosecution's burden of proof for accessory before the fact to first degree murder. Notably, the Appellate Court of Maryland found materiality by making an overly broad conclusion that Martin was "connected" to the attempted murder:

> Given all the evidence connecting [Martin] to the attempted murder, [Martin] has not met his burden of showing that, had the Computer Analysis been provided to [Martin], there is a reasonable probability that the result of his trial would have been different.

ECF No. 5-1 at 636.

"In order to determine the aggregate effect of the withheld evidence, the court must *both* add to the weight of the evidence on the defense side all of the undisclosed exculpatory evidence *and* subtract from the weight of the evidence on the prosecution's side the force and effect of all the undisclosed impeachment evidence." *Juniper v. Zook*, 876 F.3d 551, 568 (4th Cir. 2017) (internal citations omitted) (emphasis in original). The Appellate Court of

Maryland neglected to properly subtract the force and effect of Carter's testimony from the prosecution's case in considering the elements of accessory before the fact to attempted first degree murder.

To find Martin guilty, his jury was instructed:

> The Defendant is charged with being an accessory before the fact to the crimes of attempted first-degree murder, attempted second-degree murder, and first-degree assault. In order to convict the Defendant the State must prove that the crimes of attempted first-degree, attempted second-degree murder, or first-degree assault were committed by another, and that before the attempted first-degree murder, attempted second-degree murder, or first-degree assault were committed the Defendant **aided, counseled, commanded, or encouraged the commission of the crime with the intent to make the crime succeed**.

ECF No. 5-9 at 27-28 (emphasis added).

"In general, evidence whose function is impeachment may be considered to be material where the witness in question supplied the only evidence linking the defendant to the crime. Likewise, we may find impeaching evidence to be material where the witness supplied the only evidence of an essential element of the offense. This is especially true where the undisclosed matter would have provided the only significant basis for impeachment. *United States v. Bartko*, 728 F.3d 327, 339 (4th Cir. 2013) (internal citations omitted); *see also United States v. Parker*, 790 F.3d 550, 558 (4th Cir. 2015) (internal citations

omitted). In contrast, impeachment evidence is not material if it is 'cumulative of evidence of bias or partiality already presented and thus would have provided only marginal additional support for the defense.'" *Id.*

While the DNA evidence places Martin in physical contact with the bottle, it does not establish that the bottle was used as a silencer or that Martin intended for the bottle to be used as a silencer in the attempted murder of Jodi Torok. Indeed, there are various non-inculpatory explanations for the presence of DNA from Martin, the victim, and an animal on the Gatorade bottle.

The trial evidence, other than Carter's testimony, that potentially tied Martin to creation of the homemade silencer was Michael Bradley's testimony that he saw Frank Bradley going up and down the stairs with a Gatorade bottle and medical tape, and in and out of a bedroom where Martin was located. Bradley's testimony, contrary to the recitation of facts in the Appellate Court of Maryland's opinion, never places the bottle or tape in Martin's possession and is extremely tenuous. Michael Bradley was admittedly intoxicated when he witnessed these events and received a substantial benefit in exchange for his testimony.

The Appellate Court of Maryland acknowledged in footnote fourteen of its opinion that the jury instruction regarding concealment of evidence likely would not have been given had the computer forensic report not been suppressed. ECF No. 5-1 at 636. The jury was instructed:

> You have heard evidence that the Defendant removed a computer from the house of Sheri Carter. Concealment of evidence is not enough by itself to establish guilt but may be considered as evidence of guilt. Concealment of evidence may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether the Defendant concealed any evidence in this case. If you find that the Defendant concealed evidence in this case then you must decide whether that conduct shows a consciousness of guilt.

ECF 5-9 at 23. The Appellate Court of Maryland, consistent with the remainder of the opinion, found the jury instruction to be without impact because of "the strong evidence of [Martin]'s guilt." *Id.* This jury instruction, however, permitted the jury to infer consciousness of guilt as to all elements of the crime from Carter's testimony regarding destruction of the computer.

Reasonable minds would not disagree that the state's burden of proof relied on evidence that that Martin "aided, counseled, commanded, or encouraged" the attempted murder of Jodi Torek [sic] by creating the homemade silencer. Absent Carter's testimony, the state cannot prove this element of the crime. The state's burden of proof also included evidence that Martin had "intent to make the crime succeed." Absent Carter's testimony that Martin endeavored to create the silencer by researching how to do so on the internet, the state cannot meet this element of the crime. Without Carter's testimony, the

jury would not have been instructed that there was evidence Martin concealed evidence and that such concealment may be viewed as consciousness of guilt.

Carter's testimony substantiated a mere theory from Detective Alban based on a Steven Seagal movie that a Gatorade bottle found in the victim's home was a homemade silencer. Without Carter's testimony, the Gatorade bottle is simply a Gatorade bottle, and the presence of Martin's DNA is completely innocuous. In the opinion of the Court, that Martin may have had motive and means because he owned one of sixteen possible types of weapons used in the shooting would not have been sufficient to carry the state's burden. Carter's testimony was the only evidence that established a silencer was used, that it was fashioned from a Gatorade bottle, and that Martin "aided, counseled, commanded, or encouraged" the act, and "intended the crime to succeed."

The state's only evidence to meet its burden of proof as to the essential elements was Carter's testimony, which was dramatically discredited and undermined by the suppressed document. Further, the suppressed document provided the only basis for impeachment of Carter's testimony. Reasonable jurists would not disagree, therefore, that the suppressed computer forensic report was material.

Martin is entitled to habeas relief on Ground One.

### B. Claim Two-Ineffective Assistance of Counsel/Compound Voir Dire Questions

In Claim Two, Martin contends that his trial counsel was ineffective for failing to object to inappropriate compound voir dire questions:

> (1) "There will be testimony in this case regarding interracial dating. Is there any prospective juror who has such strong feelings against interracial dating that, that juror would not be able to render a fair and impartial verdict in this case?" There were no positive responses to the question.
>
> (2) "Have you or any member of your family or close friend(s) ever been associated with, or in any way, involved with a group or organization whose mission is to abolish legalized abortion? Does any member of the jury hold such strong views about abortion that if there is evidence in the case about abortion, you could not be fair and impartial?" There were no positive responses to the question.

ECF No. 5-4 at 73; 90. Martin argues, as he did in his postconviction petition, that the questions violated *Dingle v. State*, 361 Md. 1 (2000), which prohibits questions that require the prospective jurors to evaluate their own bias. The trial court agreed with Martin and granted postconviction relief on this claim (ECF No. 5-1 at 387-390), which was reversed by the Appellate Court of Maryland (*Id.* at 636-45). Upon review of the applicable precedent, the Court finds that the Appellate Court of Maryland's conclusion was neither contrary to, nor an unreasonable application of, federal law.

The law on compound jury selection questions evolved over a 14-year period in Maryland, starting with *Dingle v. State* and concluding in 2014 with *Pearson v. State*, 437 Md. 350 (2014). In *Dingle*, the Appellate Court of Maryland held that the trial court

erred when it asked several two-part questions concerning whether jurors had certain experiences or associations, and, if so, whether those experiences and associations would affect their ability to be fair and impartial. *Dingle*, 361 Md. at 8-9. The *Dingle* court found the questions objectionable because it "endorses a voir dire process that allows, if not requires, the individual voir dire venire person to decide his or her ability to be fair and impartial...the procedure...shifts from the trial judge to the venire the responsibility to decide juror bias." *Id.* at 21.

Although the Appellate Court of Maryland rejects voir dire questions that call upon jurors to find and evaluate their own biases, in 2002 it approved the phrasing of a self-assessment question in *State v. Thomas*, 369 Md. 202 (2002). The issue on appeal in *Thomas* was whether the trial court erred in refusing to ask: "Does any member of the jury panel have such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts at trial where narcotics violations have been alleged?" The Appellate Court of Maryland found the trial court erred by not permitting the question. Following *Thomas*, "[as] of May 10, 2002...the state of the law appeared to be that *Dingle* did not apply to a 'strong feelings' compound question." *State v. Davis*, 249 Md. App. at 226.

Following *Thomas*, Maryland appellate courts affirmed similar two-part questions in *Sweet v. State*, 371 Md. 1 (2002) ("Do the charges stir up strong emotional feelings in you that would affect your ability to be fair and impartial in this case?"); *Baker v. State*, 157 Md. App. 600 (2004) ("Do you have any

bias or prejudice concerning handguns which would prevent you from fairly weighing the evidence in this case?"); *Singfield v. State*, 172 Md. App. 168 (2006) ("Does any member of the jury panel feel that the nature of this case would make it difficult or impossible for you to render a fair and impartial verdict, specifically because this case involves murder with a handgun?"); and *State v. Shim*, 418 Md. 37 (2011) ("Does any member of the jury have such strong feelings about [the charges] that it would be difficult for you to fairly and impartially weigh the facts?").

In *Pearson v. State*, the Appellate Court of Maryland abrogated the precedent that permitted two-part "strong feelings" questions, recognizing that while *Dingle* prohibited two-part questions that required jurors to assess their own biases, the "strong feelings" line of cases that followed and specifically permitted such two-part questions created a conflict in the law. 437 Md. 350, 361-63 (2014) Thus, between *Dingle* in 2000 and *Pearson* in 2014, two-part "strong feelings" questions were permissible during voir dire.

In *State v. Davis*, 249 Md. App. 217 (2021), the date of the petitioner's trial was a central issue in assessing whether his trial counsel was ineffective. The petitioner in *Davis*, like Martin, argued that his trial counsel was ineffective for failing to object to a multi-part voir dire question that required jurors to self-assess their biases.[6] Recognizing that Davis's

---

[6] "The charges, as you may have heard, involve an allegation of attempted murder. Does the nature—and also kidnapping. Do the nature of the charges themselves, just alone, stir up such

trial occurred in 2007, the Court of Special Appeals held:

> Based on the law as it existed at the time of trial, Mr. Davis's trial counsel's failure to object to the two-part "strong feelings" voir dire question was not a deficiency in counsel's defense of Mr. Davis.

*Id.* at 230.

Martin's trial occurred in 2010, while Maryland law permitted two-part "strong feelings" questions; and the voir dire questions posed during Martin's jury selection were permissible at the time. Accordingly, Martin's trial counsel was not deficient for failing to object. The Appellate Court of Maryland's dismissal of this claim was neither contrary to, nor an unreasonable application of, federal law.

### C. Claim Three- Ineffective Assistance of Counsel/Prosecution's Closing Argument

In Claim Three, Martin contends that his counsel was ineffective because he failed to object during the prosecution's closing argument when it made two "burden-shifting" statements. Martin claims that the following sections of the prosecutor's closing argument suggested to the jury that Martin, and not the state, bore the burden of proof for a conviction:

> I guess they didn't want you to really think about it, but they didn't address the fact that

---

strong feelings in you that you cannot be a fair and impartial juror in this case?" *State v. Davis*, 249 Md. 217, 219 (2021).

> this Defendant did purchase the two .380 caliber handguns…
>
> They want to pretty much pin this case on Maggie. . . . [I]sn't that easy, doesn't it make it simple for the Defense to be, it's not my client, it's the girl who's not here? And really what evidence do we have that Maggie did it? We have that she—perhaps they proved that she's a rude person. Perhaps they proved that she has a big mouth and that she has bad manners. What else do they prove to tie her to this crime? Nothing. We know that she was at work that day, so certainly she was not the shooter…

ECF No. 5-9 at 92; 94. In its postconviction opinion, the trial court found that these statements impermissibly shifted the burden of proof to the defense and Martin's trial counsel was ineffective for failing to object. ECF No. 5-1 at 393-396. The Appellate Court of Maryland reversed, concluding that the comment about the handgun was a proper response to the defense closing argument that there was no evidence that Martin was guilty and the comment about "Maggie" was a "closer call," but did not warrant reversal because Martin failed to prove prejudice. *Id.* at 645-654.

The Appellate Court of Maryland's dismissal of Claim Three was neither contrary to, nor an unreasonable application of, federal law. The trial court accurately instructed the jury as to the burden of proof (ECF No. 5-9 at 17-18), and there is no indication in the context of the entire trial that the instruction was disregarded by the jury as a result of the two isolated statements during the state's closing

arguments. Martin has failed to overcome the doubly-deferential standard of review applied to the state court's determination of ineffective assistance of counsel claims. Based on the foregoing, Martin is not entitled to federal habeas relief on this claim.

### D. Claims Four and Five- Failure to Provide Bill of Particulars/Denial of Due Process

In Claims Four and Five, Martin contends that the trial court erred in failing to require the state to respond to his request for a bill of particulars and he was deprived of due process because he was unable to properly prepare for trial without the bill of particulars. Martin contends that he was denied due process because the prosecution changed theories mid-trial by arguing that he was an accessory before the fact instead of an aider and abettor. ECF No. 30 at 18. Martin raised this claim in his direct appeal and in postconviction. ECF No. 5-1 at 90; 330-31. The Appellate Court of Maryland concluded that Martin was not statutorily entitled to a bill of particulars nor was he entitled to be informed in advance of trial of the state's theory of the case. The appellate court rejected Martin's argument that he was prejudiced because the state changed its theory to "accessory before the fact" mid-trial because the state advanced the theory during its opening statement. *Id.* at 230-242. The postconviction court adopted the appellate court's conclusion that Martin was not entitled to a bill of particulars and rejected the argument that the state changed its theory mid-trial. *Id.* at 397.

Martin's argument regarding his entitlement to a bill of particulars and denial of due process relies entirely on Maryland statutory and case law. *Id.* at

117-20; ECF No. 30 at 17-19. A claim that rests solely upon an interpretation of Maryland law is not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). Indeed, there is no constitutional right to a bill of particulars. *See United States v. Bales*, 813 F.2d 1289, 1294 (4th Cir. 1987). The Maryland state courts rejected the factual premise of Claim Five, determining that Martin was aware of the state's theory of the case from the beginning of the trial. Absent clear and convincing evidence to the contrary, the Court is bound to accept the state's conclusion. *See* 28 U.S.C. § 2254(e)(1). In any event, Martin fails to provide the Court with any applicable federal authority supporting his arguments for relief in Claims Four and Five. Accordingly, the Maryland courts' dismissal of Claims Four and Five is neither contrary to, nor and unreasonable application of, federal law.

## VI. CERTIFICATE OF APPEAL

Having found that Claims Two, Three, Four, and Five of the Petition for Writ of Habeas Corpus do not present a claim upon which federal habeas relief may be awarded, this Court must consider whether a certificate of appealability should issue. 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 v. Davis*, 137 S.Ct. 759, 773 (2017). 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 as to Claims Two, Three, Four, and Five, a certificate of appealability shall be denied. *See* 28 U.S.C. § 2253(c)(2). Martin 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).

## VII. CONCLUSION

For the reasons set forth herein, the Petition is GRANTED as to Claim One and DENIED in all other respects. The subject conviction and sentence shall be vacated, and the case remanded to the Circuit Court for Anne Arundel County for a new trial. This Court's judgment shall be STAYED FOR THIRTY (30) DAYS to permit a notice of appeal or, absent same, decision by the Circuit Court for Anne Arundel County as to Martin's continued confinement.

December 14, 2023 /S/
Julie R. Rubin
United States District Judge

## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

| | |
|---|---|
| CHARLES BRANDON MARTIN<br>Petitioner<br>v<br>JEFFREY NINES and THE ATTORNEY GENERAL OF THE STATE OF MARYLAND<br>Respondents | Civil Action No. JRR-20-2602 |

**ORDER**

For reasons stated in the foregoing Memorandum, it is this 30th day of January 2024, by the United States District Court for the District of Maryland, hereby ordered that:

1. Respondents' Motion to Alter/Amend Judgment (ECF No. 40) is GRANTED;
2. The Court's Order of December 14, 2023 (ECF No. 38) is VACATED;
3. The Petition IS GRANTED on the merits of Claim One;
4. Petitioner's writ of habeas corpus is GRANTED and the matter is REMANDED to the Circuit

Court for Anne Arundel County for a new trial within sixty (60) days of this Order. If a new trial is not held within sixty (60) days, Petitioner shall be released from custody;

5. Judgment IS STAYED for thirty (30) DAYS pending an appeal;

6. A certificate of appealability is DENIED as to Claims Two, Three, Four, and Five; and

7. The Clerk SHALL SEND a copy of this Order and Memorandum to Petitioner and his counsel of record.

/S/

Julie R. Rubin
United States District Judge

**APPENDIX D**

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

E-FILED
Court of Special Appeals
Gregory Hilton
9/20/2019 2:43 PM

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3207 & 3209

September Term, 2018

---

STATE OF MARYLAND

v.

CHARLES BRANDON MARTIN

---

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

JJ.

---

Opinion by Graeff, J.

---

Filed: September 20, 2019

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

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

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

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

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

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

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

Did the postconviction court err in concluding that appellee was not prejudiced by his trial

---

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

counsel's failure to timely object to a Confrontation Clause violation?

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

**FACTUAL AND PROCEDURAL BACKGROUND**

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

> On October 27, 2008, Jodi Lynne Torok, the victim, was found at her home in Crofton, Maryland, with a gunshot wound to her head. Having survived that wound, the victim testified, at the trial below, that she had been in a romantic relationship with Martin, who was married to someone else, and that about eight or nine weeks before the shooting, she had become pregnant with his child. After the victim informed Martin of her condition, he angrily demanded that she obtain an abortion. Although she had, at first, agreed to do so, she later changed her mind and decided to have the baby. Upon informing Martin of her change of mind, the victim advised him of her intention "to go to court and take him for child support." Predictably, that advisement led to cooling of their relationship.
>
> Subsequently, on the day of the shooting, at about 3:00 p.m., the victim was talking on the phone, at her home, with a close friend, Blair

Wolfe, when a man, purporting to be a salesman, knocked on her front door. She then ended the call to respond to the "salesman," but thereafter never called Ms. Wolfe back or answered any of Wolfe's subsequent telephone calls. Growing increasingly concerned but unable to take any action on her own,[5] Ms. Wolfe telephoned Jessica Higgs, the victim's roommate, and requested that she leave work and return home to make sure that the victim was safe. Upon arriving at the residence that she shared with the victim, Ms. Higgs found the front door unlocked and the victim lying on the foyer, unconscious and bleeding from a gunshot wound to her head. Higgs immediately called "911."

When the first police officer arrived at the victim's residence, he secured the scene. Then, upon entering the residence, he found the victim, Ms. Torok, "laying in the doorway," "fully clothed," still breathing, but unresponsive. There were no signs of forcible entry or that the victim's personal property had been disturbed.

---

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

[_____]

When paramedics arrived at the scene, they transported the victim to the Shock Trauma Center at the University of Maryland Hospital in Baltimore City, where she remained for

nearly a month. As a result of the gunshot wound, the victim's pregnancy was terminated, and she suffered severe and disabling injuries. Neither during that time nor thereafter could she recall the events that took place, from the end of her telephone conversation with Ms. Wolfe on October 27th until Thanksgiving, one month later.

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

***Gatorade bottle/silencer***

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

---

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

made by an exiting bullet. It appeared, to police, to be a home-made silencer.

[7] Martin is an African–American male.

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

DNA testing of a swab of saliva taken from the mouth of the bottle revealed that it contained "a mixture of DNA from at least three individuals," at least one of whom was female and another a male. The test results excluded "approximately 94 percent of the Caucasian population," as well as "approximately 96 percent of the African–American population," but among the males, who could not be excluded, was Martin. And, among the females, who could not be excluded, was the victim, Jodi Torok.

[_____]

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

convenience store, where Martin purchased a bottle of Gatorade to drink.

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

* * *

***Ballistic evidence***

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

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

---

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

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

[_____]

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

***Victim's cell phone***

Finally, the last of the four items found at the victim's residence was her Blackberry cell

phone. Text messages extracted from that phone by police confirmed that Martin had exchanged several text messages with the victim on the day of the shooting.[12]

***Martin's statement***

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

---

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

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

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

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

---

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

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

> You have heard evidence that Defendant removed a computer from the house of Sheri Carter.
>
> Concealment of evidence is not enough by itself to establish guilt, but may be considered as evidence of guilt. Concealment of evidence may be motivated by a variety of factors, some of which are fully consistent with innocence.
>
> You must first decide whether the Defendant concealed any evidence in this case. If you find that the Defendant concealed evidence in this case then you must decide whether that conduct shows a consciousness of guilt.

On May 5, 2010, a jury in the Circuit Court for Anne Arundel County found appellee guilty of attempted first-degree murder.[4] On December 21, 2010, the circuit court sentenced appellee to life in prison. This Court affirmed appellee's conviction on direct appeal, *Martin*, 218 Md. App. at 46, and the Court of Appeals and the United States Supreme Court denied appellee's petitions for writ of certiorari. *Martin v. State*, 440 Md. 463 (2014); *Martin v. Maryland*, 135 S. Ct. 2068 (2015).

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

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

---

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

[5] The Analysis provided, in pertinent part:

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

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

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

---

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

[6] The State also argued, a position it has abandoned on appeal, that the laptop mentioned in the Computer Analysis was

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

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

---

not the same laptop discussed in Ms. Carter's testimony at trial, and therefore, there was "no evidentiary value to it."

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

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

## DISCUSSION

### STANDARD OF REVIEW

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

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

---

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

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

**I.**

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

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

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

> To establish a *Brady* violation, the defendant must establish (1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense—either because it is exculpatory, provides a basis for

> mitigation of sentence, or because it provides grounds for impeaching a witness—and (3) that the suppressed evidence is material.

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

As indicated, the first element of a *Brady* claim is that the State suppressed evidence. *Ware*, 348 Md. at 38. "Evidence will be deemed to be suppressed within the meaning of *Brady* if it is 'information which had been known to the prosecution but unknown to the defense.'" *Conyers v. State*, 367 Md. 571, 601 (quoting *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 557 (4th Cir. 1999)), *cert. denied*, 537 U.S. 942 (2002). Although the prosecutor apparently did not receive a copy of the Computer Analysis prior to trial, the disclosure obligation under *Brady* "exists even as to evidence 'known only to police investigators and not to the prosecution.'" *Smith v. State*, 233 Md. App. 372, 422 (2017) (quoting *Conyers*, 367 Md. at 602). The State concedes that the Computer Analysis "was suppressed within the meaning of *Brady*."[8,9]

---

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

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

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

We agree with the State's concessions that the Computer Analysis was suppressed and favorable to appellee. The Computer Analysis was not provided to appellee, and it could not have been found by appellee "through reasonable and diligent investigation." *Ware*, 348 Md. at 39. This is not an instance in which appellee "knew or should have known facts that would have allowed him to access the undisclosed evidence." *Id.* There was no indication prior to trial that the State had requested that the computers seized from appellee's home be analyzed for search terms. Indeed, that the Computer Analysis was never handed over to the State further supports appellee's position that he did not know, nor should he have known, of the existence of the Computer Analysis. Thus, the evidence was suppressed. And it clearly was favorable because it could have been used to impeach Ms. Carter.

Thus, the only question that remains involves the third element, i.e., whether the Computer Analysis was material under *Brady*. We review the issue of materiality *de novo* and "independently evaluate the

totality of the circumstances as evidenced by the entire record." *Id.* at 48.

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

The reasonable probability standard has been interpreted to mean a substantial possibility that the result of the trial would have been different. *Conyers*, 367 Md. at 611.[10] "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109–10 (1976). *Accord Strickler v. Greene*, 527 U.S. 263, 289 (1999) (Although impeaching information, if known, might have changed the outcome of the trial, petitioner's burden was to show

---

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

a reasonable probability that the result of the trial may have been different.); *State v. Syed*, 463 Md. 60, 87–88 (2019) (To show a reasonable probability of a different result, "'the likelihood of a different result must be substantial, not just conceivable.'") (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)), *petition for cert. filed*, No. 19-227 (Aug. 19, 2019)).

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

The parties assert that, in the situation where evidence that could have been used to impeach a witness is suppressed, the proper analysis is to assume that the jury would have discredited the witness' testimony and consider the other evidence to determine whether there is a reasonable probability of a different outcome. We agree. *See McGhie v. State*, 449 Md. 494, 511–13 (2016) (In the context of newly discovered evidence that would have impeached a State witness, the Court considered whether, if the witness' testimony was excluded, there was a

substantial possibility that the outcome of the trial would have been different.).[11]

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

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

Initially, there was DNA evidence linking appellee to the Gatorade bottle. The Gatorade bottle, which the evidence indicated was used as a silencer for the gun used to shoot the victim, was wrapped in duct tape,

---

[11] As the appellee notes, there is a stricter standard for materiality in those cases where "the prosecution's case includes perjured testimony and . . . the prosecution knew, or should have known, of the perjury." *Conyers v. State*, 367 Md. 571, 610 (2002) (quoting *Wilson v. State*, 363 Md. 333, 346–47 (2002)). In that situation, the conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment." *Wilson v. State*, 363 Md. 333, 347 (2001) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1979)). There was no evidence in this case, however, that perjured, as opposed to possibly mistaken, testimony was given, or that the prosecution knew that perjured testimony was given. *See Conyers*, 367 Md. at 605 n.32 (Inadvertently false or mistaken testimony does not qualify as perjury.). Accordingly, this stricter standard is not applicable here.

with white medical tape underneath. A human hair fragment of "Negroid origin" was found on the white medical tape. A DNA expert testified that the mitochondrial DNA profile from the hair matched appellee's mitochondrial profile. The expert explained that, due to the unique nature of mitochondrial DNA, individuals related through appellee's maternal line, such as siblings or distant relatives, could not be conclusively excluded, but appellee was in the 0.06 percent of North Americans who could have left that hair.

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

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

---

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

one of the rolls of tape seized from Ms. McFadden's home.

There also was evidence, albeit more attenuated, that connected appellee to the gun used to shoot the victim. The bullet found near the victim was from a .380 caliber semi-automatic handgun, and records from the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives showed that appellee previously had purchased two .380 caliber semi-automatic handguns. One of these handguns was transferred to someone else in 2004, but appellee's other handgun was not found in any of the searches of the locations where appellee stayed. Supporting the State's theory that appellee's missing handgun was the one used to shoot the victim was Michael Bradley's testimony that, on the day of the crime, when appellee returned to Ms. McFadden's house between 3:00 and 6:30, appellee handed Frank Bradley a brown paper bag, telling Frank Bradley to "get rid of" it.[13]

---

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

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

Text messages recovered from the victim's phone also connected appellee to the crime. The morning of the shooting, appellee texted the victim to see what time she was working. The victim responded that she was "off," but appellee did not follow up on that text. At 5:11 p.m., after the shooting, appellee texted the victim: "I got some stuff with the kids to about 7:00, so any time after. How much did you need?" A jury could infer that appellee was trying to make sure that the victim would be home when the shooter arrived and then texted again as an attempted cover.

Given all the evidence connecting appellee to the attempted murder, appellee has not met his burden of showing that, had the Computer Analysis been provided to appellee, there is a reasonable probability that the result of his trial would have been different.[14]

---

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

Accordingly, the circuit court erred in finding that there was a *Brady* violation that required a new trial.

**II.**

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

> There will be testimony in this case regarding interracial dating. Is there any prospective juror who has such strong feelings against interracial dating that, that juror would not be able to render a fair and impartial verdict in this case?
>
> * * *
>
> Have you or any member of your family or close friend ever been associated with, or in any way, involved with a group or organization whose mission it is to abolish legalized abortion? Does any member of the jury hold such strong views about abortion that if there is evidence in this case about abortion, you could not be fair and impartial?[15]

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

---

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

that counsel's failure to object was prejudicial to appellee.

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

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

**A.**

**Ineffective Assistance of Counsel Claims**

The Court of Appeals has explained:

> The Sixth Amendment to the U.S. Constitution grants criminal defendants a right to effective assistance of counsel. *Strickland*, 466 U.S. at 685, 104 S.Ct. 2052. Under *Strickland*, to establish ineffective assistance of counsel, a defendant must show that: (1) his attorney's performance was deficient; and (2) he was prejudiced as a result. *Id.* at 687, 104 S.Ct. 2052.

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

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

The second prong of an ineffective assistance of counsel claim "requires the defendant to show

prejudice." *Syed*, 463 Md. at 86. "[T]he court does not presume the defendant suffered prejudice as a result of the deficient performance." *Id.* at 86–87.[16] "A showing of prejudice is present where 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *Strickland*, 466 U.S. at 694, a "'substantial or significant possibility that the verdict of the trier of fact would have been affected,'" *Syed*, 463 Md. at 86–87 (quoting *Bowers v. State*, 320 Md. 416, 426 (1990)). The "'likelihood of a different result must be substantial, not just conceivable.'" *Syed*, 463 Md. at 87–88 (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)).

**B.**

**Voir Dire**

"*Voir dire* (*i.e.*, the questioning of prospective jurors) 'is critical to' implementing the right to an impartial jury." *Pearson v. State*, 437 Md. 350, 356 (2014) (quoting *Washington v. State*, 425 Md. 306, 312

---

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

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

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

(2012)). The circuit "court has broad discretion in the conduct of voir dire, most especially with regard to the scope and the form of the questions propounded," and "it need not make any particular inquiry of the prospective jurors unless that inquiry is directed toward revealing cause for disqualification." *Dingle*, 361 Md. at 13–14.

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

The Court of Appeals held that this voir dire procedure "usurped the court's responsibility"

---

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

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

*Dingle*, 361 Md. at 4 n.4.

because "the trial judge is charged with the impaneling of the jury and must determine, in the final analysis, the fitness of the individual venire persons." *Id.* at 8–9. It explained:

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

*Id.* at 21.

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

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

> Therefore, to the extent that this Court has not already done so, we recognize today that the potential for bias exists in most crimes, and thus we will require voir dire questions which are targeted at uncovering these biases. When requested by a defendant, and regardless of the crime, the court should ask the general question, **"Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts."**

(Emphasis added; alteration in original.)

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

> Despite this Court's holding in *Shim,* 418 Md. at 54, 12 A.3d at 681, however, we conclude that, here, the "strong feelings" *voir dire* question (*i.e.,* "Does any member of the panel hold such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts of this trial where narcotics violations have been alleged?") was phrased improperly. We realize that the "strong feelings" *voir dire* question was phrased exactly as this Court mandated in *Shim,* 418 Md. at 54, 12 A.3d at 681—"When requested by a defendant, and regardless of the crime, the [trial] court should ask the general question, 'Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts.'" (Brackets in original.)
>
> In retrospect, however, it is apparent that the phrasing of the "strong feelings" *voir dire* question in *Shim* clashed with existing precedent. *See State v. Green,* 367 Md. 61, 79, 785 A.2d 1275, 1285 (2001) ("[I]t is sometimes advisable to correct a decision . . . if it is found that the decision is clearly wrong and contrary to other established principles." (Citations and internal quotation marks omitted)).

Specifically, the phrasing of the "strong feelings" *voir dire* question in *Shim* was at odds with *Dingle v. State,* 361 Md. 1, 21, 5, 759 A.2d 819, 830, 821 (2000), in which we held that the trial court abused its discretion in asking during *voir dire* such compound questions as:

> Have you or any family member or close personal friend ever been a victim of a crime, and if your answer to that part of the question is yes, would that fact interfere with your ability to be fair and impartial in this case in which the state alleges that the defendants have committed a crime?
>
> * * *

Just like the phrasing of the *voir dire* questions in *Dingle, id.* at 5, 759 A.2d at 821, the phrasing of the "strong feelings" *voir dire* question in *Shim* "shifts from the trial [court] to the [prospective jurors] responsibility to decide [prospective] juror bias." *Dingle,* 361 Md. at 21, 759 A.2d at 830. In other words, as with the *voir dire* questions' phrasings in *Dingle, id.* at 5, 759 A.2d at 821, the phrasing of the "strong feelings" *voir dire* question in *Shim* required each prospective juror to evaluate his or her own potential bias. Specifically, under *Shim,* 418 Md. at 54, 12 A.3d at 681, each prospective juror decides whether his or her "strong feelings" (if any) about the crime with which the defendant is charged "would [make it] difficult for [the prospective juror] to fairly and impartially

weigh the facts." That decision belongs to the trial court, not the prospective juror.

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

To be clear, we amend this Court's holding in *Shim, id.* at 54, 12 A.3d at 681, only in the context of the phrasing of the "strong feelings" *voir dire* question in *Shim*. We reaffirm this Court's essential holding in *Shim* that, on request, a trial court must ask during *voir dire* whether any prospective juror has "strong feelings" about the crime with which the defendant is charged. *Id.* at 54, 12 A.3d at 681. We simply recognize that, in *Shim* and its parent cases, the "strong feelings" *voir dire* questions' phrasings were at odds with *Dingle,* 361 Md. at 21, 759 A.2d at 830. *See Thomas,* 369 Md. at 214, 204, 798 A.2d at 573, 567 (This Court held that the trial court abused its

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

*Id.* at 361–64.

Based on this case law, and the shift in 2014, we agree with the State that, at the time of appellee's trial in 2010, the case law permitted two-part "strong feelings" voir dire questions.[18] And it is clear that

---

[18] *Wimbush v. State*, 201 Md. App. 239 (2011), *cert. denied*, 424 Md. 293 (2012), also reflects the view that "strong feelings" compound questions were permissible. In *Wimbush*, this Court noted the distinction between "associations" and "state of mind" voir dire questions, citing *Thomas* for the conclusion that "state of mind" questions could be phrased as compound questions. *Id.*

"'counsel must be judged upon *the situation as it existed at the time of trial*.'" *State v. Gross*, 134 Md. App. 528, 553 (2000) (quoting *State v. Calhoun*, 306 Md. 692, 735 (1986))), *aff'd*, 371 Md. 334 (2004). *Accord State v. Hunter*, 103 Md. App. 620, 623 ("At the time this case was tried, the instruction that the trial judge gave was consistent with what was thought at the time to be the proper thing to say. The law does not require lawyers to anticipate changes in the law. . . . Since at the time it was given the instruction was generally considered to be correct, counsel's failure to object to the omission of [the phrase at issue] was not a deficient act."), *cert. denied*, 338 Md. 557 (1995).

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

**III.**

The State next contends that the "post conviction court erred in ruling that trial counsel was ineffective in failing to object to the State's closing argument." Appellee disagrees, asserting that "the post-

---

at 266–68 ("[T]wo years after *Dingle*, the Court of Appeals opined that not all compound questions are impermissible.").

conviction court correctly found that trial counsel was constitutionally ineffective for failing to object to the State's improper burden-shifting comments during closing argument."

## A.

## Background

### 1.

### Trial

During its rebuttal closing argument, the State made several statements, two of which are at issue on appeal. One comment pertained to the defense theory that it was Ms. McFadden, not appellee, who planned the shooting of the victim. In support of that theory, defense counsel during his closing argument attributed several statements to Ms. McFadden: "I had someone shot in the head"; "If people get in my way I know how to take care of them"; and "Heaven has no rage like love to hatred turned nor hell a fury like a woman scorned."

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

> Now in addition you don't just have the — I mean we know she told Sheri Carter that she had someone shot in the head. So when the State stands up and tells you there's no evidence that anybody else did it,[19] well, that's

---

[19] In the prosecutor's initial closing argument, the prosecutor addressed the possibility that the victim was shot, not

evidence, that's a statement by somebody that they did the crime, someone else—told someone else they did the crime that he's accused of.

She said she brought a gun with her to the meeting with Sheri. She said she likes to beat people up.

* * *

Now just remember something here, we don't have to prove to you that Maggie engineered this shooting, that's not our burden of proof. Because, you know, under our system of justice as I mentioned, that doesn't go to us, that's on them. Okay? So we don't have to prove that Maggie did it, but they do have to prove that she didn't, and they certainly have not proved that in this case.

* * *

And I guess the point I'm trying to make is, I think that's what happened here with the State's investigation in this case. They were so focused on Brandon Martin and on developing evidence to charge him with this crime that when evidence came up suggesting that it was Maggie McFadden who had the motive and the reason and the absolute lunatic—the lunacy, the insanity to actually do something like this they ignored it, they did not pursue her. And I

---

by appellee, but by a jealous girlfriend, stating: "There is no evidence of that."

> think that's what—that's what happened in this case.
>
> * * *
>
> Maybe—we haven't heard from Maggie McFadden. She played police and the prosecutors in this case like a violin. Conveniently going to Iraq for a year before they were able to serve her with a subpoena.
>
> * * *
>
> The—this is my last chance to address you because the State, again, they have the burden of proof . . . . There's some evidence, but is it beyond a reasonable doubt when they haven't even told you what he did or what he said? I don't think so.

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

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

> the Defendant. I guess they didn't want you to think about that when you went back to the jury room.

Additionally, the State said:

> They want to pretty much pin this case on Maggie. . . . [I]sn't that easy, doesn't it make it simple for the Defense to be, it's not my client, it's the girl who's not here?
>
> And really what evidence do we have that Maggie did it? We have that she—perhaps they proved that she's a rude person. Perhaps they proved that she has a big mouth and that she has bad manners. What else do they prove to tie her to this crime? Nothing. We know that she was at work that day, so certainly she was not the shooter.[20]

**2.**

**Postconviction Hearing**

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

> [The State]: But you're aware the State is not allowed to shift the burden on the defense. Is that a fair statement?
>
> [Counsel]: Yes.
>
> [The State]: Okay. And is it—would it be a correct statement that if you had heard any

---

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

> statements by the State shifting the burden you would have objected to those in closing; is that fair?
>
> [Counsel]: If I perceived it.

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

**B.**

**Analysis**

The State argues that the comments in closing "were proper comments on the evidence and [appellee's] closing argument and, in context, did not shift the burden of proof." Because the arguments were proper, trial counsel's failure to object did not

constitute deficient performance. In any event, even if the arguments were improper, the State contends that the postconviction court erred in concluding that appellee was prejudiced by the failure of counsel to object to the closing argument.

