IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2017

NO. 65

BRIAN TATE,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF AND APPENDIX OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE[1]

On March 16, 1992, Petitioner Brian Arthur Tate was indicted in the Circuit Court for Anne Arundel County, Case No. K-92-862, on charges of first-degree murder and related offenses. (E. 008). On November 2, 1992, Tate pleaded guilty to first-degree murder in Case No. K-92-862. (E. 069-088). Pursuant to the plea agreement, charges in a separate case, Case No. K-92-863 (arson and related offenses), were nol prossed. (E. 069-088). On January 18, 1993, the circuit court sentenced Tate within the terms of the plea agreement to life imprisonment with a recommendation to the Patuxent Institution. (E. 161-62). Tate did not seek leave to appeal the entry of his plea and sentence.

Tate filed a pro se petition for post-conviction relief in 2005, which was amended by counsel in 2006. Tate's petition was transferred to the Circuit Court for Howard County and docketed as Case No. 13-K-06-46406. (E. 017). On November 20 and 21, 2006, the circuit court held a hearing on the claims raised in the petition. (E. 019). On February 9, 2007, Tate was awarded the

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[1] Respondent does not accept the Petitioner's Statement of the Case because it contains argument.

right to file a belated application for leave to appeal the entry of his guilty plea; the petition was stayed on all remaining issues. (E. 019). Tate's belated application for leave to appeal was denied summarily by the Court of Special Appeals. (E. 020).

The circuit court held a hearing on Tate's remaining post-conviction claims on September 11, 2009. On May 25, 2010, the court awarded Tate the right to file a belated application for review of sentence, but otherwise denied post-conviction relief. (E. 165). The three-judge panel declined to change Tate's life sentence, and Tate's application for leave to appeal from the denial of post-conviction relief was denied summarily by the Court of Special Appeals. (E. 023-025).

On September 13, 2011, while his application for leave to appeal was pending, Tate filed a motion to re-open his post-conviction proceedings. On January 30, 2014, the court held a hearing on the motion. On September 26, 2014, the post-conviction court re-opened Tate's post-conviction proceedings and granted post-conviction relief by vacating Tate's guilty plea and awarding Tate a new trial. (E. 376).

The State filed a timely application for leave to appeal, which the Court of Special Appeals granted. The case was placed on the court's regular appeal docket. On August 15, 2017, the Court of Special Appeals filed an unreported opinion, reversing the judgment of the circuit court. (E. 463). Tate filed a petition for a writ of certiorari, which this Court granted.

QUESTION PRESENTED

Did the Court of Special Appeals properly reverse the determination of the post-conviction court where the post-conviction court clearly erred and abused its discretion by re-opening Tate's post-conviction proceedings and granting Tate post-conviction relief?

STATEMENT OF FACTS

On Monday, February 24, 1992, between 10:30 p.m. and 11:00 p.m., Tate, then 16 years old, beat and stabbed to death 19-year-old Jerry Lee Haines.[2] (E. 082-086). Zedra Bogner watched

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[2] The victim's name is Jerry Lee Haines, but there are instances in the record where his first name is spelled "Gerry" and his last name is spelled "Haynes."

Tate kill Haines from the window of her residence. (E. 082-083). The police were contacted, but they arrived too late to save Haines, who had been stabbed 24 times. (E. 082-083).

The cold-blooded murder Bogner observed that night was the culmination of a plan Tate told people he was going to execute. (E. 082-083). Indeed, Tate made several threats against Haines's life because Haines had been dating Tate's former girlfriend, Tammy Heath. (E. 085-086). Tate told Brian Hannon "he was going to dress up in dark clothing and ambush Gerry at his residence. He told Brian he would stab Gerry and cut his throat, and that after he was dead he would physically assault and batter him. Tate told Hannon that he had been sharpening the knife all week long." (E. 085-086). Tate also told Sandra Eastwood and Joseph Allen that he intended to kill Haines. (E. 085-086). When the police searched Tate's parents' residence following the murder, they found Haines's wallet in Tate's bathroom; Haines's blood was stained on Tate's black ski jacket. (E. 085-086).

Defense trial preparation included having Tate's mental health examined. In June 1992, in a letter filed with the court, the defense informed the State of an oral summary of the findings of

Dr. Michael Spodak. (E. 051). The defense stated that it would "not be contending that Brian is not criminally responsible for his acts." (E. 051). Rather, the defense would be arguing only that, "on the night of the alleged offense, Brian did not have sufficient mental capabilities to form the specific intent to commit first degree murder." (E. 051-52).

By October 1992, the parties were engaged in serious plea negotiations. (E. 055). On October 29, 1992, Tate's lead defense attorney, the late George S. Lantzas, sent a letter to the State "[o]n behalf of Brian Arthur Tate" confirming that Tate would accept the State's plea offer, the terms of which were outlined in the letter. (E. 055). Specifically, Tate would plead guilty to first-degree murder in Case No. K-92-862. (E. 055). In exchange, all other charges in Case No. K-92-862 and Case No. K-92-963 would be nol prossed, the State would withdraw its request for a life without parole sentence, and the State would not oppose a defense request that Tate be referred to the Patuxent Institution. (E. 055). The parties agreed to a written statement of the facts underlying the plea. (E. 057-060).

Attorney Joseph Devlin was also part of the defense team. (PC1. 20, 23).[3] According to Devlin, Tate met with counsel "a great number of times." (PC1. 20, 25). One such meeting occurred at the Anne Arundel County Detention Center, where Lantzas explained "the guilty plea rights" to Tate with Tate's parents also present. (PC1. 22-23).[4] This meeting consisted of a comprehensive advisement regarding Tate's guilty plea rights, notwithstanding that the same rights were discussed at earlier meetings. (PC1. 26, 43-44). "That was – that was a comprehensive discussion with Mr. Tate to go over the nature of the plea, the basis for the plea both in law and factually, as well as potential sentencing issues." (PC1 28, 30). This included "going through the permutations of the differences between first and second and manslaughter as it related to the facts, as it related to Mr. Tate and what information

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[3] "PC1" refers to the transcript of the November 20, 2006, post-conviction hearing. "PC2" refers to the transcript of the November 21, 2006, post-conviction hearing.

[4] Tate's parents paid for his attorneys and were very involved in the case. (E. 228-229). They also sought outside legal guidance. (E. 248-249).

we could bring to the case, if you will, that was an ongoing matter." (PC1. 30). At the conclusion of this meeting, Tate wanted to go forward with the guilty plea. (PC1. 52).

At the November 2, 1992, plea hearing, the prosecutor informed the court that a plea agreement had been reached whereby Tate would plead guilty to one count of first-degree murder in Case No. K-92-862. (E. 071). The prosecutor explained that, in exchange for Tate's guilty plea: (1) the State would nol pros the remaining charges in Case No. K-92-862, as well as all charges in Case No. K-92-863; (2) the State would withdraw its notice seeking a sentence of life without parole; (3) and the State would not oppose Tate's request for a referral to the Patuxent Institution. (E. 071-072). Tate's attorneys introduced into the record a letter, dated October 30, 1992, which also set forth the terms of Tate's negotiated plea arrangement and the agreed statement of facts supporting the plea. (E. 072).

The court initiated a plea colloquy to determine whether Tate was entering the guilty plea knowingly and voluntarily. During the plea colloquy, the court asked Tate, *inter alia*, if his attorney, Mr. Lantzas, had gone over the letter with Tate, to which

Tate responded: "Yes, he has." (E. 072). The court then asked Tate if he had "read the statement of facts that are attached thereto," to which Tate responded: "Yes, I have." (E. 072-073). Upon inquiry, Tate confirmed that his counsel had told him the consequences of pleading guilty and the rights he was giving up by doing so, and that he understood that he was facing a maximum penalty of up to life imprisonment. (E. 073).

The court's inquiry continued, with Tate telling the court that he was not induced or threatened into entering the plea. (E. 073). He confirmed that he was not under the influence of "any alcohol, drugs, narcotics or other pills." (E. 073). When the court asked Tate how far he had gone in school, Tate responded: "Halfway through my junior year, Your Honor." (E. 073). After acknowledging its awareness of Tate's pretrial mental health examination, the court then directly inquired with regard to Tate's present mental health:

> THE COURT: Now, other than this case, where I know you have been examined by various mental health individuals, before this case have you ever been under the care of a psychiatrist or in a mental institution?
>
> TATE: Yes, I have.

THE COURT: How long ago?

DEFENSE COUNSEL: Your Honor, if it please the Court, some months before the incident in question, Brian, after a series of difficulties at home and school, was presented by his parents in the office of a Dr. Steven Lasht, who I believe is a licensed social worker, perhaps psychologist, for some counseling sessions.

I have seen some statements, very brief statements, coming out of those interviews, and it does not appear that there was anything suggested in that counseling that would indicate that Mr. Tate, Brian Tate, did not understand the nature of the proceedings before the Court today.

THE COURT: Mr. Tate, is that correct?

TATE: Yes, it is, Your Honor.

(E. 074).

Following this assurance, Tate was asked by the court if he had been given a copy of the charges, to which Tate stated: "Yes, I have." (E. 074-081). Upon further questioning by the court, Tate expressly stated to the plea court, *inter alia,* that he had read and discussed the statement of charges with his attorney, that he understood what he was charged with and what he was pleading guilty to, and that he had told his attorneys all the facts about the case. (E. 074-081). Tate told the court that he understood the

rights he was relinquishing by entering the guilty plea and that he was pleading guilty "of [his] own free will." (E. 077-078).

Tate thereafter confirmed that he discussed the plea with his parents and his attorneys for over an hour at the detention center. (E. 080-082). Tate's counsel then questioned Tate specifically to confirm that Tate had met and discussed his plea arrangement with his defense attorneys, with both of his parents, and with other relatives and an attorney in New York. (E. 080-082). Tate, who acknowledged on the record that he was under 18, ultimately confirmed that the decision to plead guilty based on the information and advice he obtained was his alone. (E. 080-082).

The statement of facts, as proffered by the State at Tate's guilty plea hearing, were the following:

> On Monday, February 24, 1992, between 10:30p.m. and 11:00 o'clock p.m., Ms. Zedra Bogner, who was residing with her fiancé at 989 Roundtop Drive, Annapolis, Anne Arundel County Maryland, heard what she described to be as fighting sounds outside the residence.
>
> She looked from her bedroom window and saw the victim in this case -- identified as Gerry Lee Haynes -- who lived across the street at 1174 Summit Drive. Gerry was approached by a person she referred to as a stranger, approximately six feet tall,

approximately 200 pounds, and wearing a dark jacket, light blue jeans and a baseball cap.

Ms. Bogner observed Gerry, the victim, and the stranger struggle near Gerry's white pickup truck, which Gerry had parked next to his house near the corner of Summit and Roundtop Drives.

Ms. Bogner observed the fight move from the truck to the area next to 989 Roundtop. She observed the stranger standing next to Gerry, beating and kicking him in the area of the face. She heard Gerry calling for help, and begging his assailant to stop.

Ms. Bogner asked her fiancé's mother, Ms. Barbara Hartley, to call the police, which she did. While Ms. Hartley was on the telephone to police, Zedra continued to report to Ms. Hartley the actions of the stranger and Gerry Haynes. Ms. Bogner observed the stranger drag the body of Gerry past her bedroom to the rear of 1176 Summit Drive, the home of Marshal and Gloria Vestal, and hide the body behind a shed. She then observed the stranger walk back to the street, look around, and walk away[.]

When police arrived, the body of the victim, Gerry Lee Haynes was discovered behind a shed, and the stranger was gone.

Your Honor, a subsequent autopsy of the victim by the Office of the Chief Medical Examiner for the State of Maryland revealed that the victim had suffered 24 stab and cutting wounds to his body, including 14 stab wounds to the back; both lungs; liver; bilateral hemothoraces; six wounds to the neck; two to the upper right and one to the upper left arm; one to the left hand; and multiple cutting wounds to the neck, hands and right forearm. In addition he suffered blunt force trauma to the head, including multiple facial

lacerations, and fractures of the nasal and right maxillary bones.

Dr. John Smila, Chief Medical Examiner for the State of Maryland would testify the manner of death was homicide. Photographs I have introduced, Your Honor, would support that finding.

A search of the crime scene revealed a handle and partial blade of a broken knife, which was believed to be used to inflict the stab and cutting wounds sustained by the victim.

Through investigation the Anne Arundel County Police learned the Defendant, Brian Arthur Tate, had made several threats against the life of the victim, Gerry Lee Haynes, because Gerry had been dating Tate's former girlfriend, Tammy Heath.

Among the witnesses the State would call to prove these threats would be Brian Hannon, who would testify the Defendant told him he was going to dress up in dark clothing and ambush Gerry at his residence. He told Brian he would stab Gerry and cut his throat, and that after he was dead he would physically assault and batter him. Tate told Hannon that he had been sharpening the knife all week long.

Among the other witnesses the State would call to substantiate these threats are Sandra Eastwood and Joseph Allen, who would both testify they were told by the Defendant that he intended to kill Gerry.

A witness for the State, Amanda Jones, would testify that she was in the bedroom of the Defendant prior to the homicide, and observed a sharp knife, approximately 10 inches long, and a sharpening stone under his bed.

