IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND

Karim Ward,	*	
Applicant	*	
v.	*	
		Case No. 21-K-03-32388
STATE OF MARYLAND,	*	
Respondent	*	

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APPLICATION FOR LEAVE TO APPEAL DENIAL OF PETITION FOR POST CONVICTION RELIEF

Applicant, Karim Ward, by and through counsel, Erica J. Suter, hereby applies for leave to appeal denial of post conviction relief pursuant to Maryland Rule 8-204 and Courts and Judicial Proceedings Article, Section 12-302(g). The Order of the post conviction court dated March 10, 2015, was filed on March 11, 2014. (See Order, attached as Exhibit A). Applicant requests that the Court grant leave to appeal and reverse the judgment of the lower court.

I. INTRODUCTION

Witness intimidation is a tactic employed by guilty defendants to terrorize witnesses and hijack the criminal justice system. The average innocent defendant is not hedging his bets by striking fear into the hearts of potential witnesses. In Applicant's case, the State provided moving commentary on the blight that is witness intimidation. The inconvenient wrinkle in the State's eloquent closing was that there was no evidence of witness intimidation in Applicant's case. In place of evidence was one witness's single, bald allegation of either a threat or a bribe relayed to the State outside of the

courtroom and off the record and in turn relayed to the court and defense counsel at the bench by Assistant State's Attorney Joseph Michael. No further detail accompanied this allegation. Despite the State's affirmative, on the record decision to eschew this area of inquiry with its witness, and without a scintilla of evidence in support of the allegation, this single, unsubstantiated allegation gave rise to the State's searing commentary on the palpable dread experienced by State's witnesses of being shot to death for testifying against the Applicant. The improper comments of the State permeated the trial, from opening statements through rebuttal. The trial court wisely sustained each and every objection raised to the State's improper comments on the witness's fear of Applicant when the defense had the wherewithal to make the objection.

The entire case against the Applicant hinged on the credibility of the State's witnesses. Moreover, the accounts of these witnesses varied in critical respects. No physical evidence tied Applicant to the murder of the decedent, no fingerprints, and no DNA. The weapon used to gun down the victim was never recovered. By State witness accounts, the estimate of the crowd gathered at the scene that evening varied from six to sixteen.

While attorneys regularly utilize rhetorical flourish, they are not permitted to construct a record out of whole cloth in closing argument. Assistant State's Attorney Joseph Michael went far beyond the broad perimeters of permitted rhetorical flourish into creative fiction. The alleged fear experienced by its witnesses was both sword and shield for the State. It likely functioned as evidence of the accused's consciousness of guilt, propensity evidence, and, according to Mr. Michael's closing argument, made his

witnesses more worthy of belief. The court below found as much and noted that "[a]t trial, Joseph Michael made several inappropriate comments." (Memorandum Opinion at 18). The post conviction court also found that "[c]ounsel's failure to object to Joseph Michael's comments was clearly deficient representation." (Memorandum Opinion at 9-10). Disturbingly, despite concluding that Assistant State's Attorney Joseph Michael made several, intentional, improper remarks to which trial counsel failed to object, the post conviction court maintained the propriety of Applicant's conviction. The post conviction court wrote, "[t]he State's case against Petitioner was strong, and for that reason, and that reason alone, Petitioner failed in every allegation to meet the prejudice prong of *Strickland.*" (Memorandum Opinion at 19). In failing to grant post conviction relief, the post conviction court misread the record and misconstrued the prejudice prong of *Strickland.*

II. PROCEDURAL HISTORY AND RELEVANT FACTS

A. Trial and Sentencing

The criminal case arose from the death of Carl Wallace as a result of multiple gunshot wounds in the predawn hours on December 14, 2002 in Washington County. A fight between two women, Takima White and Asia Burns, brought both the victim and Asia's sister, Shree Harrell, to the scene. Witness accounts of the number of people at the scene varied from six to a crowd of sixteen. Applicant was convicted, following a jury trial before the Honorable Donald E. Beachley, of second degree murder; use of a handgun in the commission of a felony; wearing, carrying or transporting a handgun; unlawful possession of a regulated firearm; and unlawful possession of a firearm on

February 6, 2004. Applicant was represented by John P. Corderman.[1] The State was represented by Assistant State's Attorney Joseph Michael. On April 12, 2004, Applicant was sentenced to thirty years for second degree murder; ten years for use of a handgun in the commission of a felony, consecutive; and three years for unlawful possession of a regulated firearm, concurrent. The remaining convictions were merged.

B. Post Sentencing Proceedings

On April 21, 2004, Applicant timely noted an appeal to the Court of Special Appeals. Applicant's sole issue raised on appeal was sufficiency of the evidence. On April 26, 2005, the Court affirmed his convictions in an unreported opinion. On May 14, 2004, Applicant filed an Application for Review of Sentence by a Three Judge Panel. The panel affirmed his sentences on June 1, 2004. On May 24, 2004, Applicant filed a pro se Petition for Modification or Reduction of Sentence, which was denied on June 11, 2004. On July 9, 2004, Applicant filed another Motion for Modification of Sentence which was denied on July 14, 2004.

Applicant filed a Petition for Post Conviction Relief on March 28, 2014 and raised the following claims:

A. Did Trial Counsel Render Ineffective Assistance in Failing to Object to the State's Injecting the Specter of Witness Intimidation Into the Trial Through Remarks During Closing Argument and Rebuttal When No Such Evidence Had Been Presented at Trial?

B. Did Trial Counsel Render Ineffective Assistance in Failing to Object to the State's Making an Impermissible "Golden Rule" Argument by Informing the

1 At the time of Applicant's post conviction hearing, trial counsel was deceased. After the court ruled, over post conviction counsel's objection, that it would not permit expert testimony on criminal defense, the post conviction hearing took place without witness testimony.

Jury that They Should Find Applicant Guilty So As Not To "Let Down" the Witnesses Who Risked Their Lives to Testify?

C. Did Trial Counsel Render Ineffective Assistance in Failing to Object to the State's Vouching for the Credibility of its Witnesses During Closing Argument?

D. Did Trial Counsel Render Ineffective Assistance in Failing to Object to the State's Testifying as an Expert During Closing Argument?

E. Did Trial Counsel Render Ineffective Assistance in Failing to Object to The State's Telegraphing to the Jury that Applicant Had a Prior, Drug-Related Conviction?

F. Did Appellate Counsel Render Ineffective Assistance in Failing to Raise the State's Numerous Improper Remarks in Closing as Plain Error?

G. Did Trial Counsel Render Ineffective Assistance in Omitting Reference During its Closing to Several Critical Inconsistencies in the State's Case Where Doing So Would Have Bolstered Trial Counsel's Theory of the Case?

H. Did Trial Counsel Render Ineffective Assistance in Failing to Request a Limiting Jury Instruction that the Use of Petitioner's Stipulated Prior Conviction Was Only to be Used to Determine Whether He Was Guilty or Not Guilty of Illegally Possessing a Firearm After Conviction for a Crime for Which He is Prohibited From Possessing a Firearm, and Not to Be Used as Evidence in Determining His Guilt of Any Other Crime With Which He Was Charged?

I. Did the Cumulative Errors of Trial Counsel Constitute Ineffective Assistance?

A hearing was held on Applicant's Petition before the Honorable Daniel P. Dwyer on January 12, 2015. Applicant filed a post-hearing letter to Judge Dwyer on January 15, 2015. (Attached as Exhibit B). The court denied post conviction relief in a Memorandum Opinion filed on March 11, 2015.

III. ISSUES PRESENTED FOR REVIEW

A. Did Trial Counsel Render Ineffective Assistance in Failing to Object to the State's Injecting the Specter of Witness Intimidation Into the Trial Through Remarks During Closing Argument and Rebuttal When No Such Evidence Had Been Presented at Trial?

B. Did Trial Counsel Render Ineffective Assistance in Failing to Object to the State's Making an Impermissible "Golden Rule" Argument by Informing the Jury that They Should Find Applicant Guilty So As Not To "Let Down" the Witnesses Who Risked Their Lives to Testify?

C. Did Trial Counsel Render Ineffective Assistance in Failing to Object to the State's Vouching for the Credibility of its Witnesses During Closing Argument?

D. Did Trial Counsel Render Ineffective Assistance in Failing to Object to The State's Telegraphing to the Jury that Applicant Had a Prior, Drug-Related Conviction?

E. Did Trial Counsel Render Ineffective Assistance in Failing to Request a Limiting Jury Instruction that the Use of Applicant's Stipulated Prior Conviction Was Only to be Used to Determine Whether He Was Guilty or Not Guilty of Illegally Possessing a Firearm After Conviction for a Crime for Which He is Prohibited From Possessing a Firearm, and Not to Be Used as Evidence in Determining His Guilt of Any Other Crime With Which He Was Charged?

F. Did the Cumulative Errors of Trial Counsel Constitute Ineffective Assistance?

IV. LEGAL FRAMEWORK APPLICABLE TO THIS CASE

The Law Relating to Ineffective Assistance of Counsel

The test for ineffective assistance of counsel is a two pronged test derived from *Strickland v. Washington*, 466 U.S. 668 (1984), as defined by *Mosley v. State*, 378 Md. 548, 556-558 (2003). *See also Williams v. State*, 326 Md. 367 (1992). Under the first prong of the test, the petitioner must show that trial counsel's performance "failed to

meet an objective standard of reasonableness," under "[p]revailing professional norms." *Mosley*, 378 Md. at 557 (quoting *Strickland,* 466 U.S. at 688). When a court assesses the performance of a trial counsel, the court will be "highly deferential in reviewing counsel's performance, in order to avoid 'second-guess[ing] counsel's assistance.'" *State v. Peterson*, 158 Md. App. 558, 583 (2004) (citing *Evans v. State*, 151 Md. App. 365, 373 (2003)) (in turn quoting *Strickland*, 466 U.S. at 689). Reviewing courts will assume, until proven otherwise, that trial counsel's conduct was within a broad range of reasonable professional judgment and that their conduct was a result of trial strategy, not error. *Mosley*, 378 Md. at 558. *See also State v. Peterson*, 158 Md. App. at 583-84.

Under the second prong of the test, the petitioner must show that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687; *see also Mosley*, 378 Md. at 557. More precisely, the individual must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Peterson*, 158 Md. App. at 584 (quoting *Strickland*, 466 U.S. at 694). Further discussing prejudice, the Supreme Court has stated that in attempting to demonstrate that counsel's deficiencies prejudiced the defense, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. The Ninth Circuit has stated that "the standard of proof on the prejudice component of *Strickland* represents a fairly low threshold." *Riggs v. Fairman*, 399 F.3d 1179, 1183 (9th Cir. 2005). "In other words, the prejudicial effect of counsel's deficient performance need not meet a preponderance of the evidence standard." *Williams*, 326 Md. at 375.

