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IN THE

Petitioner,

CIRCUIT COURT
BALTIMORE CITY
CRIMINAL DIVISION

CIRCUIT COURT

v.

FOR BALTIMORE CITY

STATE OF MARYLAND,

*

CASE NO(s). 199103042-46

Respondent.

*

PETITION NO: 10432

* * * * *

MEMORANDUM OPINION

ADNAN SYED, Petitioner, by and through his counsel, filed a Petition for Post-Conviction Relief on May 28, 2010. On June 27, 2010, Petitioner filed a Supplement to his Petition for Post-Conviction Relief pursuant to the Maryland Post Conviction Procedure Act. MD. CODE ANN., CRIM. PROC. §§ 7-701 *et seq*, and a hearing was held over the course of two days: October 11, 2012 and October 25, 2012.

Petitioner's allegations, as asserted, are as follows:

- I. Trial counsel failed to establish a timeline that would have disproved the State's theory and shown that Petitioner could not have killed the victim in the manner described by States witness Jay Wilds.
- II. Trial counsel failed to call or investigate an alibi witness, Asia McClain, who was able and willing to testify;
- III. Trial counsel failed to move for a new trial based on the statements of Asia McClain, which exonerated Petitioner;
- IV. Trial counsel failed to adequately cross-examine Deborah Warren, a State witness;
- V. Trial counsel failed to approach the State about a possible plea deal;
- VI. Trial counsel failed to inform Petitioner of his right to request a change of venue;
- VII. Trial counsel failed to investigate the State's key witness, Jay Wilds, for impeachment evidence;

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- VIII. Appellate counsel failed to challenge testimony of State's expert witness that strayed outside of his expertise; and
- IX. Petitioner's counsel at sentencing failed to request that the Court hold Petitioner's hearing on Motion for Modification of Sentence in abeyance.

For the foregoing reasons, the Court will **DENY** the Petitioner's Petition for Post-Conviction Relief.

STATEMENT OF THE CASE

Petitioner was convicted by a jury in the Circuit Court for Baltimore City for kidnapping and killing his former girlfriend, Hae Min Lee (hereinafter the "victim"). Petitioner and the victim were both seniors in the gifted and talented program at Woodlawn High School in Baltimore County when the victim disappeared on January 13, 1999. On February 9, 1999, the victim's body was found partially buried in Leakin Park, in the 4400 block of North Franklinton Road in Baltimore City. The medical examiner determined that the cause of death was strangulation.

Following an anonymous tip, Petitioner was arrested and charged with first-degree murder, second-degree murder, kidnapping, robbery, and false imprisonment. A grand jury indictment was issued on April 13, 1999. Petitioner was arraigned in the Circuit Court of Baltimore City before the Honorable Judge David Mitchell on June 3, 1999.

Petitioner's trial lasted from January 7, 2000 through February 25, 2000 before the Honorable Judge Wanda Keyes Heard.¹ At trial, M. Cristina Gutierrez, Esq., represented Petitioner and Kevin Urick, Esq., and Kathleen C. Murphy, Esq., represented the State. During the trial, Jay Wilds, the State's primary witness, testified to the

¹ Petitioner's first trial was held in front of Judge William Quarles and ultimately ended in a mistrial on December 15, 1999.

following: Petitioner called Mr. Wilds from a payphone in the Best Buy parking lot at 2:36 p.m. on January 13, 1999 to request a ride. When Mr. Wilds arrived at the parking lot, Petitioner opened the trunk of the victim's car, revealing the victim's lifeless body. Mr. Wilds testified that Petitioner subsequently told Mr. Wilds that he had strangled the victim and bragged, "I killed someone with my bare hands." That evening, Mr. Wilds accompanied Petitioner while Petitioner disposed of the victim and victim's car.

The State's case rested largely on the testimony of Mr. Wilds and the corroborating cell phone records. The State argued that sometime after 2:15 p.m., when school ended, and before 2:36 p.m., when cell phone records indicate a call was made to Mr. Wilds from a payphone in the Best Buy parking lot, Petitioner received a ride from the victim and strangled the victim during the course of that ride. Petitioner then transferred the victim's body to the trunk of the victim's car. As a motive, the State presented evidence that Petitioner was jealous and enraged at the victim's new romantic relationship with another man.

