Circuit Court for Baltimore County
Case No. 03-K-81-075399

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1003

September Term, 2014

CARL P. BROWN

v.

STATE OF MARYLAND

Berger,
Reed,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: December 12, 2017

In 1981, fifteen year old appellant Carl P. Brown participated in a robbery during which another participant shot and killed an employee of the business robbed. He was charged as an adult with first degree felony murder, entered a plea of guilty, and was sentenced to a life term of imprisonment. In November 1989, appellant filed a Petition for Postconviction Relief (the "First Petition") in the Circuit Court for Baltimore County. Approximately a year after the postconviction hearing in June 1990, the First Postconviction Court denied the petition in an Order and Memorandum (the "First Postconviction Memorandum"). In 2012, appellant filed a Petition for Postconviction Relief, Or, In the Alternative, to Re-Open Postconviction in the Interest of Justice (the "Second Petition"). The Second Postconviction Court denied that petition in 2014 by an Order and Memorandum (the "Second Postconviction Memorandum"). This Court having granted appellant's Application for Leave to Appeal on March 8, 2017, he presents, slightly rephrased, the following question:

> Whether appellant's guilty plea and his concomitant waiver of his right to a jury trial was involuntary in light of the fact that they were induced by false advice of ineffective defense counsel that appellant was eligible to receive the death penalty if found guilty after a trial when, in fact, he was not?

For the reasons that follow, we vacate the judgment of the circuit court and remand the case for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of August 9, 1981, appellant accompanied twenty-one year old Jackie Harris to a guns and sporting goods store (the "Store") with the purpose of robbing

the Store and its customers. During the course of the robbery, Harris, who was armed with a .22 caliber automatic pistol, shot and killed Stephen Hviding, a Store employee.

A police informant, with a concealed electronic device, recorded a conversation with appellant.[1] In that conversation, appellant admitted that he and Harris participated in the Store robbery, but he identified a third participant by the name of "Bozie[,] Boxie[,] Box or something like that" as the person who shot Mr. Hviding.[2]

Following his subsequent arrest, appellant, in a full statement to prosecutors regarding the robbery and murder, identified Harris as the person who shot Mr. Hviding. Appellant was indicted for murder on September 21, 1981, and, on November 12, 1981, represented by George L. Russell and Kenneth Thompson,[3] he signed a written plea agreement, under which, after seeking but failing to receive a "reverse waiver"[4] to juvenile court, he agreed to plead guilty to first degree felony murder.[5] The plea

[1] At the time of the recorded conversation between the informant and appellant, the police suspected Harris of the Store robbery.

[2] Two witnesses described only two participants, and there is no further reference to a third party in the record.

[3] Mr. Russell and Mr. Thompson signed the plea agreement as co-counsel, but only Mr. Thompson was present at the reverse waiver hearing and at the plea hearing.

[4] A reverse waiver is now referred to as a transfer to juvenile court.

[5] In regard to the plea and sentence, the agreement stated, "At sentencing the State retains the right to relate to the Court the facts of the crime. The State will make clear in its recitation of facts not only the facts of the crime but will also relay to the Court the Defendant's involvement in the crime. Additionally, the State agrees to inform the Court of the Defendant's actions and conduct after the entry of the plea. The quantum of the sentence shall be left solely up to the Court. *The State agrees that the Defendant will not be eligible for the death penalty.* The State further agrees that upon the Defendant's incarceration in the Division of Correction, it will recommend that the Defendant is not housed in an institution containing his co-defendant." (Emphasis added).

agreement also provided that the State would nol pros any lesser charges, and that, if requested by the State, appellant would testify in any proceeding related to the case.

About three months later, Harris entered a guilty plea to first degree premeditated murder on February 24, 1982 before a different judge. He admitted to being the lone shooter, and was sentenced to death on April 5, 1982.[6] *Harris v. State*, 303 Md. 685, 690 (1985).

Mr. Thompson represented appellant at the reverse waiver hearing on May 25, 1982.[7] The trial judge denied the reverse waiver, and later, on the same day, appellant, represented by Mr. Thompson, entered the guilty plea to first degree felony murder.

At his sentencing hearing on August 20, 1982, appellant, now represented by new counsel, received a sentence of life imprisonment. On September 20, 1982, appellant filed a Motion to Modify or Reduce Sentence. A sentence modification hearing was held without the appellant being present on August 26, 1985; the motion was denied on September 13, 1985.