Indeed, under the case law of the Court of Appeals, a defendant need only show that based on counsel's errors, there is a "substantial or significant possibility that the verdict of the trier of fact would have been affected." *Id. See also Williams v. Taylor*, 529 U.S. 362 (2000) (noting that "[c]ases such as *Nix v. Whiteside*, 475 U.S. 157 (1986), and *Lockhart v. Fretwell*, 506 U.S. 364 (1993), do not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel does deprive the defendant of a substantive or procedural right to which the law entitles him."); *Gross v. State*, 371 Md. 334, 350 (2002) ("An advocate does render ineffective assistance of counsel, however, by failing to preserve or omitting on direct appeal a claim that would have had a substantial possibility of resulting in reversal of a petitioner's conviction."). Of course, even a single serious error by counsel can provide a basis for a finding of ineffective assistance of counsel. *In re Parris W.*, 363 Md. 717, 726 (2001).

The Court of Appeals has held that the principles governing ineffective assistance claims "both with regard to trial counsel and appellate counsel are those set forth in *Strickland v. Washington*, 466 U.S. 668 [] (1984)." *Gross v. State*, 371 Md. 334, 348 (2002). As the Court elaborated:

> As a result, in assessing the effectiveness of trial counsel in failing to preserve issues and of appellate counsel in failing to raise them on appeal, *Strickland's* performance and prejudice prongs naturally overlap because the questions of whether counsel's performance was adequate and whether it prejudiced the petitioner both will turn on the viability of the omitted claims, *i.e.,* whether there is a reasonable possibility of success.
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> An advocate does render ineffective assistance of counsel, however, by failing to preserve or omitting on direct appeal a claim that would have had a substantial possibility of resulting in a reversal of petitioner's conviction.

Id. at 350.

Furthermore, a Petition that raises multiple allegations of ineffective assistance of trial counsel claims should also contain an allegation that the cumulative effect of the attorney errors amount to a denial of the effective assistance of counsel. *See Bowers v. State*, 320 Md. 416 (1990). The Court in *Bowers* noted that "when individual errors may not be sufficient to cross the threshold [of a showing of prejudice], their cumulative effect may be." *Id.* at 436-37.

The Law Related To Improper Remarks Made During Closing Argument

When assessing whether reversible error occurs when improper statements are made during closing argument, a reviewing court may consider several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused. *U.S. v. Melendez*, 57 F.3d 238 (2nd Cir. 1995); *see also Beads v.* State, 422 Md. 1 (2011); *Henry v. State*, 324 Md. 204 (1991); *Jones v. State*, 217 Md. App. 676 (2014). In the instant case, the State made numerous improper remarks during closing. Yet, trial counsel failed to raise a single objection to the egregious comments. Moreover, the evidence against Applicant was far from overwhelming and was at times contradictory and confusing on key points. All of the State's witnesses provided radically different descriptions of the shooter's clothing and vastly different accounts of the events leading up to the shooting, and even the manner in which the shooter departed the crime scene. Furthermore, not a single witness's description of the shooting was consistent with the Medical Examiner's assessment that

all but one shot entered through the back part of the victim's body. All but one witness reported seeing the assailant shoot the victim through the chest.

V. REASONS FOR GRANTING LEAVE TO APPEAL

A. Trial Counsel Rendered Ineffective Assistance in Failing to Object to the State's Injecting the Specter of Witness Intimidation Into the Trial Through Remarks During Closing Argument and Rebuttal When No Such Evidence Had Been Presented at Trial.

On the second day of trial, the State informed trial counsel and the court that a witness had made an allegation that she was threatened in connection with her potential testimony. The State made an affirmative decision not to explore the issue so long as trial counsel did not open the door. Trial counsel never did open the door, but the State rode roughshod through it nonetheless. State's witness Shree Harrell failed to appear for the first day of court despite a subpoena. Toward the end of Harrell's direct examination, the State told the trial court at the bench that Harrell alleged that she failed to show the day before because she was threatened and/or offered a bribe not to testify. (T.2.4.2004 at 21). The court informed the State that it would give both sides an opportunity to speak with Harrell about the allegations and would permit the State to recall her on that limited subject, but that the State would have to connect any threats or offers with the defendant. (*Id.* at 21-22).

During cross examination, the State objected to trial counsel asking Harrell why she did not appear the previous day. (*Id.* at 50). At the bench, the court warned trial counsel that his question could open the door to testimony from Harrell that she was intimidated. (*Id.* at 50-51). At that point, the State volunteered that it planned on

excusing the witness and not exploring the issue of bribery or threats. (*Id.* at 52). The State remarked, "[a]s long as the door remains closed, we're not going to open it." (*Id.*) The State further remarked that it would not explore testimony regarding threats or bribes because "[i]t will just cloud the water." (*Id.* at 53). Immediately following Harrell's testimony, the court recessed and the State and defense were given the opportunity to speak privately with Harrell regarding any witness intimidation. (*Id.* at 75). Following the private consultations, the State informed the court that neither side wished to recall Harrell and she was formally excused. *(Id.*).

Later, during cross examination of defense witness Detective Hooper, the trial court demonstrated that it was aware and responsive to the State's improperly placing the issue of witness intimidation before the jury. The State elicited that, in Hoover's opinion, Harrell and Kenny Jenkins (the only other witness who identified Applicant) appeared afraid when they spoke with him. (T.2.5.04 at 213-15). In attempting to evoke Detective Hoover's opinion as to why other witnesses may have not come forward, the State asked, "Do you think the fact that the assailant left the [the victim] laying dead shot six times has something to do with the fact that they won't come forward?" (*Id.* at 213-14). The trial court sustained defense objection and admonished the State, "Mr. Michael you are close to asking a lot of improper questions. The jury is to not consider the last question. Stricken." (*Id.*). The exchange put trial counsel squarely on notice of the State's approach on this issue. Even with Hooper's observations, there was literally no evidence at trial of Harrell or Jenkins being intimidated by anyone and no evidence that they were afraid of Applicant specifically. That these witnesses appeared uncomfortable or fearful

to Hooper while he spoke with them does not support an automatic inference and argument that the witnesses were afraid of Applicant harming them in response to their testifying against him.

Against this backdrop, during closing argument, the State commented several times that the witnesses were in fear and suggested that some form of witness intimidation had occurred. In an effort to explain why some of the witnesses who may have been at the scene were not testifying in court, the prosecutor remarked:

> We didn't grab people by the collar, but in this world, and I can understand it, I hope I am never in this situation because I would like to say today that I'm enough of a man to come forward, but there is no guarantees until you are in that situation. And we don't . . . I don't have the right, having never been in this situation, to criticize others for not coming forth and **putting their lives on the line** to tell you what happened.

(T.02.06.2004 at 33) (emphasis supplied).

> The real significance of this shirt is that in this world where this could happen and does happen over nothing it is very difficult for the hardworking men of the Hagerstown Police Department and women who were with Steve Hoover, to go out there, Detective Moulton, to beat the bushes to say-Do you want to come to court and tell these people who did this and testify against a person who is willing to shoot a man down in a girl fight?

(*Id.* at 36-37).

> These are the bullets and bullet fragments removed from Mr Wallace. **The same kind of bullets that prevent people from wanting to come forward.**

(*Id* at 37) (emphasis supplied).

> [The recovered shell casings] are also a reminder as they lay on Jonathan Street, as they do in our State's exhibit number five, that **the next one could be for you if you come forward. Reminds the people that walked away from that scene as he laid there, Mr. Wallace, is an even bigger reminder.**

(*Id.* 37-38) (emphasis supplied).

> And in this world that you have gotten a glimpse of is very difficult to extract those people that are willing to overcome the fear that this kind of thing instills in people, that those shell casings and that body laying on Jonathan Street instill in people and get them to come here, and they did.

(*Id.* at 42).

> Shree Harrell is the person that, **not withstanding her fear of this happening to her**, came forward. Notwithstanding her fear. Kenny Jenkins, notwithstanding his fear. Mr. Corderman says, "Oh I have lived in Hagerstown all my life. It's not that bad." Well from what they saw that night, it is that bad. As I told you initially, this is the world, which not everybody lives in, that they live in and they are entitled, but they have to continue to live in that world from here on out with that they know and what they know could happen to them. And that is the measure of credibility.

(*Id.* at 92).

Neither Shree Harrell nor Kenny Jenkins testified that they were afraid of coming to court and testifying or that they were in fear of Applicant. The Jury heard **no testimony** or **evidence** of witness intimidation in the case. Yet the State repeatedly informed the jurors that the witnesses were afraid and that they put their lives on the line by coming to court. The State's comments took place within the context of its closing argument theme, that the events at issue took place in a dark world of fear, retribution and violence. "A world that while many people sleep is a world of fear, a world of retaliation, a world of escalation of violence." (*Id.* at 16). Trial counsel raised not a single objection to these improper and inflammatory remarks.

The comments were clearly prejudicial. The argument was improper because it was based on alleged facts that were not in evidence. *See Spain v. State*, 386 Md. 145, 156 (2005) ("Courts consistently have deemed improper comments made during closing

argument that invite the jury to draw inferences from information that was not admitted at trial."); *Wilhelm v. State*, 272 Md. 404, 413 (1974) (observing that counsel should not be permitted, during closing argument, to state and comment on facts not in evidence or to assert what he or she could have proven); *Toomer v. State*, 112 Md. 285, 292 (1910) ("It is unquestionably wrong for the state's attorney in his argument to the jury to refer to any matter not testified to by the witnesses or disclosed by the evidence in the case, and it is his duty to confine his remarks to the facts in the case ...").

Most recently, this Court reiterated the well established prohibition against commenting on facts not in evidence in *Jones v. State*, 217 Md. App. 676 (2014). In *Jones*, "the prosecutor made a *singular* remark [on a fact not in evidence] that related to an issue that was *central* the case--witness credibility." *Jones*, 217 Md. App. at 696 (emphasis in the original). This Court determined that the State's case could not be characterized as "weak" and the evidence against *Jones* was legally sufficient. However, in assessing the potential for prejudice, this Court noted ***the absence of physical evidence against Jones*** and the fact that ***the State's case hinged on the credibility of the State's witness***. *Jones*, 217 Md. App at 695, 697) (emphasis supplied). In the instant case, the State introduced facts not in evidence and not supported by the record in its effort to convince the jury that Applicant was guilty of first degree murder. Although attorneys often employ rhetorical flourish, they are not permitted to construct a record in closing argument from facts not testified to.