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

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

opponent's argument." *Henry v. State*, 324 Md. 204, 230 (1992), *cert. denied*, 503 U.S. 972 (1992).

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

We address first the State's comment regarding the handguns, i.e., that the defense "didn't address the fact that [appellee] did purchase the two .380 caliber handguns." The State contends that the comments "were a permissible comment on the evidence and a fair response to defense counsel's extensive attack on the quality of the police investigation and the State's evidence," and in "context, it is clear that the prosecutor was referring to defense counsel's failure to address the evidence in closing argument, not the defense's failure to produce evidence at trial." We agree.

Throughout closing argument, appellee's counsel discussed that there was "no evidence as to anything

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

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

> And really what evidence do we have that Maggie did it? We have that she—perhaps they proved that she's a rude person. Perhaps they proved that she has a big mouth and that she has bad manners. What else do they prove to tie her to this crime? Nothing. We know that

---

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

> she was at work that day, so certainly she was not the shooter.

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

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

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

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

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

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

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

instruction, there is a reasonable probability that the result of the trial would have been different. Accordingly, the postconviction court erred in finding that appellee received ineffective assistance of counsel.

**IV.**

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

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

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

available to testify, that the trial court *would not* have permitted their testimony, or that, if permitted to testify, their testimony would have been so unfavorable that the outcome of the trial would have been different." Because appellee failed to meet his burden of proof, the State maintains that the postconviction court "properly denied relief on this claim."

**A.**

**Background**

**1.**

**Trial**

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

---

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

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

During cross-examination, Dr. Melton testified that she did not physically test the samples in this case, and Bonnie Higgins and Michele Yon were the two technicians who worked with the samples. At that point, counsel for appellee objected to Dr. Melton's testimony and moved to strike it, arguing that appellee had the right to confront the technicians who actually did the testing on the hair sample.

The court excused the jury and proceeded to hear argument from the parties. The State argued that Dr. Melton's testimony was permissible under the Maryland Rules and Maryland statutory law,[24] stating that "an expert witness may express an opinion that's based in part on hearsay if the hearsay is the kind that's customarily relied on by experts in that particular calling." The State argued that Dr.

---

appellee on two separate occasions. Both tests yielded the same result.

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

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

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

Melton did all of the analysis and rendered conclusions as to the comparison of the hair samples, whereas the technicians who physically did the testing did not draw conclusions or truly analyze the samples. As such, the State argued that it had not violated appellee's right of confrontation.

The court responded:

> It sounds like they complied with the statute and the rule, but then it's all trumped by this case, *Melendez-Diaz* [v. Massachusetts, 557 U.S. 305 (2009)], which is similar – a similar situation to what you're describing in Massachusetts, I believe this was Massachusetts, where they had a statute and they were permitted to put in the certificates and Justice Scalia goes on and on about how the defendant has the right to have those people who did any of the work involved in determining – in coming up to the conclusion that was let into evidence in the case, he that [sic] has right to confront those people, and Scalia goes on to say "that there is no obligation on the part of the defendant to bring in those people." In other words, it's the State's obligation and the defendant need not do anything to bring those people in.
>
> Do you not feel that all of the compliance that you of course have expressed, and I agree that you've complied with the rule and the statute, is not trumped completely by this case?

The State argued that it had complied with all requirements for expert witness testimony under Maryland law, and therefore, there was no

confrontation issue. In any event, the State asked the court if it could be permitted to bring in the technicians who had actually performed the DNA testing so that appellee could cross-examine them. Counsel for appellee objected, stating that appellee would be prejudiced by the technicians' appearance because they were not listed on the witness list and counsel had not had the opportunity to prepare for their testimony.

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

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

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

Counsel for appellee stated that reliability was not part of a confrontation analysis and argued that Dr. Melton's testimony fell squarely within the purview of *Melendez-Diaz*. He proposed that the court order the State to bring the relevant witnesses in after counsel had a few days to prepare to cross-examine them.

After another break, the State argued that counsel for appellee had waived the issue by failing to timely

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

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

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

**2.**

**Postconviction**

At the June 23, 2017, postconviction hearing, appellee's counsel argued that trial counsel erred in not reviewing the discovery, and "but for the trial counsel's waiver of the confrontation clause issue[,] there was a strong probability that DNA evidence would have been excluded." He asserted that the surprise at trial that Dr. Melton was not the person who did the testing, which led to the subsequent waiver of the confrontation clause issue, entitled appellee to a new trial based on ineffective assistance of counsel. Trial counsel testified that he had no

strategic reason not to object timely to the DNA evidence, and he "didn't know the [confrontation] issue existed until the first couple of questions of cross-examination."

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

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

**B.**

**Analysis**

We agree with the circuit court that appellee failed to prove prejudice. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). *Syed*, 463 Md. at 75 (The burden of proving prejudice is on the appellee.).

The record here indicates that the technicians were available to testify if the trial court determined

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

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

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

---

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

## APPENDIX E

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

### MEMORANDUM OPINION

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

### BACKGROUND

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

On September 15, 2015, Petitioner filed a Petition for Post-Conviction Relief pursuant to the Maryland Criminal Procedure Article, §§ 7-101 through 7-109 and Maryland Rules 4-401 through 4-408. This

Petition was supplemented on October 15, 2015, and January 6, 2017. The State filed a response on June 22, 2017, and the Petitioner replied to that response on October 11, 2017.

**STANDARD OF REVIEW**

A petition for post conviction relief is governed by Maryland Rules §§ 4-401 through 4-408 and the Uniform Post Conviction Procedure Act as specified in the ANNOTATED CODE OF MARYLAND, CRIMINAL PROCEDURE, Title 7 §§ 7-101 through 7-109, formerly Article 27, Section 645A of the Annotated Code of Maryland. "The purpose of the Post Conviction Procedure Act was to create a simple statutory procedure in place of the common law habeas corpus and coram nobis remedies for collateral attacks upon criminal convictions and sentences." *Jones v. State*, 114 Md. App. 471, 474 (1997). The Uniform Post Conviction Procedure Act is designed "to consolidate into one statutory procedure all the remedies previously available for collaterally challenging the validity of a criminal conviction or sentence." *Barr v. State*, 101 Md. App. 681, 687 (1994) (citing *Brady v. State*, 222 Md. 442 (1960) *aff'd*, 373 U.S. 83, 83 S. Ct. 1194 (1963); *State v. Zimmerman*, 261 Md. 11 (1971)).

"The Act provides a remedy primarily for challenging the legality of incarceration under judgment of conviction for a crime on the premise that it was imposed either (a) in violation of the Constitution of the United States or the Constitution or laws of this State, or (b) that the court was without jurisdiction to impose the sentence, or (c) that the sentence exceeds the maximum authorized by law, or (d) that the sentence is otherwise subject to collateral

attack upon any ground of alleged error which would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy." *Creswell v. Director, Patuxent Inst.*, 2 Md. App. 142, 144 (1967). However, "a petitioner is entitled to relief under the Post Conviction Procedure Act only if his complaint (1) is substantively cognizable under the Act and (2) has not been previously and finally litigated or waived." *Pfoff v. State*, 85 Md. App. 296, 301 (1991) (quoting Ann. Code 1957, Md. Ann. Code Art. 27, § 645A, repealed by Uniform Post Conviction Procedure Act of 2001, ch. 10, § 2, Md. Code Ann. § 7-101 – 7-109 (2001)) (internal quotation marks omitted). "Because these are conditions precedent to relief, it is important that the petition address them with adequate precision to allow the court to rule upon them." *Id.*

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

On September 15, 2015, Petitioner filed a *pro se* Petition for Post-Conviction Relief pursuant to the Maryland Criminal Procedure Article, §§ 7-101 through 7-109 and Maryland Rules 4-401 through 4-408. Petitioner then obtained counsel and this Petition was supplemented on October 15, 2015, and January 6, 2017. The State filed a response on June

22, 2017, and the Petitioner replied to that response on October 11, 2017. Petitioner raises multiple and overlapping allegations of error before this Court. The Court regroups Petitioner's arguments into the following categories: (1) *Brady* Violations; (2) ineffective assistance of counsel; and (3) ineffective appellant counsel. The Court presents its findings below.

## DISCUSSION

### I. BRADY VIOLATIONS

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

Petitioner argues that there was a *Brady* violation by the State related to Petitioner's laptop. Petitioner alleges that the State violated the principles of *Brady v. Maryland*, 373 U.S. 83 (1983) and committed prosecutorial misconduct when it failed to turn over a document entitled Computer Analysis and Technical Support Squad Lab Notes ("Computer Analysis"), dated April 22, 2009, from the Anne Arundel County Police Department Criminal Investigation Division.[1] The Computer Analysis reflects that police had a "CSM" laptop in their custody. This laptop appears to be the same laptop that the State argued that Martin had taken from the house of one of Petitioner's girlfriends, Sheri Carter, to conceal evidence of his wrongdoing.

---

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

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

---

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

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

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

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

[6] The jury instruction read as follows

You have heard evidence that the Defendant removed a computer from the house of Sheri Carter. Concealment of evidence is not enough by itself to establish guilt, but may be considered as evidence of guilt. Concealment of evidence may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether the Defendant concealed any evidence in this case. If you find that

The Computer Analysis lists a laptop computer with "CSM" as the registered owner and registered organization. "CSM" stands for the College of Southern Maryland, where Petitioner worked as a basketball coach. According to the Computer Analysis, the CSM laptop had accounts called "Administrator," "Laptop," and "Todd Downs,"[7] and that none of the accounts had been logged into since May 2005. Importantly, the Computer Analysis revealed that there were no searches for various terms relevant to the case and State's argument, including "handgun," "silencer," or "homemade silencer," contrary to Carter's testimony that Martin had used a work laptop to research homemade silencers. Further, the fact that there are separate "Administrator" and "Laptop" accounts suggest that

---

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

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

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

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

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

there were administrative rights that the "Administrator" account had that the "Laptop" account did not. The State's evidence suggests as much.[8] This provides further evidence that the CSM computer in State custody is, or at least could be, the very laptop Carter testified about, as she said that the laptop was from one of Petitioner's employers, and that Petitioner did not have administrative rights in the computer. Finally, although the Computer Analysis reflects that five (5) computers were seized from Petitioner's dwelling, only one (1) computer was connected to CSM or any employer of Petitioner.

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

A true *Brady* violation has three components: (1) "[t]he evidence at issue must be favorable to the accused either because it is exculpatory, or because it is impeaching;" (2) "that evidence must have been suppressed by the State, either willfully or inadvertently;" and (3) "prejudice must have ensued."

---

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

*Yearby v. State*, 414 Md. 708, 717 (2010). Of note is that "the burdens of production and persuasion regarding a *Brady* violation fall on the defendant." *Id.* at 720. Additionally, the Maryland Court of Appeals has noted that the prosecution cannot be said to have suppressed evidence for *Brady* purposes when the information allegedly withheld was available to the defendant though diligent and reasonable investigation. *Id.* at 723. The Court will consider the three components separately.

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

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

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

Carter with the Computer Analysis in hand and challenged her veracity.

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

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

This argument is self-serving, requiring the Court to assume the veracity of Carter's testimony and to overlook the impeaching value of the Computer Analysis. The CSM laptop reviewed in the Computer Analysis matches the description of the laptop testified to by Carter. Petitioner was denied the

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

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

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

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

> We previously have explained that, under *Brady* and its progeny, the defense is not relieved of its "obligation to investigate the case and prepare for trial." *Ware*, 348 Md. at 39, 702 A.2d at 708. *See Bagley*, 473 U.S. at 675, 105 S.Ct. at 3379-80, 87 L.Ed.2d at 489 (noting that *Brady's* "purpose is not to displace the adversary system as the primary means by which truth is uncovered, … [and] [t]hus, the prosecutor is not required to deliver his entire

> file to defense counsel[.]"). Moreover, "[t]he prosecution cannot be said to have suppressed evidence for *Brady* purposes when the information allegedly suppressed was available to the defendant through reasonable and diligent investigation." *Ware*, 348 Md. at 39, 702 A.2d at 708. Finally, *Brady* "offers a defendant *no relief when the defendant knew or should have known facts permitting him or her to take advantage of the evidence in question or when a reasonable defendant would have found the evidence*." *Id.* (emphasis in original).

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

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

---

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

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

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

Indeed, this case is easily distinguishable from *Yearby*. In that case, Yearby was convicted of robbery and filed a motion for a new trial, arguing that the State had violated *Brady* when it failed to disclose that a detective had identified additional suspects for the crime underlying Yearby's conviction. Ruling against Yearby, the Court of Appeals held that Yearby knew, before trial, that the detective in question had been investigating several other robberies and that he had several other suspects. In addition, during trial, Yearby's re-cross examination of the detective revealed that Yearby knew of "at least one alleged suspect who 'look[ed] just like' him." *Yearby*, 414 Md. at 725, 997 A.2d at 154. Thus, the Court of Appeals found that Yearby had the information he alleged to be *Brady* evidence and had the chance to cross-examine the detective in question and others about whether there were other suspects. *Id.* The court held that on those facts, Yearby "knew

of the allegedly suppressed material," and thus the alleged *Brady* evidence was not suppressed. *Id.* at 726, 997 A.2d at 154.

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

***3. Did prejudice ensue?***

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

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

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

> the testimony of Sheri Carter, one of [Petitioner's] erstwhile girlfriends, if believed

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

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

The essential link between Petitioner and the victim was the silencer. Indeed, the State asserted as much in its closing argument: "If you decide that [Petitioner] made that silencer and that silencer was intended to be used upon the victim then he is guilty."[11] The two strongest links connecting

---

[11] Transcript, May 4, 2010, 40:24-25, 41:1. The State made additional comments in its closing argument regarding Carter's testimony, including the following: "[I]s anyone surprised that Sheri Carter saw the Defendant researching silencers on the internet? Natural place to go. Is anyone surprised that the

Petitioner to the silencer were the DNA evidence and Carter's testimony. In that context, it would have been significant for Petitioner to have questioned Carter about the inconsistencies between her testimony and the Computer Analysis. Carter's testimony provided an important connection between Petitioner and the silencer. In addition, her testimony provided the only evidence suggesting that Petitioner concealed or destroyed evidence, for which a jury instruction was given. Notwithstanding the other evidence presented by the State, there is a "reasonable probability" that disclosure of the Computer Analysis would have led to a different result in this case.

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

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner argues that he was denied effective assistance of counsel. Specifically, he presents thirteen (13) separate instances in which he contends counsel rendered ineffective assistance.[12] A petitioner

---

Defendant got rid of that computer after the police talked to him? No, because it fits perfectly with the evidence." Transcript, May 4, 2010, 37:12-16.

[12] Petitioner categorizes his allegations of ineffective assistance of counsel as follows: (1) Failure of defense counsel to object to testimony of DNA expert Terry Melton; (2) Failure to cross examine State's DNA expert at trial; (3) Ineffective assistance of counsel for failure to object to improper voir dire questions in jury selection; (4) Failure to voir dire potential jurors regarding racial bias; (5) Failure of defense counsel to seek suppression of

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

When applying the first prong, one seeking relief on a claim of ineffective assistance of counsel must show that counsel's assistance "fell below an objective standard of reasonableness." *Id.* at 687-88. This is a difficult task because there is a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* at 689. The second prong requires one to "affirmatively prove prejudice." *Id.* at 693. In this context, prejudice means "that there [was] a reasonable probability that, but for counsel's unprofessional errors, the result of the

---

defendant's statement to police; (6) Failure to request Mere Presence jury instruction; (7) Failure to call Steve Burnette as witness; (8) Failure to object to State's burden-shifting during rebuttal; (9) Failure to object to inconsistent verdict; (10) Failure to file Application for Review of Sentence by a three-judge panel; (11) *Brady* violation by State related to Martin's laptop; (12) Violation of Martin's due process rights when State changed its theory; and (13) Violation of Martin's right to be present during communications with jurors.

proceeding would have been different." *Id.* at 694. The term "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.* In other words, to satisfy the second prong of *Strickland*, a defendant must show that, but for counsel's errors, there is a "substantial possibility" that the result of the proceedings would have been different. *Bowers v. State*, 320 Md. 416, 426-27, 578 A.2d 734, 739 (1990). The deficient performance inquiry includes a "context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (internal citations omitted).

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

> [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time*. Because of the

> difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

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

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

Petitioner argues that defense counsel was ineffective by failing to timely object to the State's DNA expert's testimony. The trial court ultimately found that the objection was untimely and admitted the DNA evidence. Petitioner alleges that this error was grounded in a failure to adequately review discovery provided by the State. The trial court determined that Melton's testimony would have been barred under *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (holding that forensic lab reports constitute testimonial statements and are inadmissible against a defendant unless the person who did the testing is subject to cross-examination), but overruled defense counsel's objection only because it was untimely. However, the failure to make a timely objection did not result in prejudice, because had defense counsel made the objection, the two other technicians that conducted the DNA testing were available to testify at trial. Therefore, Petitioner did not receive ineffective assistance of counsel.

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

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

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

Confrontation Clause rights at this critical juncture of the trial.

The decision whether to cross-examine a witness is within the discretion of the defense attorney. *Strickland*, 466 U.S[.] at 689. The defendant needs to overcome the presumption that counsel's actions were not just part of their sound trial strategy. *Id.* Therefore, it is presumed that the defense attorney has made a reasonable tactical decision with regard to cross-examination of witnesses. It is within the purview of trial counsel to determine the breadth of cross-examination. The Court does not find counsel's decisions here to have resulted in ineffective assistance of counsel.

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

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

Petitioner argues that the court allowed the prospective jurors to self-determine their eligibility,

and trial counsel never objected. Petitioner alleges two improper voir dire questions:

> (1) "There will be testimony in this case regarding interracial dating. Is there any prospective juror who has such strong feelings against interracial dating that, that juror would not be able to render a fair and impartial verdict in this case?" There were no positive responses to the question.
>
> (2) "Have you or any member of your family or close friend(s) ever been associated with, or in any way, involved with a group or organization whose mission is to abolish legalized abortion? Does any member of the jury hold such strong views about abortion that if there is evidence in the case about abortion, you could not be fair and impartial?" There were no positive responses to the question.

Petitioner argues that asking compound questions such as these allow individual jurors to make their own determination of whether they can sufficiently put aside those feelings, follow the instructions of the Court, and act as unbiased jurors. When compound questions are posed to the jurors, the burden falls on the juror to decide whether they can be fair and impartial, and not the trial court. Petitioner relies on *Dingle*, 361 Md. 1, 759 A.2d 819, and *Pearson v. State*, 437 Md. 350, 86 A.3d 1232 (2014) in making his assertions.

In contrast, the State argues that not all compound voir dire questions are impermissible under *Dingle*, and that the questions highlighted by Petitioner are permissible. The State asserts that the

line between permissible and impermissible is drawn by the subject matter of the question, with compound questions concerning experiences or associations – such as in *Dingle* – being impermissible, and compound questions concerning states of mind or attitudes being permissible. In support of its assertion, the State relies on *Thomas v. State*, 369 Md. 202, 798 A.2d 566 (2002), *abrogated by Pearson*, 437 Md. 350, 86 A.3d 1232, and *Wimbish v. State*, 201 Md. App. 239, 29 A.3d 635 (2011). Notably, *Wimbish* relied on *Thomas* in reaching its holding on this issue.

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

respective to a particular crime "did not run afoul of *Dingle*." *Wimbish*, 201 Md. App. at 268, 29 A.3d at 651-52.

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

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

in a fair and impartial away from the judge and to the jurors themselves.[13] Therefore, the questions were objectionable. The Court must now determine whether counsel's failure to object constituted ineffective assistance.

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

---

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

objected to these voir dire questions. As such, counsel was deficient in failing to object.

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

### D. Failure to Voir Dire Potential Jurors Regarding Racial Bias

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

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

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

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

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

Petitioner's house without permission and attempted to speak with Petitioner's children.

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

### F. Failure to Request Mere Presence Jury Instruction

Petitioner alleges that trial counsel provided ineffective counsel when he did not choose to request a jury instruction that that mere presence at the scene of the crime is insufficient to establish that person's participation in the crime. Petitioner also alleges that there is a reasonable probability that the outcome of the case would have been different with the jury instruction on mere presence. In *Bruce v. State*, 318 Md. 706, 731 (1990), the court found that there was no error in refusing to give such an instruction because there were other instructions on

what is needed for a principal in the first or second degree that covered the issue of presence. In addition, following the *Strickland* standard, it is not enough to show that the "errors had some conceivable effect on the outcome of the case" because any error would be able to meet that standard. 466 U.S[.] at 693. The substance of the mere presence instruction was already covered by the instructions regarding accessory before the fact. These explained that Defendant's presence at the murder scene is not necessary to be convicted as an accessory before the fact. However, even if it is an error of counsel, Petitioner does not demonstrate that it was a prejudicial error, so it does not amount to an ineffective assistance of counsel.

### G. Failure to Call Steve Burnette as a Witness

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

Petitioner contends that had defense counsel called Burnette as a witness, the defense's theory would have been bolstered while casting doubt on the State's theory that Martin and Burks were responsible for the shootings. However, the Petitioner

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

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

Petitioner alleges that trial counsel was constitutionally ineffective for failing to object to the State's impermissible burden-shifting during closing arguments. During closing arguments, the State attempted to lead the jury to believe that it should accept the evidence indirectly linking Martin to the gun because "[the Defense] didn't address the fact that this Defendant did purchase the two .380 caliber handguns"[14] – the same caliber of the handgun used

---

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

> It was not really addressed, but the Defendant - by the Defense, I guess they didn't want you to really think about it, but they didn't address the fact that this Defendant did purchase the two .380 caliber handguns. One of them by stipulation was transferred; however, that still leaves one handgun unaccounted for, and that handgun is linked to the Defendant, and you can see the link between that missing handgun and this case,

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

---

> because it's a .380 caliber handgun, and by the way, the ballistics at the crime scene indicate that the projectile right near [the victim's] head that was located as well as a casing that popped off when the shot was fired are both .380 caliber. Again, a link to the Defendant. I guess they didn't want you to think about that when you went back to the jury room.

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

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

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

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

The jury instructions clearly and correctly advised the jury about the reasonable doubt standard,[16] the fact that the Defense did not have a burden,[17] and that closing arguments are not evidence.[18] However,

---

[16] The judge provided the following instruction:

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

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

[17] The judge provided the following instruction:

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

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

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

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

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

---

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

### I. Failure to Object to Inconsistent Verdict

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

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

Petitioner alleges ineffective assistance of counsel because counsel failed to file an application for a review of sentence by a three-judge panel, per Petitioner's request. For conduct to arise to the level of ineffective counsel, the conduct of counsel must be (1) deficient and (2) prejudicial. *Strickland*, 466 U.S. at 687. In this case, Petitioner made multiple requests to counsel to file an application for review of sentence.[20] Therefore, counsel's conduct was deficient because it went against what Petitioner wanted him to do. It was also prejudicial because it denied Petitioner a hearing by a three-judge panel. In addition, there is no reason the application should not have been filed because there would either have been no change, or a sentence reduction since Petitioner

---

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

received the maximum sentence. Therefore, counsel's failure to file an application for a sentence review by a three-judge panel constituted ineffective assistance of counsel and Petitioner should be allowed to file an application. However, in light of the remand for a new trial ordered in this case, this issue is moot.

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

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

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

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

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

On four different occasions during deliberations, jurors submitted written questions to the Court. Petitioner claims that the Court sent written responses in Martin's absence. Petitioner further asserts that he never waived his right to be present at this state of his trial; thus, his absence violated his rights in at least one of three possible ways: (1) Martin's due process rights were violated because the questions in the jury notes implicated fundamental rights that required a knowing and intelligent waiver by Martin himself; (2) defense counsel was constitutionally ineffective because Martin wished to be present at every stage of his trial, and defense counsel improperly waived his presence through acquiescence or inaction; or (3) defense counsel was ineffective in failing to object to the court's improper responses to the jurors' substantive questions.

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

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

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

---

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

counsel. The Petitioner was also present when Judge North acknowledged at least one note in open court.[22]

The record does not, however, clarify whether the Petitioner was present or even in the courtroom for jury notes #3 and 4, although, once again, the attorneys both signed off on the notes.[23] Regardless,

---

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

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

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

[23] These jury notes presented the following questions: "What is 'beyond mere preparation' meaning [sic]? (see judges [sic] instruction page 21) More specifically, what would define [sic] a 'substantial step' beyond mere preparation?" Judge North, in writing, directed the jurors that "You must apply the generally recognized meaning of those words." In addition, the jurors asked, "Is the final charge 'solicitation [of anyone] to commit murder' or 'solicitation of Jerold Burks to commit murder'? (page 25 specifically lists Jerold Burks, but the charge [sic] sheet does

there is no evidence that Petitioner affirmatively indicated that he wanted to be present for any judge-jurors communications. While Leonard Stamm, Petitioner's trial counsel, testified regarding this issue at the hearing on June 23, 2017, before this Court, the questioning on this topic was limited, and when asked about how "active" a client Petitioner was, Stamm answered that he could not recall.

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

### M. Failure to Request a Missing Witness Instruction

Petitioner argues that trial counsel provided ineffective assistance of counsel when he failed to request a missing witness instruction regarding Maggie McFadden. Petitioner argues that Ms. McFadden should have been called because she was on the State's witness list and because she had

---

not list his name specifically)." (underlined text in original). Judge North, again in writing, answered: "The charge is solicitation of Jerold Burks to commit the crime of murder."

testified for the State prior to trial before a grand jury. Petitioner does not provide any additional reasons as to why his trial counsel declined or neglected to call Ms. McFadden as a witness, what she would have testified to, or how her absence from trial prejudiced Petitioner. Accordingly, this Court cannot find that counsel's representation ineffective here.

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

Petitioner argues that the trial judge, during trial, ruled that the word "silencer" could not be used to refer to the Gatorade bottle found at the scene of the crime. The State often called the Gatorade bottle a silencer, and Petitioner asserts that counsel failed to object to the use of the word. Even if Petitioner's allegations are true, counsel's failure to object to the use of "silencer" was not deficient. Further even, if such conduct were found to be deficient, Petitioner has shown no prejudice.

### O. Failure to Correctly Advise Petitioner Regarding Character Evidence

Petitioner argues that his trial lawyer advised Petitioner that if counsel put character witnesses on the stand, as Petitioner apparently wanted, that the State would be able to bring in prior acts of Petitioner, even though Petitioner did not have any prior convictions. Even assuming that counsel did in fact advise Petitioner as Petitioner alleges, counsel's decision not to put forward character witnesses was not necessarily deficient. As the State points out, any character witnesses offered by the Petitioner would have been subject to cross-examination about how

well they knew Petitioner and the limitations of their knowledge about Petitioner. *See Poole v. State*, 295 Md. 167, 180-81, 453 A.2d 1218, 1226 (1983). Petitioner's trial counsel's decision not to offer character witnesses was not deficient based on the record before this Court. Even if it was, Petitioner has failed to articulate any prejudice.

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

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

## CONCLUSION

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

/s/ 10/5/2018
**RONALD A. SILKWORTH**, Judge
Circuit Court for Anne Arundel County

Entered: Clerk, Circuit Court for
Anne Arundel County, MD
October 5, 2018

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

**ORDER**

This matter came before the Court on June 23, 2017, for hearing on a Petition for Postconviction Relief. The Court held the matter *sub curia*. Upon consideration of the arguments of the parties, the testimony provided, and the evidence admitted, it is this 5th day of ~~September~~ October, 2018 by the Circuit Court of Anne Arundel County, hereby

**ORDERED**, that Petitioner's Petition for Post Conviction Relief is **GRANTED**; and it is further

**ORDERED**, that Petitioner shall be granted a new trial.

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

Entered: Clerk, Circuit Court for
Anne Arundel County, MD
October 5, 2018

**APPENDIX F**

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2413

September Term, 2010

---

CHARLES BRANDON MARTIN

v.

STATE OF MARYLAND

---

Krauser, C.J.,
Graeff,
Hotten,
JJ.

---

Opinion by Krauser, C.J.

---

Filed: July 30, 2014

Convicted, after a jury trial in the Circuit Court for Anne Arundel County, of attempted first-degree murder,[1] Charles Brandon Martin, appellant, presents seven issues for our review. Divested of argument, they are:

I. Whether the circuit court erred in failing to suppress text message evidence obtained by law enforcement officers from the victim's cell phone;

II. Whether the circuit court erred in allowing a State's DNA expert to testify regarding the results of DNA tests she did not personally perform;

III. Whether the circuit court erred in not requiring the State to provide the defense with a bill of particulars after the State purportedly changed its prosecution theory;

---

[1] Martin was charged with (I) attempted first-degree murder; (II) attempted second-degree murder; (III) first-degree assault; (IV) second-degree assault; (V) use of a handgun in the commission of a felony; (VI) use of a handgun in the commission of a crime of violence; (VII) carrying a handgun; (VIII) reckless endangerment; (IX) conspiracy to commit first-degree murder; and (X) solicitation to commit murder. With the exception of counts I and X, all other charges were ultimately either nol prossed or were lesser included offenses subsumed within the charge of attempted first-degree murder. He was acquitted of solicitation to commit murder.

IV. Whether the circuit court erred in finding that there was sufficient evidence to convict appellant of attempted first-degree murder;

V. Whether the circuit court erred in instructing the jury that appellant was charged with being an accessory before the fact rather than an aider and abettor;

VI. Whether the circuit court erred in accepting purportedly inconsistent verdicts; and

VII. Whether the circuit court erred in considering evidence of a letter allegedly written by appellant and then purportedly sentencing appellant for a crime of which he had been acquitted.

After argument before this Court, the parties filed a joint motion to stay any further action by this Court, until *Williams v. Illinois,* No. 10-8505, had been decided by the Supreme Court, and *Dzikowski v. State,* No. 15, September Term, 2011, by the Court of Appeals, as those pending decisions might affect the resolution of the issues presented in the instant case. Because those cases did, in fact, involve many of the same issues presented by this appeal, we granted their motion and deferred a decision in this matter.

Subsequently, the Supreme Court rendered a decision in *Williams,* 567 U.S. [50], 132 S. Ct. 2221 (2012), as did the Court of Appeals in *Dzikowski,* 436 Md. 430 (2013). We therefore now consider the issues raised by this appeal in light of those decisions.[2]

**FACTS**[3]

On October 27, 2008, Jodi Lynne Torok, the victim, was found at her home in Crofton, Maryland, with a gunshot wound to her head. Having survived that wound, the victim testified, at the trial below, that she had been in a romantic relationship with Martin, who was married to someone else, and that about eight or nine weeks before the shooting, she had become pregnant with his child. After the victim informed Martin of her condition, he angrily demanded that she obtain an abortion. Although she had, at first, agreed to do so, she later changed her mind and decided to have the baby. Upon informing Martin of her change of mind, the victim advised him of her intention "to go to court and take him for child support." Predictably, that advisement led to cooling of their relationship.

Subsequently, on the day of the shooting, at about 3:00 p.m., the victim was talking on the phone, at her

---

[2] Neither party has requested an opportunity to re-brief the issues presented in *Williams* or *Dzikowski*, nor do we find it necessary for them to do so.

[3] As required by Maryland law, we are presenting the facts in a light most favorable to the State, as the prevailing party below. *See, e.g.*, *Davis v. State,* 207 Md. App. 298, 303 (2012).

home, with a close friend, Blair Wolfe,[4] when a man, purporting to be a salesman, knocked on her front door. She then ended the call to respond to the "salesman," but thereafter never called Ms. Wolfe back or answered any of Wolfe's subsequent telephone calls. Growing increasingly concerned but unable to take any action on her own,[5] Ms. Wolfe telephoned Jessica Higgs, the victim's roommate, and requested that she leave work and return home to make sure that the victim was safe. Upon arriving at the residence that she shared with the victim, Ms. Higgs found the front door unlocked and the victim lying on the foyer, unconscious and bleeding from a gunshot wound to her head. Higgs immediately called "911."

When the first police officer arrived at the victim's residence, he secured the scene. Then, upon entering the residence, he found the victim, Ms. Torok, "laying in the doorway," "fully clothed," still breathing, but unresponsive. There were no signs of forcible entry or that the victim's personal property had been disturbed.

When paramedics arrived at the scene, they transported the victim to the Shock Trauma Center at the University of Maryland Hospital in Baltimore City, where she remained for nearly a month. As a result of the gunshot wound, the victim's pregnancy was terminated, and she suffered severe and

---

[4] At other parts of the record, her name is spelled "Blaire Wolfe." We adopt the spelling used in the State's discovery disclosure. Ms. Wolfe did not testify at Martin's trial.

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

disabling injuries. Neither during that time nor thereafter could she recall the events that took place, from the end of her telephone conversation with Ms. Wolfe on October 27th until Thanksgiving, one month later.

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

***Gatorade bottle/silencer***

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

---

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

[7] Martin is an African-American male.

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

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

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

---

DNA testing of a swab of saliva taken from the mouth of the bottle revealed that it contained "a mixture of DNA from at least three individuals," at least one of whom was female and another a male. The test results excluded "approximately 94 percent of the Caucasian population," as well as "approximately 96 percent of the African-American population," but among the males, who could not be excluded, was Martin. And, among the females, who could not be excluded, was the victim, Jodi Torok.

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

[10] The State's theory was that Burks was the shooter and that he had been solicited by Martin. Burks was tried separately, six months before Martin's trial, on charges that included attempted first- and second-degree murder and conspiracy to

Finally, Sheri Carter, one of Martin's former girlfriends,[11] testified that Martin, approximately one month before the shooting, while at her residence, used a computer to conduct internet research on how to assemble a home-made silencer. She further stated that, during the first week of November 2008, approximately one week after the shooting and shortly after Martin had been questioned by police, Martin took the computer from her apartment, telling her "that [they] had looked up so many crazy things on the internet that in case [Carter's] apartment got searched [Martin] didn't want it found there." Martin, in her words, then "got rid of" the computer.

***Ballistic evidence***

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

---

commit murder. He was acquitted by a jury on all counts. Five days before Martin's trial, the State moved in limine to "exclude from trial any evidence that Jerold Burks was acquitted of the charges" in that case, and, on the day trial commenced, the court granted that motion. Thereafter, the State nol prossed the conspiracy charge against Martin.

[11] In addition to his wife, Martin had at least three girlfriends with whom he maintained intimate relations.

manufacturers.[12] Moreover, Sheri Carter testified that, in September and October of 2008, the time period just before the shooting, she had observed Martin carrying a "small, silver, [black-handled], semi-automatic" handgun.

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

***Victim's cell phone***

Finally, the last of the four items found at the victim's residence was her Blackberry cell phone. Text messages extracted from that phone by police confirmed that Martin had exchanged several text messages with the victim on the day of the shooting.[13]

***Martin's statement***

The day after the shooting, Martin gave a statement to police. During the interrogation, Martin downplayed his relationship with Ms. Torok, the victim, telling detectives that he did not know her last name and that he was unsure where she lived, but he conceded that he had previously been to her house. And, although he was "highly doubt[ful]" that he was

---

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

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

the father of the victim's baby, since they "hadn't had any contact," he admitted to police that he had agreed to provide money to her to "help her out." Finally, Martin claimed that, on the day of the shooting, he was at home with his wife and children until mid-day and that later he had visited "Frankie" and "Mike" Bradley, who were friends of his, arriving at "around" 1:00 p.m., staying with them until about 4:30 p.m., and then returning home.

## DISCUSSION

### I.

Martin contends that the circuit court erred in denying his motion to suppress text messages retrieved by police from the victim's cell phone, in violation of the Maryland Wiretap Act, Maryland Code (1974, 2006 Repl. Vol.), § 10-401 *et seq.* of the Courts & Judicial Proceedings Article ("CJP").[14]

---

[14] Martin does not invoke the Fourth Amendment, presumably because he lacks standing to challenge a warrantless search of another person's cell phone. *Rakas v. Illinois,* 439 U.S. 128, 133-34 (1978) ("'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.'") (quoting *Alderman v. United States,* 394 U.S. 165, 174 (1969)). Under the Maryland Wiretap Act, he would, assuming that there was an "interception," qualify as an "aggrieved person," that is, "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." Md. Code (1974, 2006 Repl. Vol.), Courts and Judicial Proceedings Article, § 10-401(10) ("CJP").

During the pendency of this appeal, the Maryland Wiretap Act was amended several times. The quoted definition now appears at CJP § 10-401(1). Unless otherwise stated, all

Specifically, Martin claims that, in reading and, later, recording the text messages from the victim's Blackberry cell phone, the police had "intercepted" those text messages and were therefore required, in accordance with the strictures of the Maryland Wiretap Act, to apply for a court order before doing so, which they did not do. CJP § 10-406(a). Furthermore, the State's use of evidence derived from those text messages, maintains Martin, violated the Maryland Stored Communications Act, CJP § 10-4A-01 *et seq*.

When the police arrived at the victim's residence, they found, inside her home, her cell phone. Text messages that were later extracted, by law enforcement personnel, from that phone showed, among other things, that Martin and the victim had exchanged several text messages on the day of the shooting. At 8:23 a.m. on the day of the shooting, Martin sent the victim a text message asking, "What time do u work[?]" Less than a minute later, the victim replied, "I'm off." At 9:29 a.m., an hour later, the victim, having received no reply from Martin, sent another text message, stating, "Hello." But that greeting elicited no response from Martin until 5:11 p.m., a little more than two hours after the shooting, when he sent a message stating, "I got some stuff with the kids to about 7 so any time after how much did u need[?]"

Based in part on the text messages retrieved from the victim's cell phone and in part on Martin's own cell phone text messages, search warrants were

---

statutory references in this opinion are to the versions of the statutes that were in effect at the time of the crime.

obtained for Martin's home and vehicle; for Maggie McFadden's home; for Jerry Burks's home and computer; as well as for samples of Martin's saliva and hair. Among the items recovered, upon the execution of those warrants, were Martin's saliva and hair samples, as well as a roll of white medical tape, from McFadden's home, that, in the words of a State expert, "exhibited the same characteristics as" the medical tape found on the home-made Gatorade silencer.

