WALTER LOMAX	*	IN THE
Petitioner	*	CIRCUIT COURT
v.	*	FOR
STATE OF MARYLAND,	*	BALTIMORE CITY
Respondent	*	Case Nos. 7852831; 1754, 1755,
	*	1756 (1968 docket)
	*	Post Conviction No.: 4936
	*	

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

**ORDER GRANTING REOPENING,
GRANTING POST CONVICTION RELIEF,
AND ISSUING A NEW TIME-SERVED SENTENCE**

Upon Consideration of the record in this case including the time already served by Mr. Lomax, Mr. Lomax's motion to reopen, the fact that the State does not oppose the relief granted by this Order, and for good cause shown after a full hearing on this date, it is this 13th day of December, 2006, hereby ORDERED, that:

1. Mr. Lomax's Motion to Reopen is Granted;

2. Post-Conviction Sentencing Relief is Granted;

3. Mr. Lomax's prior sentence is Vacated;

4. Mr. Lomax is hereby re-sentenced as follows:

   a. On Case # 1755, Mr. Lomax is sentenced to Life, and that Life sentence is hereby Suspended all but time already served with three (3) years unsupervised probation.

   b. On Case # 1754, the Court finds that the prior sentence of 20 years concurrent on #1754 is and has been fully executed and served.

   c. On Case # 1756, the Court finds that the prior sentence of 10 years concurrent on # 1756 is and has been fully executed and served.

GALE E. RASIN
JUDGES ORIGINAL SIGNATURE
APPEARS IN COURT FILE

The Hon. [illegible]

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

MEMORANDUM

This matter comes before the Court pursuant to a Motion to Reopen Post Conviction filed under the Uniform Post Conviction Procedure Act ("UPCPA"). Md. Code Ann., Crim. Proc. § 7-104 (LexisNexis 2001). Based upon the Court's review of the record and transcripts in this case, the evidence presented at the post conviction hearing, the arguments of counsel, and the reasons stated herein, the Court finds the following:

BACKGROUND INFORMATION

On September 19, 1968, in the Circuit Court for Baltimore City, Judge Shirley B. Jones presiding, Petitioner was convicted of first-degree murder (case number 1755), robbery with a deadly weapon (case number 1754), and attempted armed robbery (case number 1756). On January 14, 1969, Judge Shirley B. Jones sentenced Petitioner to life for case number 1755, 20 years concurrent for case number 1754, and 10 years concurrent for case number 1756. On November 14, 1969, the Maryland Court of Special Appeals affirmed Petitioner's convictions.

On October 10, 1985, Petitioner, through his attorney, William M. Monfried, filed a Petition for Post Conviction Relief. This post conviction is case number 78528301, post conviction number 4936. On February 13, 1986, Judge David Ross of the Circuit Court for Baltimore City denied the Petition. On March 13, 1986, an application for leave to appeal the denial of post conviction relief was filed on behalf of Petitioner in the Court of Special Appeals. The Court denied this application on October 7, 1986.

Petitioner filed a pro se Petition for Post Conviction Relief on September 29, 1995. Judge David Ross again denied the Petition on February 29, 1996. Petitioner filed an application for leave to appeal on March 26, 1996. The Court of Special Appeals denied this application on May 14, 1996.

On July 2, 1998, Petitioner filed a pro se Motion to Correct an Illegal Sentence; Petition for Writ of Habeas Corpus. The docket entries do not indicate whether Judge David Ross ever ruled upon this Motion.

On July 7, 1999, Petitioner filed a pro se Motion for Appropriate Relief (to Reopen Previously filed Post Conviction, Habeas Relief, to Correct Illegal Sentence, or to Reconsider Sentence). The docket entries indicate that this Motion was inadvertently forwarded by the Clerk's Office to the wrong judge and never ruled upon.

On May 3, 2006, Petitioner, through his attorneys Larry Nathans, Booth Ripke, and Kenneth Ravenell, filed a Motion to Reopen Post Conviction case number 78528301, post conviction number 4936. This Motion to Reopen Post Conviction was assigned to Judge Gale E. Rasin of the Circuit Court for Baltimore City. On September 1, 2006, Judge Gale E. Rasin

requested that Petitioner file a new Motion as opposed to relying on the old 1999 Motion to Reopen. Petitioner's Counsel filed the new Motion on October 3, 2006.

Judge Gale E. Rasin granted the Motion to Reopen on November 22, 2006. On November 28, 2006, the State, represented by Robyne Szokoly, indicated to the Court that it would be opposing the Motion. On December 7, 2006, the state consented to the reopening of the post conviction and the post conviction relief of re-sentencing Petitioner to life suspend all but time served. On December 7, 2006, Petitioner accepted the State's offer and the hearing in this matter was held December 13, 2006.