Here, where the State's evidence was far from overwhelming, Applicant suffered prejudice as a result of the State's interjecting the specter of witness intimidation to

explain any inconsistencies and deficiencies in its case. Despite these patently improper and prejudicial remarks, trial counsel failed to raise any objection. Thus, the trial court lacked the opportunity to take any remedial measures to cure the prejudice that inevitably resulted. In failing to object to these improper and prejudicial remarks, trial counsel rendered deficient assistance and Applicant was prejudiced thereby.

In denying Appellant relief, the post conviction court concluded:

> Despite Michael's inappropriate comments, and the abundance of them, the strength of the State's case precludes a finding of prejudice. . Counsel's failure to object to Joseph Michael's comments was clearly deficient representation. But these failures do not change the fact that Petitioner's trial can be relied on as having produced a just result

(Memorandum Opinion at 9-10). Thus the post conviction court's rejection of this claim turned on the State having a strong case. In explaining its conclusion, the court cited to the testimony of other State's witnesses who testified regarding the events that night. (Memorandum Opinion at 7-9). Of the nine witnesses the State put on who were present that night, only two identified the Applicant as being the shooter. Not a single witness provided a consistent description of the shooter's clothing. Some described the shooter as wearing a "canary yellow" shirt. (T.2.2.2004 at 144). Another witness described the shooter as wearing a dark hooded jacket with the hood up. (*Id.* at 186-87). Another witness affirmatively stated that the shooter was not wearing a bright yellow shirt, a hat, or a hood, but rather a black vest jacket, ear warmers, jeans, and a sweater. (*Id.* at 209). Yet another witness described the shooter as wearing a white t-shirt and a gray sweat suit. (T.2.04.2004 at 59). At another point in her testimony, that same witness said the shooter

had on jeans or light colored pants and a t-shirt. (*Id.* at 58). The contradictions in the descriptions of the shooter's clothing is critical because there was vastly conflicting testimony as to the number of people on the scene that night. Estimates ranged from six to sixteen. Thus, the witnesses may very well have been describing different individuals who were present that night who may have been the shooter.

The post conviction court erred in distinguishing *Jones v. State*, 217 Md. App. 676 (2014), from the case at issue. Quoting from *Jones*, the post conviction court noted, "there was no confession by [Mr. Jones], nor any fingerprints, photographs, other circumstantial evidence to corroborate [either witness's] testimony regarding their observations." (Memorandum Opinion at 7, internal citations omitted). Likewise in Applicant's case, no confession, fingerprints, photographs, or other circumstantial evidence corroborated the theory that Applicant shot the victim. In fact, the testimony of the State's witnesses varied on other critical details in addition to the shooter's appearance such as, how the shooter left the scene (by car or did he reenter his house), how the victim was shot, whether the victim intervened in the women's fight or stayed on the sidelines, whether the victim's body was moved after he was killed and who moved him, the number of people at the scene, etc. That the victim was shot to death was not in dispute, but who shot the victim was. With varying estimates as to the number of individuals, and thus possible suspects ranging from six to sixteen, the inconsistent testimony was a significant weakness in the State's case. Moreover, the State's primary witness, Shree Harrell, hardly came to the scene with clean hands. She admittedly picked up her sister, who came armed with a wooden board, in the wee hours of the morning, to

drive to the home of another young woman to commit an assault. Harrell admitted that she planned on assaulting the woman as well. Harrell further admitted that she lied to the police because that was her first instinct. The only other witness who identified Applicant described him as wearing completely different clothing from Harrell's description and departing the scene by entering a vehicle, where Harrell's version was remarkably different.

In *Jones*, this Court carefully distinguished between "matters of common knowledge," upon which a prosecutor may comment, despite evidence of such facts not being formally introduced, and facts not in evidence. "Matters of common knowledge are those matters which every informed individual possesses." 217 Md. App. at 692. (internal citations omitted). During the post conviction hearing, the State argued that the portions of closing argument at issue were merely comments on common knowledge, that violent crime invokes fear amongst victims and witnesses and that there was a culture of fear in the community. Carrying the State's argument to its logical conclusion, it would be appropriate in all cases where there was a violent crime and/or a witness appeared afraid, *despite a complete and utter lack of evidence to support the proposition*, for the State to tell the jury that the witnesses were terrified, not of a similar crime happening to them, but more specifically, **that they would be shot as a result of testifying against the defendant** and, that they, in fact, risked being murdered by, "putting their lives on the line" to testify against the defendant. Such a result would be profoundly prejudicial to a defendant and inconsistent with the law. That crime frequently occurred in the section of Washington County where the victim was killed may have been common

knowledge. That witnesses of crime are sometimes hesitant to speak with the police for a variety of reasons may have been common knowledge. That Harrell appeared uncomfortable or anxious on the witness stand may have been readily apparent to the jury. What was not and could not have been common knowledge was that the witnesses were terrified of being shot to death as a direct result of testifying against Applicant

Significantly, no witness provided testimony that would have supported a second degree murder conviction. If the jury took the State's witnesses at their word, Applicant was guilty of first degree murder. The State elicited testimony from several witnesses that the victim did not act in a threatening manner and displayed no weapon. Yet the jury found Applicant guilty of second degree murder, which strongly suggests that the jury reached a compromised verdict. Based on the record and the post conviction court's conclusions regarding trial counsel's deficient representation, Applicant is plainly entitled to post conviction relief.

Bizarrely, the post conviction court cited to a single comment made by State's witnesses Shree Harrell that when her sister called her and told her that she had been jumped at the club,[2] that her sister did not need to say anymore. Harrell knew that "when you get jumped you go to the girl's house and they fight." (Memorandum Opinion at 6). The post conviction court commented that "[a]lthough this statement does not establish the basis of intimidation that Michael implied with his closing argument, it does vindicate his comments that the people involved live in a world where violence and conflict is

2 Getting "jumped at the club" meant that Ms. Harrell's sister was physically attacked at a night club. The term suggests the attack was unfair, by surprise, and possibly unprovoked.

more common and even expected and accepted." This comment hardly established that the people involved lived in a violent world. At best, it established the culture of that testifying witness. It hardly described the culture or values of all of the individuals who testified that night, most of whom did not know each other and had never met before. Some were gainfully employed factory workers from across the street, none of whom could identify the shooter. Another was a cab driver dispatched to pick up one of the factory workers who had completed his shift. Harrell herself testified that Applicant was an acquaintance and not a friend. (T2.4.2004 at 7). Moreover, that isolated comment is entirely irrelevant to any witness intimidation that may have taken place with regard to Harrell, or Kenny Jenkins, a cab driver. The State did not argue that Harrell was scared of getting beaten up by another girl because of a previous fracas. The State argued that Harrell was in fear that she would be shot to death as a result of her testifying truthfully against the Applicant. When the State asked Harrell if she was scared to talk to the police, the court sustained trial counsel's objection.

In failing to grant post conviction relief, the court below misapplied the prejudice prong in *Strickland.* On post conviction, Applicant was tasked with establishing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 694 (1994). However, Applicant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693. Moreover, Applicant's burden of persuasion on post conviction is **less than** a preponderance of the evidence. *Williams v. State*, 326 Md. 367, 375 (1992) (emphasis supplied). The State's comments served to

bolster the credibility of the State's witnesses, who were the only source of evidence against Applicant. Moreover, witness intimidation on the part of the defendant suggested consciousness of guilt, *i.e.*, defendant gunned down this victim and is now intimidating witnesses to prevent that fact from coming to light. Evidence of witness intimidation could also function as propensity evidence against the Applicant, *i.e.,* the dangerous type of person who would intimidate witnesses with threats of violence is the type of person who is more likely to have acted consistently with that character and shot an innocent bystander.

The standard to assess whether prejudice resulted from trial counsel's ineffective assistance is not whether the State presented a strong case, even assuming, *arguendo*, that the State actually had a strong case. Rather, the appropriate standard is whether, **while applying a standard that is less than a preponderance of the evidence**, the post conviction court could conclude that there is a substantial possibility that the result would have been different. *If the State were not permitted unbridled commentary on highly prejudicial, inflammatory facts that were not in evidence, is there a substantial possibility that the result may have been different?* The very verdict reached by the jury, second degree murder, when all of the testimony of State's witnesses, if believed, supported first degree murder, suggested that the State's case, was not strong and that there were questions in the minds of the jurors. The post conviction court erred in denying Applicant relief on this count.

B. Trial Counsel Rendered Ineffective Assistance in Failing to Object to the State's Making an Impermissible "Golden Rule" Argument by Informing the Jury that They Should Find Applicant Guilty So As Not To "Let Down" the Witnesses Who Risked Their Lives to Testify.

Several of the State's remarks previously discussed were also improper because they appealed to the jury to protect the community and thus violated the prohibition against the "golden rule" argument. In *Beads v. State,* 422 Md. 1 (2011), the Court of Appeals held that the State's remarks in closing that, "It's time for someone to say, 'Enough. Enough.'" were improper. 422 Md. at 11. Such remarks impermissibly prevail upon the jury to convict a defendant in order to preserve the safety or quality of their communities. *Id.* (citing *Hill v. State*, 355 Md. 206 (1999)) (arguments urging jurors to consider their own interests and send a message to protect their community were wholly improper and presumptively prejudicial). Yet trial counsel failed to object to the State's urging the jury to consider impermissible factors in determining Applicant's guilt or innocence.

The following remarks by the State constituted impermissible "golden rule" arguments:

> This case gave you a picture into a world that some of you may not be familiar with. A world that while many people sleep is a world of fear, a world of retaliation, a world of escalation of violence. A world in which coming forward to testify in front of you and coming to court and coming to the detectives equals credibility, equals class, equals reliability.

(T.02.06.2004 at 16-17)

> We didn't grab people by the collar, but in this world, and I can understand it, I hope I am never in this situation because I would like to say today that I'm enough of a man to come forward, but there is no guarantees until you are in that situation. And we don't . . . I don't have the right, having never been in this situation, to

criticize others for not coming forth and putting their lives on the line to tell you what happened.

(*Id.* at 33).

The real significance of this shirt is that in this world where this could happen and does happen over nothing it is very difficult for the hardworking men of the Hagerstown Police Department and women who were with Steve Hoover, to go out there, Detective Moulton, to beat the bushes to say-Do you want to come to court and tell these people who did this and testify against a person who is willing to shoot a man down in a girl fight?

(*Id.* at 36-37).

These are the bullets and bullet fragments removed from Mr Wallace. The same kind of bullets that prevent people from wanting to come forward.