> Another State's witness, Mark Worth, would testify that he saw the Defendant with a pair of brass knuckles on February 24, 1992, prior to the homicide.
>
> A search and seizure warrant executed February 25, 1992 at the home of the Defendant, produced a blood-stained black ski jacket, owned by the Defendant, which revealed the presence of human blood on the right cuff. This was compared by Cell Mark Laboratories with the blood of the victim, Gerry Lee Haynes by DNA profiling, and found to be a positive match. [. . .]
>
> A subsequent search of the Defendant's bathroom, adjacent to his private bedroom, revealed a pair of brass knuckles, and the victim's wallet, which contained his personal papers and identification.
>
> Those, Your Honor, in capsule form, are the facts the State would offer to support the plea of guilty in this case.

(E. 082-086).

Tate accepted the facts as set forth above. (E. 086). The court accepted the plea and found Tate guilty of first-degree murder. (E. 086).

On January 18, 1993, the court held a disposition hearing where several witnesses testified. (E. 090). The first witnesses were Michael Hill, the victim's brother, and Jacqueline Haines, the victim's mother. (E. 093-102). They both spoke about the

immeasurable loss that had been inflicted upon them by Tate's actions. (E. 093-102).

Dr. Eric English, a clinical psychologist, testified as a defense witness. (E. 103). Dr. English evaluated Tate's psychological condition by conducting clinical interviews and psychological testing. (E. 105). Dr. English testified that Tate was "suffering from a serious, significant mental disorder," which he termed narcissistic personality disorder. (E. 109). Dr. English testified that, based on his evaluation, the Patuxent Institution was a good placement for Tate because he would get favorable treatment there. (E. 111).

Dr. Michael Spodak, a licensed psychiatrist, also testified as a defense witness. (E. 119). Dr. Spodak diagnosed Tate with oppositional defiant disorder, adjustment disorder with mixed emotional features, and personality disorder. (E. 119). Dr. Spodak believed that Tate was amenable to treatment and that Patuxent Institution was a good placement for him. (E. 119-144). According to Dr. Spodak, if housed elsewhere, there would be a higher likelihood that Tate would develop "an anti-social personality disorder." (E. 136).

Tate's parents offered testimonials that Tate's actions were offshoots of his mental illness that did not reflect his true character. (E. 145-153). They asked the court to impose a merciful sentence. (E. 145-153). The State followed by requesting that the court sentence Tate to life imprisonment. (E. 153-155). The defense countered that Tate should be sentenced to life imprisonment with all but twenty or thirty years suspended and with a recommendation to the Patuxent Institution. (E. 155-159). Finally, Tate exercised his right of allocution, acknowledging that Jerry Haines's death was entirely his fault. (E. 160-161).

The trial court, pursuant to the terms of the plea agreement, sentenced Tate to life imprisonment with a recommendation to the Patuxent Institution. (E. 161-163). Tate did not file an application for leave to appeal the entry of his plea and sentence.[5] (E. 386).

In 2005, Tate initiated post-conviction proceedings, arguing that his plea was invalid and his counsel was ineffective. (E. 387). A hearing on the claims raised in Tate's petition for post-conviction relief was held on November 20-21, 2006. (E. 387). As noted,

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[5] Tate filed a motion for reconsideration of sentence, which was denied. (E. 387).

supra, Tate's only surviving trial defense counsel, Joseph Devlin, testified at the post-conviction hearing that plea negotiations were discussed extensively with Tate and his parents. (PC1. 20-52).

On February 8, 2007, the circuit court issued an order granting Tate the right to file a belated application for leave to appeal and staying the remaining post-conviction claims until that relief was pursued to completion. (E. 165). Tate subsequently filed the application for leave to appeal, arguing that his plea was defective because he was not informed of the nature of the offense, he did not understand the consequences of the plea, there was not a sufficient factual basis for the plea, and he did not receive the benefit of the plea bargain. (Apx. 1-17). The Court of Special Appeals summarily denied the application for leave to appeal. (E. 388).

The matter then returned to the circuit court for review of Tate's remaining post-conviction claims, and the court held an additional hearing on September 11, 2009. (E. 388). The court subsequently issued an opinion and order granting Tate the right to file a belated application for sentence review, but otherwise denying post-conviction relief. (E. 188). In rejecting Tate's direct

challenge to the validity of the guilty plea, the post-conviction court found that Judge Thieme, "the very experienced presiding judge," considered Mr. Tate's young age and his mental health status and that the "facts read into the record and agreed to by Mr. Tate then, crystalized the basic elements or components of premeditated first-degree murder establishing that Tate had the requisite understanding of the essential elements of that offense when he pled guilty." (E. 203; *see also* E. 230). The court also found as fact that Tate reviewed the plea terms and discussed those terms extensively with both his attorneys and his parents. (E. 203-206).

Tate filed an application for leave to appeal the ruling denying post-conviction relief, which was denied summarily by the Court of Special Appeals. (Apx. 18-48). While this application was pending, Tate filed a motion to reopen his post-conviction proceedings, asking the court to "reconsider" its decision, primarily in light of this Court's opinion in *State v. Daughtry*, 419 Md. 35 (2011). (E. 389). According to Tate, under *Daughtry*, "there was not a sufficient on-the-plea hearing record objectively setting out that the nature and elements of the crime of premeditated First

Degree Murder and its complexities, i.e., differentiation of it from first-degree felony murder, particularly and the other degrees and forms of murder, and showing those aspects were explained to him and understood by him then; if so found, that renders his guilty plea invalid." (E. 395-396).

Following a hearing, the post-conviction court issued a statement of reasons granting the motion to reopen and granting Tate post-conviction relief. (E. 376). The court determined that *Daughtry* "requires that this Petitioner's Post-Conviction proceedings be reopened in the interests of justice, the pleas and sentence be vacated, and a new trial granted. . . ." (E. 393). The court then determined that Tate's guilty plea was defective under *Daughtry* because "the plea record lacked any expressed exposition of the nature or elements of the crime, premeditated first degree murder, to which Petitioner pled guilty as required by *Daughtry*, other recent guilty plea appellate rulings cited herein, and Rule 4-242." (E. 423). The court stated that, pursuant to *Daughtry*, it could no longer rely on trial counsel's post-conviction testimony to corroborate that such discussions took place. (E. 428-429).

The State filed an application for leave to appeal this ruling. (E. 464). The Court of Special Appeals granted the application and placed the case on the regular appeal docket. (E. 464). In subsequent briefing, the State argued that the post-conviction court wrongly concluded that it was "required" to reopen Tate's post-conviction proceedings based on *Daughtry* because that case merely confirmed the state of the law that existed when the post-conviction court previously denied relief. (R. Brief of Appellant in the Court of Special Appeals). Tate rejoined that the post-conviction court properly exercised its discretion when it re-opened his post-conviction proceedings and also ruled properly when it granted post-conviction relief. (R. Brief of Appellant in the Court of Special Appeals).

In an unreported opinion, the Court of Special Appeals reversed the judgment of the circuit court. (E. 463). The court determined that the guilty plea record confirmed that Tate's guilty plea was knowingly and voluntarily entered, stating, in part:

> In sum, the post-conviction court erred in vacating Tate's guilty plea to premeditated murder. At his plea hearing, Tate confirmed that he read and discussed with his counsel a copy of the charges, Tate confirmed he understood what he was charged with

> and what he was pleading guilty to, and the prosecutor's statement of facts in support of that plea described in detail Tate's advanced planning and execution of the murder. Therefore, we conclude that Tate's 1992 guilty plea proceedings did not violate his rights under either Maryland Rule 4-242(c) or the Federal Constitution.

(E. 480).[6]

ARGUMENT

THE COURT OF SPECIAL APPEALS PROPERLY REVERSED THE POST-CONVICTION COURT WHERE THE POST-CONVICTION COURT CLEARLY ERRED AND ABUSED ITS DISCRETION BY RE-OPENING TATE'S POST-CONVICTION PROCEEDINGS AND BY GRANTING TATE POST-CONVICTION RELIEF.

In 1992, Tate knowingly and voluntarily pleaded guilty to the charge of first-degree premeditated murder. As the Court of Special Appeals recognized, the record of the plea hearing confirms

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[6] In a footnote, the Court of Special Appeals stated that the State was not contending that the circuit court erred in reopening the post-conviction proceeding under the interests of justice standard. However, the State did, in fact, argue that the post-conviction court erred by reopening because it wrongly believed it was "required" to reopen post-conviction proceedings under *Daughtry*. This reflected a failure to exercise discretion or an abuse of discretion. (Brief of Appellant in the Court of Special Appeals at 7, 18; Brief of Appellee in the Court of Special Appeals at 8).

the plea's validity beyond any doubt. Indeed, in its 2010 ruling denying post-conviction relief, the post-conviction court fully recognized the validity of Tate's guilty plea and correctly rejected Tate's challenges to it.

There was no basis for the court to reconsider this decision in 2014. The post-conviction court, if it exercised discretion at all, abused this discretion by re-opening Tate's post-conviction case to reconsider the guilty plea primarily under this Court's decision in *State v. Daughtry*, 419 Md. 35 (2011), a case that simply reiterated and applied established guilty plea precedent. The post-conviction court further erred when it determined that, under *Daughtry*, Tate's guilty plea was invalid.

The Court of Special Appeals' opinion remedied the wrong effected by the post-conviction court's flawed decision. The judgment below should be affirmed.

A. Applicable Law: Review of a decision granting a motion to reopen post-conviction proceedings.

Section 7-104 of the Criminal Procedure Article provides that a circuit court "may reopen a post-conviction proceeding that

was previously concluded if the court determines that the action is in the interest of justice." Md. Code Ann., Crim. Pro., § 7-104 (2008). In *Gray v. State*, 388 Md. 366 (2005), this Court observed that the legislature vested the circuit court with the duty to determine "when 'the interests of justice' require[d] reopening" and held that the circuit court's determination was reviewed on appeal for an abuse of discretion. *Id.* at 383 n.7.

In *Gray*, the Court noted that the interest of justice standard had been "interpreted to include a wide array of possibilities." 388 Md. at 382 n.7; *see also Jones v. State*, 403 Md. 267, 292 (2008) (recognizing that interests of justice is an "open-ended" standard). In interpreting this standard in the context of a claim of ineffective assistance of post-conviction counsel, the Court of Special Appeals has stated: "There is no entitlement to have a closed postconviction proceeding reopened unless the petitioner asserts facts that, 'if proven to be true at a subsequent hearing[,] establish that post-conviction relief would have been granted but for the ineffective assistance of . . . postconviction counsel.'" *Harris v. State*, 160 Md. App. 78, 97-98 (2005) (quoting *Stovall v. State*, 144 Md. App. 711, 715-16 (2002)). The Court of Special Appeals has also noted that,

"[i]n the context of reopening a postconviction proceeding, whatever latitude that may be assigned to the exercise of judicial discretion 'in the interests of justice' would be somewhat circumscribed by the statutory constraints of the Uniform Post Conviction Procedure Act and the type of claims to which it affords a remedy." *Gray v. State*, 158 Md. App. 635, 646 n.3 (2004).

B. Applicable Law: Post-conviction review of guilty pleas.

1. *Standard of Review*

An appellate court will not disturb the factual findings of a post-conviction court unless clearly erroneous. The reviewing court makes an independent determination of relevant law and its application to the facts. *Arrington v. State*, 411 Md. 524, 551 (2009). In *Daughtry*, 419 Md. at 46-47, this Court stated the following in the context of reviewing a direct challenge to the validity of a guilty plea:

> It is well settled that where a case "involves an interpretation and application of ... case law, our Court must determine whether the lower court's conclusions are 'legally correct' under a [non-deferential] standard of review." *Schisler v. State*, 394 Md. 519, 535, 907 A.2d 175, 184 (2006); *see Ali v. CIT Tech. Fin. Servs., Inc.*, 416 Md. 249, 257, 6 A.3d 890, 894 (2010). Further,

> to the extent that the [Petitioner] argues that the Maryland Rules require a result different than that reached by the intermediate appellate court, we note that "[b]ecause our interpretation of ... the Maryland Rules [is] appropriately classified as [a] question[ ] of law, we review the issues [without deference to the lower courts' decisions] to determine if the trial court was legally correct in its rulings on these matters." *Davis v. Slater*, 383 Md. 599, 604, 861 A.2d 78, 80-81 (2004); *see Owens v. State*, 399 Md. 388, 402-03, 924 A.2d 1072, 1080 (2007).

2. *Guilty Plea Law*

Under Maryland Rule 4-242(c), a guilty plea is invalid unless accompanied by an "on the record in open court" examination of the defendant. The purpose of the examination is to ensure that "the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea." Md. Rule 4-242(c). Acceptance of a guilty plea not knowingly and voluntarily given violates both Maryland Rule 4-242(c) and constitutional law. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (stating that involuntary pleas implicate several constitutional rights, including those enshrined in the Fifth Amendment).

The test for the adequacy of a guilty plea is "whether the totality of the circumstances reflects that a defendant knowingly

and voluntarily entered into the plea." *Daughtry*, 419 Md. at 71. Along with the trial record itself, factors which inform this case-by-case approach include: "the complexity of the charge, the personal characteristics of the accused, and the factual basis proffered to support the court's acceptance of the plea." *Id.* at 71-72 (citing *State v. Priet*, 289 Md. 267, 288 (1981)).