On November 15, 1989, appellant, represented by another new counsel, filed the First Petition, and a postconviction hearing was held on June 20, 1990. It is not disputed that appellant, his parents, and Mr. Thompson testified at the hearing, but no transcript of that hearing is available. On June 3, 1991, the First Postconviction Court denied all

[6] Harris appealed his 1982 convictions to the Court of Appeals five times. His death sentence was vacated three times before a life sentence was imposed. *See Harris v. State*, 312 Md. 225, 231-33 n.1 (1988) (brief procedural summary of the *Harris* cases).

[7] At the reverse waiver hearing, defense counsel called a psychiatrist who testified in support of transferring appellant to juvenile court.

requested relief in the First Postconviction Memorandum, and appellant's Application for Leave to Appeal from that ruling was denied by this Court on February 7, 1992.

On August 15, 2012, appellant filed the Second Petition. The Second Postconviction Court denied the requested relief in the Second Postconviction Memorandum on May 19, 2014 without a hearing. It concluded that "the issue has been fully and finally litigated" in the proceedings related to the First Petition, and that it was not in the interests of justice to reopen the postconviction proceedings because appellant "failed to prove the allegation that trial counsel was ineffective for failure to withdraw [his] guilty plea." Appellant filed an Application for Leave to Appeal, which was granted on March 8, 2017.

DISCUSSION

Standard of Review

Under the Uniform Postconviction Procedure Act ("UPPA"), the circuit court has discretion to reopen "in the interests of justice" a postconviction proceeding that was previously concluded. Md. Code Ann., Criminal Procedure ("CP") (2001, 2008 Repl. Vol.), § 7-104. We review the circuit court's denial of a motion to reopen the postconviction proceeding for an abuse of discretion. *State v. Adams-Bey*, 449 Md. 690, 702 (2016). An abuse of discretion is a decision:

> [W]ell removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective. That, we think, is included within the notion of 'untenable

> grounds,' 'violative of fact and logic,' and 'against the logic and effect of facts and inferences before the court.'

Gray v. State, 388 Md. 366, 383-84 (2005) (citing *Dehn v. Edgecombe*, 384 Md. 606, 628 (2005)).

The First Petition and the Second Petition advance ineffective assistance of counsel claims:

> The standard of review of the lower court's determinations regarding issues of effective assistance of counsel "is a mixed question of law and fact . . . ." *Strickland v. Washington*, 466 U.S. 668, 698 (1984); *see State v. Gross*, 134 Md. App. 528, 559-60 (2001). We "will not disturb the factual findings of the post-conviction court unless they are clearly erroneous." *Wilson v. State*, 363 Md. 333, 348 (2001). But, a reviewing court must make an independent analysis to determine the "ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed." *Harris v. State*, 303 Md. 685 (1985). In other words, the appellate court must exercise its own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any. *Oken v. State*, 343 Md. 256, 285 (1996). As we said in *State v. Purvey*, 129 Md. App. 1, 10 (1999), *cert. denied*, 357 Md. 483 (2000): "Within the *Strickland* framework, we will evaluate anew the findings of the lower court as to the reasonableness of counsel's conduct and the prejudice suffered . . . . As a question of whether a constitutional right has been violated, we make our own independent analysis by reviewing the law and applying it to the facts of the case."

State v. Jones, 138 Md. App. 178, 209 (2001) (internal citations edited), *aff'd*, *Jones v. State*, 379 Md. 704 (2004).

Contentions

Appellant contends that the issues presented in the Second Petition were not fully litigated in the first postconviction proceeding because those issues were never considered or fully addressed in the First Postconviction Memorandum. And, because in

the Second Postconviction Memorandum, the circuit court addressed the merits of the issues in the Second Petition, the issues are now properly before this Court.

According to appellant, he was denied his constitutional right to effective assistance of counsel because Mr. Thompson never advised him that, as a matter of Maryland law, he could not be subjected to the death penalty. And, the reason Mr. Thompson did not was either because he was not aware of the facts or he was not aware of the law in relationship to appellant's eligibility for the death penalty. In other words, if counsel did not know the law, he was ineffective at the time the plea agreement was signed because the plea agreement was directed to avoiding the death penalty. But, if counsel knew the law and was concerned that appellant shot Mr. Hviding when the plea was negotiated, he was ineffective by permitting appellant to enter the guilty plea or not withdrawing the plea after it became clear that appellant was never eligible for the death penalty. Moreover, subsequent trial counsel and the first postconviction counsel were ineffective in failing to address or advance this contention.

