Michael Austin	*	IN THE
V.	*	CIRCUIT COURT
State of Maryland	*	FOR
	*	BALTIMORE CITY
	*	CASE # 17401280-82

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MEMORANDUM OPINION AND ORDER GRANTING MOTION TO REOPEN POST CONVICTION CASE AND GRANTING POST CONVICTION RELIEF

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INTRODUCTION

Michael Austin is currently serving a life sentence for first degree murder. This Motion to Reopen Post Conviction follows Michael Austin's trial, Motion for New Trial, conviction, sentencing, appeal, three Petitions for Post Conviction Relief, a belated appeal permitted following the second Petition, and the respective appeals of each of the three petitions. Such an extensive procedural history hinders Austin's current Motion since the Uniform Post Conviction Procedure Act places various limitations upon a petitioner's ability to continuously mount collateral attacks on his or her sentence and/or conviction. This Court must therefore determine first whether it may consider the merits of Austin's various allegations within his instant Motion to Reopen Post Conviction in light of the statutory limitations upon his ability to seek relief, and if so, whether or not it should grant relief.

The first part of this opinion details the extensive history of this case. It then lists the

allegations currently before this Court, the law applying to the instant Motion, and various factual findings made by this Court in light of the evidence presented at trial and evidence surfacing after the conclusion of Austin's trial and appeal. This Court next considers the three theories offered by Austin in support of his Motion to Reopen Post Conviction. Broadly stated, Austin claims: 1) he is serving an illegal sentence which must be vacated, 2) various constitutional errors were committed during trial warranting post conviction relief, and the merits of these errors may be considered by this Court despite procedural obstacles since no reasonable juror would have convicted Austin if presented with newly discovered and presented evidence now provided by Austin, and 3) he is innocent. With respect to Austin's second theory, this Court will first consider whether each particular allegation of constitutional error faces procedural obstacles, thus preventing further consideration of the issue. If the issue is not estopped by these procedural obstacles, this Court may consider its merits. On the other hand, if the issue has been waived and/or finally litigated, this Court must then determine whether it will invoke its discretion to nevertheless reopen post conviction proceedings with respect to that issue "in the interests of justice." The final portion of this opinion summarizes the holding of this Court and addresses the proper relief for Michael Austin.

HISTORY

Michael Austin was indicted on July 1, 1974 for murder [# 17401280] and for grand larceny [# 17401282]. He was convicted by a jury on March 27, 1975 of murder in the first degree (Count 1) and a handgun violation (Count 2), and in case #17401282, of grand larceny. On May 5, 1975, his post trial motions for a new trial and In Arrest of Judgement were denied and he was sentenced by the trial judge to life imprisonment on Count 1, murder, and to a consecutive 15 years on Count 2, handgun. He was also sentenced to 10 years concurrent with the preceding two convictions for

his conviction in #17401282, grand larceny.

Mr. Austin appealed the convictions, raising four contentions: (1) "that the trial judge gave an unconstitutional instruction to the jury on the burden of proof in a murder case," (2) "that an erroneous jury instruction was given on the subject of eyewitness testimony," (3) "that the trial judge erroneously denied his Motion for a New Trial," and (4) "that he was denied effective assistance of counsel." The Court of Special Appeals affirmed these convictions, describing the offenses as follows:

> *On April 29, 1974, the Crown Food Market was held up at gunpoint by two men. Roy Kellam, a security guard, was shot and killed in the course of the armed robbery. Jackie Robinson, a store employee, who himself was forced to open two cash registers and to turn over well over $100 in bills, identified the appellant as the man who shot and killed Kellam. In addition to his in-trial identification, Robinson had made a pre-trial photographic identification of the appellant. The appellant's defense was that he was not present at the robbery scene but was working that day at the Flynn and Emrich Molding Company.*

Austin v. State, No. 774, unreported (Md. App., filed June 10, 1976).

The appellate court dismissed all of Mr. Austin's contentions. Mr. Austin's first claim, that a burden of proof instruction to the jury that it "'begin with a presumption of second-degree murder' and that the burden was on the State to raise it to first-degree murder just as a reciprocal burden was upon the defendant to lower it to manslaughter" violated the principles of *Mulaney v. Wilbur*, 421 U.S. 684 (1975), and *Evans v. State*, 28 Md. App. 640, 349 A.2d 300 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976), was to no avail. *Austin*, No. 774 at 1. The court found that this "error is no more than academic since there was no legitimate issue of justification, excuse or mitigation generated by the evidence." *Id.* at 2. The court next determined that Austin failed to take exception to the trial court's instruction on the subject of eyewitness identification, thus not preserving this

issue for appellate review. *Id.*[1] As for Mr. Austin's third contention, the court concluded that the eye-witness identification by Jackie Robinson, now deceased, was sufficient evidence and that the trial judge had not erred in refusing to grant a new trial on petitioner's post trial proffer that he could further substantiate his alibi. Finally, the issue of incompetence of counsel never arose before the trial judge. Therefore, the Court of Special Appeals found no ruling on this contention which to review. *Id.* His conviction was affirmed and on September 14, 1976, when the Court of Appeals denied Austin's *Writ of Certiorari.*

Austin then filed his first petition for post conviction relief on June 26, 1978 [No. 3729]. He alleged: 1) denial of effective counsel at trial,[2] 2) improper alibi jury instructions,[3] (3) prosecutorial

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[1]The trial court instructed the jury as follows: "I should explain also a further principle in the law to the effect that the testimony of a single eyewitness to a crime identifying the accused as the person who committed the crime is sufficient to convict if the jury is satisfied beyond a reasonable doubt as to the credibility and the accuracy of such identification testimony." (Trial Transcript at 419-420 [hereinafter "Tr."]) Austin complained that this instruction amounted to "plain error" since "the only identification...significantly differed from (Austin's) actual appearance...(and) under these circumstances giving the jury only a general 'eyewitness' description was misleading." *Brief of Appellant*, at 6.

[2]Austin alleged that his counsel, now deceased, failed to properly prepare for trial, to object to the introduction of inadmissible and prejudicial evidence, to interview or summons witnesses on behalf of Austin, to object to improper jury instructions, and to object to improper remarks by the State's Attorney. He further believed that his counsel improperly stipulated to Austin's workday records on the date of the crime and discredited his own witnesses.

[3]The court instructed the jury as follows: "Further there is a principle of law that I should advise you on. That has to do with what is referred to as alibi testimony or testimony concerning an alibi defense. The term alibi is a perfectly proper one. I don't want you to get any improper connotation from the use of that word. It is a perfectly proper and appropriate word in the criminal law in which a person, the accused, produces evidence to the effect that he was somewhere else at the time the alleged crime was committed and therefore he could not have committed it. You have heard evidence along that line in this case. You are instructed in an advisory way if the evidence with respect to the Defendant's whereabouts during the commission of this offense when taken into consideration with all the other evidence, including the evidence offered by the State, if that evidence regarding the Defendant's whereabouts raises a reasonable doubt in your minds as to his guilt, then you must find him not guilty, because I told you if there is any reasonable doubt as to his guilt, then the accused is entitled to be given the benefit of that reasonable doubt." (Tr. at 420-21).

misconduct,[4] and (4) the double jeopardy consequence of his conviction and sentence for larceny. The Court [hereafter "first post conviction court"] denied relief on November 2, 1978, except for the 15 year concurrent larceny sentence which it vacated.[5]

The court rejected the underlying claims regarding denial of effective assistance of counsel at trial. Austin's complaints about counsel's failure to properly investigate and prepare for trial and failure to object to inadmissible and prejudicial evidence amounted to "bald assertions" without specification, removing them from the scope of post conviction relief. (First post conviction opinion, at 4). The alleged improper stipulations did not warrant relief in the absence of an allegation of coercion. Mr. Austin fell short of meeting his burden of demonstrating delinquent trial counsel. *Id.* Counsel's failure to interview or summons witnesses on behalf of Austin also failed to amount to a valid complaint for several reasons. First, the first post conviction court concluded, the unreported opinion of the Court of Special Appeals, No. 774, *supra*, supported the trial judge's conclusion that the testimony of Mr. Kilduff, Austin's Personnel Manager, regarding the day of the crimes could not have added anything to the time card itself, a copy of which had been introduced into evidence. Also, the first post conviction court believed that Austin's attorney, Mr. James McAllister, wrote a

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[4]Austin asserted that the State's Attorney made improper statements in his summation to the jury regarding: 1) Austin's alibi and related time card, 2) Austin's own defense counsel's characterization of Austin as a liar, and 3) the alleged accomplice Horace Herbert.

[5]As to this contention, the post conviction court relied upon *Frye v. State*, 37 Md. App. 476, 378 A.2d 155 (1977), and interpreted as thus: "When there is sufficient evidence of both a premeditated and a felony murder, the trial judge should instruct the jury to indicate specifically under which theory its verdict is based, where there is a finding of first degree murder...If the jury's verdict was based on a felony murder, a guilty verdict upon the underlying felony would merge into the murder, precluding the imposition of another sentence based on the underlying felony. Without such an instruction, this Court cannot determine under which theory the jury returned its verdict and will resolve the doubt in favor of Petitioner. Therefore, IT IS this 2nd day of November, 1978, ORDERED by the Criminal Court of Baltimore that Michael Austin's fifteen-year concurrent sentence for the larceny conviction BE VACATED but that the petition for post conviction relief in all other respects BE and the same is hereby DENIED." (First post conviction opinion, at 7) (emphasis in original).

letter to Austin's supervisor, Mr. Chinchilla.[6] "The rationale for the letter instead of a summons was to avoid the possibility of adverse consequences of a court summons." *Id.* at 4. The court recognized the propriety of written communications to defense witnesses instead of a formal summons as an appropriate trial tactic. Finally, several witnesses did testify on Mr. Austin's behalf, and the trial transcript records Austin's stated satisfaction that Mr. McAllister "summoned all of the witnesses (he) wanted (him) to bring in to testify in (his) behalf." *Id.* at 5 (citing Tr. at 334-335).[7]

The first post conviction court dismissed Austin's other three allegations of ineffective counsel as well, finding little substance in any of the claims. The court found counsel's failure to object to the "alibi" jury instruction baseless, determining that the instruction did not include language placing the burden of proof on the defendant,[8] which distinguished Austin's alibi instruction from the instruction overturned in *State v. Grady,* 276 Md. 178, 345 A.2d 436 (1975).[9] Considering Austin's counsel's failure to object to inappropriate prosecutorial remarks, the court

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[6]The content of this letter is not in the Record, but it is supposed that it invited him to testify. He did not testify, for reasons unknown.

[7]Mr. Austin qualified this statement, however, when he also said that there "were some other witnesses but they couldn't make it I guess." However, he then agreed when Mr. McAllister stated that "we have discussed that too, have we not, that the other witnesses testimony would be, this is only as a proffer, would be cumulative as to the fact that they only worked there and perhaps they couldn't remember the same day as perhaps the other two witnesses could, isn't that correct?" (Tr. 335). During trial, the defense called several witnesses besides Michael Austin. George Chamberlin, a co-worker of Austin, testified about the clothing he and Austin wore at work, the process of removing this clothing, punching out, and showering at the end of the work day, and to the fact that he could not recall whether Austin worked on April 29, 1974. (See Tr. 239-79). Curtis McTeer, another co-worker of Austin, also testified to this effect. (See Tr. 279-90). Finally, Ellen Walker, the woman with whom Austin lived at the time of the crimes, testified that she attempted to retrieve Austin's time card from April 29, 1974, but could only obtain a photostat copy of the card. (See Tr. 290-301).

[8]See n.3, *supra*, quoting the "alibi" jury instruction at issue.

[9]In *Grady*, the court required the Defendant to "conclusively" prove an alibi, which was "misleading, ambiguous and confusing" to the jury. 276 Md. at 185, 345 A.2d at 440.

found no impropriety in the statements.[10] The State's Attorney did not declare that Austin's alibi defense was a fiction manufactured by the defense counsel as prohibited in *Reidy v. State*, 8 Md. App. 169, 259 A.2d 66 (1969). Furthermore, since both sides stipulated to the time card, Attorney McAllister's decision not to object to remarks concerning this evidence does not amount to incompetency of counsel. Finally, the claim that defense counsel discredited his own witnesses was "patently vaccuous." (First post conviction opinion, at 6). As mentioned above, the first post conviction court focused on *Grady* when dealing with the trial court's alibi instruction.[11] Even when the court assumed, *arguendo*, the defectiveness of this instruction, it found no basis for post conviction relief because *"Grady* did not create new law with respect to a defective alibi defense [instruction] not objected to at trial within the meaning of Maryland Annotated Code, Art. 27, §645A(d)." *Id.* at 3. This portion of the Maryland Code, Art. 27, §645A(d), provides relief when standards not previously recognized are imposed upon the State's trial courts.[12] According to the first post conviction court, the State's burden to prove every element of a crime beyond a reasonable doubt had been well established at the time of his trial, and as mentioned above, the language of the

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[10]Austin complained about two statements by the State's Attorney at trial. The State's Attorney said "we stipulated, the State trying to be fair, stipulated that that time card was punched for that day. Can't tell what the times are. But I ask you why does he get up here and try to convince you that the mere presence of that time card proves that Michael Austin couldn't have committed the robbery and murder when common sense tells you it proves no such thing. Because he's got to try to persuade you in any way that he can because he knows his client is guilty, he called him a liar himself. He says to you the State made a big issue of why they never subpoenaed in the time cards. Well as of yesterday it was determined that those time cards for that week cannot be located. But he's known about this. The State had no way of knowing what Michael Austin's defense was going to be until he got on that stand and testified." (Tr. 476). The State's Attorney also stated that "defense counsel himself has told you that he himself has accused his client of being a liar. He stood here and argued and told you he accused Michael Austin of being a liar and I ask you why? What happens in the course of time he has represented Michael Austin in this case that he himself has accused his client of being a liar. Think about that." (Tr. 468).

[11]See n.3, *supra*, quoting the "alibi" jury instruction at issue.

[12]This provision of post conviction law will be extensively dealt with below when this Court considers Mr. Austin's current contention with regard to the trial court's jury instructions.

alibi instruction did not shift this burden. (First post conviction opinion, at 3). Moreover, it was found, petitioner failed to demonstrate any special circumstances sufficient to rebut the presumption that he waived the jury instruction issue by failing to object to the error at trial. *See* Md. Ann. Code art. 27, § 645A(c).

The first post conviction court also denied relief on the contention of prosecutorial misconduct. The court focused on the prosecution's statements regarding Austin's alibi and timecard.[13] As previously mentioned, *Reidy* did not apply since the State's attorney did not claim that Austin's alibi defense was a manufactured fiction. Furthermore, that court found that the State's Attorney's summation to the jury only fell "partially out of context." (First post conviction opinion, at 7).[14] On December 8, 1978, the Court of Special Appeals denied Mr. Austin's application for leave to appeal his first petition for post conviction relief. *Austin v. State*, No. 174, unreported (Md. App., filed Dec. 8, 1978).[15]

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[13]See n.10 *supra*.

[14]The court addressed the issue of prosecutorial misconduct as follows: "Quite noticeably the State's Attorney, in the case sub judice, makes no statement that Defendant's alibi defense was a fiction manufactured by the defense counsel...Furthermore, the second tier of *Reidy*, that the Defendant himself committed perjury by raising the alibi defense, even though not raised as an issue sub judice, would be cured by *Pierce v. State*, 39 Md. App. 654 (1977). There the Court held that when an accused rests an alibi on an absent witness, it (is) not improper to argue the reasonableness of expecting the accused to justify or explain the absence. The analogy to our case is that instead of a missing witness, there is the matter of Defendant's missing time card. However, this Court need not go that far. The time card [apparently an illegible copy] was stipulated to by both attorneys and allowed in as evidence. Therefore, Attorney McAllister's reticence to object to these remarks does not constitute incompetent counsel as he initially injected the alibi defense, *Pierce, supra*, and composed the language which the State's Attorney only recanted to the jury partially out of context." (First post conviction opinion, at 6-7).

[15]The appellate court's review of the incompetency of counsel claim lacked precision in an important respect. The opinion states: "The opinion of the hearing judge considered each of the applicant's contentions concerning what his trial counsel had allegedly failed to do. The hearing judge specifically noted that the applicant had been asked at trial whether or not there were additional witnesses he wished summoned and the applicant had indicated that there were not. Moreover the applicant was asked if he was satisfied with the services of his trial counsel and replied that he was." However, it does not appear to be literally so that each of the ineffective counsel claims was "considered" by the hearing [post conviction] judge, at least not on the merits. The first post conviction judge concluded as to alleged failures of counsel to "properly investigate and prepare for trial and failure to object to inadmissible and prejudicial evidence, (that they) are bald assertions of denial of rights without specification. As

The next procedural action occurred on or about September 13, 1991, when Austin filed a second post conviction petition in this Court [hereafter "second post conviction court"]. This petition stated that he was entitled to relief for the following reasons:

1. "That Petitioner's failure to raise certain issues in his [trial] appeal does not preclude him from obtaining post conviction relief, as those issues involve his fundamental rights and are not waivable, or in the alternative, special circumstances exist to excuse such failure to raise;"

2. "That Petitioner was denied the effective assistance of counsel at the appellate level;"[16]

3. "That the actions of the Assistant State's Attorney at Petitioner's trial amounted to prosecutorial misconduct;"[17]

4. "That the violation of Maryland Discovery Rules was substantial enough to

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such they are not within the scope of post conviction relief." Referring to an alleged failure to procure Austin's Personnel Manager and Supervisor, the post conviction court relied on the trial judge's conclusion that "this person could not have added anything significant to the time card itself." *Austin,* No. 174, at 4.

[16]Austin alleged that appellate counsel failed "to specifically raise the egregious misconduct of the prosecutor at trial."

[17]The misconduct in question here involves the prosecutor's apparent disregard of explicit direction from the trial judge to make no reference to "Horace Herbert." Austin also mentioned the prosecutor's alleged disregard of a sequestration order by conducting a conversation with a police officer during a luncheon break, during which the officer drew the prosecutor's attention to a critical piece of evidence: a calling card with the name "Horace Herbert" written thereon. The police officer as a rebuttal witness, introduced that card following Austin's denial of any knowledge of a Horace Herbert. It is likely to have had some corroborative value in petitioner's conviction. Prior to the introduction of this evidence, the trial court detailed the events surrounding the calling card: "The discussion (between Det. Ellwood and Mr. Wase during the trial break) had to do with as I understand the Detective calling to the attention of the Assistant State's Attorney the piece of paper. Actually it has been referenced to as a calling card which had been taken from Mr. Austin when he was arrested. Now what we are all after is to try to be fair and try this case fairly and properly without any tricks or anything of that nature. I say that because I don't see any effort to trick anybody here and the reason I say that is that the evidence envelope which has been referred to and has been handled by everyone including the jury, the jury got this evidence envelope when it reviewed the eye glasses. In fact the red tab indicating this as State's Exhibit #7 is on the evidence envelope. On the front of this evidence envelope it's as big as life, a description of the property, one, a pair of sun glasses, one calling card and there is a pink tab stapled to this evidence envelope which bears the same inscription, that is one pair of sun glasses and one calling card. Now I'm saying this because I don't think that in any way there was any effort to hide this by the State because even if they tried to they couldn't. It's written here perfectly plainly. It's just nobody looked in the evidence envelope to bring this calling card out. It has now been brought out simply because Detective Ellwood brought it to the State's attention." (Tr. 358).

warrant a new trial for petitioner;"[18]

5. "That Petitioner is entitled to post conviction relief as a matter of fundamental fairness;"

6. "And for such other and further relief as law and justice may require."

On or about April 30, 1992, Austin filed a Supplemental Petition for Post Conviction Relief and a Motion for New Trial. The Supplemental Petition for Post Conviction Relief raised the following contentions:

1. "That the Petitioner's trial attorney failed to interview Eric Komitzsky prior to the Defendant's trial."

2. "That the Petitioner's trial attorney knew or should have known that the testimony of Eric Komitzsky could have exonerated his client."

3. "That the Petitioner's trial attorney failed to call Eric Komitzsky as a witness on behalf of the Petitioner."

4. "That Petitioner was denied the effective assistance of trial counsel."

5. "That Petitioner is entitled to Post Conviction Relief as a matter of fundamental fairness."

The second Motion for New Trial (the first occurring after trial) raised these issues:

1. "That Defendant stood trial and was convicted on March 27, 1975 by a Baltimore City Jury of murdering a security guard at the Crown Food Market in Baltimore City."

2. "That Eric Komitzsky was working at the Crown Food Market and witnessed the killing from a distance of a few feet."

3. "That prior to the Defendant's trial, as a part of the police investigation into this homicide, the Baltimore City Police Department showed Eric Komitzsky photographs which, among other photographs, included a photograph of the

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[18]This allegedly prejudicial error involved the Horace Herbert card which was introduced as evidence at trial. More specifically, Austin alleged that the State's failure to produce it in pre-trial discovery amounted to a violation of Maryland Discovery Rule 4-263 (Maryland Rule 728 prior to, and during, Austin's trial).

Defendant."

4. "That at that showing Eric Komitzsky failed to identify or pick out the Defendant's photographs from the photo array."

5. "That these photographs have always been in the exclusive possession and control of the State and that this pretrial photographic showing to Eric Komitzsky was never disclosed to Defendant's counsel prior to the Defendant's trial even though it was exculpatory and cast doubt on the Defendant's guilt."

6. "That within hours of the killing, Eric Komitzsky, along with other witnesses, rendered the description of the shooter to be 5 foot 8 inches tall weighing 150-162 pounds, light complected and short."

7. "That the Defendant Michael Austin is 6 foot 5 inches tall and has weighed in excess of 200 pounds for the past 18 years."

8. "That Eric Komitzsky was never called to testify at Michael Austin's trial and that Michael Austin's trial attorney is now deceased."

9. "That on April 6, 1992 Eric Komitzsky was present in the Circuit Court for Baltimore City, Part 16, at which time the Defendant, Michael Austin, was brought into the courtroom from the lockup."

10. "That on April 6, 1992, upon seeing the Defendant, Eric Komitzsky immediately and unequivocally stated that Michael Austin was not the individual who shot and killed the security guard."[19]

11. "That on April 6, 1992, Eric Komitzsky revealed for the first time that in addition to not identifying the Defendant from any photographs which he has ever been shown or seen, the fact that the Defendant is nearly a foot taller than the killer precludes the possibility that Michael Austin perpetrated the killing in 1975."

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[19]The post conviction hearing for Austin's second Petition was scheduled on April 6, 1992 in the Circuit Court for Baltimore City. The hearing commenced on that date and both Michael Austin and Eric Komitzsky were present in the courtroom. However, the State's Attorney could not attend since she was engaged in a trial. Therefore, the court postponed the hearing until June 5, 1992. Although Eric Komitzsky did not ultimately testify until September 22, 1992, he submitted an affidavit on April 29, 1992, stating that "I was present in Circuit Court for Baltimore City on April 6, 1992 when Michael Austin, the individual who was tried and convicted for the killing, was brought into the courtroom. I was never called to testify at Michael Austin's trial. If I had been called or if called to testify today, my unequivocal testimony is that Michael Austin was not the killer of Roy Kellam."

12. "That but for Defendants counsel's unprofessional error in unreasonably failing to either interview or call Eric Komitzsky as a witness on behalf of the Defendant there is the reasonable probability that the result of the proceeding would have been different."

13. "That calling Eric Komitzsky as a witness for the defense would have impacted upon this case so as to influence the outcome of this case."

14. "That the testimony of Eric Komitzsky would have provided the fact finders in this case with a reasonable doubt as to the Defendant's guilt."

In response to Austin's second Petition for Post Conviction Relief, Supplemental Post Conviction Petition, and Motion for New Trial, the second post conviction court ordered limited relief on June 8, 1993, permitting a belated appeal on the discovery issue relating to the business card, but denying relief on all other issues. The second post conviction court addressed the petitioner's contentions in detail and carefully explained the court's rationale for denying relief.

The court first considered the possibility of a *Brady* violation in light of Austin's Motion for a New Trial. Austin maintained that the State failed to provide him with evidence of the exculpatory non-identification of Austin by Eric Komitzsky. Although the court explained that at first glance, a *Brady* violation seemed apparent, it analyzed the issue with reference to all of the circumstances of the case. (Second post conviction opinion at 9).

Prior to Austin's trial, Eric Komitzsky "had viewed photographs on at least two occasions and could not positively identify Mr. Austin and...he did not identify Mr. Austin from a line-up." *Id.* at 7. Excerpts from the homicide file revealed a communication between Det. Ellwood and his superior, during which Ellwood commented that "Eric Komitzsky stated that (a) photograph of Michael Austin resembled the man he saw enter and rob the store and shot McKellum (sic)." *Id.* at 10. However, the homicide file also revealed that during a police conducted line-up attended by

Mr. McAllister, Eric Komitzsky failed to identify Austin. McAllister's attendance during this line-up implies the "fact (McAllister) knew Eric Komitzsky did not identify Mr. Austin." *Id.* at 9.

Considering the aforementioned evidence from the homicide file, the second post conviction court noted that even though "an inference may be drawn that Mr. McAllister knew of the (photographic) non-identification," McAllister "made no issue of it because it was qualified (by the statement by Ellwood)." *Id.* at 10-11. The second post conviction court then emphasized that "the Petitioner bears the burden of proof, not the State," and "from the totality of the evidence, the court finds that it was more likely than not that the Petitioner, through counsel, had been advised of the status of the photo identification, regardless of the State's response to discovery." *Id.* at 11.[20] Consequently, the court found that Austin failed to sustain his burden of proof regarding his *Brady* claim.

The court next attended to a closely related issue relying upon the same evidence, Austin's claim that "his attorney's failure to interview or call Eric Komitzsky as a witness constituted unprofessional conduct and did not meet Constitutional standards." (Second post conviction opinion, at 11). The second post conviction court noted once again that the police homicide file contained a memo from Det. John Ellwood to Capt. James J. Cadden indicating that Eric Komitzsky initially stated that a photograph of Austin resembled the assailant, though he was not positive. *Id.* at 13. From this fact, and the other evidence regarding identifications and non-identifications by Komitzsky discussed above, the second post conviction court drew these conclusions regarding

[20]The court also considered the "informal manner in which discovery was conducted," Mr.McAllister's failure to object to the lack of formal disclosure about Komitzsky's non-identification, and McAllister's extensive trial experience to infer that McAllister knew about the photographic non-identification and chose not to call Eric Komitzsky as a witness.

McAllister's defense of Austin:

> *Had Eric Komitzsky been called to the stand as a defense witness he would have been subject to cross-examination by the State. Inasmuch as identification was at issue he would most certainly have been cross-examined about the photograph of Mr. Austin resembling the assailant. It must be remembered that the descriptions given of the shooter was of an individual 5'8" 150-162 lbs. Mr. Austin is over 6'4" and at the time weighed in excess of 200 lbs. It is feasible to determine that Mr. McAllister made a calculated decision to limit any identification or potential identification of his client as much as possible in light of the over-all circumstances. The discrepancy in the description of the shooter could certainly support a conclusion he was confident about his case and did not want to run the risk of Mr. Komitzsky suggesting the face in the photograph resembled Mr. Austin. Had Mr. McAllister known of the statement by Mr. Komitzsky that the photo resembled Mr. Austin his course of action is easy to understand...It is possible counsel deliberately avoided Eric Komitzsky and the possibility of his having an effect on the jury since he knew the State was not going to call him, and this the Petitioner has not disproven. The test for competency is whether under all the circumstances of the particular case, counsel was so incompetent that the accused was not afforded genuine and effective legal representation...and this the Petitioner has not sustained...The appellate courts in this jurisdiction have ruled on many occasions that when an attorney elects not to call a witness for certain reasons, that decision is a matter of trial tactics and not grounds for Post Conviction relief...Mr. McAllister may have elected not to call Eric Komitzsky for fear of what he may have testified to on cross-examination. As indicated, he may have been aware of Komitzsky's comment regarding Mr. Austin's photo and his resembling the assailant. Were this the case, it would be a matter of trial strategy, which cannot be the basis of Post Conviction relief.*

Id. at 14-15 (citations omitted). Consequently, the court ruled that McAllister did not provide deficient representation for Austin during trial, but employed proper trial tactics. Furthermore, since Mr. Austin raised several allegations of incompetency of counsel in his first petition for post conviction relief, the post conviction court determined that Austin waived any additional allegations of ineffective counsel. *Id.* at 15.

At this point, the second post conviction court turned its attention to Austin's allegation that the State violated a discovery rule when it produced a calling card bearing the name "Horace Herbert" at trial. Det. Ellwood advised Mr. Wase of the existence of this card in evidence following

the testimony of Ellwood and Austin. Failure of the State to disclose this item to the defense prior to trial amounted to a clear violation of Maryland Rule 728 since "the state is charged with knowledge of all relevant evidence in the possession of its agents." *Id.* at 17.[21]

While recognizing this violation of the rules of discovery, the post conviction court denied relief on two of Austin's claims based on this issue. First, "from his own testimony, whatever error was committed by the trial court [in relation to the discovery rule violation] must be deemed harmless." *Id.* at 26.[22] Austin was "the only person able to shed direct light on its impact (yet) discounted its importance." *Id.* Second, Austin claimed that the actions of the State pertaining to the calling card amounted to prosecutorial misconduct.[23] However, the court did not "consider the

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[21]Maryland Rule 728, entitled "Discovery and Inspection," governed discovery issues in 1975, and provided that "upon motion of a defendant and upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable, the Court, at any time after indictment, may order the State's Attorney" to "produce and permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects obtained from or belonging to the defendant or obtained from others by seizure or by process." Petitioner made a request under this rule on August 19, 1974, and the State granted such access. The response also stated that "at the present time, there is no information known to the state which is exculpatory, in any manner, to the defendant."

[22]The second post conviction court pointed out that "in no uncertain terms, Mr. Austin (made) it abundantly clear that the calling card would have had no bearing on his decision to testify, nor his testimony It must also be remembered, the defense of this case was based upon his being at work at the time of this incident. He repeatedly denied any knowledge of a Horace Herbert and testified definitively he would have testified as he did." (Second post conviction opinion, at 25).

[23] Austin cited the State's Attorney's hallway conference with Det. Ellwood about the calling card during a trial break, alleging a violation of the sequestration rule during the trial. *See* n.17, *supra*. Furthermore, Austin complained about Mr. Wase's comments to the jury during his closing argument regarding Horace Herbert since the trial court ordered all reference to Herbert stricken. The following dialogue took place (Tr. 478-79):

Mr. Wase:	But on top of all of that the one thing that really proves the State's case beyond any doubt in my mind, I would think in any reasonable mind, is this card (the calling card bearing Herbert's name).
Mr. McAllister:	Objection Your Honor.
Mr. Wase:	State's Exhibit #9 is it?
The Court:	Yes. The card is evidence.
Mr. Wase:	State's Exhibit #9. This card that Michael Austin had in his pocket when he's arrested. Now he testified from the witness stand that he never heard of the other person described by Jackie Robinson who you heard is Horace Herbert.
Mr. McAllister:	Objection, objection. That's not in evidence.

allegation of prosecutorial misconduct to attain the level of a guaranteed fundamental right." (Second post conviction opinion, at 27) (citing *Wyche v. State*, 53 Md. App. 403, 554 A.2d 378 (1983)). Consequently, Austin waived any issue of prosecutorial misconduct by not raising it in his appeal to the Court of Special Appeals. Moreover, the first post conviction court had already denied Austin relief for prosecutorial misconduct after Austin raised the issue in his first Petition for Post Conviction Relief.