Before trial, Martin filed a "motion to suppress wiretap," contending that the police had violated the Maryland Wiretap Act by "unlawfully intercept[ing]" the text messages from the victim's cell phone and requesting that the court "suppress the contents of any intercepted wire, oral or electronic communication and evidence derived therefrom." After several hearings were held, the circuit court declined to suppress the text messages recovered from the victim's cell phone, holding that the retrieval of those messages did not violate the Maryland Wiretap Act.[15] It also declined to suppress any derivative evidence, declaring that, even if all of the references to both the victim's and Martin's cell phone text messages had been deleted from the warrant affidavits, there was still probable cause to issue a search warrant for, among other things, Martin's saliva and hair samples.

---

[15] The circuit court granted Martin's motion in part, ordering the suppression of all text messages that the police had obtained from Martin's cell phone service provider.

The Maryland Wiretap Act states that it is "unlawful for any person to . . . [w]illfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication."[16] CJP § 10-402(a)(1). It defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device," CJP § 10-401(3), and describes an "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system." CJP § 10-401(11).[17]

Although there are no Maryland appellate decisions[18] that have specifically construed the term

---

[16] CJP § 10-402(c) sets forth a detailed list of acts that are "lawful" under the Maryland Wiretap Act, including a number of exceptions to the prohibition under subsection (a)(1), but none of these exceptions is applicable to the instant case.

[17] The quoted definitions now appear at CJP § 10-401(10) and (5), respectively (the latter with slight changes that are not relevant to our analysis).

[18] During the pendency of this appeal, the Court of Appeals decided *Davis v. State,* 426 Md. 211, 218 (2012), which held that the "interception of a wire, oral, or electronic communication, for the purposes of the Maryland wiretap statute, occurs where law enforcement officers capture or redirect first the contents of the communication overheard by the wiretap and where they heard originally the communication." In that case, however, it was undisputed that an "interception" had occurred, *id.* at 213-14, and the Court had no need or reason to specifically consider the question of what constitutes an "interception." There, it was only

"intercept," there are a number of federal appellate decisions that have, under the Federal Wiretap Act, 18 U.S.C. § 2510 *et seq.,* the federal analogue of the Maryland Wiretap Act. In language that is largely mimicked by the Maryland statute,[19] the federal act provides that "any person who intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication" commits a crime and is further subject to civil suit. 18 U.S.C. § 2511(1)(a). Both acts define "intercept" and "electronic communication" in nearly[20] identical terms. *Compare* 18 U.S.C. § 2510(4) and (12) *with* CJP § 10-401(3) and (11) (defining, respectively, "intercept" and "electronic communication"). *See also Davis v. State,* 426 Md. 211, 220 & n.3 (2012) (observing that definitions of "intercept" in Maryland and Federal Wiretap Acts are "identical[]."). We therefore turn to the pertinent federal appellate decisions interpreting those terms for guidance. *Id.* at 223.

We begin with *Steve Jackson Games, Inc. v. United States Secret Service,* 36 F.3d 457 (5th Cir. 1994).

---

concerned with the issue of where that interception took place for jurisdictional purposes. *Id.* at 214.

[19] The Maryland statute provides, among other things, that "it is unlawful for any person to . . . [w]illfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." CJP § 10-402(a)(1).

[20] "Intercept" is defined identically in both the Maryland and Federal Wiretap Acts, but "electronic communication" is not.

There, the United States Court of Appeals for the Fifth Circuit held that the seizure of a computer, in which were stored private e-mail messages sent from remote computers but not as yet read by their intended recipients, was not an "intercept" of those messages under the federal act, though they were clearly "electronic communications." In addressing the question of what constituted an "intercept" of "electronic communications" at that time, the federal appellate court observed that there was a "[c]ritical" difference in the definitions of two categories of communication, "wire communication" and "electronic communication," both of which fell within the federal statutory prohibition against unlawful "interception": Both categories of communication included the "transfer" of information, but a "wire communication" further encompassed "any electronic storage of such communication," (which it no longer does, as we shall later explain), while "electronic communication" did not. *Steve Jackson Games,* 36 F.3d at 461. This textual difference, the Fifth Circuit believed, evidenced a Congressional intent that the term "intercept" be applied to "electronic communication[s]" only when those communications are in transit and not when they are in electronic storage. *Id.* at 461-62. Because the electronic communications at issue in *Steve Jackson Games* were in storage when Secret Service agents obtained them, the Fifth Circuit held that there had been no "interception" of them. *Id.*

Other federal appellate courts have subsequently adopted this construction of "intercept." For example, in *Konop v. Hawaiian Airlines, Inc.,* 302 F.3d 868 (9th Cir. 2002), the United States Court of Appeals for the

Ninth Circuit, applying *Steve Jackson Games,* held that an "interception" under the Federal Wiretap Act had not occurred when an employer, using a third-party's password, obtained access to messages stored on a secure website maintained by one of its employees. The Ninth Circuit suggested that the enactment of the "PATRIOT" Act,[21] which amended the Federal Wiretap Act,[22] evidenced Congress's intent that the term "intercept" be narrowly defined. In passing the PATRIOT Act, Congress, explained the Ninth Circuit, had "essentially reinstated the [narrow] definition of 'intercept'—acquisition contemporaneous with transmission—with respect to wire communications." *Id.* at 878. The federal appellate court therefore concluded that the Federal Wiretap Act did not apply where the acquired communications were in storage at the time of their acquisition. *Accord United States v. Steiger,* 318 F.3d 1039 (11th Cir. 2003) (holding that anonymous informant who hacked into the accused's computer to retrieve images of child pornography did not, under the Federal Wiretap Act, "intercept" those images because she did not acquire them during their transmission).[23]

---

[21] Pub. L. 107-56, 115 Stat. 272.

[22] The PATRIOT Act amended the Federal Wiretap Act by leaving the definition of "intercept" intact as it applied to "electronic communication" but then deleting the reference to electronic storage from the definition of "wire communication." *See* Pub. L. 107-56, § 209(1)(A), 115 Stat. 283.

[23] We do not consider, in this case, the interception of messages transmitted over packet-switched communications networks. Such networks, which are today in widespread use in

Prior to 2002, the Maryland Wiretap Act defined "wire communication" to include "any electronic storage of a communication as described in this paragraph," just as the Federal Wiretap Act did before the enactment of the PATRIOT Act. *See* Md. Code (1974, 1998 Repl. Vol.), § 10-401(1)(ii) of the Courts & Judicial Proceedings Article. But, in 2002, the General Assembly enacted the Maryland Security Protection Act of 2002, which, among other things, altered the definition of "wire communication" in the Maryland Wiretap Act so that it would no longer include electronic storage, thereby tracking the change in definition adopted in the PATRIOT Act

---

cell phone and internet communications, rely upon subdivision of a digital message into smaller "packets," each of which is sent separately and independently (and perhaps over a different pathway) and ultimately re-assembled into the original message upon the arrival of all of the packets at their destination. While those packets are in transit, they may be stored, very briefly, on high-speed switching devices, known as "routers," which serve as intermediate destinations for network traffic. *In United States v. Szymuszkiewicz,* 622 F.3d 701 (7th Cir. 2010), and *United States v. Councilman,* 418 F.3d 67 (1st Cir. 2005), the First and Seventh Circuits have concluded that the Federal Wiretap Act "applies to messages that reside briefly in the memory of packet-switch routers." *Szymuszkiewicz,* 622 F.3d at 706. But, as *Szymuszkiewicz* explains, such "packets" are nonetheless in transit, and, since the entire process from start to finish occurs in at most seconds, the acquisition of "packets" from routers is essentially "contemporaneous" with transmission. *Id.* Here, in contrast, the messages at issue had been received hours before the police had obtained access to them, and their storage, for an indefinite duration, on the victim's cell phone, is of an entirely different character than the transient storage of "packets" in the memory of routers during transit.

and, in effect, narrowing the scope of the term "intercept." 2002 Md. Laws, ch. 100, at 1271-72.

In light of the nearly identical definitions of "intercept" and "electronic communication" in both the Federal and Maryland Wiretap Acts, as well as the fact that Maryland has adopted the same narrow definition of "wire communication" that first appeared in the PATRIOT Act, we shall join the federal courts in construing "intercept" as requiring "acquisition contemporaneous with transmission" of the messages. *Konop,* 302 F.3d at 878. That is to say, an "intercept" does not occur when, conversely, the electronic communication was in storage at the time of acquisition.[24] We therefore conclude that the police, in the instant case, did not unlawfully "intercept" text messages from the victim's cell phone, as those messages were, at the time of their seizure, already stored in that phone, having already been sent and received before police gained access to them.

The Maryland Wiretap Act, moreover, prohibits only interceptions that occur "through the use of any electronic, mechanical, or other device." CJP § 10-401(3). Since a cell phone is not a "device," under the Wiretap Act, as it specifically excludes "telephone" from the statutory definition of "electronic, mechanical, or other device," *see id.* § 10-401(4),

---

[24] "Storage," as stated here, does not include transient storage "in the memory of packet-switch routers." *Szymuszkiewicz,* 622 F.3d at 706. As that issue is not before us, we offer no opinion as to whether we would follow the First and Seventh Circuits in their application of the Federal Wiretap Act to transient storage.

messages found in the victim's cell phone are not covered by the Act and therefore are not subject to exclusion under the strictures of the Act.

That the data was subsequently transferred onto a police department computer by means of a universal memory exchanger ("UME") is of no consequence, because the data at issue was already in the possession of police investigators before its transfer via the UME. As a consequence, even if we assume that the UME is a "device," as Martin contends, it was not used to "intercept" the text messages. Rather, the UME was used to record the data after it had already been lawfully acquired. *See United States v. Harpel,* 493 F.2d 346, 350 (10th Cir. 1974) (holding that "the recording of a conversation is immaterial when the overhearing is itself legal").

Finally, contrary to Martin's claim, the Maryland Stored Communications Act provides neither a rationale nor remedy for excluding as evidence the information obtained from the victim's cell phone (as well as any derivative evidence). The Stored Communications Act forbids "obtain[ing] . . . access to a wire or electronic communication while it is in electronic storage in an electronic communications system by (1) [i]ntentionally accessing without authorization a facility through which an electronic communication service is provided; or (2) [i]ntentionally exceeding an authorization to access a facility through which an electronic communication service is provided." CJP § 10-4A-02(a). That prohibition, however, does not apply to the victim's cell phone, which is not a "facility through which an electronic communication service is provided," but

presumably to the network infrastructure (such as the cell phone tower, its transmitters, and servers and switches), which is managed and operated by cell phone service providers.

Even if there were a violation of the Maryland Stored Communications Act, exclusion of evidence, obtained by that violation, is not an appropriate remedy. During the pendency of this appeal, we were presented with this very issue, and we held that, given the absence of a statutory exclusionary rule in the Maryland Stored Communications Act, we would "not create a suppression remedy" where none existed. *Upshur v. State,* 208 Md. App. 383, 399 (2012), *cert. denied,* 430 Md. 646 (2013).

**II.**

Relying upon *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009), Martin contends that the circuit court's admission of the testimony of Terry Melton, Ph.D., one of the State's DNA experts, regarding the results of mitochondrial DNA testing, violated the Confrontation Clause of the Sixth Amendment because she had not personally performed that testing. In *Melendez-Diaz,* the Supreme Court held that the Confrontation Clause had been violated when a trial court allowed the prosecution to introduce into evidence test reports, purporting to establish that a substance seized from the accused was cocaine of a specified weight, without the testimony of anyone who performed the underlying

tests, leaving the accused without anyone to cross-examine as to the accuracy of those reports.[25]

We must first determine whether this issue was preserved for our review. The State contends that it was not and we agree, for the following reasons:

Maryland Rule 5-103(a)(1) provides that "[e]rror may not be predicated upon a ruling that admits . . . evidence unless the party is prejudiced by the ruling, and . . . a timely objection or motion to strike appears of record[.]" Such an objection, according to Maryland Rule 4-323(a), "shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived."

After the State had completed its direct examination of Dr. Melton, Martin, during cross-examination of the doctor, objected to the admissibility of her testimony on Confrontation Clause grounds and moved "to strike all of it." This objection led to an extended bench conference, during which the parties disagreed over the applicability of *Melendez-Diaz,* which, at that time, was the most recent Supreme Court decision addressing the scope of the Confrontation Clause. That conference was, in

---

[25] The Supreme Court rejected the Commonwealth's argument that Melendez-Diaz could have subpoenaed the analysts, observing that the subpoena power "is no substitute for the right of confrontation" and that "fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 324 (2009).

turn, followed by a brief recess to afford the court and counsel the opportunity to research the question further.

When the bench conference resumed, the State propounded a new claim, namely, that Martin's belated objection had resulted in waiver of his Confrontation Clause claim. That claim prompted a shift in the focus of the bench conference from the *Melendez-Diaz* issue to the discovery materials that had been provided to Martin. After examining those materials, the circuit court made a preliminary finding that those documents had, indeed, "put[]" Martin "on notice that there was a technician other than [Dr.] Melton involved in the case." Having made that tentative finding, the court felt impelled to warn Martin's counsel that it was "going to find waiver" unless he could "come up with something that show[ed]" otherwise. The court then recessed for the weekend.

Upon reconvening on Monday morning, the circuit court, after entertaining additional argument, found that Martin's counsel had "received in discovery," and well before trial had begun, "a clear indication" that Dr. Melton "was not the technician who did the original lab work"; and furthermore had been "put on notice by" Dr. Melton's "earlier" testimony that others had performed that work and yet "did not object." The court therefore concluded that Martin had waived his objection and then denied his motion to strike Dr. Melton's testimony.

That ruling, we cannot say, was clearly erroneous. The discovery materials provided by the State to Martin's counsel gave Martin, in the words of the

court, "a clear indication" that Dr. Melton had not performed the laboratory work.[26] Nor can we say that Dr. Melton's "earlier" testimony did not, as the circuit court found, put Martin on further notice that technicians other than Dr. Melton had actually performed the laboratory work.[27] Therefore, in

---

[26] At a minimum, the following documents should have alerted Martin that Charity A. Holland, M.P.H., the "Quality Manager" at Mitotyping Technologies, LLC, and perhaps other technicians, actually performed the "bench work" necessary to test the hair sample: An electronic document in the discovery materials, entitled "TECHNICAL REVIEW: Mitochondrial DNA Case File 2910," is signed, not by Dr. Melton, but by Ms. Holland. That review is a checklist of twenty-five specific procedures that were to be followed, according to Mitotyping Technologies laboratory protocols (which were separately included in the discovery materials), followed by handwritten checkmarks indicating that they had been satisfactorily performed. In fact, since Ms. Holland herself signed that report as the "Reviewer," it cannot even be assumed that she, let alone Dr. Melton, had actually performed those routine tasks. Furthermore, Ms. Holland co-signed, with Dr. Melton, a letter dated March 26, 2009, addressed to Anne Arundel evidence coordinator Craig Robinson, summarizing the test results and concluding that Martin "and his maternal relatives are not excluded as the contributor of" the hair fragment.

[27] For example, Dr. Melton described the procedures followed after evidence is received: "When evidence comes to our laboratory, . . . **we have two people who receive** the evidence, who sign it in, who fill out a form that delineates where it came from, who sent it, and what exactly it is, including what it looks like such as labeling on the outside of the package, we take photographs of it, and then we package it with our own evidence tape on it, our own initials, dates, and so forth, and then it's stored in locked cupboards or cabinets until the time it's tested." Later, when describing the testing procedures followed in this specific case: "This is a package with [Mitotyping] Technologies

accordance with Maryland Rules 4-323(a) and 5-103(a)(1), the court below did not err in ruling that Martin's counsel had waived his objection. *See Melendez-Diaz,* 557 U.S. at 314 n.3 (observing that "[t]he right to confrontation may . . . be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections").

In his reply brief, Martin contends, as an alternative ground for reversal, that his trial counsel was ineffective in failing to lodge below a timely "Confrontation" objection to Dr. Melton's testimony. This issue is not properly before us, however, as Martin failed to raise it in his initial brief. *Williams v. State,* 188 Md. App. 691, 703 (2009) (observing that function of reply brief is limited and that it may not be used to raise issues not previously raised in initial brief), *aff'd,* 417 Md. 479, *cert. denied,* 565 U.S. [815], 132 S. Ct. 93 (2011). In any event, a claim of ineffective assistance of counsel is, ordinarily, more appropriately addressed in a post-conviction proceeding, because that proceeding affords an opportunity for an evidentiary hearing and a chance for defense counsel to explain what may have been a tactical reason for his belated objection. *Mosley v. State,* 378 Md. 548, 558-62 (2003).

---

evidence—tamper proof evidence tape with our case number 2910, the label K1, which indicates that it was the K standing for known, the first known sample and **initialed and dated by one of our staff members.**" (Emphasis added.)

## III.

Martin claims that the trial court erred in denying his exceptions to the State's refusal to provide a bill of particulars and that, as a result, he was forced to defend himself without knowing whether the State was claiming that he was a principal in the first degree, an aider and abettor, or an accessory before the fact. He further asserts that, because of this uncertainty, he was unfairly surprised when, during the trial, the State purportedly changed its theory of the case, from alleging that he accompanied the shooter to the victim's house to asserting that he was at McFadden's house at the time of the shooting, and that it was there that he prepared the homemade silencer used in that attack. He therefore maintains that he was unfairly prejudiced by the denial of his request for a bill of particulars and, as a consequence, denied due process of law. We find no merit to this claim.

Several months before the scheduled trial date and a year before Martin's trial ultimately took place, Martin filed a demand for a bill of particulars, "pursuant to Maryland Rule 4-241,"[28] as to all counts

---

[28] Maryland Rule 4-241 provides:

(a) **Demand.** Within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213(c), the defendant may file a demand in circuit court for a bill of particulars. The demand shall be in writing, unless otherwise ordered by the court, and shall specify the particulars sought.

(b) **Response to Demand.** Within ten days after service of the demand, the State shall file a bill of particulars

of the indictment. The demand directed the prosecution to:

> 1. State with particularity the exact time and place where the alleged offense occurred.
>
> 2. State with particularity what facts the State will prove to show the Defendant did commit the alleged offense.
>
> 3. State with particularity the facts the State will prove to show the alleged offense was committed.
>
> 4. State with particularity the manner and means with which the Defendant did commit the alleged offense.
>
> 5. **State with particularity if Defendant is charged with the alleged offense as a principal in the first degree or as a principal in the second degree.**

---

that furnishes the particulars sought or it shall state the reason for its refusal to comply with the demand.

(c) **Exceptions to Response.** The defendant may file exceptions to the sufficiency of the bill of particulars or to any refusal or failure to comply with the demand. The exceptions shall be filed within ten days after service of the response to the demand or, if no response is filed, within ten days after the time within which a response should have been filed. The circuit court may rule on the exceptions without a hearing.

(d) **Amendment.** On motion of the State, the court may permit a bill of particulars to be amended at any time subject to such conditions as justice requires.

> 6. **State with particularity all facts the State intends to prove that show Defendant acted as a principal in the first degree or as a principal in the second degree.**

(Emphasis added.)

Two weeks later, Martin moved to dismiss the indictment, alleging that it "fail[ed] to sufficiently characterize the offenses in order to enable the Defendant to prepare a defense." Five months later, having not received a response to his demand for a bill of particulars, Martin filed exceptions, insisting that, "[i]n view of the nature of the offenses charged in the above-captioned case, it is essential to the preparation of the defense in this matter that the State's Attorney's Office comply forthwith with the Demand for Particulars." Two weeks after that, the State filed an opposition to Martin's demand for particulars, contending that it had "given open file discovery" to Martin and that, as the discovery process had been "transparent," there was "no chance" that the indictment was so general that it failed to disclose "sufficient information to afford" Martin "a fair and reasonable opportunity to defend himself." In fact, Martin's demand for particulars was, asserted the State, nothing more than "a surreptitious attempt" to force the State to disclose its "legal theories" and thereby "box the State in at trial." That being so, it urged the circuit court to deny Martin's request.

A hearing was subsequently held on, among other things, Martin's motion to dismiss the indictment and his exceptions to the State's response to his demand for a bill of particulars. At the conclusion of that

hearing, the circuit court overruled Martin's exceptions and denied his motion to dismiss the indictment, concluding that Martin's trial counsel had "to defend against everything," that is, against the possibility that Martin was the shooter, as well as "the solicitor of the crime."

"[B]ills of particulars are intended to guard against the taking of an accused by surprise by limiting the scope of the *proof,*" *Hadder v. State,* 238 Md. 341, 351 (1965), and, ultimately, ensure that an accused's constitutional rights "to be informed of the accusation against him and . . . to prepare for his defense" are protected. *Seidman v. State,* 230 Md. 305, 312 (1962). But a bill of particulars is meant "to secure facts, not legal theories." *Hadder,* 238 Md. at 351 (quoting *Rose v. United States,* 149 F.2d 755, 758 (9th Cir. 1945)). Indeed, an accused is "not entitled to make the prosecution select and state its theory of the case." *Id.*

During the pendency of this appeal, the Court of Appeals decided *Dzikowski v. State,* 436 Md. 430 (2013). In that case, the Court of Appeals considered whether a trial court abused its discretion in overruling Dzikowski's exceptions to the State's refusal to provide the information requested by his demand for particulars because the State believed that the information requested by that demand had been previously given to him before trial. The pertinent facts of that case, as summarized by the Court of Appeals, were as follows:

> Dzikowski[] was driving a vehicle with five other passengers at 1:00 a.m. in Gaithersburg, Maryland on January 6, 2008, when he came

> upon a man, later identified as Manuel Ramirez-Gavarete, standing in the middle of the road, and, as a result, had to swerve in order to avoid colliding with him. After passing Mr. Ramirez-Gavarete, however, and upon the suggestion of one of the passengers, [Dzikowski] returned to the scene. Once there, when he and one of the passengers, Joshua Jones, got out of the vehicle, Mr. Ramirez-Gavarete, who appeared to be highly intoxicated, staggered towards them and attempted to hug or lean on the petitioner. [Dzikowski] pushed him away, nearly knocking him into a slowly passing vehicle. Mr. Ramirez-Gavarete then approached Mr. Jones, who struck him in the face, knocking him down onto the roadway. [Dzikowski] and Mr. Jones then immediately drove away, leaving Mr. Ramirez-Gavarete lying in the road. Shortly thereafter, another vehicle ran over Mr. Ramirez-Gavarete, killing him.

*Id.* at 434-35.

Dzikowski was charged in a three-count indictment, filed in the Circuit Court for Montgomery County, with manslaughter, reckless endangerment, and conspiracy to commit assault. *Id.* at 435. The reckless endangerment count merely stated, as provided in the statutory short-form indictment, that Dzikowski, "on or about January 6, 2008, in Montgomery County, Maryland, committed reckless endangerment, in violation of Section 3-204 of the Criminal Law Article against the peace, government,

and dignity of the State."[29] *Id.* at 436. Invoking Maryland Rule 4-241, Dzikowski filed a demand for a bill of particulars as to the charge of reckless endangerment. When the State responded, to each of

---

[29] Maryland Code (2002), Criminal Law Article, § 3-206(d), in effect at the time of trial, provided:

> (d) (1) To be found guilty of reckless endangerment under § 3-204 of this subtitle, a defendant must be charged specifically with reckless endangerment.
>
> (2) A charging document for reckless endangerment under § 3-204 of this subtitle is sufficient if it substantially states:
>
> "(name of defendant) on (date) in (county) committed reckless endangerment in violation of § 3-204 of the Criminal Law Article against the peace, government, and dignity of the State.".
>
> (3) If more than one individual is endangered by the conduct of the defendant, a separate charge may be brought for each individual endangered.
>
> (4) A charging document containing a charge of reckless endangerment under § 3-204 of this subtitle may:
>
> (i) include a count for each individual endangered by the conduct of the defendant; or
>
> (ii) contain a single count based on the conduct of the defendant, regardless of the number of individuals endangered by the conduct of the defendant.
>
> (5) If the general form of charging document described in paragraph (2) of this subsection is used to charge reckless endangerment under § 3-204 of this subtitle in a case in the circuit court, the defendant, on timely demand, is entitled to a bill of particulars.

The 2012 Replacement Volume contains an identical provision.

his enumerated requests, that the facts requested were "contained in discovery," Dzikowski filed exceptions to what he deemed an insufficient response. *Id.* at 437. Ultimately, the circuit court overruled those exceptions, holding that the State had complied with Rule 4-241(b).

The Court of Appeals noted that, in its opening statement at Dzikowski's trial,[30] the State stressed that Dzikowski (with co-defendant Jones) had committed "needless senseless violence" and had left Ramirez-Gavarete "in the middle of the road, where he was then hit and killed by another car." *Id.* at 439. The State further alleged that both Dzikowski and Jones "pushed" Ramirez-Gavarete but, in the words of the Court of Appeals, "did not reference or even mention that it was in the direction of a passing vehicle." *Id.* Instead, the State proffered that, after both Dzikowski and Jones had taken turns "push[ing]" Ramirez-Gavarete, Jones "punched" him, "knocking him down" and apparently "out." The two men then left him in the middle of a "very dark" and "very dangerous" road, where he was subsequently run over and killed by a passing vehicle. *Id.* at 439-40.

At the conclusion of the State's case-in-chief, Dzikowski moved for judgment of acquittal as to all counts. The trial court granted his motion as to the counts alleging manslaughter and conspiracy but denied it as to the count of reckless endangerment,

---

[30] Dzikowski and Jones were tried jointly. *Dzikowski v. State,* 436 Md. 430, 439 (2013) (quoting the State referring to Jones as the "co-defendant").

which, at that point, was the only remaining count. As to that charge, the trial court found that, based upon testimony of the driver of the "slowly passing vehicle," which had nearly struck Ramirez-Gavarete when Dzikowski shoved him in the direction of that vehicle, that Dzikowski had "timed" his shove of Ramirez-Gavarete "as though it were planned that . . . when he pushed him, he would collide with this car." *Id.* at 440. Although this on-coming vehicle was traveling "at a crawl," acknowledged the trial court, "if you lose your footing, and you fall underneath the wheels of a car going five miles an hour," you will still be, the court observed, "a dead person." *Id.* The trial court therefore concluded that there was "sufficient evidence from which a jury could conclude that there was reckless endangerment." *Id.*

"Armed with that ruling, the State thereafter proceeded on a new theory and factual basis," observed the Court of Appeals. *Id.* That is to say, the State departed from its reliance upon Jones punching the victim, knocking him down, and leaving him in the road, to prove reckless endangerment, in favor of "rel[ying] on the fact that" Dzikowski pushed Ramirez-Gavarete "in the direction of a slowly passing car, thus recklessly endangering him." *Id.* After he was convicted of reckless endangerment, Dzikowski appealed, claiming that he had been unfairly surprised and prejudiced by the State's mid-trial shift in strategy. *Id.* at 441.

The Court of Appeals ultimately reversed and remanded for a new trial. *Id.* at 441, 457. In so doing, the Court of Appeals noted that, because Dzikowski had been charged, under a statutory short-form

indictment, with reckless endangerment, he was entitled to have the State respond to his demand for a bill of particulars, under Criminal Law Article, § 3-206(d)(5), which provides that, under that circumstance, "the defendant, on timely demand, is entitled to a bill of particulars." *Dzikowski,* 436 Md. at 446. This statutory entitlement, the Court of Appeals observed, is intended "to provide 'such a description of the particular act to have been committed as to inform [the accused] of the specific conduct with which he is charged.'" *Id.* at 448 (quoting *Ayre v. State,* 291 Md. 155, 163 (1981)). Moreover, it is constitutionally required, declared the Court, so as to "apprise the defendant of the crime with which he is accused, as well as of the particular conduct to which that accusation relates and refers." *Id.*

Ordinarily, the charging document itself must provide the accused with the "constitutionally required" notice of "what he is called upon to defend," *Ayre,* 291 Md. at 163 (citing Article 21 of the Maryland Declaration of Rights), but the statutory short-form indictment, at least as to certain offenses, is typically lacking in such information. In those instances, the accused has a statutory right to particulars, which furnishes that information. *Dzikowski,* 436 Md. at 448, 453-54. Indeed, as the *Dzikowski* Court observed, the charging document in that case merely stated that Dzikowski, "on or about January 6, 2008, in Montgomery County, Maryland, did commit reckless endangerment, in violation of Section 3-204 of the Criminal Law Article," providing no information as to the underlying facts. *Id.* at 448.

"Generally," whether to grant or refuse a demand for a bill of particulars is within the trial court's discretion, as is the "the determination of whether the particulars provided were legally sufficient." *Id.* at 446-47. In *Dzikowski,* the trial court abused its discretion in overruling Dzikowski's exceptions, held the Court of Appeals, as the State's response to Dzikowski's demand for a bill of particulars merely directed him to discovery materials and therefore violated Criminal Law § 3-206(d)(5), which required that he be informed of "the factual basis underlying the reckless endangerment charge." *Dzikowski,* 436 Md. at 449, 452. The Court of Appeals further held that the "trial court's legal error,"[31] *id.* at 454 was not harmless beyond a reasonable doubt, because it was "possible" that Dzikowski was "prejudiced" by the State being permitted "to proceed upon a factual basis, on which it did not rely, or even acknowledge, in the indictment, in the bill of particulars it filed and throughout the first half of the trial." *Id.* at 456. Then, before reversing Dzikowski's conviction, the Court rejected any suggestion that Dzikowski's demand for a bill of particulars sought "the State's legal theory of the case." *Id.* at 452.

Charged with first- and second-degree assault and reckless endangerment, in a short-form indictment, Martin had, because of those charges,[32] the same

---

[31] Because the trial court, in *Dzikowski,* based its exercise of discretion upon a legal error, it "necessarily" abused its discretion. *Bass v. State,* 206 Md. App. 1, 11 (2012).

[32] *See* CL § 3-206(b) (providing that an accused, charged with either first- or second-degree assault by a short-form indictment

statutory right to a bill of particulars granted Dzikowski by Criminal Law § 3-206(d). Martin does not, however, rely upon Criminal Law § 3-206(b) or (d) and, in fact, makes no mention of those statutory subsections in either his initial or reply brief. Instead, his dispute with the State's response to his demand for a bill of particulars focuses specifically and only on the State's theory of his criminal agency with respect to the attempted murder charges. We further presume that that is because the assault and reckless endangerment charges were nol prossed by the State, or, as in the case of first-degree assault, subsumed into the greater offense, attempted first-degree murder. Moreover, the conspiracy charge was also nol prossed and thus, despite being the focal point of much of the argument below, is no longer a part of this case. Furthermore, Martin was acquitted of the solicitation charge, extinguishing its relevance and removing it from further consideration.

The case at bar is distinguishable from *Dzikowski,* though the two cases share one similarity, which we believe to be of no consequence here, and that is, in both *Dzikowski* and the instant case, the State's response to the demand for a bill of particulars was, in essence, that no response was necessary because it followed a policy of "open file discovery." *Id.* at 438. What renders the two cases disanalogous for the purposes of this decision is that, while Dzikowski was charged with reckless endangerment, by short-form indictment, and was therefore entitled to a bill of

---

or information, "on timely demand, is entitled to a bill of particulars").

particulars, Martin was charged with attempted murder, and though it was also by short-form indictment, the crime of attempted murder is not an offense which carries with it this entitlement. *See Spector v. State,* 289 Md. 407, 423 (1981) (observing that, while an accused has a right to a charging document that meets constitutional requirements, he "is not entitled as of right to particulars").[33]

Although Martin couches his argument in terms of what he calls "different factual scenario[s]" presented by the State, his complaint is actually with the State's refusal to elect, prior to trial, a particular legal theory on which to proceed and then to inform him of the theory it chose. That is clear from the following language in Martin's demand for a bill of particulars:

> 5. State with particularity if Defendant is charged with the alleged offense as a principal in the first degree or as a principal in the second degree.
>
> 6. State with particularity all facts the State intends to prove that show Defendant acted as a principal in the first degree or as a principal in the second degree.

His demand thereby directs the State to declare what theory of criminal culpability it has chosen to proceed upon. An accused, however, is not entitled to know the State's theory of the case prior to trial and,

---

[33] Martin does not contend in this Court that the indictment was defective.

under Maryland Rule 4-241, has no right to compel the State to disclose it. *Hadder,* 238 Md. at 351.

Martin further complains that, during the trial, the State changed its theory of the crime, thereby unfairly prejudicing his efforts to defend himself. He asserts, without elaboration, that the State, during its opening statement, "presented argument that Jerold Burks was definitely the shooter, that Appellant had solicited his assistance, and that Appellant was guilty as a principal in the second degree by aiding and abetting Burks at the scene." That assertion unfortunately distorts what the State actually said in its opening statement. In fact, it is fair to say that the State made no such assertions about Burks, who, by that time, had already been acquitted of all charges stemming from his alleged role in the crime.

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

the State connecting Martin to the homemade silencer.

The instant case is quite unlike *Dzikowski*. There, the circuit court erroneously permitted the State "to proceed upon a factual basis, on which it did not rely, or even acknowledge, in the indictment, in the bill of particulars it filed and throughout the first half of the trial," and that error, as the Court of Appeals pointed out, may have affected Dzikowski's trial preparation or strategy. *Id.* at 456-57. In contrast, here, there was no possibility that Martin was either unfairly surprised or prejudiced at trial because he knew, from the start, that the State would attempt to prove his participation in the steps taken to consummate the attempted murder of the victim, as an accessory before the fact.

**IV.**

Martin contends that the evidence was insufficient to sustain his conviction of attempted murder in the first degree. Specifically, he submits that "the most damning pieces of evidence, those relating to [his] activities in Maggie McFadden's house on the day of [the] shooting, were provided by" Michael Bradley, "a witness who originally told police a completely different story from the one he related at trial, was granted immunity from the present case and leniency in another in exchange for his testimony, and previously had been convicted of obstruction of justice."

In reviewing a claim of insufficiency in a criminal case, we determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). Thus, we do "not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State,* 415 Md. 174, 185 (2010).

Applying this rule of appellate review, we conclude that Martin's argument as to "the most damning pieces of evidence" is a red herring. The factors he raises in support of it, such as the alleged inconsistencies in the stories told by the State's witness and whether that witness received favorable treatment in exchange for his testimony, bear only on witness credibility, not the sufficiency of the evidence, and therefore lie beyond the scope of our review.

Martin further asserts that, although "it might be reasonable for a finder of fact to conclude that these facts [as summarized] could be consistent with [his] guilt, it simply is not the case that they are inconsistent with every single reasonable theory of his innocence." He then asks us to apply the standard articulated in *Wilson v. State,* 319 Md. 530, 537 (1990), where the Court of Appeals stated that "a conviction upon circumstantial evidence *alone* is not to be sustained unless the circumstances, taken together, are inconsistent with any reasonable hypothesis of innocence." *See also Jones v. State,* 395 Md. 97, 120 (2006); *Moye v. State,* 369 Md. 2, 13 (2002); *Hebron v. State,* 331 Md. 219, 224 (1993); *West v. State,* 312 Md. 197, 211-12 (1988).

Martin's reliance on *Wilson* and its progeny is misplaced. First of all, "Maryland has long held that there is no difference between direct and circumstantial evidence." *Hebron,* 331 Md. at 226. It

is, in fact, now an axiom of law that "[n]o greater degree of certainty is required when the evidence is circumstantial than when it is direct, for in either case the trier of fact must be convinced beyond a reasonable doubt of the guilt of the accused." *Id.* at 226-27 (quoting *Gilmore v. State,* 263 Md. 268, 292 (1971), *vacated in part on other grounds,* 408 U.S. 940 (1972)).

And, contrary to what Martin claims, circumstantial evidence "need not be such that no possible theory other than guilt can stand." *Id.* at 227 (quoting *Gilmore,* 263 Md. at 293). That is to say, "[i]t is not necessary that the circumstantial evidence exclude every possibility of the defendant's innocence, or produce an absolute certainty in the minds of the jurors." *Id.* (quoting *Gilmore,* 263 Md. at 293). Indeed, the Court of Appeals recently noted that, notwithstanding the "reasonable hypothesis of innocence" language in *Wilson* and succeeding cases, "it is well established" that the standard that Martin "champions" is not "the focus of the standard to be applied when reviewing the sufficiency of the evidence in criminal cases." *Smith,* 415 Md. at 183. Appellate courts, it warned, should not "second-guess the jury's determination where there are competing rational inferences available." *Id.* And, finally, this Court recently stated "that the better test is 'whether the evidence, circumstantial or otherwise, and the inferences that can reasonably be drawn from the evidence, would be sufficient to convince a rational trier of fact beyond a reasonable doubt, of the guilt of the accused.'" *Clark v. State,* 188 Md. App. 110, 116 (2009) (quoting *Hagez v. State,* 110 Md. App. 194, 204 (1996)).

Applying this "better test," a test consistent with the approach approved by the Court of Appeals in *Smith,* 415 Md. at 183-86, to the instant case, we hold that there was sufficient, indeed ample, evidence of Martin's guilt. To begin with, there was evidence that Martin had a motive to kill. The victim had told Martin that she was pregnant with his child and had refused his request that she undergo an abortion. Were she to have his child, Martin would have had to contribute, much to his chagrin, to the support of that child, a point the victim impressed upon an enraged Martin. Equally discomforting for Martin, the birth of the child in question would have inevitably led to the discovery of his infidelity by his wife and significant others.