(*Id.*at 37).

[The recovered shell casings] are also a reminder as they lay on Jonathan Street, as they do in our State's exhibit number five, that the next one could be for you if you come forward. Reminds the people that walked away from that scene as he laid there, Mr. Wallace, is an even bigger reminder.

(*Id.* 37-38).

And in this world that you have gotten a glimpse of is very difficult to extract those people that are willing to overcome the fear that this kind of thing instills in people, that those shell casings and that body laying on Jonathan Street instill in people and get them to come here, and they did.

(*Id.* at 42).

Shree Harrell is the person that, not withstanding her fear, came forward. Notwithstanding her fear. Kenny Jenkins, notwithstanding his fear. Mr. Corderman says, "Oh I have lived in Hagerstown all my life. It's not that bad." Well from what they saw that night, it is that bad. **As I told you initially, this is the world, which not everybody lives in, that they live in and they are entitled, but they have to continue to live in that world from here on out with that they know and what they know could happen to them.** And that is the measure of credibility.

(*Id.* at 92) (emphasis supplied).

The State concluded its rebuttal with the following comments:

> So at this point there is no doubt of who did it, what he did, first degree murder, using a handgun to do that murder, and the last link was crossed when Shree Harrell and Kenny Jenkins got it up in their guts to tell you. **Don't let them down now.**

(*Id.* at 94) (emphasis supplied).

As the Court of Appeals noted in *Hill*, "[c]ourts throughout the country have condemned arguments of that kind, which are unfairly prejudicial and risk diverting the focus of the jury away from its sole proper function of judging the defendant on the evidence presented." 355 Md. at 211. In the case *sub judice*, the State exhorted the jury to not "let down" the witnesses who had to live in a dangerous world where they had "put their lives on the line" to testify. Such pleas were extremely prejudicial and had no relevance to Applicant's guilt or innocence. The State's remarks were entirely in line with the kinds of remarks that the prohibition against the "golden rule" argument are meant to prevent. However, trial counsel failed to raise any objection and Applicant suffered prejudice as a result.

In denying relief, the post conviction court once again cited to the strength of the State's case, yet characterized the State's comments as "completely inappropriate and should not have been made" and opined that trial counsel should have objected to the comments. (Memorandum Opinion at 10-11). The court applied an incorrect standard, writing that "it cannot be said that . . . there is a significant *probability* that the outcome would have been different." (*Id.* at 11) (emphasis supplied). The proper test is whether there is a significant *possibility* that the result would have been different. (Strickland).

The term "probability" suggests a higher standard than that which applies under *Strickland.* In denying relief, the post conviction court misread the record regarding the strength of the State's case and misapplied the law regarding Applicant's burden. For these reasons, Applicant is entitled to post conviction relief on this claim as well.

C. Trial Counsel Rendered Ineffective Assistance in Failing to Object to the State's Vouching for the Credibility of its Witnesses During Closing Argument.

The State began its closing arguments with the following improper remarks that set the tone for its entire closing argument:

> This case gave you a picture into a world that some of you may not be familiar with. A world that while many people sleep is a world of fear, a world of retaliation, a world of escalation of violence. **A world in which coming forward to testify in front of you and coming to court and coming to the detectives equals credibility, equals class, equals reliability.**

(T.02.06.2004 at 16-17) (emphasis supplied). The State went on to further vouch for the credibility of its witnesses:

> As I told you initially, this is the world, which not everybody lives in, that they live in and they are entitled, but they have to continue to live in that world from here on out with what they know and what they know could happen to them. **And that is the measure of credibility.**

(*Id.* at 92) (emphasis supplied).

The State's improper remarks advised jurors that State's witnesses were credible based solely on their cooperation with the State. Trial counsel rendered deficient assistance in failing to object to the State's improper remarks and Applicant was prejudiced thereby.

Although there are no "hard-and-fast limitations" on closing arguments, it is well established that a prosecutor may not vouch for the credibility of a witness. *Spain v. State*, 386 Md. 145, 153 (2005); *Walker v. State,* 373 Md. 360, 403-04 (2003). Vouching typically occurs when a prosecutor "place[s] the prestige of the government behind a witness through personal assurances of the witness's veracity ... or suggest[s] that information not presented to the jury supports the witness's testimony." *Spain v. State*, 386 Md. at 153, *quoting United States v. Daas,* 198 F.3d 1167, 1178 (9th Cir.1999), *cert. denied*, 531 U.S. 999 (2000) (citations omitted). "Courts consistently have deemed improper comments made during closing argument that invite the jury to draw inferences from information that was not admitted at trial." *Spain v. State*, 386 Md. at 156. The Court of Appeals has characterized improper vouching "as a situation in which the prosecutor 'make[s] suggestions, insinuation, and assertions of personal knowledge' as to a witness's credibility." *Stone v. State*, 178 Md. App. 428, 451 (2008). Among the dangers of prosecutorial vouching is that "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *U.S. v. Young,* 470 U.S. 1, 18-19 (1985).

In making these comments the State impermissibly interfered with an assessment that was strictly within the purview of the jury. The credibility of a witness and the weight to be accorded to that witness's testimony are solely within the province of the jury. *Calloway v. State*, 414 Md. 616 (2010); *Butler v. State*, 392 Md. 169 (2006); *Dawson v. State*, 329 Md. 275 (1993); *Battle v. State*, 287 Md. 675 (1980); *Faulkner v.*

State, 73 Md. App. 511 (1988), *rev'd on other grounds*, 314 Md. 630 (1989). "It is also error for the court to permit to go to the jury a statement, belief, or opinion of another person to the effect that another witness is telling the truth or lying." *Bohnert v. State*, 312 Md. 266 (1988) (citations omitted). In Applicant's case, no physical evidence linked him to the crime. The entire case hinged on the credibility of the State's witnesses, who all provided significantly different accounts of what happened and descriptions of the assailant. Trial counsel should have objected to the State's vouching for the credibility of its witnesses and Applicant suffered prejudice as a result of trial counsel's deficient assistance.

In denying relief on this claim, the post conviction appeared to rely, implicitly, on the strength of the State's case in holding that Applicant did not prove prejudice on this claim. (Memorandum Opinion at 12). The court described trial counsel's lapse as "obvious deficient representation to not object to Michael's mindless attempt to vouch for the credibility of the State's witnesses. . ." (*Id.* at 13). Yet again, the post conviction court found that the State made improper comments in attempting to vouch for the credibility of its witnesses, but then concluded that it could not find prejudice because of the strength of the State's case, a case that rested entirely on the credibility of the witnesses for which the State vouched. The post conviction court erred in its ruling and Applicant is entitled to post conviction relief on this claim.

D. Trial Counsel Rendered Ineffective Assistance in Failing to Object to The State's Telegraphing to the Jury that Applicant Had a Prior, Drug-Related Conviction.

During the trial, State and trial counsel agreed to stipulate to Applicant's having been convicted of a crime that prohibited him from possessing a firearm and possessing a regulated firearm. (T.02.04.2004 at 339-343). The court took great pains to ensure that the stipulation conformed with *Carter v. State*, 374 Md. 693 (2003), and shielded the predicate offense, possession with intent to distribute, from the jury. *Id.* Nonetheless, the State, once again without objection, proceeded to telegraph to the jury the nature of Applicant's prior conviction and to suggest that as a result of that conviction, Applicant had a propensity toward violence. After first telling the jurors that the trial had given them a glimpse into "a world of fear," the State went on to remark "A world where certain people are prohibited from having firearms and weapons to prevent just this sort of thing." (T.02.06.2004 at 17). The jury had already heard that Applicant was convicted of a crime that disqualified him from possessing a firearm. Against the backdrop of that knowledge, the State impermissibly suggested that Applicant was a violent individual based on that conviction.

The State however did not stop there in improperly referencing Applicant's prior conviction:

> Refer to the stipulation that he is prohibited by law from due to his prior conviction of possessing a firearm, possessing a regulated firearm. You are asked to apply your common sense experiences to a situation like this. We are all prohibited from owning certain things and the, one of those things is drugs. People can't own illegal drugs. So if you get the illegal drugs, what is your intention when you get the illegal drugs? Just to have them? No. To use them, which is illegal. To sell them, which is illegal.

(*Id.* at 25). By referencing the stipulation regarding Applicant's prior conviction, urging the jurors to use their common sense and then referencing the illegal sale of drugs, the State plainly signaled to the jury that Applicant's prior conviction was for selling drugs. The remarks were entirely improper and prejudicial, but fit well into the State's theme of a dark criminal world characterized by fear, retaliation, and escalation of violence.

In *Old Chief v. United States*, 519 U.S. 172 (1997), the Supreme Court addressed a similar situation where a defendant had a prior conviction that prohibited him from possessing a firearm. In *Old Chief*, the prosecutor declined the defendant's offer to stipulate and instead presented the jury with evidence regarding the exact nature of his prior conviction. In analyzing whether the defendant suffered prejudice as a result, the Supreme Court noted that "'[u]nfair prejudice' results whenever evidence 'lures the factfinder into declaring guilt on a ground different from proof specific to the offense charged.'" *Carter*, 374 Md. at 716 (citing *Old Chief*). The Court went on to note, "such improper grounds certainly include . . .generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)." *Old Chief*, at 180-81.

The nature of Applicant's prior conviction was entirely irrelevant to the case at issue. The only purpose served by the State's introducing the subject of drugs and drug sales to the jury with reference to Applicant was to suggest to the jury that Applicant was more likely to be guilty of the crime charged based on his prior convictions. Such a

suggestion is flatly impermissible and Applicant suffered prejudice as a result of trial counsel's deficient assistance in failing to object.

In denying relief on this claim, the post conviction court found that the State was merely trying to explain the concept of intent that was an element of first degree murder. (Memorandum Opinion at 15). The post conviction court's reasoning is flawed in that the stipulation that Applicant's prior conviction disqualified him from possessing a firearm was entirely irrelevant to the State's demonstrating that Applicant had the necessary intent to satisfy the intent element of first degree murder. That Applicant had a disqualifying conviction did not make it more likely that he possessed a gun that night and therefore had already formed the intent to use the weapon. The disqualifying conviction would only become relevant once the jury had determined through other admitted evidence that Applicant actually possessed a gun. The stipulation was only relevant to determining whether Applicant was guilty of illegally possessing a firearm after conviction for a crime for which he is prohibited from possessing a firearm. Considering the stipulation for any other purpose, as the State was attempting, was impermissible. In denying relief on this claim, the post conviction court erred.