Finally, the second post conviction court addressed Austin's contention that his appellate counsel inadequately served his needs, examining three alleged failures: (1) to raise the State's failure to disclose the negative photographic identification, (2) to argue the prosecutor's alleged misconduct, and (3) to raise the State's failure to make pre-trial disclosure of the calling card bearing Horace Herbert's name. The court dismissed the first two contentions because Austin failed to demonstrate that McAllister was unaware of the negative identification and the court could conclude that he had a reasonable tactical purpose in not making arguing this point. The court also did not find an adequate claim of prosecutorial misconduct upon which Petitioner's appellate counsel could have argued a proper claim. (Second post conviction opinion, at 30).

The Court:	I struck down all the evidence concerning Horace Herbert. I'll sustain the objection.
Mr. Wase:	Very well Your Honor.
The Court:	The jury will ignore that argument.
Mr. Wase:	Very well. The defendant's testimony regarding Horace Herbert is in evidence ladies and gentlemen. He testified he never heard of anyone named Horace Herbert. He forgot about this card that was taken from him the day he was arrested. Just a little card, little piece of paper. On the back of it Horace Herbert whom the defendant claims to have never heard of. Now if anything corroborates the testimony of Jackie Robinson and convinces you beyond a reasonable doubt that Michael Austin is the killer and guilty of first degree murder and that Jackie Robinson who testified before you certainly is telling you the truth and was certainly taking no chances on being mistaken and knows exactly who he saw that day is this card that the defendant had with him with the name Horrace Herbert on it. Horace Herbert whom I submit to you is the other man in this murder and robbery.

However, the court turned once again to the calling card bearing the name of Horace Herbert, this time considering it as a matter of prosecutorial misconduct and its effect upon Austin's Sixth Amendment rights. The court found merit in the issue in this context. Since the card was in police custody, the State had knowledge of its existence, and the failure to disclose this item amounted to a clear violation of Maryland Rule 728. Considering that a defendant retains a fundamental right, one which cannot be waived by silence, to adequate assistance of counsel in a direct appeal, and that "adequate perusal of the record would have disclosed the discovery violation and the fact that it was properly preserved," this omission by Austin's appellate counsel resulted in a breach of Austin's Sixth Amendment right of adequate representation. *Id.* at 33.

It was this final facet of the calling card matter which prompted the second post conviction court to grant Austin leave to file a belated appeal regarding the admissibility of the calling card introduced in the underlying trial as State's Exhibit #9. However, he first filed an Application for Leave to Appeal to the Court of Special Appeals on June 30, 1993, seeking additional relief based on errors during the Post Conviction and Motion for New Trial proceedings before the second post conviction court. The Court of Special Appeals denied this application without comment in an unreported opinion on December 23, 1993. *Austin v. State*, No. 60, unreported (Md. App., filed Dec. 23, 1993). Thereafter, Austin filed a belated appeal pursuant to the relief granted by the second post conviction court, which the Court of Special Appeals, *per curiam*, also denied on April 25, 1994. *Austin v. State*, No. 716, unreported (Md. App., filed Apr. 25, 1994).

The Court of Special Appeals determined that the discovery issue warranted no relief for Austin. Not only did the State meet its burden to produce materials "when it gave an open invitation to defense counsel to come and inspect and/or copy and photograph the materials taken from the

defendant," including the calling card, but "a review of the discovery process...ma(de) clear the point made by the trial judge that there was simply no unfairness in the discovery process." *Id.* at 7.

On September 28, 1995, Michael Austin filed a third Petition for Post Conviction Relief in this Court [hereafter "third post conviction court"], presenting a single issue for consideration. Petitioner framed the issue as follows:

> *The Petitioner was convicted under a theory of felony murder. The only underlying charged felony submitted to the jury was the charge of larceny from Mr. Komitzsky. None of the enumerated felonies set forth in Article 27, Section 410 [of the Code] were submitted to the jury and there was never a factual determination as to whether the Petitioner committed any other underlying felony sufficient to establish his conviction. The only underlying or related felony submitted to the jury was vacated [by the first post conviction court] on November 2, 1978.*
>
> *The contention...is that the felony murder conviction cannot stand, because the change* [sic-charge] *involving Mr. Komitzsky was vacated and not merged on November 2, 1978. It appears that the only basis for a finding of felony murder involved the taking of the property from Mr. Komitzsky. Once that conviction was vacated,* [sic] *Petitioner contends that this felony murder conviction must also fall and Petitioner's criminal liability is limited to second degree murder.*[24]

The third post conviction court denied relief on this claim on January 3, 1996, finding that the first post conviction court erred in vacating the sentence for larceny. The court reasoned that since larceny is not among the felonies upon which a charge of felony murder may rest, the larceny conviction could not have been an element of or merged with the murder conviction.[25] However, since the jury found Austin guilty of first degree murder and of larceny:

> *It solved the problem with which the first post conviction court grappled: that the court could not determine under which theory the jury verdict was reached. In this*

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[24]Petitioner cited *Newton v. State*, 280 Md. 260, 373 A.2d 262 (1977), *State v. Frye*, 283 Md. App. 709, 393 A.2d 1372 (1977), and *Parker v. State*, 7 Md. App. 167, 254 A.2d 281 (1969), for this proposition.

[25]These felonies are "rape in any degree, sexual offense in the first or second degree, sodomy, mayhem, robbery, burglary, kidnapping...storehouse breaking...or in the escape or attempt to escape from the Maryland Penitentiary." Md. Ann. Code, Art. 27, § 410.

case, there is no doubt that the jury found Petitioner guilty of premeditated murder and not felony murder, because it did not find Petitioner guilty of a felony upon which felony murder could be based. Therefore, premeditated murder must have been the theory for its first degree murder conviction. Nevertheless, the sentence for the larceny conviction has already been vacated by the first Post Conviction Court and cannot be reinstated by this Court. The fact that the sentence for the larceny conviction was vacated does not affect the murder conviction. The conviction for first degree murder was not based on the larceny conviction, nor was it legally dependant upon it. Therefore, the conviction for first degree murder must stand.

(Third post conviction opinion, at 4).[26]

On January 17, 1996, Austin sought leave to appeal this decision, claiming once again that he was convicted of felony murder. This Application for Leave to Appeal met a similar fate when the Court of Appeals, *per curiam*, denied it in an unreported opinion on March 4, 1996. *Austin v. State*, No. 183, unreported (Md. App., filed Mar. 4, 1996).[27]

On March 23, 2001, Mr. Austin filed the petition which this Court now considers, a Motion to Reopen Post Conviction, with the Circuit Court for Baltimore City.[28]

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[26]This excerpt from the third post conviction court's opinion refers to the first post conviction court's opinion. Addressing the larceny issue, the first post conviction court stated: "Allegation No. 4 contends that Petitioner's larceny conviction merged with his first degree murder conviction under *Newton v. State*. Although questions remain about the implementation of the *Newton* merger theory, this Court will follow the guidelines established in *Frye v. State*. When there is sufficient evidence of both a premeditated and felony murder, the trial Judge should instruct the jury to indicate specifically under which theory its verdict is based, where there is a finding of first degree murder. In *Frye*, the Court of Special Appeals reasoned that in any felony murder situation there would be some independent evidence of premeditation. If the jury's verdict was based on a felony murder, a guilty verdict upon the underlying felony would merge into the murder, precluding the imposition of another sentence based on the underlying felony. Without such an instruction, this Court cannot determine under which theory the jury returned its verdict and will resolve the doubt in favor of Petitioner." (First post conviction opinion, at 7).

[27]The opinion, in its entirety, stated that "Michael Austin has filed an application for leave to appeal from a denial of post conviction relief. In seeking leave to appeal, applicant asserts that his first degree murder conviction should be vacated because a conviction for larceny that was also returned against him has been vacated. Upon our consideration of the record and applicable law, we deny the application for lack of merit." *Austin*, No. 183.

[28]Austin failed to expressly designate, from among his three prior post conviction petitions, which particular post conviction proceeding he seeks to re-open. This Court regards Austin's latest Petition with the belief that, despite three separate prior petitions, for the purposes of the Uniform Post Conviction Procedure Act, they may be considered as one post conviction remedy. In the alternative, there is no statutory reason why a court in a re-opening cannot, or should not, consider the full post conviction history.

POST CONVICTION REMEDIES

Petitioner proposes to proceed along two separate tracks of post conviction jurisprudence, one grounded in Maryland's traditional post conviction law and the other drawing on "actual innocence" principles found in certain other state and federal decisions.

The first track involves the statutory post conviction procedure in the Uniform Post Conviction Procedure Act (UPCPA), Md. Ann. Code Art. 27, § 645A. The UPCPA is a legislatively defined remedy:

> (a) *Right to institute proceeding to set aside or correct sentence; time of filing initial proceeding* – (1) Subject to the provisions of paragraphs (2) and (3) of this subsection, any person convicted of a crime and either incarcerated under sentence of death or imprisonment or on parole or probation, including any person confined or on parole or probation as a result of a proceeding before the District Court who claims that the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error which would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy, may institute a proceeding under this subtitle in the circuit court for the county to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction, or in any other proceeding that the petitioner has taken to secure relief from his conviction.
>
> (b) *When allegation of error deemed to be finally litigated* - For the purpose of this subtitle, an allegation of error shall be deemed to be finally litigated when an appellate court of the State has rendered a decision on the merits thereof, either upon direct appeal or upon any consideration of an application for leave to appeal filed pursuant to Section 645 I of this subtitle; or when a court of original jurisdiction, after a full and fair hearing, has rendered a decision on the merits thereof upon a petition for a writ of habeas corpus or a writ of error coram nobis, unless said decision upon the merits of such petition is clearly erroneous.
>
> (c) *When allegation of error deemed to have been waived* - (1) For the purposes of this subtitle, an allegation of error shall be deemed to be waived when a petitioner could have made, but intelligently and knowingly failed to make, such allegation before trial, at trial, on direct appeal (whether or not the petitioner actually took such an appeal), in an application for leave to appeal a conviction based on a guilty plea, in any habeas corpus or coram nobis proceeding actually instituted by said petitioner,

but was not in fact so made, there shall be a rebuttable presumption that said petitioner intelligently and knowingly failed to make such an allegation.

(d) *Decision that Constitution imposes standard not heretofore recognized* - For the purposes of this subtitle and notwithstanding any other provision hereof, no allegation of error shall be deemed to have been finally litigated or waived where, subsequent to any decision upon the merits thereof or subsequent to any proceeding in which said allegation otherwise may have been waived, any court whose decisions are binding upon the lower courts of this State holds that the Constitution of the United States or of Maryland imposes upon State criminal proceedings a procedural or substantive standard not theretofore recognized, which (*sic*) such standard is intended to be applied retrospectively and would thereby affect the validity of the petitioner's conviction or sentence.

It is evident from the text of the law that this path of post conviction relief presents obstacles to petitioners. Most notably, at the onset of any post conviction case, a determination must occur as to whether any of the issues submitted by the petitioner have been finally litigated or waived under Art. 27 § 645A(b) and/or (c).

However, an affirmative answer to this inquiry may not necessarily preclude further consideration of a post conviction petition. First, a 1997 amendment to the UPCPA provides that "the court may in its discretion reopen a postconviction proceeding that was previously concluded if the court determines that such action *is in the interests of justice.*" Md. Ann. Code, Art. 27, § 645A(a)(2)(iii) (emphasis added). There are no stated legislative restraints on the scope of such re-consideration. Additionally, the second track of post conviction jurisprudence involved in this case, a claim of "actual innocence," offers the possibility that a petitioner seeking to reopen post conviction may also find relief under the United States Constitution.

This alternate track of post conviction jurisprudence emerges from the Supreme Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993), and permits relief for incarcerated persons who are "actually innocent." In other words, a "truly persuasive demonstration" of innocence, meeting an "extraordinarily high" standard, may permit relief in otherwise closed criminal cases. *Herrera*

at 417.

It appears, therefore, that the "interests of justice" provision and the *Herrera* "actual innocence" principle are potential alternatives to the otherwise rigid limits to continued post conviction consideration, which would otherwise bar a petitioner who has waived or finally litigated an issue under post conviction law.

ALLEGATIONS

On March 23, 2001, Mr. Austin filed the current Motion to Reopen Post Conviction. Mr. Austin raised several allegations, supplemented with several additional filings, which will be dealt with in turn:

1. The "overriding interest in justice" demonstrated by his innocence and through newly discovered and previously withheld evidence, provides "precisely the type of interest recognized by the Maryland legislature when it described this Court's power to reopen a post conviction hearing 'in the interests of justice.'" *Reply Memorandum In Support of Michael Austin's Motion to Reopen*, at 5.

2. "The sentence and judgement imposed against him is contrary to the laws of the State of Maryland in so far as he is incarcerated under a sentence imposed in violation of the federal or state constitutions...(since) there is no underlying felony upon which the felony murder could be based." *Supplemental Memorandum In Support of Michael Austin's Motion to Reopen*, at 1-3.

3. He "is entitled to a new trial because his conviction in this case was obtained in violation of the United States Constitution....through a combination of serious errors amounting to constitutional violations." *Supplemental Memorandum in Support of Michael Austin's Motion to Reopen*, at 4. These errors include:

    a. "The trial court erred by instructing the jury that they were the judges of both the fact and the law, and that the jury instructions on the law were advisory only and the jury did not have to follow them," and therefore, under *Jenkins v. Hutchinson*, 221 F.3d 679 (4th Cir. 2000), a new trial is required. *Motion to Reopen Post Conviction*, at 23.

b. "An enormous amount of exculpatory material, some only discovered recently by Centurion Ministries,[29] was either not known by the State, or known but not turned over to defense counsel at or prior to trial." *Id.* at 26.

c. "The State's Attorney committed prosecutorial misconduct during his opening and closing arguments in four ways: (1) by erroneously providing his personal assurances to the jury that Mr. Austin was guilty and attacking the defense attorney personally, (2) by unconstitutionally shifting the burden of proof to Mr. Austin, (3) by improperly arguing that Mr. Austin's criminal record demonstrated that he was a cunning criminal who knew how to commit crimes with a false alibi, and (4) by commenting on eye witness testimony never presented to the jury." *Id.* at 36.

d. "Counsel provided ineffective assistance at trial in a variety of ways which caused prejudice." *Id.* at 45.

4. He "is innocent, and therefor must be released from his unjust incarceration." *Id.* at 14.

APPLICABLE LAW

WAIVER AND FINAL LITIGATION

Two threshold issues must be addressed prior to addressing Mr. Austin's allegations: waiver and final litigation. The UPCPA expressly states these procedural limitations, Art. 27 § 645A(b)-(c), and they may apply to one or more of Mr. Austin's allegations of constitutional error, requiring him to rely upon an "interests of justice" or "actual innocence" claim for post conviction relief.

"Waiver" occurs upon a petitioner's failure to properly assert claims. Md. Ann. Code Art. 27, §645A(c). When a petitioner neglects to raise an allegation of error, even though an opportunity for such existed, post conviction law establishes a rebuttable presumption that the petitioner

[29]Centurion Ministries "is a non-profit organization whose singular mission is to liberate from prison and vindicate individuals who are completely innocent of crimes for which they have been convicted and imprisoned." National Association of Criminal Defense Lawyers, *Centurion Ministries, available at* http://www.nacdl.org/public.nsf/freeform/centurionministries?opendocument.

intelligently and knowingly failed to make the allegation. Additionally, waiver occurs "if an allegation concerning a fundamental right has been made and considered at a prior proceeding." *Whyche v. State*, 53 Md. App. 403, 407 n.2, 454 A.2d 378 (1983) Under these circumstances, "a petitioner may not again raise that same allegation in a subsequent post conviction petition by assigning new reasons as to why the right had been violated, unless the court finds that those new reasons could not have been presented in the prior proceeding." *Id.*

A petitioner can also avoid waiver in two instances. First, with respect to errors depriving petitioners of "fundamental rights," a knowing and intelligent waiver must take place. *Oken v. State*, 343 Md. 256, 681 A.2d 30 (1996); *Cirincione v. State*, 119 Md. App. 471, 705 A.2d 96 (1998). When lesser rights are at stake, a petitioner's, or his or her respective counsel's, failure to raise allegations of error results in waiver, notwithstanding a lack of personal knowledge of the right of which the petitioner was deprived. See *McElroy v. State*, 329 Md. 136, 617 A.2d 1068 (1993); *Curtis v. State*, 284 Md. 132, 395 A.2d 464 (1978). Second, "special circumstances" may excuse waiver of claims involving fundamental rights, so long as the petitioner satisfies the burden of proving their existence. *Hunt v. State*, 345 Md. 122, 691 A.2 1255 (1997).

A petitioner faces another obstacle to post conviction relief if his or her claim has been "finally litigated." A finally litigated allegation of error cannot be heard in post conviction, Md. Ann. Code art. 27, § 645A(b), and questions previously and finally litigated in prior proceedings for post conviction relief cannot be grounds for relief in subsequent post conviction proceedings. *Williams v. Warden, Md. Penitentiary*, 240 Md. 205, 213 A.2d 579 (1965). Claims reach this status when an appellate court renders a decision on the merits thereof, either on direct appeal or upon consideration of an application for leave to appeal; or when a court of original jurisdiction has

rendered a decision on the merits upon a petition for habeas corpus or coram nobis, unless the decision is clearly erroneous. *Id.* For an issue to be considered "finally litigated," the appellate court must rule on the merits of the particular allegation. A summary opinion by the appellate court does not render an issue finally litigated. *State v. Hernandez*, 344 Md. 721, 690 A.2d 526 (1997).

Petitioner presents several issues requiring this Court to examine the possibility of waiver and/or final litigation. This category includes his claims about the jury instructions,[30] exculpatory evidence,[31] prosecutorial misconduct,[32] and ineffective trial counsel.[33]

Considering the extensiveness of Mr. Austin's previous trial, appellate, and post conviction history, it is likely that one or more of the foregoing issues may fail to overcome the procedural barriers within Art. 27, § 645A, thus prohibiting further post conviction relief. Therefore, "without conceding" waiver or final litigation, Mr. Austin resorts to the aforementioned dual tracks of post conviction jurisprudence, the "interests of justice" exception, art. 27, § 645A(a)(2)(iii), and the "actual innocence" constitutional claim. *Reply Memorandum in Support of Michael Austin's Motion*

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[30]The State argues at page 14 of its *Response to Petitioner's Motion* that Austin failed to challenge the jury instructions currently at issue on direct appeal, instead challenging a different instruction. Consequently, the State argues that Austin waived any claim to the instruction that the jury is the "judge of the law and the facts."

[31]The State argues at page 16 of its *Response to Petitioner's Motion* that the attorney who handled Mr. Austin's second post conviction petition subpoenaed the homicide files and referenced this evidence before the second post conviction court. According to the State, when the second post conviction court denied relief, Petitioner failed to "mention that the post conviction court had failed to address the *Brady* violations regarding other suspects." *State's Response*, at 16. As a result, according to the argument, use of the materials within these files as exculpatory evidence for the purposes of Austin's *Brady* argument has been waived and cannot bring relief in this court.

[32]The State argues at page 17 of its *Response to Petitioner's Motion* that Austin raised prosecutorial misconduct in his first petition for post conviction relief, albeit with reference to other prosecutorial misconduct. Since the current allegations of misconduct were available at the time of the original petition, according to the State, their later use has been waived.

[33]The State argues at page 18 of its *Response to Petitioner's Motion* that Austin waived any claims to ineffective trial counsel for similar reasons as with his waiver of prosecutorial misconduct. The State argues here that the current contentions about trial counsel were available at earlier stages of the case and that problems with trial counsel have been repeatedly raised by Austin.

to Reopen, at 4. He argues that despite the waiver or final litigation of many of his allegations, these tracks provide the means by which he may nevertheless reopen his post conviction case. In other words, even though post conviction proceedings may not normally be reopened and certain issues may not normally be considered if the petitioner's allegations have been waived or finally litigated, arguably there these two exceptions to this rule.

"INTERESTS OF JUSTICE"

The Maryland Code does not define the meaning of the "interests of justice" provision in Art. 27, § 645A which apparently permits a post conviction petitioner to jump the procedural hurdles that would typically confront a petitioner. Nor is there Maryland case precedent. This does not mean, however, that the elements of this standard cannot be discerned. This Court understands that the overarching objective of post conviction proceedings is to remedy defects which caused denial of critical and fundamental trial or appellate rights to such a degree that due process has been denied. *See State v. Long*, 235 Md. 125, 200 A.2d 641, *cert. denied*, 379 U.S. 917 (1964). Consequently, it is appropriate to look for guidance wherever courts have faced substantially similar questions.

In *Schlup v. Delo*, 513 U.S. 298 (1995), the Supreme Court held in a habeas corpus context that a sufficient demonstration of innocence permits a petitioner to pass through the "gateway" of otherwise existing procedural limits, permitting a court to consider an issue on its merits when it otherwise could not.[34] The United States District Court for the District of Maryland recently

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[34]It is important to clarify at the onset the distinction between Mr. Austin's "interests of justice" claim under *Schlup* and his "actual innocence" claim under *Herrera*. Confusion may arise since the both claims incorporate "innocence." Justice Stevens went to great pains to distinguish *Schlup* from *Herrera*. *Schlup*, 513 U.S. at 313. The principle distinction to be noted is that *Herrera* involved a "novel constitutional claim" of a "substantive" nature. More specifically, Herrera claimed that the execution of an innocent person violated the Eighth Amendment. The Court presumed, and the petitioner never contested, that the proceedings resulting in his conviction and sentence were error free. *Id.* at 314. Schlup, on the other hand, based his claim of innocence on procedural faults (i.e. ineffective counsel, prosecutorial misconduct, etc.), denying him "the full panoply of protections afforded to criminal

recognized the applicability of *Schlup* when it pointed out that "even where a petitioner fails to show cause (for) and prejudice (from) a procedural default, a court must still consider whether it should reach the merits of the petitioner's claims in order to prevent a fundamental miscarriage of justice." *Wiggins v. Corcoran*, No. JFM-99-2420, 2001 U.S. Dist. LEXIS 14588, at *14-15.[35]

In *Schlup*, the Supreme Court labeled the primary issue "a question of great importance in habeas corpus jurisprudence," when it reviewed the second habeas corpus petition of a state prisoner, convicted in the State of Missouri of participating in the murder of a fellow inmate. 513 U.S. at 313.[36] Schlup's petition raised several claims, including:

> (1) [T]hat Schlup was actually innocent of Dade's murder, and that his execution would therefore violate the Eighth and Fourteenth Amendments, cf. *Herrera v. Collins*, 506, U.S. 390 (1993); (2) trial counsel was ineffective for failing to interview alibi witnesses; and (3) the State had failed to disclose critical exculpatory evidence.

Id. at 307.

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defendants by the Constitution." *Id.* His claim, therefore, was not a constitutional claim *per se*, but rather a "gateway" through which he attempted to pass so that his otherwise barred constitutional claims could be considered. *Id.* at 315. With his "interests of justice" argument, Austin seeks to pass through this same gateway, implying that his "adequate proof of actual innocence is the special circumstance which excuses any waiver and allows him to present his claims in the interest of justice." *Reply Memorandum in Support of Michael Austin's Motion to Reopen*, at 2. He argues that success under this claim would entitle him to a new trial. Quite separately, Austin presents a "freestanding constitutional claim" under *Herrera* stating his actual innocence. By this allegation, Austin seeks immediate release from incarceration.

[35]In *Wiggins*, an inmate filed a petition for writ of habeas corpus, alleging that the evidence upon which he was convicted was constitutionally insufficient to sustain his conviction and that his trial counsel was constitutionally ineffective in failing to present mitigation evidence during his sentencing proceeding. 2001 U.S. Dist. LEXIS 14588, at *1. Prior to this petition, the petitioner had been tried, convicted, and sentenced by jury, denied on a motion for a new trial, denied on appeal, and denied relief on all grounds in post conviction. *Id.*

[36]The fact that *Schlup* and its progeny focus on *habeas corpus* jurisprudence should not be considered fatal to its application to Maryland post conviction law. In *Jones v. State*, 114 Md. App. 471, 691 A.2d (1997), the court explained that the purpose of the Maryland Post Conviction Act was to create a simple statutory procedure in place of common law habeas corpus remedies for collateral attacks upon criminal convictions. Prior to that decision, in *Creswell v. Director, Patuxent Institute*, 2 Md. App. 142, 144, 233 A.2d 375, 377 (1967), the court stated that the Maryland Post Conviction Procedure Act provides a remedy for challenging the legality of incarceration "for a crime on the premise that...the sentence is...subject to collateral attack upon any ground of alleged error which would otherwise be available under a writ of *habeas corpus*...or other common law or statutory remedy."

The State of Missouri responded by citing various procedural bars precluding the court from considering the merits of Schlup's claims. *Id.* Faced with evidence of the petitioner's actual innocence yet bound by rules generally precluding the availability of habeas relief for petitioners failing to obtain such relief in prior proceedings, the Court grappled with the possibility of satisfying competing interests. In the end, the Court articulated a standard allowing courts to recognize an exception to procedural bars to habeas corpus relief for "fundamental miscarriages of justice." *Id.* at 321 (citing *Sawyer v. Whitley*, 505 U.S. 333, 339-40 (1992), *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991), *Dugger v. Adams*, 489 U.S. 401, 414 (1989)). It drew from the *Murray v. Carrier*, 477 U.S. 478 (1986), "probably resulted" standard, concluding that when a petitioner raises a claim of actual innocence to avoid a procedural bar to consideration of the merits of constitutional claims, he or she "must show that it is more likely than not that no reasonable juror would have convicted him (or her)" in light of new evidence. *Schlup*, 513 U.S. at 327.[37] Under this standard, courts may entertain claims of actual innocence to avoid miscarriages of justice, despite existing procedural obstacles.

It is important to recognize *Schlup's* explicit acknowledgment of "the risk that repetitious filings by individual petitioners might adversely affect the administration of justice" in courts. 513 U.S. at 318. Furthermore, "such filings also pose[] a threat to the finality of state court judgements and to principles of comity and federalism." *Id.* (citing *McCleskey,* 499 U.S. at 491; *Murray*, 477 U.S. at 478). Procedural limitations on post conviction petitions, including waiver, final litigation, and limited petitions, obviously seek to control these threats, and great care must be taken not to

[37]In *Murray*, the Court held that "where a constitutional violation has *probably* resulted in the conviction of one who is actually innocent, a federal habeas corpus court may grant the writ even in the absence of a showing of cause for the procedural default." 477 U.S. at 496 (emphasis added).

interfere with these legislatively enacted provisions. These limitations aside, however, the Maryland legislature also took care to include a section permitting the courts to "reopen a post conviction proceeding that was previously concluded if the court determines that such action is in the interests of justice." Md. Ann. Code, art. 27, § 645A(a)(2)(iii). Therefore, this Court is satisfied that the standard enunciated in *Schlup* is consonant with the "interests of justice" standard in Maryland, and permits a court to find the necessary balance between "the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." 513 U.S. at 324.[38]

ACTUAL INNOCENCE

The second track of post conviction jurisprudence invoked by Mr. Austin involves a "freestanding" claim of innocence based on Supreme Court's decision in *Herrera*. In *Herrera*, the Court considered the second habeas corpus petition of an individual convicted and sentenced to death for murdering a police officer. The petitioner sought relief based on his "actual innocence." *Herrera.* 506 U.S. at 397.

The *Herrera* Court emphasized the principle that "the central purpose of any system of criminal justice is to convict the guilty and free the innocent," *Id.* at 398, but also stated that "habeas jurisprudence makes clear that a claim of 'actual innocence' is not itself a constitutional claim." *Id* at 404. Nevertheless, the Court did not foreclose the possibility of freestanding constitutional claims of innocence. *Id.* at 404. The Court noted that:

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[38]In *Schlup*, the Court also explained that "claims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity...experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare." 513 U.S. at 324. Furthermore, "of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence." *Id.*

> In a capital case, a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be *extraordinarily high.* (emphasis added).

Id. at 417.

This statement demonstrates the Court's willingness to entertain the idea of "freestanding claims of actual innocence," at least in capital cases. *Id.* at 405. However, since the Court concluded that Mr. Herrera fell "far short" of the "extraordinarily high" standard to successfully argue such a claim, it failed to explore the bounds of this test. *Id.* at 417.

A few states have grasped this narrow thread of actual innocence analysis, concluding that claims of actual innocence are cognizable in habeas corpus proceedings involving punishment by death or incarceration.[39] Others have gone as far as establishing concrete standards for evaluating freestanding claims of innocence.[40] Maryland courts, however, are yet to adopt either the principle or such a specific standard.

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[39]In *Ex Parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996), the court stated it is clear that the "incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of such a person. It follows that claims of actual innocence are cognizable by this Court in a post conviction habeas corpus proceeding whether the punishment assessed is death or confinement." Similarly, in *Summerville v. Warden, State Prison*, 641 A.2d 1356, 1369 (Conn. 1994), the court found that "a substantial claim of actual innocence is cognizable by way of a petition for a writ of habeas corpus, even in the absence of proof by the petitioner of an antecedent constitutional violation that affected the result of his criminal trial."

[40]In *Jones v. State*, 591 So.2d 911 915 (Fla. 1991), the court held that "in order to provide relief (for a motion for post conviction relief based on newly discovered evidence demonstrating innocence), the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial." *In re Clark*, 855 P.2d 729 (Cal. 1993), presented the California Supreme Court with a petition similar in nature. The court found that "newly discovered evidence is a basis for relief only if it undermines the prosecution's entire case. It is not sufficient that the evidence might have weakened the prosecution's case or presented a more difficult question for the judge or jury...[A] criminal judgement may be collaterally attacked on the basis of newly discovered evidence only if the 'new' evidence casts fundamental doubt on the accuracy and reliability of the proceedings." *Id.* at 739.