Furthermore, the forensic evidence linked Martin to the homemade silencer found at the crime scene. An expert for the State testified that the hair found on the silencer most likely came from someone in the same direct maternal line as Martin and that only 0.06 per cent of the population in North America would be expected to have similar DNA. And, as for the saliva found on the home-made silencer, the State introduced expert testimony that the DNA test results excluded "approximately 94 percent of the Caucasian population" of, presumably, North America, as well as "approximately 96 percent of the African-American population" of, we assume, the same geographical area, from consideration, but not Martin.[34]

---

[34] Although that expert, Sarah Chenoweth, did not testify as to whether the populations she considered were from North

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

Martin also had the opportunity to commit the crime, as he had been able to establish, through text messages, that the victim was at home the day of the

---

America, we infer that she used that database in her analysis, as that was the reference population used by the other expert, Dr. Terry Melton, in analyzing the mitochondrial DNA evidence. This inference is consistent with the standard of review we apply in addressing a claim of evidentiary sufficiency. *See Jackson v. Virginia,* 443 U.S. 307, 319 (1979) (requiring that, in determining whether evidence was sufficient, we "view[] the evidence in the light most favorable to the prosecution").

crime. The testimony of Michael Bradley, moreover, implicated him in the preparation of the silencer and the planning of the shooting. Finally, the jury could have reasonably inferred, based on Michael Bradley's testimony that Martin and Burks left Maggie McFadden's home the afternoon of the shooting and returned several hours later, that Martin transported Burks to the crime scene.

In sum, a reasonable fact finder could have found, beyond a reasonable doubt, based on the evidence presented by the State, that Martin planned and participated in the shooting.

**V.**

Martin contends that the circuit court erred both in giving the State's proposed jury instruction on accessory before the fact and in refusing to give his proposed instruction on aiding and abetting. He further asserts that "the State originally had proceeded on an aider and abettor argument" but, later, during trial, switched gears and advanced a different theory of criminality, namely, that Martin was actually an accessory before the fact, and that the trial court's actions, in giving the State's instruction while refusing his, "reward[ed] the State for fostering uncertainty through inconsistency and unpreparedness."

As to his proposed aiding-and-abetting instruction, Martin insists that, at the beginning of trial, the State "opted to introduce" that theory and that it should have been forced "to cope with the consequences of doing so." He maintains, moreover, that his proposed instruction was a correct statement of the law, was applicable to the facts of the case, and

was not fairly covered by any other instruction given and that the trial court's refusal to give that instruction therefore violated Maryland Rule 4-325.

As interpreted by the Court of Appeals, Maryland Rule 4-325 provides that a circuit court may not refuse to give "a requested jury instruction" (1) when that instruction "is a correct statement of the law"; (2) when it is "applicable to the facts of the case"; and (3) when "the content of the instruction was not fairly covered elsewhere in instructions actually given." *Cost v. State,* 417 Md. 360, 368-69 (2010) (citation and quotation omitted). To prove that Martin was an aider and abettor, the State was required to prove, among other things, that Martin "was present when the crime was committed." *Maryland Criminal Pattern Jury Instructions* 6:01 ("Aiding and Abetting"). And, as the State points out, Martin, himself, acknowledges that there was insufficient evidence that he was present at the scene of the shooting.[35] Thus, his proposed aiding-and-abetting jury instruction was not "applicable to the facts of the case," *Cost,* 417 Md. at 368, and the circuit court did not err in refusing to give that instruction. *Id.* at 369.

Nor did the circuit court err in giving the State's requested "accessory-before-the-fact" instruction. As previously noted in Part IV of this opinion, there was ample evidence that Martin participated in the

---

[35] In his brief, Martin states: "Simply because the State decided to change theories upon realizing there was insufficient evidence to convict . . . under [an aiding and abetting theory] is not reason enough for the court to refuse an[] otherwise proper jury instruction."

assemblage of the homemade silencer found at the scene of the shooting. Hence, the State's accessory-before-the-fact instruction was, to be sure, "applicable to the facts of the case." *Id.* at 368. Since Martin does not contend that this instruction misstated the law, or that another instruction "fairly covered" the content of the accessory-before-the-fact instruction, *id.* at 368-69, we have no grounds upon which to find that the circuit court erred in giving the State's requested instruction.

**VI.**

Martin claims that the circuit court erred in accepting inconsistent verdicts. He refers specifically to two verdicts: one that convicted him of attempted first-degree murder, the other that acquitted him of solicitation to commit murder. The State responds that, because Martin failed to raise this issue when the verdicts were announced, the issue is unpreserved for our review. It adds that, even if this issue had been preserved, the verdicts were, at most, factually, but not legally, inconsistent and that, therefore, under *McNeal v. State,* 200 Md. App. 510, *cert. granted,* 424 Md. 55 (2011),[36] the circuit court did not err in accepting the verdicts.

After the jury foreperson announced the verdicts, Martin's counsel requested that the jury be polled. At the conclusion of the poll, the verdict was hearkened, and the jury was excused. The court then ordered a

---

[36] As we shall hereafter explain, during the pendency of this appeal, the Court of Appeals affirmed the holding and reasoning of this Court in that case. *McNeal v. State,* 426 Md. 455 (2012), *aff'g* 200 Md. App. 510 (2011).

pre-sentence investigation ("PSI") report and proceeded to discuss, with counsel, the scheduling of the sentencing hearing. After confirming that defense counsel would explain to Martin what a "PSI" was and how the sentencing would proceed, the court informed Martin of his right to file a motion for a new trial and the court adjourned. At no time did Martin object to the allegedly inconsistent verdicts.

In *Tate v. State,* 182 Md. App. 114, *cert. denied,* 406 Md. 747 (2008), we held that, to preserve for appeal a claim that a jury has rendered inconsistent verdicts, "a defendant must note his objection" to the inconsistent verdicts "while the trial court has an opportunity to remedy the error," that is, before the verdicts are "final and the jury is discharged. Failure to do so constitutes waiver." *Id.* at 136 (quoting *Price v. State,* 405 Md. 10, 42 (2008) (Harrell, J., concurring)). It is undisputed that Martin failed to object below to what he now alleges were inconsistent verdicts. In fact, he waited until this appeal to raise this issue. We therefore hold that the issue is not properly before us.

In any event, if the issue had been preserved for our review, we would find that it has no merit. The Court of Appeals held, during the pendency of this appeal, that, while legally inconsistent jury verdicts in criminal cases are "prohibited," jury verdicts "which are illogical or factually inconsistent are permitted." *McNeal v. State,* 426 Md. 455, 458-59 (2012), *aff'g* 200 Md. App. 510 (2011). It defined "legally inconsistent verdicts" as those verdicts "where a defendant is acquitted of a 'lesser included' crime embraced within a conviction for a greater

offense." *Id.* at 458 n.1. A "lesser included crime" is a "required element of the greater" crime. *Tate,* 182 Md. App. at 131.

Martin was convicted of attempted first-degree murder. The "elements of attempted murder in the first degree are the intent to commit murder in the first degree and some overt act towards the crime's commission." *State v. Holmes,* 310 Md. 260, 271-72 (1987). And "the intent required for first[-]degree murder is that it shall have been wilful, deliberate, and premeditated."[37] *Id.* at 272. Consequently, to prove that Martin was guilty of attempted murder in the first degree, the State had to prove that he "had the wilful, deliberate, and premeditated intent to kill" the victim, and that he committed "some overt act towards that end." *Id.*

On the other hand, the crime of which Martin was acquitted, solicitation to commit murder, required the State to prove that he counseled, enticed, or induced another to commit the crime of murder. *Denicolis v. State,* 378 Md. 646, 659 (2003). "The person solicited need not commit, attempt to commit, or even intend to commit the act for the solicitation to be complete. The solicitation is complete once the incitement is made, even if the person solicited does not respond at all." *Monoker v. State,* 321 Md. 214, 220 (1990).

Solicitation to commit murder is, to be sure, not a lesser included offense of attempted first-degree

---

[37] The only exception to this rule is where the defendant is charged with first-degree felony murder. *State v. Holmes,* 310 Md. 260, 272 n. 5 (1987).

murder. While solicitation requires proof that the accused counseled, enticed, or induced another to commit murder, attempted first-degree murder does not.

Martin was acquitted of solicitation, presumably because the State had failed to prove, beyond a reasonable doubt, that he had counseled, enticed, or induced anyone else to murder or attempt to murder the victim. But, that is all that his acquittal suggested. There is no legal inconsistency between Martin's conviction of attempted first-degree murder and his acquittal of solicitation. Indeed, there may not be even a factual inconsistency between the verdicts, because the jury could have found that whoever assisted Martin in the planning and logistics of the murder attempt volunteered his assistance, without any counseling, enticement, or inducement by Martin.

**VII.**

Martin contends that the circuit court erred in sentencing him. The court, he claims, "improperly" considered a letter "allegedly" written by him and then, by imposing a life sentence instead of a sentence within the guidelines applicable to him, which were five to ten years, "effectively sentenced [him] for a crime of which he had been acquitted[.]"

To begin with, the State maintains that Martin has failed to preserve the "letter" issue for our consideration. "At no time during sentencing," the State avers, did Martin "voice any objection to consideration of the letter he now challenges." Rather, according to the State, Martin "challenged the admission of the letter on authentication grounds" and "objected to the State's request that the

sentencing hearing be postponed so it could authenticate the letter" but "did not object to the letter being considered by the court." Invoking *Reiger v. State,* 170 Md. App. 693, 700 (2006), a case which held that, in the absence of a contemporaneous objection, a defendant may not claim, on appeal, that a court considered improper evidence or impermissible factors when imposing sentence, the State insists that Martin "has given up any right to argue on appeal that the sentencing judge was motivated by impermissible considerations."

At the sentencing hearing, Thomas Laue, an administrator at the Jennifer Road Detention Center in Anne Arundel County, where Martin was incarcerated while awaiting imposition of sentence, testified that, in performing his duty to screen mail to and from inmates, he noticed an unusual piece of mail that Martin was attempting to send. The letter, which attracted his attention, "didn't have a return address," although "the outside [envelope] had the name Lil D written on it."[38]

The letter appeared to instruct an unknown recipient to enlist Jerry Burks in an effort to falsely implicate Maggie McFadden in the shooting at issue and have Burks place telephone calls to the prosecutor to achieve that end. For that purpose, it contained instructions on how to place telephone calls

---

[38] It is clear from the transcript that the letter was introduced into evidence at the sentencing hearing and was considered by the court. The suspicious letter and the envelope containing it, although referred to in the list of State Exhibits, are not part of the record before us.

without the risk of their being traced and included an offer of "a paid lawyer" to Burks should he agree to cooperate.[39] The letter further proposed, according to the State, that an e-mail be sent (by whom, the record does not say) "to law enforcement [which] would also shift the blame from Martin to Maggie [McFadden]." The letter then concluded with a veiled instruction to kill Burks once he had completed the task of planting the false accusation.[40]

The State also introduced, at sentencing, testimony from Diane Lawder, a forensic scientist with the Maryland State Police and an expert in the field of forensic document examination. Having compared the handwriting in the letter and on the envelope with that from a sample of Martin's handwriting, she opined that it was "virtually certain" that the handwriting in the letter belonged to Martin, whereas the handwriting on the envelope did not. Over objection, the State introduced the letter and envelope into evidence.

---

[39] At the time the letter was intercepted, on June 16, 2010, Burks had already been acquitted of all charges based upon his alleged role in the attempted murder.

[40] The State read, in open court, the following quote from the letter:

> "Take [Burks] down the road somewhere and do what you do, make sure there is no coming back. Be safe, and if you have to do it different okay, but make sure the call and (indiscernible—10:29:00) are in place and e-mail makes it all the best. Just tell him a friend is trying to help him."

At the conclusion of the sentencing hearing, the court imposed the maximum allowable sentence, life imprisonment. The court expressly noted that it was imposing a sentence greater than the range of sentence recommended by the sentencing guidelines and then articulated specific reasons for doing so, namely: Martin's major role in the offense, the excessive level of harm inflicted by his crime, his exploitation of a position of trust, and the "vicious or heinous nature of [his] conduct." It did not directly or indirectly suggest that the letter, in any way, influenced the sentence it imposed.

Turning now to Martin's claim of sentencing error, we begin by addressing the State's non-preservation argument. Although the State cites *Reiger v. State, supra,* 170 Md. App. 693, in support of its argument, we find that another case is more directly on point—that case is *Brecker v. State,* 304 Md. 36 (1985), a case that is addressed briefly in *Reiger,* 170 Md. App. at 699.

Brecker was convicted of, among other things, storehouse breaking and malicious destruction of property and was ordered to pay restitution of $1,036.76. *Brecker,* 304 Md. at 37-38. "At no time did the trial court make any inquiry into [Brecker's] ability to pay," and that failure to so inquire was the basis of Brecker's appeal. *Id.* at 39. Because Brecker objected, at his sentencing hearing, on the ground that the amount of restitution had not been proven, but he did not then object on the ground that the court had failed to inquire into his ability to pay restitution, the Court of Appeals deemed his appellate contention waived. *Id.* at 40-42.

In the case at bar, the State makes a similar argument, that the claim raised on appeal is different from the claim raised at Martin's sentencing hearing, and, therefore, his appellate claim should be deemed waived. We agree. Martin challenged, during his sentencing hearing, the authenticity of the letter at issue, but at no time did he contend below that, upon proof of the letter's authenticity, it was nonetheless improper for the circuit court to consider its substance. In that respect, the instant case is analogous to *Brecker,* and, applying the holding in that case, we hold that Martin's improper consideration claim was waived.

Even if Martin had preserved this issue for our review, we would find that it has no merit. "[A] sentencing judge in a criminal proceeding is 'vested with virtually boundless discretion.'" *State v. Dopkowski,* 325 Md. 671, 679 (1992) (quoting *Logan v. State,* 289 Md. 460, 480 (1981)). Maryland appellate courts recognize only three grounds for challenging a sentence imposed by the circuit court. Those grounds arise when: (1) the sentence violates the Eighth Amendment prohibition against cruel and unusual punishment, or its Maryland cognates[41]; (2) the

---

[41] Article 16 of the Maryland Declaration of Rights provides:

> That sanguinary Laws ought to be avoided as far as it is consistent with the safety of the State; and no Law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time, hereafter.

Article 25 of the Maryland Declaration of Rights provides:

sentence exceeds statutory limits; or (3) the sentencing court was motivated by ill-will, prejudice, or other impermissible considerations. *Id.* at 680. Only the third ground is alleged here.

"The strict rules of evidence do not apply at a sentencing proceeding." *Id.; see Williams v. New York,* 337 U.S. 241, 246-47 (1949). "In order to impose what is necessary to accomplish [the objectives of sentencing], [the sentencing judge] has a very broad latitude, confined only by unwarranted and impermissible information, to consider whatever he has learned about the defendant and the crime." *Johnson v. State,* 274 Md. 536, 540 (1975). The sentencing judge may consider, among other things, "the evidence presented at the trial, the demeanor and veracity of the defendant gleaned from his various court appearances, as well as the data acquired from such other sources as the presentence investigation or any personal knowledge the judge may have gained from living in the same community as the offender." *Id.* Moreover, "a sentencing judge may properly consider uncharged or untried offenses." *Smith v. State,* 308 Md. 162, 172 (1986).

The State introduced, at Martin's sentencing hearing, a letter showing that, while awaiting sentencing, Martin solicited an unknown person to persuade Burks to leave telephone messages falsely implicating McFadden in the shooting and, upon completion of that illicit task, to kill Burks. Given the

---

That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law.

"very broad latitude" the sentencing judge possesses, she acted within her discretion in considering the letter, even if it constituted evidence of an uncharged offense. *Smith,* 308 Md. at 172.

We also reject Martin's contention that the sentencing judge improperly sentenced him, in effect, for a crime of which he had been acquitted, as evidenced by the fact that his sentence was substantially greater than the sentencing guidelines recommended. In *Henry v. State,* 273 Md. 131, 140-51 (1974), the defendant made a similar type of claim (though, at that time, the Maryland Sentencing Guidelines did not exist).[42] The Court of Appeals held, however, that a sentencing judge may consider the defendant's involvement in crimes of which he was acquitted by a jury, so long as the sentence imposed does not exceed the statutory maximum for the crimes of which he was convicted. *See also Owens v. State,* 161 Md. App. 91, 101 (2005) ("Unfortunately, at times, an accused is improperly acquitted of a crime.") (quoting *Jeter v. State,* 9 Md. App. 575, 582 (1970), *aff'd,* 261 Md. 221 (1971)).

Martin was sentenced to the maximum penalty, life imprisonment, for the crime of which he was convicted: attempted murder in the first degree. *See* Md. Code (2002), § 2-205 of the Criminal Law Article. Because the sentence was authorized by statute and because Martin has failed to show that the sentencing

---

[42] The Maryland State Commission on Criminal Sentencing Policy, the body that promulgates the Maryland Sentencing Guidelines, was established by chapter 648 of the 1999 Laws of Maryland. *See* 1999 Md. Laws, ch. 648, at 3564, 3568-74.

judge was motivated by ill-will, prejudice, or other impermissible considerations, there are no grounds for vacating that sentence.

**JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

**APPENDIX G**

FILED: February 11, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 24-6086

(1:20-cv-02602-JRR)

---

CHARLES BRANDON MARTIN

Petitioner - Appellee

v.

JEFFREY NINES, Acting Warden; ATTORNEY GENERAL OF MARYLAND

Respondents - Appellants

---

ORDER

---

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 40. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

# APPENDIX H

## STATUTORY PROVISIONS INVOLVED

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of

rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order

directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

**APPENDIX I**

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND,

vs. Case Number:

CHARLES BRANDON MARTIN, 02-K-09-000831

Defendant.

---

OFFICIAL TRANSCRIPT OF PROCEEDINGS

TRIAL TO THE COURT

Anne Arundel, Maryland

Wednesday, April 28, 2010

BEFORE:

HONORABLE PAMELA L. NORTH

APPEARANCES:

For the Plaintiff:

ANASTASIA PRIGGE, ESQUIRE

CRIGHTON CHASE, ESQUIRE

For the Defendant:

LEONARD STAMM, ESQUIRE

JOHANNA LESHNER, ESQUIRE

Electronic Proceedings Transcribed by: Erica L. Van Ostrand

HUNT REPORTING COMPANY

Court Reporting and Litigation Support

Serving Maryland, Washington, and Virginia

410-766-HUNT (4868)

1-800-950-DEPO (3376)

* * * * *

JODI TOROK,

a witness produced on call of the State, first having been duly sworn according to law, was examined and testified as follows:

THE CLERK: Okay.

DIRECT EXAMINATION

BY MS. PRIGGE:

Q Jodi, are you familiar with the address of 1671 Hart Court in Crofton, Anne Arundel County, Maryland?

A Yes. It was my old address.

Q Were you living there on October 27, 2008?

A Yes. I was.

Q And who did you live at that address with?

A Jessica Higgs.

Q I can barely hear you over here, so you're going to have to speak up quite a bit. What relationship did you have with Jessica?

A She was my boss.

Q And did you have a personal friendship with Jessica, as well as—

A Uh-huh.

Q Where did the two of you work?

A Regis Hair Salon in Annapolis—

Q What?

A —Mall.

Q In Annapolis? Okay. And going back to that period of October 27, 2008, were you dating a Charles Brandon Martin at that time?

A Uh-huh.

Q Do you see him in the courtroom at this time?

A Uh-huh.

Q Can you point him out for the record?

MS. PRIGGE: Your Honor, indicating the defendant, for the record.

BY MS. PRIGGE:

Q What kind of relationship did you have with Charles Brandon Martin?

A We were dating.

Q How long had you been dating?

A For a while.

Q When you say a while, how long is a while?

A Probably, like, a year.

Q A year? Did you consider the relationship serious?

A Yeah.

Q Did you have feelings for him?

A Uh-huh.

Q Describe your feelings for him.

A I liked him as a boyfriend.

Q As a boyfriend?

A Uh-huh.

Q Okay. And was your relationship sexual?

A Yes.

Q And when you had sex, was protection used?

A No.

Q And did there come a point in time where you had a physical change in your body?

A Yes.

Q What was the physical change?

A I ended up pregnant.

Q When you became pregnant, did you discuss this with Charles Brandon Martin?

A Yes.

Q What was Charles Brandon Martin's—first of all, what did you call him?

A Brandon.

Q Brandon? What was Brandon's response when he found out that you were pregnant?

A He was mad about it.

Q And did he tell you why he was mad?

A Because he didn't want me to have a baby.

Q Did he give you any information why he didn't want you to have a baby or just said he didn't want you to have it?

A Just said I—he didn't want me to have it.

Q What did he want you to do?

A Get an abortion.

Q Did you, at any point in time, agree to get an abortion?

A I at first did, and then I changed my mind.

Q Why did you change your mind?

A Because I decided that I didn't want to have an abortion, that I wanted the baby.

Q And did you tell Brandon that you'd changed your mind?

A Uh-huh.

Q And how did he take that?

A He was mad about it.

Q When you say he was mad, how did he express that?

A Yelling at me through text messages.

Q Okay. Was that your primary mode of—

A Uh-huh.

Q —communication?

A That's how we always talked.

Q Okay. And once you decided to have the child, what did you envision as your future with him or how it would work?

A That I would raise the baby and he would just give me money to pay for stuff.

Q And did he seem open to that idea of helping to financially support you and the baby?

A Not really.

Q Not really? Well, what did he say exactly? Did he offer to give you money?

A No.

Q Or did he ever give you money?

A No.

Q He never—did he even give you a dime for this new baby?

A No.

Q At some point in time, did your discussions about the financial arrangements—did they get more heated?

A Yes.

Q And how—what did you discuss when you weren't getting any money from him?

A That I was going to go to court and take him for child support.

Q What was his reaction to you saying that you would go to court for child support?

A That he didn't want me to do that.

Q Was he happy, or upset, or mad, or what was his—

A Mad.

Q Mad? When you were dating him, did you have any knowledge of what kind of other relationships he was in? What did he tell you?

A He told me that he wasn't with anybody else.

Q Did you believe that for most of your relationship?

A Yes. Most of it.

Q Did there come a point in time where you began to suspect maybe there was somebody else?

A Yes.

Q And did you ever discuss the other person with Charles Brandon?

A I told him that I was going to tell his wife or baby mama, whatever she was.

Q What were you going to tell the wife or the baby mama?

A That I was pregnant.

Q And how did he react to that?

A He was mad about it.

Q When leading up to the time of October 27, 2008, were you still seeing Brandon in person?

A Not really.

Q Not really? How—did he keep coming over? Or did, at some point in time, he back off on coming over?

A He backed off.

Q And if you know, leading up to the time period of October 27, 2008, when's the last time that you saw him?

A I don't know.

Q Had it been very close or do you think a little while?

A A little while.

Q When you woke up on October 27, 2008, could you walk?

A Yes.

Q And did you have any head injuries?

A No.

Q What do you remember from October 27, 2008?

A Waking up in the morning, and calling my friend Blaire, and talking to her, and we got on the computer and we were looking at the crib that I had purchased.

Q Do you remember anything else after—

A No.

Q —looking at the crib? What's the next thing that you remember?

A Thanksgiving.

Q Thanksgiving? And Thanksgiving—what month is Thanksgiving?

A November.

Q So approximately how much time had passed?

A A month.

Q A month? And in that month that had passed, do you have any strong memories of that time period?

A No.

Q And what was your physical condition when you woke up?

A I was in a hospital bed and couldn't walk.

Q Were you pregnant when you woke up?

A No.

Q And if you know, was your pregnancy terminated while you were in a coma?

A Yes.

Q Who had just—if you know, had your parents participated in that decision?

A Yes.

Q Leading up to the time period before you were shot, did you have another relationship with somebody else?

A Yes.

Q Who else were you in a relationship with?

A Emmanuel.

Q And Emmanuel—was it possible that he was the father?

A Could have been.

Q In your heart, did you have an opinion on whose it was?

A I thought it was more Brandon's.

Q How did Emmanuel take the news that you were pregnant?

A He was okay with it.

Q Did he cut off contact when he found out that—

A No.

Q —you were going to have a baby?

A Not at all.

Q Did you ever see Emmanuel in the hospital?

A Yes. He was there almost every day.

Q Did he visit?

A Uh-huh.

Q And did he continue to stay in contact with you?

A Uh-huh.

Q And at some point, did you leave the State of Maryland and go back—

A Yes.

Q —move somewhere?

A I moved back home with my mom and dad.

Q And where do they live? What state?

A In Pennsylvania.

Q Did you ever see Emmanuel in Pennsylvania?

A Yes. He came up there once to visit me and he's supposed to be coming up again.

Q Okay. Are you familiar with the phone number 301-455-3792?

A Yes.

Q Whose phone number is it?

A It's Brandon's.

Q I'm sorry. Say it for the record.

A It's Brandon's.

Q Brandon's phone number?

A Uh-huh.

Q And what kind of phone did you have at that point in time?

A A Blackberry Pearl.

Q And at—around that October 27, 2008 time period, does your Blackberry have a feature in it where you can preprogram names like a contact list?

A Yes.

Q And did you in fact do that with Brandon?

A Uh-huh.

Q You have to say yes for—

A Yes.

Q —the record. Yes? And so if you answered a text or a phone message and the name Brandon popped up, who would be on the other line or that sent you a message?

A Usually Brandon.

Q Okay. Did anyone else ever send—

A No.

Q —you a message other than Brandon?

A No.

Q Do you remember who shot you?

A No.

Q Do you drink Gatorade?

A No.

Q Who do you know that drinks Gatorade?

A Brandon.

Q Does he—did he drink Gatorade a little or a lot?

A A lot.

Q Did Jessica, your roommate, drink Gatorade?

A No.

Q And on the day of October 27th, at least up until the point where you still had your memory, had you consumed any Gatorade?

A No.

Q Had Jessica consumed any—

A No.

Q —Gatorade? Was Jessica a neat or a messy person?

A Neat.

Q Were you, at that time, a neat or a messy person?

A Neat.

Q How neat was the apartment, the condo, on October 27th?

A Very neat.

Q Very neat? Would it have been typical or your—part of your practice to leave an item of trash around—

A No.

Q —like an empty Gatorade bottle?

A No.

Q Was that empty Gatorade bottle, to your knowledge, yours?

A No.

Q And did you keep a handgun in the townhouse?

A No.

Q Would you have kept an item of trash with gunshot residue in the house, to your knowledge?

A No.

Q Did you not have any enemies at the time, or were you fighting with anyone other than Brandon—

A No.

Q —at the time of the shooting?

A Uh-nuh.

MS. PRIGGE: Your witness.

CROSS-EXAMINATION

BY MR. STAMM:

Q Jodi, you were pretty involved with Emmanuel. Right?

A Uh-huh.

Q Emmanuel's black?

A Uh-huh.

Q And in fact, you took Emmanuel back to Pittsburgh in August. Do you remember that?

A Yes.

Q Okay. And do you remember telling Detective Regan that Emmanuel wasn't real happy when he found about the baby, either?

A Yes.

Q Okay. So when you testified just earlier that Emmanuel was okay with it, he actually—he wasn't real—really thrilled about it?

A He was better with it than—

Q Better than Brandon? Okay.

A Uh-huh.

Q Better than Brandon, but not, I mean, really—

A Right.

Q —thrilled either, and Emmanuel also wanted you to get an abortion. Is that right?

A No.

Q No?

A Uh-nuh.

MR. STAMM: Court's indulgence.

BY MR. STAMM:

Q Do you remember—you know, Detective Regan went and visited you in Pittsburgh in June of last year. Do you remember that?

A Uh-huh.

Q And he and Detective Gajda—did you talk with both of them?

A Uh-huh.

Q Do you remember that? And you—I think you gave a tape-recorded interview with them?

A Uh-huh.

Q And do you remember telling them that Emmanuel wanted to have an abortion—

A No.

Q —wanted you to get an—you don't remember that?

A Uh-nuh.

Q Okay. Now, as far as thinking that Brandon was more likely the father, you really didn't know which one was the father. Right?

A No.

Q Now, was there a third guy that you were also seeing at that—

A No.

Q —time or that you were friendly with?

A No.

Q Okay. So Emmanuel and Brandon were the only two men that you were having—

A Yes.

Q —sex with at that time?

A Uh-huh.

Q Okay. And back in October, you were about somewhere between six and eight weeks pregnant?

A Yes.

Q Okay. And you had, had some discussion about—with Brandon about a crib. Right?

A Uh-huh.

Q And he had agreed to pay for half the crib?

A Maybe.

Q Okay. Did you have a dog?

A Yes.

Q Okay. The dog barked when people came to the door it didn't know?

A Yes.

Q Okay. And the dog knew Brandon?

A Yes.

Q Okay. So the dog didn't usually bark when Brandon was there?

A Uh-nuh.

MR. CHASE: Court's indulgence?

THE COURT: Yes.

BY MR. STAMM:

Q Your picture—you had a MySpace page?

A Uh-huh.

Q Okay. And your picture was on it?

A Uh-huh.

Q All right.

MR. STAMM: That's all I have, Your Honor, thank you.

THE COURT: Anything else, State?

REDIRECT EXAMINATION

BY MS. PRIGGE:

Q Brandon never actually gave you the money for that crib. Is that—

A No.

Q —correct? Did you tell Brandon that he was the father of the baby?

A No. I told him I thought he was.

Q Okay. And how often did the defendant come over to your house?

MR. STAMM: Objection.

THE COURT: Sustained.

THE WITNESS: Like five times.

MR. STAMM: Objection.

THE COURT: Okay. Don't answer the question.

MS. PRIGGE: No further questions.

THE COURT: Anything else?

MR. STAMM: No, thank you, Your Honor.

THE COURT: All right, thank you very much, ma'am. You can step down. I'm warning you not to discuss your testimony with anyone.

(Witness excused.)

* * * * *

JESSICA HIGGS,

a witness produced on call of the State, first having been duly sworn according to law, was examined and testified as follows:

THE CLERK: Please have a seat. Please state your name for the record. Spell your name, please.

THE WITNESS: It's Jessica Higgs, J-E-S-S-I-C-A H-I-G-G-S.

MR. STAMM: Your Honor, can we approach?

THE COURT: Yes.

(Bench conference follows:)

THE COURT: So, I am going to overrule your objection.

MR. STAMM: Thank you.

(Bench conference concluded.)

DIRECT EXAMINATION

BY MS. PRIGGE:

Q Jessica, are you familiar with the address of 1671 Hart Court in Crofton, Anne Arundel County, Maryland?

A Yes. That's where I used to live.

Q That's where you used to live?

A Yes.

Q All right, you sound a little sick, but unfortunately—

A I'm sorry.

Q —you're going to have to project a little bit with your voice.

A Yes. I used to live there.

Q Okay. And who did you live at 1671 Hart Court with around the time period of October 27th, 2008?

A Jodi Torok.

Q Is Jodi Torok the young lady who just left the courtroom?

A Yes.

Q What kind of relationship did you have with Jodi Torok?

A Pretty good. I mean, we were friends. I mean, we—you know, we'd function just like, I don't know, kind of—I don't know. Like, we hung out. We—

Q Okay.

A —cleaned, shared duties.

Q Did you also have a professional relationship with Jodi?

A Yes. I was her boss.

Q At—and where did you work at that time?

A Regis Hair Salon.

Q And was Jodi seeing anyone named Brandon?

A Yes.

Q Do you see Brandon here in the courtroom today?

A Yes.

Q How often would you see Brandon?

A I worked a lot, so I probably saw him maybe, I would say, maybe three, three times, two or three, physically.

Q Physically at the condo?

A Yes.

Q And did he ever seen [sic] to have any trouble finding the address?

A No.

MR. STAMM: Objection.

THE COURT: Sustained.

MR. STAMM: Move to strike.

THE COURT: Okay. Please strike the last statement and don't consider it.

BY MS. PRIGGE:

Q And were you aware that Jodi's physical condition had changed?

MR. STAMM: Objection, leading.

THE COURT: Okay. Sustained.

BY MS. PRIGGE:

Q What, if anything, did you notice unusual about Jodi's physical condition in the weeks leading up to October 27th, 2008?

MR. STAMM: Objection.

THE COURT: Overruled.

THE WITNESS: What? That she was pregnant?

BY MS. PRIGGE:

Q Did you know whether she was pregnant?

A Yeah.

Q And were you going to help her with the pregnancy?

A Yeah. We'd discussed it. We were looking at—I mean, I might have meant this, but we were looking up other alternatives as well. She decided that she wanted to have it. We worked out a thing where she wouldn't have to—

MR STAMM: I'm going to object.

THE COURT: All right, I'll sustain.

MS. PRIGGE: Okay.

BY MS. PRIGGE:

Q Where were you on the afternoon hours of Monday, October 27, 2008?

A Working.

Q You were working at Regis?

A Yes.

Q And did there come a point in time where you received a phone call?

A Yes.

Q Who called you?

A Blaire [sic].

Q Who was Blaire [sic]?

A Jodi's best friend.

Q And where did Blaire [sic] live?

A PA.

Q And what information did Blaire [sic] give you?

A She told me that a salesman came to the door around 3:00, and Jodi said, let me get off the phone. He was selling insurance, and she said, "I got to get off the phone to give the guy Jessie's phone number," which I'm still trying to figure why she did that. Anyway—but—so she got off the phone and she said she would call Blaire [sic] right back, and Blaire [sic] tried to call her. After she didn't answer for—

MR. STAMM: Objection.

THE COURT: Sustained.

THE WITNESS: —two hours—

MR. STAMM: Objection.

THE COURT: Sustained. Now—

MS. PRIGGE: Well, can I—

THE COURT: Ma'am if I sustain the objection, you can't keep talking.

THE WITNESS: Okay. I'm sorry. I've never—

THE COURT: All right?

THE WITNESS: —done this before.

THE COURT: Okay.

MS. PRIGGE: Can I approach, Your Honor?

THE COURT: Yes.

(Bench conference follows:)

(Bench conference concluded.)

BY MS. PRIGGE:

Q All right, specifically, what did Blaire [sic] tell you that made you leave work to go to the townhouse to check on Jodi?

MR. STAMM: Objection.

THE COURT: Sustained. Overruled. I'm sorry.

THE WITNESS: So I can answer now?

THE COURT: Yeah. You can answer.

BY MS. PRIGGE:

Q Yeah, and you need to speak up because we're all having trouble hearing you.

A I'm sorry. She said that she wasn't answering her phone and that wasn't like Jodi. She would answer if she was in the shower, you know. She always answered her phone, so that's what made me—when I tried to call, she didn't answer her phone, plus she cooks dinner on Monday nights. I didn't—I didn't feel right. I don't know.

Q And so once you had these concerns, what did you do?

A Clocked out and drove home.

Q To the 1671 Hart Court?

A Yes.

Q When you got there, do you remember if the door was locked or unlocked?

A Unlocked.

Q And what happened when you walked into the hallway of your townhome?

A She was laying on the foyer of my—of my townhouse.

Q Who was laying on the foyer?

A Jodi.

Q What physical condition was Jodi in when she was laying on the foyer?

A She was—

Q Was she awake? Was she—

A No. She was unconscious and—

Q Was she breathing?

A Yes. Her stomach was going up and down and the first thing I noticed is that, like, she wet her—like, she was—she'd, you know, wet herself. At first, I thought she just passed out.

Q Okay. And was she able to respond to questions?

A No.

Q Did you notice any unusual items around where she was laying?

A A shell casing by her left foot.

Q Are you familiar with shell casings?

A Yes.

Q What do you understand a shell casing to be?

A The shell of the bullet or the casing of the bullet. Sorry.

Q Okay. And once you saw the shell casing, did you make any observations of her head?

A Well, yeah. At—I'd move up forward because, you know, I was trying to figure out where she was shot at because all I could see was—you know, she's laying down, so I proceeded to move forward and then I noticed it was her head. Yeah.

Q What—when you found her in this condition, what did you do?

A Called 9-1-1.

Q And did the police eventually come?

A Yeah. Within, like, three minutes.

Q Did you stay by yourself at the townhome or did you ask for help from any of your neighbors?

A I ran outside when I was dialing 9-1-1 and my neighbor, Jay, was outside, and I needed somebody.

Q What's his name?

A Jay, Jason.

Q Jason?

A Yeah. They call him Jay.

Q Do you know his last name?

A No.

Q Okay. And what did you do with Jason?

A Just had him stay with me.

Q Okay. Did you know whether or not anybody else was still inside the home?

A No. I wasn't thinking that. I just wanted to know if she was breathing. I wasn't thinking about that.

Q Do you have a dog?

A Yes. I have a pit bull.

Q A pit bull? How was the dog behaving when you arrived home?

A He didn't—he was laying right next to her.

Q Laying right next to whom?

A Jodi.

* * *

Q Showing you what's previously been marked as State's Exhibit 4, do you recognize what's in the State's Exhibit 4?

A Yes. That's where her head was.

Q That's where her head was?

A Yes.

Q Okay. Do you know approximately where that shell casing was in relationship to this picture?

A Down, like, to the left of the picture. It was down by her feet.

Q Okay. Is it depicted in this picture or in the other picture?

A I don't think it was in the other one. I think the—that's after the crime scene people came.

Q Okay.

A I'm not sure. The bullet might be in there because the bullet never penetrated her head.

Q Did you see a bullet as well as a shell casing?

A Yeah.

Q You did? Where was the bullet located when you saw it?

A To the left of her head.

Q To the left of her head?

A Yes.

Q Okay.

* * *

Q Now showing you what's previously been marked as State's Exhibit 15, do you recognize State's Exhibit 15?

A Yeah. That's my table.

Q Okay. Do you notice anything else unusual in this picture?

A Yeah.

Q Go ahead and look at your monitors right next to you. I just saw it.

A Yeah. There's a bottle on the floor.

Q Okay. You indicated there's a bottle on the floor. Had you seen that bottle on the floor when you left for work on October 27, 2008?

A No. Because I just cleaned the house this—the Sunday.

Q And would there have been any trash laying around?