E. Trial Counsel Rendered Ineffective Assistance in Failing to Request a Limiting Jury Instruction that the Use of Applicant's Stipulated Prior Conviction Was Only to be Used to Determine Whether He Was Guilty or Not Guilty of Illegally Possessing a Firearm After Conviction for a Crime for Which He is Prohibited From Possessing a Firearm, and Not to Be Used as Evidence in Determining His Guilt of Any Other Crime With Which He Was Charged.

At trial, Applicant stipulated that he had a prior conviction that disqualified him from possessing a regulated firearm. That conviction was only to be considered in

determining whether he was guilty of illegally possessing a firearm after conviction for a crime for which he is prohibited from possessing a firearm. However, trial counsel failed to request a limiting jury instruction requiring the jury to consider the stipulation as to the charge of illegally possessing a firearm after conviction for a crime for which he is prohibited from possessing a firearm only; that the jury cannot use it as evidence that Applicant had the propensity to commit the crimes for which he was charged; or that the jury cannot otherwise consider it in rendering the verdict on any of the other charges. In so doing, trial counsel rendered ineffective assistance. This error prejudiced Applicant as it permitted the jury to consider the fact of his prior conviction in determining his guilt on all of his charges.

When evidence is admitted that is admissible as to one party or for one purpose but not admissible as to another party or for another purpose, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. Md. Rule 5-105. When requested by trial counsel, it is incumbent upon the court to give an advisory instruction on every essential question or point of law supported by the evidence. *Bruce v. State*, 218 Md. 87, 97 (1958). Maryland Rule 4-325(c) reads: "[t]he court need not grant a requested instruction if the matter is fairly covered by instructions actually given." Under this rule, the trial court is required to give a requested instruction if: (1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given. *Thompson v. State*, 393 Md. 291, 302-03 (2006) (citing *Ware v. State*, 348 Md. 19, 58

(1997)); *See also McMillan v. State, 428 Md. 333, 354* (2012) (citing *Thompson*); *Brogden v. State*, 384 Md. 631, 641 (2005) (citing *Patterson v. State*, 356 Md. 677 (1999) (in turn quoting *Ware*)); *Graham v. State*, 151 Md. App. 466 (2003). To determine whether the jury instructions given were adequate, jury instructions are to be read as a whole, not in a vacuum. *Thomas v. State*, 183 Md. App. 152, 166-67 (2008). If the jury instructions read as a whole are "ambiguous, misleading, or confusing," a reversal of the conviction and a new trial is required. *Id.*

In the instant case, the judge merely instructed the jury that stipulations were not in dispute and should be considered proven, (T.02.06.2004 at 5), and that Applicant admitted he was convicted of a disqualifying crime. (T.02.06.2004 at 15). Further, defense counsel did not object to the instructions as given and did not request any additions. (T.02.06.2004 at 10, 16). Had trial counsel requested the limiting instruction the judge would have been required to give it under Rule 5-105, and Rule 4-325(c) as interpreted by *Thompson*.

Applying *Thompson* to the instant case, an instruction that limits the admissible purpose of the stipulation to determining Applicant's guilt as to the illegal possession of a handgun charge is a correct statement of the law. Unbridled use by the jury of the fact of a prior conviction risks a conviction based on improper propensity evidence. In *Old Chief v. United States*, the Supreme Court addressed a similar situation where a defendant had a prior conviction that prohibited him from possessing a firearm and was charged with illegal possession of a firearm. 519 U.S. 172 (1997). The Court noted that juries may generalize a defendant's prior conviction into "bad character and taking that as raising the

odds that he did the later bad act now charged." 519 U.S. at 180-81; *See also Carter v. State*, 374 Md. 693, 716 (2003) ("'[u]nfair prejudice' results whenever evidence 'lures the factfinder into declaring guilt on a ground different from proof specific to the offense charged.'") (citing *Old Chief*)). *See also Hoes v. State,* 35 Md. App. 61, 71 (1977) ("The trial judge is required to offset or avoid as well as he can, the inherent human tendency to substitute a predisposition of guilt for the constitutional presumption of innocence when an accused's reputation as a 'bad man' becomes known"). Thus, an instruction limiting the use of a stipulated prior conviction to the purpose it was admitted for is a correct statement of the law.

Further, the instruction is applicable to the instant case. Though *Old Chief* and *Carter* were concerned with prejudice coming from evidence regarding the nature of the prior conviction rather than the fact of the prior conviction itself, a significant risk still exists that, given boundless discretion, a jury may take the fact of a prior conviction as raising the odds that the defendant committed the crime with which he is currently charged.

Moreover, the content of the instruction was not fairly covered elsewhere in the jury instructions as the court did not address in any form any limitation on the use of the stipulation. Therefore, had trial counsel requested a limiting instruction the court would have been required to offer it pursuant to Rule 5-105, and Rule 4-325(c) as interpreted by *Thompson.*

Trial counsel's error prejudiced Applicant primarily by permitting the jury to consider the stipulation in determining his guilt or innocence on the other charges, and to

convict him based on propensity evidence. Further, trial counsel's failure to request the instruction prejudiced Applicant because, had the judge denied the request, it would have constituted reversible error on appeal. *See Huber v. State*, 2 Md. App. 245, 258 (1967) (failure of the lower court to advise the jury on limited effect of prior convictions as defense requested constituted reversible error). *But see Carter v. State*, 366 Md. 574 (2001) (a defendant does not have an absolute right to a curative instruction regarding the inappropriate admission of prejudicial evidence, and it is within the discretion of the trial court to decide whether a cautionary or limiting instruction should be given). Trial counsel's failure to request the instruction or object to the given instructions also prejudiced Applicant because it resulted in a lost opportunity for Applicant to challenge the validity of the instructions on appeal. Because of the error, Applicant's only option for challenging the deficiency of the instructions on appeal was plain error review. However, appellate counsel could not have raised as plain error the deficient jury instructions. Where trial counsel fails to object to the given jury instructions, an error of commission is reviewable on appeal as plain error, while an error of omission is generally not. *See, e.g., Morris v. State*, 418 Md. 194, 227 (2011) (The court will not *sua sponte* give a limiting instruction – the defense must request it); *Jenkins v. State*, 59 Md. App. 612 (1984) (a party's failure to make a timely objection to the court's instructions, or to its omission to give an instruction, precludes appellate review of any error relating to the instructions); *Dove v. State*, 47 Md. App. 452, 456 (1980) (same); *Brown v. State*, 14 Md. App. 415 (1972), cert. denied 265 Md. 736 (1972) (refusal to review as plain error failure

of judge to give supplemental instruction clarifying law where judge would have given instruction had trial counsel requested it).

An error of omission may only be reviewable as plain error where the error affected a material right of the defendant. In *State v. Hutchinson*, the Court of Appeals took notice of plain error where the judge failed to instruct the jury that it could return a not guilty verdict and trial counsel failed to object. 287 Md. 198, 218 (1980). Citing Md. Rule 757(f), the Court reiterated the general rule that an intermediate appellate court will not take notice of plain error in jury instructions unless the defense objected to the proffered instruction, or requested an instruction which was then denied. *Id.* at 201-02. However, Md. Rule 757(h) allows a court in its discretion to take cognizance of plain error material to the rights of the defendant where the defense did not object as required by section f of that rule. *Id.* at 202. In response to the State's argument that an omission in the instructions not objected to is unreviewable, the Court cited four cases in which the Court took notice of plain error to unobjected to erroneous instructions. *Id.* at 203-04 (citing *Squire v. State*, 280 Md. 132 (1977); *Dempsey v. State*, 277 Md. 134 (1976); *Fowler v. State*, 7 Md. App. 264 (1969); and *Barnhart v. State*, 5 Md. App. 222 (1968)). However, all of the cases cited were errors of commission rather than omission, which is consistent with *Brown* (decided before *Hutchinson*) and *Morris* (decided after *Hutchinson*), holding that plain error is not reviewable unless the error is one of commission. The *Hutchinson* court went on to hold that where the error vitally affected the defendant's rights to a fair trial, an appellate court, in its discretion, may take notice

of plain error in the jury instructions pursuant to Md. Rule 757(h) where the defense neither objected to the given instructions nor requested a desired instruction. *Id.* at 202.

It is unlikely given the facts of the instant case that the appellate court would find that the failure to give the limiting instruction affected a material right of the Applicant. Therefore it is unlikely that Applicant would have been able to benefit from plain error review under *Hutchinson* in his direct appeal. Thus trial counsel's failure to request the instruction foreclosed all appellate review of the deficiency of the jury instructions.

In sum, trial counsel was ineffective in failing to request a limiting instruction on the use of the stipulation because the judge would have been required to give the instruction under Rule 4-325(c) and *Thompson* had trial counsel requested it. This failure prejudiced Applicant because: (1) it allowed the jury to consider Applicant's prior conviction for improper purposes; (2) had the trial court erroneously denied the request for instruction, its refusal would have constituted reversible error on appeal; and (3) by not requesting the limiting instruction, trial counsel foreclosed all possibility of review of the instruction on appeal.

Once again relying on the purported strength of the State's case, the post conviction court denied relief on this claim. "Based on the strength of the State's case, there is not a significant possibility that the result would have been different." (Memorandum Opinion at 18). The court considered only one of the two arguments presented for finding prejudice on this claim, that by failing to ask for the instruction, if the trial court denied it, Applicant would have had the benefit of appellate review. (*Id.*). The post conviction court failed to address the other argument in favor of finding

prejudice, that by failing to ask for the instruction, jury was allowed to consider Applicant's prior conviction for improper purposes, as propensity evidence. Under Maryland Rule 4-407(a) and *Pfoff v. State*, 85 Md. App. 296, 304-05 (1991), the post conviction court must rule on every allegation raised in the post conviction petition. In misapplying the prejudice standard and failing to consider Applicant's full argument in support of prejudice, the post conviction court erred.

F. The Cumulative Errors of Trial Counsel Constituted Ineffective Assistance.

After failing to grant relief as to each of Applicant's claim, the post conviction court denied relief on Applicant's cumulative claim and once again cited to the strength of the State's case. The post conviction court erred here too in failing to grant relief on this claim. The errors of trial counsel in this case individually and collectively prejudiced the defense. The cumulative effect of the multiple errors prejudiced Applicant under *Strickland. See Bowers v. State*, 320 Md. at 431-37 (granting new trial based on single attorney error and the cumulative effect of multiple errors). In *Bowers*, the Court of Appeals noted that "when individual errors [by trial counsel] may not be sufficient to cross the threshold [of a showing of prejudice], their cumulative effect may be." *Bowers*, at 436-37 (citing *People v. Cole*, 775 P.2d 551, 555 (Colo. 1989); *People v. Bell*, 505 N.E.2d 365, 374 (Ill. 1987); *Smith v. State*, 547 N.E.2d 817 (Ind. 1989); *Yarborough v. State*, 529 So. 2d 659 (Miss. 1988); *People v. Trait*, 527 N.Y.S.2d 920, 921 (N.Y. App. Div. 1988); and *Doherty v. State*, 781 S.W.2d 439, 442 (Tex. Crim. App. 1989)). In failing to relief, the post conviction court erred and Applicant is entitled to relief.