At trial, trial counsel's strategy was two-fold: (1) to prove that Petitioner and the victim broke-up amicably due to outside pressures and remained friends, thereby challenging the State's suggested motive and (2) to prove that the police too quickly focused their investigation on Petitioner and, consequently, failed to pursue evidence that would have proven Petitioner's innocence.

On February 25, 2000, the jury convicted Petitioner of first-degree murder, robbery, kidnapping, and false imprisonment. On March 6, 2000, Petitioner, through his trial counsel, submitted a Motion for a New Trial. In the motion, Petitioner raised the following issues: (1) Petitioner's due process rights were violated when the court refused

to admit evidence that Jay Wilds did not plead guilty to accessory after the fact to the murder of the victim; (2) the court erred in refusing to allow Petitioner to prove that the plea agreement between the State and Jay Wilds included benefits not in the written plea agreement; (3) the State failed to provide discovery regarding Jay Wild's plea prior to the trial; (4) the verdicts were against the weight of the evidence; (5) there was insufficient evidence to sustain the convictions; and (6) the court improperly restricted the defense's presentation of its case.

The sentencing proceeding was scheduled for April 5, 2000. On that date, Judge Heard granted Petitioner's request to dismiss M. Cristina Gutierrez as Petitioner's counsel,² and agreed to postpone the sentencing so that Petitioner's new attorney had time to adequately prepare.

Sentencing was held on June 6, 2000. At sentencing, Charles Dorsey, Esq., represented Petitioner and Kevin Urick, Esq., and Kathleen C. Murphy, Esq., represented the State. During sentencing, Judge Heard considered and denied Petitioner's Motion for a New Trial and sentenced Petitioner to life in prison for the murder, thirty (30) years, to run consecutively with the life sentence, for the kidnapping, and ten (10) years, to run concurrent, for the robbery. Petitioner, through his attorney, Mr. Dorsey, filed a Motion for Modification of Sentence on July 28, 2000. Judge Heard denied the motion on August 2, 2000.

Petitioner filed a timely appeal to the Maryland Court of Special Appeals, which was denied on March 19, 2003. Warren A. Brown, Esq. and Nancy S. Forster, Esq.

² During the proceedings, Judge Heard indicated that while she would not normally have the authority to remove Ms. Gutierrez as Petitioner's attorney, the Administrative Judge, Judge Mitchell, granted Judge Heard limited authority to hear Petitioner's request. Transcript of Proceedings, *State v. Adnan Syed* (Nos. 199103042-46), Apr. 5, 2000 at 3.

represented Petitioner. On appeal, Petitioner raised the following issues: (1) whether the State committed prosecutorial misconduct, violated *Brady*, and violated Appellant's Due Process rights when it (a) suppressed favorable, material evidence of an oral side agreement with its key witness, and (b) when it introduced false and misleading evidence; (2) whether the trial court committed reversible error in prohibiting Appellant from presenting evidence to the jury; (3) whether the trial court erred in admitting hearsay in the form of a letter from the victim to the Appellant, which is highly prejudicial; and (4) whether the trial court erred in permitting the introduction of the victim's diary. The Court of Appeals of Maryland denied certiorari on June 25, 2003.

Petitioner, through his attorney, C. Justin Brown, Esq., filed a Petition for Post-Conviction Relief, which was received on May 28, 2010,³ alleging ineffective assistance of defense counsel, M. Cristina Gutierrez, Esq., ineffective assistance of counsel at sentencing, Charles Dorsey, Esq., and ineffective assistance of appellate counsel, Warren A. Brown, Esq.. On June 27, 2011, Petitioner supplemented his Petition. After multiple postponements,⁴ the Court held a post-conviction hearing on October 11, 2012 and October 25, 2012. At the hearing, C. Justin Brown, Esq., represented Petitioner and Kathleen C. Murphy, Esq., represented the State.⁵

³ The Certificate of Service attached to the Petition for Post-Conviction Relief states the date of service as June 28, 2010, which would be more than 10 years after the date sentencing was imposed (June 6, 2000). Under Md. Code Ann., Crim. Proc. § 7-103, Petitions for Post-Conviction Relief must be filed within 10 years of the date sentencing was imposed. However, we can assume the date listed on service was an error because the petition was received by the Court on May 28, 2010.

⁴ The post-conviction hearing was scheduled and postponed seven times before the hearing took place. The previously scheduled dates were: December 20, 2010, August 8, 2011, October 20, 2011, February 6, 2012, March 6, 2012, July 26, 2012, and August 9, 2012.