The State responds that the Second Postconviction Court properly exercised its discretion in denying appellant's Second Petition because it correctly concluded that the issue being raised was "merely a repacking of the same allegation" in the First Petition that was finally litigated by the First Postconviction Court and that it was not in the interests of justice to reopen the previous postconviction proceeding. According to the State, the First Postconviction Court found that the appellant and his mother were not credible, and that appellant fully understood the nature of the charge and agreed to the

plea's consequences at the time of the plea hearing. In addition, the State argues that it was established at the first postconviction hearing that there was troublesome evidence regarding appellant's role in the killing, including a "body tap" conversation that would indicate appellant "confessing to facts that would convict him of the murder." The State also points out that, at the time of appellant's plea, the law stated that in a murder-for-hire case, the principal in the second degree could be subject to the death penalty.[8]

The State further contends that the ineffective assistance of counsel claim fails to meet the two-prong standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner must prove both deficient performance of counsel and prejudice as a result of that deficiency. In the State's view, Mr. Thompson's performance, viewed at the time and in the context within which it was rendered, was reasonable under prevailing professional norms because appellant's degree of culpability was problematic and legitimately of concern. Therefore, given the highly deferential presumption of counsel's competence, it was a reasonable strategy to eliminate any possibility of the death penalty, no matter how remote it may have been.

Analysis

The Law of Murder and the Death Penalty at the Time of the Robbery

Appellant's ineffective assistance of counsel claims are rooted in the law of principalship as it related to the death penalty at the time of the robbery. A brief

[8] Under the statute, the death penalty could be imposed on a person who employed another person to commit murder. Md. Code Ann. (1957, 1982 Repl. Vol.), Art. 27 § 413(d)(7); *see Johnson v. State*, 303 Md. 487, 510 (1985). No evidence in this case supported a murder-for-hire killing.

discussion of felony murder law and the death penalty provides context for the plea agreement and the subsequent plea.

Under Maryland's statutory scheme at that time, a murder committed in the perpetration of, or attempt to perpetrate, a robbery, rendered each participant guilty of first degree murder. Md. Code Ann. (1957, 1982 Repl. Vol.), Art. 27, § 410. The penalty for first degree murder[9] was provided in Art. 27, § 412(b):

> A person found guilty of murder in the first degree shall be sentenced either to death or to imprisonment for life. The sentence shall be imprisonment for life unless (1) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and (2) a sentence of death is imposed in accordance with § 413.

But under Section 413, "[t]he terms 'defendant' and 'person,' except as those terms appear in subsection (d) (7) of this section, include *only a principal in the first degree*." Art. 27 § 413(e)(1) (emphasis added). Subsection (d)(7) is a "statutory exception to the

[9] There were no degrees of murder at common law. *See State v. Ward*, 284 Md. 189, 195 (1978) (providing a thorough history), *overruled on other grounds by Lewis v. State*, 285 Md. 705 (1979). The parties engaged in a felony were either principals or accessories. Principals later came to be classified "as in the first degree (perpetrators) or in the second degree (abettors)." *Id.* at 196.

The *Ward* Court explained: "According to the ancient analysis only the actual perpetrator of the felonious deed was a principal. Other guilty parties were called 'accessories', and to distinguish among these with reference to time and place they were divided into three classes: (1) accessories before the fact, (2) accessories at the fact, and (3) accessories after the fact. At a relatively early time the party who was originally considered an accessory at the fact ceased to be classed in the accessorial group and was labeled a principal. To distinguish him from the actual perpetrator of the crime he was called a principal in the second degree. Thereafter, in felony cases there were two kinds of principals, first degree and second degree, and two kinds of accessories, before the fact and after the fact." *Id.* at n.13 (quoting Perkins, Criminal Law 643 (2d ed. 1969)).

perpetrator requirement" for a person who "engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or promise of remuneration." Art. 27 § 413(d)(7); *see Johnson v. State*, 303 Md. 487, 510 (1985).

In short, subject to the murder-for-hire exception, only a principal in the first degree was eligible for the death penalty. Art. 27 §§ 412(b), 413(a), and 413(e)(1); *Gary v. State*, 341 Md. 513, 520 (1996). A principal in the first degree was "one who actually commit[ted] a crime, either by his own hand, or by an inanimate agency, or by an innocent human agent." *Johnson*, 303 Md. at 510 (quoting *State v. Ward*, 284 Md. 189, 197 (1978)); *see also Conyers v. State*, 367 Md. 571, 612-13 (2002) (witness's testimony directly cast defendant, rather than his alleged accomplice, as the actual perpetrator of murder). A principal in the second degree is "one who aided, counseled, commanded or encouraged the commission of the crime in [the principal's presence]." 303 Md. at 510.