PREFATORY FINDINGS

An open courtroom pre-hearing took place before this Court on June 20, 2001. It was convened for pre-hearing conference purposes, but with counsels' consent, limited testimony was heard to convenience David Katz, a witness who now works and resides in San Diego, California. Thereafter, a formal hearing occurred on July 27, 2001. Mr. Austin presented this Court with evidence either unknown or unavailable at his trial in 1975.[41] Evidence was introduced through the parties' petitions and responses (including supplemental papers), introduction of documents, and live testimony by Eric Komitzsky, John Robinson, Harry Robinson, Willie H.. Neal, and Joseph Wase. Further testimony was accepted by stipulation in the form of affidavit by Professor Gary Wells and Cheryl Robinson Valentine. After careful consideration of this evidence, the trial transcript, and previous post conviction opinions, this Court makes the following prefatory findings:[42]

1. The trial of Michael Austin began on March 24, 1975. During this trial, the State called Jackie Robinson of 1112 E. 36th Street to testify regarding the Crown Market Food store robbery on April 29, 1975. He identified Austin as the person who shot the Roy Kellam.

2. Michael Austin's trial attorney had not prepared to defend his client in the case called to trial on March 24, 1975. At the onset of trial, McAllister indicated that he "thoroughly prepared indictment 995 for trial (but) the State...wish(ed) to proceed with 280, 281, and 282. And the result of 280, 81 and 82 may very well make the indictment of 995 moot." (See Tr. at 10-11).[43]

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[41] Austin divides this new evidence into two categories: 1) evidence which Centurion Ministries has discovered during its investigation into Mr. Austin's case, and 2) exculpatory evidence which was uncovered in the police files during Mr. Austin's Second Petition for Post Conviction which that Court did not address. *Motion to Reopen Post Conviction*, at 26.

[42] This Court does not limit its findings of fact to those listed in this section. Other facts, especially those involving the jury instructions given at trial, and other statements at trial by the court, prosecutor, and defense attorney, will be addressed *infra* as they pertain to the underlying issues of this case.

[43] 280, 281, and 282 referred to the cases under review here.

3. On April 29, 1974, Jackie Robinson signed a sworn affidavit stating that he "completed the tenth grade at Dunbar High School." According to the school records of Jackie Robinson, he completed the 9th grade at Lombard Middle School. He was then supposed to attend Dunbar High School in September, 1965. Mr. Robinson was "not promoted" while attending Dunbar, and "permanently" withdrew from the school in December, 1967.

4. Neither the State of Maryland nor the Commonwealth of Virginia record that Jackie Robinson passed the GED Test to receive a high school diploma.

5. During trial, prosecuting Assistant State's Attorney Joseph Wase described Jackie Robinson as "a young man attending college on a scholarship, a fine young man attending college in Lynchburg, Va....(who) comes up to testify in this case all the way from Lynchburg, Va where he's going to college...(because of) his duty as a citizen to come before (the jury) and testify to the truth" (See Tr. at 463) and that Robinson was "a very honest witness....A very honest young man." (See Tr. at 473). Virginia College transcripts indicate that Jackie Robinson enrolled in classes at Virginia College, in Lynchburg, Va., during the 1974-1975 academic year. However, Jackie Robinson was placed on academic probation at Virginia College by the former President of Virginia College, M.C. Southerland on or about June 18, 1975.

6. Combined with the records of Jackie Robinson's pre-college education, the following facts would have tended to discredit Jackie Robinson's assertion during Michael Austin's trial that he was "attending college on an academic scholarship." (See Tr. at 157).

   a. M.C. Southerland, the former president of Virginia College, and his financial aid officer, Janice Moore, pled guilty in federal court and admitted to conspiracy and making false statements and representations in documents in violation of Title 18 U.S.C., Section 371, 1001&2. This plea was to charges alleging the false inflation of attendance and enrollment records at the Virginia College, consequently "impeding, impairing, obstructing and defeating the lawful governmental functions of the then Department of Health, Education, and Welfare with respect to monies intended for financial aid to eligible college students."

   b. M.C. Southerland and Janice Moore conducted the unlawful activities, described *supra*, at Virginia College between October 11, 1974 and February 13, 1980.

7. Jackie Robinson used and sold drugs, including marijuana and heroin, around the time of the Crown Market Food store robbery on April 29, 1975, and later died of a drug overdose, as testified by his family members.

8. During Austin's trial, Detective Ellwood testified that Jackie Robinson identified Horace Herbert by photograph in connection with the crimes committed at the Crown Food Market on April 29, 1974. (See Tr. at 113). Following an objection to this testimony by Mr. McAllister, the court ruled that this evidence was admissible, on the condition that the State back up its proffer that "it's relevant to the crime which was committed." (See Tr. at 112, 114).

9. At a later point during Austin's trial, the court struck all references pertaining to Horace Herbert, stating for the record, "*[t]here were certain photographs the detective said he showed to Robinson and that Robinson identified 3F, Horace Herbert. There was an objection and motion to strike and the State proffered it would back up the relevancy of the reference to Herbert. I said if it did not I would strike that reference to him and to these photographs. I am granting the motion to strike in light of the State's failure to back that up. (Thereupon the jury took their seats in the jury box) Members of the jury, these comments have to do with a portion of the testimony which by ruling I have stricken and I am striking from the record and it has to do with testimony through Officer or Detective Ellwood regarding certain photographs which had been referred to as State's Exhibit 3A thru F just for identification. They had not been passed to you because they are not in evidence in which there was a reference to a Horace Herbert having been picked out by Mr. Robinson. This is a series of photographs which Mr. Robinson stated he was not familiar with and I have stricken from the record all references to that particular series of photographs. And you are to ignore them as well as any testimony in connection with them.*" (See Tr. at 258-60).

10. Even though the trial court struck all references to Horace Herbert, the prosecuting attorney nevertheless twice referenced Herbert during his closing argument after the court had ruled the references out of bounds.[44]

11. A letter from Detectives James Russell and John Ellwood to Captain James J. Cadden, dated June 6, 1974, reveals that the Detectives showed Eric Komitzsky a group of photographs containing Michael Austin, and "[a]fter viewing this group of photographs, Mr. Eric Komitzsky stated that the photograph of Michael Austin resembled the man he saw enter and rob the store and shoot Mr. Kellam, however he was unable to positively identify

[44]See n.23, *supra*, for the pertinent portion of Mr. Wase's closing argument.

same as the assailant."

12. According to a police report dated June 10, 1974, that day, "a line-up was conducted at the Central District (police station)...Suspect Michael Austin was positively identified by the witness, Mr. Jackie Robinson. Mr. Eric Komitzsky also viewed the line-up but was unable to identify anyone. Attorney, Mr. James McAllister was present as counsel for the defendant."

13. Mr. Austin's trial attorney grievously mishandled the alibi defense in failing to secure the original time records and the corroborating witnesses from the company for trial.[45]

14. During Austin's trial, the court told the jury that: "these instructions are advisory only because under the law of the State of Maryland in a criminal case, the jury is the judge of the law as well as of the facts. So that I shall advise you concerning the law, but it is your right and your duty to interpret the law and apply it to the facts as you find them to be." (See Tr. at 414).

15. During Austin's trial, the court told the jury that: "[y]ou are instructed in an advisory way if the evidence with respect to the Defendant's whereabouts during the commission of this offense when taken into consideration with all the other evidence, including the evidence offered by the State, if that evidence regarding the Defendant's whereabouts raises a reasonable doubt in your minds as to his guilt, then you must find him not guilty, because I told you if there is any reasonable doubt as to his guilt, then the accused is entitled to be given the benefit of that reasonable doubt." (See Tr. at 420-21).

16. Prior to the trial of Horace Herbert, which began on June 29, 1976, Jackie Robinson identified Horace Herbert from a photograph as one of the participants in the crimes committed at the Crown Food Market on April 29, 1974.

17. Prior to the trial of Horace Herbert, Jackie Robinson maintained that he remembered the individuals responsible for the crimes committed in the Crown Food Market on April 29, 1974, and could make an in-court identification.

18. Prior to the trial of Horace Herbert, Assistant State's Attorney David Katz and Detective James Russell traveled to Columbia, South Carolina to

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[45]The Court is aware that Austin expressed his satisfaction with the witnesses called at trial, but cannot make sense of it given the post trial effort to reopen for an alibi corroboration witness and the apparent illegibility of the time card. *See* n.7, *supra.*

investigate an alibi offered by Horace Herbert. This trip was detailed in a letter from Det. Russell to Captain James J. Cadden on June 19, 1976. According to this letter, the detectives learned that Horace Herbert "was employed under the name of Charles Monroe...from April 17, 1974 until May 19, 1974 (in Columbia, South Carolina). However on the day of the homicide, the suspect did not report to work and it is unknown at what exact time he reported for work on the 30th of April."

19. The trial of Herbert Horace in cases 57606222, 23, and 24 began on June 29, 1976. This day of trial included Herbert's arraignment, "not guilty" plea, election of trial by jury, the hearing and denial of his motion to suppress identification, and jury voir dire.

20. During the trial of Horace Herbert, the Assistant State's Attorney prosecuting the case, David Katz, asked Jackie Robinson to look around the courtroom and point out anyone involved in the Crown Market Food store robbery on April 29, 1974. Despite the presence of Herbert at counsel's table at that time, Robinson testified that he did not see any of the robbers in the courtroom.

21. Following Jackie Robinson's failure to identify Horace Herbert during Herbert's trial, David Katz requested a brief recess, which the court granted. During this time, Robinson informed Katz that despite his earlier identification of a photograph of Horace Herbert, the defendant sitting in the courtroom did not commit the crimes Robinson witnessed in the Crown Food Market on April 29, 1974. Robinson pointed out to Katz that Herbert's complexion in the photograph appeared lighter than it actually was upon viewing Herbert in person.

22. Once Herbert's trial reconvened, David Katz affirmatively confessed Horace Herbert not guilty based on the testimony of Jackie Robinson during that trial, his discussion with Robinson, and a discussion with Deputy State's Attorney Joseph Murphy (now chief Judge Murphy) during which Katz was advised that "sometimes it is the highest duty of a prosecutor to confess someone not guilty."

23. The trial of Herbert Horace in cases 57606222, 23, and 24 concluded on June 30, 1976, when the State of Maryland confessed him not guilty. The docket entries of the files for these cases report the confessed not guilty of Horace Herbert, an action prompted by the statements of Jackie Robinson. However, the reason behind the confessed not guilty was not disclosed to Michael Austin.

24. Eric Komitzsky was not summonsed, and did not testify during the trial of Michael Austin. Had Eric Komitzsky testified at Michael Austin's trial he would have exonerated Austin. This witness was not interviewed by Austin's defense counsel.

25. The Court accepts as fact the following sworn testimony of Eric Komitzsky on July 27, 2001:

a. He was working the cash register at the Crown Food Market on April 29, 1974, when the crimes at issue occurred.

b. He witnessed the shooting of Roy Kellam in a convex mirror, placed to provide a view of people entering the store, and soon thereafter, the shooter approached him, Eric Komitzsky, at the register.

c. He viewed the shooter from arms length when the shooter pointed a gun to his head and ordered him to empty the cash register.

d. After observing Michael Austin in person during the hearing he testified under oath that Austin was "absolutely" not the shooter he witnessed on April 29, 1974.

SHOULD POST CONVICTION RELIEF BE GRANTED?

Mr. Austin claims that "there are three independent legal grounds under which (he) is entitled to post conviction relief by this court." *Supplemental Memorandum in Support of Michael Austin's Motion to Reopen*, at 1. First, "the sentence and judgement imposed against him is contrary to the laws of the State of Maryland in so far as he is incarcerated under a sentence imposed in violation of the federal or state constitutions." Second, "numerous highly prejudicial constitutional errors." Third, "solely because he is innocent." *Id.* This categorization provides an acceptable structure for consideration of each of Mr. Austin's allegations.

I. Illegal Sentence

Md. Ann. Code, art. 27, § 410 defines felony murder as "murder which shall be committed in the perpetration of, or attempt to perpetrate, any rape in any degree, sexual offense in the first or

second degree, sodomy, mayhem, robbery, burglary, kidnapping...storehouse breaking...or in the escape or attempt to escape from the Maryland Penitentiary." *See Evans v. State*, 28 Md. App. 640, 695-97, 349 A.2d 300, 335-46 (1975). In order to "secure a conviction for first degree murder under the felony murder doctrine, the State is required to prove the underlying felony and the death occurring in the perpetration of the felony." *Bates v. State*, 127 Md. App. 678, 693, 736 A.2d 407, 415 (1999). It is important to acknowledge that the underlying felony is an "essential ingredient of the murder conviction." *Id.*

It was not clear to either the first post conviction court or the third post conviction court whether the State proceeded on a felony murder theory or a pre-meditated murder theory.[46] Nevertheless, this Court now holds that the jury instructions given at trial pointed the jury in the direction of a felony murder theory. Consideration of the following excerpt from the jury instruction at trial makes this point:

> Only one of these charges is being submitted to you for your consideration and your verdict...it is one which charges that on the day in question, April 29, 1974, that the defendant Michael Austin in Baltimore City feloniously did then and there steal and take away $1,942 current money of the goods, chattels, money and property of Milton Komitzsky. This is in simple language a charge of grand larceny. In order to establish the crime of grand larceny it must be proved that an amount and value of at least $100 or more was taken. Now the precise exact amount does not have to be proved but it must be proved that it was in excess of $100. There are other elements which must be proved in order to make out the crime of larceny and I'm going to define what that crime is and what must be proved in order to establish it. The word feloniously was used in this charge and that most simply means wrongful or fraudulent. So that larceny is the wrongful and the fraudulent taking and carrying

[46]In deciding the third Petition for Post Conviction Relief, the third post conviction court determined that the jury, not having expressly found an underlying felony, must have convicted Austin of premeditated murder: "in this case, there is no doubt that the jury found Petitioner guilty of premeditated murder and not felony murder, because it did not find Petitioner guilty of a felony upon which felony murder could be based. Therefore, premeditated murder must have been the theory for its first degree murder conviction." (Third post conviction opinion, at 4). The first post conviction court was likewise perplexed by this aspect of the trial.

away of goods or chattels which would include money from the possession of another person without his consent and against his will and with the wrongful and the specific intent to permanently deprive that person of the ownership in that property. The term ownership may be placed in the actual or the real owner of the property or it may be placed in the person whose possession the property or the money was left at the time of the theft. This is what we call having a special interest in the property. So that if you are convinced beyond a reasonable doubt that Milton Komitzsky had a special interest in the money, that is to say if it had been left in his possession, he had a right to have possession of it at the time it was taken, if you find that the money was taken from his rightful possession with the specific intent that he, Mr. Komitzsky be deprived permanently of that money, it was taken wrongfully and fraudulently, and if you are convinced that this defendant Michael Austin is the one who took the money, then you would find the defendant guilty of this charge of larceny under the sixth count of this indictment. Now of course just the reverse is true, if you have any reasonable doubt as to any of these factors that I have just mentioned, then you would have to find him not guilty.

Now the other indictment is the one which contains two counts or two charges. The first one is a homicide charge. In essence it charges on the day in question, April 29, 1974, Michael Austin in the City of Baltimore **feloniously, wilfully and of deliberately premeditated malice aforethought did kill** and murder one Roy Kellam, contrary to the laws of this State. The second count in essence charges that the defendant on the date and place in question unlawfully used a handgun in the commission of a crime of violence contrary to the laws of the State of Maryland. Now before I give you the definitions of homicide and what must be proved in such case, in order to make one element of this charge clear to you, I'm going to have to define for you what the crime of robbery is because when I get into the murder instructions you are going to hear the term robbery used in a specific way. **Now there is not before you a charge for your determination with regard to the crime of robbery. There were some such charges but they are not presented for you for your determination.** But as I have indicated in order to make the murder instructions clear to you, you are going to have to understand what the crime of robbery is. So I am going to explain to you what it is. In part it will duplicate the definition which I previously have given you of larceny. The two are similar in some respects. Robbery may be defined as the felonious or wrongful taking and carrying away of the personal property of another person either from him personally or in his presence and without his consent by the use of violence and by putting that person in fear. And there must be the specific intent on the part of the person taking the property or the money to deprive the owner permanently of his property or if that property is in the lawful possession of another person, other than the owner, then this would be the same as taking it from the actual owner. **So that for example if you are satisfied beyond a reasonable doubt that**

Jackie Robinson as an employee of the Crown Food Market was in proper or lawful possession of the money that you have heard referred to as being taken from the cash register which he said he was forced to open at gunpoint, if you find that this is the situation, and whoever took the money took it with the intent to permanently deprive the rightful owner of that money, then this would constitute the crime of robbery...

Getting then to the indictment which charges the defendant Austin with murder, the way the indictment is written it is a charge of murder in the first degree, but under such a charge the jury is permitted if the facts of the case warrant such finding to find the defendant guilty of any lesser degree of homicide or of course to find him not guilty. Now the law of the State of Maryland as passed by our legislature provides that all murder which shall be perpetrated by means of poison or lying in wait or by any kind of wilful and deliberate and premeditated killing shall be murder in the first degree. **This same law also provides further that all murder which shall be committed in the perpetration or the attempt to perpetrate certain crimes, including the crime of robbery, shall also be murder in the first degree.** So there are certain situations established by the legislature which create the crime of murder in the first degree. Now felonious or wrongful homicide, and homicide means the killing of one human being by another human being, wrongful homicides are divided into three classes in the State of Maryland, murder in the first degree, murder in the second degree and manslaughter. And upon proof by the State of a fact of a murder with nothing else, there is created a presumption that the murder was committed in the second degree unless there's some evidence of justification or excuse or some circumstance of mitigation which would reduce it to either manslaughter or to not guilty. And the State has the burden of proving beyond a reasonable doubt the elements of the crime which would elevate it or raise it to first degree murder. You start out with the presumption of second degree, but the State has the burden of proof all the way through and has the burden of elevating the crime to first degree murder. **That is to say it was wilful and deliberate or it is the State's position in this case as I understand it that the murder was committed during the course of the commission of a crime of robbery. This is what is called a felony murder.** You may hear that term argued or presented in the arguments of counsel. So if you hear the term felony murder it means one which has been committed during the course of certain crimes including the crime of robbery. **Now under this rule, that is the felony murder rule, the State does not have to prove premeditation,** wilfulness and deliberation in order to prove murder in the first degree because the fact that the person who was doing the shooting or the killing was committing a felony creates proof of what we call malice and premeditation sufficient to sustain a conviction for first degree murder for the killing which is done in connection with a felony such as robbery. I should explain to you, however, that in order to sustain a conviction under this felony murder rule, there must be proved a causal or a direct connection between the killing, between the homicide and between the

felony which is being committed, and in this case a robbery is claimed to have been committed. So there must be proved to be some connection between the two. So that something more than mere coincidence at the time and place between the two must be shown. In simple language it must be shown that the killing, homicide was committed directly in connection with the commission of some other felony such as robbery.

Now there is an issue in this case obviously as you have heard, an issue as to whether or not this defendant was even present at the time these crimes were committed. As I told you before, if you have any doubt as to that fact, then you must find him not guilty. **As I told you before, he or anyone else can be convicted of a crime of first degree murder in this case you would have to be satisfied beyond a reasonable doubt that the death of Roy Kellam was caused or committed in connection with a robbery being perpetrated at the time at his place of employment.** If you have any reasonable doubt that there was a robbery committed at the time, even though you may be convinced there was a killing, if you have any reasonable doubt that it was in connection with a robbery, then you could not convict the defendant of first degree murder because that's what the first degree murder charge is based upon in this case. If on the other hand you are convinced beyond a reasonable doubt that Mr. Roy Kellam was shot and killed by someone during the perpetration of a robbery of this Crown Food Market, and if you are further convinced beyond a reasonable doubt that the defendant, Michael Austin, is the person who committed these crimes, then you would find him guilty of first degree murder under the first count of this indictment which carries a number on the back 1280.

Going on further with regard to other degrees of unlawful homicide I should cover that because of course I do not know what your findings of facts will be and I must cover all the possible applicable law which may be appropriate in this case. Now if you are convinced beyond a reasonable doubt that this defendant Austin did in fact shoot Roy Kellam and thereby caused his death, but if you are not convinced that such shooting was connected with any robbery at the store, then you would have to go on in you deliberations to determine whether or not such shooting constitutes second degree murder or manslaughter. So I must therefore explain to you what these crimes are...

...Now members of the jury, these instructions as I told you have to do with all three grades or classifications of unlawful homicide, the first degree murder, the second degree murder and the manslaughter. I caution you that for the jury to find this defendant Austin guilty of any degree of unlawful homicide, it would be necessary for you to be convinced beyond a reasonable doubt, one, that he did in fact shoot the deceased Roy Kellam on the day in question, and that such shooting caused the death of the deceased Roy Kellam. *And before you could find the defendant guilty of first degree murder, you would also* **have to be satisfied beyond a reasonable doubt that such shooting and killing was done in the perpetration of a robbery.**

(Tr. 421-33) (emphasis added).

The jury convicted Austin on count one, #17401280 (referenced in the above excerpt as "1280"). One logical inference from this fact, considered in light of certain language in, and the focus of, the instruction is that the jury convicted Michael Austin of felony murder. However, the question is *what* felony. It is not clear precisely what robbery the jury considered within the felony murder context. Moreover, the only crime similar to a felony apparently addressed in the instruction was the larceny charged in a separate indictment. Yet, as the third post conviction court properly concluded, "larceny is not an underlying felony upon which murder can be based...(so) the conviction for first degree murder was not based on the larceny conviction, nor was it legally dependent upon it." (Third post conviction opinion, at 3). Therefore, the jury must have convicted Austin based on a crime amounting to a felony other than the larceny.

Both the first post conviction court and the third post conviction court were persuaded by the absence of a definitive reference to a specific felony victim that the jury was either relying upon the larceny, which is not a felony murder for this purpose, or acted on a pre-meditated murder theory. Broadly stated then, consideration of this issue in its current context requires this Court to determine whether Maryland law permits the conviction of a defendant of felony murder when the jury has not been informed of the particulars upon which the first degree murder conviction could rest. *Mumford v. State*, 19 Md. App. 640, 643, 313 A.2d 563, 566 (1974), provides an answer:

> *Under the felony-murder rule, the State does not have to prove premeditation, willfulness and deliberation in order to prove murder in the first degree. Rather, the fact that the accused was committing a felony creates proof of malice and premeditation sufficient to sustain conviction for first degree murder for any killing consequent to the felony. There is no further requirement upon the State that it indict and convict upon that underlying felony in order to sustain a felony-murder conviction.*

Based on *Mumford*, the State acknowledges that "the primary factor in proceeding on a felony murder charge is that the State is required to present proof of the underlying felony beyond a reasonable doubt." *State's Memorandum*, at 1. Furthermore, under Md. Ann. Code, Art. 27, § 616, an indictment for felony murder "growing out of a robbery," does not require the fact of robbery to be incorporated in an indictment as part of the crime charged." *Dishman v.* State, 352 Md. 279, 287-88, 721 A.2d 699, 702-3 (1998) (quoting *Wood v. State*, 191 Md. 658, 663, 62 A.2d 576, 578 (1948)). Therefore, the State argues that "[i]t is of no consequence that the underlying felony did not go to the jury in Austin's case" because the State demonstrated evidence sufficient to sustain a charge of robbery with a deadly weapon at trial. *State's Memorandum*, at 2.[47] This Court now considers the validity of this assertion.

In his closing argument during trial, the prosecutor addressed the jury with respect to felony murder rather than pre-meditated murder. Mr. Wase stated that the case concerned the "question of whether or not Michael Austin on April 29th, 1974, was the man who *robbed* Crown Food, Inc." (Tr. 443). Mr. Wase continued to emphasize that there was "no question that Crown Food was *robbed* and that Roy Kellam in the course of that *robbery* was killed." *Id.* Later, during his rebuttal, the prosecutor further elaborated his point by informing the jury that:

> *[I]f someone is killed in the course of a robbery it's first degree murder. Now whether or not the indictment*[48] *said Jackie Robinson was robbed or Milton Komitzsky was robbed or anyone else was robbed, one thing we know (is) that a*

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[47]The State explains that "the evidence presented was that two men armed with guns entered the Crown Food Market. One of the two men, identified as Austin, shot Roy Kellam. Jackie Robinson was ordered at gunpoint to open the cash register. He removed an unknown amount of bills and gave them to one of the perpetrators. The two suspects left the store, taking the money with them. That evidence alone was enough to send the robbery deadly weapon charge to the jury." *State's Memorandum*, at 1-2.

[48]The original indictment papers have not been located, but according to comments by the trial judge, Jackie Robinson was not the named victim. *See* pp. 37-40, *infra*.

robbery took place, money was taken from two different people. It does not make any difference who was robbed. A robbery took place, it's a felony murder. That's what Jackie Robinson testified to."

(Tr. 477).

Was the "felony" in question the robbery of Milton Komitzsky, as was seemingly argued to the jury by defense counsel?[49] If so, virtually no proof exists that Komitzsky was robbed. Robbery is a crime against a person, involving the taking and carrying away of property from someone, by force or threat of force, with the intent to deprive the victim of the property. *See, e.g., West v. State*, 312 Md. 197, 202-03, 539 A.2d 231, 233 (1988). After careful consideration of the trial transcript, it is apparent that the State failed to provide sufficient evidence to support a robbery of Milton Komitzsky.

Central to this conclusion is the absence of evidence placing Milton Komitzsky in the room where the crimes occurred. The only witness to the crime to testify, Jackie Robinson, who was standing behind one of the two cash registers in the store, stated that he "didn't know where Milton was at the time" of the incident, but "he was not at the register." (Tr. 248).[50] Furthermore, the last time Robinson saw Milton Komitzsky at the register was "about ten minutes before" the crime. (Tr. 189). More importantly, the State failed to prove that the perpetrators used force or the threat of force against Milton Komitzsky. Even though Robinson testified that Milton Komitzsky was "upset and visibly shaken," this was not until "after the alleged incident took place" when Robinson "had

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[49] "...the State did allege that my client Mr. Michael Austin did in fact rob Mr. Milton [also erroneously referred to by counsel as "Michael" Komitzky.] Komitzky. But Judge Jones pointed out the only count the State is pressing would be the sixth count." (Tr. 449-450).

[50] Earlier during his testimony, Jackie Robinson indicated that Milton Komitzsky "was on the side of the store." (Tr. 183). Even assuming that this prior statement placed Milton Komitzsky in the store, it is contravened by Robinson's later statement, and fails to indicate that "the side of the store" placed Milton Komitzsky within proximity of the crime.

occasion to observe both Mr. Eric Komitzsky and Mr. Milton Komitzsky." (Tr. 214-15). Milton Komitzsky did not testify.

Milton Komitzsky's brother and fellow employee at the Crown Food Market, Eric Komitzsky also failed to testify during trial, although according to his recent post conviction hearing testimony, he was robbed. But during trial the State presented no evidence that Eric Komitzsky was robbed. Accordingly, the State never proved the necessary elements of the underlying felony beyond a reasonable doubt in support of a conviction for first degree murder based upon the robbery of Milton or Eric Komitzsky, and the sentence for first degree murder cannot stand on this theory.

Alternatively, was the "felony" in question the robbery of Jackie Robinson?[51] This possibility was discussed at trial during a bench conference. The trial court explained to the attorneys that Mr. McAllister "indicated in chambers there is insufficient evidence this is a felony murder. I think there is sufficient evidence. There is clearly evidence that this was a robbery. It's true Mr. Robinson wasn't named in the indictment as a victim but that doesn't change the facts of the case." (Tr. 412). After McAllister agreed with this statement, the court shifted its focus to the larceny, informing that attorneys that "as to the larceny charge I'm going to send that to the jury." *Id.*

The prosecutor, during closing argument, explained that the robbery of Jackie Robinson

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[51]This Court posed the following question to the State: "If the defendant Austin was convicted of felony murder, but the felony (referring to larceny) was vacated by Judge Dorf, how is that particular conviction sustained?" In response, the State submitted a Memorandum and a Second Memorandum. In the Memorandum, the State seems to indicate that the robbery victim was Jackie Robinson. *See* n.47, *supra.* In the Second Memorandum, the State argued on page 1 that it proved every element of the robbery of Milton Komitzsky during the trial of Michael Austin. ("Petitioner was indicted for first degree murder and the robbery with a dangerous weapon of Milton Komitzsky."). Petitioner attacked the latter in his *Response to the State's Second Memorandum,* but did not clearly address the possibility that the victim of the robbery was Jackie Robinson. The responses generated by the parties indicate the confusing nature of this issue, and how it may have appeared to the jury.

would suffice as the basis for a conviction of felony murder. (Tr. 477). Jackie Robinson testified that the man who shot Roy Kellam "came down the aisle towards me. At the same time the other man with him put a gun on me and made me open the other cash register." (Tr. 165). According to Robinson, he placed the money from the register in a brown paper bag and gave it to the second gunman. (Tr. 183).[52]

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[52]On March 26, 1975, the second day of Austin's trial, the following examination of Jackie Robinson by State's Attorney Wase took place, in pertinent part:

Mr. Wase: After you saw Michael Austin shoot Roy Kellam, what happened then?
Jackie Robinson: The other man came up to me with a gun and told me to open the cash register.
Mr. Wase: I know that the ladies and gentlemen of the jury, I'm sure are having trouble hearing you because I am and I'm closer. Speak into the microphone and speak up.
Jackie Robinson: After Michael Austin shot Roy Kellam the other guy came -
Mr. McAllister: Objection as to what the other guy said, Your Honor.
The Court: Overruled. You may state what if anything the other man did.
Jackie Robinson: The other guy came over to me with a gun and told me to open the register.
Mr. Wase: Now at this time where were you standing when he came over to you with the gun?
Jackie Robinson: I was standing between the aisles.
Mr. Wase: Did you leave that position after he told you to open up the register?
Jackie Robinson: Yes.
Mr. McAllister: Objection as leading.
The Court: Well, don't lead him.
Mr. Wase: What did you do after he told you to open the register?
Jackie Robinson: I opened the register for him.
Mr. Wase: Could you do that from where you were?
Mr. McAllister: Objection.
The Court: Do you understand the question?
Jackie Robinson: I understand the question.
The Court: You may answer.
Jackie Robinson: Repeat it again, please?
Mr. Wase: Could you do that from where you were when the man gave you that order?
Jackie Robinson: No, I had to move up into the register.
Mr. Wase: Once you moved up into the register could you still see – by the way, that is register what?
Jackie Robinson: Register A.
Mr. Wase: Register A you went to?
Jackie Robinson: Right.
Mr. Wase: The register, what register did the defendant Michael Austin go to?
Jackie Robinson: Register B.
Mr. Wase: After you went to register A could you still see register B?
Jackie Robinson: No I couldn't.
Mr. Wase: Why not?
Jackie Robinson: Because of the shelves, the counters.
Mr. Wase: There are shelves in between?
Jackie Robinson: Yes.

In this scenario, the murder occurred during the course of the robbery of Jackie Robinson. The State demonstrated that money was taken and carried away from Jackie Robinson by threat of force with the intent to deprive the victim of the property.[53] More important, despite the serious confusion as to the victim of the underlying robbery, based upon the instructions of the trial judge and statements by the prosecuting attorney, it was intelligible to the jury that it could convict Austin of first degree, felony murder based upon the underlying robbery of Jackie Robinson. Since the State proved the necessary elements of the robbery of Jackie Robinson, it was unnecessary for the prosecution to both charge and indict the defendant for the commission of this felony. *Mumford*, 19 Md. App. at 643, 313 A.2d at 566. Austin was thereby properly sentenced and convicted of felony murder, and warrants no post conviction relief on this issue.

