IN THE COURT OF SPECIAL APPEALS OF MARYLAND

NOVEMBER TERM, 2012

---

xxxxxx

XXXXX XXXXX XXXXX,

Appellant

v.

STATE OF MARYLAND,

Appellee

APPEAL FROM THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY
(The Honorable Michael Whalen)

STATEMENT OF THE CASE

On February 24, 2011, the Grand Jury for Prince George's County returned a nine-count Indictment charging the Defendant, Xxxxx Xxxxx Xxxxx with First Degree Murder (count 1), Attempted First Degree Murder (counts 2 & 3), First Degree Assault (counts 4 & 5), Use of a Handgun in a Crime of Violence (counts 6-8) and Conspiracy to Commit First Degree Murder (count 9). The matter proceeded to a Jury Trial before the Honorable Michael Whalen from November 28 through December 2, 2011 (although the Court did not sit on November 30, 2011). On December 2, 2011, the Jury returned a verdict of not guilty as to counts 1-8 and lesser

included charges and guilty as to Count 9, Conspiracy to Commit First Degree Murder.

On March 7, 2012, the Court sentenced Defendant to Life to the jurisdiction of the Division of Correction suspending all but 60 years. This timely Appeal followed.

QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERR IN REFUSING TO GIVE THE CUSTOMIZED IDENTIFICATION INSTRUCTION WHICH ACCURATELY INFORMED AND EDUCATED THE JURY ON HOW TO EVALUATE THE EYEWITNESS TESTIMONY IT HAD RECEIVED?

II. DID THE TRIAL COURT ERR IN REFUSING TO LIMIT THE STATE'S IDENTIFICATION EVIDENCE AND IN DENYING THE MOTION FOR MISTRIAL WHEN THE EVIDENCE WAS UNFAIRLY HEARD BY THE JURY?

III. DID THE STATE ENGAGE IN A SYSTEMATIC PATTERN OF DISCRIMINATORY PEREMPTORY CHALLENGES IN VIOLATION OF THE LAW?

IV. WAS THE EVIDENCE SUFFICIENT TO CONVICT APPELLANT OF CONSPIRACY TO COMMIT FIRST DEGREE MURDER AS CHARGED IN COUNT 9 OF THE INDICTMENT?

STATEMENT OF FACTS

The decedent, Aaron Leach, was shot and killed on June 9, 2010, outside of a cookout at the home of his friend, Ron Ofori, in Bowie, Maryland, at approximately 11:00 p.m. (T3.261).[1] Mr. Ofori testified that there were "a lot" of people at the party and at least one other party in the neighborhood that night. (T5.114, 137).[2] The narrow streets in and out of the neighborhood and the street in front of the Ofori home were crowded with vehicles and people. (T5.137-38). Some men who were not personally known by Mr. Ofori were nevertheless in Mr. Ofori's home attending the party. (T5.141-43). One of these men, described by Mr. Ofori in his testimony (not the Defendant), began a verbal argument with Mr. Ofori about the basement door being left open. (T5.116-19, 142). A crowd of men surrounded the argument which then moved outside of the Ofori home and around to the front yard. (T5.117-18). John Griffin took a bottle of wine from the hands of one of the men. (T5.118). The argument ended in the front yard when the man arguing with Mr. Ofori and the three other men with him left the front yard and drove away in a gold car. (T5.126). The Defendant was identified at Trial by Mr. Ofori (T5.119) and Mr. Griffin (T4.233),[3] over objection, as one of these four men.

A short time later, shots were fired outside of the party. (T5.128) Mr.

[1] T3 refers to the November 28, 2011 trial transcript.
[2] T5 refers to the December 1, 2011 trial transcript.
[3] T4 refers to the November 29, 2011 trial transcript.

Leach was killed, Mr. Ofori was struck on his thigh and John Griffin was struck on his hand. (T5.129, T4.218).

On July 20, 2010, Jasmine Solano, identified the Defendant from an array of six photographs as one of the men she saw shooting that night. (T5.163-68). She had not previously given the police a written statement but did so on July 20. (T5.172-73). Ms. Solano identified the Defendant during her direct examination and also testified regarding the late hour of the shooting and the limited lighting. (T5.163). During cross examination, she testified that she observed the shooter for a total of less then one second (T5.184) and described her frightened state of mind (T5.187), her distance from the shooter (T5.186-87), her observations of the flashes during the shooting (T5.187), her high heart rate at the time of the shooting, (T5.188) and other matters relating to her identification. (T5.183-188).