Finally Litigated

Our analysis begins with whether what was raised in the Second Petition has been "finally litigated" under the UPPA and whether it is "merely a repacking" of the First Petition. Section 7-102 provides, in pertinent part:

> (a) Subject to subsection (b) of this section, §§ 7-103 and 7-104 of this subtitle and Subtitle 2 of this title, a convicted person may begin a proceeding under this title in the circuit court for the county in which the conviction took place at any time if the person claims that:
> (1) the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of the State;
>
> * * *

> (b) A person may begin a proceeding under this title if:
> (1) the person seeks to set aside or correct the judgment or sentence; and
> (2) *the alleged error has not been previously and finally litigated or waived in the proceeding resulting in the conviction or in any other proceeding that the person has taken to secure relief from the person's conviction.*

CP § 7-102 (emphasis added). An allegation of error is "finally litigated" when:

> (1) *an appellate court of the State decides on the merits of the allegation:*
> (i) on direct appeal; or
> (ii) *on any consideration of an application for leave to appeal filed under § 7-109 of this subtitle*; or
> (2) a court of original jurisdiction, after a full and fair hearing, decides on the merits of the allegation in a petition for a writ of habeas corpus or a writ of error coram nobis, unless the decision on the merits of the petition is clearly erroneous.

CP § 7-106(a) (emphasis added). This Court denied appellant's first Application for Leave to Appeal on February 7, 1992, but a summary denial "without the assignment of any reason" is not a decision on the merits of the allegation.[10] *See Hernandez v. State*, 108 Md. App. 354, 365 (1996), *aff'd*, 344 Md. 721 (1997). Accordingly, the issue before the First Postconviction Court has not been finally litigated. And, even if the allegation of error in the First Petition had been finally litigated, the ineffective assistance of counsel allegations in the Second Petition extend beyond Mr. Thompson to subsequent trial and postconviction counsel.

The First Petition alleged that:

> [Appellant] was never told by his attorney that he was not eligible for the death penalty as a Principle in the second degree. He felt his fate, if

[10] This Court wrote, "The application of Carl Phillip Brown for leave to appeal from a denial of post conviction relief has been read, considered, and is denied. APPLICATION FOR LEAVE TO APPEAL DENIED."

> convicted of first degree murder, would potentially be death. This is why he signed the plea agreement and why he pled guilty to murder in the first degree.
>
> * * *
>
> While he signed the agreement, and pled guilty under oath, it was not the voluntary, intelligent plea the law requires. Because he felt it was in his best interests to avoid the death penalty and get a guarantee of that at least, he entered into a plea negotiation. That, however, is not pleading guilty with an intelligent understanding of his situation.

Appellant alleges in the Second Petition that:

> [Appellant] was denied his right to the effective assistance of trial counsel who failed to withdraw [appellant's] guilty plea to first degree murder prior to sentencing by which time counsel knew or should have known that the basis for [appellant's] pleading guilty, which was to avoid the death penalty, was, in fact, never a possibility.

We agree that the Second Petition also rests on what the first trial counsel knew or did not know regarding appellant's eligibility for a death sentence. But, whereas the First Postconviction Court's analysis focused on what counsel knew or did now know at the time of the plea agreement, the Second Petition also focuses on the subsequent entry of the plea. Appellant argues that whatever the first trial counsel knew or did not know at the time of the plea agreement, he should have fully understood both the law and the facts before the plea was entered on May 25, 1982. By then, Jackie Harris had already entered a plea of guilty as being the lone shooter three months before, and the State, at the reverse waiver hearing that morning, acknowledged that appellant was not the shooter. Clearly, the defense, the prosecution, and the court all knew that appellant was not a principal in

the first degree before the plea was entered, and yet, counsel did nothing to set aside or modify the plea agreement. This was not addressed by the First Postconviction Court.

Because no transcript from the 1990 postconviction hearing is available, we must look to the First Postconviction Memorandum to reconstruct that hearing.[11] On the ineffective assistance of counsel claim, the following relevant findings were made:

> The Petitioner was represented by George L. Russell, Jr., Esq. (Russell) and Kenneth L. Thompson, Esq. (Thompson). Brown testified at that post conviction hearing that Russell and Thompson told him he could receive the death penalty for the crime charged. Counsel did not explain to him the difference between being a principal in the first degree and a principal in the second degree. *Brown was concerned that he may receive the death penalty.*
>
> * * *
>
> Thompson testified that *at the time of the plea agreement*, no one knew whether a juvenile would be executed or not. *Thompson's contact with the State was with a view to obtaining a guarantee that Brown would not have to face the death penalty.* Counsel said that Brown was in pretty bad shape on the merits of the case because a body tap showed him confessing to the murder and Thompson could not see this evidence being kept out of a trial.
>
> Thompson testified he doubted he would have explained to Brown the difference between being a principal in the first degree as opposed to being a principal in the second degree. He *probably explained to Brown that if he was there assisting in the crime, he was guilty*. Counsel said he told Brown from the beginning he *probably* would not get the death penalty though he was not convinced he would not.
>
> * * *
>
> No doubt, no one sat down to explain to Brown the difference between being a principal in the first degree as opposed to being a principal

[11] We note that the postconviction hearing occurred June of 1990 and the First Postconviction Memorandum was filed nearly a year later.