II. Constitutional Errors

Austin next turns to a series of allegedly prejudicial constitutional errors which he argues

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Mr. Wase: How high are they?
Jackie Robinson: They are about eight feet tall.
Mr. Wase: Whose register is register B?
Jackie Robinson: That would be Eric's.
Mr. Wase: Whose register is register A?
Jackie Robinson: It would be Milton Komitzsky's register.
Mr. Wase: Where was Milton Komitzsky a this time?
Jackie Robinson: He was on the side of the store, I didn't see him.
Mr. Wase: So you went to his register then to open it for the other gunman?
Jackie Robinson: Yes.
Mr. Wase: What did you do after you opened it?
Jackie Robinson: I put the money in a brown bag.

(Tr. 180-183).

[53]According to Jackie Robinson's testimony, the robbery itself was committed by the second gunman, not Austin. However, courts have recognized, since before Austin's conviction and sentence in 1975, that under the felony murder doctrine, a participating felon is guilty of murder when a co-felon commits a robbery. *Campbell v. State*, 293 Md. 438, 442, 444 A.2d 1034, 1037 (1982) (citing *Stevens v. State*, 232 Md. 33, 41, 192 A.2d 73, 78, *cert. denied*, 375 U.S. 886 (1963); *Boblit v. State*, 220 Md. 454, 457, 154 A.2d 434, 435 (1959), *appeal dismissed sub nom; Brady v. State*, 222 Md. 442, 160 A.2d 912 (1960); *Shockley v. State*, 218 Md. 491, 497, 148 A.2d 371, 374 (1959); *see Veney v. State*, 251 Md. 159, 174, 246 A.2d 608, 617 (1968), *cert. denied*, 394 U.S. 948 (1969); *see also Mumford v. State*, 19 Md.App. 640, 643-44, 313 A.2d 563, 566 (1974)).

entitle him to post conviction relief. He argues that despite waiver or final litigation of many of these issues, his newly presented evidence entitles him to pass through the *Schlup* gateway and have his issues considered on the merits. The *Schlup* model provides this Court with an intelligible and reasonable standard regarding whether it should reopen post conviction proceedings in this instance "in the interests of justice."[54] Accordingly, if, in light of the new evidence presented by Austin, it is more likely than not that a reasonable juror would not have convicted Austin, then the interests of justice require this Court to reconsider the merits of Petitioner's allegations despite otherwise existing procedural obstacles.

The essential case presented to the jury by the State during Austin's trial appears to have been as follows: First, Jackie Robinson, represented by the State to have been an "honest...fine young man attending college," identified Michael Austin as the shooter in the Crown Food Market robbery on April 29, 1975. Second, a calling card bearing the name "Horace Herbert," found in the possession of Austin, linked Austin to Herbert, "the other man in this murder and robbery," (Tr. 479), even though Austin denied knowing Herbert. Third, Austin failed to provide an original and legible time card at trial, a crucial piece of evidence to substantiate his alibi that he worked the full day of the crime and could not possibly have traveled to the Crown Food Market in time to commit it. Fourth, the State informed the jury that Eric Komitzsky, another employee of the Crown Food Market who witnessed the crime, could not add anything of substance to Robinson's testimony about Austin's

[54]This Court also notes, however, that the *Schlup* paradigm does not provide the sole basis for courts to reopen post conviction proceedings in the interests of justice. The language of the UPCPA permits this Court "in its discretion" to reopen post conviction proceedings "in the interests of justice." Ann. Code Md., art. 27 § 645A(a)(2)(iii). Since the legislature granted this Court such broad discretionary powers with respect to the reopening of post conviction proceedings by using such vague language, and Maryland courts provide no guidance with respect to the precise scope and meaning of art. 27 § 645A(a)(2)(iii), this Court looks to *Schlup* for guidance in this particular case.

involvement with the murder of Roy Kellam since his testimony would merely be "cumulative." (See Tr. 37, 443).

This Court must now decide whether, "in the light of the new evidence," the case is sufficiently affected such that it is "more likely than not that no reasonable juror would have convicted" Austin, thus warranting the reopening of Austin's post conviction remedy in the interests of justice. *See Schlup*, 513 U.S. at 327. Several important considerations, not before the jury at Austin's trial, deserve consideration, with regard to each of the elements of the State's case.

1. The jury was indeliberately misled about the character of its prime witness, Jackie Robinson.

This Court must consider Jackie Robinson's testimony, which was heavily, almost exclusively, relied upon by the State, with respect to the new information about his credibility. Robinson, after all, initially linked Herbert and Austin by initially identifying Herbert as the other suspect involved in the Crown Food Market murder. Jackie Robinson was one of three possible witnesses to the crime, the others being Eric and Milton Komitzsky, and was the only witness to the shooting called by the State. Robinson had identified Austin from a line-up on June 10, 1974, and before that, from a photo array. At trial, Robinson again identified Austin as the man who shot Roy Kellam. (Tr.155-56).

The State based its case on the testimony of Jackie Robinson, portraying him as a clean-cut, credible college student. New evidence seriously disrupts this characterization of Mr. Robinson, and if available at trial, it clearly would have seriously affected the weight afforded his statements by the jury. Although Robinson may have been a "college student," or at least a college occupant, at some brief point, it is highly unlikely that he would have basked in the presumptively favorable light of

the popularly perceived "college student" based on his pre-college educational record and the apparent fraudulent inflation of admissions records by the former President of Virginia College at the time of Robinson's attendance.[55] When one adds Robinson's drug abuse and drug crimes during the period of his life when he witnessed the Crown Food Market murder, the credibility of his testimony would have likely suffered dramatically.

2. The jury was not, and could not have been, aware of the resolution of the Horace Herbert trial.

It is difficult to minimize the consequence of references to Herbert during Austin's trial.[56] Even though the court eventually struck all references to Herbert by Jackie Robinson, the calling card bearing Herbert's name, brought to the State's Attorney's attention by Detective Ellwood during a trial recess, could only have severely damaged Mr. Austin's defense. It seriously impeached his credibility and alibi by linking him to Horace Herbert, "the other man in this murder and robbery,"(Tr. at 479), and contradicted his testimony that he did not know Horace Herbert (Tr. at 336-37). Additionally, the prosecutor disregarded the trial court's restrictions on references to

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[55]See "Prefatory Findings," 3-7, *supra.* It is reasonable to assume that a capable defense attorney would have vigorously pursued this information to identify Robinson as one of the suspect students, as he had not even completed high school. However, this Court must emphasize that Austin presents no "hard" evidence that Jackie Robinson was, in fact, specifically one of these students.

[56]The State summed up the importance of Herbert to its case during a bench conference at trial (Tr. 112). The State began questioning Det. Ellwood about a photo identification by Jackie Robinson. The trial judge called the attorneys to the bench and asked:

The Court:	I'm just wondering why the State - are you getting into any identification other than the defendant? I was wondering why you have got into these other photographs.
Mr. Wase:	Well, if Your Honor please, there were two people who committed the crime. It all goes to the commission of the crime. The State feels the full story should be told to the jury. There may be other reasons which may come out later. But the State would state at this time that it's relevant to the crime which was committed."
The Court:	In what respect?
Mr. Wase:	In that two persons did commit the crime and the witness Jackie Robinson was able to identify both persons and this is one of the two persons whom he could identify (in reference to Horace Herbert).

Herbert in an egregious way by continuing to refer to Herbert during his closing argument.[57]

As already noted, Jackie Robinson could *not* identify Herbert at his trial, and Horace Herbert was consequently confessed not guilty by the State. As a result, in the eyes of the law, Herbert did not participate in the Crown Food Market robbery on April 29, 1974. Knowledge of that conclusion of the Horace Herbert trial is attributed to all agents of the State. *Brady v. Maryland*, 373 U.S. 83, 97 (1963); *Arizona v. Robinson*, 486 U.S. 675, 687-88 (1988). It is uncontested that the State failed to inform Mr. Austin and the post conviction courts of Mr. Herbert's status.[58] However, for reasons explained below, this Court finds that this failure to disclose the confessed not guilty does not technically constitute a *Brady* violation. Regardless of this finding, this Court recognizes the importance of the State's confession of Horace Herbert not guilty and the potential impact this information would likely have had upon the jury. This new evidence demands the attention of this Court in its consideration of whether or not to reopen post conviction proceedings in the interests of justice.

Although the words "confessed not guilty" appear in the docket entries, and arguably should have been discovered by Austin prior to this point in his proceedings, nowhere does the file state, nor would it in the normal course, that the *reason* for this conclusion involved Jackie Robinson's admission that he could not identify Herbert Horace as the individual who robbed the Crown Market Food store. This historical fact was not otherwise publicly published or recorded, but it seems strange to this Court that the resolution of an alleged co-perpetrator's trial was of such little interest

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[57]*See* n. 23, *supra.*

[58]The State confessed Horace Herbert not guilty on June 30, 1976. Austin filed his first Petition for Post Conviction Relief on November 2, 1978.

to so many for so long.

During the hearing before this Court, David Katz, who prosecuted Horace Herbert, confirmed his reasoning for the State's conclusion that Horace Herbert should be confessed not guilty. After Robinson surprised Katz in court during the trial of Horace Herbert by failing to identify Herbert as one of the men involved in the crimes at the Crown Food Market on April 29, 1974, Robinson assured Katz during a recess that the defendant (Herbert) did not commit the crime. Following this discussion, Katz concluded that it "appeared appropriate to do just...(since) I believed Mr. Robinson's explanation about why he did not identify Mr. Herbert in the courtroom."[59] Upon returning to court, Mr. Katz "ended the trial by affirmatively confessing Mr. Herbert not guilty." Mr. Katz has not been inaccessible since his decision in the Herbert case.

3. The passage of time and the ineffective assistance of Austin's trial counsel has made it impossible to view Austin's original time record.

The following excerpts from the trial testimony present the larger picture regarding the time record.:

Cross Examination by Mr. Wase

Q. *Mr. Austin, you testified that you looked at your time card for this week, is that correct? For the week of, the week that would have included April 29, 1974 you looked at the time card, is that correct?*
A. *You mean the one on the sheet of paper?*
Q. *Yes, you testified you looked at that, right?*
A. *No.*
Q. *You testified that you worked that day, is that correct?*
A. *Right.*
Q. *You also testified that you don't know what time it was you got off from work that day?*

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[59]See "Prefatory Findings," 20-23, *supra*. Apparently, a difference between the complexion of Herbert's skin when viewed in person varied from its appearance in the photograph Robinson earlier identified.

at 417.

It appears, therefore, that the "interests of justice" provision and the *Herrera* "actual innocence" principle are potential alternatives to the otherwise rigid limits to continued post conviction consideration, which would otherwise bar a petitioner who has waived or finally litigated an issue under post conviction law.

ALLEGATIONS

On March 23, 2001, Mr. Austin filed the current Motion to Reopen Post Conviction. Mr. Austin raised several allegations, supplemented with several additional filings, which will be dealt with in turn:

1. The "overriding interest in justice" demonstrated by his innocence and through newly discovered and previously withheld evidence, provides "precisely the type of interest recognized by the Maryland legislature when it described this Court's power to reopen a post conviction hearing 'in the interests of justice.'" *Reply Memorandum In Support of Michael Austin's Motion to Reopen*, at 5.

2. "The sentence and judgement imposed against him is contrary to the laws of the State of Maryland in so far as he is incarcerated under a sentence imposed in violation of the federal or state constitutions...(since) there is no underlying felony upon which the felony murder could be based." *Supplemental Memorandum In Support of Michael Austin's Motion to Reopen*, at 1-3.

3. He "is entitled to a new trial because his conviction in this case was obtained in violation of the United States Constitution....through a combination of serious errors amounting to constitutional violations." *Supplemental Memorandum in Support of Michael Austin's Motion to Reopen*, at 4. These errors include:

    a. "The trial court erred by instructing the jury that they were the judges of both the fact and the law, and that the jury instructions on the law were advisory only and the jury did not have to follow them," and therefore, under *Jenkins v. Hutchinson*, 221 F.3d 679 (4th Cir. 2000), a new trial is required. *Motion to Reopen Post Conviction*, at 23.

b. "An enormous amount of exculpatory material, some only discovered recently by Centurion Ministries,[29] was either not known by the State, or known but not turned over to defense counsel at or prior to trial." *Id.* at 26.

c. "The State's Attorney committed prosecutorial misconduct during his opening and closing arguments in four ways: (1) by erroneously providing his personal assurances to the jury that Mr. Austin was guilty and attacking the defense attorney personally, (2) by unconstitutionally shifting the burden of proof to Mr. Austin, (3) by improperly arguing that Mr. Austin's criminal record demonstrated that he was a cunning criminal who knew how to commit crimes with a false alibi, and (4) by commenting on eye witness testimony never presented to the jury." *Id.* at 36.

d. "Counsel provided ineffective assistance at trial in a variety of ways which caused prejudice." *Id.* at 45.

4. He "is innocent, and therefor must be released from his unjust incarceration." *Id.* at 14.

APPLICABLE LAW

WAIVER AND FINAL LITIGATION

Two threshold issues must be addressed prior to addressing Mr. Austin's allegations: waiver and final litigation. The UPCPA expressly states these procedural limitations, Art. 27 § 645A(b)-(c), and they may apply to one or more of Mr. Austin's allegations of constitutional error, requiring him to rely upon an "interests of justice" or "actual innocence" claim for post conviction relief.

"Waiver" occurs upon a petitioner's failure to properly assert claims. Md. Ann. Code Art. 27, §645A(c). When a petitioner neglects to raise an allegation of error, even though an opportunity for such existed, post conviction law establishes a rebuttable presumption that the petitioner

[29]Centurion Ministries "is a non-profit organization whose singular mission is to liberate from prison and vindicate individuals who are completely innocent of crimes for which they have been convicted and imprisoned." National Association of Criminal Defense Lawyers, *Centurion Ministries*, *available at* http://www.nacdl.org/public.nsf/freeform/centurionministries?opendocument.

intelligently and knowingly failed to make the allegation. Additionally, waiver occurs "if an allegation concerning a fundamental right has been made and considered at a prior proceeding." *Whyche v. State*, 53 Md. App. 403, 407 n.2, 454 A.2d 378 (1983) Under these circumstances, "a petitioner may not again raise that same allegation in a subsequent post conviction petition by assigning new reasons as to why the right had been violated, unless the court finds that those new reasons could not have been presented in the prior proceeding." *Id.*

A petitioner can also avoid waiver in two instances. First, with respect to errors depriving petitioners of "fundamental rights," a knowing and intelligent waiver must take place. *Oken v. State*, 343 Md. 256, 681 A.2d 30 (1996); *Cirincione v. State*, 119 Md. App. 471, 705 A.2d 96 (1998). When lesser rights are at stake, a petitioner's, or his or her respective counsel's, failure to raise allegations of error results in waiver, notwithstanding a lack of personal knowledge of the right of which the petitioner was deprived. See *McElroy v. State*, 329 Md. 136, 617 A.2d 1068 (1993); *Curtis v. State*, 284 Md. 132, 395 A.2d 464 (1978). Second, "special circumstances" may excuse waiver of claims involving fundamental rights, so long as the petitioner satisfies the burden of proving their existence. *Hunt v. State*, 345 Md. 122, 691 A.2 1255 (1997).

A petitioner faces another obstacle to post conviction relief if his or her claim has been "finally litigated." A finally litigated allegation of error cannot be heard in post conviction, Md. Ann. Code art. 27, § 645A(b), and questions previously and finally litigated in prior proceedings for post conviction relief cannot be grounds for relief in subsequent post conviction proceedings. *Williams v. Warden, Md. Penitentiary*, 240 Md. 205, 213 A.2d 579 (1965). Claims reach this status when an appellate court renders a decision on the merits thereof, either on direct appeal or upon consideration of an application for leave to appeal; or when a court of original jurisdiction has

rendered a decision on the merits upon a petition for habeas corpus or coram nobis, unless the decision is clearly erroneous. *Id.* For an issue to be considered "finally litigated," the appellate court must rule on the merits of the particular allegation. A summary opinion by the appellate court does not render an issue finally litigated. *State v. Hernandez*, 344 Md. 721, 690 A.2d 526 (1997).

Petitioner presents several issues requiring this Court to examine the possibility of waiver and/or final litigation. This category includes his claims about the jury instructions,[30] exculpatory evidence,[31] prosecutorial misconduct,[32] and ineffective trial counsel.[33]

Considering the extensiveness of Mr. Austin's previous trial, appellate, and post conviction history, it is likely that one or more of the foregoing issues may fail to overcome the procedural barriers within Art. 27, § 645A, thus prohibiting further post conviction relief. Therefore, "without conceding" waiver or final litigation, Mr. Austin resorts to the aforementioned dual tracks of post conviction jurisprudence, the "interests of justice" exception, art. 27, § 645A(a)(2)(iii), and the "actual innocence" constitutional claim. *Reply Memorandum in Support of Michael Austin's Motion*

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[30]The State argues at page 14 of its *Response to Petitioner's Motion* that Austin failed to challenge the jury instructions currently at issue on direct appeal, instead challenging a different instruction. Consequently, the State argues that Austin waived any claim to the instruction that the jury is the "judge of the law and the facts."

[31]The State argues at page 16 of its *Response to Petitioner's Motion* that the attorney who handled Mr. Austin's second post conviction petition subpoenaed the homicide files and referenced this evidence before the second post conviction court. According to the State, when the second post conviction court denied relief, Petitioner failed to "mention that the post conviction court had failed to address the *Brady* violations regarding other suspects." *State's Response*, at 16. As a result, according to the argument, use of the materials within these files as exculpatory evidence for the purposes of Austin's *Brady* argument has been waived and cannot bring relief in this court.

[32]The State argues at page 17 of its *Response to Petitioner's Motion* that Austin raised prosecutorial misconduct in his first petition for post conviction relief, albeit with reference to other prosecutorial misconduct. Since the current allegations of misconduct were available at the time of the original petition, according to the State, their later use has been waived.

[33]The State argues at page 18 of its *Response to Petitioner's Motion* that Austin waived any claims to ineffective trial counsel for similar reasons as with his waiver of prosecutorial misconduct. The State argues here that the current contentions about trial counsel were available at earlier stages of the case and that problems with trial counsel have been repeatedly raised by Austin.

to Reopen, at 4. He argues that despite the waiver or final litigation of many of his allegations, these tracks provide the means by which he may nevertheless reopen his post conviction case. In other words, even though post conviction proceedings may not normally be reopened and certain issues may not normally be considered if the petitioner's allegations have been waived or finally litigated, arguably there these two exceptions to this rule.

"INTERESTS OF JUSTICE"

The Maryland Code does not define the meaning of the "interests of justice" provision in Art. 27, § 645A which apparently permits a post conviction petitioner to jump the procedural hurdles that would typically confront a petitioner. Nor is there Maryland case precedent. This does not mean, however, that the elements of this standard cannot be discerned. This Court understands that the overarching objective of post conviction proceedings is to remedy defects which caused denial of critical and fundamental trial or appellate rights to such a degree that due process has been denied. *See State v. Long*, 235 Md. 125, 200 A.2d 641, *cert. denied*, 379 U.S. 917 (1964). Consequently, it is appropriate to look for guidance wherever courts have faced substantially similar questions.

In *Schlup v. Delo*, 513 U.S. 298 (1995), the Supreme Court held in a habeas corpus context that a sufficient demonstration of innocence permits a petitioner to pass through the "gateway" of otherwise existing procedural limits, permitting a court to consider an issue on its merits when it otherwise could not.[34] The United States District Court for the District of Maryland recently

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[34]It is important to clarify at the onset the distinction between Mr. Austin's "interests of justice" claim under *Schlup* and his "actual innocence" claim under *Herrera*. Confusion may arise since the both claims incorporate "innocence." Justice Stevens went to great pains to distinguish *Schlup* from *Herrera*. *Schlup*, 513 U.S. at 313. The principle distinction to be noted is that *Herrera* involved a "novel constitutional claim" of a "substantive" nature. More specifically, Herrera claimed that the execution of an innocent person violated the Eighth Amendment. The Court presumed, and the petitioner never contested, that the proceedings resulting in his conviction and sentence were error free. *Id.* at 314. Schlup, on the other hand, based his claim of innocence on procedural faults (i.e. ineffective counsel, prosecutorial misconduct, etc.), denying him "the full panoply of protections afforded to criminal

recognized the applicability of *Schlup* when it pointed out that "even where a petitioner fails to show cause (for) and prejudice (from) a procedural default, a court must still consider whether it should reach the merits of the petitioner's claims in order to prevent a fundamental miscarriage of justice." *Wiggins v. Corcoran*, No. JFM-99-2420, 2001 U.S. Dist. LEXIS 14588, at *14-15.[35]

In *Schlup*, the Supreme Court labeled the primary issue "a question of great importance in habeas corpus jurisprudence," when it reviewed the second habeas corpus petition of a state prisoner, convicted in the State of Missouri of participating in the murder of a fellow inmate. 513 U.S. at 313.[36] Schlup's petition raised several claims, including:

> (1) [T]hat Schlup was actually innocent of Dade's murder, and that his execution would therefore violate the Eighth and Fourteenth Amendments, cf. *Herrera v. Collins*, 506, U.S. 390 (1993); (2) trial counsel was ineffective for failing to interview alibi witnesses; and (3) the State had failed to disclose critical exculpatory evidence.

Id. at 307.

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defendants by the Constitution." *Id.* His claim, therefore, was not a constitutional claim *per se*, but rather a "gateway" through which he attempted to pass so that his otherwise barred constitutional claims could be considered. *Id.* at 315. With his "interests of justice" argument, Austin seeks to pass through this same gateway, implying that his "adequate proof of actual innocence is the special circumstance which excuses any waiver and allows him to present his claims in the interest of justice." *Reply Memorandum in Support of Michael Austin's Motion to Reopen*, at 2. He argues that success under this claim would entitle him to a new trial. Quite separately, Austin presents a "freestanding constitutional claim" under *Herrera* stating his actual innocence. By this allegation, Austin seeks immediate release from incarceration.

[35]In *Wiggins*, an inmate filed a petition for writ of habeas corpus, alleging that the evidence upon which he was convicted was constitutionally insufficient to sustain his conviction and that his trial counsel was constitutionally ineffective in failing to present mitigation evidence during his sentencing proceeding. 2001 U.S. Dist. LEXIS 14588, at *1. Prior to this petition, the petitioner had been tried, convicted, and sentenced by jury, denied on a motion for a new trial, denied on appeal, and denied relief on all grounds in post conviction. *Id.*

[36]The fact that *Schlup* and its progeny focus on *habeas corpus* jurisprudence should not be considered fatal to its application to Maryland post conviction law. In *Jones v. State*, 114 Md. App. 471, 691 A.2d (1997), the court explained that the purpose of the Maryland Post Conviction Act was to create a simple statutory procedure in place of common law habeas corpus remedies for collateral attacks upon criminal convictions. Prior to that decision, in *Creswell v. Director, Patuxent Institute*, 2 Md. App. 142, 144, 233 A.2d 375, 377 (1967), the court stated that the Maryland Post Conviction Procedure Act provides a remedy for challenging the legality of incarceration "for a crime on the premise that...the sentence is...subject to collateral attack upon any ground of alleged error which would otherwise be available under a writ of *habeas corpus*...or other common law or statutory remedy."

The State of Missouri responded by citing various procedural bars precluding the court from considering the merits of Schlup's claims. *Id.* Faced with evidence of the petitioner's actual innocence yet bound by rules generally precluding the availability of habeas relief for petitioners failing to obtain such relief in prior proceedings, the Court grappled with the possibility of satisfying competing interests. In the end, the Court articulated a standard allowing courts to recognize an exception to procedural bars to habeas corpus relief for "fundamental miscarriages of justice." *Id.* at 321 (citing *Sawyer v. Whitley*, 505 U.S. 333, 339-40 (1992), *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991), *Dugger v. Adams*, 489 U.S. 401, 414 (1989)). It drew from the *Murray v. Carrier*, 477 U.S. 478 (1986), "probably resulted" standard, concluding that when a petitioner raises a claim of actual innocence to avoid a procedural bar to consideration of the merits of constitutional claims, he or she "must show that it is more likely than not that no reasonable juror would have convicted him (or her)" in light of new evidence. *Schlup*, 513 U.S. at 327.[37] Under this standard, courts may entertain claims of actual innocence to avoid miscarriages of justice, despite existing procedural obstacles.

It is important to recognize *Schlup's* explicit acknowledgment of "the risk that repetitious filings by individual petitioners might adversely affect the administration of justice" in courts. 513 U.S. at 318. Furthermore, "such filings also pose[] a threat to the finality of state court judgements and to principles of comity and federalism." *Id.* (citing *McCleskey,* 499 U.S. at 491; *Murray*, 477 U.S. at 478). Procedural limitations on post conviction petitions, including waiver, final litigation, and limited petitions, obviously seek to control these threats, and great care must be taken not to

[37]In *Murray*, the Court held that "where a constitutional violation has *probably* resulted in the conviction of one who is actually innocent, a federal habeas corpus court may grant the writ even in the absence of a showing of cause for the procedural default." 477 U.S. at 496 (emphasis added).

interfere with these legislatively enacted provisions. These limitations aside, however, the Maryland legislature also took care to include a section permitting the courts to "reopen a post conviction proceeding that was previously concluded if the court determines that such action is in the interests of justice." Md. Ann. Code, art. 27, § 645A(a)(2)(iii). Therefore, this Court is satisfied that the standard enunciated in *Schlup* is consonant with the "interests of justice" standard in Maryland, and permits a court to find the necessary balance between "the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." 513 U.S. at 324.[38]

ACTUAL INNOCENCE

The second track of post conviction jurisprudence invoked by Mr. Austin involves a "freestanding" claim of innocence based on Supreme Court's decision in *Herrera*. In *Herrera*, the Court considered the second habeas corpus petition of an individual convicted and sentenced to death for murdering a police officer. The petitioner sought relief based on his "actual innocence." *Herrera.* 506 U.S. at 397.

The *Herrera* Court emphasized the principle that "the central purpose of any system of criminal justice is to convict the guilty and free the innocent," *Id.* at 398, but also stated that "habeas jurisprudence makes clear that a claim of 'actual innocence' is not itself a constitutional claim." *Id* at 404. Nevertheless, the Court did not foreclose the possibility of freestanding constitutional claims of innocence. *Id.* at 404. The Court noted that:

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[38]In *Schlup*, the Court also explained that "claims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity...experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare." 513 U.S. at 324. Furthermore, "of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence." *Id.*

> In a capital case, a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be *extraordinarily high.* (emphasis added).

Id. at 417.

This statement demonstrates the Court's willingness to entertain the idea of "freestanding claims of actual innocence," at least in capital cases. *Id.* at 405. However, since the Court concluded that Mr. Herrera fell "far short" of the "extraordinarily high" standard to successfully argue such a claim, it failed to explore the bounds of this test. *Id.* at 417.

A few states have grasped this narrow thread of actual innocence analysis, concluding that claims of actual innocence are cognizable in habeas corpus proceedings involving punishment by death or incarceration.[39] Others have gone as far as establishing concrete standards for evaluating freestanding claims of innocence.[40] Maryland courts, however, are yet to adopt either the principle or such a specific standard.

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[39]In *Ex Parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996), the court stated it is clear that the "incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of such a person. It follows that claims of actual innocence are cognizable by this Court in a post conviction habeas corpus proceeding whether the punishment assessed is death or confinement." Similarly, in *Summerville v. Warden, State Prison*, 641 A.2d 1356, 1369 (Conn. 1994), the court found that "a substantial claim of actual innocence is cognizable by way of a petition for a writ of habeas corpus, even in the absence of proof by the petitioner of an antecedent constitutional violation that affected the result of his criminal trial."

[40]In *Jones v. State*, 591 So.2d 911 915 (Fla. 1991), the court held that "in order to provide relief (for a motion for post conviction relief based on newly discovered evidence demonstrating innocence), the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial." *In re Clark*, 855 P.2d 729 (Cal. 1993), presented the California Supreme Court with a petition similar in nature. The court found that "newly discovered evidence is a basis for relief only if it undermines the prosecution's entire case. It is not sufficient that the evidence might have weakened the prosecution's case or presented a more difficult question for the judge or jury...[A] criminal judgement may be collaterally attacked on the basis of newly discovered evidence only if the 'new' evidence casts fundamental doubt on the accuracy and reliability of the proceedings." *Id.* at 739.

PREFATORY FINDINGS

An open courtroom pre-hearing took place before this Court on June 20, 2001. It was convened for pre-hearing conference purposes, but with counsels' consent, limited testimony was heard to convenience David Katz, a witness who now works and resides in San Diego, California. Thereafter, a formal hearing occurred on July 27, 2001. Mr. Austin presented this Court with evidence either unknown or unavailable at his trial in 1975.[41] Evidence was introduced through the parties' petitions and responses (including supplemental papers), introduction of documents, and live testimony by Eric Komitzsky, John Robinson, Harry Robinson, Willie H.. Neal, and Joseph Wase. Further testimony was accepted by stipulation in the form of affidavit by Professor Gary Wells and Cheryl Robinson Valentine. After careful consideration of this evidence, the trial transcript, and previous post conviction opinions, this Court makes the following prefatory findings:[42]

1. The trial of Michael Austin began on March 24, 1975. During this trial, the State called Jackie Robinson of 1112 E. 36th Street to testify regarding the Crown Market Food store robbery on April 29, 1975. He identified Austin as the person who shot the Roy Kellam.

2. Michael Austin's trial attorney had not prepared to defend his client in the case called to trial on March 24, 1975. At the onset of trial, McAllister indicated that he "thoroughly prepared indictment 995 for trial (but) the State...wish(ed) to proceed with 280, 281, and 282. And the result of 280, 81 and 82 may very well make the indictment of 995 moot." (See Tr. at 10-11).[43]

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[41]Austin divides this new evidence into two categories: 1) evidence which Centurion Ministries has discovered during its investigation into Mr. Austin's case, and 2) exculpatory evidence which was uncovered in the police files during Mr. Austin's Second Petition for Post Conviction which that Court did not address. *Motion to Reopen Post Conviction*, at 26.

[42]This Court does not limit its findings of fact to those listed in this section. Other facts, especially those involving the jury instructions given at trial, and other statements at trial by the court, prosecutor, and defense attorney, will be addressed *infra* as they pertain to the underlying issues of this case.

[43]280, 281, and 282 referred to the cases under review here.

3. On April 29, 1974, Jackie Robinson signed a sworn affidavit stating that he "completed the tenth grade at Dunbar High School." According to the school records of Jackie Robinson, he completed the 9th grade at Lombard Middle School. He was then supposed to attend Dunbar High School in September, 1965. Mr. Robinson was "not promoted" while attending Dunbar, and "permanently" withdrew from the school in December, 1967.