There is no set recitation for determining the validity of a guilty plea. *Id.* at 275. Indeed, this Court concluded in *Davis v. State*, 278 Md. 103, 114 (1976), that

> *Boykin* does not stand for the proposition that the due process clause requires state trial courts to specifically enumerate certain rights, or go through any particular litany, before accepting a defendant's guilty plea; rather, we think *Boykin* merely holds that the record must affirmatively disclose that the accused entered his confession of guilt voluntarily and understandingly.

In *Priet*, this Court opined that, while no specific litany is required, the litany conducted must be sufficient to inform the defendant of the nature of the charge:

> [The Rule] does not impose any ritualistic or fixed procedure to guide the trial judge in determining whether a guilty plea is voluntarily and intelligently entered. The rule does not require that the precise legal elements compromising the offense be communicated to the defendant as a prerequisite to

> the valid acceptance of his guilty plea. Rather, by its express terms, the [Rule] mandates that a guilty plea not be accepted unless it is determined by the court, after questioning of the defendant on the record, that the accused understands the "nature" of the charge. This, of course, is an essential requirement of the rule and must be applied in a practical and realistic manner. It simply contemplates that the court will explain to the accused, in understandable terms, the nature of the offense to afford him a basic understanding of its essential substance, rather than of the specific legal components of the offense to which the plea is tendered.

Priet, 289 Md. at 288 (examining prior Rule 731(c)).

As a long-standing practice, Maryland trial courts, with the approval of this Court and the United States Supreme Court, presumed that when a defendant, represented by counsel, entered into a negotiated plea such as the one in Tate's case, the defendant was informed of the nature of the charges against him. *See, e.g., Henderson v. Morgan*, 426 U.S. 637 (1976); *Priet, supra.*

In *Priet*, the Court ostensibly applied this presumption to three separate cases involving three separate "youthful" defendants: Priet (19 years old with a ninth grade education), Pincus (19 years old with a seventh grade education and one year spent in a mental institution), and Vandiver (18 years old with a seventh grade education). After review, this Court reinstated

guilty pleas found invalid by the Court of Special Appeals, stating, in part:

> [T]he record demonstrates that each defendant was questioned at length concerning the voluntariness *vel non* of his plea, was informed of the penalty for the offense, and of the constitutional and other rights that would be waived by the entry of a guilty plea. While in each case the defendant was youthful and possessed of little formal education, each was represented by counsel with whom he acknowledged discussing the case and his guilty plea. As to this, we note the observation made by the Supreme Court in *Henderson*, *supra*, 426 U.S. at 647, 96 S.Ct. at 2258-59, that unless the contrary clearly appears from the record (as was true in *Henderson*), "it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." In each case, the personal responses of the defendant to the questions asked of him were made of record. In each case, the defendant acknowledged that he understood that he was pleading guilty to the particular offense involved, although in no instance does the record particularize the precise basis of the defendant's claimed knowledge that he understood the nature of the offense. It would, we think, in each of the cases before us, exalt formalism over real substance, far beyond the requirements of due process or Rule 731 c, to require that the record disclose the reasons for the defendant's belief that he understands the nature of the offense; indeed, such a standard would be wholly impracticable, if not impossible of compliance. The test, as we have indicated, is whether, considering the record as a whole, the trial judge could fairly determine that the defendant understood the nature of the charge to which he pleaded guilty.

Priet, 289 Md. at 290.

In *Daughtry*, which involved direct review of a guilty plea, the State relied heavily on the *Henderson/Priet* presumption to support its assertion that Daughtry's plea was valid. This Court held that notwithstanding the fact that Maryland courts had routinely accepted this presumption for years (at least until the Supreme Court's ruling in *Bradshaw v. Stumpf*, 545 U.S. 175 (2005)), Maryland law has in fact always judged guilty pleas based on the totality of the circumstances. *Daughtry*, 419 Md. at 69.

Daughtry involved a guilty plea colloquy consisting of the trial court asking Daughtry: "Have you talked over your plea with your lawyer[?]" 419 Md. at 44. Daughtry answered: "Yes." *Id.* This Court held that this exchange was insufficient to establish that the plea was "knowing" as required by Maryland Rule 4-242. Acknowledging the existence of a well-established "limited presumption" that a defendant represented by counsel has been properly advised of the nature of the charges against him, this Court nonetheless held that

> [e]mploying the . . . presumption in cases in which the only evidence proffered to show that a defendant is aware of the nature of the charges against him is the

> fact that he or she is represented by an attorney and that the defendant discussed the plea with his or her attorney undermines the purpose of a "totality of the circumstances test." Utilizing the presumption on an otherwise bare record obviates the need to look any further than the mere fact of representation itself.

419 Md. at 69. *See also id.* at 80 (citing *Lovell v. State*, 347 Md. 623, 635 (1997), for the proposition that "it *may* be appropriate to assume *in most cases* defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit"); *id.* at 84 ("We are not sounding the death knell for the *Henderson/Priet* presumption.").

As this Court later noted in *State v. Smith*, 443 Md. 572 (2015), *Daughtry* did not change, but clarified and reiterated, *Priet*'s holding that the record of a guilty plea must, under the totality of the circumstances, demonstrate that a guilty plea was knowing and voluntary. *Smith*, 443 Md. at 619. The mere fact that a defendant is represented by counsel at his guilty plea is not enough, without more, to demonstrate that a defendant was aware of the nature of the offense at issue.

Ultimately, *Daughtry* instructs that although no specific words must be used, the record must feature an additional "hook"

on which to hang the "hat" of the presumption. *Id.* at 76. No such hook exists when all that the record shows is that: (1) the defendant was asked whether "he understood the plea offer," because the plea offer is different from the charged offense, *Miller v. State*, 185 Md. App. 293 (2009); *see also Daughtry*, 419 Md. at 69 (holding that the affirmative answer to the question, "have you talked over your plea with your lawyer?", was insufficient to trigger the *Henderson/Priet* presumption because again, "your plea," was too generic and different than the charged offenses specifically); or (2) the crime was curtly referred to as "the handgun charge" and all that the defendant said was that he "talked this over with his attorney" without specifying what "this" referred to. *Graves v. State*, 215 Md. App. 339 (2013).

Conversely, a sufficient hook for the *Henderson/Priet* presumption does exist when the record shows: (1) the defendant "discussed his guilty plea with his attorney, as well as the relevant facts of the case and possible defenses to the case," *Priet*, 289 Md. at 270; (2) the defendant states that he understood the difference between first- and second-degree murder and had taken the differing punishments into account, *id.* at 273 (discussing

consolidated *Pincus* case); (3) the defendant acknowledged that he had discussed the elements of robbery with counsel and understood the facts that the State would need to prove, *id.* at 274 (discussing consolidated *Vandiver* case); (4) the defendant confirmed that he "had a chance to discuss the charges in this case, as well as the terms of this plea with [his] attorney," *Rivera v. State*, 180 Md. App. 693, 712 (2008); or (5) the defendant confirmed that he had "gone over the charges with [his] attorney and the elements of the offense," had "been provided with a copy of the charging documents," and had "discussed the charges and possible defenses with [his] attorney." *Gross v. State*, 186 Md. App. 320, 350-51 (2009).

C. The post-conviction court clearly erred or abused its discretion when it reopened Tate's post-conviction proceedings.

In granting Tate's motion to re-open, the post-conviction court explicitly stated that it "had no alternative" and was "compelled" to re-open Tate's post-conviction proceeding to vacate his guilty plea under *Daughtry*, *Baines v. State*, 416 Md. 604

(2010), and *Cuffley v. State*, 416 Md. 568 (2010). (E. 451, 460-461).[7] As addressed, *supra*, *Daughtry* did not change prevailing law with respect to guilty pleas. Thus, *Daughtry* contradicts the post-conviction court's reasons for re-opening Tate's case. *Accord Smith*, 443 Md. at 649-50. The decision in *Daughtry* did not justify the reconsideration of Tate's post-conviction case, nor did *Daughtry* justify awarding Tate post-conviction relief. Furthermore, this Court's decisions in *Baines*, 416 Md. at 614-15, and *Cuffley*, 416 Md. at 579-81, also cited by the post-conviction court as requiring reopening, addressed the obligations of a guilty plea court which agrees to be bound in sentencing under Maryland Rule 4-243, a matter not at issue in Tate's case.

The authority cited by the post-conviction court did not support its conclusion that re-opening of Tate's post-conviction proceedings and setting aside his guilty plea was required. In this respect, the court failed to exercise its discretion or, at the very least, abused its discretion. Indeed, Maryland's Uniform Post-

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[7] In *Cuffley* and *Baines*, this Court held that the sentences imposed exceeded the terms of the respective plea deals. *Cuffley*, 416 Md. at 573; *Baines*, 416 Md. at 607.

Conviction Procedure Act was enacted, in part, "to achieve finality in the criminal adjudicative process without unduly interfering with a defendant's right to present his case before a court." *Arrington*, 411 Md. at 548. Sanctioning the post-conviction court's reasoning for re-opening Tate's case would render such limitations meaningless. Indeed, by the time the post-conviction court granted Tate's motion to reopen, the Court of Special Appeals had denied two prior applications for leave to appeal raising the same challenge to the validity of Tate's guilty plea. (Apx. 1-48). This Court should hold that the post-conviction court erred or abused its discretion when it re-opened Tate's post-conviction case.

D. The Court of Special Appeals properly determined that Tate's guilty plea was valid.

After granting re-opening, the post-conviction court determined that Tate's guilty plea was invalid because "the plea record lacked any expressed exposition of the nature or elements of the crime, premeditated first degree murder, to which Petitioner pled guilty as required by *Daughtry*, other recent guilty plea appellate rulings cited herein, and Rule 4-242." According to the

post-conviction court, its conclusion was supported and confirmed by "increased consideration" of Tate's diminished capacity as a juvenile "suffering from impaired or diminished mental and emotional conditions as set forth by psychological experts." (E. 432). To the contrary, the totality of the circumstances confirm that Tate's plea was knowing and voluntary with a full understanding of the nature of the charge. Accordingly, the Court of Special Appeals properly reversed the post-conviction court's decision.

1. The Henderson/Priet presumption applies to Tate's case.

The *Henderson/Priet* presumption—that in most cases defense counsel routinely explains the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit—should apply here. The trial court asked, and Tate confirmed, that he was "given a copy of the charges" and that he "read and discussed it" with his attorneys, with whose services he was satisfied. (E. 74-76). Tate told the court that he understood what he was charged with and what he was pleading guilty to. (E. 75).

At the plea hearing, Tate's attorneys introduced into the record a letter, dated October 30, 1992, which set forth the terms of Tate's negotiated plea arrangement and the statement of facts supporting the plea, (E. 072), which facts were subsequently read into the record verbatim, (E. 082-086). During the plea colloquy, the court asked Tate, *inter alia*, if his attorney, Mr. Lantzas, had gone over the letter with Tate, to which Tate responded: "Yes, he has." (E. 072-073). The court then asked Tate if he had "read the statement of facts that are attached thereto," to which Tate responded: "Yes, I have." (E. 072-073).

The statement of facts read by Tate and read into the record established, *inter alia*, that the victim, who was seen being attacked, beaten and kicked in the face outside his house, died as a result of

> twenty-four (24) stab and cutting wounds to his body, including fourteen (14) stab wounds to the back, both lungs, liver, bilateral hemothoraces; six (6) wounds to the neck; two (2) to the upper right and one to the upper left arm; one (1) to the left hand; and multiple cutting wounds to the neck, hands and right forearm. In addition he suffered blunt force trauma to the head, including multiple facial lacerations, and fractures of the nasal and right maxillary bones.

(E. 082-086).

The facts also established that, prior to the killing, Tate had made several threats against the life of the victim, Haines, including telling others that he was going to dress in dark clothing and ambush the victim at his residence, that he "would stab Gerry and cut his throat and that after he was dead he would physically assault and batter him," that he "had been sharpening a knife all week long," and that he intended to kill the victim. (E. 082-086). DNA testing confirmed that blood found on the cuff of a ski jacket owned by Tate was a positive match for the blood of the victim. The victim's wallet, containing personal papers and identification were found in the bathroom adjacent to Tate's private bedroom along with a pair of brass knuckles. (E. 082-086).

Tate was also asked by the guilty plea court, and confirmed to the court, that his counsel had told him the consequences of pleading guilty and the rights he was giving up by doing so, and that he understood that he was facing a maximum penalty of up to life. (E. 073). Tate's counsel also questioned Tate to confirm that Tate had met and discussed his plea arrangement with both of his

defense attorneys, with both of his parents, and with other relatives and an attorney in New York. (E. 081).[8]

This record is akin to *Priet*, *Rivera*, and *Gross*, discussed above, in which the presumption applied, and unlike *Daughtry*, *Miller*, and *Graves*, also discussed above, in which the presumption did not apply. Tate confirmed that he received a copy of his charges, making consultation with counsel possible and meaningful, and he had sufficient time to consult with counsel and his parents about not just the plea agreement, but the charges

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[8] Tate's surviving trial counsel testified at the post-conviction hearing that Tate was informed of the nature of the offense of first-degree murder before pleading guilty. (PC1. 20-52). The post-conviction court's initial ruling denying post-conviction relief relied on this testimony. (E. 427-428). The post-conviction court interpreted *Daughtry* to prohibit reliance on this extrinsic evidence, which was a primary reason the court disavowed its earlier decision. (E. 427-428). In *Smith*, this Court indicated that such extrinsic evidence may be utilized to inform the validity of a plea challenged by way of a coram nobis action. 443 Md. at 654 (stating that "a lawyer's testimony at a coram nobis hearing concerning having advised a defendant prior to the guilty plea of the nature of the charges against him or her" "may be considered in a coram nobis proceeding in determining whether a defendant pled 'voluntarily, with understanding of the nature of the charge' within the meaning of Maryland Rule 4–242(c)"). If the same reasoning applies to this post-conviction case, then trial counsel's post-conviction testimony would resolve the issue of whether Tate was informed of the nature of the offense before he pleaded guilty because Devlin's testimony confirms that Tate was so informed.

specifically. His guilty plea was not deficient in the manner alleged.