⁵ On September 29, 2011, Petitioner, by and through his attorney, C. Justin Brown, Esq., moved to disqualify Assistant State's Attorney Kathleen Murphy, Esq., as counsel for the State. The Motion alleged that Ms. Murphy must be disqualified pursuant to Maryland Rule of Professional Conduct 3.7, which forbids an attorney from acting as counsel and a witness in the same proceeding. Petitioner argued that he intended to call Ms. Murphy as a witness during the post-conviction hearing. Following a hearing on

DISCUSSION

A criminal defendant has the right to be represented by counsel as well as the right to effective assistance of counsel during the course of that representation. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). The Constitution does not require the best possible defense or that trial counsel render a perfect defense. *State v. Hunter*, 103 Md. App. 620, 623 (1995). The standard for measuring counsel's representation is "whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

To prevail on an ineffective assistance of counsel claim, the petitioner must satisfy the two-prong test set forth in *Strickland v. Washington*, which requires the petitioner to show that: (1) counsel's performance was deficient; and (2) counsel's deficient performance caused prejudice to the defense. 466 U.S. at 687. If either prong fails, then the Petitioner's ineffective assistance of counsel claim must fail. *Id.*

To satisfy the first prong of the *Strickland* test, the petitioner must identify specific acts or omissions by counsel during the course of representation that, by themselves or taken together, establish that the representation fell below an objective standard of reasonableness. *Id.* at 688. This inquiry requires an evaluation of trial counsel's performance in light of prevailing professional norms. *Redman v. State*, 363 Md. 298, 310 (2001). Where a petitioner fails to show that trial counsel's actions were "outside the wide range of professionally competent assistance," the first prong of

Strickland is not satisfied, and the ineffective assistance of counsel claim fails. *Strickland*, 466 U.S. at 690.

In judging the reasonableness of counsel's actions, there is a strong presumption that counsel rendered effective assistance. *State v. Thomas*, 325 Md. 160, 171 (1992). In a post conviction hearing, the petitioner, as the moving party, bears the "heavy" burden to prove that he was deprived of effective representation. *State v. Hardy*, 2 Md. App. 150, 156 (1967). Whether an act or omission of trial counsel was unreasonable, and, thus, amounted to a deficient act or omission, should be determined from the perspective of the trial counsel at the time of the alleged act or omission. *Strickland*, 466 U.S. at 689-90; *see also Gilliam v. State*, 331 Md. 651, 666 (1993) (courts should not use hindsight to second-guess trial counsel's decisions).

The prejudice prong of the *Strickland* test "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Williams v. Taylor*, 529 U.S. 362, 393 n. 17 (2000). To satisfy the second prong of the *Strickland* test, a petitioner must show that in light of the totality of the circumstances and all the evidence presented at trial, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is defined as, "a probability sufficient to undermine confidence in the outcome." *Id.* The Court of Appeals of Maryland further expanded on the "reasonable probability" standard, providing that prejudice exists where "there was a substantial or significant possibility that the verdict of the trier of fact would have been affected." *Bowers v. State*, 320 Md. 416, 426 (1990).

Additionally, under Maryland law, it is a petitioner's burden to prove the facts supporting an allegation of ineffective assistance of counsel. *Cirincione v. State*, 119 Md. App. 471, 504 (1998). Where a petitioner fails to prove the required facts of an allegation, a court should deny the allegation as a bald allegation. *Duff v. Warden*, 234 Md. 646, 648 (1964). A court must also deny relief in instances where a petitioner successfully proves facts, but those facts fail to prove the allegation asserted. *Dougher v. State*, 236 Md. 629, 630 (1964).

I. Trial counsel's decision not to call additional alibi witnesses, which could have helped to establish a timeline for the defense, was the result of a sound and reasonable trial strategy.

Petitioner argues that trial counsel was unreasonable in failing to call several alibi witnesses who could have established a timeline of Petitioner's movements on the day of the murder. Petitioner contends that counsel's failure to call such witnesses caused prejudice to the defense because the timeline provided by those witnesses disproved the State's ultimate theory of the case; namely, that Petitioner killed the victim in the Best Buy parking lot between 2:15 pm and 2:36 pm.