> in the second degree. Brown's emphasis of the importance of this legal point begs the question. *While Brown may have been clear in his own mind that he was not involved with the murder to the extent that he pulled the trigger or caused it to be pulled so as to expose him to the death penalty, that fact was evidently not cast in stone in the view of the situation taken by the State. A body tap showed Brown confessing to facts that would convict him of the murder. Thompson correctly explained to Brown that if he was assisting, he was guilty of murder.* Brown initially told Thompson that [the informant] did the shooting, and the body tap showed Brown involved with Jackie Harris doing the shooting. There were different versions of the facts from different sources.
>
> * * *
>
> What happened here was nothing more than what Thompson said occurred. *Brown's degree of participation in the crime was problematical for both sides, Thompson did not know whether a juvenile would be executed or not, a reasonable, and at the time, acceptable plea bargain was struck*, and thereafter, whatever the facts that evolved, Brown could not be eligible for the death penalty.
>
> The *plea agreement of November 12, 1981 which resulted in the plea being entered on May 25, 1982* provided for Brown to plead guilty to murder in the first degree when the State had a strong case against him to prove that case and *allowed him to escape the possibility of the death sentence*. It also allowed him to put his case, his conduct, and his cooperation before the court in the best possible light. The lack of instruction by Thompson on the niceties of legal principals concerning the law of principals was not an error. *Doubt as to the facts and consequences generated a reasonable plea agreement.* Brown's attempts after eight years to attack a plea bargain on a technical point consumed in the plea bargain process by the parties at the time cannot succeed.
>
> (Emphasis added).

The First Postconviction Court's analysis appears to assume that counsel knew the law as it related to the death penalty and to center on the reasonableness of the plea bargain when it was signed on November 12, 1981, and not when the plea was entered on May 25, 1982 or at sentencing on August 20, 1982. The First Postconviction Court

concluded that "Brown's degree of participation in the crime was problematical for both sides, Thompson did not know whether a juvenile would be executed or not, *a reasonable, and at the time, acceptable* plea bargain was struck, and thereafter, whatever the facts that evolved, Brown could not be eligible for the death penalty" (emphasis added). And, Mr. Thompson's testimony at the postconviction hearing apparently also related to the plea agreement when it was struck. Although the Postconviction Court mentioned the date that the plea was entered, there was no analysis of counsel's effectiveness in light of developments after Harris entered a plea of guilty as the shooter or after appellant's reverse waiver hearing when the State made clear that appellant did not have a weapon and was not the shooter.

The First Postconviction Court based its conclusion of factual uncertainty in part on its determination that the "body tap showed [appellant] confessing to facts that would convict him of the murder," and that counsel "correctly explained to [appellant] that if he was assisting, he was guilty of murder." To be sure, counsel's latter statement "correctly" explained the concept of felony murder, but it did not explain the difference between assisting and being the shooter, as it related to the death penalty. And, nothing in the "body tap" transcript, which is in the record, would, in our view, constitute a confession by appellant to being the shooter or "trigger man."[12]

[12] Relevant portions of this recorded conversation are, as follows:

INFORMANT: Did Jackie shoot [Mr. Hviding]? Did Jackie shoot him?
APPELLANT: No.

The allegation of the Second Petition extends beyond the plea agreement and includes the failure of the trial counsel to withdraw the plea when both the facts and law were clear, the failure of postconviction counsel to raise certain issues regarding the sentence, the failure of substitute trial counsel to demand appellant's presence at the sentence modification hearing, and the cumulative effects of the alleged errors. Those claims were neither considered nor fully addressed by the First Postconviction Court.

INFORMANT:	Oh, well it was on you then?
APPELLANT:	*No, there was one other person that was with us, right?*
	* * *
INFORMANT:	Young boy?
APPELLANT:	Yeah.
INFORMANT:	Oh, there was three of you all in the store?
APPELLANT:	Uh huh.
INFORMANT:	You, Jackie and another boy?
APPELLANT:	Yeah, 'cause see
INFORMANT:	*He was the trigger man?*
APPELLANT:	*Yeah.*
	* * *
INFORMANT:	What's the boy's name? What's the boy's whole name? 'Cause I don't know the boy, right?
APPELLANT:	The boy that was with me?
INFORMANT:	Yeah. I don't know him, right?
APPELLANT:	No. I don't even know his whole name. I just know him, you know
INFORMANT:	What's his first name, 'cause they might got his, they might got his real name that was on that list.
	* * *
APPELLANT:	Bozie. Boxie. Box or something like that.
INFORMANT:	What did you call him?
APPELLANT:	I call him Box. I heard everybody else calling him Boxie or Box, right?