2 Tate's guilty plea survives even if the Henderson/Priet presumption is not applied to his case.

Even assuming this Court does not apply the *Henderson/Priet* presumption to Tate's case, his guilty plea still survives scrutiny. Contrary to the post-conviction court's ruling, in *Daughtry,* the Court of Appeals did not mandate that a guilty plea court present an on-the-record description of the elements of the various charges in question before a plea could pass muster under Rule 4-242. In fact, the Court found just the opposite.

Daughtry confirms the Court of Special Appeals' determination that Tate's plea conformed with the requirements of Rule 4-242(c) and *Priet.* The on-the-record colloquy conducted by the plea court in Tate's case is wholly distinguishable from the sole question addressed and found wanting in *Daughtry.* Tate's express confirmation to the court, pursuant to the court's on-the-record examination of Tate, that Tate had read the charging documents against him, which charged that he, *inter alia,*

"feloniously, willfully, and of deliberately premeditated malice aforethought did kill and murder Jerry Lee Haines," that he understood what offense he was charged with and was pleading guilty to, and that he had discussed the charges with his attorneys, fully complied with the requirements of Rule 4-242(c) and *Priet*. Tate's counsel's confirmation that the defense team had thoroughly discussed the negotiated plea arrangement with Tate buttressed the court's finding that Tate's guilty plea was knowingly and voluntarily entered with an understanding of the nature of the first degree murder offense to which he was pleading. As the Court of Special Appeals explained:

> "Tate's confirmation to the court that he understood what he was charged with as well as what he was pleading guilty to, that he had been given a copy of the charges and had read it and that he had discussed those charges with his attorney, is, declared the *Daughtry* Court, "strong evidence" that he had the requisite understanding of the nature of the charges at the time of his plea and was pleading guilty knowingly and voluntarily."

(E. 474).

The post-conviction court's conclusion that the absence of an on the record explanation by the court of "premeditation" vitiated Tate's plea is refuted, not supported, by *Daughtry*. Contrary to the

post-conviction court's conclusion, this Court's controlling authority subsequent to Tate's 2010 post-conviction proceeding, including *Daughtry* and *Smith*, reaffirms the validity of Tate's guilty plea and confirms the propriety of the guilty plea court's acceptance of Tate's plea under Rule 4-242(c).

In arguing to the contrary, Tate spends a substantial portion of his brief trying to convince this Court that the defendant's age and mental health status are personal characteristics that must be considered in the totality of the circumstances test. (Brief of Petitioner at 22-27). But, this is an undisputed point. What is disputed, however, is Tate's position that the trial court or the Court of Special Appeals did not sufficiently take into account these personal characteristics in assessing whether he entered his plea knowingly and voluntarily. Tate's position is negated by the plea record.[9]

Tate's youthful age, as reflected by the date of birth set forth in the docket entries, was an obvious feature in this tragic

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[9] Tate's argument incorrectly attempts to portray the post-conviction court's legal assessment of the plea record as a series of factual determinations entitled to deference. (Brief of Petitioner at 28-34).

case. Nevertheless, the court still asked Tate during the plea colloquy how far he had gone in school to which Tate responded: "Halfway through my junior year, Your Honor." (E. 073). Later in the plea colloquy, Tate specifically confirmed on the record that he was "under 18." There can be no dispute that the court took into account Tate's age when assessing whether he understood what he was doing and whether he was doing it voluntarily.

Similarly, the court, armed with knowledge of Tate's pretrial mental health examination, specifically inquired about Tate's present mental health, which resulted in the following exchange:

> THE COURT: Now, other than this case, where I know you have been examined by various mental health individuals, before this case have you ever been under the care of a psychiatrist or in a mental institution?
>
> TATE: Yes, I have.
>
> THE COURT: How long ago?
>
> DEFENSE COUNSEL: Your Honor, if it please the Court, some months before the incident in question, Brian, after a series of difficulties at home and school, was presented by his parents in the office of a Dr. Steven Lasht, who I believe is a licensed social worker, perhaps psychologist, for some counseling sessions.

> I have seen some statements, very brief statements, coming out of those interviews, and it does not appear that there was anything suggested in that counseling that would indicate that Mr. Tate, Brian Tate, did not understand the nature of the proceedings before the Court today.
>
> THE COURT: Mr. Tate, is that correct?
>
> TATE: Yes, it is, Your Honor.

(E. 074).

Thus, the record confirms that the court clearly factored Tate's mental health into the "totality of the circumstances" calculus. The inquiry itself, which acknowledges the court's reflection on Tate's mental health, establishes the court's consideration of this personal characteristic in combination with Tate's other personal characteristics, such as the fact that he received substantial assistance from both counsel and his parents in a thoughtful and deliberative plea negotiation. As the Court of Special Appeals recognized, the court's targeted inquiry into Tate's present mental health was met with direct reassurance by counsel on the record — confirmed by Tate — that Tate's mental health

status did not prevent Tate from entering into the guilty plea knowingly and voluntarily. (E. 479-480).[10]

To be sure, this Court acknowledged in *Daughtry* that the crime of first-degree murder is not readily understandable from the label of the crime itself.[11] However, as the Court of Special Appeals explained, (E. 478), the totality of the circumstances in Tate's case, which include the label of the offense, a detailed and specific factual statement describing the pre-planned and executed murder, and multiple acknowledgments by Tate of his discussions with counsel about the charges and plea negotiations, are sufficient to confirm Tate's awareness of the nature of the first-degree murder charge in this case.

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[10] As the Court of Special Appeals recognized, testimony at sentencing regarding Tate's mental health was offered only to support a placement at the Patuxent Institution. There was no testimony that Tate did not have sufficient mental capacity to enter the guilty plea knowingly and voluntarily. (E. 479-480).

[11] The *Daughtry* Court noted that in *Lovell*, 347 Md. at 635, this Court reached a different conclusion regarding the complexity of a first-degree murder charge: "The first-degree murder to which Lovell pled guilty is one of those crimes, 'the nature of [which] is readily understandable from the crime itself.'" (quoting *Priet*, 289 Md. at 288). *Daughtry*, 419 Md. at 73.

As the Court of Special Appeals explained, Tate's after-the-fact challenges to the validity of his guilty plea are defied by the totality of the plea record, which establishes that the plea was knowing and voluntary. Indeed, Tate's case is not appreciably different than the pleas upheld by this Court in *Priet*, which involved less educated, but similarly youthful defendants, one of whom had spent a year in a mental institution. The totality of the circumstances confirm that Tate, with comprehensive advice from counsel and with the full support and involvement of his parents, understood that he was entering a plea to first-degree premediated murder. The post-conviction court erred when it ruled to the contrary, and the Court of Special Appeals properly reversed that decision.

CONCLUSION

The State respectfully asks the Court to affirm the judgment of the Court of Special Appeals.

Dated: March 6, 2018

Respectfully submitted,

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Counsel for Respondent

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH THE MARYLAND RULES

This filing was printed in 13-point Century Schoolbook font; complies with the font, line spacing, and margin requirements of Maryland Rule 8-112; and contains 8984 words, excluding the parts exempted from the word count by Maryland Rule 8-503.

/s/ Edward J. Kelley
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Counsel for Respondent

BRIAN TATE,	IN THE
Petitioner,	COURT OF APPEALS
v.	OF MARYLAND
STATE OF MARYLAND,	September Term, 2017
Respondent.	No. 65

CERTIFICATE OF SERVICE

In accordance with Md. Rule 20-201(g), I certify that on this day, March 6, 2018, I electronically filed the foregoing Brief and Appendix of Respondent using the MDEC System, which sent electronic notification of filing to all persons entitled to service, including Booth Marcus Ripke, NATHANS & BIDDLE, LLP, 120 East Baltimore Street, Suite 1800, Baltimore, MD 21202.

/s/ Edward J. Kelley
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Counsel for Respondent

PERTINENT PROVISIONS

West's Annotated Code of Maryland
Criminal Procedure (Refs & Annos)
Title 7. Uniform Postconviction Procedure Act (Refs & Annos)
Subtitle 1. In General (Refs & Annos)

MD Code, Criminal Procedure, § 7-104

§ 7-104. Reopening postconviction proceeding

Currentness

The court may reopen a postconviction proceeding that was previously concluded if the court determines that the action is in the interests of justice.

Credits
Added by Acts 2001, c. 10, § 2, eff. Oct. 1, 2001.

Formerly Art. 27, § 645A.

MD Code, Criminal Procedure, § 7-104, MD CRIM PROC § 7-104
Current through Chapters 1 to 4 from the 2018 Regular Session of the General Assembly

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APPENDIX

BRIAN A. TATE,	*	IN THE
Applicant	*	CIRCUIT COURT
v.	*	FOR
STATE OF MARYLAND,	*	HOWARD COUNTY
Respondent	*	Case No. 13-K-06-46406

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

APPLICATION FOR LEAVE TO APPEAL FROM GUILTY PLEA

Applicant, Brian A. Tate, by and through counsel, Gary E. Bair and Bennett & Bair, LLP, pursuant to Maryland Rule 8-204, hereby applies for leave to appeal from the guilty plea and sentencing in the above-captioned case. Applicant requests that the Court grant leave to appeal and reverse the judgment of the lower court. The basis for this Application for Leave to Appeal is as follows.

I. PROCEDURAL HISTORY

A. Introduction

On March 16, 1992, a six-count indictment was filed in the Circuit Court for Anne Arundel County (Case No. K-92-000862) charging 16-year-old Brian Tate with first degree murder, robbery with a dangerous or deadly weapon, attempted robbery with a dangerous or deadly weapon, robbery, assault with intent to rob, and theft. (See Amended Petition for Post Conviction Relief, Exhibit A). On November 2, 1992, Applicant pleaded guilty to first degree murder. On January 18, 1993, Applicant was sentenced to a term of life imprisonment. No application for leave to appeal was timely filed.

On September 29, 2005, Applicant filed a pro se petition for post conviction relief, which was superseded by counsel's amended petition filed on January 31, 2006. A hearing on the petition was initially scheduled for August 16, 2006 in the Circuit Court for Anne Arundel County, but the case was transferred to the Circuit Court for Howard County (new Case No. 13-K-06-46406) on July 13, 2006, and the hearing was postponed. The hearing was held on November 20 and 21, 2006.

The post conviction court (Becker, J.) issued a Statement of Reasons and Order of Court on February 8, 2007. The court found that trial counsel had rendered ineffective assistance of counsel in failing to file an application for leave to appeal from the guilty plea and sentencing in 1993. The court granted relief in the form of the right to file a belated application for leave to appeal. The post conviction court also stayed proceedings on all other aspects of the post conviction petition, pending the outcome of the belated application for leave to appeal to the Court of Special Appeals.

B. The Guilty Plea

On November 2, 1992, Mr. Tate pleaded guilty to first degree murder. (See Amended Petition for Post Conviction Relief, Exhibit B [hereinafter "T."]).[1] The plea bargain contemplated that, in return for the plea to count one, the State would nol pros the remaining counts of the indictment, enter a nol pros in another case (K-92-863), and "withdraw the State's request for a sentence of life without parole." (T. 5). The prosecutor also agreed not

[1]The transcript cover page shows the date of the guilty plea as November 2, 1991. (T. 1). This is an obvious typographical error.

to object to a referral to Patuxent. Both the prosecution and defense were free to argue any relevant information at sentencing.

The court informed Mr. Tate that the maximum sentence was life imprisonment. The court asked whether Mr. Tate had been promised anything or threatened in any way, and he answered in the negative. The court then determined that Mr. Tate was not under the influence of any alcohol, drugs, narcotics, or medications. The court learned that Mr. Tate was half way through his junior year of high school. (T. 7). Defense counsel explained that Mr. Tate had received treatment from a psychologist, but that there was nothing to suggest he would not understand the nature of the proceedings. (T.8).

The court then explained some of the rights Mr. Tate was giving up by pleading guilty: his right to plead not guilty; to have the charges proved by evidence, beyond a reasonable doubt and to a moral certainty; the right to a speedy trial by court or jury; the right to a jury trial, consisting of 12 people from the county; the right to see, hear and question State's witnesses; the right to call witnesses on his behalf; the presumption of innocence; the right to challenge illegally obtained evidence; the right to challenge voluntariness of confessions; and the right to an automatic appeal. (T. 9-13).

When the court asked Mr. Tate whether he was pleading guilty because he was guilty, no answer was recorded. (T. 12). Likewise, no answer was recorded when Mr. Tate was asked by counsel whether he understood that he could not challenge on appeal the admissibility of evidence seized from his room. (T. 16). Finally, no answer was recorded

when counsel asked Mr. Tate whether he had any further questions to ask of defense counsel Lantzas or Devlin. (T. 16).