In the course of representation, trial counsel has a duty to make reasonable investigations of law and fact relevant to plausible options. *Strickland*, 466 U.S. at 691. A decision not to investigate must be reasonable in light of prevailing professional norms, with heavy deference to trial counsel's judgment. *Id.* Strategic choices made after thorough investigation are "virtually unchallengeable," and strategic decisions made after less than complete investigation are reasonable "to the extent that reasonable professional judgments support" the decision not to further investigate. *Id.* Where "a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or

even harmful, counsel's failure to pursue those investigations may not be later challenged as unreasonable." *Strickland*, 466 U.S. at 691.

The evidence shows that trial counsel conducted a thorough investigation of the potential alibi witnesses in Petitioner's case and made a strategic decision against using them at trial. Trial counsel identified more than eighty (80) potential alibi witnesses prior to Petitioner's trial. State Post-Conviction Exhibit 1. Trial counsel also noted how each witness could be used to support Petitioner's own stated alibi; that he had remained at school from 2:15 p.m. until track practice at 3:30 p.m. on the day of the murder. *Id.* Nevertheless, trial counsel decided against using the witnesses at trial. Based on *Strickland*, because trial counsel conducted a thorough investigation of the witnesses, her decision against using them is "virtually unchallengeable" and the Court must defer to trial counsel's strategic judgment.

Furthermore, Petitioner offers no evidence that trial counsel's decision against using the alibi witnesses was unsound. In *Veney v. Warden*, the Court denied relief to a defendant who failed to call an alibi witness on post-conviction and instead, made a proffer that the witness' trial testimony would have supported the defendant's alleged alibi. *Veney v. Warden*, 259 Md. 437, 450 (1970). Similarly, Petitioner simply asserts that trial counsel should have called an alibi witness to testify at trial, but does not specify which witness should have been called or for what purpose. Additionally, Petitioner has not produced any of the eighty potential alibi witnesses to testify at the post-conviction hearing.

Consequently, trial counsel was not deficient in investigating the potential alibi witnesses and trial counsel's decision not to further pursue certain witnesses was sound

and reasonable. Therefore, Petitioner is not entitled to post-conviction relief on this claim of ineffective assistance of counsel.

II. Trial counsel's decision not to pursue alibi witness, Asia McClain, was the result of sound a reasonable trial strategy.

Petitioner argues that trial counsel failed to investigate Asia McClain as a potential alibi witness and that trial counsel's failure to do so was unreasonable. Petitioner further asserts that Ms. McClain's testimony would have directly challenged the State's theory of the case.

In the course of representation, trial counsel has a duty to make reasonable investigations of law and fact relevant to plausible options. *Strickland*, 466 U.S. at 691. A decision not to investigate must be reasonable in light of prevailing professional norms, with heavy deference to trial counsel's judgment. *Id.* Strategic choices made after thorough investigation are "virtually unchallengeable," and strategic decisions made after less than complete investigation are reasonable "to the extent that reasonable professional judgments support" the decision not to further investigate. *Id.* Where "a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not be later challenged as unreasonable." *Strickland*, 466 U.S. at 691.

Furthermore, "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). In order to succeed on a claim of ineffective assistance of counsel, Petitioner is required to overcome the presumption that trial counsels acts or omissions at trial were the result of sound and reasonable trial strategy. *Id.*

Based on Petitioner's assertion that he informed trial counsel of Ms. McClain's potential to be an alibi witness and trial counsel's notations indicating that such an interaction with Petitioner took place, it appears that trial counsel was made aware of Ms. McClain and made a strategic decision not to pursue her for the purpose of an alibi. Defense Post-Conviction Exhibit 1 (Trial Counsel's Notes). However, the Court finds several reasonable strategic grounds for trial counsel's decision to forego pursuing Ms. McClain as an alibi witness in Petitioner's case.⁶

Firstly, the letters sent from Ms. McClain to Petitioner do not clearly show Ms. McClain's potential to provide a reliable alibi for Petitioner. In the first letter, sent on March 1, 1999, Ms. McClain recounted that she saw Petitioner in the public library on January 13, 1999, but did not state the exact time during which the encounter took place. Defense Post-Conviction Exhibit 7. The only indication of Ms. McClain's potential to be an alibi witness for Petitioner is in Ms. McClain's offer to "account for some of [Petitioner's] un-witnessed, unaccountable lost time (2:15 – 8:00; Jan 13th)." *Id.* In the letter sent on March 2, 1999, the following day, Ms. McClain again told Petitioner that she saw the Petitioner in the public library on January 13th and conjectured, "maybe if I would have stayed with you or something this entire situation could have been avoided." Defense Post-Conviction Exhibit 6. To require counsel to interpret such vague language as evidence of a concrete alibi would hold counsel to a much higher standard than is