ALLEGATIONS

Petitioner alleged that a new trial or at the very least a new sentencing was appropriate based upon:

1. Errors by the prior post conviction court in not granting a new sentencing hearing.
2. Errors by prior counsel (trial and post conviction) in not presenting compelling mitigation evidence to support a lower sentence.
3. New evidence of innocence that would have reasonably led to a different outcome, had it been presented.

(Mot. at 3.)

APPLICABLE LAW

Motion to Reopen Post Conviction Petition

Under Maryland Annotated Code, Criminal Procedure Section 7-104, "a court may reopen a post conviction proceeding that was previously concluded if the court determines that the action is in the interests of justice." The Court of Appeals has found that at the very least 'in

the interests of justice' allows a Petitioner to reopen a post conviction, if Petitioner has asserted facts "that—if proven to be true at a subsequent hearing—establish that post conviction relief would have been granted but for the ineffective assistance of the petitioner's post conviction counsel." *Stovall v. State*, 144 Md. App. 711, 716 (2002). *See also Harris v. State*, 160 Md. App. 78, 97-8 (2004).

The Maryland Appellate Courts have indicated that 'in the interests of justice' is not limited to proving ineffective assistance of post conviction counsel, and have noted that in other contexts, 'in the interest of justice' "includes a wide array of possibilities." *Stovall*, 144 Md. App. at 715 (citing *Love v. State*, 95 Md. App. 420, 427 (1993)). *See also Gray v. State*, 388 Md. 366, 383 n.7 (2005) (noting that the decision to reopen is in the trial court's discretion and 'in the interests of justice' may include ineffective assistance of post conviction counsel or a retroactive change made in the law).

Post Conviction Relief

Under Maryland Annotated Code, Criminal Procedure Section 7-102(a), a petitioner may file in the Circuit Court for the county in which his conviction took place, a post conviction proceeding to set aside or correct a judgment or sentence, if the petitioner claims that: (1) the sentence or judgment was a violation of the Constitution of either the United States or the Constitution or laws of the State; (2) the court lacked jurisdiction to impose the sentence; (3) the sentence exceeds the maximum allowed by law; or (4) the sentence is otherwise subject to collateral attack. The petitioner must also prove that the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction, or in any

proceeding that the Petitioner has initiated to secure relief from the conviction. Md. Code Ann., Crim. Proc. § 7-102(b)(2) (LexisNexis 2001).

The Petitioner has the burden of proof in a post conviction proceeding. *State v. Hardy* 2 Md. App. 150, 156 (1967). Thus, the Petitioner must prove facts to establish his allegations. *Cirincione v. State*, 119 Md. App. 471, 504, *cert denied*, 350 Md. 275 (1998). The burden of proof placed upon a Petitioner has been described as "heavy." *Harris v. State*, 303 Md. 685, 697 (1985).

The Petitioner must sustain the burden of proving that he was denied effective representation. *State v. Calhoun*, 306 Md. 692, 729 (1986), *cert. denied*, 48 U.S. 910 (1987). A strong presumption exists that counsel rendered effective assistance. *State v. Thomas*, 325 Md. 160, 171 (1992); *Bowers v. State*, 320 Md. 416, 421 (1990). The standard which guides the analysis of ineffective assistance of counsel claims was set forth by the United States Supreme Court in *Strickland v. Washington*, 446 U.S. 668 (1984). In order to prevail, the Petitioner must prove that 1) his trial counsel was deficient, and 2) the deficiency prejudiced his case. *Id.* at 687. Unless Petitioner can establish both prongs of the *Strickland* test, he is not entitled to post conviction relief. *Harris*, 303 Md. at 694. A criminal defendant has the right to have his counsel render effective assistance. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). A post conviction petitioner has a right to effective assistance of counsel. *Stovall v. State*, 144 Md. App. 711, 715 (2002).

FINDINGS OF FACT

In reaching a decision in this case, this Court considered the record, transcripts, and pleadings along with the consent between Petitioner and the State to a modified sentence of life

suspend all but time served. In addition to this consent, the Court considered the facts surrounding the robbery and murder in this case, how those facts create possible claims of ineffective assistance of trial and post conviction counsel, and the four purposes of punishment (retribution, general deterrence, specific deterrence, and rehabilitation).

Facts surrounding the crime for which Petitioner was convicted.