The State proffered facts that would have been shown had the case gone to trial. Counsel for Mr. Tate agreed with the factual proffer. The court then accepted the guilty plea of Mr. Tate. The court stated: "I am satisfied — and find him guilty of first degree murder." (T. 20). The court ordered a pre-sentence investigation and a psychiatric evaluation. (T. 22).

The court did not specifically find a factual basis for the plea. The court never made a finding that Mr. Tate freely and voluntarily entered the plea. Further, the court never explained the nature of the offense or the elements of the offense of first degree murder.

C. The Sentencing Proceeding

On January 18, 1993, the court sentenced Mr. Tate. (See Amended Petition for Post Conviction Relief, Exhibit C [hereinafter "S."]). The court had the presentence investigation and a psychiatric evaluation. The prosecution called two witnesses, Michael Hill and Jacqueline Haynes, the victim's brother and mother. Both witnesses read victim impact letters to the court.

A number of witnesses testified on behalf of Mr. Tate. The first was Dr. Eric English, a licensed psychologist. Dr. English did a comprehensive psychological assessment of Mr. Tate. Dr. English testified as an expert that Mr. Tate "is suffering from a serious, significant mental disorder," more specifically "narcissistic personality disorder." (S. 20). Dr. English stated that intensive treatment of five to ten years would be needed to treat this disorder. On

cross examination, Dr. English discussed the differences between narcissistic personality disorder and anti-social personality disorder. (S. 29).

Dr. Michael Spodak, a psychiatrist, next testified for the defense. There were no organic problems found with Mr. Tate. Dr. Spodak made three diagnoses: oppositional defiant disorder; adjustment disorder, with mixed emotional features; and personality disorder, NOS. (S. 34). Dr. Spodak described Mr. Tate as "emotionally undeveloped." (S. 36). Dr. Spodak also testified that he believed Mr. Tate's "capacity to form specific intent was impaired." (S. 44).

The prosecutor argued that Mr. Tate should be sentenced to life in prison. Defense counsel asked the court to recommend Patuxent and to suspend a portion of the life sentence, perhaps to 20 to 30 years. Mr. Tate also made a brief statement to the court, in allocution.

The court began its sentencing remarks by saying that "under the facts of this case, Mr. Tate would not be eligible for life without parole." (S. 72). The court said that the State did not give up anything by this guilty plea. (S. 72-73). The court sentenced Mr. Tate to life, with a recommendation to Patuxent. The judge told Mr. Tate that he could appeal within 30 days, file a request for three-judge panel review within 30 days, and ask for reconsideration of sentence within 90 days. (S. 73-74). The sentence was to commence as of February 25, 1992. The State nol prossed the remaining counts of the indictment as well as Case No.K-92-863.

II. ISSUES PRESENTED FOR REVIEW

A. Did the circuit court err in accepting the guilty plea where the record fails to show that Mr. Tate was adequately informed of the nature of the offense?

B. Does the record of the guilty plea fail to show that the plea was entered into voluntarily and with an understanding of the consequences of the plea?

C. Was there a sufficient factual basis for entry of the guilty plea?

D. Did Mr. Tate receive the benefit of the plea bargain that was the basis of the guilty plea?

III. ARGUMENT

Maryland Rule 4-242(c) sets forth the controlling standards for when a guilty plea may be accepted by a judge. In relevant part, the Rule provides:

> The court may accept a plea of guilty only after it determines, upon an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea.

Under that rule and case law construing it, there are four basic prerequisites to a valid guilty plea. First, the court must determine after a hearing in open court that the defendant is entering the plea "voluntarily." Second, the defendant must have an "understanding of the nature of the charge" to which he is pleading guilty. Third, the defendant must understand "the consequences of the plea." Fourth, the record must show the "factual basis for the

plea."[2] Where a guilty plea is not entered voluntarily and intelligently, or without a factual basis, the plea is void because it has been obtained in violation of the accused's due process rights. *See Metheny v. State*, 359 Md. 576, 601 (2000); *McCall v. State*, 9 Md. App. 191, 199 (1970). The court reviews "the validity of the guilty plea as a whole under the 'totality of the circumstances' test." *Metheny*, 359 Md. at 604 n.18.

With respect to the voluntariness of a defendant's guilty plea, the Supreme Court has recognized three constitutional rights involved, of which the defendant must be advised and which he must affirmatively waive. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1968). The first is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964). Second is the right to trial by jury. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Third is the right to confront one's accusers. *Pointer v. Texas*, 380 U.S. 400 (1965). The Supreme Court stated in *Boykin* that a court cannot presume a waiver of these three federal constitutional rights from a silent record. The Court has also noted that a waiver of the three constitutional rights, to be valid under the Due Process Clause, "must be an intentional relinquishment or abandonment of a known right or privilege." *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

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[2]As of July 1, 1999, the court must also advise the defendant that if he is not a United States citizen, the entry of the plea may subject him to "deportation, detention, or ineligibility for citizenship." Md. Rule 4-242(e).

The Court of Appeals has noted that, in addition to the three rights alluded to in *Boykin*, other important constitutional rights are given up when a defendant pleads guilty. These include "the right to insist that the prosecution's proof at trial establish guilt beyond a reasonable doubt," as well as "the Sixth Amendment right of the defendant to present witnesses to testify on his or her behalf," and "the Sixth Amendment right to a speedy and public trial." *Metheny v. State*, 359 Md. at 598 & n.14. The Court of Appeals has also ruled that while the record as a whole must show that a guilty plea was voluntary and intelligent, there need not be a specific on-the-record reference to and waiver of the three *Boykin* rights. *Davis v. State*, 278 Md. 103, 114 (1976).

"Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot truly be voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy*, 394 U.S. at 466. The United States Supreme Court has ruled that a guilty plea is invalid if the defendant enters the plea without knowledge of the crime's elements. *See Bradshaw v. Stumpf*, 545 U.S. 175, 182-83 (2005); *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976). The Court of Special Appeals has also ruled that the failure to explain the elements of an offense makes a guilty plea involuntary. *See State v. Hicks*, 139 Md. App. 1, 7-8 (2001); *Miller v. State*, 32 Md. App. 482, 486, *cert. denied*, 278 Md. 728 (1976), *cert. denied*, 430 U.S. 966 (1977). The Court of Appeals has ruled that for a guilty plea to be valid, a defendant must have a basic understanding of the

essential substance of an offense. *See Lovell v. State*, 347 Md. 623, 634 (1997); *State v. Priet*, 289 Md. 267, 288 (1981).

The requirement of a factual basis for the guilty plea serves "mainly as a safeguard that the accused not be convicted of a crime that he or she did not commit." *Metheny*, 359 Md. at 602. The Court in *Metheny* further explained that this requirement "is designed to 'protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" *Id.* at 602-03 (quoting *McCarthy*, 394 U.S. at 467). Under the Maryland Rule, "when facts are admitted by the defendant and are not in dispute, the judge need only apply the facts to the legal elements of the crime charged to determine if an adequate factual basis exists." *Metheny*, 359 Md. at 603.

A.

THE CIRCUIT COURT ERRED IN ACCEPTING THE GUILTY PLEA WHERE THE RECORD FAILS TO SHOW THAT MR. TATE WAS ADEQUATELY INFORMED OF THE NATURE OF THE OFFENSE.

Among the many defects in the guilty plea that violate both the Rule and the Constitution is the absence of a record showing Mr. Tate's understanding of the nature of the offense to which he pleaded guilty. For this reason alone, the guilty plea must be vacated.

As the indictment shows, the State chose to charge first degree murder in the short form language: "THE GRAND JURY charges that the aforesaid defendant, on or about the aforesaid date, feloniously, wilfully, and or deliberately premeditated malice aforethought

did kill and murder Jerry Lee Haines." (Amended Petition for Post Conviction Relief, Exhibit A, at 1). This legal jargon would be virtually indecipherable to a 17-year-old lay person.

Given this short form language, there is no way to determine whether the State was proceeding against Mr. Tate on a theory of premeditated murder, felony murder, or both. There was no discussion on the record whether Mr. Tate was pleading guilty to premeditated murder or felony murder, which have very different elements.[3] Although Mr. Tate was charged with robbery offenses in other counts of the indictment, there was no explanation of either form of first degree murder by the court, and it is not clear from the proffered facts which theory the State would have proceeded on had the case gone to trial. Nor was there any explanation by the court of the 12 different varieties of murder under Maryland law. *See Glenn v. State*, 68 Md. App. 379, 386, *cert. denied*, 307 Md. 599 (1986).

In this regard, Mr. Tate's case is similar to *Henderson v. Morgan*. In that case, the question before the Supreme Court was "whether a defendant may enter a voluntary plea of guilty to a charge of second-degree murder without being informed that intent to cause the death of his victim was an element of the offense." 426 U.S. at 638. In that case, a 19-year-old who was "substantially below average intelligence" killed a woman in her home. *Id.* at

[3]Further evidence of this confusion is found at sentencing. There, the court remarked: "Did a robbery occur? I doubt if the State could have proved that robbery would have occurred...." (S. 72). Yet, Mr. Tate was charged with armed robbery, attempted armed robbery, robbery, assault with intent to rob, and theft. (Amended Petition for Post Conviction Relief, Exhibit A, at 2-3). He may very well have thought that he was pleading guilty to felony murder rather than premeditated murder.

641-42. Morgan entered a guilty plea to second-degree murder, but there was no discussion of the nature of the offense and no reference to the intent requirement. *Id.* at 642-43. At a later sentencing hearing, his lawyers told the court that he "'meant no harm to that lady' when he entered her room with that knife." *Id.* at 643.

The Supreme Court found the guilty plea involuntary because Morgan "did not receive adequate notice of the offense to which he pleaded guilty." *Id.* at 647. This was so even though the prosecutor "had overwhelming evidence of guilt available." *Id.* at 644. This was also so even though Morgan admitted that he killed the victim because he did not "necessarily also admit that he was guilty of second-degree murder." *Id.* at 646.

The same thing happened at Mr. Tate's guilty plea. The court never explained the crime or the elements of first degree murder. Nor was it suggested that defense counsel had done so. Just as in Morgan's case, there was testimony at Mr. Tate's sentencing that called into question his intent to kill the victim. Finally, Dr. Spodak testified that he believed Mr. Tate's capacity to form a specific intent was impaired. (S. 44).

In short, the lack of an explanation of the offense to which Mr. Tate pleaded guilty renders the plea involuntary and violative of due process. Under *Lovell* and *Priet*, the court has an obligation to ascertain that the defendant has a basic understanding of the essential substance of the offenses before the plea is accepted. And under *Hicks* and *Stumpf*, the record must show that the elements of the offense were explained to the defendant before the guilty plea is accepted. Because the court did not advise Mr. Tate of the elements of first

degree murder–let alone which variety was applicable here–the plea was neither voluntary nor intelligent, *see Stumpf*, 545 U.S. at 182-83; *Hicks*, 139 Md. App. at 7-8, and must be vacated.

B.

THE RECORD OF THE GUILTY PLEA FAILS TO SHOW THAT THE PLEA WAS ENTERED INTO VOLUNTARILY AND WITH AN UNDERSTANDING OF THE CONSEQUENCES OF THE PLEA.

In addition to the failure of the court to explain the nature of the offense to which Mr. Tate pleaded guilty, the record of the plea fails to show it was entered knowingly and voluntarily for four additional reasons.

First, Mr. Tate was not informed that he was giving up his privilege against compelled self-incrimination under the Fifth Amendment by entering a guilty plea. This violates the dictates of *Boykin* and necessitates reversal.

Second, there are notable omissions in the record of the guilty plea that make it impossible to determine whether the plea was entered voluntarily and with an understanding of the consequences of the plea. As mentioned, no answers were recorded when Mr. Tate was asked whether he was pleading guilty because he was guilty, when asked whether he understood he could not challenge the admissibility of evidence seized from his room, and when asked whether he had any further questions of his counsel. (T. 12, 16).

Third, notably absent from the plea record is any reference to whether Mr. Tate understood that he could have entered a plea of not criminally responsible or that the defense

of imperfect self-defense might be relevant to his case. Defense counsel informed the court that "some months before the incident in question," Mr. Tate had seen a psychologist or licensed social worker. (T. 8). Rather than explore issues of mental capacity with respect to the taking of the guilty plea, the court merely ordered a psychiatric evaluation in aid of sentencing. (T. 22).

Fourth, the court did not make the proper findings under Rule 4-242. There was no finding that the plea was knowingly, intelligently, or voluntarily entered. Rather, the court merely stated: "I am satisfied – and find him guilty of first degree murder." (T. 20). That one finding is insufficient to sustain a guilty plea. "The issue as to whether a plea is voluntary and intelligent is a matter for the trial court to determine." *Hicks*, 139 Md. App. at 11. Because of the absence of these essential findings, the plea was defectively entered for this reason as well.

C.

THERE WAS NOT A SUFFICIENT FACTUAL BASIS FOR THE ENTRY OF THE GUILTY PLEA.

Under *Metheny*, the factual basis for the plea serves to ensure that a defendant understands that his conduct falls within the charge. 359 Md. at 602-03. In Mr. Tate's case, the record does not support a finding that the accused pleaded guilty to a crime that he, in fact, committed. *Id.* at 602.