(Emphasis added).

Reopening in the Interests of Justice

Under CP § 7-103(a), "For each trial or sentence, a person may file only one petition for relief." When originally enacted in 1958, the UPPA did not limit the number of postconviction petitions arising out of any one trial that could be filed. *See Mason v. State*, 309 Md. 215, 217-18 (1987). In 1986, the statute was amended, effective July 1, 1986, limiting the number of petitions that could be filed to two. Md. Code Ann., (1957, 1982 Repl. Vol., 1986 Cum. Supp.), Art. 27, § 645A(a); 1986 Md. Laws Ch. 647. The Court in *Mason* held that the amended statute was to be afforded a prospective application and that a petitioner who had already filed two petitions prior to the amendment's effective date could file a third petition. 309 Md. at 222. In 1995, the statute was amended to permit only one petition after the effective date of October 1, 1995. Md. Code Ann., (1992 Repl. Vol., 1995 Supp.), Art. 27, § 645A(a)(2); 1995 Md. Laws Ch. 110.[13] In 2001, as part of recodification, the UPPA was repealed and reenacted

[13] Ch. 110 of the Acts of 1995 stated:

> SECTION 2. AND BE IT FURTHER ENACTED, That, subject to Section 3 below, the provisions of this Act shall apply to all criminal cases, regardless of whether the case arises out of an offense that is committed before or after the effective date of this Act or whether the trial or sentencing of the defendant occurs before or after the effective date of this Act.
>
> SECTION 3. AND BE IT FURTHER ENACTED, That the provisions of this Act that amend Article 27, § 645A of the Code do not apply to a case in which a second postconviction petition was filed prior to the effective date of this Act. In such a case, the court shall process the case in due course as required under Article 27, § 645A prior to the effective date of this Act.

at CP §§ 7-101 *et seq.* The provision relating to the reopening of a postconviction proceeding has "new language derived without substantive change." *Gray v. State*, 158 Md. App. 635, 646 (2004) (quoting Revisor's Note), *aff'd*, 388 Md. 366.

Appellant's First Petition was filed in 1989 and denied in 1991.[14] In the absence of a reopening, appellant would be barred from filing a second petition for postconviction relief. A circuit court can effectively reopen a prior postconviction proceeding by discussing the petitioner's contentions in detail and ruling upon them without explicitly stating that it is reopening the case. *See Grayson v. State*, 354 Md. 1, 15-16 (1999). In *Grayson*, the petitioner raised an ineffective assistance of counsel claim in his second petition for postconviction relief, which the parties conceded would have been barred by the one petition limitation in § 645A(a)(2). *Id.* at 9. The circuit court "weigh[ed] any cumulative effect" of the alleged deficiencies by counsel, and found that precedent provided no basis for postconviction relief and there had been no denial of constitutional rights. *Id.* at 15. The Court of Appeals held that the circuit court had, in effect, reopened the postconviction proceeding by discussing and ruling on the merits of the issues raised. Notwithstanding its stated conclusion that it was not in the interests of justice to reopen the case, *Grayson* suggests that the Second Postconviction Court effectively reopened the postconviction proceeding under Section 7-103 by reaching the merits of the ineffective

[14] In 1995, the statute also was amended to provide, "Unless extraordinary cause is shown, a petition may not be filed more than 10 years after the sentence was imposed." CP § 7-103(b); 1995 Md. Laws Ch. 258. The ten year limitation, however, does not apply to individuals sentenced before October 1, 1995, the effective date of the statute. *State v. Williamson*, 408 Md. 269, 277 (2009).

assistance of counsel claims. And, if it had not, we would hold that it would be an abuse of discretion not to do so. We explain below.

The Second Postconviction Memorandum

The Second Postconviction Court, having concluded that the issue had been finally litigated by the First Postconviction Court, proceeded, without a hearing, to rule on the merits of appellant's ineffective assistance of counsel claim. In the Second Postconviction Memorandum, it determined that "even if the [appellant's] allegation of error . . . had not been fully litigated, the [appellant] still is not entitled to post conviction relief." According to the court, "[Appellant] has failed to prove the allegation that trial counsel was ineffective for failure to withdraw [appellant's] guilty plea" because "[appellant] willingly, knowingly, and voluntarily pleaded guilty."