⁶ Due to trial counsel's death prior to Petitioner's original filing of the Petition for Post-Conviction Relief, trial counsel was unavailable to testify at Petitioner's Post-Conviction hearing as to the specific strategic decisions that were made during the course of her representation of Petitioner. As a result, the Court can only presume as to the ultimate basis for trial counsel's strategic decisions to forego pursuing Ms. McClain as an alibi witness in Petitioner's case.

required by *Strickland*. In addition, trial counsel could have reasonably concluded that Ms. McClain was offering to lie in order to help Petitioner avoid conviction.

Secondly, the information in Ms. McClain's letters stating that Petitioner was present at the public library contradicted Petitioner's own version of the events of January 13th, namely Petitioner's own stated alibi that he remained on the school campus from 2:15 p.m. to 3:30 p.m. Based on this inconsistency, trial counsel had adequate reason to believe that pursuing Ms. McClain as a potential alibi witness would not have been helpful to Petitioner's defense and may have, in fact, harmed the defense's ultimate theory of the case.

Consequently, trial counsel was not deficient in failing to further pursue Ms. McClain as a potential alibi witness and trial counsel's decision in that regard was the result of a sound and reasonable trial strategy. Therefore, Petitioner is not entitled to relief for this claim of ineffective assistance of counsel.

III. Trial counsel failed to move for a new trial based on the statements of Asia McClain, which exonerated Petitioner.

Petitioner claims that trial counsel's failure to raise the issue of Ms. McClain's statements in the Motion for a New Trial filed by trial counsel on March 6, 2000 amounted to ineffective assistance of counsel. On March 30, 2000, after trial counsel had already filed Petitioner's Motion for a New Trial, Petitioner and his parents wrote separate letters to trial counsel urging her to amend the motion to include Ms. McClain's statements as a basis for a new trial. After trial counsel's apparent failure to acquiesce to their demands, Petitioner requested that trial counsel be dismissed.⁷ On April 5, 2000,

⁷ In a letter written by Petitioner's father, he explains that trial counsel was dismissed for failure to file a Motion for a New Trial, failure to call mitigating witnesses to sentencing, and "many other [issues] that

Judge Heard granted Petitioner's request to dismiss trial counsel, and agreed to postpone the sentencing until June 6, 2000 so that Petitioner's new attorney had time to adequately prepare. On June 6, 2000, during sentencing, Judge Heard considered and denied Petitioner's Motion for a New Trial.

Petitioner dismissed trial counsel two months prior to the hearing on his motion for a new trial. Following trial counsel's dismissal, Petitioner had the opportunity to submit an amended motion for a new trial and also failed to raise Ms. McClain's statements at the subsequent hearing on the motion for a new trial. Furthermore, Judge Heard twice asked Petitioner's new counsel at sentencing whether Petitioner wished to raise any additional issues and Petitioner's new counsel twice declined to do so. Hearing Tr., June 6, 2000 at 1, 5-6.

Consequently, trial counsel's failure to raise Ms. McClain's statements in the motion for a new trial did not prejudice Petitioner as Petitioner had ample opportunity to raise the issue following counsel's dismissal. Therefore, Petitioner is not entitled to relief on this claim of ineffective assistance of counsel.

IV. Trial counsel's cross-examination of State's witness Deborah Warren was not deficient and did not prejudice Petitioner.

Petitioner contends that trial counsel's performance during cross-examination of State witness Deborah Warren was deficient, and that deficiency ultimately prejudiced Petitioner. Specifically, Petitioner argues that trial counsel should have cross-examined Ms. Warren about her previous statement to police made on March 26, 1999, in which Ms. Warren stated that she saw Petitioner at 2:45 p.m. on the day that the victim went

came up during [trial counsel]'s representation of [Petitioner]." Defense Post-Conviction Exhibit 7 (Rahman letter to Judge Heard).

missing and that she saw the victim between 2:45 p.m. and 3:15 p.m. on that same day. Defense Post-Conviction Exhibit 3 (Deborah Warren taped statement). Petitioner contends that trial counsel should have attempted to elicit this information from Ms. Warren on cross-examination for the purpose of rebutting the State's theory that the victim was killed between 2:15 p.m. and 2:36 p.m.