A No. We didn't do that. I don't tolerate that.

Q And even though there's no trash laying around, are you a Gatorade drinker?

A No. We didn't drink Gatorade. We drink water.

Q When you say we, you didn't drink Gatorade. Did Jodi drink Gatorade?

A No. I bought the groceries.

Q I can't hear you.

A No. I bought the groceries. We drank water because it was cheaper.

Q Okay. So you never purchased Gatorade?

A No. Too expensive.

Q Did you have Gatorade in your house on the morning of October 27, 2008?

A No.

Q Is it a fair and accurate picture of how the apartment looked after the shooting?

A Yeah, and her purse is on the couch, which is normal.

Q Whose purse is that on the couch?

A Jodi's.

Q Jodi's purse was on the couch?

A Uh-huh.

MS. PRIGGE: Your Honor, we'd move in State's Exhibit 15.

THE COURT: All right.

(Whereupon, State's Exhibit 15 was admitted into evidence.)

BY MS. PRIGGE:

Q I'm showing you what's previously been marked as State's Exhibit 16. That's just a closer photo. Was that Gatorade bottle on the floor when you left for work?

A No.

Q And giving you a fair and accurate picture of how the scene looked after the shooting?

A Yes.

MS. PRIGGE: I'm moving in State's Exhibit 16.

THE COURT: All right.

(Whereupon, State's Exhibit 16 was admitted into evidence.)

BY MS. PRIGGE:

Q And showing you what's previously been marked as State's Exhibit 17, another close-up, have you ever seen that Gatorade bottle prior to October 27, 2008?

A No.

MS. PRIGGE: Your Honor, that's all the questions I have. We can turn the light back on.

THE COURT: All right, any cross?

MR. STAMM: Court's indulgence.

CROSS-EXAMINATION

BY MR. STAMM:

Q Ms. Higgs, you had a boyfriend named Alvin Odell (phonetic) at the time?

A Yes. I did.

Q Okay. He's African American?

A No.

Q He's not? Okay. Do you remember being interviewed by Detective Regan shortly after this, or Detective—one of the Anne Arundel County detectives?

A Yes.

Q And do you remember telling the detectives that you got along with your roommate, both of you liked to date black men?

A No. I do not—

Q Okay.

A —at all.

MR. STAMM: Thank you.

THE COURT: Okay. Anything else?

MS. PRIGGE: No, Your Honor.

THE COURT: All right, thank you, ma.am. You can step down and I'm warning you not to discuss your testimony with anyone.

THE WITNESS: Okay.

(Witness excused.)

* * * * *

EMMANUEL QUARTEY,

a witness produced on call of the State, first having been duly sworn according to law, was examined and testified as follows:

THE CLERK: Please have a seat. Move up to the microphone, sir. Please state your name and occupation. Spell your full name for the record.

THE WITNESS: My name is Emmanuel Quartey and I'm a student.

DIRECT EXAMINATION

BY MS. PRIGGE:

Q Can you spell your name, please?

A It's E-M-M-A-N-U-E-L. My last name is Q-U-A-R-T-E-Y.

THE COURT: Thank you.

BY MS. PRIGGE:

Q Emmanuel, are you familiar with a woman named Jodi Torok?

A Yes.

Q And directing your attention to October 27th, 2008 and around that time period, how did you know Jodi Torok?

A We met at a nightclub. That's where we met at.

Q And how much earlier had you met at the nightclub?

A Probably like a week after—the week later after the nightclub.

Q I'm sorry, like—

A A week—

Q You met her a week before October 27, 2008 or sometime before that?

A I mean sometime before that.

Q Okay. Do you remember how much earlier before October 27, 2008, that you had met her?

A No, I don't remember.

Q Would it have been more or less than a year, if you know?

A Less than a year.

THE COURT: Sir, I can't hear you. Could you move your chair much closer to the microphone?

THE WITNESS: Sure.

THE COURT: Try to keep your voice much louder. Okay?

THE WITNESS: Okay.

THE COURT: What was your last answer?

THE WITNESS: What's my last answer?

THE COURT: What was your last answer?

THE WITNESS: I met her a year—less than a year before.

THE COURT: Less than a year before?

THE WITNESS: Yeah.

THE COURT: Okay.

BY MS. PRIGGE:

Q And after you met Jodi Torok at the nightclub, did you develop a relationship with her?

A Yeah.

Q What kind of relationship did you have with her?

A We were more like friends, trying to get to know each other.

Q And did there come a point in time where the relationship became more than friends and became romantic?

A Yes.

Q And how long had it been romantic, referring to the October 27, 2008 time period?

A It was, like, probably, like, three or four months.

Q Three or four weeks, months, or what?

A Months.

Q Months? And after you had been dating three to four months, how would you describe your relationship at that point in time, after you had been dating three or four months?

A It was more—we were very close to each other, very, very close, and we were trying to just—she was talking about—we should move and just have a place to stay together.

MR. STAMM: Objection, what she said, what she said.

THE COURT: I'll sustain, but State, I'll tell you. I can't hear him. I don't know if all the jurors can hear him—

MS. PRIGGE: Okay.

THE COURT: —only because I'm sitting up here.

MS. PRIGGE: All right. Pull your chair forward. You might sound like you are shouting, but you won't be.

THE WITNESS: Okay.

BY MS. PRIGGE:

Q Just describe whether your relationship was getting more serious or less serious—

A More serious.

Q —after that three or four—okay. But now, you have to wait for me to finish.

A Okay.

Q Was your relationship getting more or less serious?

A More serious.

Q More serious?

A Right.

Q Describe your feelings for her.

A I care about Jodi. I care so much about her and—

Q Okay.

A —she's a very good friend of mine, too.

Q I heard you say that you care about Jodi, and then I didn't hear what you said.

A Actually, I care about Jodi, and she's a very good friend, too.

Q A good friend? Leading up to the period before October 27, 2003, were you aware of whether or not she was pregnant?

A Yeah. I was aware of it.

Q And did you know whether or not the child might have been yours?

A Well, I don't know. She told me that there's a possibility—

MR. STAMM: Objection to what she said.

THE COURT: Don't tell us what she said. Did you understand the State's question?

THE WITNESS: Yeah, yeah.

THE COURT: This question, I think, from State, was, did you know if it was your child?

MS. PRIGGE: Yes.

THE COURT: Yes or no?

THE WITNESS: No.

MR. STAMM: I thought he answered I don't know.

THE COURT: Did you answer I don't know, sir?

THE WITNESS: I don't know if it was mine.

THE COURT: Okay. You don't know.

BY MS. PRIGGE:

Q Did you consider whether it was possible for the child to be yours?

A Yes.

Q And when you had, assuming you had a romantic relationship if you had sex, had you used protection?

A Most of the time.

Q Were there times where you didn't use protection?

A Yes.

Q Okay. And how did you feel about Jodi being pregnant?

A Well, I wasn't too much excited about it, but at the same time, I have nothing to do, so—

Q You had nothing to what?

A —to do about it.

Q To do? Okay.

MR. STAMM: He said he had nothing to do about it.

MS. PRIGGE: Nothing to do about it?

BY MS. PRIGGE:

Q What do you mean by that?

A Well, I mean, she wanted to—she wanted to have the baby and I tried to explain to her that so far as she don't know who's the baby's father is, then it's up to her, whatever she wanted to do.

Q Okay.

A If it's mine, then I'll take care of it.

Q All right, were you angry with her for being pregnant?

A No, no.

Q And did you ever discuss her having an abortion?

A No.

Q And when she was going to keep the baby, were you upset?

A I wasn't upset about it.

Q Okay. And leading up to the time period right around October 27, 2008, were you still—were you in infrequent or regular contact with her?

A Frequent.

Q And how often were you seeing around [sic] that October 27th time period?

A Man, I saw—I saw her pretty much twice or three times a week.

Q Okay. And going to the date of October 27th, did you see her on October 27th?

A No. I didn't see her.

Q Did you try to contact her in any way on October 27th?

A Yeah. I called her.

Q And were you in contact with her that day? Did you actually—

A Yeah.

Q —speak to her?

A Yes, I did.

Q What time of day did you speak to her?

A We started talking through text message since—

Q Just tell me what time it was that you were communicating with her.

A From early, like 9:00.

Q And when you were texting, was it, like, just a one-time text when you sent a message, or was it kind of a back-and-forth, where you were in touch all day?

A It was kind of back and forth.

Q Did there come a point in time where the texting stopped?

A Yes.

Q And what time did the texting stop?

A Around, like, 12:00, around 12 o'clock, 1:00,

12:00, 1:00.

Q Did you continue to text her, even though she wasn't texting back?

A Yes.

Q Did you go over to Jodi's condo at any point that day, even later?

A Later, later that night.

Q Okay. What time did you go over?

A Around, like, 7:00 or—7:00 or 8:00.

Q Was Jodi there by the time you got there?

A No.

Q And yes or no, did you receive information about Jodi's health?

A Yes, I did.

Q And did you make any attempt to visit Jodi—

A Yeah.

Q —in that couple of weeks following October 27, 2008?

A Yes.

Q Where would you visit her?

A I visited her at the hospital and the rehab center.

Q And how often would you go visit her?

A Pretty much every day.

Q And how long did these visits go on for?

A Since she was over there to when she moved to Pittsburgh.

Q Do you recall approximately how long went by after the October 27th shooting, that she moved to Pittsburgh, how long she was—

A No, I don't.

Q —in the area?

A No, I don't.

Q Did you ever take the time to go visit her in Pittsburgh?

A Yes. I did.

MS. PRIGGE: Your witness.

CROSS-EXAMINATION

BY MR. STAMM:

Q How many times did you go to visit her in Pittsburgh?

A Once.

Q And that was before October 27th or after?

A After.

Q Okay. You never visited her in Pittsburgh in August?

A I don't remember going over there. I went over there only one time, so I don't remember that.

Q Okay. You sure it wasn't in August?

A I don't know. I don't remember.

MR. STAMM: Okay. Those are all the questions I have.

THE COURT: All right, thank you. State, any questions related to that question?

MS. PRIGGE: No, Your Honor.

THE COURT: All right, thank you, sir, you can step down.

THE WITNESS: All right.

THE COURT: Sir, I'm ordering you not to discuss your testimony with anyone.

THE WITNESS: All right.

(Witness excused.)

THE COURT: State, would you like to call an additional witness?

MS. PRIGGE: Yes, Your Honor. The State would call Sergeant Richard Alban.

THE COURT: All right.

THE CLERK: Sir, remain standing. Raise your right hand. Whereupon,

SERGEANT RICHARD ALBAN,

a witness produced on call of the State, first having been duly sworn according to law, was examined and testified as follows:

THE CLERK: Please have a seat. Please turn to the microphone. Please state your name and occupation. Spell your full name for the record.

THE WITNESS: My name is Richard Alban, I'm a supervisor with the Anne Arundel County Police Department and it's A-L-B-A-N.

THE COURT: Okay.

DIRECT EXAMINATION

BY MS. PRIGGE:

Q Sergeant Alban, how long have you been a police officer?

A Just over 20 years.

Q And what is your current duty assignment?

A I'm a supervisor assigned to the Anne Arundel County Police, Western District, platoon number one.

Q And directing your attention back to October 27, 2008, what was your duty assignment at that time?

A I was the supervisor of the homicide unit.

Q And how long had you been supervisor of the homicide unit?

A I was going on a little over two years.

Q And have you had any prior experience or contact with the homicide unit?

A Yes, I was a homicide detective for over 10 years.

Q And basically, in your experience as a homicide detective, both as a regular detective, as well as a supervising sergeant, have you had an occasion to respond to crime scenes?

A Yes.

Q And did you actually have an occasion to respond in this case to 1671 Hart Court in Crofton, Anne Arundel County to help with the investigation of Jodi Torok?

A I did, yes.

* * *

Q When you first walked into that crime scene as part of the evidentiary walk-through, both Detective Regan and ECU Technician Caliendo, what did you see when you first walked in that hallway?

A When you entered the residence, it's a bottom, like, apartment condominium and over top of it is a townhome. So, you walk down some steps and go to, like, a storm door, and then entering the storm door, you are looking down, like, a hallway and it—in the hallway, right there, there's, like, a little table was right there in the hallway, and then you saw some clothing that had been apparently cut off of the victim by medical personnel laying in the hallway. There was some blood, some—looked to— what appeared to be vomit. There was also a shell casing from a .380-caliber handgun. There was a projectile recovered, laying on the floor, and that was just—and a cell phone was also laying on the little table in the hallway, and then off to the left of the hallway, as you walk down, like, you had, like, a little wall when you walked in the foyer, and then the wall stopped, and it opened up into the living room area. But they had a sofa that went through and kind of made the hallway go further. So the hall—the sofa actually acted as, like, a little barrier between the hallway and the living room.

So, the living room was off to the left, and then as you walked down further, there was a little, like, dining room area, and if you continued walking straight back, that would have been where the kitchen was, and then off to the right before the kitchen would have been a little hallway that went back, and there was a bedroom to the right and a

bedroom to the left. The front bedroom, towards the street, was Jodi Torok's and the back bedroom was Jessica Higgs, her roommate.

Q Okay, and I guess I'm going to direct you to the point where you came around the backside of the couch, where the hallway was, and started to look into the living room. Are you familiar with that point in time—

A Yeah.

Q —and vantage point?

A I am.

Q And let me just digress for a moment. When you were the supervisor of the homicide unit, did you ever make any attempts to just, in general, stay up-to-date on new trends or areas in the field of criminal law that criminals might be using?

A It's important because, unfortunately, man's inhumanity to man is always changing, So, it's important to try and stay on top of crime trends and read as much as you can about new things that are happening. There are also safety bulletins that come out with new types of weapons and there's stuff on the internet you can look up. So, it's good to keep researching stuff so that you have a good, active knowledge and also attend as much training as you can.

Q And when you came around that corner inside that townhouse and had an opportunity to look near the couch area, yes or no, did an item attract your attention?

A Yes, it did.

Q Describe what the item was that attracted your attention.

A It was a Gatorade bottle laying on the floor and it had some tape around the mouth of it.

Q And did you have an opportunity, obviously once precautions, like, with gloves were taken, to kind of look at that bottle and further examine it?

A I did.

Q What was also interesting to you when you had a chance to eyeball this plastic Gatorade bottle with the tape around the top?

A Upon further observation, this, like, it's—I think it was a 20-ounce Gatorade bottle. There was tape inside the lip of the bottle and there was tape on the outside of the bottle. Some of it was white tape and some of it was duct tape, and then opening in the mouth of the bottle is—there was a rectangular impression where something was stuck in there and it looked—it was consistent with being an apparent—

MR. STAMM: Objection.

THE COURT: All right, I'll sustain.

BY MS. PRIGGE:

Q Well, let me go back and ask you some further questions. When you're a police officer, specifically one in homicide, do you have any familiarity with weapons in general?

A I do.

Q And are you familiar with the muzzle of a gun?

A I am.

Q What is the muzzle of a gun?

A The muzzle of the gun is the end of a gun, like a revolver would be, like, a round shape. You know, a shotgun would be round. You know, long guns would be round shapes. Semi-automatics would be, like, a rectangular shape.

Q And when you looked at the top of the inside of this Gatorade bottle, what did you notice?

A A rectangular shape.

Q And what did it look like, just based on being a police officer? What did it look like to you?

MR. STAMM: Can we approach? I object.

(Bench conference follows:)

(indiscernible – 1:54:44)

(Bench conference concluded.)

(Counsel returned to the trial tables, and the following occurred in open court:)

THE COURT: All right, ladies and gentlemen of the jury, a few minutes ago, you heard the officer testify that what he observed in the Gatorade bottle was apparent gunshot residue. Okay? I want you to strike that and not consider that as evidence in the case. Okay? All right, State?

BY MS. PRIGGE:

Q Sergeant Alban, when you looked at this Gatorade bottle and saw the apparent bullet hole in the bottom, and also the tape at the top, as well as the

apparent muzzle print at the top of the tape, did it remind you—

MR. STAMM: Your Honor, I object to the form of the question.

THE COURT: All right, sustained.

MS. PRIGGE: Well—

THE COURT: We just talked about that.

MS. PRIGGE: All right.

BY MS. PRIGGE:

Q Did the item remind you of anything?

A Yes.

Q What did the item, the Gatorade bottle, remind you of?

MR. STAMM: Objection.

THE COURT: Overruled.

BY MS, PRIGGE:

A It—in watching movies—I like action movies—and I have seen a movie where Steven Seagal—I hate to—my wife would kill me for saying this—but had a bottle. He used a two-liter plastic bottle that he attached to the end of a weapon and he fired a projectile through it in order to—he was going around stealth.

He was not trying to get caught by—there was a bunch of bad guys looking for him and he used the two-liter bottle to deaden the noise of the—of his weapon being fired, and I also saw stuff on YouTube

where they show you how to make silencers out of plastic bottles and other items.

Q Okay. Sergeant Alban—

MS. PRIGGE: If I could approach, Madame Clerk's 16, Exhibit 34.

(Whereupon, State's Exhibit 34 was marked for identification.)

BY MS. PRIGGE:

Q Sergeant Alban, I'm showing you what's previously been marked as State's Exhibit 34. Do you recognize that?

A Yeah.

Q Describe what that is.

A This was the Gatorade bottle that was recovered next—laying on the floor next to the couch in Jodi Torok's residence.

Q And looking at State's Exhibit 34, looking at the bottom of the bottle, again, is it in the same condition today as it was the day that you discovered it lying by the couch in the Torok/Jessica Higgs residence?

A It is, other than that Technician Caliendo, when she collects evidence, she put her initials on the bottom of the bottle.

Q Can you just hold the bottle up and point to where you see the apparent bullet hole?

A It's right here in the upper corner.

Q And—

MR. STAMM: Objection to it.

THE COURT: All right, sustained.

MS, PRIGGE: Okay. Well—

MR. STAMM: Move to strike.

THE COURT: All right, please strike the last answer that the detective gave.

MR. STAMM: Also, I move to strike the question.

THE COURT: All right, do you recall—if the jury remembers what the question was, you are not to consider the question or the answer.

BY MS. PRIGGE:

Q Directing you to the top of the bottle, is it in that—the same condition today or is it in a slightly different condition?

A It's in a different condition.

Q Well, how is the top of the bottle different?

A Located in—the tape had been removed. There was tape inside the mouth of the bottle and tape on the outside of the bottle, and that had been removed, so that forensic examinations could be completed on it.

Q Okay. Other than the tape issue being different today than what you previously saw, is items—State's Exhibit 34 in substantially the same condition today as it was when the item—the day it was discovered?

A It is.

MS. PRIGGE: Your Honor, I'm moving in State's Exhibit 34.

MR, STAMM: I don't object to that.

THE COURT: All right, that'll be admitted.

(Whereupon, State's Exhibit 34 was admitted into evidence.)

BY MS. PRIGGE:

Q I'm showing you—

MR. STAMM: Can I approach, Judge? I'm sorry. Can I just see that before you put it back? Thank you.

BY MS. PRIGGE:

Q And Sergeant Alban, I'm showing you what's previously been marked as State's Exhibit—State's Exhibit 15. Do you recognize what State's Exhibit 15 is?

A This is the living room of Jodi Torok's residence.

Q And what, if anything, is unusual about that picture?

A This shows you the sofa. This shows you, like, a coffee table, a round coffee table, and then at the foot of the sofa, you can see the Gatorade bottle in the picture.

Q Okay. And is this Gatorade bottle—is that in substantially the same condition today as it was the day you discovered it?

A Yes. That's exactly how it was discovered.

MS. PRIGGE: Your Honor, moving in State's Exhibit 15.

MR. STAMM: No objection.

THE COURT: All right, that'll be admitted.

(Whereupon, State's Exhibit 15 was admitted into evidence.)

* * *

BY MS. PRIGGE:

Q Showing you what's previously been marked as State's Exhibit 21 and State's Exhibit 20—

A State's Exhibit 20—that is the picture of the Gatorade bottle after it had been photographed at the scene and collected by the evidence techs. They then take it back to our laboratory, the crime scene laboratory, and at that point they take further photographs of it, and then look at it for further evidence, and this is just a picture of—a close-up picture of it.

Q And that's the same condition as it was then as it is today?

A Yes.

MS. PRIGGE: Your Honor, moving in State's Exhibit 20.

MR. STAMM: No objection.

THE COURT: All right, that'll be admitted.

(Whereupon, State's Exhibit 20 was admitted into evidence.)

MR. CHASE: May we publish this exhibit, Your Honor?

THE COURT: Sure.

MS. PRIGGE: Your Honor, that's all the questions I have of this witness.

THE COURT: All right, thank you. Mr. Stamm?

MR. STAMM: Thank you, Your Honor.

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. STAMM:

Q Sergeant Alban, you're not an expert in the subject of gunpowder, are you?

A I am not, sir.

Q Okay. And you're not—there are experts. There are people who are specially trained in these things, that sometimes come into court and testify in various cases, is that right?

A Right. I have received training in regards to those subject matters, but I'm not considered an expert, but there are experts.

Q Okay. And so, you—there are firearms experts, is that right?

A Yes, sir.

Q And there are experts who can testify about a lot of different things that are routinely used in criminal cases, is that right?

A That is correct, sir.

Q In fact, there are many experts in this case, I mean, not—obviously not including yourself. Is that right, since you're not an expert?

A I am not an expert.

Q So, your familiarity with using Gatorade bottles is—well, first of all, do you know—would you say it was approximately the front of the couch? Was that approximately 15 or 20 feet from the location where Ms. Torok was found?

A I don't believe so, no.

Q 10 feet?

A I'd have to see the measurements.

Q Okay. But it was—the bottle was on the other side of the couch from where she was found, that right?

A Yes, sir.

Q Okay. And as I understand it, your exposure to plastic bottles being used as silencers is based, as you testified, on Steven Seagal and YouTube, is that right?

A Yes.

Q Okay. And I guess you would agree with me that sometimes, things that happen in the movie don't happen in real life?

A Absolutely, sir.

Q Okay. Now, would it surprise you to—have you ever researched on the internet using plastic bottles as devices to smoke marijuana, bongs?

A Yes, sir.

Q Okay. And would it surprise you to know that if you look up on Google right now, Gatorade and bong, you would get probably about 300,000 hits. Would it surprise you to know that?

A It wouldn't surprise me.

MR. STAMM: Okay. That's all I have.

THE COURT: All right, State, anything further?

REDIRECT EXAMINATION

BY MS. PRIGGE:

Q In your experience as a homicide detective, do people ever get ideas from movies about how they can use in committing murder—

MR. STAMM: Objection.

THE COURT: I'll sustain.

MS. PRIGGE: No further questions.

THE COURT: Okay. Great, thank you very much. Now, you can step down. Sir, I'm warning you not to discuss your testimony with anyone.

THE WITNESS: Yes, yes, Your Honor, thank you.

(Witness excused.)

* * * * *

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND,

vs. Case Number:

CHARLES BRANDON MARTIN, 02-K-09-000831

Defendant.

---

OFFICIAL TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

Anne Arundel, Maryland

Thursday, April 29, 2010

BEFORE:

HONORABLE PAMELA L. NORTH

APPEARANCES:

For the State:

ANASTASIA PRIGGE, ESQUIRE

CRIGHTON CHASE, ESQUIRE

For the Defendant:

LEONARD STAMM, ESQUIRE

JOHANNA LESHNER, ESQUIRE

Electronic Proceedings Transcribed by: Sherri L. Breach

HUNT REPORTING COMPANY

Court Reporting and Litigation Support

Serving Maryland, Washington, and Virginia

410-766-HUNT (4868)

1-800-950-DEPO (3376)

* * * * *

CRAIG ROBINSON

a witness produced on call of the State, first having been duly sworn according to the law, was examined and testified as follows:

THE CLERK: Please have a seat. Pull your chair up to the microphone. Please state your name and occupation, your full name, and spell your full name for the record.

THE WITNESS: My name is Craig Robinson. I'm an evidence coordinator with the Anne Arundel County Police Crime Scene Unit. The spelling is C-R-A-I-G R-O-B-I-N-S-O-N.

DIRECT EXAMINATION

BY MS. PRIGGE:

Q Good morning. Can you describe what an evidence coordinator does for the Anne Arundel County Police Department?

A As evidence coordinator I oversee case management of the major cases that come into the crime scene unit and, typically, that is the evidence that's collected from our techs and police officers, various other police personnel. Basically, what I do in

a nutshell is follow the evidence from its time of collection to its end processing in whatever lab we may choose for it to go to and its subsequent use in court.

* * *

Q And did you have an occasion to assist the police department with looking at some evidence in deciding what testing would be appropriate in the shooting involving Jodi Torok that occurred on 1671 Heart [sic] Court in Crofton, Maryland on October 27th, 2008?

A Yes, I did.

Q And specifically, are you familiar in your position with different kinds of forensic or scientific testing?

A Yes.

Q In this case I'm going to show you some items that have been collected and ask what your role was with respect to each item and what testing you determined to send it for and who—who sent the items for testing.

The first item I'm showing has previously been admitted as State's Exhibit 34. Can you open it and tell me what it is in just a general—

MS. PRIGGE: Court's indulgence.

THE COURT: Uh-huh.

MS. PRIGGE: Can we approach?

THE COURT: Sure.

(At sidebar.)

MS PRIGGE: I don't want to get in trouble. He's probably going to call it a homemade silencer. So if you want to call him up and just tell him to—

THE COURT: That's fine.

MS. PRIGGE: —describe it as a Gatorade bottle.

THE COURT: Okay.

All right. Mr.—

MR. STAMM: Robinson.

THE COURT: —Robinson.

Mr. Robinson—

THE WITNESS: Yes.

THE COURT: —would you approach, please?

She's going to ask you questions about the Gatorade bottle and we're all (unintelligible) silencer, so concerning anything like that (unintelligible).

THE WITNESS: That's fine.

THE COURT: I know we've referred to it but (unintelligible).

THE WITNESS: Okay.

(Sidebar concluded.)

BY MS. PRIGGE:

Q And, again, we're talking for the record about State's Exhibit 34. Can you describe what State's Exhibit 34 is?

A Exhibit 34 is identified as a twenty-ounce Gatorade bottle. My initials are on the bag from

handling it the time prior, and this item was recovered from the crime scene.

Q And what contact did you have with that Gatorade bottle?

A The bottle—for my purposes I received it from an evidence locker and the item had at the time had some tape wrapped around it that I subsequently removed in company with a forensic chemist and examined further.

* * *

CROSS-EXAMINATION

BY MR. STAMM:

* * *

Q Okay. And you examined the tape for about an hour and forty-five minutes. Is that right?

A Roughly. Yes.

* * *

Q Okay. Now you're aware that there are—there is testing that can be done to determine whether there's gunshot residue on various surfaces. There's testing that you can have done?

A That's correct.

Q And, in fact, there was—there were numerous places where gunshot residue testing was done in this case?

A Correct.

Q And—

A Actually, I don't know about numerous. I believe it was two. I'm not—

Q Okay. But there were other there were times that that technology was used in this case?

A Correct.

Q You—there was no gunshot residue testing done on the Gatorade bottle, correct?

A Correct.

Q And, also, you're aware of various tests that could be done to determine whether or not there's marijuana on various areas. Is that right?

A Typically, we don't get involved with any CDS—

Q Okay. Because you're not a—

A Right.

Q —you're not a narcotics division?

A Civilian.

Q But you're aware that they—that those tests can be done?

A Correct.

Q And you never asked for anybody to test the bottle to see if there was marijuana residue in it.

A No, sir.

Q Is that right?

A No, sir.

* * *

REDIRECT EXAMINATION

BY MS. PRIGGE:

Q When—are you the person who makes the decision whether or not gunshot residue testing would be effective or efficient in a particular situation?

A Often times I am, but I also converse with others.

Q With respect to CS 6—the Gatorade bottle, did you consider whether or not to submit the Gatorade bottle for gunshot residue testing?

A Yes, I did.

Q And why did—did you send it or not for gunshot residue testing?

A We did not send it for gunshot residue testing. At that point in our case we were looking for the probative evidence that was needed, basically a link to attach a person to that bottle, that being through latent fingerprints and DNA analysis.

Q Were you in the process of determining whether or not a shooting had occurred?

A No.

Q Okay. And although you don't typically do any drug testing yourself because the drug lab does it, where are you familiar enough with evidence in general that you could see a sign of evidence of controlled dangerous substances?

MR. STAMM: Objection.

THE COURT: All right. I'll sustain it.

BY MS. PRIGGE:

Q Did you see any signs or evidence of controlled dangerous substances with respect to the Gatorade bottle?

A I observed none. No.

Q Thank you.

* * * * *

DETECTIVE MICHAEL REGAN,

a witness produced on call of the State, first having been duly sworn according to the law, was examined and testified as follows:

THE CLERK: Have a seat.

Please pull your chair up to the microphone. State your full name and occupation. Spell your full name for the record, please.

THE WITNESS: My name is Detective Michael Regan. Last name is R-E-G-A-N and I'm a detective with Anne Arundel County Police Department assigned to the criminal investigation division.

DIRECT EXAMINATION

BY MR. CHASE:

Q Afternoon, sir.

A Good afternoon.

Q Detective Regan, how long have you been a police officer?

A Almost twenty-three years.

Q How long have you been a detective?

A I've been a detective for about the last ten years.

Q On October 27, 2008 what was your assignment?

A I was a detective assigned to the homicide unit.

Q Did you work the case, the shooting of Jodi Torok?

A Yes, sir, I did.

Q And what was your role in that case?

A I was the lead detective assigned to that case.

Q Did you respond to the scene of the shooting on Heart [sic] Court on December—or October 27, 2008?

A Yes, I did. It was 1671 Heart [sic] Court in Crofton.

* * *

Q Okay. And did there come a time when you had entered the residence that Sergeant Alban pointed out an item of evidence that was recovered from near the couch to you? Did he point it out to you?

A Yes, sir, he did.

Q And did you examine that item?

A Briefly I did. Yes, sir.

Q Can you describe it for us?

A It's a—it was a plastic Gatorade bottle. I believe it was—it had orange Gatorade. On the top of the bottle was some gray duct tape wrapped around like the neck where a cap would go on. There was no cap. The bottle, of course, was empty. There was like

a black soot material inside of the bottle and there was also a small hole near the bottom of the bottle.

Q How far from—did—was the victim still there? I may have asked you this already. Was she still present when you arrived?

A By the time I—I arrived on the scene the victim had already been removed by emergency medical personnel.

Q Did you see any debris or materials left from the emergency medical personnel's efforts on her?

A Yes. I believe there were like rubber gloves and things of that nature.

Q And based on having spoken to the responding officer, did you figure out approximately where her body was discovered?

A Yes, sir, I did.

Q And how far from her body was this bottle with the tape on it that you described?

A Well, her body was found like in the foyer area of the—of the condo, and to the left of that is a couch. And it was just on the other side of that couch where it was found. So I would say no more than four or five feet at the most.

Q Now in your work as a police officer have you ever been around marijuana?

A Yes, I have.

Q Have you had occasion to arrest people for violation of the marijuana laws?

A Yes, I have.

Q What about paraphernalia, marijuana paraphernalia?

A Yes, sir, I have.

Q Do you know what marijuana smells like?

A Yes, I do.

Q When—and when you handled the bottle that had the tape on it did you smell—

MR. STAMM: Objection.

MR. CHASE: Any—

MR. STAMM: Can we approach?

THE COURT: Yes.

(At sidebar.)

MR. CHASE: Technically, I should be allowed to finish the question, but I think I understand the objection so go ahead.

MR. STAMM: Well, if you understand it then you understand the ruling.

MR. CHASE: Well, I think it's a perfectly reasonable and legitimate question.

THE COURT: So what 's your—

MR STAMM: My—I'm sorry. My objection is that this officer has not been identified as I don't think that's common knowledge what marijuana smells like—

MR. CHASE: (unintelligible.)

MR. STAMM: —and I think it's expert area and he hasn't been offered as an expert and he's not been disclosed to us as an expert.

MR. CHASE: And you think you need to be an expert to say what marijuana smells like when you've been a cop for twenty years and you've arrested people for it and paraphernalia? I mean—

MR. STAMM: That's exactly—that's exactly right.

MR. CHASE: I mean, if I were asking him to do some sort of test or make some sort of—offer some sort of opinion testimony that something is marijuana because he sniffed it, I think your objection would be—would be well noted.

THE COURT: Okay. I'm going to overrule the objection. But I think maybe you could lay a little bit of foundation to determine what his (unintelligible). I mean—

MR. CHASE: Yes, ma'am.

THE COURT: —arrests for it.

MR. CHASE: Okay. That's fair. I'll do that.

(Sidebar concluded.)

BY MR. CHASE:

Q Sir, let's step back—back it up just a tad bit. Back when you were involved in patrol activities and—and you arrested people for marijuana offenses, did you ever smell burning marijuana?

A Yes, I have.

Q When you were a police cadet at the police academy twenty years ago did they ever give you marijuana familiarization training?

A As far as the look of it they did. When I was at the academy they—they never burned any marijuana for us to be familiar with it. No, sir.

Q Okay. So your experience with the smell of burning marijuana came during your time as an—actually working as a police officer out on the road?

A Yes. That's correct.

Q More or less than a dozen arrests for violation of marijuana laws?

A More than a dozen.

Q Okay. When you had that bottle in your hand and you took it, I understand, a brief examination of it, did you smell the odor of burning marijuana emanating from it?

A No, sir, I didn't.

MR. STAMM: Objection.

THE COURT: Overruled.

BY MR. CHASE:

Q What was your answer, sir?

A No, sir.

THE COURT: Well, are you asking him if he smelled burning marijuana?

MR. CHASE: The smell of burnt marijuana. I thank you, Your Honor. I'll be more precise.

THE COURT: Okay.

BY MR. CHASE:

Q Did you smell—

MR. STAMM: Objection.

BY MR. CHASE:

Q —the odor of burnt marijuana as you examined that bottle?

MR. STAMM: Objection.

THE COURT: Overruled.

THE WITNESS: No, sir, I did not.

* * * * *

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND,

vs. Case Number:

CHARLES BRANDON MARTIN, 02-K-09-000831

Defendant.

---

OFFICIAL TRANSCRIPT OF PROCEEDINGS

TRIAL TO THE COURT

DAY 4

Anne Arundel, Maryland

Friday, April 30, 2010

BEFORE:

HONORABLE PAMELA L. NORTH,

And a Jury.

APPEARANCES:

For the State:

ANASTASIA PRIGGE, ESQUIRE

CRIGHTON CHASE, ESQUIRE

For the Defendant:

LEONARD STAMM, ESQUIRE

JOHANNA LESHNER, ESQUIRE

Electronic Proceedings Transcribed by: Dawn South and Sheri Monroe

HUNT REPORTING COMPANY

Court Reporting and Litigation Support

Serving Maryland, Washington, and Virginia

410-766-HUNT (4868)

1-800-950-DEPO (3376)

* * * * *

DETECTIVE MICHAEL REGAN,

a witness produced on call of the State, previously having been duly sworn according to law, was examined and testified as follows:

* * *

CROSS EXAMINATION (Resumed)

* * *

BY MR. STAMM:

Q Now there came a time where you interviewed Michael Bradley in this case; is that right?

A That's correct, Mr. Bradley was interviewed.

Q Okay. And the date of that—of the initial interview, do you recall when that was?

A He was initially spoken to I believe on the 29th of October.

Q Right. But then there came a period in time where—I'm talking with—there was a—came a point in time where Mr. Bradley changed his story.

A I remember another interview with him, yes.

Q Yes, and when was that second interview?

A I believe it was in November of 2009.

Q Okay. So that second interview occurred after Jerry Burks' trial?

A Yes, I believe it did.

Q Okay. And Ms. McFadden, fair to say was cooperative at the beginning of the investigation in this case?

A She agreed to speak with us. Yeah, I would say that she was cooperative in the beginning.

Q Okay. But as the investigation progressed she became more and more uncooperative?

A She became very difficult to deal with, yes, sir.

Q Okay. In fact it got to the point where she basically used obscenity towards the prosecutors in this case—

A Yes.

Q —are you aware of that?

A Yes, I am.

Q And did she have similar words for you?

A Yes, she did.

Q Okay. Do you remember exactly what she said to you?

A No. It was something in reference to police and maybe donuts, but I don't remember specifically what she said.

Q Did she use the F word?

A She may have, I don't—I don't remember, but she may have.

* * *

Q Okay. Now fair to say that you never aggressively interrogated Ms. McFadden?

A Yes, that's correct.

Q Okay. You never had the Gatorade bottle tested for marijuana residue?

A We're talking about the Gatorade bottle that was recovered?

Q Yes.

A That's correct, it was never tested for marijuana.

Q Okay. You never had it tested for gunshot residue, correct?

A That's correct. That wasn't necessary.

* * *

REDIRECT EXAMINATION

BY MR. CHASE:

Q Sir, other than Mr. Burks and Mr. Martin who else was charged out of the shooting of Ms. Torok?

A There were no other individuals charged.

* * *

Q Okay. Now regarding Ms. McFadden. You acknowledged that Ms. McFadden was somewhat rude to you, correct?

A That's correct.

Q Did you have an occasion in the early stages of the investigation to go—and strike that, let me back that up.

When you—did you understand that Ms. McFadden was Mr. Martin's girlfriend?

A That is my understanding, yes, sir.

Q Okay. And did there come a time when you went to Ms. McFadden's place of employment in an effort to speak with her?

A We contacted her employment, yes.

Q Okay. Did she respond to you in any way regarding your visit to her employer?

A I recall that she was up upset, that we were talking—you know, getting her employer involved in the fact that we wanted to speak with her.

Q A little upset or a lot upset?

A I would say she was pretty upset.

Q Okay. Do you know where Ms.—do you know where Ms. McFadden is today?

A It's my understanding that she's overseas in Iraq.

Q Okay, sir.