In rejecting appellant's ineffective assistance of counsel claims, the Second Postconviction Court, by adopting the findings of the First Postconviction Memorandum, concluded that: (1) appellant's claim that he pleaded guilty because he believed he was subject to the death penalty is not worthy of belief because he and his mother were not credible;[15] (2) appellant's knowledge and understanding that he was not subject to the

[15] Regarding appellant's mother's credibility, the Second Postconviction Court found, "[Appellant's mother] had no reservation about lying if it aided it her son." The court referred to her statements in a recorded conservation between her and the informant, made before the informant's conversation with appellant. We provide her statements, at length:

> If my son gets into any trouble, I'm going to point my fucking finger at you . . . . You ain't got nothing to do, you got no business with [appellant].
>
> * * *

death penalty was supported by the record. These "findings" were made without the benefit of a transcript of the first postconviction hearing and without a second postconviction hearing. The decision to hold a second postconviction hearing falls within the court's discretion, and is presumed correct, "unless either it is shown to be certainly wrong or 'evidence of greater persuasion' favoring a different ruling is established." *Crum v. State*, 58 Md. App. 303, 307 (1984) (quoting *Weiner v. State*, 55 Md. App. 548 (1983)). The circumstances of this case persuade us that the Second Postconviction Court could not rely solely upon the findings of the First Postconviction Memorandum in deciding the merits of appellant's ineffective assistance of counsel claims and that appellant is entitled to a hearing on those claims.

For example, the Second Postconviction Court found in the Second Postconviction Memorandum that appellant, when the plea was entered, knew that he was not subject to the death penalty, and the maximum sentence that he faced was life imprisonment. According to the court, "[Appellant] clearly understood that he was not eligible for the

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> I'm gonna tell the police if anything goes up with [appellant], I'm gonna point the finger at you and I'm gonna tell them that you were threatening me, okay?
>
> * * *
>
> My baby, he's a minor and I mean I'm gonna point the finger at any damn body who puts [appellant] into trouble, okay.
>
> * * *
>
> You and all the rest of them are out here doing wrong and getting these young kids to do, to run your errands . . . . But you ain't gonna use my child.

In our view, "point[ing] the finger" at persons, who are "doing wrong" and "getting young kids . . . to run [their] errands," may equate with snitching, but it does not necessarily equate to lying.

death penalty." Of course he did; the plea agreement had guaranteed that. But that does not mean that he knew, as a matter of fact and law, that he was never eligible to receive the death penalty. That concern was the driving force in the plea negotiations. And, if he did know that he was not eligible for the death penalty *before* entering into the plea agreement, then the agreement and resulting plea gained him nothing in regard to the death penalty.

The fact that the appellant was fifteen when he signed the plea agreement and sixteen when he entered his plea is a necessary factor in the ineffective assistance of counsel calculus in this case. Presumably, appellant heard what the prosecutor said at the reverse waiver hearing and heard the facts supporting the plea at the plea hearing. And if so, he heard on those occasions that he was not the shooter. But that does not mean that he understood that he was ineligible for the death penalty because he was not the shooter when he signed the plea agreement and entered the plea. A child that age was not likely to understand the "niceties" of death penalty law; he had to rely on the advice of counsel throughout the process. The facts stated by the court at the plea hearing were, of course, accurate as to appellant's role in the robbery, but nothing that the court said indicated that those facts, and not the plea agreement, were the reason that he was not eligible for the death penalty.

Ineffective Assistance of Counsel

An ineffective assistance of counsel inquiry involves a "context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'"

State v. Borchardt, 396 Md. 586, 603 (2007) (quoting *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (internal citations omitted)). That said, defense counsel in a criminal case has the duty to conduct a reasonable and thorough investigation of law and facts regarding the client's case. *Strickland*, 466 U.S. at 690-91.

Courts have found that a criminal defendant had met the *Strickland* requirements where counsel gave the defendant erroneous information on which he based his guilty plea. *See, e.g.*, *Heard v. Addison*, 728 F.3d 1170 (10th Cir. 2013) (ineffective assistance where counsel advised client to plead guilty without pursuing a facial constitutional challenge or arguing for a narrowing construction of the broadly written statute's reach); *United States v. Mooney*, 497 F.3d 397 (4th Cir. 2007) (ineffective assistance where counsel advised client to plead guilty based on erroneous assumption that no justification defense existed); *United States v. McCoy*, 215 F.3d 102 (D.C. Cir. 2000) (ineffective assistance where counsel miscalculated the applicable sentencing guidelines and misinformed client on his prospective range of punishment under the plea); *Finch v. Vaughn*, 67 F.3d 909 (11th Cir. 1995) (ineffective assistance where defendant was induced to plead guilty by counsel's erroneous advice that his federal and state sentences would run concurrently); *Garmon v. Lockhart*, 938 F.2d 120 (8th Cir. 1991) (ineffective assistance where counsel gave defendant incorrect parole eligibility date of five years instead of fifteen under plea); *Berry v. State*, 675 S.E.2d 425 (S.C. 2009) (ineffective assistance where counsel did not inform defendant of potential challenge to sentencing enhancement by prior drug paraphernalia conviction); *State v. Doggett*, 687 N.W.2d 97

(Iowa 2004) (ineffective assistance where counsel did not raise a lack-of-a-factual-basis challenge to felony-eluding charge, to which defendant pleaded guilty).