Although, trial counsel made no reference to Ms. Warren's previous statement to police during cross-examination, counsel's decision to omit the statement during cross-examination was reasonable and did not prejudice Petitioner because Ms. Warren's testimony on direct examination, that she had seen the victim at 3:00 p.m. on January 13, 1999, was consistent with the prior statement she had given to police. Therefore, trial counsel had no reason to confront Ms. Warren on cross-examination with regard to that portion of her testimony. It is unlikely that trial counsel would have elicited any additional useful information had he cross-examined Ms. Warren in the way that Petitioner insists he should have, given that Ms. Warren had already testified to information that contradicted the State's timeline for the murder.⁸

Consequently, trial counsel's failure to cross-examine Ms. Warren about her prior statement to police was not a deficient act, nor did it prejudice Petitioner. Therefore, Petitioner is not entitled to relief on this claim of ineffective assistance of counsel.

V. Trial counsel was not deficient in failing to pursue a plea deal with the State and Petitioner was not prejudiced by counsel's decision against doing so.

⁸ Trial counsel also utilized Ms. Warren's recollection of events to contradict the State's timeline at other points during the trial. During the cross-examination of Rebecca Walker trial counsel specifically stated: "In the days after Hey's [sic] disappearance, did you ever become aware that Debbie Warren, her friend, had seen her at about 3 p.m.?" Trial Tr., Feb. 23, 2000 at 159-60.

Defendants are “entitled to the effective assistance of competent counsel” during plea negotiations. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Moreover, trial counsel has a duty to communicate to the client any plea that has been offered or suggested by the State and advise the client as to whether or not that plea should be accepted. *Williams v. State*, 326 Md. 367, 378 (1992). However, defendants have no constitutional right to be offered a plea. *See Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012) (quoting *Missouri v. Frye*, 132 S.Ct. 1399, 1410 (2012)).

Petitioner asserts that trial counsel rendered ineffective assistance by ignoring Petitioner’s request to pursue a plea deal and falsely reporting back that the State would not put forth an offer. In support of this claim, Petitioner asserts that, at the time of Petitioner’s trial, it was the policy of the Baltimore City States Attorney’s Office to make plea offers to defendants charged with murder and such an offer was never conveyed to Petitioner. Petitioner relies on *Merzbacher v. Shearin*, where the court found defense counsel ineffective when he failed to communicate a plea offer that was discussed during a meeting between defense counsel, the state’s attorney, and the judge. *Merzbacher v. Shearin*, 706 F.3d 356 (4th Cir. 2013).

The Court disagrees with Petitioner’s assertion that trial counsel was deficient in this case. First, there is nothing in the record indicating that the State was prepared to make a plea offer had trial counsel pursued such negotiations. In fact, Petitioner has provided no convincing evidence that a plea offer was even contemplated or discussed by the State. Petitioner’s bald assertion that the policy of the State’s Attorney’s Office at the time was to offer plea’s to defendants charged with murder is unfounded and is inconsistent with the State’s claim that there was never a plea offer available in

Petitioner's case. This greatly distinguishes Petitioner's case from *Merzbacher v. Shearin*, where there was clear evidence that a plea offer had been discussed prior to counsel's unilateral decision not to pursue the plea. *Id* at 365.

Second, even if trial counsel had gone ahead and negotiated a plea offer with the State, it is impossible to determine with certainty whether the Petitioner would have agreed to accept a plea. In fact, Petitioner's own statements at sentencing indicate the contrary; that Petitioner intended to maintain his innocence throughout. Trial Tr., Jun. 6, 200, 2000 at 14-15. Therefore, Petitioner has not established that trial counsel's alleged failure to elicit a plea caused him prejudice.

Consequently, trial counsel's failure to initiate plea negotiations was not a deficient act and did not prejudice Petitioner. Therefore, Petitioner is not entitled to relief on this claim of ineffective assistance of counsel.

VI. Trial counsel's failure to request a change of venue did not cause prejudice to Petitioner.

Petitioner alleges that trial counsel was deficient in failing to inform Petitioner of his right to request a change of venue. Furthermore, Petitioner argues that trial counsel's failure in this regard likely caused him prejudice due to the significant media attention that accompanied Petitioner's case.