VI. CONCLUSION

For the foregoing reasons, Applicant requests that the Court grant this Application and reverse the judgment entered on the Petition for Post Conviction Relief, or, in the alternative, grant the Application and order further proceedings in accordance with Maryland Rule 8-204(g).

Respectfully submitted,

Erica J. Suter
The Law Offices of Erica J. Suter, LLC
6305 Ivy Lane, Suite 608
Greenbelt, Maryland 20770
ejsuter@ericasuterlaw.com
301.880.7118

Counsel for Applicant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of April, 2015, a copy of the foregoing Application for Leave to Appeal Denial of Post Conviction Relief was mailed, first class postage prepaid, to the Office of the Attorney General, Criminal Appeals Division, 200 Saint Paul Place, Baltimore, Maryland 21202.

Erica J. Suter

Exhibit A

IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND

KARIM WARD, Petitioner	*	
vs.	*	Case No. 21-K-03-032388
STATE OF MARYLAND Respondent	*	

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

MEMORANDUM OPINION

Background

On February 6, 2004, in the Circuit Court for Washington County, the Honorable Donald E. Beachley presiding, a jury found Karim Ward ("Petitioner") guilty of second degree murder; use of a handgun in the commission of a felony; wearing, carrying or transporting a handgun; unlawful possession of a regulated firearm; and unlawful possession of a firearm. On April 12, 2004, Petitioner was sentenced to thirty years for second degree murder; ten years for use of a handgun in the commission of a felony, consecutive; three years for unlawful possession of a regulated firearm, concurrent; and the remaining convictions were merged.

Petitioner appealed his conviction to the Court of Special Appeals on April 21, 2004. The only issue raised on appeal was sufficiency of the evidence. That court affirmed his convictions in an unreported opinion on April 26, 2005. Additionally, on May 14, 2004, Petitioner filed an Application for Review of Sentence by a Three Judge Panel. That panel affirmed Petitioner's sentences on June 1, 2004. On May 24, 2004, Petitioner filed a pro se Petitioner for Modification or Reduction of Sentence, which was denied on June 11, 2004.

Petitioner filed a second Motion for Modification of Sentence, which was denied on July 14, 2004.

Petitioner filed a Petition for Post Conviction Relief with this Court on September 16, 2014. A hearing was held on January 12, 2015, after which this Court took the matter under advisement.

Facts

On December 14, 2002, in the early morning hours, a fight broke out on the curb in front of 466 Jonathan Street in Hagerstown, Maryland. Asia Burns, along with her sister Shree Harrell, and their friend Carl Wallace, had driven together to 466 Jonathan Street to confront Takima White, who allegedly attacked Asia earlier that evening in a night club. At the time, Takima White and Petitioner, resided at 466 Jonathan Street.

Eyewitnesses testified that during the fight, Carl Wallace got in between Takima and Asia in an effort to break up the fight. Petitioner thereafter pulled out a handgun and fired several shots at Carl Wallace, killing him.

Allegations of Error

In his Petition for Post Conviction Relief, Petitioner alleged nine separate errors by trial or appellate counsel. All but one claim referred to alleged ineffective assistance by trial counsel. The remaining claim, that his appellate counsel was ineffective, was waived at the January 12, 2015 hearing. Petitioner's eight remaining claims are restated as follows:

1. Whether trial counsel rendered ineffective assistance by failing to object to the State's injecting the specter of witness intimidation into the trial at closing argument when no such evidence was admitted at trial.

2. Whether trial counsel rendered ineffective assistance by failing to object to the State's "Golden Rule" argument at closing by telling the jury to not let down the witnesses who risked their lives to testify.
3. Whether trial counsel rendered ineffective assistance by failing to object to the State's vouching for the credibility of its witnesses during closing argument.
4. Whether trial counsel rendered ineffective assistance by failing to object to the State's testifying as an expert during closing argument.
5. Whether trial counsel rendered ineffective assistance by failing to object to the State's telegraphing to the jury that petitioner had a prior, drug-related conviction.
6. Whether trial counsel rendered ineffective assistance by omitting several critical inconsistencies in the State's case.
7. Whether trial counsel rendered ineffective assistance by failing to request a limiting jury instruction that Petitioner's stipulated prior conviction was only to be used to determine whether he was guilty or not guilty of illegally possession a firearm after conviction for a crime which prohibited such possession, and not as evidence of guilt with other charged crimes.
8. Whether the cumulative errors of trial counsel constituted ineffective assistance.

Standard of Review

The landmark Supreme Court decision, *Strickland v. Washington*, 466 U.S. 668 (1984) provides a two part test for a petitioner claiming ineffective assistance of counsel. The first prong requires the petitioner to "show that counsel's performance was deficient." *Id.* at 687. The second prong requires the petitioner to "show that the deficient performance prejudiced the defense." *Id.*

The reviewing court does not need to consider both prongs to reach a conclusion that satisfies the test. A court may review whether a counsel's performance caused the defendant prejudice before it determines that counsel's performance was deficient. *Id.* at 697 ("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."); *see also Yoswick v. State*, 347 Md. 228, 245 (1997); *Oken v. State*, 343 Md. 256, 284 (1996).

With regard to prejudice, Petitioner "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. In fact, "the prejudicial effect of counsel's deficient performance need not meet a preponderance of the evidence standard." *Williams v. State*, 326 Md. 367, 375 (1992). Rather, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. The Court of Appeals, in interpreting *Strickland*, has held that prejudice exists if it is shown that, without the error, there was a substantial or significant possibility that the outcome would have been different. *Bowers v. State*, 320 Md. 416, 426 (1990).

This Court holds that Petitioner's trial counsel was deficient. However, counsel's deficiencies did not prejudice the defense such that, without the error, there is a substantial or significant possibility that the outcome would have been different.

Discussion

1. The Specter of Witness Intimidation

Petitioner first alleges that the State improperly injected the specter of witness intimidation into its closing argument. Several times in closing argument, the State made comments that intimated that witnesses were hesitant to come forward, or that witnesses were risking their lives by testifying.

When explaining why not every witness present at the scene had testified in court, Assistant State's Attorney Joseph Michael stated:

> We go knock on the doors. We didn't grab people by the collar, but in this world, and I can understand it, I hope I am never in this situation because I would like to say today that I'm enough of a man to come forward, but there is no guarantees [sic] until you are in that situation. And we don't . . . . I don't have the right, having never been in this situation, to criticize others for not coming forth and *putting their lives on the line* to tell you what happened.

T.02.06.2004 at 33 (emphasis added).

> The real significance of this shirt is that in this world where this could happen and does happen over nothing it is very difficult for the hardworking men of the Hagerstown Police Department and women who were with Steve Hoover, to go out there, Detective Moulton, to beat the bushes to say-Do you want to come to court and tell these people who did this and testify against a person who is willing to shoot a man down in a girl fight?

Id. at 36-37.

> These are the bullets and bullet fragments removed from Mr. Wallace. *The same kind of bullets that prevent people from wanting to come forward.*

Id. at 37 (emphasis added).

> [The recovered shell casings] are also a reminder as they lay on Jonathan Street, as they do in our State's exhibit number five, that *the next one could be for you if you come forward. Reminds the people that walked away from that scene as he laid there, Mr. Wallace, is an even bigger reminder.*

Id. at 37-38 (emphasis added).

> And in this world that you have gotten a glimpse of is very difficult to extract those people that are willing to overcome the fear that this kind of thing instills in people, that those shell casings and that body laying on Jonathan Street instill in people and get them to come here, and they did.

Id. at 42.

> Shree Harrell is the person that, notwithstanding her fear, came forward. Notwithstanding her fear. Kenny Jenkins, notwithstanding his fear. Mr. Corderman says, "Oh I have lived in Hagerstown all my life. It's not that bad."

> Well from what they saw that night, it is that bad. As I told you initially, this is the world, which not everybody lives in, that they live in and they are entitled, but they have to continue to live in that world from here on out with that they know and what they know could happen to them. And that is the measure of credibility.

Id. at 92.

The Court notes at the outset that the jury heard no testimony or evidence regarding witnesses being intimidated. However, Shree Harrell did testify about the "world" she lived in when she explained why she, her sister, and Carl Wallace went to 466 Jonathan Street that night. When describing that her sister had been attacked in a club, Harrell stated, "[My sister] didn't have to tell me to do anything. I mean she got jumped in a club and when you get jumped you go to the girl's house and they fight." T. 02.04.2004 at 9. Although this statement does not establish the basis of intimidation that Michael implied with his closing argument, it does vindicate his comments that the people involved live in a world where violence and conflict is more common and even expected and accepted.

The issue here is whether Michael's comments, and Petitioner's trial counsel's failure to object to them, constituted sufficient prejudice to grant a new trial. Relying on *Jones* v. State, 217 Md. App. 676 (2014),[1] Petitioner argued that commenting on facts not in evidence, when the evidence against a criminal defendant was not overwhelming, constituted prejudice.

In *Jones*, the Court of Special Appeals reiterated that, "If the State has a strong case, the likelihood that an improper comment will influence the jury's verdict is

[1] Petitioner provided this case to bolster its argument in a letter mailed after the January 12, 2015 hearing.

reduced." *Id.* at 694 (quoting *United States v. Young*, 470 U.S. 1, 19-20 (1985)). The *Jones* court was tasked with deciding whether overruling the defendant's objections to improper statements at closing arguments constituted harmless error. *Id.* The Court of Special Appeals looked at three factors for guidance: "*first*, 'the weight of the evidence against the accused'; *second*, 'the severity of the remarks, cumulatively'; and *third*, 'the measures taken to cure any potential prejudice.'" *Id.* (quoting Lee v. State, 405 Md. 148, 174 (2008)). Because the issue is whether Petitioner was prejudiced by the statements (and his trial counsel's failure to object to them), this Court will focus on only the first two factors.