MR. CHASE: The Court's brief indulgence.

THE COURT: Uh-huh.

(Pause.)

BY MR. CHASE:

Q And did you, sir, have occasion to confirm that fact that Ms. McFadden was in fact overseas in Iraq?

A Yes, sir, that's correct.

Q All right. And in connection with that, sir, I want to show you what's already been marked as State's Exhibit No. 45 and ask if you can tell us what this is, please.

A It's a letter—letter of authorization from the Department of Defense.

Q To who?

A It is—

Q Sir, is it fair to say that that was Ms. McFadden's orders—

A Yes, yes, they're her military orders.

Q Okay.

A Civilian orders.

Q Thank you, sir.

MR. CHASE: Your Honor, move to admit State's Exhibit No. 54.

MR. STAMM: No objection.

THE COURT: All right, that's admitted.

(Whereupon, State's Exhibit No. 54 was admitted into evidence.)

BY MR. CHASE:

Q Sir, did there—did you ever uncover any evidence indicating Ms. McFadden was a suspect in this case?

A No, sir, we didn't.

Q Was Ms. McFadden a State's witness in this case?

A I believe she was a State's witness in the prior—in a prior case.

Q Well, okay. And she indicated to you she would or would not cooperate and testify in this case, Mr. Martin's case, if called to do so other than the fact that she got deployed?

MR. STAMM: Objection.

THE COURT: Sustained.

* * *

Q All right, sir, just to be clear, you—when did you initially come into contact with Ms. McFadden in connection with this investigation?

A The first time I interviewed her was approximately a few days to a week after I believe it was early November when I first spoke with her I believe.

Q Okay. And was she cooperative with you at that time?

A Yes, she was.

Q Okay, sir. And did there come a time after that that her attitude changed where she became less cooperative?

A Yes.

Q Okay. And how much longer after the initial interview did that start to happen, approximately?

A It's hard to say how long after, but as—as the case got more involved she became less—less cooperative with us—with the police department.

Q Okay, sir. And are you aware if at that time she still had a relationship with Mr. Martin?

A As far as I know she did at that—in the early stages, yes.

Q And what about all the way through? I mean during the entire episode?

A I believe she—

MR. STAMM: Objection.

THE COURT: Overruled.

THE WITNESS: It's my understanding that as they—that at some point it had ended.

BY MR. CHASE:

Q Okay. Now do you know how she responded when or excuse me—do you know how her job responded when you visited them there to ask them about her?

A When we went to the job we didn't have any problems with the employer, we only spoke to like a secretary or something at the front.

Q Do you know what happened as a result of that meeting? Well, strike that, never mind, that's okay, sir.

And you acknowledge she was not happy that you had done that; is that correct?

A No, she was upset that we went to her job at all.

Q Okay. And did the time that her cooperation started to fail come after you had done that?

A Yes, that'd be fair to say.

* * * * *

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND,

vs. Case Number:

CHARLES BRANDON MARTIN, 02-K-09-000831

Defendant.

---

OFFICIAL TRANSCRIPT OF PROCEEDINGS

TRIAL TO THE COURT

DAY 5

Anne Arundel, Maryland

Monday, May 3, 2010

BEFORE:

HONORABLE PAMELA L. NORTH,

and a Jury.

APPEARANCES:

For the State:

ANASTASIA PRIGGE, ESQUIRE

CRIGHTON CHASE, ESQUIRE

For the Defendant:

LEONARD STAMM, ESQUIRE

JOHANNA LESHNER, ESQUIRE

Electronic Proceedings Transcribed by: Dawn South

HUNT REPORTING COMPANY

Court Reporting and Litigation Support

Serving Maryland, Washington, and Virginia

410-766-HUNT (4868)

1-800-950-DEPO (3376)

* * * * *

MICHAEL WILLIAM BRADLEY,

a witness produced on call of the State, first having been duly sworn according to law, was examined and testified as follows:

THE CLERK: Have a seat. Please state your full name and address, spell your full name for the record.

THE WITNESS: Michael William Bradley, 206 West Taylor Avenue, Wildwood, New Jersey.

THE COURT: Okay.

MR. CHASE: Thank you, Your Honor.

THE COURT: Uh-huh.

DIRECT EXAMINATION

BY MR. CHASE:

Q Good morning, Mr. Bradley.

A Hi.

Q Sir, I'd ask you the scoot forward a little bit, keep your voice up, speak right into that microphone, please.

Sir, do you know Charles Brandon Martin?

A Yes, sir.

Q And how do you know him?

A He was with my sister, Maggie.

Q What do you mean with my sister?

A They were in a relationship together.

Q Dating, what?

A Dating.

Q Okay.

A Boyfriend and girlfriend.

Q How long were they together?

A A couple years.

Q Is Maggie your older sister or your younger sister?

A One year younger.

Q I'm going to show you a picture I've had marked as State's Exhibit No. 32 and is—who is who's in that picture?

A Brandon and my sister, Maggie.

MR. CHASE: All right, move to admit State's Exhibit No. 32.

MR. STAMM: No objection.

THE COURT: All right, that'll be admitted.

(Whereupon, State's Exhibit No. 32 was admitted into evidence.)

BY MR. CHASE:

Q Do you see the person you're referring to as Brandon or Charles Martin—Charles Brandon Martin in the courtroom today?

A Yes, sir.

Q Please point him out for the jury?

A Right there.

Q Indicate an article of clothing. Give me something he's wearing.

A Black suit with a white tie.

MR. CHASE: Okay, indicating the Defendant, Your Honor.

BY MR. CHASE:

Q Sir, when you gnaw [sic] Mr. Martin where were you living?

A At 115 Brookside Place when I first met him.

Q Okay. And where was Maggie living?

A The same place, 115 Brookside, sir.

Q Did there time when Maggie ever moved some place different?

A Yes, around the corner. I forget the name of the street, but it was where the incident happened. It's where everything took place.

Q All right. I'm going to show—

A Where we lived.

Q —you what I've had marked as State's Exhibit No. 31, and ask you if you recognize what's depicted in State's 31?

A Yes, that's where we lived.

Q Okay. That's whose house?

A Maggie's house.

Q All right.

MR. STAMM: The Court's indulgence, could I just—

THE COURT: Uh-huh.

MR. CHASE: Of course.

MR. STAMM: —see the back of that?

(Pause.)

BY MR. CHASE:

Q Who else lived at that house with you and Maggie?

A Frankie Bradley, which is my brother, and Dennis Bradley, which is my other brother, and Nanna (phonetic) McFadden, which is Maggie's daughter, and that was it.

Q Okay. Now did you live there all year or did you live some place else too?

A No, I lived in Wildwood, New Jersey. I only came to visit my sister around the holidays every year.

Q Now if now [sic] know, sir, was Mr. Martin dating your sister in October of 2008?

A Yes, sir.

Q Okay. Now when he was dating your sister did he come over there a lot to the house?

A Yes.

Q Did he spend the night?

A Yes, he would come late at night around 11:00, 11:30 at night every—almost six days out of a seven night period.

Q Did you have your own room there?

A No.

Q Where'd you sleep?

A On the couch in the living room.

Q Did he sleep in the living room?

A Brandon?

Q Yeah.

A No, sir.

Q Do you know where he slept?

A In Maggie's room upstairs.

Q Now did Mr. Martin ever talk about being married?

A Yes.

Q He mentioned that he was married?

A Yeah—

MR. STAMM: Objection, leading.

THE WITNESS: —Maggie had told me that he was married.

MR. STAMM: Objection, move to strike.

THE COURT: Okay.

MR. CHASE: Okay.

THE COURT Okay, strike the last answer.

BY MR. CHASE:

Q Sir, did—did he—strike that.

Were you friends with Mr. Martin?

A Not close friends, but like on a Maggie basis when I was at Maggie's house that was her boyfriend so I respected him for that.

Q Okay. And who were the main people that hung out over there?

A Me, Maggie, Frankie, Jerry Burks, a couple guys, Steve and Kevin Bradley, Shawn—

Q Now is Kevin—sorry, I didn't mean to interrupt. Shawn?

A Shawn, I don't know his last name.

Q Okay. Shawn his name is. Shawn they spell it like Shawn or Shawn?

Q Right. Is Kevin Bradley your brother?

A No, sir.

Q Okay. Is he a black guy or white guy?

A Black guy.

Q Okay. Now was that whole group friendly as far as you knew?

A Yeah.

Q Now, sir, in the time that you visited—or lived at Maggie's house and Mr. Martin was there did you ever see Mr. Martin with any firearms?

A Yes.

Q Where did you see it?

A In my sister's room. It was a little bronze—

MR. STAMM: Objection, can we approach?

THE COURT: Uh-huh.

* * *

BY MR. CHASE:

Q Sir, you said you come down every holiday. When did you arrive in town in 2008?

A About the end of December—the end of September.

Q Okay.

A Beginning of October. My job usually closes up at the end of October—end of September every year.

Q Okay. So when did you arrive at Maggie's?

A About September 27th probably.

Q Okay. And did there come a time when you eventually went back to New Jersey?

A Yes, right after New Years.

Q Okay. Now did you ever have occasion to go upstairs into Maggie's room?

A Yes.

Q Okay. And did you ever see Mr. Martin up there in Maggie's room?

A Yes.

Q Did you ever see Mr. Martin with something that you thought was interesting?

A Yes.

Q What was it?

A A little .25 semi-automatic gun.

* * *

Q Did you know it was a .25 or are you guessing it was a .25?

A Guessing.

Q All right.

A Because it was a small gun.

Q Just describe what it looked like without guessing anything.

A Bronze, got a handle about that long with a clip on the bottom. It was a bronze looking color, not dark—not all the way black, but not all the way golden either, it was like old looking.

Q Okay. Now let's talk about October 27th, 2008, okay? Do you remember that day?

A Yes.

Q Where'd you sleep the night before?

A On the couch.

Q What time did you wake up that day?

A About 6:00 in the morning. Every day I wake up to take Maggie's daughter to school Monday through Friday, and then pick her up in the afternoon.

Q And on that particular day did you take Maggie's daughter to school?

A Yes.

Q And where was Maggie?

A She already had went to work. I drop—I actually take her, drop her off to the—she takes a bus every day and I would drop her off first with her truck, take her truck back to her house, and then take her daughter to school, to the Cushion Academy School.

Q And is that what you did on October 27, 2008?

A Yes, every day, Monday through Friday.

Q Did Frank go with you?

A Not in the morning. He went with me in the afternoon.

Q Did you see Mr. Martin before you left to take the daughter to school that morning?

A At 6:00 in the morning, no, but his car was parked out front.

Q Did you actually see him at all that day?

A Later on that day around noontime.

Q Where was he when you saw him?

A He was—he was coming in the front door again. He had spent the night, I think he might have left when I came back with—when I came back from dropping Maggie's kid off I think he might have left somewhere and came back because he was coming in the front door.

Q Was that the first time you'd physically seen him that day?

A Yes.

Q All right. And approximately what time was that when you saw him for the first time?

A About noontime. Probably about noon, 12:00, 12:30.

Q And at that point who else was home?

A Me and Frankie, and my brother Dennis, was upstairs in the room really sick sleeping. He never had came out of the room.

Q Okay. Is Frank an older or younger brother?

A Older. Both of them are my older brothers.

Q Had Frank left the house that day without—did you ever see Frank leave the house that day?

A Yeah, just to go to the liquor store and come back.

Q Okay. Now had Frank been staying outside of Maggie's house in the weeks before this or the days before this?

A No, sir.

Q Okay. Did Frank ever need any kind of medical treatment or anything? Did Frank ever need any kind of medical treatment? You told us Dennis was sick, but was there anything wrong with Frankie that he might need some treatment for?

A No.

Q Okay. Now when you saw Mr. Martin come in on October 27th about noon you said, where was Frank? Where was Frank when Mr. Martin came in?

A Either walking around or drinking or somewhere around the house.

Q Did you ever see Mr. Martin and Frank have a conversation? Did you ever see them talking?

A Not like no, maybe briefly say hello to each other.

Q Okay.

A You know, but—

Q Did there come a time when anybody else showed up that day?

A Yes.

Q Who?

A Jerry Burks.

Q What time did Jerry Burks—

A A little bit after I seen him after 12:30, 1 o'clock, about that time.

Q Now what he [sic] happened after Burks arrived?

A We were all sitting there smoking marijuana.

* * *

Q So after Mr. Burks arrived it's you and Burks and who else?

A Frankie was in the house and Brandon.

Q Okay. Now where—where was Brandon at this point?

A Sitting in the kitchen. Him and Jerry were sitting in the kitchen, they were rolling blunts. We smoked about maybe five or six blunts that day. We just kept smoking and smoking. And then periodically I seen Frankie running up the steps, and I was like—and I seen him come down the steps with some white tape—medical tape, and I said, "What are you doing, Frank?" You know—

Q Without repeating anything—

MR. STAMM: Objection.

BY MR. CHASE:

Q —he said.

A Okay.

Q You can tell us what you said, but not what he said, okay?

A No problem.

Q What'd you say?

A I said, "What are you doing, Frank?" You know.

Q Okay. And where did he go with the tape?

A Out to the—out to the kitchen. And then afterwards Brandon and them went upstairs, some—Jerry was still downstairs smoking on the blunt, Brandon went up in Maggie's room, and after I seen Frankie run downstairs and he went for a Gatorade bottle, and I seen him run back up the steps with a

Gatorade bottle, and I said, "Frank, you know, what are you doing?"

MR. STAMM: Objection.

THE WITNESS: And—

THE COURT: Sustained.

BY MR. CHASE:

Q Without repeating what anyone else said.

A Yes, sir.

Q Okay. Well, did you ever go in the kitchen when they were in there?

A Yeah.

Q Okay. Well, did you see them—what were they doing in [sic]?

A They were just talking and Jerry was just talking, Brandon was talking, and Brandon went upstairs, and Brandon went in Maggie's room.

Q Now when you saw your brother with the white medical tape where did he take that to? Upstairs or to the kitchen?

A He took the medical tape to the kitchen, and then Brandon went up into Maggie's room, and then I seen Frankie come from downstairs again and go in the kitchen and grab a Gatorade bottle and went upstairs into Maggie's room again.

And then after that I went to pick up Nanna about 2:30, which is Maggie's daughter, because I had to pick her up between 2:00 and 2:30, I had to be there by 2:30. If I was late I couldn't sign her out—

Q Okay. Well, hang on.

A —because I wasn't—

Q You're getting ahead of yourself.

A Oh, no problem.

Q We'll get there in just a second. Now where was Mr. Martin when you saw your brother with the Gatorade bottle?

A In Maggie's room.

Q Okay. And where was your brother going when he had the Gatorade bottle in his hand?

A To Maggie's room.

Q All right. Now did there come a time when Mr. Martin left the house that day?

A Yes.

Q What time did you see him leave?

A About—he left approximately 1:30, 2:00. Before I left to go pick up Nanna.

Q Who else, if anyone, went with him?

A Jerry Burks.

Q And then did you go some place?

A I went to pick up Nanna.

Q What time did you pick her up?

A I had to be there before 2:30 because then I—my sister would have to sign her out because I wasn't a parent and we—I wasn't able to sign her out if I was late.

Q At what time did you get back to—well, strike that.

How long did it take you to get back to the apartment from picking up the girl?

A About 25 minutes to a half an hour drive.

Q Was anyone home when you got there?

A No, just Frankie. Frankie was there.

Q What was he doing?

A He was intoxicated.

Q Is that unusual for him?

A Yes, every single day.

Q So it was usual or unusual?

A Yeah, usual to—

Q All right.

A —see Frankie drinking, yes.

Q All right, sir. Now did there come a time when anyone came back to the house when you were there with Frank?

A Yes, Jerry—Jerry popped up in the house. Jerry—

Q What do you mean by popped up in the house, sir?

A Well, he came in—walked into the house.

Q Okay.

A And came into the kitchen and he was really nervous—he was acting really nervous.

MR. STAMM: Objection.

THE COURT: All right, I'll sustain.

BY MR. CHASE:

Q Okay. Sir?

A Yes.

Q Was anyone with Jerry when he came back?

A Brandon was with him.

Q Jerry went into the kitchen, right?

A Yes.

Q Where did Brandon go?

A I have no idea. Because after I left the kitchen Brandon disappeared.

Q So—

A I guess he went into Maggie's room—

MR. STAMM: Objection, okay.

THE COURT: Sustained.

BY MR. CHASE:

Q If you didn't see where he went that's okay.

A Okay, no problem.

Q All right. So Jerry comes in and goes in the kitchen, is that what you're telling us?

A Yes, sir.

Q And where did you go?

A I went into the kitchen with Jerry.

Q Okay.

A Because he asked me if I wanted to smoke another blunt with him.

Q Describe Jerry's body language? Do you know what I mane [sic] by body language?

A He was—

MR. STAMM: Objection.

THE WITNESS: Yes.

MR. STAMM Objection.

THE COURT: What's your objection?

MR. STAMM: To body language.

THE COURT: Well—

MR. STAMM: How do we interpret that?

THE COURT: —can't you just ask him what he saw?

MR. CHASE: Sure.

BY MR. CHASE:

Q Tell us—describe Jerry, what'd you see when you were hanging out with Jerry?

A He was very, very nervous.

MR. STAMM: Objection, move the strike.

THE COURT: All right, sustained, and strike that.

BY MR. CHASE:

Q Okay, you can't tell us—

THE COURT: Just ask him what he saw.

BY MR. CHASE:

Q —tell us what he was thinking, just tell us what you saw.

A No, but he was—very—walking back and forth, pacing and asking me If I wanted to smoke—

MR. STAMM: Objection.

THE WITNESS: —and he took a couple—

MR. STAMM: Objection to what he said.

THE COURT: Don't tell us what he said, sir.

THE WITNESS: I'm sorry. I apologize.

BY MR. CHASE:

Q Okay, sir. Now—so at some point, sir, did you—strike that.

Was Frank—was Frank with you guys in the kitchen or where was Frank, if you know?

A Well, Frankie was all over the place, man. He was cleaning, he was—he was just intoxicated.

Q All right. Now—

A He was just broken, talking.

Q Okay. Now when you came back in was Mr. Martin there?

A When I came back in—

Q From the kitchen, when you came back into the living room was Martin around?

A No.

Q Okay. Now, sir, at some point did Ms.—did your sister Maggie come home?

A Yes.

Q Now, sir, did there come a time—and approximately what time did Maggie get home?

A Between 5:30 and 6:00 every single day, Monday through Friday.

Q Well, what about October 27th, 2008?

A A little bit later, probably about 6:30 quarter to 7:00.

Q Now did there come a time, sir, when the police showed up at Maggie's house?

A Yes.

Q When was that?

A Either that night or the day after. A couple days after that day or that night. It was at nighttime definitely because I was sleeping on the couch when they knocked on the door.

Q Did you talk to them?

A No, I didn't talk to them.

Q Well, why not?

A I gave them my name and where—I gave them my address where I worked in New Jersey and that was it.

Q Okay. Did you tell them you didn't want to talk to them or did you—

MR. STAMM: Objection.

THE WITNESS: I didn't have anything to say to them because—

THE COURT: Sustained.

THE WITNESS: —I didn't know what these guys were up to.

THE COURT: Sir, if I sustain the objection then don't answer the question, okay?

THE WITNESS: Okay, I apologize.

THE COURT: Uh-huh.

BY MR. CHASE:

Q Were you particularly interested in talking to the police that day?

MR. STAMM: Objection.

THE WITNESS: No.

THE COURT: Sustained.

BY MR. CHASE:

Q Sir, without repeating anything they said, did they ask you if you would come to the station and speak with them?

A Yes.

Q Did you?

A No.

Q Why not?

MR. STAMM: Objection.

THE COURT: Want to come up?

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

THE COURT: (Inaudible).

MR. CHASE: Because it's Maggie's—this is his—the cops showed up asking about Brandon and that's his girlfriend's—I mean that's his sister's boyfriend. I think what we're going to might possibly hear something maybe to the fact that he didn't truly want to cooperate. He said, yeah, I saw Brandon today and that's it, difficult for him to articulate that as it is, but—

THE COURT: Uh-huh.

MR. CHASE: —it's to show that the reason he wasn't particularly cooperative is not because he was involved in some conspiracy, it's because that's his sister's girlfriend—I mean boyfriend and here the police are asking questions so why is he going want to help them?

THE COURT: Okay. So far (inaudible) what the police came for.

MR. CHASE: Okay.

THE COURT: So it's like when—

MR. CHASE: Okay, I get it.

THE COURT: What is your objection?

MR. STAMM: I just didn't know what the answer was going to be, so I figured we'd come up here and—

THE COURT: Well, it didn't seem relevant.

MR. CHASE: Okay, you're right.

THE COURT: So far (inaudible) we're investigating a burglary.

MR. CHASE: Okay, you're right. Okay, thank you.

(Counsel returned to the trial tables, and the following occurred in open court:)

BY MR. CHASE:

Q I want to back you up just a little bit, okay? When the police showed up there did they tell you—without repeating what they way [sic] have said what they wanted—who they wanted to talk to you about?

A No.

Q Did they ask you anything about Mr. Martin?

A They just asked me if I knew him or asked me if he sold drugs, that's what that—Mr. Regan had asked me.

Q Now did you go down to the station to speak with the police?

A No, sir.

Q Why not?

A I didn't want to.

Q Okay. Now, sir, did there come a time later when you left Maggie's house and went home?

A Excuse me?

Q Did there come a time after this all happened that you moved out of Maggie's house?

A Yes, Maggie had threw [sic] me out. When she moved to Virginia and I helped her to move she had asked me to leave because when this stuff started

when the truth of everything started coming out about this—

MR. STAMM: Objection.

THE COURT: Sustained.

BY MR. CHASE:

Q Okay, just leave it right there.

Now at the time you were moving out of Maggie's house, if you know, was Mr. Martin still coming around?

A Yes.

Q Now at the time the police were coming around did you know that there was an investigation into a shooting of a girl named Jodi Torok?

A No, sir.

Q Did you know that Jodi Torok was pregnant at the time she was shot?

A No, sir.

Q Now, sir, after you moved back to New Jersey did there come a time when you got arrested for something?

A Yes.

Q What'd you get arrested for?

A I got arrested for obstruction of justice—obstruction of justice and I had two Percosets on me.

Q Okay.

A The warrant they had for me for obstruction of justice is—when they arrested me for that warrant I had two painkillers in my pocket, and—

Q Did you have a prescription for them?

A No, sir.

Q All right. What was what was the obstruction of justice charge all about?

A It was—I was—I have these seven staples in the back of my head and they wanted me to—it was friends, we got in a fight and it got out of hand and they wanted me to point the guys out in a line up and I wouldn't go to court and so they gave me—they sentenced me to 120 days for not going to court and charged me with obstruction of justice and they sentenced me to 120 days and I did it.

Q Now after you'd been back in Jersey did you know that we were looking to talk to you?

A Not until I tried to bail out and they told me I had a—

MR. STAMM: Objection.

THE WITNESS: —fugitive of justice warrant.

BY MR. CHASE:

Q Just answer the question.

THE COURT: All right, sir, don't tell us what someone else told you.

BY MR. CHASE:

Q Did you know that we were looking to talk to you, yes or no?

A Yes.

Q Okay. When did you find that out?

A When I tried to get out.

Q Okay.

A It was a fugitive of justice warrant against me.

Q When—okay. When did you try to get out on the Percocet charge?

A I'd say around September 27th.

Q Of what year?

A Because I got locked up September 25th.

Q What year?

A 2009.

Q All right. Now did you in fact meet with us?

A Yes.

Q Okay. And did—we came to an agreement didn't we?

A Yeah.

Q And what was our agreement?

A What was our agreement?

Q Yeah.

A As far as?

Q As far as what was going on in Jersey and what was going on here.

A I don't understand.

Q We wanted you to come back here and talk to us didn't we?

A Yeah.

Q Okay. And you were dealing with some charges in New Jersey weren't you?

A Yes.

Q What was our agreement vis-a-vis those charges in New Jersey? Did we have some kind of agreement about us contacting New Jersey on your behalf?

A Yes.

Q Okay. Tell us what the agreement was.

A The agreement was—I don't remember.

Q Okay. Well, did the charges in New Jersey disappear and go away?

A No.

Q Okay. Did you—did you have to go back to jail?

A Yes.

Q Okay. Did you get any benefit in New Jersey based on something that we may have said to them?

A No.

Q Okay. All right. And did you do the 120 days?

A Yes, I did.

Q All right.

A Day for day.

Q Did you—did you get put on probation?

A No, sir.

Q All right. So—all right, fair enough.

Now and in fact we did meet about information that you had, correct?

A Yes.

Q All right. Well, did I tell you what to say when you came in?

A No.

Q All right. And are you telling the truth today?

A Yes, I am.

Q All right, thank you.

Now I just want the [sic] back you up for a second, okay, to the time that you're in the apartment and you've come home from picking up Nanna and you said that Mr. Martin came back and Mr. Burks came back; is that correct?

A Yes.

Q And Frankie was there?

A Yes.

Q And did you see Mr. Martin and Frank have any conversation at all?

A No.

Q Never saw them talk to other?

A No.

Q Okay. Did you notice anything unusual—did you notice any unusual items after Mr. Martin came back to the house with Jerry?

MR. STAMM: Objection.

THE COURT: Overruled.

BY MR. CHASE:

Q Did you notice him with anything unusual when he came back and you were there with Frank?

A No, sir.

Q Okay. Did Mr. Martin have anything with him when he came back to the house that day with Mr. Burks?

A Yes, sir.

Q What'd he have?

A He had a brown paper bag and he handed it to my brother, Frankie, and said to get rid of this.

Q Okay, sir.

MR. CHASE: Your Honor, thank you, those are my questions for Mr. Bradley.

THE WITNESS: Okay.

THE COURT: Okay, Mr. Stamm?

MR. STAMM: Thank you.

CROSS-EXAMINATION

BY MR. STAMM:

Q Mr. Bradley, part of your agreement with the State is also you signed what's known as an immunity agreement did you not? Yes?

A Yes.

Q You have to answer out loud, okay?

A Yes, sir.

Q And the immunity agreement is that you're going to talk to them and you're going to testify for them; is that right?

A Yes.

Q And you can only get in trouble if they don't think you're telling the truth; is that right?

A No, sir.

Q Oh, so you can get up here and lie and that's okay with them?

A No.

Q Okay. So the only way you get in trouble is if you lie under the agreement, right?

A There's no reason to lie.

Q My question is, your agreement with them is you can still get in trouble under your agreement can't you?

A I don't know, sir.

Q Suppose you didn't testify today would you be in trouble with them?

A If I didn't come to court I'm sure if I had a fugitive of justice warrant right in the beginning they had subpoenaed me and gave me a fugitive of justice warrant that I never knew I had.

Q Right. But part of your agreement with them is not only that they're going release you from that warrant, but also that you're not going get in trouble for this case; is that right?

A Yes.

Q That's part of your agreement with them. And it's only you don't get in trouble for this case as long as you tell the truth.

A I didn't do anything to get in trouble in this case, sir.

Q Okay. But you got an immunity agreement with them, right, to make sure that you can't get in trouble for this case, correct?

A Yes.

Q All right. And the—you're aware that the charges in this case carry a very severe sentence; is that right?

A No, sir, I don't know that part.

Q Okay. Well, you know—you know that attempted murder carries a potential life sentence—

A I'm sure.

Q —is that right? And they're not going charge you with that in this case as a result of you coming in here and testifying, correct?

A I didn't do anything wrong, sir—

Q All right.

A —so why would they charge me with that?

Q Right. So you don't admit to being involved at all in this; is that right?

A I wasn't involved.

Q All right. And your agreement to talk to the police was two things. It was—first was the immunity that we just talked about, right? And the second part

was that they would talk to the police and the prosecutors in New Jersey; is that right?

A No. My agreement was to talk to them because my sister had asked me to talk to them because he was threatening my sister.

Q Okay. So your sister was the one who asked you to talk to them—

A Yes.

Q —is that right?

A Yes.

Q And your sister asked you to talk to them in November of 2009; is that right?

A Yes.

Q And that was after the trial in this case for Jerry Burks; is that right?

A Yes.

Q So you didn't talk to them before that; is that right?

A No, sir.

Q The only thing they had from you before that was when you talked to them that day they—or night they came to your house and you told them that Mr. Martin had been there that day, right?

A Told who?

Q You told the police. When they came to your house and they asked you for your name and address you—and you didn't want to go to the police station—

A The only thing I gave them was my information where—because he said I need an address where I can come find you.

Q Okay.

A And that's the only thing I said to them that day, sir.

Q All right. You don't remember saying to them that Mr. Martin had been there that day, the day that we've been talking about on the Monday? You don't remember saying that to them?

A To the police the day that—

Q The police when they came—

A —they came to Maggie's house?

Q Yeah, right.

A No, I do not.

Q Okay. Well, the—the—so any way Maggie called you and told you to talk to the prosecutors; is that right?

A Yes, she told me to tell them everything and what happened because she was involved. She says that they brought her here and he was threatening—

Q Well, hold on, I'm not asking you what she said—

A Okay.

Q —I was just asking you that she told you to talk to them, right?

A Yes.

Q Okay. And are you the same Michael Bradley that was convicted in 1998 for a distribution of CDS—

A Yes.

Q —and served four years for that?

A Yeah.

* * *

Q Now when you made the plea agreement in the obstruction and drug case part of what you got from that was that they dismissed the drug case; is that right?

A Yeah, because they made me plead guilty to the—they made me plead guilty to the obstruction of justice.

Q Right. Now the obstruction of justice was because you pled guilty to lying to the police basically, is that right?

A Yes.

Q Okay. And you didn't do 120 days for that you did 84 days.

A One hundred and twenty days.

Q Okay. Well, you went into jail, you were arrested on—

A One hundred and twenty days was the sentence, and you get good time from when you're in there. That was the sentence, 120 days. You only had to do like 80 some days to get credit for the 120 days. I got credit for 121 days to be exact, sir.

Q Okay. And you're—the sentence though you got released on the day that you did the plea—

A Yes.

Q —is that right?

A And I had to go back—

Q So the plea is the total amount when you did the—when you did the plea was for basically for time served?

A Yes.

Q So you got out of jail when you made the deal—when you did the deal in court; is that right? You got out of jail that day—

A Yes, in (indiscernible – 11:30:21) County.

Q —from court? Okay.

A December 17th.

Q Now the crime obstruction is basically—that's the nature of the crime is lying to the police; is that right?

A What's that have to do with this?

Q Well, when you pled guilty to it you admitted that you were lying—

A Yeah.

Q —is that right?

A Yes.

Q Okay.

A But they also told me I could go home that day.

Q All right. And that's the thing that you wanted out of this was to go home; is that right?

A Out of what?

Q Out of jail.

A You said out of this.

Q Out of this case you wanted to go home.

A Out of my case in New Jersey, which has nothing to do with this case that's going on here, sir.

Q Right. Except that you had an agreement with the State to talk to the folks in New Jersey so that you would get favorable treatment up there.

A Agreement with which state?

Q With Ms. Prigge and Mr. Chase, right?

A No.

Q Didn't you have an agreement with them?

A No.

Q Okay. Do you remember when Mr. Chase was asking you the questions you said that you did have an agreement with him? Do you remember that just a couple minutes ago?

A Yeah.

Q Okay. So which one is it? You did have an agreement with them or you don't?

A I don't understand the question, man.

Q Okay. Now some of the people that come to your house, there's a guy named Kevin Bradley; is that right?

A Yeah. Yes, sir.

Q And Donte Fowler; is that right?

A Yes.

Q Steve Bernett?

A Yes, sir.

Q Steve Bernett was a friend of yours; is that right?

A They all were friends—

Q Okay.

A —but mainly friends of Jerry's, but I met them through Jerry.

Q Okay. And Steve Bernett was also a friend of Maggie's—

A Yes.

Q —is that right? Was—did Steve Bernett ever date Maggie?

A No.

Q Okay. And Shawn Richter, I think you mentioned Shawn, would that be Shawn Richter or could it be?

A I don't know his last name, but yeah.

Q All right. John Richter?

A They were all Jerry's friends that lived around the corner from him.

Q Okay. Now the day that all this happened you're certain that Mr. Martin spent the night there—

A Yeah.

Q —is that right? And you say you say his Rivera in the driveway?

A Yes, sir.

Q All right. And the—the—you told the police at that point in time that you didn't—that you didn't like Mr. Martin; is that right?

A Yeah.

* * *

Q So just so we understand you. You did sign an agreement with that State that you would not be prosecuted in today's case if you cooperated with them; is that right?

A Yes.

Q Okay. And part of your agreement was also that your time in New Jersey would be cut?

A I don't think so.

MR. STAMM: Can we approach?

THE COURT: Uh-huh.

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

MR. STAMM: I'm just going throw this out and (inaudible).

MS. PRIGGE: (Inaudible).

MR. STAMM: Uh-huh.

MS. PRIGGE: I think we have a problem (inaudible), but at that time we were kind of prohibited from talking (inaudible) it was something I can (inaudible). I mean (inaudible) that letter it'll create the impression that we worked a deal.

It's possible that Mr. Bradley doesn't exactly know the ins or outs of what that agreement was, so that letter is fine, but you'd have to have a provision that we never talked about that deal with him, we only talked about (inaudible).

MR. CHASE: Right. I mean what she's saying is it that it may not be easily proven or understood—

MS. PRIGGE: He may not understand—

MR. CHASE: —is that we did have a deal with him and we were willing to tell—ask them to make that agreement, but—

THE COURT: Uh-huh.

MR. CHASE: —they made it any way. I mean he went in, he's pled to time served with the instruction that they'd drop the charge and he'd been in for 120, they gave him credit—

MS. LESHNER: But you talked to the prosecutors there.

MR. CHASE: We did, but at that time the prosecutor reached out to the defense attorney and they said we don't want to talk to him. His public defender up there said we don't want to talk to you.

MS. LESHNER: I thought—

MR. CHASE: That wasn't until after—

(Simultaneous speaking).

THE COURT: Well, you can do it (inaudible) want, you can show it to him and see if he's aware of it, but he may not be.

MR. STAMM: Well, it's just—I think at this point perhaps we're going to need some kind of stipulation to clarify the record because, you know, unless—

MR. CHASE: Well, we can certainly agree to stipulate to the reality of what happened.

MR. STAMM: I don't want—I mean I'm trying not to call them as my witnesses to the deal. I think that it could be done by stipulation, I just wanted you to know what—

MS. PRIGGE: As long as its (inaudible).

MR. STAMM: He said what he—

MS. PRIGGE: —work it out (inaudible) and it's not clear what the New Jersey prosecutor or the public defender (inaudible).

MR. STAMM: I mean certainly I think the jury is entitled to know that he did receive a benefit, whether he—you know, he apparently—we don't know how competent he is to evaluate that.

THE COURT: Well, is there more than—did he receive I mean (inaudible) in this case.

MR. STAMM: Right, the time served in that case.

THE COURT: It was the time served.

MR. STAMM: Now he's apparently disputing that now, but I don't know how accurate he is on that.

MS. PRIGGE: Well, he might not be aware of it (inaudible) cooperate.

MR. STAMM: I can't ask him about something he doesn't know, but I think that the jury is certainly entitled to know that he got that benefit.

MR. CHASE: Well, yeah, why don't you say—let me take a shot at that real quick. If you said are you aware that the prosecutors called the prosecutor in New Jersey and proposed an arrangement whereby—

MR. STAMM: I'll ask—I'll ask him if he knows that you called and asked that he be released.

MR. CHASE: (Inaudible).

MS. PRIGGE: Because that's the point of the whole thing is whether or not the witness is aware that—

THE COURT: Exactly. Right, because—

MS. PRIGGE: (Inaudible).

THE COURT: Right, because otherwise he's not—right.

(Counsel returned to the trial tables, and the following occurred in open court:)

BY MR. STAMM:

Q So, Mr. Bradley, you're aware are you not that the prosecutors here called the prosecutors in New Jersey and asked that you be released as part of your agreement to cooperate with them in this case? Are you saying you didn't—you're not aware of that?

A No.

Q Okay. You have no idea that—

A If the State did that—

Q —part of the reason that you got out—

A —that was great, but I don't think that was the reason why I got out.

Q But you don't really—is what your saying you don't really know why you got out?

A No, I know why I got out. It doesn't carry that much time, sir, obstruction of justice. I never had that kind of charge on my jacket, and in the State of New Jersey that would have counted maybe a year probation or something.

Q But they also—

A And I couldn't afford the bail money to get out, that's why I sat in there and they gave me credit for time served.

Q You could have got a lot more time on the drug charge.

A No. Two Percocets? What were that, what'd they have?

Q I'm sorry?

A A big drug dealer? Two Percocets.

Q How much time were you facing on the drug charge?

A I was probably facing five years probation is what I was facing all together.

Q Okay. You did not get any probation as a result of your deal—

A No, they gave me credit for the time served because I couldn't bail out, sir—

Q Probation—

A —and I shouldn't have gotten any time at all because of that.

Q Probation. My question is you got out of there without any probation?

A Yes.

Q Okay. That was also part of the deal, right?

A How do you know that?

Q I'm asking you.

A I don't know that. There wasn't no deal that I signed in New Jersey.

Q Okay. When you made a plea agreement in this case they dropped the drug charge, right, totally gone, correct?

A Yes.

Q And—

A New Jersey did that.

Q That's right.

A Nothing to do with Maryland.

Q Well, that's your opinion. Are you saying you don't—you have no knowledge that the prosecutors over here called New Jersey and asked them to let you out of jail—

A To let me out?

Q —so that you could testify in this case? You're saying you have no knowledge of that?

A To bring me here?

Q That's right.

A Of course I had to come here, sir.

Q Okay. So you did know that that was part of what was going on was that you were cooperating with the prosecutors here in order to be able to get out—

A Why are you trying to confuse me?

