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

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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.

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]

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[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.

[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

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 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.

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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.

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.

[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.

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." *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.

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

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[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 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 guilty, 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, 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 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 may raise, for the first time, the issue of ineffectiveness of counsel at a

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[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 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 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

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 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).

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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.

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 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.
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> (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

[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.

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 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 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.

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

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[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, 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.

[16] The judge provided the following instruction:

evidence.[18] However, 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]

> 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.

[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).

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.

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

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

application should not have been filed because there would either have been no change, or a sentence reduction since Petitioner 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.

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

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 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, 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

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[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 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."

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 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

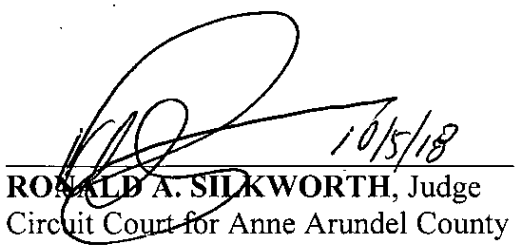
Petitioner argues that his trial lawyer advised Petitioner that if counsel put character witnesses on the stand, as Petitioner apparently wanted, that the State would be able to bring in prior acts of Petitioner, even though Petitioner did not have any prior convictions. Even assuming that counsel did 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.



10/5/18

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