4. Neither the State of Maryland nor the Commonwealth of Virginia record that Jackie Robinson passed the GED Test to receive a high school diploma.

5. During trial, prosecuting Assistant State's Attorney Joseph Wase described Jackie Robinson as "a young man attending college on a scholarship, a fine young man attending college in Lynchburg, Va....(who) comes up to testify in this case all the way from Lynchburg, Va where he's going to college...(because of) his duty as a citizen to come before (the jury) and testify to the truth" (See Tr. at 463) and that Robinson was "a very honest witness....A very honest young man." (See Tr. at 473). Virginia College transcripts indicate that Jackie Robinson enrolled in classes at Virginia College, in Lynchburg, Va., during the 1974-1975 academic year. However, Jackie Robinson was placed on academic probation at Virginia College by the former President of Virginia College, M.C. Southerland on or about June 18, 1975.

6. Combined with the records of Jackie Robinson's pre-college education, the following facts would have tended to discredit Jackie Robinson's assertion during Michael Austin's trial that he was "attending college on an academic scholarship." (See Tr. at 157).

   a. M.C. Southerland, the former president of Virginia College, and his financial aid officer, Janice Moore, pled guilty in federal court and admitted to conspiracy and making false statements and representations in documents in violation of Title 18 U.S.C., Section 371, 1001&2. This plea was to charges alleging the false inflation of attendance and enrollment records at the Virginia College, consequently "impeding, impairing, obstructing and defeating the lawful governmental functions of the then Department of Health, Education, and Welfare with respect to monies intended for financial aid to eligible college students."

   b. M.C. Southerland and Janice Moore conducted the unlawful activities, described *supra*, at Virginia College between October 11, 1974 and February 13, 1980.

7. Jackie Robinson used and sold drugs, including marijuana and heroin, around the time of the Crown Market Food store robbery on April 29, 1975, and later died of a drug overdose, as testified by his family members.

8. During Austin's trial, Detective Ellwood testified that Jackie Robinson identified Horace Herbert by photograph in connection with the crimes committed at the Crown Food Market on April 29, 1974. (See Tr. at 113). Following an objection to this testimony by Mr. McAllister, the court ruled that this evidence was admissible, on the condition that the State back up its proffer that "it's relevant to the crime which was committed." (See Tr. at 112, 114).

9. At a later point during Austin's trial, the court struck all references pertaining to Horace Herbert, stating for the record, "*[t]here were certain photographs the detective said he showed to Robinson and that Robinson identified 3F, Horace Herbert. There was an objection and motion to strike and the State proffered it would back up the relevancy of the reference to Herbert. I said if it did not I would strike that reference to him and to these photographs. I am granting the motion to strike in light of the State's failure to back that up. (Thereupon the jury took their seats in the jury box) Members of the jury, these comments have to do with a portion of the testimony which by ruling I have stricken and I am striking from the record and it has to do with testimony through Officer or Detective Ellwood regarding certain photographs which had been referred to as State's Exhibit 3A thru F just for identification. They had not been passed to you because they are not in evidence in which there was a reference to a Horace Herbert having been picked out by Mr. Robinson. This is a series of photographs which Mr. Robinson stated he was not familiar with and I have stricken from the record all references to that particular series of photographs. And you are to ignore them as well as any testimony in connection with them.*" (See Tr. at 258-60).

10. Even though the trial court struck all references to Horace Herbert, the prosecuting attorney nevertheless twice referenced Herbert during his closing argument after the court had ruled the references out of bounds.[44]

11. A letter from Detectives James Russell and John Ellwood to Captain James J. Cadden, dated June 6, 1974, reveals that the Detectives showed Eric Komitzsky a group of photographs containing Michael Austin, and "[a]fter viewing this group of photographs, Mr. Eric Komitzsky stated that the photograph of Michael Austin resembled the man he saw enter and rob the store and shoot Mr. Kellam, however he was unable to positively identify

[44]See n.23, *supra*, for the pertinent portion of Mr. Wase's closing argument.

same as the assailant."

12. According to a police report dated June 10, 1974, that day, "a line-up was conducted at the Central District (police station)...Suspect Michael Austin was positively identified by the witness, Mr. Jackie Robinson. Mr. Eric Komitzsky also viewed the line-up but was unable to identify anyone. Attorney, Mr. James McAllister was present as counsel for the defendant."

13. Mr. Austin's trial attorney grievously mishandled the alibi defense in failing to secure the original time records and the corroborating witnesses from the company for trial.[45]

14. During Austin's trial, the court told the jury that: "these instructions are advisory only because under the law of the State of Maryland in a criminal case, the jury is the judge of the law as well as of the facts. So that I shall advise you concerning the law, but it is your right and your duty to interpret the law and apply it to the facts as you find them to be." (See Tr. at 414).

15. During Austin's trial, the court told the jury that: "[y]ou are instructed in an advisory way if the evidence with respect to the Defendant's whereabouts during the commission of this offense when taken into consideration with all the other evidence, including the evidence offered by the State, if that evidence regarding the Defendant's whereabouts raises a reasonable doubt in your minds as to his guilt, then you must find him not guilty, because I told you if there is any reasonable doubt as to his guilt, then the accused is entitled to be given the benefit of that reasonable doubt." (See Tr. at 420-21).

16. Prior to the trial of Horace Herbert, which began on June 29, 1976, Jackie Robinson identified Horace Herbert from a photograph as one of the participants in the crimes committed at the Crown Food Market on April 29, 1974.

17. Prior to the trial of Horace Herbert, Jackie Robinson maintained that he remembered the individuals responsible for the crimes committed in the Crown Food Market on April 29, 1974, and could make an in-court identification.

18. Prior to the trial of Horace Herbert, Assistant State's Attorney David Katz and Detective James Russell traveled to Columbia, South Carolina to

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[45]The Court is aware that Austin expressed his satisfaction with the witnesses called at trial, but cannot make sense of it given the post trial effort to reopen for an alibi corroboration witness and the apparent illegibility of the time card. *See* n.7, *supra.*

investigate an alibi offered by Horace Herbert. This trip was detailed in a letter from Det. Russell to Captain James J. Cadden on June 19, 1976. According to this letter, the detectives learned that Horace Herbert "was employed under the name of Charles Monroe...from April 17, 1974 until May 19, 1974 (in Columbia, South Carolina). However on the day of the homicide, the suspect did not report to work and it is unknown at what exact time he reported for work on the 30th of April."

19. The trial of Herbert Horace in cases 57606222, 23, and 24 began on June 29, 1976. This day of trial included Herbert's arraignment, "not guilty" plea, election of trial by jury, the hearing and denial of his motion to suppress identification, and jury voir dire.

20. During the trial of Horace Herbert, the Assistant State's Attorney prosecuting the case, David Katz, asked Jackie Robinson to look around the courtroom and point out anyone involved in the Crown Market Food store robbery on April 29, 1974. Despite the presence of Herbert at counsel's table at that time, Robinson testified that he did not see any of the robbers in the courtroom.

21. Following Jackie Robinson's failure to identify Horace Herbert during Herbert's trial, David Katz requested a brief recess, which the court granted. During this time, Robinson informed Katz that despite his earlier identification of a photograph of Horace Herbert, the defendant sitting in the courtroom did not commit the crimes Robinson witnessed in the Crown Food Market on April 29, 1974. Robinson pointed out to Katz that Herbert's complexion in the photograph appeared lighter than it actually was upon viewing Herbert in person.

22. Once Herbert's trial reconvened, David Katz affirmatively confessed Horace Herbert not guilty based on the testimony of Jackie Robinson during that trial, his discussion with Robinson, and a discussion with Deputy State's Attorney Joseph Murphy (now chief Judge Murphy) during which Katz was advised that "sometimes it is the highest duty of a prosecutor to confess someone not guilty."

23. The trial of Herbert Horace in cases 57606222, 23, and 24 concluded on June 30, 1976, when the State of Maryland confessed him not guilty. The docket entries of the files for these cases report the confessed not guilty of Horace Herbert, an action prompted by the statements of Jackie Robinson. However, the reason behind the confessed not guilty was not disclosed to Michael Austin.

24. Eric Komitzsky was not summonsed, and did not testify during the trial of Michael Austin. Had Eric Komitzsky testified at Michael Austin's trial he would have exonerated Austin. This witness was not interviewed by Austin's defense counsel.

25. The Court accepts as fact the following sworn testimony of Eric Komitzsky on July 27, 2001:

a. He was working the cash register at the Crown Food Market on April 29, 1974, when the crimes at issue occurred.

b. He witnessed the shooting of Roy Kellam in a convex mirror, placed to provide a view of people entering the store, and soon thereafter, the shooter approached him, Eric Komitzsky, at the register.

c. He viewed the shooter from arms length when the shooter pointed a gun to his head and ordered him to empty the cash register.

d. After observing Michael Austin in person during the hearing he testified under oath that Austin was "absolutely" not the shooter he witnessed on April 29, 1974.

SHOULD POST CONVICTION RELIEF BE GRANTED?

Mr. Austin claims that "there are three independent legal grounds under which (he) is entitled to post conviction relief by this court." *Supplemental Memorandum in Support of Michael Austin's Motion to Reopen*, at 1. First, "the sentence and judgement imposed against him is contrary to the laws of the State of Maryland in so far as he is incarcerated under a sentence imposed in violation of the federal or state constitutions." Second, "numerous highly prejudicial constitutional errors." Third, "solely because he is innocent." *Id.* This categorization provides an acceptable structure for consideration of each of Mr. Austin's allegations.

I. Illegal Sentence

Md. Ann. Code, art. 27, § 410 defines felony murder as "murder which shall be committed in the perpetration of, or attempt to perpetrate, any rape in any degree, sexual offense in the first or

second degree, sodomy, mayhem, robbery, burglary, kidnapping...storehouse breaking...or in the escape or attempt to escape from the Maryland Penitentiary." *See Evans v. State*, 28 Md. App. 640, 695-97, 349 A.2d 300, 335-46 (1975). In order to "secure a conviction for first degree murder under the felony murder doctrine, the State is required to prove the underlying felony and the death occurring in the perpetration of the felony." *Bates v. State*, 127 Md. App. 678, 693, 736 A.2d 407, 415 (1999). It is important to acknowledge that the underlying felony is an "essential ingredient of the murder conviction." *Id.*

It was not clear to either the first post conviction court or the third post conviction court whether the State proceeded on a felony murder theory or a pre-meditated murder theory.[46] Nevertheless, this Court now holds that the jury instructions given at trial pointed the jury in the direction of a felony murder theory. Consideration of the following excerpt from the jury instruction at trial makes this point:

> Only one of these charges is being submitted to you for your consideration and your verdict...it is one which charges that on the day in question, April 29, 1974, that the defendant Michael Austin in Baltimore City feloniously did then and there steal and take away $1,942 current money of the goods, chattels, money and property of Milton Komitzsky. This is in simple language a charge of grand larceny. In order to establish the crime of grand larceny it must be proved that an amount and value of at least $100 or more was taken. Now the precise exact amount does not have to be proved but it must be proved that it was in excess of $100. There are other elements which must be proved in order to make out the crime of larceny and I'm going to define what that crime is and what must be proved in order to establish it. The word feloniously was used in this charge and that most simply means wrongful or fraudulent. So that larceny is the wrongful and the fraudulent taking and carrying

[46]In deciding the third Petition for Post Conviction Relief, the third post conviction court determined that the jury, not having expressly found an underlying felony, must have convicted Austin of premeditated murder: "in this case, there is no doubt that the jury found Petitioner guilty of premeditated murder and not felony murder, because it did not find Petitioner guilty of a felony upon which felony murder could be based. Therefore, premeditated murder must have been the theory for its first degree murder conviction." (Third post conviction opinion, at 4). The first post conviction court was likewise perplexed by this aspect of the trial.

away of goods or chattels which would include money from the possession of another person without his consent and against his will and with the wrongful and the specific intent to permanently deprive that person of the ownership in that property. The term ownership may be placed in the actual or the real owner of the property or it may be placed in the person whose possession the property or the money was left at the time of the theft. This is what we call having a special interest in the property. So that if you are convinced beyond a reasonable doubt that Milton Komitzsky had a special interest in the money, that is to say if it had been left in his possession, he had a right to have possession of it at the time it was taken, if you find that the money was taken from his rightful possession with the specific intent that he, Mr. Komitzsky be deprived permanently of that money, it was taken wrongfully and fraudulently, and if you are convinced that this defendant Michael Austin is the one who took the money, then you would find the defendant guilty of this charge of larceny under the sixth count of this indictment. Now of course just the reverse is true, if you have any reasonable doubt as to any of these factors that I have just mentioned, then you would have to find him not guilty.

Now the other indictment is the one which contains two counts or two charges. The first one is a homicide charge. In essence it charges on the day in question, April 29, 1974, Michael Austin in the City of Baltimore **feloniously, wilfully and of deliberately premeditated malice aforethought did kill** and murder one Roy Kellam, contrary to the laws of this State. The second count in essence charges that the defendant on the date and place in question unlawfully used a handgun in the commission of a crime of violence contrary to the laws of the State of Maryland. Now before I give you the definitions of homicide and what must be proved in such case, in order to make one element of this charge clear to you, I'm going to have to define for you what the crime of robbery is because when I get into the murder instructions you are going to hear the term robbery used in a specific way. **Now there is not before you a charge for your determination with regard to the crime of robbery. There were some such charges but they are not presented for you for your determination.** But as I have indicated in order to make the murder instructions clear to you, you are going to have to understand what the crime of robbery is. So I am going to explain to you what it is. In part it will duplicate the definition which I previously have given you of larceny. The two are similar in some respects. Robbery may be defined as the felonious or wrongful taking and carrying away of the personal property of another person either from him personally or in his presence and without his consent by the use of violence and by putting that person in fear. And there must be the specific intent on the part of the person taking the property or the money to deprive the owner permanently of his property or if that property is in the lawful possession of another person, other than the owner, then this would be the same as taking it from the actual owner. **So that for example if you are satisfied beyond a reasonable doubt that**

Jackie Robinson as an employee of the Crown Food Market was in proper or lawful possession of the money that you have heard referred to as being taken from the cash register which he said he was forced to open at gunpoint, if you find that this is the situation, and whoever took the money took it with the intent to permanently deprive the rightful owner of that money, then this would constitute the crime of robbery...

Getting then to the indictment which charges the defendant Austin with murder, the way the indictment is written it is a charge of murder in the first degree, but under such a charge the jury is permitted if the facts of the case warrant such finding to find the defendant guilty of any lesser degree of homicide or of course to find him not guilty. Now the law of the State of Maryland as passed by our legislature provides that all murder which shall be perpetrated by means of poison or lying in wait or by any kind of wilful and deliberate and premeditated killing shall be murder in the first degree. This same law also provides further that all murder which shall be committed in the perpetration or the attempt to perpetrate certain crimes, including the crime of robbery, shall also be murder in the first degree. So there are certain situations established by the legislature which create the crime of murder in the first degree. Now felonious or wrongful homicide, and homicide means the killing of one human being by another human being, wrongful homicides are divided into three classes in the State of Maryland, murder in the first degree, murder in the second degree and manslaughter. And upon proof by the State of a fact of a murder with nothing else, there is created a presumption that the murder was committed in the second degree unless there's some evidence of justification or excuse or some circumstance of mitigation which would reduce it to either manslaughter or to not guilty. And the State has the burden of proving beyond a reasonable doubt the elements of the crime which would elevate it or raise it to first degree murder. You start out with the presumption of second degree, but the State has the burden of proof all the way through and has the burden of elevating the crime to first degree murder. That is to say it was wilful and deliberate or it is the State's position in this case as I understand it that the murder was committed during the course of the commission of a crime of robbery. This is what is called a felony murder. You may hear that term argued or presented in the arguments of counsel. So if you hear the term felony murder it means one which has been committed during the course of certain crimes including the crime of robbery. Now under this rule, that is the felony murder rule, the State does not have to prove premeditation, wilfulness and deliberation in order to prove murder in the first degree because the fact that the person who was doing the shooting or the killing was committing a felony creates proof of what we call malice and premeditation sufficient to sustain a conviction for first degree murder for the killing which is done in connection with a felony such as robbery. I should explain to you, however, that in order to sustain a conviction under this felony murder rule, there must be proved a causal or a direct connection between the killing, between the homicide and between the

felony which is being committed, and in this case a robbery is claimed to have been committed. So there must be proved to be some connection between the two. So that something more than mere coincidence at the time and place between the two must be shown. In simple language it must be shown that the killing, homicide was committed directly in connection with the commission of some other felony such as robbery.

Now there is an issue in this case obviously as you have heard, an issue as to whether or not this defendant was even present at the time these crimes were committed. As I told you before, if you have any doubt as to that fact, then you must find him not guilty. **As I told you before, he or anyone else can be convicted of a crime of first degree murder in this case you would have to be satisfied beyond a reasonable doubt that the death of Roy Kellam was caused or committed in connection with a robbery being perpetrated at the time at his place of employment.** If you have any reasonable doubt that there was a robbery committed at the time, even though you may be convinced there was a killing, if you have any reasonable doubt that it was in connection with a robbery, then you could not convict the defendant of first degree murder because that's what the first degree murder charge is based upon in this case. If on the other hand you are convinced beyond a reasonable doubt that Mr. Roy Kellam was shot and killed by someone during the perpetration of a robbery of this Crown Food Market, and if you are further convinced beyond a reasonable doubt that the defendant, Michael Austin, is the person who committed these crimes, then you would find him guilty of first degree murder under the first count of this indictment which carries a number on the back 1280.

Going on further with regard to other degrees of unlawful homicide I should cover that because of course I do not know what your findings of facts will be and I must cover all the possible applicable law which may be appropriate in this case. Now if you are convinced beyond a reasonable doubt that this defendant Austin did in fact shoot Roy Kellam and thereby caused his death, but if you are not convinced that such shooting was connected with any robbery at the store, then you would have to go on in you deliberations to determine whether or not such shooting constitutes second degree murder or manslaughter. So I must therefore explain to you what these crimes are...

...Now members of the jury, these instructions as I told you have to do with all three grades or classifications of unlawful homicide, the first degree murder, the second degree murder and the manslaughter. I caution you that for the jury to find this defendant Austin guilty of any degree of unlawful homicide, it would be necessary for you to be convinced beyond a reasonable doubt, one, that he did in fact shoot the deceased Roy Kellam on the day in question, and that such shooting caused the death of the deceased Roy Kellam. *And before you could find the defendant guilty of first degree murder, you would also* **have to be satisfied beyond a reasonable doubt that such shooting and killing was done in the perpetration of a robbery.**

(Tr. 421-33) (emphasis added).

The jury convicted Austin on count one, #17401280 (referenced in the above excerpt as "1280"). One logical inference from this fact, considered in light of certain language in, and the focus of, the instruction is that the jury convicted Michael Austin of felony murder. However, the question is *what* felony. It is not clear precisely what robbery the jury considered within the felony murder context. Moreover, the only crime similar to a felony apparently addressed in the instruction was the larceny charged in a separate indictment. Yet, as the third post conviction court properly concluded, "larceny is not an underlying felony upon which murder can be based...(so) the conviction for first degree murder was not based on the larceny conviction, nor was it legally dependent upon it." (Third post conviction opinion, at 3). Therefore, the jury must have convicted Austin based on a crime amounting to a felony other than the larceny.

Both the first post conviction court and the third post conviction court were persuaded by the absence of a definitive reference to a specific felony victim that the jury was either relying upon the larceny, which is not a felony murder for this purpose, or acted on a pre-meditated murder theory. Broadly stated then, consideration of this issue in its current context requires this Court to determine whether Maryland law permits the conviction of a defendant of felony murder when the jury has not been informed of the particulars upon which the first degree murder conviction could rest. *Mumford v. State*, 19 Md. App. 640, 643, 313 A.2d 563, 566 (1974), provides an answer:

> *Under the felony-murder rule, the State does not have to prove premeditation, willfulness and deliberation in order to prove murder in the first degree. Rather, the fact that the accused was committing a felony creates proof of malice and premeditation sufficient to sustain conviction for first degree murder for any killing consequent to the felony. There is no further requirement upon the State that it indict and convict upon that underlying felony in order to sustain a felony-murder conviction.*

Based on *Mumford*, the State acknowledges that "the primary factor in proceeding on a felony murder charge is that the State is required to present proof of the underlying felony beyond a reasonable doubt." *State's Memorandum*, at 1. Furthermore, under Md. Ann. Code, Art. 27, § 616, an indictment for felony murder "growing out of a robbery," does not require the fact of robbery to be incorporated in an indictment as part of the crime charged." *Dishman v.* State, 352 Md. 279, 287-88, 721 A.2d 699, 702-3 (1998) (quoting *Wood v. State*, 191 Md. 658, 663, 62 A.2d 576, 578 (1948)). Therefore, the State argues that "[i]t is of no consequence that the underlying felony did not go to the jury in Austin's case" because the State demonstrated evidence sufficient to sustain a charge of robbery with a deadly weapon at trial. *State's Memorandum*, at 2.[47] This Court now considers the validity of this assertion.

In his closing argument during trial, the prosecutor addressed the jury with respect to felony murder rather than pre-meditated murder. Mr. Wase stated that the case concerned the "question of whether or not Michael Austin on April 29th, 1974, was the man who *robbed* Crown Food, Inc." (Tr. 443). Mr. Wase continued to emphasize that there was "no question that Crown Food was *robbed* and that Roy Kellam in the course of that *robbery* was killed." *Id.* Later, during his rebuttal, the prosecutor further elaborated his point by informing the jury that:

> *[I]f someone is killed in the course of a robbery it's first degree murder. Now whether or not the indictment*[48] *said Jackie Robinson was robbed or Milton Komitzsky was robbed or anyone else was robbed, one thing we know (is) that a*

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[47]The State explains that "the evidence presented was that two men armed with guns entered the Crown Food Market. One of the two men, identified as Austin, shot Roy Kellam. Jackie Robinson was ordered at gunpoint to open the cash register. He removed an unknown amount of bills and gave them to one of the perpetrators. The two suspects left the store, taking the money with them. That evidence alone was enough to send the robbery deadly weapon charge to the jury." *State's Memorandum*, at 1-2.

[48]The original indictment papers have not been located, but according to comments by the trial judge, Jackie Robinson was not the named victim. *See* pp. 37-40, *infra*.

robbery took place, money was taken from two different people. It does not make any difference who was robbed. A robbery took place, it's a felony murder. That's what Jackie Robinson testified to."

(Tr. 477).

Was the "felony" in question the robbery of Milton Komitzsky, as was seemingly argued to the jury by defense counsel?[49] If so, virtually no proof exists that Komitzsky was robbed. Robbery is a crime against a person, involving the taking and carrying away of property from someone, by force or threat of force, with the intent to deprive the victim of the property. *See, e.g., West v. State*, 312 Md. 197, 202-03, 539 A.2d 231, 233 (1988). After careful consideration of the trial transcript, it is apparent that the State failed to provide sufficient evidence to support a robbery of Milton Komitzsky.

Central to this conclusion is the absence of evidence placing Milton Komitzsky in the room where the crimes occurred. The only witness to the crime to testify, Jackie Robinson, who was standing behind one of the two cash registers in the store, stated that he "didn't know where Milton was at the time" of the incident, but "he was not at the register." (Tr. 248).[50] Furthermore, the last time Robinson saw Milton Komitzsky at the register was "about ten minutes before" the crime. (Tr. 189). More importantly, the State failed to prove that the perpetrators used force or the threat of force against Milton Komitzsky. Even though Robinson testified that Milton Komitzsky was "upset and visibly shaken," this was not until "after the alleged incident took place" when Robinson "had

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[49] "...the State did allege that my client Mr. Michael Austin did in fact rob Mr. Milton [also erroneously referred to by counsel as "Michael" Komitzky.] Komitzky. But Judge Jones pointed out the only count the State is pressing would be the sixth count." (Tr. 449-450).

[50] Earlier during his testimony, Jackie Robinson indicated that Milton Komitzsky "was on the side of the store." (Tr. 183). Even assuming that this prior statement placed Milton Komitzsky in the store, it is contravened by Robinson's later statement, and fails to indicate that "the side of the store" placed Milton Komitzsky within proximity of the crime.

occasion to observe both Mr. Eric Komitzsky and Mr. Milton Komitzsky." (Tr. 214-15). Milton Komitzsky did not testify.

Milton Komitzsky's brother and fellow employee at the Crown Food Market, Eric Komitzsky also failed to testify during trial, although according to his recent post conviction hearing testimony, he was robbed. But during trial the State presented no evidence that Eric Komitzsky was robbed. Accordingly, the State never proved the necessary elements of the underlying felony beyond a reasonable doubt in support of a conviction for first degree murder based upon the robbery of Milton or Eric Komitzsky, and the sentence for first degree murder cannot stand on this theory.

Alternatively, was the "felony" in question the robbery of Jackie Robinson?[51] This possibility was discussed at trial during a bench conference. The trial court explained to the attorneys that Mr. McAllister "indicated in chambers there is insufficient evidence this is a felony murder. I think there is sufficient evidence. There is clearly evidence that this was a robbery. It's true Mr. Robinson wasn't named in the indictment as a victim but that doesn't change the facts of the case." (Tr. 412). After McAllister agreed with this statement, the court shifted its focus to the larceny, informing that attorneys that "as to the larceny charge I'm going to send that to the jury." *Id.*

The prosecutor, during closing argument, explained that the robbery of Jackie Robinson

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[51]This Court posed the following question to the State: "If the defendant Austin was convicted of felony murder, but the felony (referring to larceny) was vacated by Judge Dorf, how is that particular conviction sustained?" In response, the State submitted a Memorandum and a Second Memorandum. In the Memorandum, the State seems to indicate that the robbery victim was Jackie Robinson. *See* n.47, *supra.* In the Second Memorandum, the State argued on page 1 that it proved every element of the robbery of Milton Komitzsky during the trial of Michael Austin. ("Petitioner was indicted for first degree murder and the robbery with a dangerous weapon of Milton Komitzsky."). Petitioner attacked the latter in his *Response to the State's Second Memorandum,* but did not clearly address the possibility that the victim of the robbery was Jackie Robinson. The responses generated by the parties indicate the confusing nature of this issue, and how it may have appeared to the jury.

would suffice as the basis for a conviction of felony murder. (Tr. 477). Jackie Robinson testified that the man who shot Roy Kellam "came down the aisle towards me. At the same time the other man with him put a gun on me and made me open the other cash register." (Tr. 165). According to Robinson, he placed the money from the register in a brown paper bag and gave it to the second gunman. (Tr. 183).[52]

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[52]On March 26, 1975, the second day of Austin's trial, the following examination of Jackie Robinson by State's Attorney Wase took place, in pertinent part:

Mr. Wase: After you saw Michael Austin shoot Roy Kellam, what happened then?
Jackie Robinson: The other man came up to me with a gun and told me to open the cash register.
Mr. Wase: I know that the ladies and gentlemen of the jury, I'm sure are having trouble hearing you because I am and I'm closer. Speak into the microphone and speak up.
Jackie Robinson: After Michael Austin shot Roy Kellam the other guy came -
Mr. McAllister: Objection as to what the other guy said, Your Honor.
The Court: Overruled. You may state what if anything the other man did.
Jackie Robinson: The other guy came over to me with a gun and told me to open the register.
Mr. Wase: Now at this time where were you standing when he came over to you with the gun?
Jackie Robinson: I was standing between the aisles.
Mr. Wase: Did you leave that position after he told you to open up the register?
Jackie Robinson: Yes.
Mr. McAllister: Objection as leading.
The Court: Well, don't lead him.
Mr. Wase: What did you do after he told you to open the register?
Jackie Robinson: I opened the register for him.
Mr. Wase: Could you do that from where you were?
Mr. McAllister: Objection.
The Court: Do you understand the question?
Jackie Robinson: I understand the question.
The Court: You may answer.
Jackie Robinson: Repeat it again, please?
Mr. Wase: Could you do that from where you were when the man gave you that order?
Jackie Robinson: No, I had to move up into the register.
Mr. Wase: Once you moved up into the register could you still see – by the way, that is register what?
Jackie Robinson: Register A.
Mr. Wase: Register A you went to?
Jackie Robinson: Right.
Mr. Wase: The register, what register did the defendant Michael Austin go to?
Jackie Robinson: Register B.
Mr. Wase: After you went to register A could you still see register B?
Jackie Robinson: No I couldn't.
Mr. Wase: Why not?
Jackie Robinson: Because of the shelves, the counters.
Mr. Wase: There are shelves in between?
Jackie Robinson: Yes.

In this scenario, the murder occurred during the course of the robbery of Jackie Robinson. The State demonstrated that money was taken and carried away from Jackie Robinson by threat of force with the intent to deprive the victim of the property.[53] More important, despite the serious confusion as to the victim of the underlying robbery, based upon the instructions of the trial judge and statements by the prosecuting attorney, it was intelligible to the jury that it could convict Austin of first degree, felony murder based upon the underlying robbery of Jackie Robinson. Since the State proved the necessary elements of the robbery of Jackie Robinson, it was unnecessary for the prosecution to both charge and indict the defendant for the commission of this felony. *Mumford*, 19 Md. App. at 643, 313 A.2d at 566. Austin was thereby properly sentenced and convicted of felony murder, and warrants no post conviction relief on this issue.

II. Constitutional Errors

Austin next turns to a series of allegedly prejudicial constitutional errors which he argues

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Mr. Wase: How high are they?
Jackie Robinson: They are about eight feet tall.
Mr. Wase: Whose register is register B?
Jackie Robinson: That would be Eric's.
Mr. Wase: Whose register is register A?
Jackie Robinson: It would be Milton Komitzsky's register.
Mr. Wase: Where was Milton Komitzsky a this time?
Jackie Robinson: He was on the side of the store, I didn't see him.
Mr. Wase: So you went to his register then to open it for the other gunman?
Jackie Robinson: Yes.
Mr. Wase: What did you do after you opened it?
Jackie Robinson: I put the money in a brown bag.

(Tr. 180-183).

[53]According to Jackie Robinson's testimony, the robbery itself was committed by the second gunman, not Austin. However, courts have recognized, since before Austin's conviction and sentence in 1975, that under the felony murder doctrine, a participating felon is guilty of murder when a co-felon commits a robbery. *Campbell v. State*, 293 Md. 438, 442, 444 A.2d 1034, 1037 (1982) (citing *Stevens v. State*, 232 Md. 33, 41, 192 A.2d 73, 78, *cert. denied*, 375 U.S. 886 (1963); *Boblit v. State*, 220 Md. 454, 457, 154 A.2d 434, 435 (1959), *appeal dismissed sub nom; Brady v. State*, 222 Md. 442, 160 A.2d 912 (1960); *Shockley v. State*, 218 Md. 491, 497, 148 A.2d 371, 374 (1959); *see Veney v. State*, 251 Md. 159, 174, 246 A.2d 608, 617 (1968), *cert. denied*, 394 U.S. 948 (1969); *see also Mumford v. State*, 19 Md.App. 640, 643-44, 313 A.2d 563, 566 (1974)).

entitle him to post conviction relief. He argues that despite waiver or final litigation of many of these issues, his newly presented evidence entitles him to pass through the *Schlup* gateway and have his issues considered on the merits. The *Schlup* model provides this Court with an intelligible and reasonable standard regarding whether it should reopen post conviction proceedings in this instance "in the interests of justice."[54] Accordingly, if, in light of the new evidence presented by Austin, it is more likely than not that a reasonable juror would not have convicted Austin, then the interests of justice require this Court to reconsider the merits of Petitioner's allegations despite otherwise existing procedural obstacles.