On December 2, 1967, an armed robbery and murder was committed at the Giles Food Market located in the 900 block of East Patapsco Avenue. (Mem. 4; Ex 5.) Robert Brewster, a store employee, was the victim of the fatal shooting. (Mem. 4.) A string of robberies occurring throughout Baltimore led to "racial tensions and near civil unrest" in the months prior to this robbery. *Id.* In response, the police began conducting mass line-ups at the station, which were announced in the newspaper. *Id.* On December 12, 1967, Petitioner went into the police station because he mistakenly believed a warrant was issued for him. *Id.* at 7. Actually, it was a warrant for Petitioner's brother for the non-payment of child support. *Id.* Petitioner and his brother were placed in several line-ups together, along with many other people. *Id.* Eventually Petitioner was picked out of a line-up as the perpetrator of the Giles Food Market robbery and shooting. *Id.*

On November 25, 1967, Petitioner was chaperoning his sisters at a Thanksgiving Day dance and he was jumped by a group of 'trouble makers' outside the dance. *Id.* at 5. He was stabbed in his right hand, and the wound went so deep that it traveled through muscle and fractured a bone. *Id.* at 6. He was also kicked and stomped, which led to bruised ribs and difficulty walking for the next two weeks. *Id.* On December 1, 1967, approximately ten hours

before the shooting, Petitioner received treatment at the Johns Hopkins Hospital's plaster clinic, with a 15 layer plastic splint placed on his right hand and arm. *Id.* at 29-30.

Petitioner was convicted based upon the identification of five witnesses. *Id.* at 28. Two were seated in a car outside the grocery store. (Tr. 75-77, 89-92.) Three witnesses were inside, and testified to seeing the shooter for no more than a minute or so. (Tr. 58, 109, 151.) One was in an office, and observed through a window. (Tr. 137.) The two store clerks who were with the shooter for half an hour did not identify Petitioner, and did not notice anything unusual about the shooter's right hand. (Mem. 28.)

Even if opposed by the State, evidence of ineffective trial and post conviction counsel could have presented appropriate grounds for relief.

This Court found evidence, which if presented at a post conviction hearing, may have proved that Petitioner's post conviction counsel was ineffective. Petitioner's original post conviction counsel failed to properly present mitigation evidence, which could have supported a reduced sentence. (Mot. 7 citing Original Pet. 12.)

Additionally, this Court could have found Petitioner's original post conviction counsel ineffective for his failure to present the ineffective assistance of trial counsel. Trial Counsel could have been found ineffective for his failure: (1) to explain to the jury how Petitioner's hand injury occurred (*see* Mot. 12; Tr. 187.); (2) to present evidence of the other injuries from which Petitioner was suffering (severely bruised ribs and difficulty walking), which could have been presented through Petitioner's sister (*see* Mot. 11.); (3) to explain to the jury how Petitioner was apprehended, which the jury questioned after defense had closed its case (*see* Tr. 224.); and (4) to procure the attendance of two police officers, one who could have explained identifications of

persons other than Petitioner as the alleged shooter made in the case, and another who could have detailed a police chase, which took place after the robbery and shooting during which the suspect outran a patrolman while under fire (*see* Tr. 156, 207; Mot. 16.) This Court considered this evidence of ineffective assistance of both trial and post conviction counsel in agreeing to reopen Petitioner's post conviction and in agreeing to the modified sentence to which the State consented.

Analysis of the four purposes of punishment indicates that the relief granted is appropriate.

This Court examined the four purposes of punishment as they apply to Petitioner.

1. Retribution

Punishment of convicted criminals serves to express society's moral outrage for their actions. Here, as of December 13, 2006, Petitioner had served 39 years in prison. This is much longer than most defendants convicted of first-degree murder serve. Additionally, until Governor Glendening issued a policy denying parole to "lifers," prisoners serving life sentences were eligible for parole. The Parole Commission recommended Petitioner for full parole in 1994. In 1995, Petitioner was one of eight individuals for whom parole was imminent. (*See* Mem. at 22.) The Governor pulled Petitioner back from the exit door of the prison as the Petitioner approached it. *Id.* This Court finds that Petitioner's 39 year sentence satisfies the retribution component of punishment.

2. General Deterrence

Assuming the public is made aware of the sentence in this case, this Court finds that the general deterrence component of punishment has been satisfied because Petitioner has served a longer sentence than most prisoners convicted of similar crimes.

3. Specific Deterrence

Punishment serves to deter a person from committing future crimes and to insure public safety. Here, evidence of actual innocence persuades this Court that Petitioner is not a threat to public safety.

No physical evidence links Petitioner to this crime. Petitioner indicated that:

> No gun was ever located. No proceeds of the theft were ever located. Multiple searches of [Petitioner's] home recovered no evidence. No fingerprints matched. There was no ballistics evidence tying [Petitioner] to the crime. There was obviously no DNA. There was no videotape, audiotape, or any other recording. There was no confession. There was no cooperating witness, or informant. No car was found tying [Petitioner] in any way to the scene. In fact, it was never suggested by a shred of evidence that he even frequented the area.

(Mem. 27.)