As discussed above, it is far from clear how the facts support a first degree murder conviction. It was unclear what theory the State would pursue at trial. Nor did the court

make a specific finding that the factual proffer satisfied the factual basis for the plea to first degree murder.

Moreover, several of the court's remarks at sentencing undermine any confidence a reviewing court would have that there was a sufficient finding relating to the factual basis for the plea. Rather than refer to the factual basis as showing the defendant committed murder by proof beyond a reasonable doubt, the court instead said, "The State got what it could probably prove." (S. 73). Even more significant is the court's remark: "Did a robbery occur? I doubt if the State could have proved that robbery would have occurred...." (S. 72). This statement shows that the court did not believe a factual basis existed to the charge of felony murder. Because the record is unclear whether Mr. Tate pleaded guilty to felony murder or premeditated murder, the plea must be vacated for this reason as well.

D.

MR. TATE DID NOT RECEIVE THE BENEFIT OF THE PLEA BARGAIN THAT WAS THE BASIS OF THE GUILTY PLEA.

The record setting forth the plea bargain in this case is clear: Mr. Tate entered the guilty plea to first degree murder because he thought the State otherwise would seek a sentence of life without the possibility of parole. At the outset of the proceedings, the prosecutor stated that in return for the plea to count one, he would "withdraw the State's request for a sentence of life without parole in Case K-92-862." (T. 5). Two matters of record, however, undercut the notion that Mr. Tate ever received the benefit of the plea bargain. As such, he is entitled to have the plea vacated.

First, there is nothing in the record to show that the State ever filed the required notice to seek life without parole. Although the matter certainly was discussed by the parties, that is not enough under *Gorge v. State*, 386 Md. 600 (2005). That case requires that a sentence of life without parole may not be imposed "unless the record satisfactorily reveals that the statutory conditions were satisfied, including giving written notice to the defendant at least 30 days before the trial." *Id.* at 604. To avoid a problem with this rigorous notice requirement, the Court of Appeals suggested that a copy of the notice be timely served and filed with the court or that the defendant be presented with written notice in open court at least 30 days prior to trial. *Id.* at 620. No such notice was given to Mr. Tate in this case.

Second, at sentencing, the court made a series of remarks that appear to undercut the validity of the plea bargain. The court said both that there was no plea bargain in the case, and that Mr. Tate was not eligible for life without parole in the case. The Court's remarks in full are as follows:

> THE COURT: There wasn't any deal by the State. The talk about life without parole, under the facts of this case, Mr. Tate would not be eligible for life without parole. The State didn't give up anything.
>
> The motive behind this crime was not robbery. It was other than robbery. Did a robbery occur? I doubt if the State could have proved that robbery would have occurred, because they would have had to show that Mr. Haynes was alive at the time the wallet was taken, which they may or may not have been able to do. So, it is highly speculative as to whether the State could meet the requirements of any life without parole. So no deals were made. The State didn't give up anything. The State got what it could probably prove.

(S. 72-73). These remarks are extremely troubling, to say the least.

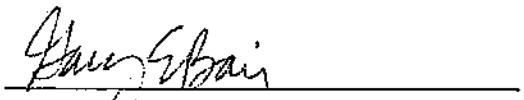
The primary aspect of the plea bargain was the fact that the State agreed to withdraw its life without parole notice in the case. (T. 5). Otherwise, there can be no doubt that Mr. Tate would not have pleaded guilty to first degree murder. Given that the record does not comply with the rigorous requirements of *Gorge*, the sentence could not have been imposed even had the parties thought otherwise. Under *Santobello v. New York*, 404 U.S. 257, 262 (1971), an agreement made and relied upon by a defendant must be fulfilled by the prosecution. Even if the failure to fulfill the obligation is inadvertent, and not the result of bad faith, the impact is the same. *Id.* Moreover, if Mr. Tate was not eligible for life without parole, as the court posited, then he entered into the plea bargain under an erroneous impression, which also invalidates the guilty plea. Where a "defendant has not received the benefit of a plea bargain to which he is entitled," he may withdraw the guilty plea. *See Tweedy v. State*, 380 Md. 475, 488 (2004). Mr. Tate's guilty plea and sentence should be vacated under these circumstances.

Even if the court was wrong that there was "no deal" in the case and wrong in its conclusion that Mr. Tate was not eligible for life without parole, the remarks at sentencing show that the court was imposing the sentence under a gross misimpression. Given this confusion and misinformation, any confidence this Court might have in the validity of the proceeding has been completely undermined and the guilty plea must be vacated.

IV. CONCLUSION

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

Respectfully submitted,



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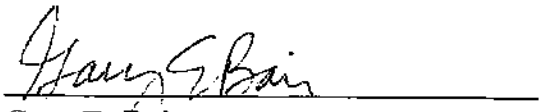
Counsel for Applicant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March, 2007, a copy of the foregoing Application for Leave to Appeal from Guilty Plea was mailed, postage prepaid, to the Office of the Attorney General, Criminal Appeals Division, 200 Saint Paul Place, Baltimore, Maryland 21202.



Gary E. Bair

BRIAN A. TATE,	*	**IN THE**
Petitioner	*	**CIRCUIT COURT**
v.	*	**FOR**
STATE OF MARYLAND,	*	**HOWARD COUNTY**
Respondent	*	**Case No. 13-K-06-46406**

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

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

Petitioner, Brian A. Tate, by and through counsel, Gary E. Bair and Bennett & Bair, LLC, pursuant to Maryland Rule 8-204, hereby applies for leave to appeal from the denial of the Petition for Post-Conviction Relief in the Opinion and Order of the Circuit Court for Howard County entered on May 26, 2010. Petitioner requests that the Court grant leave to appeal and reverse the judgment of the lower court. The basis for this Application for Leave to Appeal is as follows.

I. STATEMENT OF THE CASE AND FACTS

On March 16, 1992, a six-count indictment was filed in the Circuit Court for Anne Arundel County (No. K-92-862) charging 16-year-old Brian Tate with first degree murder, robbery with a dangerous or deadly weapon, attempted robbery with a dangerous or deadly weapon, robbery, assault with intent to rob, and theft. The criminal case arose from events that occurred on the evening of February 24, 1992, involving the stabbing death of Jerry Lee Haines at 1174 Summit Drive in Annapolis.

A. The Guilty Plea Proceeding.

On November 2, 1992, Mr. Tate, represented by counsel George Lantzas and Joseph Devlin, pleaded guilty before Judge Raymond G. Thieme, Jr. in the Circuit Court for Anne Arundel County, to first degree murder. The plea bargain contemplated that, in return, the State would nol pros the remaining counts of the indictment, enter a nol pros in another case (K-92-863), and withdraw the request for a sentence of life without parole. (T. 5). [1] The prosecutor also agreed not to object to a referral to Patuxent. Both the prosecution and defense were free to argue any relevant information at sentencing.

The court informed Mr. Tate that the maximum sentence was life imprisonment. The court asked whether Mr. Tate had been promised anything or threatened in any way, and he answered in the negative. The court then determined that Mr. Tate was not under the influence of any alcohol, drugs, narcotics, or medications. The court learned that Mr. Tate was half way through his junior year of high school. Defense counsel explained that Mr. Tate had received treatment from a psychologist, but that there was nothing to suggest he would not understand the nature of the proceedings.

The court then explained some of the rights Mr. Tate was giving up by pleading guilty: the right to plead not guilty; to have the charges proved by evidence, beyond a

[1] Transcript references are as follows: "T" refers to the guilty plea on November 1, 1992 (The transcript cover page shows the date of the guilty plea as November 2, 1991. This is an obvious typographical error); "S" refers to the sentencing on January 18, 1993; "PC1" refers to the post conviction hearing on November 20, 2006; and "PC2" refers to the post conviction hearing on November 21, 2006.

reasonable doubt and to a moral certainty; the right to a speedy trial by court or jury; the right to a jury trial, consisting of 12 people from the county; the right to see, hear and question State's witnesses; the right to call witnesses on his behalf; the presumption of innocence; the right to challenge illegally obtained evidence; the right to challenge voluntariness of confessions; and the right to an automatic appeal. (T. 9-13).

When the court asked Mr. Tate whether he was pleading guilty because he was guilty, no answer was recorded. (T. 12). Likewise, no answer was recorded when Mr. Tate was asked by counsel whether he understood that he could not challenge on appeal the admissibility of evidence seized from his room. (T. 16). Finally, no answer was recorded when counsel asked Mr. Tate whether he had any further questions to ask of defense counsel Lantzas or Devlin. (T. 16).

The State proffered facts that would have been shown had the case gone to trial. Counsel for Mr. Tate agreed with the factual proffer. The court then accepted the guilty plea of Mr. Tate. The court stated: "I am satisfied — and find him guilty of first degree murder." (T. 20). The court ordered a pre-sentence investigation and a psychiatric evaluation. (T. 22).

The court did not specifically find a factual basis for the plea. The court never made a finding that Mr. Tate freely and voluntarily entered the plea. Further, the court never explained the nature of the offense or the elements of the offense of first degree murder.

B. The Sentencing Proceeding.

On January 18, 1993, Judge Thieme sentenced Mr. Tate. Mr. Tate continued to be represented by Mr. Lantzas and Mr. Devlin. The court had the presentence investigation and a psychiatric evaluation. The prosecution called two witnesses, Michael Hill and Jacqueline Haynes, the victim's brother and mother. Both witnesses read victim impact letters to the court.

A number of witnesses testified on behalf of Mr. Tate. The first was Dr. Eric English, a licensed psychologist. Dr. English did a comprehensive psychological assessment of Mr. Tate. Dr. English testified as an expert that Mr. Tate "is suffering from a serious, significant mental disorder," more specifically "narcissistic personality disorder." (S. 20). Dr. English stated that intensive treatment of five to ten years would be needed to treat this disorder. On cross examination, Dr. English discussed the differences between narcissistic personality disorder and anti-social personality disorder. (S. 29).

Dr. Michael Spodak, a psychiatrist, next testified for the defense. There were no organic problems found with Mr. Tate. Dr. Spodak made three diagnoses: oppositional defiant disorder; adjustment disorder, with mixed emotional features; and personality disorder, NOS. (S. 34). Dr. Spodak described Mr. Tate as "emotionally undeveloped." (S. 36). Dr. Spodak also testified that he believed Mr. Tate's capacity to form a specific intent or mens rea might be impaired. (S. 44).

The prosecutor argued that Mr. Tate should be sentenced to life in prison. Defense counsel asked the court to recommend Patuxent and to suspend a portion of the life sentence, perhaps to 20 to 30 years. Mr. Tate also made a brief statement to the court, in allocution.

The court began its sentencing remarks by saying that "under the facts of this case, Mr. Tate would not be eligible for life without parole." (S. 72). The court said that the State did not give up anything by this guilty plea. (S. 72-73). The court sentenced Mr. Tate to life, with a recommendation to Patuxent. The judge told Mr. Tate that he could appeal within 30 days, file a request for three-judge panel review within 30 days, and ask for reconsideration of sentence within 90 days. (S. 73-74). The sentence was to commence as of February 25, 1992. The State nol prossed the remaining counts of the indictment as well as Case No. 92-863.

C. Post-Sentencing Proceedings.

No application for leave to appeal was filed. Nor was an application for a three-judge panel review of sentence filed.

A motion for reconsideration of sentence was filed on April 6, 1993. Judge Thieme held a hearing on the motion on October 19, 1993, and denied the motion on October 26, 1993.

A motion to correct illegal sentence–based on the argument that the Governor's no-parole for inmates serving life sentences violated ex post facto principles–was filed on July

2, 1999, and denied on July 28, 1999. *See State v. Kanaras*, 357 Md. 170 (1999); *Lomax v. Warden, MCTC*, 356 Md. 569 (1999).

D. Post Conviction Proceedings.

A pro se petition for post-conviction relief was filed by Mr. Tate on September 29, 2005. Present counsel entered his appearance in the case in December, 2005 and filed an Amended Petition on January 31, 2006. After determining that a conflict of interest prevented any judge in Anne Arundel County from hearing the matter, Administrative Judge Manck transferred the case to the Circuit Court for Howard County.

A post conviction hearing was held before Judge Louis A. Becker on November 20, 2006 and continued on November 21, 2006. In a February 8, 2007 Statement of Reasons and Order of Court, Judge Becker found that trial counsel rendered ineffective assistance of counsel in failing to file an application for leave to appeal from the guilty plea and sentencing in 1993, and granted relief in the form of the right to file a belated application for leave to appeal. The Court stayed proceedings on all other aspects of the post conviction petition, pending the outcome of the belated application for leave to appeal to the Court of Special Appeals.

Petitioner filed an Application for Leave to Appeal on March 9, 2007. In an unreported, per curiam decision, the Court of Special Appeals denied Petitioner's application. *Brian Arthur Tate v. State of Maryland,* No. 160, Sept. Term, 2007 (filed May 14, 2009). Thereafter, Judge Becker scheduled a further hearing to consider the remaining claims from

Petitioner's amended Petition. Both Petitioner and the State filed Memoranda with the Court in late August, 2009, and a hearing was held on September 11, 2009.

After hearing extensive arguments by counsel for Petitioner and the State, the Court rendered what it characterized as a "preliminary" oral ruling in the case. The Court addressed the merits of all of the claims in the amended Petition, rejecting all of the State's procedural defenses such as laches, waiver, and the like. The Court invited counsel to provide further information before the Court reached a "final" written ruling in the case, which would follow receipt of the transcript of its oral ruling. Counsel for Petitioner filed a Memorandum with the Court on October 9, 2009.