The essential case presented to the jury by the State during Austin's trial appears to have been as follows: First, Jackie Robinson, represented by the State to have been an "honest...fine young man attending college," identified Michael Austin as the shooter in the Crown Food Market robbery on April 29, 1975. Second, a calling card bearing the name "Horace Herbert," found in the possession of Austin, linked Austin to Herbert, "the other man in this murder and robbery," (Tr. 479), even though Austin denied knowing Herbert. Third, Austin failed to provide an original and legible time card at trial, a crucial piece of evidence to substantiate his alibi that he worked the full day of the crime and could not possibly have traveled to the Crown Food Market in time to commit it. Fourth, the State informed the jury that Eric Komitzsky, another employee of the Crown Food Market who witnessed the crime, could not add anything of substance to Robinson's testimony about Austin's

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[54]This Court also notes, however, that the *Schlup* paradigm does not provide the sole basis for courts to reopen post conviction proceedings in the interests of justice. The language of the UPCPA permits this Court "in its discretion" to reopen post conviction proceedings "in the interests of justice." Ann. Code Md., art. 27 § 645A(a)(2)(iii). Since the legislature granted this Court such broad discretionary powers with respect to the reopening of post conviction proceedings by using such vague language, and Maryland courts provide no guidance with respect to the precise scope and meaning of art. 27 § 645A(a)(2)(iii), this Court looks to *Schlup* for guidance in this particular case.

involvement with the murder of Roy Kellam since his testimony would merely be "cumulative." (See Tr. 37, 443).

This Court must now decide whether, "in the light of the new evidence," the case is sufficiently affected such that it is "more likely than not that no reasonable juror would have convicted" Austin, thus warranting the reopening of Austin's post conviction remedy in the interests of justice. *See Schlup*, 513 U.S. at 327. Several important considerations, not before the jury at Austin's trial, deserve consideration, with regard to each of the elements of the State's case.

1. The jury was indeliberately misled about the character of its prime witness, Jackie Robinson.

This Court must consider Jackie Robinson's testimony, which was heavily, almost exclusively, relied upon by the State, with respect to the new information about his credibility. Robinson, after all, initially linked Herbert and Austin by initially identifying Herbert as the other suspect involved in the Crown Food Market murder. Jackie Robinson was one of three possible witnesses to the crime, the others being Eric and Milton Komitzsky, and was the only witness to the shooting called by the State. Robinson had identified Austin from a line-up on June 10, 1974, and before that, from a photo array. At trial, Robinson again identified Austin as the man who shot Roy Kellam. (Tr.155-56).

The State based its case on the testimony of Jackie Robinson, portraying him as a clean-cut, credible college student. New evidence seriously disrupts this characterization of Mr. Robinson, and if available at trial, it clearly would have seriously affected the weight afforded his statements by the jury. Although Robinson may have been a "college student," or at least a college occupant, at some brief point, it is highly unlikely that he would have basked in the presumptively favorable light of

the popularly perceived "college student" based on his pre-college educational record and the apparent fraudulent inflation of admissions records by the former President of Virginia College at the time of Robinson's attendance.[55] When one adds Robinson's drug abuse and drug crimes during the period of his life when he witnessed the Crown Food Market murder, the credibility of his testimony would have likely suffered dramatically.

2. The jury was not, and could not have been, aware of the resolution of the Horace Herbert trial.

It is difficult to minimize the consequence of references to Herbert during Austin's trial.[56] Even though the court eventually struck all references to Herbert by Jackie Robinson, the calling card bearing Herbert's name, brought to the State's Attorney's attention by Detective Ellwood during a trial recess, could only have severely damaged Mr. Austin's defense. It seriously impeached his credibility and alibi by linking him to Horace Herbert, "the other man in this murder and robbery,"(Tr. at 479), and contradicted his testimony that he did not know Horace Herbert (Tr. at 336-37). Additionally, the prosecutor disregarded the trial court's restrictions on references to

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[55]See "Prefatory Findings," 3-7, *supra.* It is reasonable to assume that a capable defense attorney would have vigorously pursued this information to identify Robinson as one of the suspect students, as he had not even completed high school. However, this Court must emphasize that Austin presents no "hard" evidence that Jackie Robinson was, in fact, specifically one of these students.

[56]The State summed up the importance of Herbert to its case during a bench conference at trial (Tr. 112). The State began questioning Det. Ellwood about a photo identification by Jackie Robinson. The trial judge called the attorneys to the bench and asked:

The Court:	I'm just wondering why the State - are you getting into any identification other than the defendant? I was wondering why you have got into these other photographs.
Mr. Wase:	Well, if Your Honor please, there were two people who committed the crime. It all goes to the commission of the crime. The State feels the full story should be told to the jury. There may be other reasons which may come out later. But the State would state at this time that it's relevant to the crime which was committed."
The Court:	In what respect?
Mr. Wase:	In that two persons did commit the crime and the witness Jackie Robinson was able to identify both persons and this is one of the two persons whom he could identify (in reference to Horace Herbert).

Herbert in an egregious way by continuing to refer to Herbert during his closing argument.[57]

As already noted, Jackie Robinson could *not* identify Herbert at his trial, and Horace Herbert was consequently confessed not guilty by the State. As a result, in the eyes of the law, Herbert did not participate in the Crown Food Market robbery on April 29, 1974. Knowledge of that conclusion of the Horace Herbert trial is attributed to all agents of the State. *Brady v. Maryland*, 373 U.S. 83, 97 (1963); *Arizona v. Robinson*, 486 U.S. 675, 687-88 (1988). It is uncontested that the State failed to inform Mr. Austin and the post conviction courts of Mr. Herbert's status.[58] However, for reasons explained below, this Court finds that this failure to disclose the confessed not guilty does not technically constitute a *Brady* violation. Regardless of this finding, this Court recognizes the importance of the State's confession of Horace Herbert not guilty and the potential impact this information would likely have had upon the jury. This new evidence demands the attention of this Court in its consideration of whether or not to reopen post conviction proceedings in the interests of justice.

Although the words "confessed not guilty" appear in the docket entries, and arguably should have been discovered by Austin prior to this point in his proceedings, nowhere does the file state, nor would it in the normal course, that the *reason* for this conclusion involved Jackie Robinson's admission that he could not identify Herbert Horace as the individual who robbed the Crown Market Food store. This historical fact was not otherwise publicly published or recorded, but it seems strange to this Court that the resolution of an alleged co-perpetrator's trial was of such little interest

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[57]*See* n. 23, *supra.*

[58]The State confessed Horace Herbert not guilty on June 30, 1976. Austin filed his first Petition for Post Conviction Relief on November 2, 1978.

to so many for so long.

During the hearing before this Court, David Katz, who prosecuted Horace Herbert, confirmed his reasoning for the State's conclusion that Horace Herbert should be confessed not guilty. After Robinson surprised Katz in court during the trial of Horace Herbert by failing to identify Herbert as one of the men involved in the crimes at the Crown Food Market on April 29, 1974, Robinson assured Katz during a recess that the defendant (Herbert) did not commit the crime. Following this discussion, Katz concluded that it "appeared appropriate to do just...(since) I believed Mr. Robinson's explanation about why he did not identify Mr. Herbert in the courtroom."[59] Upon returning to court, Mr. Katz "ended the trial by affirmatively confessing Mr. Herbert not guilty." Mr. Katz has not been inaccessible since his decision in the Herbert case.

3. The passage of time and the ineffective assistance of Austin's trial counsel has made it impossible to view Austin's original time record.

The following excerpts from the trial testimony present the larger picture regarding the time record.:

Cross Examination by Mr. Wase

Q. *Mr. Austin, you testified that you looked at your time card for this week, is that correct? For the week of, the week that would have included April 29, 1974 you looked at the time card, is that correct?*
A. *You mean the one on the sheet of paper?*
Q. *Yes, you testified you looked at that, right?*
A. *No.*
Q. *You testified that you worked that day, is that correct?*
A. *Right.*
Q. *You also testified that you don't know what time it was you got off from work that day?*

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[59]See "Prefatory Findings," 20-23, *supra*. Apparently, a difference between the complexion of Herbert's skin when viewed in person varied from its appearance in the photograph Robinson earlier identified.

A. *Yes, I know what time it was I punched out.*

Q. *I thought you testified in answer to your attorney's question that you knew it was late, but you didn't know what time it was?*

A. *I said it was late. He didn't ask me the exact time.*

Q. *I misunderstood because I thought he did.*

Mr. McAllister: *Objection to comments by counsel*

Mr. Wase:

Q. *Tell us then please the exact time you left work that day?*

A. *Before I punched any way I always look at the clock. I think it was to five minutes to five or 5 o'clock.*

Q. *Do you know what time you punched out that day?*

A. *Five minutes of five.*

Q. *Five minutes of five? Now your attorney has explained to you that you have the right, you have certain rights of subpoena, is that correct?*

Mr. McAllister: *Objection Your Honor, objection.*

The Court: *Well I'll sustain the objection to his conversation with his lawyer.*

Mr. Wase:

Q. *You know that you have a right to summons evidence in you behalf, don't you?*

Mr. McAllister: *Objection Your Honor.*

The Court: *The question is do you know whether you have that right, Mr. Austin? I'll overrule it.*

The Witness: *I understand the question.*

Mr. Wase:

Q. *You know you have a right to subpoena that evidence in you own behalf, don't you?*

A. *Right.*

Q. *You know that you have the right to subpoena the time cards from where you worked, right?*

A. *Right.*

Q. *You know you have the right to subpoena the time cards as a matter of fact from Flynn and Emrich, is that right?*

A. *Right.*

Q. *Do you have those time cards with you today?*

A. *No. I went -*

Mr. McAllister: *Objection, Your Honor. I ask he be allowed to explain this.*

The Court: *Yes.*

Mr. McAllister: *Explain.*

The Witness: *I went out to Flynn and Emrich personally myself when I got out on bail when I talked to the manager in the personnel department.*

Mr. Wase: *Your Honor, this isn't responsive.*

Mr. McAllister: *Objection. He asked the question.*

The Court: *The witness should be given the opportunity to explain.*

The Witness: *I went to the personnel department myself. So like I talked to the manager whose name is Tom. Like I begged and asked for the time card.*

Mr. Wase: *Objection.*

Mr. McAllsiter: *Objection.*

The Court: *Let him explain why.*

The Witness: *I asked for the time card. He tells me like -*

Mr. Wase: *Objection to what someone told him.*

The Court: *What did you find out?*

Mr. McAllister: *What did you find out?*

The Witness: *I asked for the time card. I asked not only for myself but the people who worked that day. I worked, so I have evidence that when I come to work to prove that they had worked on the day I worked.*

Mr. Wase: *If Your Honor please -*

Mr. McAllister: *You asked the question.*

Mr. Wase: *I know you said he can explain the answer, but my question had to do with a subpoena.*

The Court: *You asked him why, so I'll permit him.*

Mr. Wase: *Why he did not subpoena the records.*

The Court: *He is giving the reason why. He may explain.*

The Witness: *So Tom told me -*

The Court: *I realize it's hearsay.*

Mr. McAllster: *But he asked for it.*

The Witness: *The manager told me -*

Mr. Wase: *Of course I object to what the manager told him, Your Honor.*

The Court: *What's the manager's name you talked to?*

The Witness: *His name is Tom. I forget his last name. Well he told me, he say like-*

Mr. Wase: *I object to what Tom is saying, what someone else told him.*

The Court: *I have overruled the objection. I am permitting it in response to your question why he did not subpoena these records.*

The Witness: *So like I asked him would it be possible I could have the time cards of 1974 in the department that I worked. He said it would be impossible for me to get the cards simply behind the fact after a certain time all of the cards they have they ship out somewhere and it would a while before he'd get the cards and then he don't know if he could get the cards then. Then he told me that I was lucky enough to get a duplicate of the time card showing the day I worked and the time on it. So I kept going back out there asking for, if I could get the time*

cards and the time card of the people that worked around me, but he says it's impossible, you couldn't get it. But I tried. I was discussing with Mr. McAllister to have a subpoena. His secretary, they called out there, they just told him the same thing.

Mr. Wase: *I would object to what -*

The Court: *You discussed this in any event with Mr. McAllister.*

Mr. McAllister: *Yes Your Honor.*

Mr. Wase: *Now I'd like this to be marked at this time for identification, Your Honor.*

Mr. McAllister: *I have no objection whatsoever. Even introduce it into evidence.*

The Court: *State's Exhibit #8 for identification.*

Mr. Wase: *Yes, Your Honor.*

Q. *Now Mr. Austin, you say they told you you were lucky to have a photostatic copy?*

A. *Right.*

Q. *They did give you this photostatic copy?*

A. *Did they give it to who?*

Q. *What?*

A. *Who?*

Q. *Who gave you this photostatic copy?*

A. *No one gave it to me, they gave it to Ellen* (Austin's girlfriend).

Q. *You said they told you that you were lucky to get it?*

A. *Right, because they know it was my time card.*

Q. *But they told you they didn't have the time card?*

A. *Right.*

Q. *Well now if this was a photostatic copy it had to be photostated from something, did it not?*

Mr. McAllister: *Objection Your Honor. It speaks for itself.*

The Court: *I'll overrule it, you may answer.*

Mr. McAllister: *You may answer that.*

The Witness: *What's the question?*

Mr. Wase:

Q. *I say if as a photostatic copy it had to be photostated from something, is that right?*

A. *Right.*

Q. *All right. Now you say you went and had this conversation, you asked for this time card. They told you you couldn't get it, right?*

A. *Right.*

Q. *Did you then file a subpoena for it to be brought into court?*

A. *I couldn't file a subpoena.*

Q. *You couldn't file a subpoena?*

A. No. I don't have the knowledge of knowing how to.
Q. Did you ask your lawyer to file a subpoena?
Mr. McAllister: Objection Your Honor.
The Court: I'll have to sustain the objection as to conversation.
Mr. Wase: If Your Honor please, he's already been allowed to testify to the conversations with his lawyer which I objected to.
The Court: I don't think there was any objection.
Mr. Wase: I had objected and Your Honor had allowed it.
The Court: We'll have the record read back, but I'll sustain the objection to the conversation with his lawyer.
Mr. Wase: You mean he can testify to those parts he wants to?
Mr. McAllister: I object to this.
The Court: Will you come to the bench? Come to the bench.
Mr. Wase: I apologize.

(Bench Conference)

The Court: I'm directing you not to argue with the Court's rulings. If I'm wrong I shall be duly corrected, not by you but by an appellate court and I don't want to hear that any more.
Mr. Wase: Yes Your Honor.
The Court: Especially before the jury. You want to come up here, you can come up here and make your arguments. I'm not going to tolerate this.
Mr. Wase: Your Honor is correct, I apologize.
The Court: There was one instance he said what the lawyer's secretary sent out. I don't recall any objection and it came in. The previous time I did sustain the objection. There's a privilege between the client and the lawyer. That's why I sustained the objection.

(End of Bench Conference)

Mr. Wase:
Q. Mr. Austin, do you know of any subpoena that has been filed on your behalf in this case for the time cards from where you worked?
Mr. McAllister: Objection.
The Court: I'll overrule it. If you know, if you know of any or do not have any you may tell us.
The Witness: I don't have any knowledge of it truthfully.
Mr. Wase:
Q. I ask you again do you have those times in court with you today?
A. What time cards?

Q. The time cards for what hours you worked, if at all, on April 29, 1974?
A. No, but I have duplicates.
Q. But you don't have the time cards, do you?
A. No I don't.
Q. You have a piece of paper that purports to be some kind of a photostat, is that correct?
A. It is a photostat of my time card.
Q. Thank you...

(Tr. at 315-25).

What this uncontradicted testimony reveals is that Austin and his girlfriend each made an effort to get the time card, when at least his counsel would have known, that original time records are not simply handed out to the curious. Rather, they can and should be procured by a properly issued subpoena *duces tecum* so that the authenticated record can come directly to the court for evidentiary use. There never was a subpoena and it is now apparent that the original record has been lost with the demise of the custodian company.

Consequently, the original timecard was never entered into evidence. Rather, as the State correctly pointed out during trial, the court and the jury were presented with "a totally unintelligible photograph of what purports to be a time card that we couldn't make out any sense of and neither we or the Court could so we couldn't allow it to go into evidence." (Tr. 476).

4. The jury was unaware of Eric Komitzsky's inability to identify Austin pre-trial, and of his later explicit exculpation of Austin.

Finally, and crucially, evidence from Eric Komitzsky sheds new light on this case.[60] At trial, the prosecutor characterized Eric Komitzsky's potential testimony as "cumulative," which wrongly implied it was consonant with that of Jackie Robinson. Moreover, Austin's defense counsel

[60]Eric Komitzsky testified before this Court during a hearing on July 27, 2001.

neglected to call Komitzsky to appear as a witness or to contact him for the extensive interview that was warranted.

Eric Komitzsky informed this Court that he was working a cash register at the Crown Food Market on April 29, 1974, when it was robbed. While looking into a convex mirror, placed in the store to provide a view of people entering the store, Komitzsky witnessed someone approach Roy Kellam closely, "in an intimate way," and "the next second...(he) heard the pop of the gun." A moment later, "the shooter appeared in (Komitzsky's) vision within probably three feet away." The shooter then held a gun to his head "and his nose was two inches from" Mr. Komitzsky's, at which time the assailant instructed Komitzsky to empty out the cash register.

After testifying that he saw, and closely saw, the person who shot Roy Kellam, Eric Komitzsky unequivocally stated on July 27, 2001, that he was "certain" that Michael Austin, sitting before Komitzsky in the courtroom, was "absolutely" not the perpetrator. According to Komitzsky, Austin is "too tall, too big, (and) too dark," to be the individual who shot Kellam on April 29, 1974. Questioned about how he could make such a determinative statement more than twenty years after the incident, Komitzsky answered that "everybody remembers where they were when President Kennedy was shot. Its like a...snapshot in time. I had the same exact snapshot in time when I stepped forward" and the shooter first appeared in his vision. Asked why he did not testify to this effect during Austin's trial, Komitzsky stated that he was "not invited."

Summary of *Schlup* Gateway Evidence

In summary, the credibility of Jackie Robinson, the State's star witness during Austin's trial, would have been severely compromised, if not destroyed, had his full history been told. Furthermore, the other individual linked to Austin in the robbery by Robinson before Austin's trial,

and connected to Austin by a calling card produced for the first time during trial, was subsequently confessed not guilty by the State of the Crown Food Market crime. No serious effort to procure Austin's critical, original time record was made and it is now lost. Finally, an eyewitness to the April 29, 1974 murder who stood within inches of the shooter never testified during Austin's trial, and now unequivocally states that Austin was not the shooter and that he would have so testified.

In light of this new evidence, this Court will consider each of Austin's allegations of constitutional violations. First, it is necessary to address any procedural barriers to these constitutional claims, including waiver or final litigation. If these obstacles exist for a particular issue, this Court will then consider whether, in light of the new evidence presented by Austin, it is more likely than not that a reasonable juror would not have convicted Austin for the Crown Food Market shooting. *See Schlup*, 513 U.S. at 313. If so, Austin will pass through the "gateway" of procedural obstacles discussed in *Schlup*, and this Court will reopen Austin's post conviction proceedings "in the interest of justice" and consider whether relief is warranted.

At the same time, this Court is mindful of the potential consequences to judicial economy if courts begin reopening entire post conviction proceedings based upon evidence affecting only one or a few of the underlying issues in a case. The procedural restraints within the UPCPA should be heeded whenever possible. Therefore, this Court will consider whether to reopen post conviction proceedings "in the interests of justice" on an issue by issue basis. The standard this Court relies upon, set forth in *Schlup,* expressly speaks in terms of "new evidence." 513 U.S. at 332. Thus, if the new evidence in this case bears no impact on a particular allegation, then this Court will not consider the merits of that particular issue if Austin waived or finally litigated the claim.

A. "Advisory" Jury Instruction

Austin argues that under the recent holding of *Jenkins v. Hutchinson*, 221 F.3d 679 (4th Cir. 2000), he deserves a new trial based on the erroneous "advisory" jury instruction given at his trial.[61] In *Jenkins*, the petitioner filed for federal habeas corpus relief from his convictions in Maryland. 221 F.3d at 681. During trial before the Circuit Court for Prince George's County, the court first explained to the jury that the court's function was to give advisory instructions. *Id.* It then used additional language indicating the advisory nature of the instructions.[62] Jenkins failed to object to these instructions at trial or on appeal. In his fifth petition for post conviction relief in Maryland, Jenkins complained that "the trial Judge erroneously instructed the jury in an advisory capacity." *Id.* at 682. The state post conviction court held that under Article 23 of the Maryland Declaration of Rights, instructions on the law in criminal cases on which the trial court may give are advisory and the trial court must inform the jury of this fact. *Id.* Jenkins' subsequently filed a federal habeas corpus petition, alleging that the advisory nature of the jury instruction during his trial relieved the State of its burden to prove every element of a crime beyond a reasonable doubt, thus violating his due process rights. This contention was rejected by the United States District Court. *Id.* On appeal of this decision, however, the United States Court of Appeals for the Fourth Circuit reversed, finding that the advisory instructions at trial violated his due process rights. *Id.* at 686.

Austin contends that this decision entitles him to post conviction relief. Indeed, Austin's situation parallels the procedural history of Jenkins in that both were convicted in 1975, and the

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[61] See "Prefatory Findings" 14-15, *supra.*

[62] The trial court in *Jenkins* stated that "further, the Court says to you, in an advisory capacity, that the burden of proof, which rests on the State,...is that the Defendants must be found guilty at your hands only after you are satisfied beyond a reasonable doubt and to a moral certainty of the guilt of the Defendants, or either of them, or any or all of the charges brought against the Defendants." *Jenkins*, 221 F.3d at 681.

convictions became final in 1976. *Id.* at 682. However, the State argues a vital difference between the two cases. Federal review was only available to Jenkins because during Mr. Jenkins' fifth petition for post conviction relief, "the Maryland court did not rule that Jenkins' challenge to the jury instructions was waived, but rather addressed the claim on its merits." *State's Response*, at 15 (quoting *Jenkins*, 221 F.3d at 682). A federal court "may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule." *Jenkins*, 221 F.3d at 682 (citing *Harris v. Reed*, 489 U.S. 255 (1989)). In this case, argues the State, there has been an appellate decision on the merits.

Has Austin waived further challenges to the jury instructions given at trial? And, if he has, is it excused? Austin failed to object to the "advisory nature" of the instructions at trial and during direct appeal. Since *Stevenson v. State*, 289 Md. 167, 423 A.2d 558 (1980), Maryland has recognized that a jury is not entitled to decide the law in a case, only the facts.[63] Although the Court of Appeals failed to articulate this principle until after Austin's trial, conviction, and appeal (all complete by June 10, 1976), the United States Supreme Court had unequivocally declared in 1970, prior to Austin's trial, that "lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute

[63]In *Stevenson*, the Court of Appeals addressed the meaning of Article 23 of the Maryland Declaration of Rights, providing that the jury shall be the judge of the law, as well as the facts. "Despite Article 23's facial breadth, it is a postulate well recognized in the prior decisions of this Court, and one which the United States Supreme Court correctly observed in *Brady v. Maryland*, that Article 23 'does not mean precisely what it seems to say.'" *Stevenson* at 175, 423 A.2d at 563 (citations omitted). In fact "the jury was not granted, by Article 23, the power to decide all matters that may be correctly included under the generic label "law." Rather, its authority is limited to deciding "the law of the crime," *Wheeler v. The State*, 42 Md. 563, 570 (1875), or "the definition of the crime," as well as "the legal effect of the evidence before (the jury)." *Beard v. State*, 71 Md. 275, 280, 17 A. 1044, 1045 (1889). *Stevenson* at 178, 423 A.2d at 564.

the crime with which he is charged." *In re Winship*, 397 U.S. 358 (1970). Despite this unambiguous decision in *Winship*, Austin's counsel failed to object to the instruction which potentially reduced this burden in the minds of the jury. In other words, constitutional law clearly required the State to prove every element of a crime beyond a reasonable doubt, yet Austin and his attorney failed to object to an instruction which permitted a juror to believe that he or she was merely "advised" about the reasonable doubt standard, and could choose whether or not to follow this law. Austin's counsel himself admitted to the trial court that he advised Austin that "under the law of the State of Maryland the jurors will be the judges of both the law and the facts." (Tr. 4).

Austin's, and his counsel's, failure to object to the advisory nature of these jury instructions, created a rebuttable presumption of waiver of this issue. *See Curtis,* 284 Md. 132, 395 A.2d 464 (1978). The Court of Appeals has determined that "the 'knowing and intelligent' waiver concept is not applicable to the failure to object to an erroneous jury instruction. *Hunt v. State*, 345 Md. 122, 150, 691 A.2d 1255, 1268 (1997) (citing *Davis v. State*, 285 Md. 19, 35, 400 A.2d 406, 414 (1979)). Therefore, Austin presumably waived any issue with regard to the "advisory" nature of the trial court's jury instruction.

Moreover, Maryland courts have previously considered complaints by Austin concerning the instructions given during his trial.[64] A petitioner may not present an endless stream of post

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[64]The Court of Special Appeals dismissed the contentions that the trial judge gave unconstitutional instructions to the jury on the burden of proof and on the subject of eyewitness testimony. *Austin v. State*, No. 774, unreported (Md. App., filed June 10, 1976). The Court stated that "it is true that the trial judge erroneously instructed the jury that they should begin 'with the presumption of second degree murder' and that the burden was on the State to raise it to first-degree murder just as a reciprocal burden was upon the defendant to lower it to manslaughter. Although the instruction was academically incorrect in light of *Mullaney v. Wilbur* and *Evans v. State*, the error is no more than academic since there was no legitimate issue of justification, excuse or mitigation generated by the evidence in this case. The appellant, moreover, was convicted of murder in the first degree, demonstrating that the State shouldered its burden of proving every element beyond a reasonable doubt and had no need to rely upon a presumption of non-mitigation." *Id.* at 1-2. Moreover, the first post conviction court considered one of the same parts of the instruction relied on by Austin here (the alibi instruction) and denied relief on this

conviction petitions based on jury instructions whenever he or she finds fault in another aspect of the instructions at a later time. *See Whyche v. State*, 53 Md. App. 403, 407 n.2, 454 A.2d 378, 379 (1983) ("if an allegation concerning a fundamental right has been made and considered at a prior proceeding, a petitioner may not again raise that same allegation in a subsequent post conviction petition by assigning new reasons as to why the right had been violated, unless the court finds that those new reasons could not have been presented in the prior proceeding."). This holds true for fundamental rights, let alone non-fundamental rights, such as jury instructions, which are more susceptible to procedural defect. Hence, this Court would not normally afford an individual in Mr. Austin's position another opportunity to raise the issue of jury instructions.

The apparent waiver of the jury instruction issue, however, does not necessarily conclude this examination. Post conviction law excuses waiver of any allegation of error when "subsequent to any proceeding in which said allegation otherwise may have been waived, any court whose decisions are binding upon the lower courts of this State holds that the Constitution of the United States or of Maryland imposes upon State criminal proceedings a procedural or substantive standard not theretofore recognized." Md. Ann. Code, art. 27 § 645A(d). Furthermore, post conviction law permits the retroactive application of a court's decision if the standard created by that decision "is intended to be applied retrospectively and would thereby affect the validity of the petitioner's conviction or sentence." *Id.* Despite the important difference between Austin's and Jenkins' cases argued by the State, *Jenkins* still represents a new decision, subsequent to Austin's presumed waiver of the jury instruction issue, providing binding law about jury instructions in Maryland during the

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ground. Consequently, Austin has previously attacked the jury instruction for different reasons but has never addressed this aspect of the instruction before.

1970's. It provides an express requirement for these jury instructions, to withstand constitutional scrutiny. The central holding of *Jenkins* was:

> [If] the jury understood the advisory nature of the instructions as permitting it to ignore the reasonable doubt instruction, then the jury could fashion any standard of proof that it liked. That *the jury must be instructed* that the Government is required to prove the defendant's guilt 'beyond a reasonable doubt' [is] not an open question after *Winship*.

221 F.3d 684 (emphasis added).[65]

Bearing this in mind, the only question is whether this advisory instruction prohibition applies retroactively. This Court believes that it does. In *State v. Colvin*, 314 Md. 1, 548 A.2d 506 (1988), the Court of Appeals directly quoted the language of Art. 27 § 645A(d) when stating that petitioners are entitled to the benefit of any binding decision "holding that the United States Constitution 'imposes upon State criminal proceedings a procedural or substantive standard not theretofore recognized, which...is intended to be applied retrospectively and would thereby affect the validity of the petitioner's conviction or sentence." 314 Md. at 25, 548 A.2d at 518. In that case, the court considered the implications of *Mills v. Maryland*, 486 U.S. 367 (1988), where the "the Supreme Court held that the potential for uncertainty in a jury's interpretation of the sentencing form for capital cases specified by former [Maryland] Rule 772A violated the eighth amendment's prohibition against cruel and unusual punishments." *Colvin*, 314 Md. at 24-5, 548 A.2d at 517. Since *Mills* affected "the very integrity of the fact-finding process," the Court of Appeals determined that it applied retrospectively. *Id.* at 25, 548 A.2d at 518. *Jenkins* deals with an issue of similar import, and also applies retrospectively.

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[65]Again, the *Jenkins* trial judge gave an "advisory" instruction which was found defective for this very reason. *See* n. 62, *supra*.

Due process demands that the government prove each element of a crime beyond a reasonable doubt. *Jenkins*, 221 F.3d at 683. The ability of a jury to ignore this requirement compromises the integrity of the fact-finding process by permitting it to ignore the Supreme Court's pronouncement in *Winship* that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which (a defendant) is charged." 397 U.S. 358, 364 (1970). Therefore, since *Jenkins* provides a binding due process standard to this Court, intended to apply retrospectively and not recognized at the time Austin waived further claims about the jury instructions at his trial, Art. 27, § 645A(d) requires this Court to consider Austin's allegation. Based on the application of the law discussed in *Jenkins* to Mr. Austin's case, he is entitled to post conviction relief for this error of law.