In *Jones*, the Court of Special Appeals characterized the State's case as "strongly disputed." *Id.* at 695. That court noted that "[t]here was no confession by [Mr. Jones], nor any fingerprints, photographs, or other circumstantial evidence to corroborate [either witness's] testimony regarding their observations." *Id.* (quoting *Sivells v. State*, 196 Md. App. 254, 289 (2010)). Instead, the case against Jones "hinged primarily on witness testimony." *Id.* The Court of Special Appeals, quoting the Court of Appeals in *Donaldson v. State*, 416 Md. 467, 499-500 (2010), noted, "that where "the entire defense centered on the . . . credibility [of the State's witnesses] and the accuracy of their testimony," it could not conclude that the evidence was so overwhelming that the prosecutor's improper statements could not have influenced the jury's verdict." *Jones*, 217 Md. App. At 695 (internal quotations omitted).

In the instant case, it cannot be said that the evidence was strongly disputed. Harrell, who was part of the group that came to 466 Jonathan Street to start the

altercation that night, gave an account of a man she knew named Karim Ward coming out of the house with Takima White. Harrell testified that she was acquainted with Petitioner, recognized him, and saw him shoot and kill Carl Wallace. She testified that Carl Wallace was trying to break up the fight when Petitioner shot him, and that the last time she saw Petitioner after the shooting was watching him head back inside 466 Jonathan Street.

Despite the fact that Michael intimated to the jury that Harrell was threatened into not testifying, other witnesses gave corroborating accounts of the events. Raymond Williams, an employee of the Coca-Cola plant across the street, was outside taking a cigarette break when the fight and shooting transpired. Williams testified to facts similar to Harrell's account, including the fact that the shooter was a man who came out of 466 Jonathan Street, that the victim tried to break up the fight, and that after shooting the victim, the shooter went back inside 466 Jonathan Street. Further, Williams recognized Karim Ward as the man who lived at 466 Jonathan Street, having seen him before on numerous occasions. However, Williams could not see the shooter's face that night.

Another Coca-Cola employee named Decatur Young came outside after the altercation had started, but before the shooting. He observed only two men in the group of people involved in the fight. Young saw the shooter, one of the two males present, shoot the victim, the only other male present in the group, and then go inside 466 Jonathan Street.

Another important witness was Kenny Jenkins, a taxicab driver dispatched to pick up an employee from the Coca-Cola plant. Jenkins testified that he heard the first gunshot, and then looked up to see the shooter fire more shots into the victim. Because he was parked very close by to the scene, Jenkins was able to see the shooter's face, and identified Petitioner as the shooter in a photo-array and again at trial.

Despite the fact that details such as clothing, or where the shooter went after the shooting varied, it cannot be said that the evidence against Petitioner was "strongly disputed." Therefore, the weight of the evidence against Petitioner factors against finding prejudice.

The next issue is "the severity of the remarks, cumulatively." In *Jones*, the Court of Special Appeals noted that "the prosecutor made a *singular* remark that related to an issue that was *central* to the case—witness credibility." *Jones*, 217 Md. App. At 698. Here, Michael made several inappropriate remarks regarding witness credibility. The *Jones* court held that, "where the case . . . was not particularly strong and depended in large measure on witness credibility, improper vouching by the prosecutor present[s] a strong possibility of prejudicial effect." *Id.* (quoting *United States v. Weatherspoon*, 410 F. 3d 1142, 1151 (9th Cir. 2005) (internal quotations omitted). But unlike the *Jones* case, which was "strongly disputed," here, the State's case was strong. Despite Michael's inappropriate comments, and the abundance of them, the strength of the State's case precludes a finding of prejudice. *Strickland* provides that, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Counsel's failure to

object to Joseph Michael's comments was clearly deficient representation. But these failures do not change the fact that Petitioner's trial can be relied on as having produced a just result. It cannot be said that without the error, there is a significant possibility that the outcome would have been different to justify granting relief. *Bowers* 320 Md. at 426.

2. The "Golden Rule" Argument

Petitioner contends that Michael improperly made the "golden rule" argument at closing by telling the jury to not disappoint the witnesses who risked their lives to testify. "A "golden rule" argument is one in which a litigant asks the jury to place themselves in the shoes of the victim." *Lee v. State*, 405 Md. 148, 171 (2008).

At closing, Michael stated:

> This case gave you a picture into a world that some of you may not be familiar with. A world that while many people sleep is a world of fear, a world of retaliation, a world of escalation of violence. A world in which coming forward to testify in front of you and coming to court to the detectives equals credibility, equals class, equals reliability.

T. 02.06.2004 at 16-17.

> So at this point there is no doubt of who did it, what he did, first degree murder, using a handgun to do that murder, and the last link was crossed when Shree Harrell and Kenny Jenkins got it up in their guts to tell you. *Don't let them down now.*

Id. at 94 (emphasis added).

There can be no doubt that the comment "Don't let them down now" was completely inappropriate and should not have been made. However, as this Court stated above, through Harrell's testimony, the State did establish the facts that created the inference that the people involved in this incident live in a world where retaliation and violence and escalation are not only accepted but expected.

The Court agrees with Petitioner that Michael should not have made these comments, and that Petitioner's trial counsel should have objected to them. The issue for this Court, though, is whether, under *Strickland* and *Bowers*, the trial produced a just result, and whether there is a substantial or significant probability that the outcome of the trial would have been different without these errors. This Court is convinced that the State had a strong case against Petitioner. Because the State had two witnesses identify the shooter, and another two witnesses corroborate most of the relevant details, it cannot be said that the trial produced an unfair result, or that there is a significant probability that the outcome would have been different. Therefore, Petitioner cannot prove prejudice here.

3. Vouching for Witness Credibility

Petitioner contends that the State inappropriately vouched for the credibility of its witnesses at closing. Near the beginning of his closing argument, Michael stated:

> This case gave you a picture into a world that some of you may not be familiar with. A world that while many people sleep is a world of fear, a world of retaliation, a world of escalation of violence. *A world in which coming forward to testify in front of you and coming to court to the detectives equals credibility, equals class, equals reliability.*

T. 02.06.2004 at 16-17 (emphasis added). Near the end of his closing argument, Michael stated:

> As I told you initially, this is the world, which not everybody lives in, that they live in and they are entitled, but they have to continue to live in that world from here on out with what they know and what they know could happen to them. *And that is the measure of credibility.*

Id. at 92 (emphasis added).

Vouching is when a prosecutor "place[s] the prestige of the government behind a witness through personal assurances of the witness's veracity . . . . or suggest[s] that

information not presented to the jury supports the witness's testimony." *Spain v. State*, 386 Md. 145, 153 (2005) (quoting *United States v. Daas*, 198 F. 3d 1167, 1178 (9th Cir. 1999), *cert. denied*, 531 U.S. 999 (2000) (citations omitted)). Maryland courts have held that "the bar against prosecutorial vouching makes it improper for a prosecutor to make suggestions, insinuations, and assertions of personal knowledge." *Walker v State*, 373 Md. 360, 396 (2003).

Here, Michael did not personally verify the credibility of the witnesses based on his personal knowledge. Rather, he stated that the mere fact that these witnesses had testified, coming from a world of violence and retaliation, gave them credibility simply because they had testified. These two ideas are antithetical. First, Michael established that the witnesses came from a dangerous world that exists while others sleep, implying that their values and social norms are as distinct from the jury panel's as night and day. Then, Michael argued, despite this disparity in customs and core beliefs that he spent so much time establishing, that mere presence in the court room as a witness negated these questionable characteristics. The words Michael spoke were confusing and nonsensical. However, this Court agrees that Michael was probably trying to vouch for the credibility of his witnesses, even if his words did the exact opposite.

Even assuming that the ill-conceived attempt to vouch for the witnesses had actually conveyed the message intended, Petitioner still failed to establish prejudice. Although the State's case hinged on witness credibility, it is a vast overstatement to claim, as Petitioner did, that the witnesses provided significantly different accounts of

what happened, including descriptions of the assailant. Although it was obvious deficient representation for Petitioner's trial counsel to not object to Michael's mindless attempt to vouch for the credibility of the State's witnesses, this did not prejudice the Petitioner under *Strickland* or *Bowers*.

4. The State Testifying as an Expert

Petitioner argues that Michael testified as an expert in his closing argument when he made the following statements:

> Well for the bullet to end up in an upward path, as Carl Wallace was falling to die, Mr. Ward still intended to kill him, still aimed that gun directly at his body formulating that intention. Because the bullet – He [sic] wasn't aiming the gun upwards. It's only situated in his body because his body is falling like this, entering low and exiting higher although shot on a straight plane.

T. 02.06.2004 at 20.

> Similarly, shot three, or pardon me, gunshot wound C, left to right, back to front and upwards. A cowardly act continuing to take the time to shoot him repeatedly in the back.

Id.

Petitioner alleges that these statements are inappropriate for two reasons. First, that Michael improperly testified as an expert witness by speculating about the position of the shooter and the trajectory of the bullets despite lacking the training and qualifications to do so. Second, that Michael was commenting on facts not in evidence. The Court disagrees with both contentions, and finds no error in Petitioner's trial counsel's failure to object to these statements.

First, Michael was permitted to make inferences regarding the facts introduced at trial by Dr. Susan Hogan, the State's medical examiner. At closing, a "prosecutor is allowed

liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Jones*, 217 Md. App. At 691 (quoting *Lee v. State*, 405 Md. 148, 163 (2008)). "Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is free to comment legitimately and to speak fully, although harshly, on the accused action and conduct if the evidence supports his comments." *Jones*, 217 Md. at 691 (quoting *Sivells v. State*, 196 Md. App. 254, 270 (2010)). Michael's statements regarding the positions of the bodies and paths of the bullets were based on statements in evidence, and were reasonable inferences from those statements. During direct examination, Dr. Hogan explained the path of bullet "B" as "directed back to front, left to right and *upward*." T. 02.04.2004 at 227 (emphasis added). By testifying that the bullet's path was "upward," Dr. Hogan introduced many possible inferences to explain the flight path of the bullet. Michael chose the inference that supported his theory of the case—that the victim fell as the bullets struck him, causing the entrance point of the bullet to be lower than on exit. Additionally, because Dr. Hogan testified that a bullet flew in an upward direction, Michael's statement was not a fact not in evidence—it was based on admitted evidence.

Michael did not testify as an expert in closing, and he did not comment on facts not on evidence when discussing the flight path of bullets and the positioning of the victim's body as the shots were fired. Therefore, there is no merit to this contention.

5. Telegraphing Petitioner's Prior Drug-Related Conviction to the Jury

Petitioner argues that Michael improperly telegraphed to the jury that Petitioner had a prior, drug-related offense which prohibited him from possessing a firearm and possessing a

regulated firearm. Petitioner points to the following statements Michael made at closing to support his argument:

> A world where certain people are prohibited from having firearms and weapons to prevent just this sort of thing.