Q —over there?

A Why are you trying to confuse me?

Q I'm not trying to confuse you.

A Yeah, you are.

Q I'm just asking you what you understood about this deal.

A I understand everything. I understand that you're defending somebody that committed a very bad crime, that's what I understand. How do you feel about yourself?

Q Okay. So you're coming in here, you don't have any responsibility to this, you'll get a free pass on anything that you might have done, right?

A I lost two days pay coming here.

Q You got a free pass in terms of any responsibility that you may have in order to testify for them—

MR. CHASE: Objection, asked and answered.

BY MR. STAMM:

Q —is that right?

THE COURT: Huh?

MR. CHASE: He's asked and answered this, and it's been covered.

THE COURT: All right, I'll sustain.

MR. CHASE: Thank you.

MR. STAMM: Okay.

BY MR. STAMM:

Q And you're telling us today that you have no knowledge that they called prosecutors in New Jersey and told them to let you out of jail in return for cooperating here today? You didn't know that?

A If they did that was great, you know, but to sign a deal or nothing, no, New Jersey didn't say that to me.

Q All right.

MR. STAMM: That's all I have.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. CHASE:

Q Did you have a lawyer in New Jersey for this obstruction thing?

A Yes, I do.

Q Did your lawyer ever tell you that we called him and said if your client is willing to come to Maryland and talk with us we would make some kind of favorable recommendation to the prosecutor in your case? Did he ever tell you?

A No, sir.

Q Okay. You just went to court and they offered you a plea deal; is that correct?

A He told—yeah.

Q All right.

A He told me you can go—

Q And you took it?

A —home today, Mr. Bradley, if you—if you want to fight the Percocets he says you can take a chance in fighting it, but you can go home today if you sign and plead guilty to obstruction of justice.

Q Thank you.

A And I said, no problem, I would love to do that.

Q Thank you.

Now I want to follow up on one other thing. Back—and we're going back to Maggie's house on October 27th, 2008, did Steve Bernett ever come over there that day? Did you see him there?

A That day?

Q Yeah.

A No.

Q Okay.

A When the cops came he was walking to knock for me when the cops had came to the house.

Q Right, we're talking about October 27th.

A Okay, no, sir.

Q Thank you.

MR. CHASE: No further questions.

THE COURT: Mr. Stamm?

MR. STAMM The Court's indulgence.

(Pause.)

RECROSS-EXAMINATION

BY MR. STAMM:

Q When you testified about this gun in Maggie's room Maggie was in the room at the time; is that right?

A When I seen it?

Q Yes.

A Yes.

Q All right. And—

A A couple of times, yes.

Q What's that?

A A couple of times I seen it—

Q Okay.

A —when they were both in there.

Q Okay.

MR. STAMM: That's all I have.

THE COURT: All right. Thank you, sir, you can step down.

THE WITNESS: Okay.

THE COURT: Sir, I'm ordering you not to discuss your testimony with anyone.

THE WITNESS: No problem, ma'am.

THE COURT: Okay.

THE WITNESS: Okay.

THE COURT: You can leave.

THE WITNESS: Oh, okay.

(Pause.)

MR. CHASE: Your Honor, the State's next witness—assuming you want to start—okay, keep going? Is Sheri Carter.

THE COURT: Okay.

THE CLERK: Please raise your right hand.

Whereupon,

SHERI CARTER,

a witness produced on call of the State, first having been duly sworn according to law, was examined and testified as follows:

THE CLERK: Please have a seat. Ma'am, pull your chair up to the microphone. Please state your full name and address, spell your full name for the record.

THE WITNESS: Sheri Ellen Carter, it's 5280 Duke Street, Apartment 410, Alexandria, Virginia 22304.

THE CLERK: Spell your full name, please.

THE WITNESS: S-H-E-R-I, last name Carter, C-A-R-T-E-R.

DIRECT EXAMINATION

BY MR. CHASE:

Q Good morning, Ms. Carter. Ma'am, how old are you?

A Twenty-eight.

Q Are you married?

A No.

Q Have any children?

A No.

Q Are you from Maryland?

A No.

Q Where are you from?

A Bristol, Virginia.

Q And where do you currently live—what county and what state do you currently live in?

A It's Alexandria City, Virginia.

Q Ma'am, do you know Charles Brandon Martin?

A Yes.

Q Do you see him in the courtroom today?

A Yes.

Q Point him out for the jury, please. Indicate a [sic] article of clothing.

A Dark suit.

MR. CHASE: Indicating the Defendant, Your Honor.

BY MR. CHASE:

Q Ma'am, when was the first time you met Mr. Martin?

A December 2005.

Q And did you develop a relationship with him?

A Yes.

Q What kind of a relationship?

A I guess it could be characterized as an intimate relationship.

Q Was he your boyfriend?

A Yes.

Q How long was he your boyfriend?

A A little over three years.

Q As far as you were concerned was the relationship exclusive?

A Yes.

Q When you were dating Mr. Martin did you spend much time together?

A Yes.

Q Did he ever meet your parents?

A He met my mom.

Q Did—do you know if he has any children?

A I thought that he had two children.

Q Now, did you ever meet his parents?

A No.

Q Do you know if he has any brothers or sisters?

A He had—well, he told me that he had two full brothers and sisters and I think it was three half brothers.

Q Now where were you living when you were dating Mr. Martin?

A Park Center Drive in Alexandria.

Q Did he ever come to your house?

A Yes.

Q How often did he come to you [sic] house?

A I saw him most days.

Q Did he ever spend the night?

A Yes.

Q Did you ever go to his house?

A Only on a couple of occasions. Well, I thought it was his house, but it wasn't his house.

Q Where did you go that you thought was his house?

A It was Brian Hall's house.

* * *

Q Did you ever go to a house in Bryans Road, Maryland?

A Yes.

Q Did you go inside?

A No.

Q Did he tell you that he lived there?

A He told me that his aunt and uncle lived there.

Q Did Mr. Martin ever visit you at your place of employment?

A Yes.

Q And did he meet your bosses?

A Yes, he had met them on a couple of occasions and gone to work Christmas parties.

Q What were your hopes for your relationship with Mr. Martin during the three years you were seeing him?

A I mean, I thought it was developing, but I was wrong.

Q What do you mean by that?

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

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

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

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

A No, I never knew him to be married.

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

A Yes.

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

A Yes.

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

MR. STAMM: Objection.

THE COURT: Overruled.

THE WITNESS: He was looking up gun silencers.

BY MR. CHASE:

Q Did you see that?

A Yes. We had a conversation about it.

Q What did you say? What was the conversation?

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

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

A No.

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

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

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

A No.

Q Was that his computer or your computer?

A It was his computer.

Q Did you ever use it?

A Yes.

Q What was unique about that computer?

A It was—he told me that he had got it from a place that he used to work and we didn't have administrative rights so you couldn't make any changes to the computer because we didn't have the password log in. So you couldn't download anything, you couldn't basically alter the computer.

Q What happened to that computer?

A He took it from my apartment.

Q Did you ask him about that?

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

Q Did he say what he did with it?

A He said he got rid of it.

Q When was this?

A It was the first week in November 2008.

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

A Yes, he used to carry one.

* * *

Q Ma'am, in September and October of 2008 did you ever see Mr. Martin with a gun?

A Yes.

Q Describe it for the jury, please.

A It was small, silver, with a black handle, semiautomatic.

Q Did you ever talk to him about the gun?

A Yes.

Q Did you ask him why he had it?

A He said it was for protection.

Q Now, ma'am, did Mr. Martin ever tell you he was being investigated for an assault?

A Yes.

Q What did he say?

A He said that a friend of his from Pittsburgh had been assaulted and he was being investigated.

Q When did he say that?

A I talked to him—I guess it was two days after it happened, the Wednesday.

Q And that would have been October 29th?

A Yes.

Q Where did you see him that day?

A In the parking lot of my apartment complex.

Q Well, back it up a little bit. Did you see him on October 27th, 2008?

A Yes.

Q Okay. Where did you see him that day?

A He came to my apartment in the evening.

Q What time in the evening, approximately?

A It was after 7:00.

Q Did he spend the night?

A No.

Q What time did he leave?

A It was before 11:00.

Q Now did you see him the following day, Tuesday, October 28th?

A No, I was unable to reach him all day.

Q Did you attempt to reach him?

A Yes.

Q Now you were telling us you saw him on the 29th of October 2008?

A Yes.

Q And where did you see him?

A In the—well, he met me in the parking lot of my apartment complex.

Q Did he come upstairs?

A Yes.

Q And did he talk to you that day?

A Yes.

Q What, if anything, did he say?

A He was crying, he was upset, he said that he was being investigated for an assault, but that everything would be cleared up by the end of the week.

Q Now, ma'am, at some point after this did Mr. Martin give you an article of his clothing?

A Yes.

Q Describe what it was, please.

A It was a navy blue quilted jacket. He left it outside of my car.

Q Did he tell you anything about the jacket?

A He said he was wearing it while he was being investigated or questioned on that Tuesday and it had bad memories associated with the jacket.

Q Did he ask you to do anything with it?

A He told me just to get rid of it.

Q And did you?

A No, I washed it and kept it.

Q Where'd you put it?

A I put it in my closet—my coat closet. And then when I moved apartments I moved it with me to my new apartment.

Q Now had you had Mr. Martin's cell phone throughout the time—phone number—throughout the time you had been seeing him?

A Yes.

Q Did there come a time when that number no longer worked for him?

A He switched numbers.

Q And do you recall when that was?

A I believe it was November 2008.

Q Did he give you the new number?

A Yes.

Q Now going back to when he mentioned he was being investigated, at that time did he tell you that a girl had been shot?

A No.

Q At some point did you find out that a girl had been shot?

A Yes.

Q How did you find out about it?

A I found out from one of his girlfriends.

* * *

Q Who told you?

A Maggie McFadden.

Q Now how did you come to be in contact with Ms. McFadden?

A She called me one night in February.

Q Did you agree to meet with her?

A Yes.

Q Were you aware that Mr. Martin had also been dating her during the time he was dating you?

A I found out that night that she called me.

Q And where did you agree to meet her?

A I met her she lived in Alexandria at the time as well and I met her at a gas station near my house.

Q And where—did you go anywhere with her or—

A We went to a bar.

Q How did you all get there?

A I drove.

Q Did she ride with you in your car?

A Yes.

Q Was anyone else there?

A A friend of mine.

Q Who was the friend?

A Brook Morris.

Q What does—now did you actually go to the bar?

A Yes.

Q And who was there?

A It was myself, Brook, Maggie, and Brian.

Q And was Mr. Martin there?

A He came, but he didn't come inside.

Q How did you know he was there?

A Because Brian had been outside for a couple minutes and I thought it was odd so I realized that Brandon was outside in the parking lot.

Q Did you go outside and talk to him?

A Yes.

Q Did Maggie go with you?

A Only for a second.

Q What was Maggie's behavior towards you like during this meeting? Friendly, not friendly?

A She kind of went back and forth between being volatile and friendly.

Q What do you mean by volatile?

A She told me that she had a gun on her and that she'd brought it for protection because she didn't know what I was like.

Q What else made you think she was volatile?

A She said she liked to beat people up. She said that she beat Brandon up on a regular basis. She basically just said that if people got in her way she, you know, knew how to take care of it.

Q Did she try to beat you up?

A No.

Q Did she physically touch you in any way?

A No.

Q Were you scared?

A No. I actually thought it was a joke at first.

Q Did she say anything about hurting other people, other than beating them up?

A She said that she'd had someone shot at one point.

Q Now—thank you.

Now going back to the meeting when you went out you said Mr. Martin was there?

A Yes.

Q Where outside was he?

A He was in the parking lot.

Q Was there anyone with him?

A Brian was outside with him.

Q Did you talk to him?

A Only for a second.

Q What was he wearing?

A He was wearing a sweater that had been in my apartment, so I realized that he had gone into my apartment while I was there waiting for him to get some of his stuff out.

Q Was that a problem for you?

A Yeah, I was pretty furious.

Q Why? Why was it a problem for you?

A Because I was there waiting for him to get my keys back and knowing he wasn't supposed to go into my apartment he went into the apartment knowing that I wasn't there.

Q Did he have permission to go in your apartment when you weren't there?

A He previously had permission yes, because he had a key.

Q Had you revoked that?

A Yes, I told him I was waiting there to get my stuff back.

Q So he was wear thing [sic] sweater that you had put away in your house; is that correct?

A Yes. He had left it on the sofa the night before and he was wearing it, so I realized he had gone inside.

Q So that night out on the street in front of the bar did you try to talk to him?

A Yes.

Q Did he want to talk to you?

A No.

Q Did he say anything to you?

A He said everything just happened.

Q What else, if anything?

A He said that it was my fault because I didn't trust him, I listened to other people instead of him. I should called [sic] him instead of going to meet with her.

Q Now at that point did you know about anyone having been shot?

A No.

Q Now when you went home that night did you notice anything missing from your apartment?

A I just noticed that he had gone in and his coat—the coat was missing that I had for him.

Q The what?

A The coat, the navy blue coat.

Q The one you had washed?

A Yes.

Q Where had you put it?

A It was hanging up in the coat closet.

Q Now did you come to find out at that meeting anything about Mr. Martin's marital status?

A I found out that he was married from Maggie.

Q And did you know that prior?

A No, he told me that they had never married.

Q Did you find out his wife's name?

A I had already known—oh, I knew—he always referred to her as my kid's mom, so I knew her name, we had talked about her.

Q And what was her name?

A Carissa.

Q Did you contact Carissa?

A Yes, I sent her an e-mail when I got home that evening.

Q And what did you say to her?

A I apologized. Basically said I didn't know that you were married, I know two of your children, I've met them, I didn't know that you had this third child and I apologized.

Q How'd you get her e-mail address?

A From Maggie.

Q Did you send her any photographs?

A Yes.

Q What photographs did you send her?

A I sent her photographs of Brandon, a photograph of me with Brandon, and another photograph of Brandon.

Q What was the other photograph of?

A It was of his genital area.

Q Why did you send that message to his wife? Why'd you send that picture to his wife I should say?

A In part I thought—I felt like she had a right to know what he was up to. I didn't know at this point that she knew anything and I was kind of in shock not—you know, not really believing what was happening and so I sent it to her.

Q Now when was the next time after that that you saw the Defendant?

A It was maybe a week, a week and a half.

Q And where did you see him?

A He came to my apartment.

Q Now at that time did you learn more about the investigation?

A I had never learned anything from him directly.

Q When he showed up at your apartment that day what did he want?

A He came to get his cell phone charger.

Q Anything else?

A That was all he picked up. He said he would get the rest of his stuff later.

Q How much time did he spend at your apartment that day?

A Maybe five minutes.

Q Now after that, ma'am, did you—did there come a time when you learned more about the investigation?

A Yes.

Q And when did you learn more?

A A friend of mine in Colorado who's from—

MR. STAMM: Objection.

THE COURT: Sustained.

BY MR. CHASE:

Q Okay, without telling us anything that someone else said, did you—how did you find out about that there was more details involved in Ms. Torok or—excuse me—into the investigation?

A An article was e-mailed to me.

Q What kind of article?

A It was his arrest—I guess he had been arrested the day before and it was just a statement that someone had been arrested with his picture from the Annapolis paper.

Q An article in what?

A It was from the Annapolis Capitol paper.

Q And after that did you contact anybody?

A I called Detective Regan.

Q And did you meet with him?

A Yes, he came to my apartment in Alexandria.

Q Did you tell him everything that you could think of at that time?

A Yes.

Q Now, ma'am, how did you feel when you found out Mr. Martin in fact was married with children and in fact also seeing other women?

A Violated.

Q And after you learned about that and had some of the interactions you've described here today were you still interested in dating him?

A No.

Q Are you here today to try and get back at Mr. Martin for lying to you?

MR. STAMM: Objection.

THE COURT: Sustained.

BY MR. CHASE:

Q The—have you and I or representatives from the State's Attorney's Office met to discuss your—the knowledge that you have about this case?

A Yes.

Q Did I or anyone else ever tell you or suggest in any way what we wanted you to say?

MR. STAMM: Objection.

THE COURT: Sustained.

BY MR. CHASE:

Q Going back in time just for a second till the time before Mr. Martin said the police were investigating him, did he ever take anything from your house? And I'm not talking about the computer.

A A pair of gloves.

Q When was that?

A It was late September 2008.

Q And what kind of gloves were they?

A They were Playtex gloves, like plastic surgical gloves.

Q Why did you have those?

A I worked part care urgent—I worked at an urgent care center on the weekends.

Q Is this near to in time when he was looking on the internet at silencers?

A Yes.

Q Did he say why he needed the gloves?

A I asked him and he said he was going kill something [sic].

MR. CHASE: Your Honor, thank you, those are my questions for Ms. [C]arter.

THE COURT: All right, thank you. Anything?

CROSS-EXAMINATION

BY MR. STAMM:

Q Ms. Carter, you testified you—at the time that you were dating Mr. Martin you did not know that he was married?

A No, I did not.

Q And isn't it true that you—that Mr. Martin actually had told you that his wife worked on Wednesday at home and those were the days he would come over to your house?

A He said his kid's mom worked on Wednesdays at home.

Q Okay. And don't you—do you remember that actually there was a time that Ms. Martin found out about you and you had a conversation with her on the phone; do you remember that?

A That is not correct.

Q Okay. You never talked to her on the phone?

A No.

(Pause.)

MR. STAMM: May I approach the clerk?

THE COURT: Uh-huh.

(Whereupon, Defendant's Exhibit No. J was marked for identification.)

BY MR. STAMM:

Q Ms. Carter, I'm going to show you what's been marked as Exhibit J. Can you identify that, please.

A Yes, it's the e-mail that I sent her tonight [sic] I found out that he was married and seeing other people.

Q Okay. And if you want to look at the attachments there are other—there are some pictures attached to that?

A Yes.

Q And the pictures include pictures of you with Mr. Martin—

A Yes.

Q —is that right? And you also—to help Ms. Martin included a picture of Mr. Martin's penis, right, that was to be helpful to her?

A Yes.

Q Okay. Not because you felt violated?

A No.

Q Had nothing to do with that, right?

A No.

Q Just out of the interest of trying to be friendly to Ms. Martin and to let her know what her husband was up to so she would also know—

A Yes.

Q —is that right? The—you—and I think you said you thought you might be—the relationship might develop further and who knows maybe some day the two of you might get married?

A Yes, it was over three years.

Q That's what you were thinking. But in the e-mail you indicated that you met Mr. Martin online—

A Yes.

Q —is that right? And the way that you met him online was because he identified himself online as quote, "I got that big long," end quote.

A Yes.

Q That's how you met him. So—and you also indicated that he had loose lips or something like that and something lex [sic] tongue, I think it's in your e-mail.

A Yes.

Q Is that right? So you knew that he was advertising himself for sex on the internet; is that right?

A Well, I found out about the other names from Maggie actually, I didn't know about them.

Q Okay. But I got that big long, that's how you met him?

A Yes.

Q And yet you think that this guy who's putting himself out that way on the internet is the guy that you want to marry?

A He didn't come across that way.

Q Okay. But that was what you were looking for when you found him; is that right?

A No, not originally.

Q Okay. Well, after you say that you contacted him; is that right?

A No, he contacted me.

Q Okay. And he contacted you by that name, I got that big long?

A Yes.

Q All right. And now when he came and saw you on that—the night that this shooting occurred, October 27, 2008, he came to you house that night; is that right?

A Yes.

Q He didn't seem at all upset to you; is that right?

A No, he was—he was fine.

Q He seemed normal—

A Uh-huh.

Q —right? He came over and the two of you watched TV—

A Uh-huh.

Q —is that right? And then around 11:00 he left—

A Yes.

Q —right? Now later—let's see.

When you—there came a point in time I think it was two days later he came over, do you remember during that week you—I think it was on the Wednesday you talked to him also, that was the time you saw him in the parking lot?

A Yes.

Q And do you remember that you went with him—you took him to go get his car?

A We went to pay for it.

Q Okay. His car was in the—what did he have, a Rivera?

A He had—

Q Aurora?

A —he was driving a Suburban and the Aurora was at a shop in Arlington.

Q The Aurora was in the shop in Arlington and on Wednesday was it?

A Yes.

Q You went to pay for the car because the car was in the shop—

A Uh-huh, but we didn't pick it up.

Q —is that right? All right.

And now later in February you get a text message from Mr. Martin; is that right?

A Yes, it was a picture mail.

Q It was a picture mail and it had—it was a picture of his son at the monster truck rally—

A Yes.

Q —is that right?

A Well, it was just the truck, there was no picture—the son was not in the picture.

Q Okay, just the truck.

A Uh-huh.

Q And there were some cc's on the picture mail—

A Yes.

Q —is that right? And that was how you and Maggie found out about each other.

A Yeah, she called—she hit reply all and brought up the phone numbers and called me.

Q Okay. And you ended up meeting?

A Right.

Q Now Maggie you say at times during this meeting she was volatile?

A Yes.

Q And extremely upset?

A Yes.

Q And she told you that somebody had been shot?

A Yes.

Q She told—or that she told you that she had someone shot—

A Yes.

Q —is that right? And that's also information that you later relayed to Detective Regan?

A Yes, I told him that in the meeting.

Q Okay. And that the—that someone was shot in the head—

A Yes.

Q —is that right? Okay.

Now there was also I believe you told Detective Regan that Maggie had also threatened you on MySpace, that basically—well, maybe you can tell me what the MySpace threat was.

A She sent me a message that was—she told me she doesn't tolerate kid shit and if someone gets in her way she can take care of it.

Q Okay. Was that—is that exactly what she said or more or less?

A More or less, and then the—

Q Okay. And in other words you took that as a threat to you?

A And then the following week an e-mail came into my work.

Q And what did that—from who?

A From Maggie. She e-mailed all the attorneys in the firm.

Q And what'd she tell them?

A That I was a drug dealer and that she had charges against me, that I got her fired, I got her security clearance revoked, that I got her kicked out of the Army.

Q And she sent that to your entire—everybody in your office?

A Yeah, all the attorneys.

Q Okay. You work at a law firm?

A I did, I don't work there anymore.

Q Okay.

A I mean, I called the Fairfax police and filed a complaint against that.

Q Okay. Now—

MR. STAMM: Court's indulgence.

THE COURT: Uh-huh.

(Pause.)

BY MR. STAMM:

Q Now throughout the time that you say that you saw him with a gun you continued to date him—

A Yes.

Q —is that right? And when—when he made the statement that he's going kill somebody you never believed that.

A No, I thought he was kidding.

Q Okay. And the—when he was looking up the silencers on the internet that was in connection to you were watching Law and Order at the time, right?

A Yes.

Q All right. And you kept dating him after that; is that right?

A Yes.

Q Okay. You never reported any of that stuff to the police while you were dating him—

A No.

Q —is that right? It was only after he—you found out that he was married and you—and that he also had other girlfriends and you felt violated that you talked to the police?

A No, it was after his arrest.

Q Okay. It was also after that wasn't it?

A I spoke to the attorneys at work, they knew the situation that was going on because of the e-mails that had come in, they didn't want the police coming to the office if I were to get questioned, so they said it was better that I go ahead and call the police.

Q Okay. And—but my question to you is still you did not talk to the police in this case until after you felt violated by Mr. Martin, right?

A No.

Q It happened after it?

A No, it was after—

Q It didn't?

A —his arrest.

Q It happened before it?

A It was after his arrest, it wasn't while I was upset over what had happened.

Q Okay. So you're saying it happened before it?

A I'm saying I did not call while I was upset over what happened, I called after. I threatened to call the night that I found out, but I didn't call.

Q All right. And—but you finally followed through on that threat and you did call; is that right?

A After his arrest.

Q I see.

A It said—there was a note that said if you have information call the detective so I called the detective.

Q Okay.

MR. STAMM: That's all I have.

THE COURT: State, anything further?

MR. CHASE: No, ma'am.

* * * * *

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND,

vs. Case Number:

CHARLES BRANDON MARTIN, 02-K-09-000831

Defendant.

---

OFFICIAL TRANSCRIPT OF PROCEEDINGS

TRIAL TO THE COURT

DAY 6

Anne Arundel, Maryland

Tuesday, May 4, 2010

BEFORE:

HONORABLE PAMELA L. NORTH,

and a Jury.

APPEARANCES:

For the State:

ANASTASIA PRIGGE, ESQUIRE

CRIGHTON CHASE, ESQUIRE

For the Defendant:

LEONARD STAMM, ESQUIRE

JOHANNA LESHNER, ESQUIRE

Electronic Proceedings Transcribed by: Dawn South

HUNT REPORTING COMPANY

Court Reporting and Litigation Support

Serving Maryland, Washington, and Virginia

410-766-HUNT (4868)

1-800-950-DEPO (3376)

* * * * *

[STATE'S CLOSING ARGUMENT]

MR. CHASE: Your Honor, thank you. May it please this Honorable Court, Counsel.

Ladies and gentlemen of the jury, on October 27th, 2008 about 3 o'clock p.m. Jodi Lynn Torok was shot in the head and left for dead. She was shot by a man that she did not know, a man that the Defendant had sent there to end her life.

Jodi had no other enemies. She was a hairdresser from Crofton. This wasn't a burglary, nothing was taken. It wasn't a suicide, there was no gun, there was no note. The Defendant is the only one with the real motive to kill her.

Well why? Why would he do it? Because she was pregnant and she thought he was the father of her baby. She testified, I was going raise the baby and he was going give me money. That wasn't an unreasonable request from Jodi. She'd moved to Maryland from Pennsylvania to be with the Defendant. They'd been together for over a year. She thought it was serious. She thought she was the only one. She didn't know about Maggie or Sheri, she

didn't know he was still married and had a wife at home with which I would, a wife who was pregnant. Of course he never told her that, he never told her the truth.

Jodi said the discussion regarding money got heated. He was not really open to that and so she told the Defendant she would take him to court for child support and that did not fit with his agenda at all. She had just made herself expendable to the Defendant.

This was a ruthless, premeditated attempt to murder an innocent girl, and the Defendant had a lot to lose if she went public. He had a wife at home who worked full-time, three kids who he got to see during the day. His wife was pregnant with his fourth child. Plus he had two other children with two other women. If Jodi went public, and that was the last straw and the wife divorced him, he could potentially have seven children to support.

And let's not forget about the three girls on the side, including Jodi. These were long-term relationships and none of them knew about each other.

Imagine the effort at keeping all that a secret. Imagine the effort and the time it took to set up this elaborate program of deception, this elaborate lifestyle that he had created for himself. This was his whole life and Jodi was going to take it all away. She was going take away that freedom and replace it with a burden. She was going to ruin it all by taking him to court for child support. So yes, now he has a motive to kill.

And folks he planned this murder very carefully. He expected to get away with it. After all he's smart, he's good at juggling situations, but there were problems with the secret plan. As the police looked closer and closer cracks appeared. And now in the light the evidence presented in this courtroom we can see the outline of his plan to kill Jodi.

Obviously he couldn't shoot her himself, he'd been to her house, her friends knew him. They knew that he and Jodi were arguing about the baby. It was the first thing her friends said to the police when they got there, so obviously he needed a trigger man. And somebody pulled that trigger, somebody did but not him. It was somebody Jodi didn't know. Probably somebody that didn't know her.

Well who? Who would it have been? Maybe someone from one of his various lives. Not Sheri. Who else? Maybe someone from Maggie's house.

Oh, yeah and he needed an alibi to [sic]. An alibi provides that measure of comfort. He can tell anyone who asked, I wasn't there. So of course he has an alibi. And again, the alibi supplied courtesy of the people at Maggie's house.

Folks you're here to decide if the Defendant participated in this crime, and based upon the evidence the clear answer is yes. He had the motive, he had the means, and he had the method. So let's look at some of the hard evidence against Mr. Martin.

We know Jodi was shot with a .380 caliber semi-automatic handgun. The ballistics establish that conclusively. That gets stamped on the back of the

shell casing, a .380 auto. You'll have it in evidence, you can look at it.

The firearm's expert told us that among the hundreds of different types of .380 autos out there, there are 16 that could have fired the bullet that struck Jodi Torok; 16 of them. And guess what kind of they include? A Jennings Bryco Arms .380 semi-automatic handgun. And guess who purchased a Jennings Bryco Arms .380 caliber semi-automatic handgun in 2003? The Defendant. This is the records from the Bureau of Alcohol, Tobacco, and Firearms complete with their fancy red ribbon and the gold seal. I guess he didn't know the ATF keeps records like that.

And it fits, it fits with what Sheri told you too. He always had a gun with him. And she described it as small and semi-automatic.

So indeed in addition to the motive he had the means to carry out this crime.

Now Detective Regan told us that his officers canvassed the residential area where Jodi and Jessica lived. Regan said that no one reported hearing a gunshot. But we know for sure a gun was fired in that house that day. Why didn't anyone hear anything? Because that was part of the plan.

You heard from Sergeant Alban, the 20-year police veteran who was in charge of the Homicide Unit the day that Jodi was shot. He found the Gatorade bottle four feet from where she was found. He said the layers of tape sticking out from the mouth of the bottle were impressed in a rectangular shape just like the muzzle

of a semi-automatic handgun. He described a small projectile hole in the bottom of the bottle.

And I want you to take notice of something—I (indiscernible - 11:04:49) use the gloves, and you're welcome to too—I want you all to notice about this bottle. Pretty hard. And other thing is the hole pokes out, not in. Whatever caused that hole in that bottle came from within the bottom, it came from the inside of the bottle, not the outside.

Regan saw the bottle too, he looked at it and described the tape and he described the black sooty residue inside the bottle. He said it didn't smell like marijuana, so if anyone here were to suggest that it was some kind of a pot pipe we would know that that was wrong.

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

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

So is anyone surprised that Sheri Carter saw the Defendant researching silencers on the internet? Natural place to go. Is anyone surprised that the Defendant got rid of that computer after the police

talked to him? No, because it fits precisely with the evidence.

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

And you know we looked at that silencer very, very closely, and it gave up its secrets. The white tape from the silencer, here it is, you'll get to look at it back in the jury room more closely. The white tape from the silencer has the exact threads, exact number of horizontal and vertical threads per square inch and the exact same kind of adhesive as the tape the police took from Maggie's house. Now we can't say it's the same roll, because we don't have a tear line to match, but isn't it interesting that the tape they found at Maggie's is identical to the tape found on the silencer? Isn't it interesting considering the Defendant was at her place the day of the shooting and he was seen with white medical tape?

Add that to the silencer research, add that to the same kind of gun being used, add that to him owning a .380, add that to the motive and we're really now starting to see a picture of the Defendant's guilt emerge.

Now all the evidence that we've discussed this far points directly at the Defendant and it's very strong evidence, but indeed we have more, we have the DNA. The Defendant wasn't counting on leaving his DNA behind.

First the hair, the hair that changes everything. 99.94 percent of people in the world absolutely could not have left that hair. We know that because Dr. Melton told us that the DNA sequence in the hair is very rare—very rare. Only about 1/2 of one percent of people in the world has it, and guess who has it? Guess who's among the 1/2 of one percent? The Defendant, Charles Brandon Martin. His sequence is the same as the hair, His sequence and his maternal relatives I guess to be precise has the same sequence as the hair. That's pretty amazing stuff.

How many of that less than one percent even knew Jodi? How many of that less than one percent had a motive to kill her? How many of that less than one percent owned the same caliber of gun that was used to shoot her? How many of those people researched silencers? How many of those people were seen with white medical tape the day of the shooting, tape that matches the tape from the silencer? The answer is only one, the Defendant.

You also heard from Sarah Chenoweth. Sarah was the Anne Arundel County Crime Lab DNA expert, and she found a mix of DNA on the mouth of the bottle. One strand of that DNA was African American male. She said the sequence from the African American male DNA is not seen in 95.95 percent of the African American population so she excludes approximately 96 percent of the African American population as having left the male DNA on the mouth. Again, but not him, not the Defendant, he's included in the very small number of people who have the same DNA sequence as was observed in the male strand on the mouth of the bottle.

Now when you consider the odds that his DNA is on the bottle and the tape by coincidence you're left with only one conclusion, that's not a coincidence, that is statistically unlikely to say the least. He had direct physical contact with both items. Not a random thing, the DNA didn't float down from the air. Jessica and Jodi had just finished cleaning the apartment.

And again, it isn't like that hair was stuck to the outside of the bottle. The hair was under all this duct tape, which you'll get to look at as closely as you want, under the one, two, three, four layers of duct, under the and then there are these two long layers of white, and the hair was in the white. Duct was on top, you'll have the pictures of the silencer as it was found on the scene, and the duct tape was on top, the white tape was underneath.

So the hair wasn't just stuck somehow on the outside of the silencer, the hair was under layers and layers of tape. The hair was hiding in there waiting to reveal the truth of what Mr. Martin did. Waiting to reveal the truth of what Mr. Martin did to Jodi.

So in combination with the other evidence the DNA evidence shows us conclusively beyond a reasonable doubt that the Defendant was involved in the shooting of Jodi Torok because he helped make that silencer. He took that tape and he put it on the end of that bottle and stuck it to his gun.

If you decide that he made that silencer and that silencer was intended to be used upon the victim then he is guilty.

Let's look at a little more of the evidence and then we'll come back to the law in just a second.

We've so far discussed the motive and the physical evidence, but there's more. There's the eyewitness testimony of Michael Bradley, and Michael gives us another important piece of the puzzle.

Mike was home the day of the shooting. Mike saw the Defendant there. He arrived—he saw him at first about noon, some time after that Mr. Burks arrived and Mike saw them putting their heads together in the kitchen, and he was curious. And when Mike saw his brother give the Defendant a Gatorade bottle and white medical tape he must have wondered what they were up to. But he stayed out of it.

At some point Martin went upstairs, upstairs where Mike had seen the Defendant previously with the semi-automatic handgun, and after he came back down he and Burks left together. Mike said they left the house before he went to pick up Maggie's daughter. And when he came back from picking up Maggie's daughter they still weren't there. He said they finally came back about 5:00 before Maggie got home from work.

When they came back Burks was pressed, he was agitated, he was pacing. He went in the kitchen and Mike followed. Martin went upstairs. And when the Defendant came down he had a brown paper bag and he gave it to Frank and he told him to get rid of it and then he left.

At that time Michael didn't know who Jodi was, he didn't know Jodi was pregnant, he didn't know what Burks and the Defendant had done. So when the cops showed up a couple days later asking him questions about his sister's boyfriend he had nothing for them. Even so he didn't lie to them. He said, yeah, Martin

was here that day, and no, I don't want to go to the station and talk about it.

Martin probably figured that Mike would leave town shortly thereafter, and in fact he did.

Now Mike said he didn't even know we were looking for him. He says he didn't even know that we had talked to his lawyer in New Jersey. Seems his lawyer didn't even tell him that.

Mike said he did 120 days. He went to court, they offered him a plea, he had done his time—okay, 84 days with good credit time—he had done his time and they cut him loose.

The bottom line, folks, is that now when [M]ike testifies his sister as far as we know is not dating the Defendant, so Mike really has no reason to lie, and I'm sure that he's not quite smart enough to make this stuff up any way.

But the Defendant has a reason to lie, and he locked himself into it. The lie is the alibi he gave. The alibi he gave in his videotaped statement. The only thing in that statement that he really seemed sure of was that he was with Frank from 1:00 to 4:00 talking about rehab.

But Mike says the alibi is false. He says Martin was there that day, but not for the whole time as he claims, and he wasn't talking about rehab with Frank, he was there to gear up for the mission, it was time to put the plan into operation.

It was a big mistake for the Defendant to count on Maggie and Mike. He must have assumed that all he needed out of them was the initial confirmation of his

alibi and then he'd be home free. Mike would go back to where he had come from, things would be fine. Didn't work out that way because the police found other evidence and the case just kept building. And as it comes into focus now you can see through his lies, his powers of control and manipulation are not infinite after all.

Now is this possible that this is the work of a jealous girlfriend and the Defendant didn't even know? There is no evidence of that. There's no evidence that Maggie even knew who Jodi was until after Jodi was shot. Maggie probably found out about Jodi the way everybody else did, when the case blew up. So it would be wildly speculative to suggest that Maggie shot Jodi because she was jealous. It's just not supported by the evidence. It really doesn't make sense. Why would Maggie threaten people and e-mail people and send nasty pictures to people if she was running around trying to kill off the competition? Way to draw attention to yourself Maggie. Not logical.

Now it's true that Maggie was close to the Defendant before and after the shooting. Like the other women in his life she thought she was his only girlfriend. Did she know he was going to use her brothers as his alibi? It's possible, but again, there's no evidence of that. We just don't know what, if anything, the Defendant told her, and she is not here to answer it.

If you're going to have people killed you need plausible deniability. You got to have a plan that lends support to your claim that you didn't do it. We don't know about Maggie, but we know about the Defendant, he had such a plan. He had such a plan.

But his plan and his ability to predict the possible outcomes was really put to the test when he gave his statement to the police.

The day after the shooting the police met with the Defendant, he drove over an hour from his house to Charles County to Annapolis to Maryland, to Crownsville to the police station. He says later his cell phone is in the car, but when he shows up he acts like he has no idea of what's going on. But his wife had filled him in at least with some of the details. Wouldn't you have called everybody and everybody you know to find out what happened to Jodi? I mean he knows where she works, he knows who Jessica is, at least he knows some of her friends, and that's his girlfriend. Wouldn't you be frantic for information if you were innocent and you found out that she was hurt? He wasn't. He wasn't because he knew full well what had happened to Jodi.

So the detective sat down with him. And I hope you weren't expecting him to break down and fall apart, remember he's an experienced liar, a manipulator, he put thought into this plan before he executed it. But if you looked carefully you could see the subtle signs that he was hiding something. He thinks the plan with [sic] insulate him. He doesn't know how much the police know and that makes him nervous, very nervous, and it showed. He was so nervous he forgot how to spell his own kid's names. His behavior is just not genuine, folks.