On May 26, 2010, Judge Becker filed a 103-page "Confirmatory & Supplemental Statement of Reasons–Amended Post Conviction Petition" and a three-page "Order on Confirmatory & Supplemental Statement of Reasons–Amended Petition for Post Conviction Relief." Attached to the Order was a copy of Judge Becker's 21-page Statement of Reasons and Order of Court, which had been entered on February 8, 2007. Also attached were copies of the transcript excerpts of September 11, 2009, Findings of the Court.

II. ISSUES PRESENTED

1. Did the post conviction court err in ruling that the record of the guilty plea was not defective under Maryland Rule 4-242 and the United States Constitution?

2. Did the post conviction court err in ruling that trial counsel was not ineffective in failing to fully investigate the case and for advising Petitioner to plead guilty to first degree murder?

3. Did the post conviction court err in ruling that trial counsel was not ineffective for pressuring Petitioner to plead guilty and for permitting Petitioner's family to pressure him to plead guilty to first degree murder?

4. Did the post conviction court err in ruling that trial counsel was not ineffective at sentencing?

5. Did the post conviction court err in ruling that the cumulative effect of trial counsel's errors prejudiced Petitioner's right to a fair trial?

III. ARGUMENT

A. The Legal Framework Applicable to this Case.

1. The Law Relating to Guilty Pleas.

Maryland Rule 4-242(c) sets forth the controlling standards for when a guilty plea may be accepted by a judge. In relevant part, the Rule provides:

> The court may accept a plea of guilty only after it determines, upon an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea.

Under that rule and case law construing it, there are four basic prerequisites to a valid guilty plea. First, the court must determine after a hearing in open court that the defendant

is entering the plea "voluntarily." Second, the defendant must have an "understanding of the nature of the charge" to which he is pleading guilty. Third, the defendant must understand "the consequences of the plea." Fourth, the record must show the "factual basis for the plea."[2] Where a guilty plea is not entered voluntarily and intelligently, or without a factual basis, the plea is void because it has been obtained in violation of the accused's due process rights. *See Metheny v. State*, 359 Md. 576, 601 (2000); *McCall v. State*, 9 Md. App. 191, 199 (1970). The court reviews "the validity of the guilty plea as a whole under the 'totality of the circumstances' test." *Metheny*, 359 Md. at 604 n.18.

With respect to the voluntariness of a defendant's guilty plea, the Supreme Court has recognized three constitutional rights involved, of which the defendant must be advised and which he must affirmatively waive. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1968). The first is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964). Second is the right to trial by jury. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Third is the right to confront one's accusers. *Pointer v. Texas*, 380 U.S. 400 (1965). The Supreme Court stated in *Boykin* that a court cannot presume a waiver of these three federal constitutional rights from a silent record. The Court has also noted that a waiver of the three constitutional rights, to be valid under the Due Process Clause, "must be an

[2]As of July 1, 1999, the court must also advise the defendant that if he is not a United States citizen, the entry of the plea may subject him to "deportation, detention, or ineligibility for citizenship." Md. Rule 4-242(e).

intentional relinquishment or abandonment of a known right or privilege." *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

The Court of Appeals has noted that, in addition to the three rights alluded to in *Boykin*, other important constitutional rights are given up when a defendant pleads guilty. These include "the right to insist that the prosecution's proof at trial establish guilt beyond a reasonable doubt," as well as "the Sixth Amendment right of the defendant to present witnesses to testify on his or her behalf," and "the Sixth Amendment right to a speedy and public trial." *Metheny*, 359 Md. at 598 & n.14. The Court of Appeals has also ruled that while the record as a whole must show that a guilty plea was voluntary and intelligent, there need not be a specific on-the-record reference to and waiver of the three *Boykin* rights. *Davis v. State*, 278 Md. 103, 114 (1976).

"Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot truly be voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy*, 394 U.S. at 466. The United States Supreme Court has ruled that a guilty plea is invalid if the defendant enters the plea without knowledge of the crime's elements. *See Bradshaw v. Stumpf*, 545 U.S. 175, 182-83 (2005); *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976). The Court of Special Appeals has also ruled that the failure to explain the elements of an offense makes a guilty plea involuntary. *See Abrams v. State*, 176 Md. App. 600 (2007); *State v. Hicks*, 139 Md. App. 1, 7-8 (2001);

Miller v. State, 32 Md. App. 482, 486, *cert. denied*, 278 Md. 728 (1976), *cert. denied*, 430 U.S. 966 (1977).

The requirement of a factual basis for the guilty plea serves "mainly as a safeguard that the accused not be convicted of a crime that he or she did not commit." *Metheny*, 359 Md. at 602. The Court in *Metheny* further explained that this requirement "is designed to 'protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" *Id.* at 602-03 (quoting *McCarthy*, 394 U.S. at 467). Under the Maryland Rule, "when facts are admitted by the defendant and are not in dispute, the judge need only apply the facts to the legal elements of the crime charged to determine if an adequate factual basis exists." *Id.* at 603.

2. 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, (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 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." *Peterson*, 158 Md. App. at 584 (quoting *Strickland*, 466 U.S. at 694). Prejudice under *Strickland* requires a showing only that "'the particular and unreasonable errors of counsel 'actually had an adverse effect on the defense.'" *Williams*, 326 Md. at 374, 605 A.2d at 106 (quoting *Bowers v. State*, 320 Md. 416, 425 (1990)) (in turn quoting *Strickland*, 466 U.S. at 693).

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 *Williams* court explained that "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. 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).

The Court of Appeals of Maryland has noted that 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*, 371 Md. at 348. 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.
>
> * * *
>
> 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.

Moreover, in the context of a guilty plea, the Supreme Court has held that the voluntariness of the plea depends on whether the advice given by counsel was within the range of competence demanded of attorneys in criminal cases. *See Hill v. Lockhart*, 474 U.S. 52 (1985). In *Hill*, the Supreme Court extended the two-part standard adopted in *Strickland* to guilty plea challenges based on ineffective assistance of counsel. *Id.* at 57. In order to satisfy the second, or "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Id.* at 59.

The Court of Appeals has addressed the adequacy of counsel in the plea bargaining process, noting that a trial attorney performs deficiently if, "while disclosing the plea offer, [he] provides the defendant with incomplete or misleading information with regard to the offer." *Williams*, 326 Md. at 378-79 (collecting cases). Prejudice is determined by consideration of "whether, but for the deficient performance by counsel, there is a substantial possibility that the defendant would have accepted the plea agreement." *Id.* at 381.

In addition to the deficient performance and prejudice standard, courts addressing ineffective assistance of counsel claims often note the sentiment that:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Oken v. State, 343 Md. 256, 283-84 (1996).

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.

B. Issues Presented For Review.

1. The Post Conviction Court Erred in Ruling that the Record of the Guilty Plea Was Not Defective under Maryland Rule 4-242 and the United States Constitution.

The guilty plea record in Mr. Tate's case is deficient in several fundamental ways. First, the plea colloquy fell far short of the requirements under the Rule and the Constitution. The biggest defect in the proceedings relates to the absence of a record showing Mr. Tate's understanding of the offense to which he pleaded guilty. As the language of the indictment shows, the State chose to charge first degree murder in the short form language: "THE GRAND JURY charges that the aforesaid defendant, on or about the aforesaid date, feloniously, wilfully, and or deliberately premeditated malice aforethought did kill and murder Jerry Lee Haines." This legal jargon is virtually indecipherable to a 17-year-old lay person.

Despite the way the charge was brought, nothing was explained on the record to Mr. Tate. There was not even a discussion whether he was pleading guilty to premeditated murder or felony murder, which have very different elements.[3] Indeed, there was no on the record explanation of the crimes or of the elements of the offenses. Under *Lovell* and *Priet*, the court has an obligation to ascertain that the defendant has a basic understanding of the

[3] Further evidence of this confusion is found at sentencing. There, the court remarked: "Did a robbery occur? I doubt if the State could have proved that robbery would have occurred...." (S. 72). Yet, Mr. Tate was charged with armed robbery, attempted armed robbery, robbery, assault with intent to rob, and theft. He may very well have thought that he was pleading guilty to felony murder rather than premeditated murder.

essential substance of the offenses before the plea is accepted. And under *Hicks* and *Stumpf*, the record must show that the elements of the offense were explained to the defendant before the guilty plea is accepted. Because the court did not advise Mr. Tate of the elements of first degree murder–let alone which variety was applicable here–the plea was neither voluntary nor intelligent. *See Stumpf*, 125 S. Ct. at 2405; *Hicks*, 139 Md. App. at 7-8.

The guilty plea record is defective in other ways. Notably absent from the plea record is any reference to whether Mr. Tate understood that he could have entered a plea of not criminally responsible or that the defense of imperfect self-defense might be relevant to his case. Defense counsel informed the court that "some months before the incident in question," Mr. Tate had seen a psychologist or licensed social worker. (T. 8). Rather than explore issues of mental capacity with respect to the taking of the guilty plea, the court merely ordered a psychiatric evaluation in aid of sentencing. (T. 22). Indeed, at sentencing, Dr. Michael Spodak testified that he believed Mr. Tate's "capacity to form specific intent was impaired." (S. 44). This psychiatric opinion, of course, totally undercuts the validity of the plea to first degree murder. Because there was no discussion on the record of Mr. Tate's intent at the time of the incident, or even whether the plea was to premeditated or felony murder, the plea is invalid.

Finally, the court did not make the proper findings under Rule 4-242. There was no finding that the plea was knowingly, intelligently, or voluntarily entered. Nor did the court make a specific finding that the factual proffer satisfied the factual basis for the plea to first

degree murder.[4] Rather, the court merely stated: "I am satisfied – and find him guilty of first degree murder." (T. 20). That one finding is insufficient to sustain a guilty plea. "The issue as to whether a plea is voluntary and intelligent is a matter for the trial court to determine." *Hicks*, 139 Md. App. at 11. Because of the absence of these essential findings, the plea was defectively entered for this reason as well.

The testimony adduced at the post conviction hearing supports this claim. According to Petitioner, Mr. Lantzas never explained to him that there are different kinds and degrees of homicide in Maryland or the requisite elements of those crimes. (PC2. 71-72, 94). Petitioner testified that when Judge Thieme asked him if he had been informed of the charges, he answered affirmatively because, based on his limited understanding, he mistakenly believed he had. (PC2. 90). Petitioner further testified that trial counsel informed him prior to his entering his guilty plea that the judge was going to ask him "a bunch of questions, and all I have to do is answer yes to them," but that counsel never reviewed the questions that the court was likely to ask him. (PC2. 102-103).

Despite this testimony and all of the above defects in the record of the guilty plea, the post conviction court did not grant relief. In large part, this was due to the fact that the post conviction court believed it was not its function to do so. As Judge Becker states:

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[4] One of the court's remarks at sentencing also undermines any confidence a reviewing court would have that there was a sufficient finding relating to the factual basis for the plea. Rather than refer to the factual basis as showing the defendant committed murder by proof beyond a reasonable doubt, the court instead said, "The State got what it could probably prove." (S. 73).

> This Court is not sitting as an appellate court reviewing the errors that the trial judge may have committed or even errors in the record or transcription of the underlying proceedings, but as a reviewing court to determine if there was ineffective assistance of counsel.

Confirmatory & Supplemental Statement of Reasons–Amended Post Conviction Petition at 10-11 [hereinafter "Confirmatory Opinion"]. Thus, in effect, the post conviction court refused to rule on the issue whether the record of the guilty plea was defective. This refusal was erroneous, given that Petitioner had filed a belated application for leave to appeal from his guilty plea and sentence, which application had been denied by the Court of Special Appeals. Given that the denial was done as a mere "read, considered, and denied," there was no adjudication of Petitioner's defective record claims on the merits and, as such, the post conviction court should have ruled on this claim. *See State v. Hernandez*, 344 Md. 721, 728-29 (1997). Had Judge Becker considered the merits of this claim, he would have granted Petitioner a new trial because of the defects in the guilty plea proceeding. For this reason alone, this Court should vacate Petitioner's conviction and grant him a new trial.

2. The Post Conviction Court erred in Ruling that Trial Counsel was Not Ineffective for Failing to Fully Investigate the Case and For Advising Mr. Tate to Plead Guilty to First Degree Murder.

Trial counsel was ineffective for failing to fully investigate the case insofar as Mr. Tate's mens rea was concerned. As shown from the guilty plea and sentencing proceedings, counsel believed the issue was one for sentencing, and not for trial. Thus, counsel did not adequately investigate or know that Mr. Tate's mental state could have reduced the crime of first degree murder to manslaughter under the doctrine of imperfect self-defense. *See State*

v. Faulkner, 301 Md. 482 (1984). Nor did counsel pursue or discuss with Mr. Tate the option of entering a plea of not criminally responsible, which was Mr. Tate's personal decision. *See Treece v. State*, 313 Md. 665, 674 (1988). Defense counsel did not pursue the fact that Mr. Tate had abused steroid drugs in 1991 and 1992. Had defense counsel pursued these factual and legal matters more completely, counsel would not have advised Mr. Tate to plead guilty to first degree murder. Further, had Mr. Tate known about these legal doctrines, there is a reasonable probability that he would not have pleaded guilty to first degree murder. This incomplete and misleading advice with regard to the plea and plea bargain was due to trial counsel's failure to investigate the case fully and prepare for trial. This constitutes deficient performance under *Strickland.* And, as in *Williams v. State*, 326 Md. 367, 382 (1992), "there is at least a 'substantial possibility' that the outcome would have been different." For this reason, too, Mr. Tate is entitled to post conviction relief.