Additionally, this alibi instruction flaw becomes even more ominous when considered in light of the felony murder ambiguity discussed *infra*. Given the uncertain felony foundation for the jury's verdict, a circumstance which has perplexed at least two judges in the history of this case, there can be no assurance that the jury did not develop its own theory of murder.

B. Exculpatory Evidence

Petitioner next alleges that the State failed to provide him with exculpatory evidence, thereby violating the principles of *Brady v. Maryland*, 373 U.S. 83 (1963). Generally, *Brady* obliges the State to provide a defendant with all exculpatory evidence in its possession. In *Brady*, the Court stated that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

Petitioner claims that "the homicide files in (his) case contain a vast amount of exculpatory

evidence not turned over to the defense until 1992 and not presented at trial despite a discovery request from the defense requesting all exculpatory evidence." *Motion to Reopen Post Conviction*, at 30. This information falls into two categories: 1) "the State's failure to disclose to Mr. Austin the post trial exculpatory evidence of the confessed not guilty (of Horace Herbert), particularly during the Second Post Conviction Hearing," and 2) "eye-witness descriptions of suspect #1 which are not close to the height, weight, size or complection of Mr. Austin and also identification of numerous other potential suspects that the police and defense counsel never followed up."

The State does not argue that the confessed not guilty *Brady* issue has been waived or finally litigated. Rather, "the State has difficulty seeing the confessed not guilty as a *Brady* issue." *State's Response*, at 13. This Court agrees. As an initial matter, a *Brady* violation could not possibly have occurred during Austin's trial since the State did not confess Horace Herbert not guilty until June 30, 1976. By that time, Austin had been convicted (March 27, 1975), sentenced (May 5, 1975), and denied on appeal (June 10, 1976). *A fortiori*, the prosecutor could not possibly have suppressed or withheld evidence.

Petitioner further claims that failure to disclose this information during the second post conviction resulted in a *Brady* violation. However, the State's neglect of informing Petitioner about the fact of the confessed not guilty of Horace Herbert does not itself amount to a *Brady* violation. *Ware v. State*, 348 Md. 19, 39, 702 A.2d 699, 708 (1997) ("The prosecution cannot be said to have suppressed evidence for *Brady* purposes when the information allegedly suppressed was available to the defendant through reasonable and diligent investigation."). First, the docket entries for the Herbert Horace case reflect that the "State confesses (Herbert) not guilty" on June 30, 1976. This file is a matter of public record. Criminal files may be retrieved from the Mitchell Courthouse

Clerk's office. If the files are more than 12 years old, they are transferred to the state archives in Annapolis. Upon request, these files may be retrieved from Annapolis by the Circuit Court for Baltimore City Clerk of the Court's office for examination. Although files of this age cannot be located in the Mitchell Courthouse "in 20 minutes," as the State implies, they are still available to a person through a "reasonable and diligent investigation." Thus, the State did not commit a *Brady* violation by not informing Petitioner of the *mere occasion* of the confessed not guilty of Horace Herbert during Austin's second post conviction. This, however, does not conclude examination of this issue.

An additional step must occur in this *Brady* analysis to determine whether the State committed a violation, not by failing to disclose the existence of the confessed not guilty of Horace Herbert, but by failing to disclose the *underlying reasons* of the confessed not guilty. Petitioner correctly points out that "nothing in the file indicates the nexus between Mr. Robinson's acknowledgment of his false identification and the State's decision to confess (Herbert Horace) not guilty." *Reply Memorandum*, at 17.

This Court admits that it is troubled by the State's failure to inform Petitioner's counsel during the second post conviction that Jackie Robinson stated in open court, despite the presence of Horace Herbert, that he did not see either of the individuals who participated in the crimes committed in the Crown Food Market on April 29, 1974. As discussed above, this newly available evidence about the reasons underlying the confessed not guilty of Horace Herbert provides important information relating to this case, and is now being considered by this Court. Yet this failure by the State to disclose the reasons behind the confessed not guilty of Herbert Horace does not necessarily amount to a *Brady* violation. This Court is unaware of, and Petitioner fails to point out, any

precedent for the application of the *Brady* doctrine to any proceeding other than trial. To the contrary, courts indicate that *Brady* specifically applies to the prosecutor's conduct at trial. *See U.S. v. Bagley*, 473 U.S. 667, 674 (1985) ("The Court explained in *United States* v. *Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976): 'A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the *outcome of the trial*.'"(emphasis added)); *Jones v. State*, 132 Md. App. 657, 674, 753 A.2d 587, 597 (2000) ("*Brady* and its progeny deal...with the very issue of withholding from the knowledge of the jury, *right through the close of the trial*, exculpatory evidence which, had the jury known of it, might well have produced a different verdict."(emphasis added)). Therefore, a *Brady* violation could not technically occur, despite the possibility that the State neglected to inform Petitioner of the confessed not guilty of Horace Herbert, since this information came into existence after the trial, conviction, sentencing, and appeal of Michael Austin.

Next, Petitioner alleges that a *Brady* violation occurred when the State withheld the police homicide files until 1992. According to Petitioner, these files contain important information including:

- *The initial report of the police from the day of the offense list(ing) witnesses (Jackie) Robinson, (Eric) Komitzsky, Franklin Washington, John Wilmer, and Samuel Graves. The report also contained two descriptions "M-N 22-25 yrs, 5'8" 150-160 lbs Lt Complection short" and "M-N-22-25 5'5" 130-140 Dk Complex NFD.*

- *Jackie Robinson described the shooter as 5'8"-5'9" 150-160 lbs, full hair short on top, sideburns to the bottom of the ear, light complection gold rimmed glasses. Mr Robinson said he could not describe the robber's clothes because he did not get a good look at them.*

- *Franklin Washington, an employee of Crown Market, was also interviewed and stated he was outside near the entrance to the store, heard a gun shot*

and ran but not before he saw the robbers leave with a brown paper bag in their hands. Later, it was learned that Mr. Washington told police and would have testified that he saw the robbers outside the store and they were his height, 5'8". Also, Mr. Washington would have testified to viewing a line up of suspects of varying heights which included Mr. Austin, but he did not pick Mr. Austin out.

- *Eric Komitzsky, another employee who got a good look at the robbers, gave a statement in which he explained that the shooter who stood directly before him was 5'8"-5'10", slender build, wearing a green nylon short sleeve "ban lon' shirt."*

- Mention of *"Gerald Dent (who was wanted for another shooting) and Paul Lee, possible suspects identified by a 'reliable informant.' Mr. Komitzsky identified Dent as a 'look alike' to suspect #1. The reports explain on a number of occasions the detective sought to arrest Dent and question him, but there is no report of them ever having done so. Furthermore, a caller who claimed to have information did not meet the detective as promised and it was known in the area that Dent would 'attempt to quiet' anyone discussing his criminal activity."*

- Mention that *"Jackie Robinson received a call from an unknown source who stated that 'Snake' and 'Chilly' killed Kellam at Crown. Frank Washington, another Crown Market employee, stated that a friend of his brother had told him that Snake and Chilly laughed and walked away when they heard someone say that they did not know who committed the Crown store crime. Snake is identified as Leon Donald Tillery who spends a lot of time with Luther Franklin Moore. After being arrested for a robbery, Leon Tillery told police that his partner in that crime was Gregory Lee Edwards who had bragged that he shot the guard in the Crown case and had committed the crime with a 'Herman.'"*

- Mention that *"Robert Carter Jr. was identified by Oscar Wendell Bennett, Carter said he had done the Crown hold up and shot the guard because he would not give up his gun. Carter showed Bennett a .38 caliber revolver at his belt with a long barrel and a broken hammer. Carter also mentioned an unarmed partner."*

- *Lt. Bangor indicated that a Kelly (Pete Kelly), who sometimes worked as an informant, was outside the store and could help identify the suspects.*

- Mention of *suspects "Neal Norris and Clarence Hucklebuck who matched the initial description of the suspects."*

Motion to Reopen, at 31-2.

During the hearing before the second post conviction court on September 22, 1992, Petitioner's counsel, Robert Feinberg, made the following statement to the court with respect to the aforementioned evidence:

> *What I also didn't know, not only was there existence of this Robert Carter, but that when Carter's photograph was shown to Robinson, Robinson said, in words to the effect, –I didn't write the exact words down, but they were words to the effect that, "Robert Carter looks like the shooter with the glasses." He didn't make a positive I.D., but he said he looked like the shooter with the glasses.*
>
> *That was never disclosed, Your Honor. Moreover, Your Honor, moreover, Robert Carter made an admission that he did it. And I don't know if he told one of the police officers, or whether he told another inmate. But it was in black and white type in that file that Robert Carter had made an admission that he committed this crime. And the existence of that confession is evidence by that file or in that file somewhere, Your Honor.*
>
> *Another thing that was irregular, it was not disclosed to the State – to the defense, even though it was requested, there was another pair of suspects for this crime named Gerald Dent and Paul Lee. And these people were both wanted too for shootings. And they were genuine suspects in this case, Your Honor. They were – they were genuine enough where their photographs were shown to people.*
>
> *I'm sorry. I made a mistake, Your Honor. Earlier I said that Robert Carter had been picked out by Jackie Robinson. He was not. Carter was a suspect. Carter made an admission that he did it, but Jackie Robinson was shown photographs of these other two people Gerald Dent and Paul Lee, and it was – it was Gerald Dent, excuse me, that Jackie Robinson said looked like the shooter.*
>
> *Again, Your Honor, this is from my handwritten notes from looking in this file. Eric Komitzsky, who was a witness that the State argued in the trial transcript could ascertain nothing, could help with no identifications about anything, the police must not have agreed with that because they did show Eric Komitzsky photographs.*
>
> *And Eric Komitzsky also indicated that Gerald Dent looked like the suspect wearing glasses. That was not disclosed.*
>
> *Another irregularity, which I would maintain, Your Honor, that Eric Komitzsky was also shown a photo array containing the defendant's picture, and there was no*

positive identification made. However, Mr. Komitzsky did indicate that Gerald Dent looked like the suspect wearing the glasses who was the shooter.

Now, something else which was somewhat irregular, I don't know if it was a mistake, but there was a lineup conducted. I don't have the details of it, but I do have Mr. Komitzsky who will tell us that there was a lineup that was had.

Now, I know that Jackie Robinson picked the defendant out of the lineup because that's in the trial transcript. But nowhere does it say that Eric Komitzsky went to a lineup and failed to pick the defendant out. I still, even in the material that I was able to look at the other day, didn't see anything about a lineup in there.

And again, the State's answer was, "There is nothing exculpatory in this case." The eighth thing that I learned that there were two other persons, one named Lee O. Tillery – Leon Tillery, T-I-L-L-E-R-Y, and a Luther Moore, and that both Leon Tillery and Luther Moore existed and were suspects.

And Tillery told the police that the co-defendant that they thought was Luther Moore was, in fact, not Luther Moore, but should have been a guy named Greg Lee Edwards.

And Tillery also told the Police that Edwards admitted to Tillery that he killed the security guard. That's in black and white in the file as well. That was also not given over in discovery.

As well, Your Honor, there is a man named Franklin Washington who was a witness in the sense that it is clear that he saw people. Whether he could pick out a face or not is unclear. But the police took a shot, and they showed him pictures of a photo array including the defendant. And Franklin Washington did not pick out – did not positively identify anyone. So that is another failure of what I consider to be exculpatory and was not given to defense counsel, Your Honor.

Second Post Conviction Hearing Transcript, at 25-9.

Later, during the same hearing, the following deliberation took place:

Mr. Feinberg: *What we are really pressing on the post conviction relief, Your Honor, is the – the failure of the appellate lawyer to pursue the manner in which the calling card was handled at trial. It was objected to at trial. It was preserved, but no one ever raised it – the issue of the failure to get the card and then the way the card was used. That, in and of itself is the first issue that we are pressing, Your Honor.*

And the second one was the failure of the appellate lawyer to pursue the non-disclosure of photographic arrays where the defendant was not picked out. Those would be the two issues that I believe we would be pressing at this time, Your Honor.

The Court: *Come up here to the bench?*

Mr. Feinberg: *Your Honor, if I could, there is another matter that I want to add in post conviction. The trial lawyer, Jim McAllister, I've already submitted for evidence his motion for discovery and inspection.*

He made a request on Number 15, "if the State knows of any reliable evidence of a probative nature tending to exculpate the defendant, please furnish this" –

The Court: *Slow down. Nobody can take that down as fast as you are going.*

Mr. Feinberg: *Ms. Rose, I'm sorry.*

"If the State knows of any reliable evidence of a probative nature tending to exculpate the defendant, please furnish this information."

Your Honor, we would be pursuing on post conviction that instruction, in that it is only a general request for Brady material and not a specific request.

And I would incorporate by reference all of the various irregularities which I outlined earlier to go towards that particular aspect of the post conviction.

Hearing Transcript at 38-40.

As evident from these excerpts, Petitioner's counsel raised several potential *Brady* violations before the second post conviction court during the September 22, 1992 hearing. Notably, these issues did not all arise in his filings with that court. In his Second Petition for Post Conviction Relief (filed on or about September 13, 1991), Supplemental Petition for Post Conviction Relief (filed April 30, 1992), and Second Motion For New Trial (filed April 30, 1992), Petitioner only referred to the photographic non-identification by Eric Komitzsky and disparity between Austin's

size and the descriptions rendered by witnesses soon after the killing in relation to non-disclosure of the homicide file.[66] However, Petitioner now contends that despite presenting the second post conviction court with possible *Brady* violations, the court neglected to address these claims. Under the UPCPA, the lower court must consider all grounds asserted for post conviction relief. *Duff v. Warden of Md. Penitentiary*, 234 Md. 646, 200 A.2d 78 (1964).

The second post conviction court clearly recognized, both during the hearing and in its opinion, that Petitioner sought relief based upon *Brady* violations.[67] In its opinion, the second post conviction court explained that:

> *It must be remembered that the essence of the Petitioner's claim for relief lies in his allegation that the State failed to provide certain pretrial disclosures about items taken from the Petitioner as well as failing to disclose the fact that various photographic showings were conducted by the police prior to trial which resulted in a negative identification of the Petitioner. Again, a factual predicate is required to gain a clear understanding of the issues. Mr. Austin was convicted of murder in this case when a security guard was killed in the robbery of a convenience store. Three*

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[66] *See* pp. 9-12, *supra* for text of these documents.

[67] During the September 22, 1992 hearing, the post conviction court summarized the pertinent issue after considering its explanation by Petitioner's attorney transcribed *supra*:

The Court: The question of whether or not counsel was incompetent is somewhat illusory. Because the issue in the case is that the State didn't disclose a certain item. If the State didn't disclose it, and counsel asked for it, he would never have known to object in the first place because he wouldn't have known about it.

So it's not a question of whether or not Mr. McAllister was incompetent. The question is whether or not the State did not disclose what they were supposed to. That also goes to the issues of appellate counsel. Appellate counsel couldn't raise various issues if they didn't know it. And the only way they would have known it would be through the State's disclosure or looking at the homicide file, which they didn't have.

Ms. Saxon: That's as to one issue, Your Honor.

The Court: So, Mr. Feinberg, it seems the simplistic way to proceed would be – and this is a ground for post conviction relief, the fact that there was non-disclosure by the State of various Brady material period.

> *other individuals were present at the time. One individual, Jackie Robinson, positively identified Mr. Austin as the shooter. A Milton Komitzsky could make no identification even though he saw the assailants briefly. Finally Eric Komitzsky could not positively identify Mr. Austin from the photo-arrays. It is upon the negative identification of Eric Komitzsky the Petitioner focuses. Mr. Austin maintains that the State's non-disclosure of the negative identifications coupled with defense counsel's failure to interview and call Eric Komitzsky as a witness warrant the relief requested.*

(Second post conviction opinion, at 6-7).

Later in the opinion, the court again emphasized that "specifically (Austin) contends that the negative photographic identification of Eric Komitzksy was exculpatory in nature and necessitated disclosure...On its face, it appears there is a clear *Brady* violation, however, other factors must be considered." *Id.* at 9. Upon closer and diligent examination of this issue, the court concluded that no *Brady* violation occurred. The post conviction court inferred that Mr. McAllister was aware of the non-identification from his failure to object to the lack of formal disclosure about the non-identification of the photograph. The non-identification was qualified by evidence that Komitzsky also stated at one point that a photograph of Austin resembled the assailant, but he was not positive. (Second post conviction opinion, at 10-13). Therefore, the second post conviction court squarely addressed the *Brady* issue pertaining to the issue raised by Petitioner in his Second Petition, Supplemental Petition, and Second Motion for New Trial. The court, however, made no mention of the existence of other suspects or the identification of another individual by Jackie Robinson, the oversight upon which Petitioner now focuses.

Although Maryland Rule 4-407(a)(3) requires a post conviction petitioner to include "the allegations of error upon which the petition is based" within the petition, Maryland Rule 4-402(c) instructs courts that "amendment of the petition shall be freely allowed in order to do substantial

justice." This includes oral amendments of petitions. *Cirincione v. State*, 119 Md. App. 471, 504, 705 A.2d 96, 112 (1998), *cert. denied*, 350 Md. 275, 711 A.2d 868 (1998). During the September 22, 1992 hearing, Petitioner's counsel, Mr. Feinberg "orally amend(ed) to cover those particular areas that my original petition and my supplemental petition for post conviction relief did not cite." (Hearing Transcript, at 44). Consequently, the evidence pertaining to other suspects and Jackie Robinson's identification of another suspect were properly before the second post conviction court.

The State does not argue in its response that the second post conviction court addressed each of these claims. Instead, the State argues that Austin waived the police file issue because "if this issue or any others were not dealt with in the post conviction opinion, the Petitioner should have pointed that out either to [the second post conviction court] or to the Court of Special Appeals." *State's Response*, at 16. While the State is correct to the extent that Petitioner should have, but did not, specifically mention each piece of exculpatory evidence to the Court of Special Appeals in his Application for Leave to Appeal, Petitioner in fact made the following allegation with respect to the Franklin Washington evidence:

> *[T]he lower court erred when the Court concluded that only three witnesses, Jackie Robinson, Eric Komitzsky, and Milton Komitzsky were present at the scene of the shooting...There was in fact another employee working that day at the scene of the killing named Franklin Washington and the aforementioned homicide file contained information that Franklin Washington was indeed also shown photographs, including that of the Petitioner, and that a negative identification was had. This information was never disclosed to Defendant's trial counsel prior to Petitioner's trial, nearly twenty years ago, and this information became known to Petitioner only after counsel for the Petitioner was able to review the contents of that homicide file. The lower court erred when it failed to even address or consider this fact in rendering its conclusions of law.*

Application for Leave to Appeal to the Court of Special Appeals (of the second post conviction court), at 4. More generally, Petitioner stated that:

> *[T]he lower court erred when it failed to grant the Petitioner relief in the form of a new trial as a result of the multitude of exculpatory documents which were discovered in 1992/1993 to have been contained in the original twenty year old homicide file that was subpoenaed by the Petitioner and reviewed in-camera by the Court and admitted into evidence at Petitioner's 1992/1993 Post Conviction and New Trial Proceedings.*

Id. at 3. Furthermore, Petitioner drew the Court of Special Appeals' attention to the fact that "all witnesses at the crime scene rendered the description of the shooter as five feet eight inches tall, and weighing between 150-160 pounds. In addition to being six feet five inches tall, Michael Austin has weighed in excess of two hundred pounds for the last twenty years." *Id.* at 2.

Contrary to the State's contention, Petitioner raised these issues at the appropriate time, during his appeal of the second post conviction court's decision, as well as his complaint that the second post conviction court did not address the specific *Brady* claims in its opinion. Thus, waiver is not a procedural obstacle to consideration of these homicide file issues. Nor have these *Brady* issues been finally litigated. The Court of Special Appeals did not address these claims on the merits. Rather, the appeals court simply stated that "the application of Michael Austin for leave to appeal from a denial of post conviction relief, having been read and considered, is denied." *Austin v. State*, No. 60, unreported (Md. App., filed Dec. 23, 1993). An issue is not "finally litigated" when the Court of Special Appeals summarily denies leave without addressing the particulars of a petitioner's claim. *State v. Hernandez*, 344 Md. 721, 728, 690 A.2d 526, 530 (1997).[68] Therefore,

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[68]This Court realizes that *Hernandez* was decided several years after the Court of Special Appeals ruled on Austin's Application for Leave to Appeal the decision of the second post conviction court. In *Hernandez,* the Court of Appeals considered whether "an issue raised in a post conviction petition (had) been 'finally litigated' for purposes of Article 27, Section 645A(b) where the issue was previously raised in an application for leave to appeal from a guilty plea and the application was denied summarily without addressing the issue with particularity". 344 Md. at 725, 690 A.2d at 528. Art. 27, § 645A(b) was added to the UPCPA in 1965, by 1965 Md.. Laws, ch. 442. *Id.* at 724, 690 A.2d 528. The Court answered this query by invoking well established principles of statutory construction to interpret the "finally litigated" provision contained within the UPCPA *since 1965.* As such, the same standard obviously applied to the Court of Special Appeals decisions levied prior to *Hernandez*, although it was not

this Court will consider whether Petitioner offers a viable *Brady* claim to the extent that this issue has not yet been addressed by a reviewing court.

A "petitioner must establish" that a *Brady* violation occurred. *Wilson*, 363 Md. at 345, 768 A.2d at 681. The Petitioner must demonstrate: "(1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense--either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness--and (3) that the suppressed evidence is material." *Id.* In the instant case, this Court needs not proceed beyond the first step of this analysis.

Generally speaking, Petitioner alleges that the State failed to turn over the homicide file until 1992. This Court is not persuaded, however, that Petitioner adequately demonstrated that the State failed to turn over the homicide file.[69] The police arrested Austin on June 3, 1974. On or about July 31, 1974, Mr. McAllister made a Motion for Discovery and Inspection. Trial occurred about 7 months after this request, in March of 1975. At no time during the course of trial did McAllister indicate that the State failed to turn over the homicide file now at issue. Therefore, this Court can only speculate at this point as to whether the State suppressed or withheld that evidence from the defense, and Petitioner has not satisfied his burden of demonstrating a *Brady* violation.[70]

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articulated until *Hernandez*.

[69]This holding is tacitly confirmed by the second post conviction court's discussion on the Eric Komitzsky non-identification evidence, hinting that the defense may have been aware of the contents of the homicide file, and the failure of that court and the Court of Appeals to address the additional allegations of *Brady* violations. This Court believes that the second post conviction court's failure to substantively address this aspect of the *Brady* issue within its opinion, and the Court of Special Appeals' affirmation of this decision, reflects that the second post conviction court was unpersuaded by Petitioner's presentation of this issue.

[70]In support of the *Brady* claim pertaining to the homicide file, Petitioner draws attention to the puzzling circumstances surrounding Petitioner's April 29, 1974 time card from work as evidence that the State did not turn over the homicide file to the defense. The homicide file contained a police report by Det. Ellwood, dated June 4, 1974, detailing his visit to Austin's employer the previous day. During that visit, Det. Ellwood interviewed the

C. Prosecutorial Misconduct

Austin next alleges several instances of prosecutorial misconduct.[71] These allegations include personal assurances to the jury,[72] shifting the burden of proof,[73] improper reference to Austin's criminal record,[74] and commenting on the potential value of Eric Komitzsky's testimony.[75]

Personnel Manager at Flynn and Emrich. The report states that during this interview, "it was noted that on 29 April 1974 (Austin) was working and that (sic) checked into worked (sic) at approx. 0700 hrs. And checked out that date at 1653 hrs." A reasonably competent attorney, knowing of a police report which lends significant corroboration to his client's alibi, would take advantage of it, most likely by subpoenaing the original time card. Also, defense counsel told the jury that he was unaware until the trial that the State had the same photostatic copy of the time record as he did. [Tr. 460] One can therefore draw the inference from the absence of the defense attorney's objection as to disclosure that the file was either not turned over or that it was, but was not read. However, while this reasoning may be pertinent to consideration of ineffective assistance of counsel, it is not adequate to the task of establishing a *Brady* claim regarding the police files.

[71]Notably, Austin neglects to include the prosecutor's disregard of the trial court's order that all references to Horace Herbert be struck in his specific allegations prosecutorial misconduct, presumably aware that this particular instance of the State's conduct at trial has been either waived or finally litigated. *See* n. 23, *supra* (for the text of the prosecutor's references) and "Prefatory Findings" 8-9, *supra* (for the trial court's decision to strike references to Horace Herbert). Petitioner does claim, however, that his "trial was fundamentally unfair because the State presented the jury with irrelevant and extremely prejudicial evidence regarding Herbert." *Motion to Reopen*, at 30. This allegation is considered above as it pertains to Petitioner's *Schlup* claim.

[72]During rebuttal, the prosecutor stated that Austin's counsel "matches his argument to fit the testimony. Whatever the testimony would have been, he would have found some way of arguing to you, some way of bending that testimony or bending his argument to fit the testimony to match his argument to you. That's obvious too. I don't blame him for that, that's his job, that's what he's paid for. By the way of course I'm paid too, I'm the Assistant State's Attorney. I take an oath to do my job and my oath is to prosecute the guilty and protect the innocent. That's what I am paid to do." (Tr. 473). Austin alleges that this statement "vouched for (Austin's) guilt."

[73]During rebuttal, the prosecutor stated that "the Defense is unable to produce a single witness to come into this courtroom and say to you for any reason, yes, Michael Austin was somewhere else when this robbery occurred, when this murder occurred." (Tr. 468-69). Austin alleges that although the burden of proof rests upon the State, this statement attempted to shift this burden to the Defense.

[74]During the prosecutor's rebuttal, the following deliberation took place:

Mr. Wase:	You heard Michael Austin's testimony. He's not dumb, he's an articulate intelligent young man. You also heard his criminal record, the convictions he had when he was -
Mr. McAllister:	I object to this.
The Court:	Well I have instructed the jury as to the light in which the evidence of a criminal record may or may not be considered. It is up to the jury.
Mr. Wase:	Than you. As I say, you have heard him testify to the convictions, the criminal conviction that he had when he was represented by an attorney or waived his right to an attorney. Now he's been around, he knows if you're going to commit a crime prepare for the worst, do it the smart way.

The second post conviction court extensively dealt with alleged prosecutorial misconduct at Austin's trial during the second petition for post conviction. In its opinion, that court declared that:

> [A]n appeal (of Austin's conviction)...was timely filed in the Maryland Court of Special Appeals. The issue of prosecutorial misconduct was not raised. The factual support of this allegation was readily available to the Petitioner. No explanation is offered as to why this issue was not raised on appeal...No showing of special circumstances for failure to raise this issue having been made, the Court deems the allegation waived.

(Second post conviction opinion, at 27). Furthermore, as the second post conviction court correctly pointed out, "Mr. Austin raised the allegation of prosecutorial misconduct in his first Post Conviction...the case was appealed to the Maryland Court of Special Appeals and in an unreported opinion filed December 8, 1978 the application for leave to appeal was denied." *Id.* at 28. Since Austin failed to present the evidence necessary to demonstrate that his contentions were not available to him when he originally filed for post conviction relief, the second post conviction court properly recognized that this issue had reached the point of finality.

Similarly Austin presents no evidence justifying re-examination of the alleged instances of the prosecutor's personal assurances to the jury, burden shifting, and mention of Austin's criminal record. These issues could and should have been raised before, and the evidence recently introduced by Austin does nothing to demonstrate that these issues were not available at the time he filed his first post conviction petition. For these reasons, Austin has waived his right to further pursue most of his allegations of prosecutorial misconduct.

On the other hand, the prosecution's reference to Eric Komitzsky falls into a category

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Austin alleges that this discussion was "not a proper use of evidence of a criminal defendant's prior criminal record. Such evidence can only be used for impeachment and not as substantive evidence that the defendant is a bad person or a criminal in general."

[75]Again, Mr. Wase characterized Eric Komitzsky's potential testimony as "cumulative." (Tr. 443).

separate from the other allegations of prosecutorial misconduct because new evidence presented by Austin affects the impact of these references at trial. In his opening argument, the prosecutor assured the jury that "Mr. Komitzsky could only testify as to the robbery taking place, (sic) he would not be able to make any identification and he will not be called as a witness by the State." (Tr. 37). In his closing argument, Mr. Wase once again addressed the testimony of Komitzsky, describing it as "cumulative." (Tr. 443). He told the jury that Komitzsky "could not make an identification and would not be able to tell you whether this was or was not the man." *Id.* These statements were not completely correct in light of the recent testimony of Eric Komitzsky, that as a close eye-witness, he could vouch that Austin was *not* the shooter. Given what his testimony would have been if confronted with Austin in the courtroom at trial, a reasonable juror would more likely than not have acquitted Austin.

As previously discussed, prior to Austin's trial, Eric Komitzsky viewed two photo arrays and attended a line-up. He failed to conclusively identify Austin at any one of these times. At best, according to police correspondence, Eric Komitzsky stated that a "photograph of Michael Austin resembled the man he saw enter and rob the store and shoot Mr. Kellam, however he was unable to positively identify same as the assailant." Such a statement, however, is far from being "cumulative" to Jackie Robinson's testimony during Austin's trial when he pointed to Michael Austin and said "that's the man that shot Roy Kellam," (Tr. 166), and it failed to account for his failure to identify Austin at a line-up attended by Austin's attorney. In fact, according to Eric Komitzsky, he was never "invited" to testify at all, until Austin's Second Petition for Post Conviction Relief in 1992.[76] Once

[76]Again, the second post conviction court dismissed McAllister's failure to call Eric Komitzsky as a trial tactic, since "had Eric Komitzsky been called to the stand as a defense witness he would have been subject to cross-examination by the State. Inasmuch as identification was at issue he would most certainly have been cross-examined

he did testify, he stated a version of the facts quite the opposite of Jackie Robinson's, informing the court that Michael Austin was not the man that shot Roy Kellam.

The nature and extent of this testimony satisfies the *Schlup* "gateway" standard. It permits review of the issue of prosecutorial misconduct to the extent it pertains to the State's references to Eric Komitzsky's testimony at trial, compelling this court to consider this issue on its merits even though prosecutorial misconduct was otherwise waived during prior proceedings.

For prosecutorial misconduct, *Wilhelm v. State*, 272 Md. 404, 326 A.2d. 707 (1974) is "the landmark case addressing closing arguments in criminal cases." *White v. State*, 125 Md. App. 684, 726 A.2d 858 (1999), *cert. denied*, 354 Md. 573 (1999). In *Wilhelm*, the court stated:

> *[T]he prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the [prosecution] produces. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined--no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.*

272 Md. at 412-13, 326 A.2d 707.

Furthermore, the court explained that the "fundamental limitation upon the remarks of attorneys is that they may not appeal to the passions or prejudices of the jurors." *Id.* at 445, 326 A.2d 707 (citing *Wood v. State*, 192 Md. 643, 652, 65 A.2d 316 (1949)). Prosecutorial misconduct, after all, may "so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

In *White*, the court considered the law as articulated by *Wilhelm* and outlined a three part test

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about the photograph of Mr. Austin resembling the assailant."(Second post conviction opinion, at 13).

to determine whether remarks by a prosecutor during closing arguments warrant a new trial for a defendant. In making this determination, a court must consider whether (1) the comments were improper and focused on a central issue of the case, (2) the court mitigated or eliminated prejudice stemming from the remarks, and (3) the error was harmful. *White,* 125 Md. App. at 705, 726 A.2d at 868.