Petitioner was convicted solely on cross-racial identifications. (Mem. 28.) The Court of Appeals has acknowledged the difficulties with cross-racial identifications. *See Smith v. State*, 388 Md. 468 (2005). It was because of these difficulties that the Court in *Smith* held that defense counsel are entitled to argue the problems with cross-racial identifications in closing arguments. *Id.* at 489. The Court cited research, which suggests that some individuals "are better able to identify members of their own race, but are significantly impaired when attempting to identify individuals of another race or ethnicity." *Id.* at 479.

At least one witness who testified that Petitioner was the shooter in this case made previous misidentifications. (Tr. 150.) Additionally, two store clerks who were with the shooter in this case for half an hour could not identify Petitioner. (Tr. 37, 49, 125.)

Nine days before this crime occurred, Petitioner was jumped by a group of teenagers as he chaperoned his two little sisters at a Thanksgiving Day dance at the Druid Hill YMCA. (*See*

Mem. 28.) Petitioner was stabbed in his right hand and the wound was so severe that it sliced through muscles and fractured a bone. *Id.* at 28-9. This resulted in a large hematoma in Petitioner's right hand. *Id.*

Hours before the shooting took place, Petitioner was at the John's Hopkin's plaster clinic receiving a splint, which consisted of:

> gauze padding around the hand and around the opening of the wound, bulky, cushion dressing to cover from the finger tips with the fingertip exposed, all the way to the elbow, plaster of Paris, usually about fifteen layers, to produce a thickness of a half inch covers the swollen surface of the hand going from the palm to the elbow.
>
> *Id.* at 30.

The swelling of Petitioner's hand after he was beaten was so severe that it "looked like a boxing glove." *Id.* All the witnesses testified that the robber shot the gun with his right hand, and no witnesses reported any swelling or cast. *Id.*

Petitioner also suffered several bruised ribs as a result of the stomping and kicking he endured during his attack at the dance. *Id.* at 31. As a result, he was barely able to walk for two weeks. *Id.* After the robbery in this case, the perpetrator was chased by a patrolman whom he outran while under fire. (Mem. 35; Ex. 5.)

Residual doubt persuades this court that Petitioner does not need specific deterrence, and will not be a threat to public safety. Assuming that Petitioner indeed committed the crime, the severe consequences he has experienced should serve to deter him from committing future criminal acts.

4. Rehabilitation

Punishment is also used to rehabilitate criminals and insure that they will not pose a threat to public safety upon their return to society. Even if this Court were not persuaded by the above evidence of actual innocence, Petitioner has proved that he has rehabilitated himself and is not a threat to public safety.

When Petitioner entered prison in 1967, he was evaluated as having borderline mental retardation. *Id.* at 10. While in prison, Petitioner surpassed what was expected of him, and in 1978 he earned his GED. *Id.* at 25. He went on to receive an A.A. degree from Essex Community College in 1986. *Id.* Petitioner also took college creative writing courses at Towson University. *Id.* at 26. His professor, Clarinda Harriss, described him as a "gentleman and a scholar." (Ex. 22.) Petitioner was Editor in Chief of "The Conqueror," a prison-wide monthly Newsletter. *Id.* Petitioner became a tutor in the family literacy program. *Id.* Petitioner has amassed dozens of certificates for his achievements in prison. These certificates are attached as Exhibit Three (3) to Petitioner's Memorandum.

Petitioner has earned the respect and support of officers in the institutions in which he has been housed, people he has worked with in the community, and politicians around the state. (*See* Mem. 24-25; Ex. 9-20.) The current Secretary of the Department of Public Safety and Correctional Services, Mary Ann Saar, wrote a letter on Petitioner's behalf. (*See* Mem. 25; Ex. 16.)

Finally, Petitioner has proved that he can be a productive citizen. Petitioner participated in the work release program for five and a half years. (*See* Mem. 23.) He had no violations and he was eventually promoted to supervisor at Advo-System, Inc. in Baltimore. *Id.* Petitioner also completed 54 family leave visits with no violations. *Id.* Petitioner was accepted at Morgan State

University, but was unable to complete college because Governor Schaefer ended the work release program. (*See* Mem. 25-6.)

This Court is persuaded that Petitioner has rehabilitated himself and can contribute positively to our society.

The State consented to the reopening of Petitioner's post conviction and a modification of his sentence to life suspend all but time served. This Court considered the parties' agreement and the evidence discussed above in reaching its decision to sentence Petitioner to life suspend all but time served, with three (3) years of unsupervised probation.

WHEREFORE, the Motion to Reopen Post Conviction is GRANTED, and the Post Conviction Relief of Re-Sentencing is GRANTED, and Petitioner is sentenced in case number 1755 to life suspend all but time served, with three (3) years of unsupervised probation.

Judge Dale E. Rasin