Clearly, counsel's focus in the plea agreement negotiation was directed at avoiding a death sentence. According to the First Postconviction Memorandum, counsel doubted whether he would have explained to appellant the difference between, and the significance of, being a first degree as opposed to a second degree principal in relation to the death penalty.[16] What he told appellant was that "he probably would not get the death penalty though he was not convinced he would not."

Even assuming that counsel's concern or uncertainty was not one of law, but of fact—the possibility that appellant was the shooter—the plea agreement was executed on November 12, 1981. Jackie Harris entered a plea of guilty on February 24, 1982 to being the lone shooter, and, on May 25, 1982, at the reverse waiver hearing on the morning of the same day that appellant's plea was entered, the trial judge asked the prosecutor, "The State does not contend that [appellant] is the actual shooter?" The prosecutor responded, "No, it does not . . . . Mr. Harris shot Mr. Hviding once . . . . [Mr. Hviding] was shot an additional six times." The judge clarified, "By Mr. Harris alone?" The prosecutor responded, "By Mr. Harris, yes, sir. [Appellant] did not have a handgun on his person." During the hearing, appellant's counsel stated, "Of course the court has recognized, the State has conceded, that this young man was not the person who pulled the trigger." If

[16] That counsel did not speak to a fifteen or sixteen year old in terms of principalship is not particularly concerning. Speaking in terms of being or not being the "shooter" would have adequately conveyed the message.

counsel was unsure whether appellant could be charged as a principal in the first degree at the time of the plea agreement, he certainly knew at the time of entering the plea that appellant was not a first degree principal and therefore, not eligible for the death penalty.

The First Postconviction Court, viewing appellant's involvement with the murder as "not cast in stone in the view of the situation taken by the State," concluded, "The lack of instruction by [counsel] on the niceties of legal principals [sic] concerning the law of principals was not an error." We agree that "niceties" were not required. The critical aspect of the statutory scheme could be easily translated into everyday speech: "If you didn't pull the trigger, you are not subject to the death penalty." Counsel may have said, as reported by the First Postconviction Court, that appellant was "in pretty bad shape on the merits of the case because a body tap showed him confessing to the murder," but even if he did, appellant in the "body tap" only "confessed" to being a participant in the robbery, which would make him guilty of felony murder as a principal in the second degree.

There are "three phases of revocability" in the plea negotiation process: before acceptance, between acceptance and sentencing, and after sentencing. *Custer v. State*, 86 Md. App. 196, 200 (1991). Prior to trial, parties generally have the right to unilaterally withdraw a guilty plea without any reason. *Id.* at 200; *see also Mabry v. Johnson*, 467 U.S. 504, 507 (1984) ("A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally

protected interest."), *overruled in part on other grounds by Puckett v. United States*, 556 U.S. 129 (2009). Therefore, a defendant can freely withdraw his guilty plea until the trial court, after compliance with the requirements of the Maryland rules, has exercised its authority to accept the plea.[17] *See* 86 Md. App. at 203 (holding that defendant had an "absolute right to withdraw his plea" because at the time of attempted withdrawal there was no finding on the record of a factual basis for the plea).

Once counsel knew and the State confirmed that appellant was not a principal in the first degree, not entering the plea or subsequently withdrawing it were possibilities to be considered. There, of course, may have been good reasons not to withdraw the plea. But, only a plea entered with full knowledge of the facts and the law could be "a voluntary and intelligent choice among the alterative courses of action open to the defendant." *Davis v. State*, 278 Md. 103, 115 (1976) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)).

CONCLUSION

The ineffective assistance of counsel claims in this case have not been finally litigated; the first postconviction proceeding either has been effectively reopened or should, in the interests of justice, be reopened; and a hearing should be granted to address the Second Petition.

[17] Maryland Rule 731(f), in effect in 1982, provided in part, "When justice requires, the court may permit a defendant to withdraw a plea of guilty or nolo contendere and enter a plea of not guilty at any time before sentencing."

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY VACATED AND REMANDED. COSTS TO BE PAID BY BALTIMORE COUNTY.