T. 02.06.2004 at 17.

> Refer to the stipulation that he is prohibited by law from due [sic] to his prior conviction of possessing a firearm, possessing a regulated firearm. You are asked to apply your common sense experiences to a situation like this. We are all prohibited from owning certain things and the, one of those things is drugs. People can't own illegal drugs. So if you get the illegal drugs, what is your intention when you get the illegal drugs? Just to have them? No. To use them, which is illegal. To sell them, which is illegal. The same thing when a person makes the act of breaking the law and get [sic] the firearm. They are already forming that illegal intention long before this crime happened. And then you know from Mr. Williams' statement that he had to have formed it prior to coming out of the house because it takes time to have these things unfold.

Id. at 25-26.

As this Court has stated above, Michael established that there is such a world where retaliation and violence are expected when Harrell testified, "[My sister] didn't have to tell me to do anything. I mean she got jumped in a club and when you get jumped you go to the girl's house and they fight." T. 02.04.2004 at 9. Further, Michael's statement only intimated that if a person does not own a gun, he cannot use that gun to hurt someone.

The contention that Michael telegraphed that the Petitioner's prior conviction was for selling drugs is severely undermined when taken in context with the rest of Michael's statement. In his example above, Michael stated "People can't own illegal drugs. So if you get the illegal drugs, what is your intention when you get the illegal drugs?" T. 02.06.2004 at 25. But Michael continued by stating, "The same thing when

a person makes the act of breaking the law and get [sic] the firearm." Id. at 25-26. The purpose of these two examples was to convey intent. In the first example, a person who intentionally possesses illegal drugs has formed the intent to do something illegal with them, whether it is selling or using them. In the second example, a person who intentionally possesses an illegal firearm (or a firearm, illegally) has formed the intent to do something with that firearm, namely, to illegally use it to shoot bullets. It is not fair to characterize Michael's statement as an attempt to telegraph something to the jury when, taken in context, Michael's statement argues that Petitioner had formed intent. Because this Court looked at the full context of Michael's statements, it disagrees with Petitioner's characterization. Therefore, Petitioner was not prejudiced when his trial counsel chose not to object.

6. Omitting Reference to Inconsistencies That Would Have Bolstered Trial Counsel's Theory of the Case

Petitioner argues that his trial counsel failed to highlight the inconsistencies in the State's case during closing argument. Specifically, Petitioner argues that his trial counsel should have focused on the fact that none of the witnesses testified consistent with the medical examiner's analysis that Carl Wallace was shot in the back, rather than in the front. Further, Petitioner points out that descriptions of the shooter's clothing, as well as where the shooter went after shooting, varied.

Upon review of the transcript of the closing argument, it appears that trial counsel did comment on these inconsistencies. After recounting the numerous accounts of witnesses, trial counsel stated, "Well this guy that Mr. Williams saw, he didn't get into a dark car and drive away. He didn't run between the buildings and go south on Ruby Alley and over to Park

Place. The guy that Mr. Williams saw went back into 466 and three second later came out the back with a hooded sweatshirt." T. 02.06.2005 at 57. Trial counsel continued,

> But what we do know is that we got Mr. Jenkins putting the shooter in the car, riding away with three black males who also got in the car, that means they were at the scene, another black male walking up Charles Street because Mr. Williams saw him. And we've got another black male running down Ruby Alley and over to Park Place.

Id. at 58. Rather than focus on the inconsistencies in clothing, trial counsel focused on the different escape efforts where some of the State's witnesses contradicted each other.

This is not to say that trial counsel ignored the inconsistent accounts of the clothing the shooter wore. In fact, trial counsel suggested that no one could agree what the shooter looked like that night, stating,

> [W]hat I would suggest that you Ladies and Gentlemen might want to consider doing when you retire to consider your verdict – divide up in groups of three and each one of you take a statement and determine for yourself what the shooter looks like. And then get together with the rest of your colleagues and see if you all come up with the same description.

Id. at 64. Not only did trial counsel notice the inconsistences and remind the jury of their existence, trial counsel challenged the jury to describe the shooter themselves, based on the contradictions they had heard at trial. By tasking the jury with such an assignment, it cannot be fairly stated that trial counsel omitted reference to these contradictions.

7. Trial Counsel Failed to Request a Limiting Jury Instruction That Petitioner's Prior Conviction was Not Evidence in Determining Guilt for Any Other Crime

Petitioner argues that trial counsel failed to request a limiting instruction regarding Petitioner's prior conviction. By failing to request such an instruction,

Petitioner argues that the jury was free to consider that fact when rendering verdicts on the other charges. The problem with this contention is that Petitioner failed to establish prejudice. The mere fact that by requesting an instruction, it is possible (though highly unlikely) that the trial court would have erroneously denied the request, which would have constituted reversible error on appeal, does not establish prejudice to Petitioner.

As stated above, prejudice exists if it is shown that, without the error, there was a substantial or significant possibility that the outcome would have been different. *Bowers v. State*, 320 Md. 416, 426 (1990). Based on the strength of the State's case, there is not a significant possibility that the outcome of the case would have been different.

8. Cumulative Errors by Trial Counsel

Finally, Petitioner argues that the cumulative effect of trial counsel's errors prejudiced his defense. The Court of Appeals has held that, "Even when individual errors may not be sufficient to cross the threshold, their cumulative effect may be." *Id.* at 436. Here, the State's case against Petitioner was strong. Additionally, the errors at issue here seem more numerous than they actually were because many of Michael's comments were alleged to be inappropriate for multiple reasons. Therefore, Petitioner was not prejudiced.

Conclusion

The Court is not unsympathetic to Petitioner's plight. At trial, Joseph Michael made several inappropriate statements. However, the issue before this Court is whether Petitioner was prejudiced when his trial counsel failed to object to these statements. The test for prejudice is whether there is a significant possibility that the outcome of the case would have been different, not whether trial counsel could have done a better job. This Court notes that

Shree Harrell positively identified Petitioner as the shooter, having seen him that night, and recognizing him as an acquaintance prior to the shooting. This Court also notes that Kenny Jenkins, who was close by when the shooting transpired, testified that he saw the shooter's face that night, and saw that Petitioner was that shooter. The State's case against Petitioner was strong, and for that reason, and that reason alone, Petitioner failed in every allegation to meet the prejudice prong of *Strickland*. Accordingly, Petitioner's request for relief is denied.

March 10, 2015
Date

Daniel P. Dwyer
Associate Judge

cc: Joseph Michael, Esq.
Erica J. Suter, Esq.

Exhibit B

THE LAW OFFICES OF
ERICA J. SUTER, LLC

6305 IVY LANE
SUITE 608
GREENBELT, MD 20770

TEL: 301.880.7118
FAX: 301.358.6598
EJSUTER@ERICASUTERLAW.COM
WWW.ERICASUTERLAW.COM

January 15, 2015

The Honorable Daniel P. Dwyer
Associate Judge
Circuit Court for Washington County
Court House
24 Summit Avenue
Hagerstown, Maryland 21740

Re: ***Karim Ward v. State of Maryland***
Case No. 21-K-03-32388

Dear Judge Dwyer:

Undersigned counsel appeared before Your Honor in the above case for a post conviction hearing on January 12, 2015. The enclosed case, *Jones v. State*, 217 Md. App. 676 (2014), was decided after Petitioner filed his post conviction petition. In that case, the intermediate appellate court restates the well settled law that commenting on facts not in evidence in closing argument is improper. In reversing the Appellant's conviction, the Court of Special Appeals considered the evidence against the defendant, and noted that though the evidence was sufficient, it was not overwhelming. That the case turned on the credibility of the witnesses because no physical evidence linked the defendant to the crime also factored into the Court's decision. Thus, commenting on a fact not in evidence was particularly prejudicial to the defendant. Moreover, the intermediate appellate court noted "the limited curative effect of general jury instructions, given before closing arguments because the instructions cannot 'address objectionable remarks' that have not yet been made.'" *Jones,* 217 Md. *at* 698. (internal citations omitted). Likewise, in Petitioner's case, jury instructions were given *before* closing remarks.

In *Jones*, the intermediate appellate court carefully distinguishes between "matters of common knowledge," upon which a prosecutor may comment, despite evidence of such facts not being formally introduced, and facts not in evidence. "Matters of common knowledge are those matters which every informed individual possesses." 217 Md. App. at 692. (internal citations omitted). During Monday's hearing, the State seemed to argue that the portions of closing argument at issue were merely comments on common knowledge, that violent crime invokes fear amongst victims and witnesses and that there was a culture of fear in the community. Carrying the State's argument to its logical conclusion, it would be appropriate in all cases where there was a violent crime and/or a witness appeared afraid, *despite a complete and utter lack of*

evidence to support the proposition, for the State to tell the jury that the witnesses were terrified, not of a similar crime happening to them, but more specifically, **that they would be shot as a result of testifying against the defendant** and, that they, in fact, risked being murdered by, "putting their lives on the line" to testify against the defendant. Such a result would be profoundly prejudicial to a defendant and inconsistent with the law. That crime frequently occurred in the section of Washington County where Mr. Wallace was killed may have been common knowledge. That witnesses of crime are sometimes hesitant to speak with the police for a variety of reasons may have been common knowledge. That Ms. Harrell appeared uncomfortable or anxious on the witness stand may have been readily apparent to the jury. What was not and could not have been common knowledge was that the witnesses were terrified of being shot to death as a direct result of testifying against Petitioner.

That the State's remarks were improper is pellucid. Although Petitioner lacked the benefit of testimony from Mr. Corderman at the post conviction hearing, the record nonetheless supports Petitioner's contention that Mr. Corderman's inaction could not have been the result of sound trial strategy. No benefit could have inhered to Petitioner from Mr. Corderman's silence in the face of the State's repeated improper, prejudicial, and unsupported remarks. The improper comments of the State permeated the entire trial, from opening statements through rebuttal. Judge Beachley wisely sustained each and every objection raised to the State's improper comments on the witness's fear of a similar fate, when the defense had the wherewithal to make the objection. That Mr. Ward was convicted of second degree murder as opposed to first degree murder is hardly dispositive of Mr. Corderman's competence with regard to the specific errors alleged. That Petitioner suffered prejudice as a result of the trial counsel's errors is patently apparent given the closeness of the case and the compromised verdict reached by the jury.

Sincerely,

Erica J. Suter

enc.

cc: Mr. Joseph S. Michael
Deputy State's Attorney
for Washington County
33 West Washington Street
Room 302
Hagerstown, Maryland 21740