Under the Maryland Constitution, a defendant charged with a crime for which the maximum penalty is death is entitled to automatic removal of the case upon request by the defense. In *Redman v. State*, the court found that a defense attorney's failure to inform the defendant of his right to automatic removal was a deficient act, however, the court found no prejudice where the defense attorney "conducted a professional and

extensive voir dire examination of the jury” and the defense attorney “was satisfied, after jury selection, that an impartial jury had been impaneled.” 363 Md. 298, 314 (2001).

Here, Petitioner was charged with first-degree murder, a charge which, at the time, carried a maximum penalty of death. At the hearing, Petitioner testified that trial counsel failed to inform Petitioner of his right to request a change of venue prior to trial. However, as was the case in *Redman*, trial counsel conducted an extensive voir dire of the jurors and the record is otherwise devoid of any evidence suggesting that the jury was impartial or that Petitioner was denied a fair trial.

Consequently, Petitioner has failed to establish that trial counsel’s actions caused him prejudice. Therefore, Petitioner is not entitled to relief based on this claim of ineffective assistance of counsel.

VII. Trial counsel conducted a thorough investigation of State’s key witness Jay Wilds for impeachment evidence and Petitioner’s claim is merely a bald allegation.

Petitioner claims that trial counsel was ineffective when he failed to sufficiently investigate the State’s key witness, Jay Wilds, for impeachment purposes. In support of this claim, Petitioner asserts that, had trial counsel conducted an adequate investigation of Mr. Wilds, she would have discovered additional facts about Mr. Wilds’ background that could have been used for impeachment.

Based on *Strickland*, strategic choices made by trial counsel after thorough investigation are “virtually unchallengeable.” *Strickland*, 466 U.S. at 691. Upon review of the trial record, it is clear that trial counsel conducted a thorough investigation of State’s witness Jay Wilds. In fact, trial counsel spent five days cross-examining Mr. Wilds, during which trial counsel impeached the credibility of Mr. Wilds by eliciting

testimony regarding his previous lies to police, his previous drug history, and the plea agreement he took in exchange for his testimony against Petitioner. Additionally, in preparation for Mr. Wilds being called as a State's witness, trial counsel conducted an extensive investigation into Mr. Wilds' background. This investigation included issuing subpoenas for Mr. Wilds' employment records, student records, grade reports, extra-curricular activities, and class schedules. *See* Trial Tr., Feb. 4, 2000 at 221–23, 229–30; Feb. 10, 2000 at 41–42, 68–69, 84, 124–157, 172–189; Feb. 11, 2000 at 65–87 (lies to police officers); Trial Tr., Feb. 4, 2000 at 236, 239–40; Feb. 10, 2000 at 63, 174 (drug use) Trial Tr., Feb. 4, 2000 at 164–74, 191–95, 211–20; Feb. 10, 2000 at 13–14, 155–58 (plea agreement).

Based on the above evidence, the Court finds that trial counsel conducted a thorough investigation of State's witness Jay Wilds and as a result, trial counsel's impeachment strategy on cross-examination is virtually unchallengeable. Accordingly, Petitioner is not entitled to relief based on this allegation of ineffective assistance of counsel.

VIII. Appellate counsel's decision not to challenge the testimony of the State's expert witness on appeal was the result of a sound and reasonable trial strategy.

Petitioner argues that appellate counsel, Warren Brown, rendered ineffective assistance when he failed to argue on appeal that the State's expert, Abraham Waranowitz, had testified at trial to topics beyond his expertise. In support of this claim, Petitioner points to portions of the transcript in which the State's expert witness testified to topics beyond the limitations established by the trial court, namely the witness'

testimony with regard to cell phone equipment which he had not personally worked with or used.

The Court has determined that the *Strickland* test applies not only to claims of ineffective assistance of trial counsel, but also to claims of ineffective assistance at the appellate level. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Thus, to prevail on a claim of ineffective assistance of appellate counsel, a petitioner has the burden of showing that (1) trial counsel's performance was deficient and; (2) that the deficiency caused prejudice on appeal. Establishing prejudice in the appellate context requires a petitioner to show that, but-for appellate counsel's actions, the appellate court would have granted an appeal. *Gross v. State*, 371 Md. 334, 349-350 (2002).