Getting the news that your girl has been shot would be a punch for the gut and he's joking about Oxycontin and Oxycodone, and he's joking about baby names and baby mommas? He laughed out loud on

three separate occasions. He wants them to believe that he just found out about Jodi and he's distraught. He shows no emotion. We know he has emotions. Sheri saw him crying. Or does he only cry for himself? He couldn't hide his nervousness very well so he tried to mask his concern. (Indiscernible – 11:19:28) what happened?

Yes, it's true when people talk to the police sometimes they get nervous, but that's when you're getting a ticket or when you've done something wrong. If someone you care about has been shot the cops are your friends. I mean these are the guys that are going to catch the SOB who did this.

Question, Mr. Martin, do you know why you're here? Answer, no, uh-uh, trying to figure it out. Someone got shot. Piecing it together, don't know. My wife said Jodi, a girl I used to deal with.

Wait a minute, a girl I used to deal with? What? He's distances [sic] himself from Jodi. But later he admits that they're in touch. He calls her my girl. His response is simply not genuine. Not shocked, not shocked because he set this in motion. What he really wants to know is, is she alive, is she talking, is the shooter caught, is he talking?

So when he asks about Jodi he thinks he needs—when they ask about Jodi—what he really wants to know is what's going on? Are they toying with me, how much do they know? When he asked about Jodi he thinks he needs to distance himself a little bit more from her. He says, I don't know her last name, I don't know when the last time I saw her was. I know the area where she lives, but I probably don't know how to get there.

Seriously? What? He knows all about her. He knows they met two years, they stayed in touch, they had a romantic relationship, they dated for a year, he knew that she lives with her boss because he's been to her place, he knows she lives in Crofton. It's his girl, but he doesn't know her last name, he doesn't know how to get to her house. He's distances [sic] himself from her. He's lying.

This was never a strong part of the plan. He didn't know what to expect from the police so he tried to stick with the plan. Give the alibi, follow up with the text that you sent after she was shot and it'll be okay. But even that had problems.

He said I texted her and she responded, and I asked again and I never heard back, and that makes it sound like he's trying to reach her when in fact he's only checking to see if she's going to be home that day. She says she's off and he doesn't respond until nine hours later.

We know this because Detective Knisley downloaded Jodi's phone. He told you the Defendant sent her a text message on October 27 of 2008 at 8:23 a.m. It said, "What time do you work?" She wrote back at 8:23 a.m. and 40 seconds, she said, "I'm off." She sent a second text message, Jodi that is send a second text message at 0923, it said, "Hello..." There is no response until that evening at 5:11 p.m., it said, "I got stuff with the kids until 7:00, any time after that, how much did you need?" Nine hours later. He wasn't trying to get in touch with Jodi, this was part of his plan.

Wait a second, I thought he said this was a girl he used to deal with, a girl he doesn't even remember

when the last time he saw her was, but he's asking her how much she needs? That doesn't make sense.

Detective Regan asks him was there a falling out? And the Defendant says, "I don't know if it was a falling out." You don't? Jodi did, Jessica did, Blair did. Asked, well, did you text her today? And he says he can't remember. They asked him, well, what did you do yesterday? And his reaction to that question, he calmly gives his detailed alibi about where he was and when he was there like he was expected them to ask and he had rehearsed it.

If he knows what he did yesterday from 1:00 to 4:00—he knows what he did yesterday from 1:00 to 4:00, but he doesn't remember if he texted Jodi that very same day?

And even the alibi isn't very convincing. He says, "I was with Frank counseling him on going back to rehab." What's Frank's last name? I don't know. Where does Frank live? I don't know. What's Frank's phone number? I don't know, I can get it. What a crock. He knows full well who Frank is, that's his girlfriend's brother. He knows where Frank lives he's there all the time. He was distancing himself from them too, maybe because he knew they were hard to control.

But he's got the plan. Fall back on the plan. Sure you check my car, sure you can check my house, not a problem. Of course he didn't use his own stuff other than one of his Gatorade bottles. He didn't use his own car just like he didn't shoot her himself.

Jodi didn't know the person who knocked on her door that day. I mean he probably didn't know her.

How did he know what door to knock on? How did he know that was Jodi? When you're sending someone to do a hit you might want to make some, you know, efforts to make sure you hit the right person.

Oh, yeah, it was a pretty well thought out plan but there were a few major failures. The human element very difficult to control. The little things about hairs and DNA, the things that people don't always think through. Very difficult to control. He never expected that hair to fall off as he put that silencer together, but it did, we got it, got him. He didn't expect Jodi to live, but she did, and now her body is evidence that she's impaired, perhaps permanently. And by his conduct the Defendant contributed to that and he's not going to get away with it.

Let's talk about the law that applies in this case. The Defendant is charged with attempted first-degree murder. His participation in that crime makes him what we refer to as an accessory before the fact.

For him to be guilty as an accessory before the fact we have to prove two things. One, the crime of attempted murder was committed by another person, and two, before the attempt was made the Defendant aided, counseled, commanded, or encouraged the commission of the crime with the intent that it succeed.

That's what this has all been about. That is the question for you to answer. If your answer is we have proved those two things then he's guilty, the rest of the questions on the sheet are easy after that.

I'm going read that again. The crime of attempted first-degree murder was committed by another person

and before the attempt was made the Defendant aided, counseled, encouraged, or commanded the commission of the crime with the intent to make it succeed. The jury instructions say exactly that and they're going back with you to your room.

So let's see, first, we know someone tried to kill Jodi Torok. We know he didn't pull the trigger himself. So okay, yeah, one, satisfied. The murder was committed—the attempted murder was committed by another person.

Let's move on the number 2. If you believe that the silencer that was used by the person who shot—was used by the person who shot Jodi then we've proved number 2, and the evidence tying him to that silencer is conclusive. He made it for the shooter.

Folks, if you all agree with what I just said then you should find him guilty of attempted murder as an accessory before the fact.

The fact is he made that silencer before the attempt or [sic] Jodi's life and that shows premeditation. He thought about it before he did it. We know he'd been planning it for a little while. That also shows the intent to kill, the fact that she was shot in the head, the fact that he took fact pains to cover his tracks.

Now when you look at your verdict sheet you're not going find a charge that says accessory before the fact, that's not how it works. The charge is attempted murder, attempted first-degree, attempted second-degree. We call attempted second-degree murder and first-degree assault lesser included offenses.

So you're not going to see accessory before the fact as a count, the count is attempted murder. He is guilty because of his involvement in the crime because he aided, encouraged, or counseled the shooter to do the deed and all the evidence in this case confirms that fact, that conclusion.

Lawyers used to come up with all kinds of names and the various roles people take in killings, accessories for the helper, the principals for the shooters, and then they just said let's make this easy and they said the following:

> "The distinction between an accessory before the fact and a principal is abrogated and an accessory before the fact can be charged, tried, and convicted as a principal."

What that means is no matter what you want to call it if you help someone make the crime possible by aiding, encouraging, or commanding you're just as guilty as the guy who pulled the trigger. That's why he's guilty of the attempted first-degree.

If you have the motive and you have the will power and you convinced another person to do it for you you're just as guilty as if you did it yourself. The law says that an accessory may be tried, charged, and convicted regardless of whether the principal has been charged or tried.

So the question is he an accessory does not depend on knowing who pulled the trigger. All that needs to be shown is that the trigger was pulled and before that happened the Defendant aided, counseled, or commanded it to happen.

Even so we did provide you with evidence of who he did it with, Gerald Burks is the obvious answer. He was with Martin the day of the shooting, they left together at the right time, they came back together at the right time, Burks was agitated. We know he was involved, we know the Defendant was involved, we know he needed a trigger man. So you can infer from all the circumstances that he got Burks to do it. We call that solicitation to commit murder.

Now with the other crimes we don't have to prove who pulled the trigger, but with solicitation you got to pick a name, and the name is Gerald Burks.

Folks, we don't have to prove what the whole plan was, we don't have to prove that he was there that day at or near Jodi's house, that is not what the law requires for the attempted first-degree. We have to prove to you beyond a reasonable doubt that he aided or counseled or commanded in the attempt to kill Jodi and I would submit to you that we have done that.

Now I want to make just a quick word about this evidence this is [sic]. This evidence is mostly circumstantial. The law makes no distinction between circumstantial and direct evidence, that's what Judge North said.

Here's a quick I think and simple, easy, good example of how you can—how you can see this.

You're in the kitchen and you're making dinner and the kids are there at the kitchen table and they're doing their homework. Your little boy, your little girl. You got a cookie jar on your kitchen counter. It's glass and there's a cookie in it. Big, fat, nice chocolate chip cookie. And you walk out of the room for a minute.

You come back in and your little boy is standing there looking at you and he's got cookie crumbs on his shirt. Did you eat the cookie? Little girl, did he eat the cookie? She's not talking, that's her brother, come on.

What are you going to do? You're going to sit him down and you're going to say, you know the rule, no cookies before dinner. You're going to find him guilty and you're going to discipline him, mildly of course, it's just a cookie, but you're going to explain to him why that's not okay. Parents use their love for their children as the standard that they apply. You don't just come down out of the blue and discipline your child, you have to convict them first.

In the law we have fancy names for stuff like that and we call it beyond a reasonable doubt. We don't just come down and discipline somebody and say that they're guilty without finding them guilty, without presenting evidence.

And I don't use the example of the child to be cute or smart, it's a good example, it's simple, it also highlights—shows and highlights beyond a reasonable doubt. Because just like the parent cares for the child, the State, the government, us, the people, we care about our citizens, and we impose upon ourselves a requirement that if we're going to charge him with a crime and ask you the jury to convict there must be proof beyond a reasonable doubt. We welcome that burden, we agree wholeheartedly with that burden, and we have met that burden.

So when you go back into your jury room to deliberate don't be fooled by the idea the circumstantial evidence is not good enough. Proved is

proven and we've proved this case beyond any doubt, beyond a reasonable doubt for sure.

The Defendant is guilty for his participation in the crime of attempting to murder Jodi Torok and I ask you to find him guilty.

Thank you.

* * * * *

[STATE'S REBUTTAL ARGUMENT]

MS. PRIGGE: Thank you.

We agree on one thing with Mr. Stamm, and he keeps on talking about the—how offensive the Defendant's lifestyle, and probably most people would agree with that, but what we want you to know is that the State does not have this case on trial because of his lifestyle. You do not attract the attention of prosecutors and the entire Homicide Department because you have affairs and cheat and lie to your wife. You attract the attention of the Homicide Department and the prosecutor and the courts when you try to kill someone as a result of getting rid of the evidence that you had those affairs. That's why he's here.

And he keeps analogizing this Defendant to Tiger Woods, and really yes, they might have had a similar sexual appetite, but the difference is Tiger Woods has not been accused of, that we know of, to trying to silence anyone about the affairs, and that's the difference.

They want to talk a lot about this missing tape from Frank Bradley, and we're not going to stand up here and tell you it's great. One policeman

inadvertently misplaced some evidence, but just by way of explanation it's a crazy scene when there's a homicide, you want to try and span out and hit as many different areas and leads as you can, because if you don't work those leads and get that information and move in a very fast direction and send people all over the place very quickly guess what, these cases can go cold and then they never get solved.

So you've got one director and he's directing all these people. It's a mad house. He's telling you go here, you go here, you go talk to that person. Oh, we got a tag number, well call that in and see. Oh, I got a friend down there he might know some information, and it's a little bit crazy. And as a result of that sometimes innocent mistakes happen, and in a case this large it's—it's almost unavoidable that it's going to happen. And they want you to make you think like it's a tragedy that's going to somehow impact upon the Defendant, but let's look at the facts.

What is really missing on this case? We have Detective Gajda who went to meet with Frank Bradley, the brother Margaret McFadden. And did the police try and hide what Frank Bradley said, was this tape just purposefully chucked in the trash? No, it wasn't. It was just inadvertently lost with no malice on the part of the police department.

In fact you don't even have to feel that uncomfortable that the tape was missing because what happened in the case? Within 48 hours of this—within 48 hours of the shooting Detective Gajda went out, made contact with Frank Bradley, wrote notes about what happened, transcribed those notes into a report. And guess what? They were handed over to the

Defense. There was no cover up, they got that information.

So really it's not the big deal that the Defense wants to make you think it is. We turned over the information. Yes, this one guy, Frank Bradley, who had these alcohol problems said that during the time period of the shooting that he was with him talking about rehab, okay, so that evidence was preserved in a slightly different way, but it was still preserved.

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

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

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

because it's a .380 caliber handgun, and by the way, the ballistics at the crime scene indicate that the projectile right near Jodi's head that was located as well as a casing that popped off when the shot was fired are both .380 caliber. Again, a link to the Defendant. I guess they didn't want you to think about that when you went back to the jury room.

How do we know someone else did the shooting? We agree with the Defense, that Blair said that there was a salesmen at the door that Jodi didn't seem to know, apparently the dog was barking, it happened around 3 o'clock on October 27th. By the way that is smack in the middle of the time period that even the Defendant's wife puts him out of the house. The Defendant's wife somehow stands up and admits that he was out of the house somewhere between this 12:00 and 5:00ish time period, which by the way is just about exactly the time period where Michael Bradley gives you some information. That is plenty of time for him to go over to that Bradley slash McFadden household.

I asked the Defendant's wife approximately how far they are from addresses in Waldorf, she said about 15 minutes. So the Defendant could go over there, spent a little bit there that morning, make it to Crofton and back and still be home to meet up with his family to go out to an event. That window of time is wide open, and the Defendant by all accounts has the ability to participate in this crime.

They want to pretty much pin this case on Maggie. Well, first of all that's pretty much a common defense trick so we would just ask you when you go back to that room to think carefully. Sure pick the person

who's not there to blame it on. And isn't that easy, doesn't it make it simple for the Defense to be, it's not my client, it's the girl who's not here?

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

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

In addition even if you get this—and I'm saying for argument sake only, okay, we're not suggesting that Maggie is the real player here who concocted this entire idea to get Jodi Torok killed—but even if you wanted to think about that for a moment don't think for a minute that that then obviates or takes him out of the case. If she's in the case, he's in the case. He's the one with the connection to Jodi. Maggie is only connected to Jodi through him, okay?

So besides the fact that there's no evidence linking her to this shooting other than she has a big mouth and likes to blab it and intimidate people, there's really no reason to suggest that that would excuse the Defendant's role or make him innocent in the case.

In addition he wants to make it seem like this kind of cat fighting that's going on between the women somehow explains how Jodi Torok got shot. And this is where you're able to use your own common sense experiences. Perhaps you've seen it before in your own life, but you have a situation—and unfortunately in the (indiscernible – 12:34:02) about sometimes it's more the guy that you hear about that may be cheating or having these flings or affairs—and it seems like your story—that it's like the girls who are cat fighting with each other, and you always kind of wonder, well, why not get mad at the guy, he's the one doing the cheating? But in any event it's not so weird or unusual that this little cat fight erupts between the various parties.

And insofar as e-mails are going to the Defendant's wife, why are they doing that? Well, it's obvious while they're doing that, they're not doing it to be mean to Carissa, they're doing it to get Charles Brandon Martin, the one who started the whole mess in trouble. They want his wife to know what he's doing and then he has to go home and deal with his wife. That's why they're sending it.

They talked a lot about don't decide the case on the emotions that you might have over someone being a cheaters. And what's really interesting is we are not asking you to decide the case on emotions—on your emotions either.

But what's really interesting in this case is the DNA, for example, has no emotion, it's just the technicians and the analysts working together as a team. And in fact Dr. Melton even told you that she doesn't even particularly want to know all the facts in

the case because she doesn't want it to cloud her independent judgment. She just wants the samples to come in, they do their lab work, they analyze it, they give the result and that's it. That's—that's all the emotion that goes into the case. They're just there to do a job, no more, no less. DNA does not talk.

And they also don't have an agenda. That lab, it's not like they're just going out to convict people needlessly. That same lab gets hired by Project Innocent which can be used to help exclude people and help them walk from a crime. So that's a truly independent lab and that DNA does not lie.

Similarly the tape comparisons do not have any emotions, and also ballistics have no emotions. And the Defendant similarly in this case has very few emotions, except when it comes to the issue of whether or not he's going to get caught for the shooting. That's the only emotion that he shows in the case.

They made a big deal about what's the big deal, Charles Brandon Martin's wife already seemed to know that he was cheating. Well, that's not what she told the police. She told the police that she didn't think he was having an affair. But in any event there is a difference between throwing some money at someone, here's a crib, which by the way if you even believe I'll get into why that's not even true—and an actual paternity action. Paternity actions are expensive, they're public, and you have to go through court and you have to pay for that child until you're 18. That's a lot different than maybe giving a little bit of money here, a little bit there. When you get that court order it's every single two week or whatever

your paycheck period is that you have to send a certain amount of your income to that child and that doesn't it's a court order, you don't get out of that. You can even go to jail if you don't care [sic] child support.

So it's a huge deal to have someone say they're going to file a paternity action against you, and if you don't want to deal with it that may be enough if you're the kind of person that doesn't want to deal with responsibility to try and kill someone and just make the problem go away.

Let alone it's not clear what his wife's reaction would have been if she's already got the three kids at home, and she's pregnant with another child. It's not clear at all that she would just said, all right, I knew you were cheating, so don't worry about it, because the child is a huge, enormous thing that has implications for everyone that are enormous.

They want to talk about how in this case the focus has always been on Charles Brandon Martin, that other people were overlooked.

Well, it's kind of interesting the police didn't pick where to put the focus on the case, the evidence did from very early on. Even Jessica Higgs is, you know, mentioning by the way who would have a reason to kill Jodi Torok? Well, she's fighting with her boyfriend. On the 911 tape she even saying this.

But at one point are they start—are the police in this case supposed to stop thinking of Charles Brandon Martin as a suspect? The evidence kept coming in in this case and it kept only going one way over and over and over again to that Defendant. Are they supposed to stop thinking on a suspect when

they get not one, but two DNA hits implicating him to the crime scene? And then we point out this silencer, this bottle that was used. Jodi and Blair [sic] said that was not theirs, that they don't drink Gatorade, and by the way they're clean people who clean the apartment.

Are they supposed to stop thinking a suspect when that ballistic or firearm evidence is discovered object him? That he in fact owns the same caliber handgun that was used in the shooting? Or from Jerry's information that he carried a gun, a small handgun, or Mike Bradley's information that by the way he say a gun up in Maggie's room, the same room that the Defendant was in all the time.

Are they supposed to stop thinking of him as a suspect when Sheri says he has a gun and he researches silencers on the internet? And by the way he took gloves from my apartment.

Are they supposed so stop thinking of him as a suspect when Michael Bradley says that the Defendant was accessing Gatorade and tape on the day of the shooting going to and from the room where it was kept?

And by the way are they supposed to stop thinking of him as a suspect when Brandon comes back presumably after the shooting and hands Frank and bag and says get rid of it? And that's consistent with Brandon's other attempts in this case to get rid of what other evidence he could think of.

They want you to think it's a big deal, for example, that his house didn't have any evidence related to this crime or that his car didn't have any evidence to the

crime. Well, of course, most people who watch any kind of TV know that maybe I shouldn't leave the evidence where I live because they're going to come looking for me and that would be a great place to find it. Of course he's not going to keep those items there.

And the bulk of the items in this case were probably disposed of by the Defendant in his attempt to make this plan so he wouldn't get caught, but he still got caught because of the other mistakes he made, but that doesn't mean he didn't try, and it's not weird or strange that his house or his car didn't have any evidence there.

They want to make a big deal about Michael Bradley, about his testimony was bought. The reason that we're concerned about witnesses who enter plea agreements with the State is that maybe if I help the State they'll make my case go away and I have an interest or a motive to not be truthful or tell the truth. Well guess what? In this case Mike Bradley—and I agree with Mr. Stamm on something, you can't make this stuff up—he seemed to have absolutely no idea that there was some sweetening of the pot for him in New Jersey. Apparently his lawyer never told him and he never learned from the State, so this is someone when came in and told the truth, and he thought his sentence was just what was fair for what he did and also considered the fact that he had been locked up because he didn't make bail. So Michael Bradley does not have any idea that this incentive was given.

And yes, they want to make a big deal that he was given criminal immunity from the crime. Well, when you sit down with someone and talk to them you have

an interview before and you know this that this house is where all the bad things went down the day of the shooting. You don't necessarily know what each person did and what their role is, and if they think that they're going to get prosecuted or can't talk to you or that you're going to turn what they say on them they're not going to talk to you and tell you what happened, so that's why immunity is given.

As it turns out even though Mike Bradley could have told us a lot of things that day when he met [sic] which would have very much heightened his criminal liability he didn't, and he could have, he had a free get out of jail card at least insofar as it came to that interview, and the reason why he didn't tell you that is because he didn't do anything. He couldn't have said it more times, I didn't do anything. And maybe he had his doubts that it was a little weird that this stuff was going on—there was this secretive stuff going on, but that doesn't mean he has any criminal liability whatsoever, In fact there's no evidence anywhere in this entire saga of this case that Michael Bradley had any criminal liability whatsoever.

And really the reason why that he final came forward was that he said—and this is in response to the Defense's questions—is that he was sick of the Defendant threatening his sister. And you know what sometimes people get tired of being manipulated, and that's again part of the reason why the Defendant's plan broke down. He expected people to cover for him and keep his silence and it [sic] there just came a point in time where it wasn't worth keeping the Defendant's secrets anymore.

And also Michael Bradley made—he said it was a .25 caliber handgun. They want to make a big deal out of the fact that he said it was the wrong caliber handgun. I would just say it's really not that unusual, lots of people think they're really familiar with guns and it's a very large technical area and it could have just been an innocent mistake where he thought he was more familiar with guns than he really was.

They want to float this idea that somehow that silencer was some kind of smoking device. That's just kind of silly. I mean you can look at the bottom and conclude by yourselves just from looking at it it certain [sic] looks like a bullet hole and certainly there aren't many smoking devices where the bullet the hole is the force is made from the bottom going out through the bottom through the other side. Well, who would make a smoking device that way? I guess if you had to make a hole first of all why would you put it at the bottom? And then second of all why would you jam it through the top of the bottle? I mean that's almost hard. You'd have to stick a pen or some long thin device. It's almost impossible. It's just silly. It's not a smoking device, it's a homemade silencer.

They also want to ask you why—why the bottle wasn't tested for gunshot residue. Well, first of all, it's already pretty clear what it was used for in the crime by looking at all the evidence.

And just a word about tests. You can test and test and test all kinds of forensic tests but that doesn't mean that's a smart idea. What you want to do—what the police—I really wanted to do in this case was find out who had a connection to that bottle. We don't—it's pretty clear there's no need to prove that there was a

shooting, I mean Jodi Torok has the gunshot wound to the head, so what would the gunshot residue prove? Oh, there was a shot in the apartment that day. Well, we already know that.

What they decided to do was try and see if they could link who used that device because then it would link them back to the shooting and they would have clues as to who the shooter was, and as it turned out not one, but two DNA hits ended up giving them that information. So they did the right test at the right time and it led to the person who put the silencer together to do that shooting, and he's sitting over there.

They want you to make it seem like lots of other people in Maryland because in the world there can be over 4 million contributes to that DNA hair, and I think 30,000 in Maryland alone could have possibly contributed the DNA to that hair on the bottle.

But what's interesting when you flip it around, isn't it odd that only one person out of that 4 million or 30,000 in Maryland had a motive to kill Jodi Torok? Only one person was making a silencer the day of the shooting. Only one person provided a gun for the shooting. Only one person was purchasing [sic] the internet—you know, silencers on the internet and all the other things. Those numbers don't exist in a vacuum.

We're not standing up before you and only showing you the DNA, which by the way is extremely powerful, we're asking you to consider the DNA in conjunction with all the other evidence in the case.

So when you think about it that way the little 4 million or 30,000, whichever large, enormous number he wants to throw at you to get you all confused, that number shrinks down to one. I mean how many other people out of those 30,000 or 4 million were sleeping with Jodi Torok? It goes back that way to that person. So those large numbers he's throwing at you really have no significance when you put it in that context.

They just wanted to—couldn't resist bringing up the fact that Sheri Carter apparently met the Defendant, I got that big long. About that, maybe we could just say okay she likes to walk a little bit on the wild side. And you know, for relevance maybe if her mom was watching she might want to take her outside and say something to the effect of honey, if you want to meet a man or a person to marry that might not be the best place to look. But really what does that have to do with this case? Nothing. It's really injected in this case to try and discredit Sheri because the things that she says are very powerful and she is someone who is very sane and very normal but caught up in a bad situation.

And you know, they also want to make a big deal out of the fact that she didn't come forward until after all these other things about the Defendant and his girlfriends were known. Well, the truth is at the time of the shooting Sheri didn't really know about the other girlfriends and she didn't know about the shooting. In fact the Defendant was lying to her about his role in this assault and didn't give her all the information. When she did have all the pieces together that's when she put it all together and pretty

much came forward and told the police what she knew. And if there was a delay in her coming forward it was because of the Defendant keeping his secretes [sic] and manipulating her.

They want you to believe that the fact that he got rid of a computer was just so that he could protect Sheri and Brandon's privacy. And that's—you know, the police aren't going to raid your house if they think that you might have some pornography on your computer or else a lot of the population in Maryland would probably be getting their doors kicked in and having a (indiscernible – 12:47:50) police department. If the police came to look for a computer for Brandon maybe because they'd be looking for information for this crime, not because he may or may not look at pornography on this cite [sic]. Okay? And it's not about privacy, it's about the fact that the Defendant got rid of the computer because there was probably something on it that would have brought the police's attention to the fact that he had something to do with this murder—or attempted murder.

They want you to believe that Charles Brandon Martin's demeanor during that interview was totally consistent. Why would you meet with the police if you had something to hide? Well, a good way to attract the attention of the police is if you're dating someone who got shot is tell the police, I know my rights, I don't have to talk to you. Obviously the police are going to be a little bit curious about that and it's not going make them go away. The Defendant thinks that if he can play this role of this sad guy who had been dealing with some girl in the past who got shot, and I'm very distraught when he finds out that Jodi's been shot,

he's playing a role. He wants to answer some very basic questions, that by the way give him that coverage during the time where an alibi would be useful, and then maybe the police will go away and he can go back to his activities with all the different ladies and lifestyle that he was trying so hard to protect. And his demeanor is not consistent with the evidence, it's consistent with a liar and a manipulator.

And you know, they wanted to say that it was just a—why would someone buy a bottle of Gatorade on the way to the station if you know there's a Gatorade bottle involved? Well, we don't know what the shooter said to him when the whole thing was over. Maybe the shooter didn't mention that the Gatorade bottle went flying off. And if you think about it maybe it was a little bit of a batched [sic] case. This was a hit, get rid of Jodi Torok. Yes, a single gunshot to the wound maybe you think would take care of it, but the fact is she lived. Maybe the shooter didn't give the Defendant all the information, and that can be a lot of reason for the Defendant's panic, especially when he finds out, how's she doing? Well, she's not doing well. Well, guess what, the shooter didn't finish the job, she's still alive. That's the reason for him to be stressed during that interview, not because he actually has any care or concern about Jodi.

They want to use that analogy about buying a house and why would you buy a house with a defect? Well, the truth is when people go to buy a house you might say to yourself I like that $800,000 house on the cul-de-sac with the white picket fence with the very pleasant neighbors in a school system that's just fantastic and wonderful. Well, that may not be in your

price range, so instead the house that you find might be a cute house, but fixer upper, good schools, but you're going to have to stay on top of your kid and just make sure he's getting everything he needs, and maybe in five years you're going have to put a new deck on or a new roof, and you still make the decision to go ahead and buy the house because you're satisfied and comfortable that you can live with that. That's much more analogous to real life. They're trying to set up some situation that's not even realistic.

This case might not have every last piece of the puzzle like he told you put into place, but that does not mean that you can't go back in that jury room and feel comfortable that you know who orchestrated, planned, counseled, advised, and participated in making the attempted murder of Jodi Torok happen.

They probably want you to go back in the room and to keep sitting there and questioning the evidence and questioning the evidence because if you stop, if you get to that point where you say, you know what, I am comfortable, everything only leads to that Defendant then you're going to convict him and they don't want that. So be careful of that.

Finally the other names that they threw out to you as possible people that had something to do with Jodi Torok. Keep in mind Jodi Torok doesn't have any connection to them whether it's Maggie or Gerald Burks or Steven Bernett. The only way that Jodi Torok is connected to all these other people is through Charles Brandon Martin.

And the case started with that 911 call, but Brandon Martin as a name and it ends here today,

and pretty much the only name that's come up is that Defendant.

And it's been a long time for Jodi Torok, almost a year and a half. You can see she's still in a wheelchair from this horrible crime. There's no obviously end in sight to that. And the time has come for justice and we ask you to convict the Defendant for what he did.

Thank you.

* * * * *

# APPENDIX J

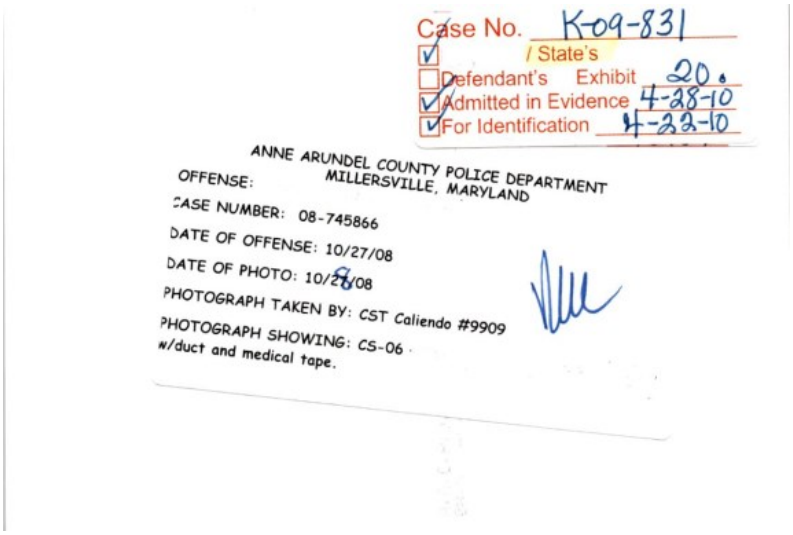
State-Court Trial Exhibits

State of Maryland v. Charles Brandon Martin,
Circuit Court for Anne Arundel County, Maryland
Case No. 02-K-09-000831

---

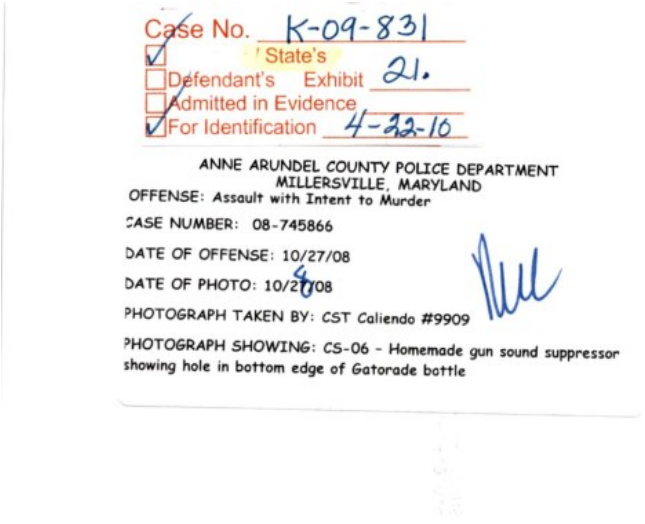
The following state-court trial exhibits were made part of the federal habeas record on appeal at the joint request of the parties and by order of the United States Court of Appeals for the Fourth Circuit, dated April 25, 2024, in *Martin v. Nines, et al.*, No. 24-6086.


State's trial exhibit 20, admitted into evidence on April 28, 2010




State's trial exhibit 20, reverse side

State's trial exhibit 21, identified and used at trial on April 28, 2010


Case No. K-09-831
State's
Defendant's Exhibit 21.
Admitted in Evidence
For Identification 4-22-10

ANNE ARUNDEL COUNTY POLICE DEPARTMENT
MILLERSVILLE, MARYLAND

OFFENSE: Assault with Intent to Murder

CASE NUMBER: 08-745866

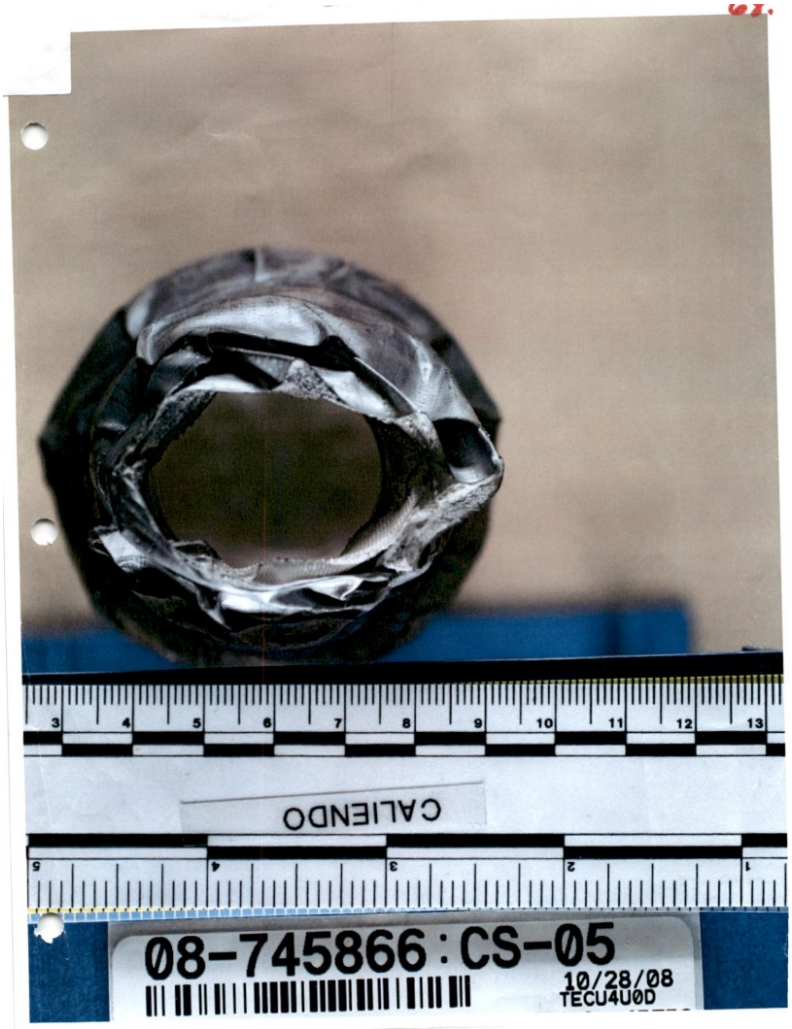
DATE OF OFFENSE: 10/27/08

DATE OF PHOTO: 10/27/08

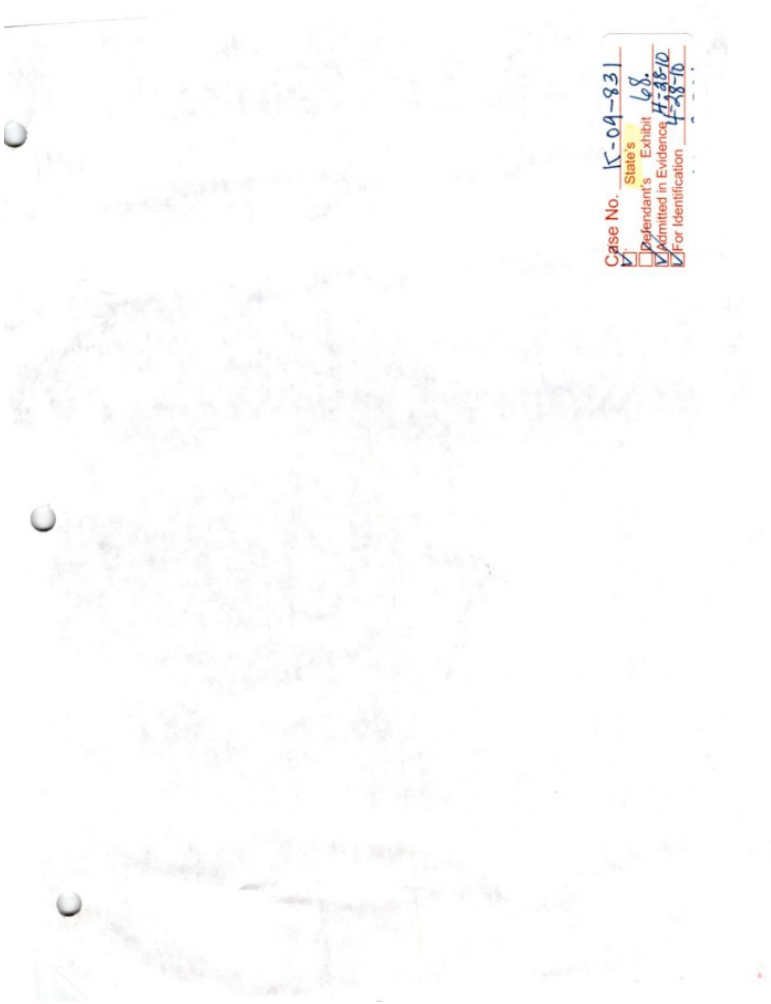
PHOTOGRAPH TAKEN BY: CST Caliendo #9909

PHOTOGRAPH SHOWING: CS-06 - Homemade gun sound suppressor showing hole in bottom edge of Gatorade bottle

State's trial exhibit 21, reverse side




State's trial exhibit 68, admitted into evidence on April 28, 2010




State's trial exhibit 68, reverse side