The facts adduced at the post conviction hearing support this claim as well. Lead trial counsel in Mr. Tate's case, George Lantzas, died on November 11, 2006 of lung cancer. (PC1. 9). Mr. Lantzas's co-counsel on the case, Joseph Devlin, testified at the post conviction hearing. According to Mr. Devlin's testimony, he recalled reading a report from Dr. Spodak, a forensic psychiatrist retained by the defense, that indicated that Mr. Tate's capacity to form specific intent was impaired. (PC1. 36). Mr. Devlin had no specific recollection of discussions of an NCR defense, but speculated that "we would have discussed an NCR plea as part of the overall work of this case." PC1. 37). Mr. Devlin stated that

although he had a vague recollection that there was some indication from Mr. Tate regarding steroid use, "it never really became a big part . . . of the overall case." (PC1. 38). With regard to whether counsel ever discussed the defense theory of imperfect self-defense, Mr. Devlin had no specific recollection, but once again speculated that it would have been something that was discussed. (PC1. 38-39).

Petitioner's parents, Rita and Arthur Tate, also testified at the hearing. According to Ms. Tate, about three months prior to Petitioner's arrest, she became increasingly concerned with Brian's mental health. (PC2. 21). According to Petitioner's parents, two doctors who examined Brian Tate, concluded that he did not posses the mens rea to commit first degree murder. (PC2. 34, 62). Based on the conclusion of these doctors, Brian's parents strongly felt that Brian should pursue some sort of mental health defense. (*Id.*). Mr. Lantzas dismissed the idea and said that it would never work. (*Id.*).

Petitioner testified at the hearing that he wished to pursue an NCR defense, but that his counsel advised him that it would not work and rejected the idea. (PC2. 87, 89). Mr. Tate further testified that he began to abuse steroids on a daily basis about seven to eight months before his arrest and that he continued to use up until the day before his arrest, (PC2. 108-109). Mr. Tate testified that he informed his attorneys of this fact and fully discussed it with them. According to Petitioner, Mr. Lantzas never explained to him that there are different kinds and degrees of homicide in Maryland or the requisite elements of those crimes. (PC2. 71-72, 94).

Notwithstanding the facts in the record and the law set forth above, the post conviction court ruled that Petitioner's trial counsel was not ineffective in connection with this claim. See Confirmatory Opinion at 28-37. Based on the authority cited above, this Court should find that trial counsel's performance was deficient and that there is a substantial possibility that Petitioner would not have pleaded guilty to first degree murder but for that deficient performance.

3. The Post Conviction Court Erred in Ruling that Trial Counsel was Not Ineffective for Pressuring Mr. Tate to Plead Guilty and for Permitting Mr. Tate's Family to Pressure Him to Plead Guilty to First Degree Murder.

In addition to the defects evident from the face of the record, Mr. Tate's guilty plea was not voluntary, knowing, and intelligent for other reasons. First, as described above, counsel did not discuss or fully explore a plea of not criminally responsible or an imperfect self-defense defense. Moreover, Mr. Tate was under pressure to plead guilty to first degree murder from his attorneys and family.

Counsel and members of Mr. Tate's family told Mr. Tate that he had no choice but to plead guilty in order to avoid the State's seeking life without the possibility of parole. Mr. Tate and his family were under the erroneous impression that even with a life sentence, Mr. Tate would be paroled after 15 years. This advice from counsel was, of course, wrong. Trial counsel must be aware of relevant law and facts to effectively advise a client, and the mistaken belief about the law or its application constitutes ineffective assistance of counsel. *Williams*, 326 Md. at 378. Moreover, as in *Williams*, *id.* at 382, "there is at least a 'substantial

possibility' that the outcome would have been different." For this reason, too, Mr. Tate is entitled to post conviction relief.

The facts adduced at the post conviction hearing fully supported this claim as well. According to the uncontroverted testimony of Petitioner, Petitioner's parents, and two attorney friends from whom the Tates sought advice, Mr. Lantzas informed all of them, in no uncertain terms, that if Brian proceeded to trial, he would be found guilty and would receive a sentence of life without parole. (PC1. 60, PC2. 21, 42-43, 73, 76). On the other hand, Mr. Lantzas assured them that if Petitioner accepted the State's plea offer, that he would receive a suspended sentence of twenty to thirty years and be released in twelve to fifteen years. (PC1. 60, PC2. 9, 22, 42-43, 73, 76). Edward Jablonski, a seasoned criminal trial attorney, practicing district attorney, and dear friend of Arthur Tate, testified that he recommended to Arthur Tate that Brian take the deal based on Mr. Lantzas's insistence that Brian would be released within twelve years. (PC1. 61-62). Mr. Lantzas spoke directly with Mr. Jablonski regarding the case. Initially, given his experience as a prosecutor and defense attorney, Mr. Jablonski was puzzled by Mr. Lantzas's approach. As Mr. Jablonski testified at the hearing:

> So he had to convince me that pleading to the top count, which is what could happen after a trial, was something that you would want to do, and he kept pushing the 12, the 12 years, he'd get out in 12 years. So that convinced me, and I recommended to the Tate family that they should take this.

(PC1. 62).

Mr. Lantzas also gave the Tates the impression that he had a close personal relationship with Judge Thieme, who would be hearing the case. (PC2. 19-20, 41). Brian's parents testified that Mr. Lantzas was very excited when Judge Thieme took the case because of this relationship. (*Id.*). Mr. Lantzas portrayed his relationship with the presiding judge as providing an advantage to Brian. (PC2. 43-44). This belief, further convinced the Tates that Mr. Lantzas knew best how to proceed before Judge Thieme and that Brian would receive the sentence that Mr. Lantzas claimed. (*Id.*)

Despite Mr. Lantzas assurances to the contrary, Judge Thieme did not suspend any portion of Brian's sentence. Unfortunately, Mr. Lantzas failed to advise Mr. Tate, his parents, or their attorney friends, that with a life sentence, Brian could not be paroled without the Governor's approval. (PC1. 68, PC2. 11, 26, 46, 78). Had they been aware of this critical fact, Mr. and Mrs. Tate and Mr. Jablonski would never have recommended that Brian accept the deal. (PC1. 68, PC2. 26, 46). Brian Tate also testified that had his attorney advised him that he could only be paroled with the approval of the governor, he would not have accepted the deal. (PC2. 78).

Despite the grim predictions of trial counsel, Brian Tate did not want to accept the State's offer. (PC1. 69, PC2. 22, 49, 74). Believing that the State's plea offer was the only means by which they could prevent their child from dying in prison, Mr. and Mrs. Tate threatened their son Brian that they would withdraw all financial and familial support if he did not accept the offer and that he would have no attorney. (PC1. 69, PC2. 22, 27, 48, 74-

75). Confident that his parents would make good on their threats and believing he had no other options, Brian, who was seventeen-years-old at the time, succumbed to the pressure from his attorney and his parents and accepted the State's offer. (PC2. 74-75).

Although the post conviction court acknowledged much, if not all, of the above, it nonetheless denied relief on this ground. See Confirmatory Opinion at 37-64. In so ruling, Judge Becker noted that Petitioner's "decisions were influenced by advice from counsel and his parents' input but not to the extent of being improper, psychologically or legally." *Id.* at 40. In this ruling, Judge Becker erred, both in his factual findings and in his conclusions of law.

4. Trial Counsel was Ineffective At Sentencing.

At sentencing, the court made a series of remarks that substantially undercut the validity of the guilty plea. First, the court mistakenly said that there was no plea bargain in the case. The court also stated that Mr. Tate was not eligible for life without parole in the case. The court stated that robbery could not be proved in the case. Finally, the court undercut the factual basis for the guilty plea by remarking that the State could only "probably prove" its case. These remarks should have been clarified, at the least, or counsel should have moved to withdraw the guilty plea.

The Court's remarks in full are as follows:

> THE COURT: Let me make a couple of comments about some of the letters that I have received – and there have been many. And some of them indicate that the State has made a deal. There wasn't any deal by the State.

> The talk about life without parole, under the facts of this case, Mr. Tate would not be eligible for life without parole. The State didn't give up anything.
>
> The motive behind this crime was not robbery. It was other than robbery. Did a robbery occur? I doubt if the State could have proved that robbery would have occurred, because they would have had to show that Mr. Haynes was alive at the time the wallet was taken, which they may or may not have been able to do. So, it is highly speculative as to whether the State could meet the requirements of any life without parole. So no deals were made. The State didn't give up anything. The State got what it could probably prove.

(S. 72-73). These remarks are extremely troubling, to say the least.

The primary aspect of the plea bargain was the fact that the State agreed to withdraw its life without parole notice in the case. (T. 5). The court was simply wrong that there was "no deal" in the case. The court was further wrong in its belief that Mr. Tate was not eligible for life without parole if the State could not prove a felony murder. That is simply not the law, given that *any* first degree murder qualifies for a sentence of life without the possibility of parole provided proper notice is given. *See Gorge v. State*, 386 Md. 600 (2005). Given these statements, counsel should have moved to withdraw the guilty plea. The failure to do so constitutes ineffective assistance of counsel under *Williams*.

Nonetheless, the post conviction court rejected this claim as well. See Confirmatory Opinion at 64-72. As Judge Becker states: "The failure of Mr. Lantzas to attempt to correct [Judge Thieme's] statements do not, in this Court's judgment under the totality of the circumstance standards applicable in this case, constitute ineffective assistance of counsel." *Id.* at 71. This finding is at odds with the standards required of effective counsel in *Williams*. This is particularly so, given that the post conviction court concluded that the sentencing

judge's statements evidenced "an erroneous or incomplete perception of the facts and/or misstatement of the law applicable to what was involved in Petitioner's overall plea negotiations." *Id.* As such, Petitioner should be granted post conviction relief as to this claim as well.

5. The Cumulative Effect of Trial Counsel's Errors Prejudiced Petitioner's Right to a Fair Trial.

The errors of trial counsel in this case individually and collectively prejudiced the defense. The cumulative effect of the multiple errors prejudiced Petitioner under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Bowers v. State*, 320 Md. 416, 431-37 (1990) (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." 320 Md. 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)).

The post conviction court rejected this claim as well. See Confirmatory Opinion at 86-89. Given the fact that the post conviction court erred in rejecting the four previously discussed claims, this ruling is understandable. This Court, however, should find that the cumulative effect of trial counsel's errors prejudiced Petitioner after examining the individual claims in this case.

IV. CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant the Application and reverse the judgment entered on the post conviction petition denying it, or in the alternative, grant the Application and order further proceedings in accordance with Maryland Rule 8-204(g).

Respectfully submitted,

Gary E. Bair
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Greenbelt, Maryland 20770
301. 220.1570

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of June, 2010, a copy of the foregoing Application for Leave to Appeal from Denial of Petition for Post-Conviction Relief was mailed, postage prepaid, to the Office of the Attorney General, Criminal Appeals Division, 200 Saint Paul Place, Baltimore, Maryland 21202.

Gary E. Bair

CORRECTED

UNREPORTED

IN THE
COURT OF SPECIAL APPEALS
OF MARYLAND

Application for Leave to Appeal

No. 2560

September Term, 2010

Post Conviction

BRIAN ARTHUR TATE

v.

STATE OF MARYLAND

Krauser, C. J.,
Zarnoch,
Hotten,

JJ.

PER CURIAM

Filed: July 24, 2012

The application of Brian Arthur Tate for leave to appeal from a denial of petition for post conviction relief, having been read and considered, is denied.

APPLICATION FOR LEAVE TO APPEAL DENIED.

ANY COSTS TO BE PAID BY APPLICANT.

CA-0-2643

Maryland Relay Service
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MANDATE

Court of Special Appeals

No. 02560, September Term, 2010

Brian Arthur Tate
vs.
State of Maryland

JUDGMENT: July 24, 2012: Application for leave to appeal denied. Any costs to be paid by applicant. Per Curiam filed.

August 20, 2012: Motion for Reconsideration of Application for Leave to Appeal from Order of Three-Judge Sentence Review Panel filed by Applicant.

June 28, 2013: Ordered that a corrected opinion shall be filed; and it is further Ordered that the Motion for Reconsideration be and hereby is denied.

June 28, 2013: Mandate issued.

From the Circuit Court: for **HOWARD COUNTY**
13K060046406

STATEMENT OF COSTS:

Appellant(s):

Lower Court Costs-	60.00
Filing Fee of Appellant-	50.00

CRIMINAL APPEALS DIVISION
RECEIVED
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OFFICE OF
THE ATTORNEY GENERAL

CRIMINAL APPEALS DIVISION
ENTERED
JUL 2 2013
Office of the Attorney General

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this **twenty-eighth** *day of* **June** **2013**

Leslie D. Gradet
Clerk of the Court of Special Appeals

COSTS SHOWN ON THIS MANDATE ARE TO BE SETTLED BETWEEN COUNSEL AND NOT THROUGH THIS OFFICE.