Appellate counsel may render ineffective assistance by failing to raise a particular issue or argument on appeal. *Wilson v. State*, 284 Md. 664, 676 (1979). However, counsel is not required to raise every conceivable appellate claim. *Jones v. Barnes*, 463 U.S. 745 (1983). Appellate counsel instead, must use reasonable tactical judgment in determining whether or not to raise a particular issue on appeal. *Oken v. State*, 343 Md. 256, 271 (1996). Thus, where appellant counsel reasonably believes that an issue or argument will be rejected by the appellate court, he is not required to raise such an argument. *Carter v. State*, 73 Md. App. 437, 445 (1988).

While Petitioner is correct that the issue of the cell phone testimony of the State's expert witness was not raised by appellate counsel on appeal, Petitioner has failed to overcome the presumption that appellate counsel's decision not to raise the issue was the result of a reasonable appellate strategy. In fact, appellate counsel was well within reason to focus on the more pressing issues arising from trial, which included concerns of

possible *Brady* violations, prosecutorial misconduct, and evidentiary errors by the trial court.

Furthermore, the testimony of the State's expert was only one of numerous pieces of cell phone evidence. In fact, the State also presented AT&T records which included subscriber and billing information, call logs, cellular tower maps, and cell site addresses. Each of these items was submitted into evidence for the jury to review. *See* State's Exhibits 30-34. Given the alternative evidence, it is unlikely that the trial court's decision to allow the State's expert to testify to cell phone equipment affected the outcome of Petitioner's trial. Therefore, the cell phone testimony issue was unlikely to succeed on appeal and appellate counsel was reasonable in deciding not to raise that issue.

Consequently, appellate counsel's decision against raising the testimony of the State's expert witness as an issue on appeal was based on a sound and reasonable appellate strategy. Therefore, Petitioner is not entitled to relief based on the allegation of ineffective assistance of appellate counsel.

IX. Sentencing counsel's failure to request that the hearing for modification of sentence be held in abeyance did not cause prejudice to Petitioner.

Petitioner claims that his counsel at sentencing performed deficiently by failing to request that the Motion for Modification of Sentence be held *sub curia*, to be ruled on after Petitioner had time to demonstrate some rehabilitation. Sentencing counsel filed a Motion for Modification of Sentence on July 28, 2000, which did not include a request for a hearing on the motion to be held in abeyance. As a result, the court ruled on—and denied—the motion five days after it was filed, on August 2, 2000.

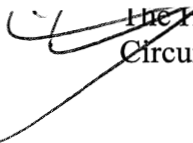
While sentencing counsel did fail to request that the motion be held in abeyance pending Petitioner's rehabilitation, Petitioner has not shown that he was prejudiced by counsel's failure to make such a request. Petitioner has made no showing that Judge Heard would have postponed her ruling on Petitioner's motion and granted Petitioner's request that the motion be held *sub curia*. Furthermore, had the motion been held *sub curia*, it is not certain that Judge Heard would have ultimately reduced Petitioner's sentence at the later date.

Therefore, Petitioner has not shown that he was prejudiced by trial counsels failure to request that Petitioner's motion for modification of sentence be held in abeyance. Consequently, Petitioner is not entitled to relief on this claim of ineffective assistance of counsel.

CONCLUSION

Based on the reasons stated above, considered individually and cumulatively, Petitioner is not entitled to post conviction relief of any form. Therefore, the Court shall **DENY** Petitioner's Petition for Post-Conviction Relief.

/s/


The Honorable Martin P. Welch
Circuit Court for Baltimore City

RECEIVED

ADNAN SYED,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

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CIRCUIT COURT
BALTIMORE CITY
CRIMINAL DIVISION

IN THE

CIRCUIT COURT

FOR BALTIMORE CITY

CASE NO(s). 199103042-46

PETITION NO: 10432

* * * * *

ORDER

Upon consideration of Petitioner's Petition for Post-Conviction Relief and the arguments heard on October 11, 2012 and October 25, 2012, and for the reasons stated in the attendant Memorandum Opinion, it is this 30th day of December, 2013,

ORDERED that all of Petitioner's requests for Post-Conviction Relief are, hereby, **DENIED**.

/s/

~~Judge Martin P. Welch~~

cc: Adnan Syed

C. Justin Brown, Esq.
The Law Offices of C. Justin Brown

Kathleen C. Murphy, Esq.
Office of the State's Attorney for Baltimore City

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