First of all, suggestion to the jury that Eric Komitzsky possessed little or no information which could help reveal the identity of the robbers, expressed by dismissing his testimony as "cumulative," implied that he would simply repeat what Jackie Robinson told them, that Austin was the shooter. To the contrary, Komitzsky has unequivocally stated that Austin was *not* the individual who shot the security guard and that he would have so testified at trial.[77] Furthermore, police reports prior to Austin's trial reveal that Eric Komitzsky could not identify Michael Austin from a line-up, nor could he identify Austin from a photo array with any degree of certainty. It obviously must be granted that *at the time of trial*, this experienced prosecutor knew only that Komitzsky could not make a *positive* identification. Any mention of Eric Komitzsky, a non-witness at trial, at all necessitated a full disclosure of his pre-trial identification history. Otherwise, he should have maintained silence about Eric Komitzsky. His positive statement that Eric Komitzsky's testimony would be "cumulative" and that he could not tell the jury that this "was not the man" strikes at the heart of this case. One cannot ignore the central role of Robinson's eyewitness identification of Austin as the shooter during trial, and its likely effect on the jurors. By so characterizing the

[77]At the time of trial, of course Eric Komitzsky had not spoken as unequivocally as he has since, and there is no suggestion here that the prosecutor, an able and honorable member of the Bar, had knowledge that Mr. Komitzsky would testify as he later did. Nevertheless, while it was literally so that Eric Komitzsky would not have added anything to the State's case, there was no factual basis, independently of the 1992 and 2001 explicitly exculpating testimony, to lead the jury to believe that Eric Komitzsky's testimony would be somehow similar to that of Jackie Robinson.

testimony of Komitzsky, the prosecutor indirectly "testified" to the accuracy of Robinson's account of the situation by implying that Komitzsky would not differ, thus bringing, in effect, a second prosecution witness to the jury not subject to cross examination. Furthermore, the record is devoid of any indication that the trial court took steps to mitigate or eliminate any prejudice stemming from Wase's remarks. For these reasons, the statements by the prosecuting attorney during Mr. Austin's trial about Eric Komitzsky satisfy the *White* requirements for prosecutorial misconduct, entitling Michael Austin to post conviction relief on this issue.

D. Ineffective Assistance of Trial Counsel

Mr. Austin also alleges the ineffectiveness of his trial counsel. He initially argues that "trial counsel was not prepared for his defense and failed to realize which case was being called the first day of trial." *Motion to Reopen*, at 45. Due to this ill preparation, Petitioner claims "prejudicial errors ensued." *Id.* at 44 Additionally, Petitioner alleges that "counsel provided ineffective assistance after sentencing by failing to file either a Motion for Modification of Sentence or an Application for Review of Sentence." *Id.* at 47.

Once again, the extensive history in this case would normally present procedural barriers to this issue. Ineffective assistance has been repeatedly and unsuccessfully raised during prior proceedings, albeit in differing manifestations.[78] However, this Court cannot ignore the new

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[78]Austin first raised denial of effective assistance of counsel during his direct appeal to the Court of Special Appeals. The court declined consideration of the issue since the issue failed to arise before the trial judge. Austin next visited the issue in his first petition for post conviction relief, citing counsel's failure to prepare for trial, to object to the introduction of inadmissible and prejudicial evidence, to interview or summons witnesses on behalf of Austin, to object to improper jury instructions, and to object to improper remarks by the State's Attorney. He also objected to his counsel's stipulation to his work records. The first post conviction court dismissed each of these arguments. *See* pp. 4-8, *supra*. The Court of Special Appeals also considered and denied these issues. *See* n.15, *supra*. In his second petition for post conviction relief, in his Supplemental Petition for Post Conviction Relief on or about April 30, 1992, Austin again complained of his trial counsel's failure to prepare for trial. This time, he focused on the potential testimony of Eric Komitzsky.

evidence presented by Mr. Austin, compelling it to act in the interests of justice and reopen post conviction proceedings as they relate to portions of Petitioner's current allegations of ineffective assistance of counsel. To repeat, given Eric Komitzsky's recent testimony, the new information impeaching Jackie Robinson's trial testimony, and the confessed not guilty resolution of Horace Herbert's case, it is more likely than not that a reasonable juror would not have convicted Michael Austin beyond a reasonable doubt. This Court, under *Schlup*, will therefore consider whether McAllister's actions amounted to ineffective assistance of counsel.

This new evidence illuminates Mr. Austin's claim that counsel failed to properly prepare for trial. Austin's attorney admitted that he prepared the wrong case.[79] First, this lack of preparation

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[79]Austin's Attorney, Mr. McAllister, admitted at trial that he prepared for the wrong case:

Mr. McAllister:	The reason these are submitted late, I received a copy from the computer, State's Attorney's office indicating that indictment 995 would be on trial in Criminal Court Part 5. I also received a copy from the State's Attorney's Office computer showing that the indictment 280 would be in for trial in Criminal Court Part 11. I checked with Criminal Court Part 11, was informed that the case was not in for trial. I was further informed two weeks ago that one of the witnesses was also a witness in my case, is present in court this morning in 280 had received a summons to appear and been in Criminal Court Part 5. Acting on that information may it please this Honorable Court I thoroughly prepare indictment 995 for trial. The State informs me it wishes to proceed with 280, 281, and 282. And the result of 280, 81, and 82 may very well make indictment 995 moot, is that correct Mr. Wase?
Mr. Wase:	That's correct
The Court:	I will approve this late summons form. Whether or not the sheriff can summons all these people in time for this case I don't know. It remains to be seen.
Mr. McAllister:	We'd like to have in the record it has been approved by the Court and an effort was made by the sheriff's office to get in touch with them today, is that correct?
The Court:	But they had never been summonsed prior.
Mr. McAllister:	They have been notified and talked to and letters had been gotten off to them in the past.
The Court:	For this case?
Mr. McAllister:	Not for this date.
The Court:	Have they been summonsed?
Mr. McAllister:	Not officially summonsed. *We were under the impression 995 would be in for trial today and had all the witnesses present for that case* (emphasis added).

(Tr. 10-11) This Court is unaware of the precise nature of "indictment 995," as it related to Austin's trial, but evidently, that indictment did not require the same preparation and/or witnesses as "280, 81, and 82."

surely influenced the handling of Eric Komitzsky as a potential defense witness. While the second post conviction court's speculation is certainly reasonable - that defense counsel "deliberately avoided Eric Komitzsky and the possibility of his having an effect on the jury since he knew the State was not going to call him...(and) for fear of what he may have testified to on cross-examination" (Second post conviction opinion, at 15) - counsel's admission that he prepared the wrong case makes it more likely that he had no idea of how he would testify. This is reinforced by Eric Komitzsky's testimony before this Court that he had no contact with Austin's attorney before the trial. Eric Komitzsky saw the shooter more closely than even Robinson, and he has sworn under oath that Michael Austin was not present at the scene of the crime on April 29, 1974.

Additionally, counsel's mishandling of the procurement of his client's time record is equally grave. Petitioner's counsel never subpoenaed the original time records from Austin's place of work on April 29, 1974. As a result, the only indication that Austin worked on the day of the crime was from an illegible photostat of the time record, not allowed into evidence "because it was agreed by counsel for both sides, in fact by the Court also that the photostat could not be interpreted." (Tr. 523). Furthermore, the witnesses called during trial could not confirm the time Austin left work on April 29, 1974. Nevertheless, counsel did not summons a witness who might have authenticated an original time card. Nor, in this Court's view, did he take advantage of a police report containing an explicit reference to his client having worked until 1453 hours on April 9, 1974.[80] Finally, Austin's counsel failed to "walk" his client through the sequence of each act of departure - undressing,

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[80] The trial judge was unpersuaded by the post trial proffer of testimony by a representative of the employer that the original time record, authenticated by him, demonstrated that Austin was paid for a full day's work and was recorded as having worked a full day. The trial judge believed that the jury already had this information; but in fact the jury had evidence only that Austin punched in that day, not that he worked the full day.

showering, dressing, etc.[81]

To demonstrate ineffective assistance of counsel, a petitioner must show that "(1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense." *Harris v. State*, 303 Md. 685, 696 (1985) (explaining *Strickland v. Washington*, 466 U.S. 668 (1984)). In order to satisfy the first element of this test, deficiency, a petitioner must: (1) identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgement, (2) show that his counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment - that, considering all the circumstances, the representation fell below an objective standard of reasonableness, and (3) overcome the presumption that, under the circumstances the challenged action *might* be considered sound trial strategy. *Harris*, 303 Md. at 697 (footnotes omitted, emphasis in the original). The fact that McAllister, by his own admission, prepared the wrong case in and of itself demonstrates deficiency on his part. Counsel need not provide a perfect defense. *Strickland*, 466 U.S. at 690. However, in this case, Petitioner has met the burden of proving the deprivation of effective representation, by demonstrating his attorney's ill preparation in general and in particular.

As for the second element of the *Strickland* test, the "prejudice" component, *Bowers v. State*,

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[81]Petitioner also mentions that "trial counsel did not object to a number of blatantly incorrect jury instructions which by themselves may not require reversal, but contributed to the maelstrom or prejudice and error surrounding the trial....These instructions included: (1) informing the jury as to the degrees of murder that there was a 'presumption of second degree murder' which the State could raise to first degree by showing premeditation and deliberation or which the defense could lower to manslaughter or even not guilty by proving mitigation or justification, (Tr. 427), (2) prejudicially providing the jury with the entire indictment which included assault and robbery of different members of the Crown Market despite the fact that the State only proceeded on three counts, (Tr. 421), (3) instructing the jury that it could only consider testimony and exhibits in determining the facts but not mentioning stipulations, where much of the alibi defense rested upon stipulations as to the photocopy of the time card of the foundry, (Tr. 415), and (4) an alibi instruction which shifted the burden of proof to the defendant and informed the jury that a successful alibi alone could not be cause for an acquittal, but had to be considered first in 'consideration with all the other evidence,' despite the fact that the defendant is entitled to the presumption of every inference of innocence without such limitations. (Tr. 420-21)." *Motion to Reopen*, at 46-7 n.29.

320 Md. 416, 426, 578 A.2d 734, 739 (1990), merely requires Austin's demonstration of a "substantial or significant possibility that the verdict of the trier of fact would have been affected" by his counsel's deficiency. A reviewing court must consider the totality of the evidence before the jury when deciding whether a petitioner has proven prejudice. *Harris v. State*, 303 Md. 685, 701, 496 A.2d 1074, 1081 (1985). Counsel's evident failure to prepare for the case created more than a substantial possibility that the outcome could have been different if Austin's counsel arrived in court properly prepared. Counsel erred in multiple ways. Most notably, he failed to interview and prepare Eric Komitzsky as a witness and to properly develop and document Austin's alibi defense.[82] Therefore, Austin also deserves post conviction relief based upon the ineffectiveness of his trial counsel.[83]

III. Actual Innocence

Finally, Mr. Austin "has asserted his actual innocence as a freestanding constitutional claim," invoking the principles outlined by the Supreme Court in *Herrera*, and proposing the possibility that his case may proceed along this second track of post conviction jurisprudence. *Supplemental Memorandum in Support of Michael Austin's Motion to Reopen*, at 13. Austin claims that his demonstration of innocence requires his release from prison since the Due Process clause of the

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[82]Again, the defense called three witnesses at trial other than Austin. These witnesses could not affirmatively place Austin at work on April 29, 1974. *See* n.7, *supra*. More importantly, defense counsel failed to produce the actual time card of Austin's employer from April 29, 1974. Rather, defense offered an illegible photocopy of the card. This Court questions why a photostat was available, yet the defense failed to obtain the original document, from which the photocopy was produced.

[83]With respect to Petitioner's allegation that counsel failed to file either a Motion for Modification of Sentence or an Application for Review of Sentence, Petitioner failed to raise this issue during numerous prior proceedings. None of the evidence currently before this Court warrants consideration of this issue at this point. Moreover, Petitioner requests the opportunity to file a belated Motion for Reconsideration of Sentence with respect to this issue. *Motion to Reopen*, at 49. In light of this Court's decisions on the other issues in this case and the relief deemed appropriate, this issue is rendered moot.

Fourteenth Amendment prevents unjust deprivation of a citizen's liberty. As previously mentioned, *Herrera* established the possibility that a "truly persuasive demonstration" of innocence after trial could warrant the release of a prisoner. 506 U.S. at 417. However, the "disruptive effect that entertaining claims of actual innocence" has on the need for finality and economy demand that the standard for this type of demonstration "be extraordinarily high." *Id.*

Without further guidance from the Supreme Court or Maryland appellate courts, regarding the meaning of the "extraordinarily high" standard under *Herrera*, this Court can only speculate about what persuasive level of demonstration is required to successfully establish a freestanding constitutional claim of innocence. Petitioner admits that his "freestanding constitutional claim of innocence requires a higher standard of proof than is required by the comparatively lower standard set by *Schlup*." Petitioner offers two other state court decisions offering actual innocence standards,[84] recognizing that "the State of Maryland has yet to establish its own standard for freestanding innocence claims." *Supplemental Memorandum*, at 15. He also provides support that *Herrera* applies to cases involving punishment of both death and imprisonment.[85] However, absent any clear precedent from Maryland courts, this Court declines to expand upon this State's post conviction jurisprudence beyond mere recognition of *Herrera,* and the possibilities it presents in future cases.

This Court should note the obvious, however, that there is a substantial difference between (1) a trial which, because of constitutional error, cannot stand and (2) a case where the convicted is actually innocent. As to the constitutionally impaired trial, a new trial is granted to pay tribute to our

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[84]See n. 40, *supra.*

[85]See n.39, *supra.*

nation's constitution, not to champion a particular defendant, except to the extent that the constitution itself champions individuals presumptively innocent of a crime and guarantees them due process in the course of prosecution.

The second category of case, actual innocence, is much rarer because the criminal justice system is a strong and fair one, albeit not always perfect. It is a system with many quality controls intended to honor and protect the innocence presumption, and for a citizen to reach that final point of conviction, he or she has been through a due process strainer intended to separate the innocent from the guilty.

While counsel for Mr. Austin make a reasonably beguiling case that their client is actually innocent, particularly with reference to the physical description discrepancies and the testimony of Eric Komitsky, there are other evidentiary factors to be considered:

1. Although it is highly probable that the credibility of an important eyewitness, Jackie Robinson, called by the State would have been undermined at trial by the later discovered evidence about him, it cannot be ignored that he was an eyewitness and did testify, under oath, that Austin was the shooter. His apparently troubled past - high school drop-out, campus visitor rather than college student, and drug addict and dealer, might well have been overlooked by a jury convinced by his testimony. After all, the prosecutor was very experienced and well regarded. It is very probable that, had it been his professional judgment to go forward with such a witness, knowing his flaws, he would have known how to present even a less attractive Robinson to a

jury.[86]

2. Although Jackie Robinson later recanted, he had earlier identified Horace Herbert as a co-culprit, and did so with sufficient persuasiveness that the State prosecuted Herbert.

3. Although this Court is disturbed by the injection of Horace Herbert's name and alleged role in the crime, before Herbert had been tried and confessed not guilty by the State, Austin did deny knowing him, despite evidence, that was properly stricken, that he had Herbert's card in his possession and despite later discovered evidence that both Austin and Herbert were historically linked in 1971.[87]

4. Although the Court applauds Mr. Eric Komitzsky's good citizenship in coming forward to testify in 2001, it is reasonable to ask why that did not happen much earlier. The serious consequence of ineffective assistance of counsel to this aspect of the case has already been addressed; but citizens have duties too, and the duty runs from the time charges are made. Mr. Komitzsky might have indulged a bit of basic curiosity about who was tried and convicted for a murder that took place in his family store and in his presence. His integrity has not been questioned, but reasonable speculation about the possibility of sympathy for the defendant's cause might not be out

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[86]Mr. Wase is to be commended for coming forward and offering his proffers and views that he would not have prosecuted had today's knowledge been yesterday's.

[87]A late discovered police report dated May 20, 1971, presented for the first time in this Court, indicates that a Michael Austin and a Horace Herbert were arrested in connection with a burglary that took place on May 8, 1971.

of place in an objective assessment of actual innocence.[88]

5. As has been addressed as well as the record will permit, it appears that, had it been properly procured, a clear original of Austin's time record might have helped exonerate him. But this depends upon, first, that fact, which cannot be firmly established now, and, second, upon the somewhat insecure presumption that, as a matter of logistical fact, he *could not* have traveled from his employment to the crime scene in time to accomplish the crime. The jury had this time-motion evidence and convicted Austin.[89] In this

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[88]Mr. Komitzsky testified before this Court that he has not been a willing witness (he was seriously ill for an extended period of time). He said that he did not come forward even after forming the opinion that Austin was innocent. He responded only to the possibility of a subpoena.

[89]A police report (not admitted into evidence at trial) corroborated Petitioner's testimony that he punched out a few minutes before 5:00 p.m. on the day of the crime. (Tr. 316). Detective Ellwood testified that he was able to drive from Petitioner's workplace to the crime scene in 18 minutes on one occasion and 14 minutes on another occasion. He conducted these test runs on a Monday and a Tuesday, each at 4:56 p.m. (Tr. 338-39). According to the police reports, the murder occurred sometime before 5:32 p.m., when the responding officer was called. However, testimony at trial also indicated that employees working in jobs similar to Austin at Flynn and Emrich showered and changed from the clothing they wore at work after punching out their time cards, but before leaving the premises. *See* n.7, *supra.*

Before sentencing him, the trial judge gave careful attention to Austin's motion for new trial That court heart two pertinent witnesses who had not testified at the trial. One, a Mr. Kilduff from Flynn and Emrich, further substantiated Austin's alibi. Kilduff testified that Austin had been paid for a 9 hour day and that, although he could not say that it was Austin who personally punched the time card out, he had verified Austin's original time card as documenting his signing out at 1653 hours. Another witness, an employee of Austin's new attorney, testified that he timed the travel from the place of employment to the crime scene at 21 minutes. However, his test drive was at 6:00 p.m., not 5:00 p.m. The trial court concluded as to the time card issues:

> *The only thing actually which Mr. Kilduff added which was not brought out at the trial was an explanation to the effect that the figure 1653 which is in his handwriting is interpreted to mean seven minutes before 5 p.m., and he took this figure off the original time card as representing the punch out time on April 29 from Mr. Austin. The only other thing of any difference was that he also said that the initials C.C. were the foreman's initials and they were put on there the following day after the entry was made for payroll purposes to indicate that the man worked that day and the time punch was reasonable. These initials allegedly are Charlson Chinchilla, that's all we know about him. He hasn't been here to testify. He apparently was a foreman at the time but that's all we know about him. I think the important thing is that Mr. Kilduff also said that he dos not have any knowledge as to whether Mr. Austin in fact punched this card out or not. He can only testify to what his interpretation is of what's on that card, but he cannot testify that Michael Austin was the one that punched the card out. I don't recall it was a general stipulation, it was to*

> connection it is to be remembered that the whereabouts of Horace Herbert on the fatal day have not been established. What was subsequently established, during the investigation of Horace Herbert after the trial of Michael Austin, was that the immediate time period of the crime presented an unexplained interruption to Herbert's work routine in South Carolina.[90]

So, while the Court is convinced, for all the reasons given, that no reasonable juror could have voted Austin guilty beyond a reasonable doubt in light of the new evidence, and that his trial suffered from serious constitutional flaws requiring a new trial, the leap from there to "actual innocence" is too far.

Although Austin meets the lower *Schlup* standard for several of his allegations in this case, and he satisfies the requirements for this Court to award him post conviction relief, he fails to present enough new evidence to warrant his immediate release from prison. Therefore, although the very convincing history and testimony in this case from Eric Komitzsky might meet the *Herrera* standard, this Court declines to risk overstepping its bounds by offering relief under *Herrera* when the

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> *the effect that if the representative of Flynn and Emrich testified that testimony would show that the time card had been punched for April 29th, 1974 for Mr. Austin. It was not punched the following day, but the person from the company could not say that Austin in fact punched the card. The original of the card was not available and the photostat cannot be interpreted. That was the essence of the stipulation according to my bench notes. I really don't see that there's anything new produced here today that the jury didn't already know about on that score. Mr. Austin testified that he had punched the card out, punched it out about five minutes of five to 5 o'clock. And the jury simply chose not to believe him. I really don't think that what Kilduff has told us here today is materially different than what the jury knew during the time of the trial.*

(Tr. 524-26). The Court was understandably skeptical of the 6:00 p.m. travel test

This Court must respectfully disagree with the distinguished trial judge's conclusion as to the significance of Mr. Kilduff's testimony. There was no authenticated *employer* evidence at trial that Austin did punch out when he said that he did. Such testimony would have been far more convincing to a jury than a defendant's likely self-serving memory. This is the quality of evidence that should have been, but was not, presented to the convicting jury.

[90] *See* "Prefatory Finding" 18, *supra.*

Petitioner will otherwise be granted relief, few guidelines exist regarding the contours of *Herrera*'s standard, and the Petitioner himself acknowledges that "it is unlikely that this Court will need to set (the standard under *Herrera*) here, as relief is clearly justified"[91] otherwise.

SUMMARY

The trial of Michael Austin was plagued by multiple problems which, cumulatively, present the inescapable conclusion that he was denied a fair trial. Michael Austin's due process rights were buffeted by numerous questionable occurrences about which this Court has concluded he has exhausted his right to complain. They will not be recounted here. There were other more serious assaults on due process which this Court was obliged to consider. These include:

1. A woefully ill-prepared defense attorney.
2. The jury which was presumably confused about exactly what robbery facts and murder theory the State was asking them to consider, confusion compounded by an instruction which allowed them to act on their own interpretation of the law, and by statements of the prosecuting attorney which were not completely accurate and were likely misleading. The defense attorney added to this confusion by his repeated references in closing to Milton or a "Michael" Komitzsky being the robbery victim.
3. Eric Komitzsky, one of only a few individuals known to be present during the crimes committed at the Crown Food Market, was unable, prior to trial, to affirmatively identify Austin as a participant in the crime, and later unequivocally testified to this Court that Austin was not a participant. Soon

[91] See *Supplemental Memorandum in Support of Michael Austin's Motion to Reopen*, at 15.

after witnessing the crime, Eric Komitzsky described the shooter as 5 foot 8 inches tall, 150-162 pounds. However, at the time of the crime and thereafter, Austin stood about 6 foot 5 inches tall, weighing over 200 pounds. When the police presented Eric Komitzsky with a photo array, including a photo of Michael Austin, Komitzksy failed to affirmatively identify Austin. More importantly, when Eric Komitzsky viewed a line-up of individuals, including Michael Austin, Komitzksy could not identify Austin as the individual who shot Roy Kellam. Yet, this witness never testified before the trial court; and, according to him, was never interviewed by the defense.

4. Austin's attorney failed to produce the requisite evidence to support Austin's alibi, that Austin was working the day of the crime. Rather than subpoenaing and producing Austin's original time card, counsel presented an illegible photostat of the card and two witnesses who could not specifically recall whether Austin worked on April 29, 1974. Instead of a subpoena, Austin's girlfriend and Austin himself made inquiries, and any reasonable attorney would understand that original employment records would not just be handed over. This attorney did have access to the homicide file containing a police report which expressly stated that a detective examined the time card and it indicated that Austin punched out at 4:53 p.m. (1653 hrs.). This attorney also had an opportunity to inspect the State's file and also discover another crucial item of evidence, a calling card, later used to link his client to the crime; but he never became aware of this evidence until the day of trial when his client

was forced to confront it before a jury.

5. The State prejudicially linked Austin to a "co-defendant," an individual that the State confessed not guilty in a subsequent trial concerning the same crime.[92] The prosecutor linked Austin to this "co-defendant" in front of the jury despite admonition by the trial court not to do so.

6. The exoneration of the latter defendant, Horace Herbert, was based upon the collapse of the same witness who testified so convincingly against Austin, a witness whose credibility was greatly strengthened by an apparently false background. New evidence severely impeaches the credibility of this witness, the star of the State's case against Austin, Jackie Robinson.

CONCLUSION

Developments in this case have been much like discovering another painting beneath the ostensible original. The newly discovered picture offers an entirely different view of Michael Austin's trial. It is with this new picture of the case in mind that this Court, even after some aspects have been carefully reviewed by two very able judges in post conviction, reviewed Austin's Motion to Reopen Post Conviction Relief and considered the appropriateness of relief.

As one looks back over the history of this case, a complex of interwoven events and non-events seems apparent. Acts of commission and omission which might not, at first appearance, reflect well on our capacity to find a resolution of such crimes; but the history of the Circuit Bench and of the Bar is written from the hundreds of thousands of cases which are handled smoothly and

[92]This future development could not, of course, have been known to Mr. Wase.

without serious flaw.[93] It is, however, to the credit of the judiciary, the Bar, the media, and the public in general that the few flaws are noted, and that justice is poised to respond and correct them.

The present case is one of those flawed cases. It is a bad thread in an otherwise carefully woven tapestry of justice in Maryland. It will be removed without damage to the tapestry. This case proves the self-evident, that a bad thread can appear despite the enormous skill and conscientiousness of the weavers. This case, and the justice system, has benefitted from the very conscientious deliberation and care of three eminent jurists, two of our esteemed retirees, Judges Jones and Dorf, and the third, an equally esteemed active member of the Bench, Judge Noel. Each reviewing judge gave dutiful attention to various, separate aspects of Michael Austin's criminal justice history. But it fell to this Court to study the entirety of that history. The *cumulative* effect of what went wrong constitutes the manifest injustice which deserves remedy. *See Bowers v. State*, 320 Md. 416, 435-38, 578 A.2d 734 (1990).

To the extent possible, a successful post conviction petitioner deserves placement in the position he or she would have been in had the errors found never occurred. *Williams v. State*, 326 Md. 367, 382-83, 605 A.2d 103, 110-111 (1992). This requires resort to the remedy of a new trial. *State v. Howard*, 7 Md. App. 429, 256 A.2d 192 (1969). Considering the array of committed errors, and for all of the reasons given in the foregoing opinion, Michael Austin will get the relief of a new trial.

Michael Austin as an accused was wronged, and no matter the age of the wrong, it remains wrong. Remedying the wrong is not a benefit conferred solely on an individual named Michael Austin. Our capacity to right a wrong is a measurement of our true commitment to due process and

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[93]In 1991, 5993 felony and 3,666 misdemeanor defendants came before the Circuit Court of Baltimore City. The projection for the year 2001 is 10,500 felony and 7000 misdemeanor defendants. *Alan Woods*, Chief of Research , Development, and Training, Office of the State's Attorney.

justice as a State. This is a benefit conferred upon all of the citizens of Maryland.

His petition for relief will be granted. His post conviction remedy will be re-opened and for the reasons stated, a new trial ordered.

JOHN CARROLL BYRNES
The Judge's Signature Appears
On The Original Document

12/27/01
Date

John Carroll Byrnes
Judge

APPENDIX 1

PROCEDURAL HISTORY

CASE	ISSUES RAISED	OUTCOME
Trial of Michael Austin (March 27, 1975)	1. Murder (1st Degree) 2. Handgun 3. Larceny	1. Guilty 2. Guilty 3. Guilty
Austin v. State, No. 774, unreported (Md. App., filed June 10, 1976).	1. Unconstitutional burden of proof jury instruction (relieved State of its burden). 2. Erroneous jury instruction on eyewitness testimony. 3. Erroneous denial of Motion for New Trial for improper consideration of evidence. 4. Ineffective assistance of counsel. • failure to object to introduction of composite sketch of the suspect • failure to request instruction compelling jury to weigh Robinson's poor description of the suspect • stipulation as to Austin's workday on April 29, 1974	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed (issue not before the trial court)
Writ of Certiorari to the Court of Appeals of Maryland (September 14, 1976)		Denied

1st Petition for Post Conviction Relief (November 2, 1978) Judge Dorf presiding	1. Improper alibi jury instructions placing improper burden of proof on Petitioner. 2. Ineffective assistance of counsel • failure to properly prepare for trial • failure to object to inadmissible and prejudicial evidence • failure to interview or summons witnesses • failure to object to improper jury instructions • failure to object to improper remarks by the prosecution • improper stipulation to Petitioner's workday records 3. Prosecutorial misconduct pertaining to improper remarks regarding: • Petitioner's alibi and time card • Defense counsel's characterization of Petitioner as a liar • Horace Herbert 4. Double Jeopardy of sentence for larceny	1. Denied 2. Denied 3. Denied 4. Larceny sentence vacated
Austin v. State, No. 174, unreported (Md. App. filed Dec. 8, 1978).	Application for Leave to Appeal the first post conviction court's holdings	Denied

2nd Petition for Post Conviction Relief (June 8, 1993) Judge Noel presiding	1. Ineffective assistance of appellate counsel • failure to allege prosecutorial mis-conduct for references to the calling card • failure to allege prosecutorial mis-conduct for failure to make pre-trial disclosure of calling card • failure to raise the failure to disclose a negative photo identification 2. Prosecutorial misconduct • references to Horace Herbert • violation of sequestration order by speaking with Det. Ellwood 3. *Brady* violations 4. Ineffective assistance of trial counsel • failure to interview Eric Komitzsky • failure to call Eric Komitzsky as a witness 5. Violation of discovery rule pertaining to calling card	1. Limited relief granted for failure to allege prosecutorial misconduct for failure to disclose the calling card (belated appeal) 2. Waived 3. Denied 4. Denied (trial tactic) 5. Denied (discovery violation found, but Austin's testimony discounted the card's importance)
Austin v. State, No. 60, unreported (Md. App., filed Dec. 23, 1993).	Application for Leave to Appeal the second post conviction court's holdings	Denied
Austin v. State, No. 716, unreported (Md. App. filed Apr. 25, 1994).	Belated Appeal (based on the second post conviction court's grant of limited relief)	Denied

3rd Petition for Post Conviction Relief (Jan. 3, 1996) Judge Byrnes presiding	Felony murder conviction without an underlying felony	Denied
Austin v. State, No. 183, unreported (Md. App., filed Mar. 4, 1996)	Application for leave to appeal the third post conviction court's holding	Denied

Michael Austin	*	**IN THE**
V.	*	**CIRCUIT COURT**
State of Maryland	*	**FOR**
	*	**BALTIMORE CITY**
	*	**CASE # 17401280-82**

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ORDER

For the reasons given in the Memorandum Opinion filed simultaneously herewith, it is this 27 day of December 2001, hereby:

ORDERED that Michael Austin, Petitioner, is granted a new trial.

JOHN CARROLL BYRNES
The Judge's Signature Appears
On The Original Document

John Carroll Byrnes
Judge