Antwone Brown testified that he was one of the four men who attended the cookout and had become involved in the verbal argument with Mr. Ofori. (T4.42). He testified that after the argument he, the Defendant, Von Xxxxx and "B-Roy", left the party in Xxxxx Xxxxx's gold Acura. (T4.41-43). A discussion ensued in the vehicle between Defendant and Xxxxx Xxxxx as they drove around after leaving, wherein Defendant stated "do you want to go back and do that to him." (T4.43). The vehicle and all four men then returned to Mr. Ofori's neighborhood.

(T4.45).

When they returned to the neighborhood, Xxxxx Xxxxx parked his car in the entrance to the neighborhood facing outbound. (T4.45). Mr. Brown further testified that the Defendant and Xxxxx got out of the car and that he saw two guns, one in the hand of the Defendant which he described as a black "handgun" (T4.46), a semi-automatic (T4.135-37) and one in the hand of Xxxxx Xxxxx, (T4.46) which he described as a revolver. (T4.136). A few minutes later, Brown heard gun shots fired but did not see who had fired. (T4.47). The Defendant and Mr. Xxxxx returned to the vehicle and, now with B-Roy driving, left the neighborhood. (T4.48-49). Mr. Brown testified that the Defendant stated "I always get my man," (T4.49) and that there was further conversation about one guy being shot in the head and the others in the leg or arm. (T4.49-50). The men then left the neighborhood in Xxxxx Xxxxx's vehicle and went to the Stanton Road area of the District of Columbia. (T4.52).

When interviewed at the Prince George's County Detention Center, Brown also provided information about where the gun used by the Defendant could be found. (T4.60-61). A search warrant was executed at that location but no guns were found. (T5.237).

Brown became a witness for the State only after he himself was charged with Armed Robbery and First Degree Assault in an unrelated case.(T4.36-39,114). He told his public defender that he had information

about a shooting. (T4.118). He then met with detectives while in the Prince George's County Detention Center. (T4.118-19). Thereafter, an agreement was reached with the State's Attorney's Office whereby Mr. Brown agreed to testify before the Grand Jury regarding this case in exchange for which, on the same day after his Grand Jury testimony, all of the charges in the pending Armed Robbery case against him were placed on the stet docket. (T4.127-29) Mr. Brown was released from detention in that case that same day as well. (T4.134).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUEST FOR A CUSTOM IDENTIFICATION INSTRUCTION.

Prior to the jury instruction phase of this trial, the Defense requested that the Court give a customized identification instruction incorporating language designed to decrease the risk of misidentification in light of "scientific advances that have led to a greater understanding of the mechanics of memory." Bomar v. State, 412 Md. 392, 423 (2010). The customized instruction propounded added components to Maryland Pattern Jury Instructions 3.10 and 3.30 necessary to educate the jury on the vagaries of Identification testimony and to decrease the all-too-common occurrence of misidentification leading to wrongful convictions. The propounded instruction was in large part prompted by a footnote in Bomar, Id, in which the Court of Appeals suggested that Maryland's Pattern Instruction might be outdated and that the time was right for the Standing Committee on Criminal Pattern Jury Instructions to revise its instruction incorporating scientific advances in the field of memory and eyewitness identification. *See also* State v. Henderson, 27 A.3d 872 (N.J. 2011) (discussed extensively *infra*). Nevertheless, in spite of a timely and proper request, the trial judge erred in refusing to give the customized instruction which accurately informed and educated the jury on how to evaluate the eyewitness testimony it had received.

Maryland Rule 4-325 addresses Instructions to the Jury. Rule 4-325(c) provides that the trial court, upon request of a party, "shall instruct the jury as to the applicable law…" However, the Rule goes on to state that the court need not grant a requested instruction "if the matter is fairly covered by instructions actually given." In Dickey v. State, the Court of Appeals summarized that the Rule requires the trial judge to give a requested instruction when (1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given. Dickey v. State, 404 Md. 187, 197-98 (2008). The trial court's failure to give an instruction on an issue not fairly covered by other instructions is reversible error. Roach v. State, 358 Md. 418 (2000).

In recognition of the importance of jury instructions to "aid the jury in clearly understanding the case, to provide guidance for the jury's deliberations, and to help the jury arrive at a correct verdict," Chambers v. State, 337 Md. 44, 48 (1994), the Court of Appeals appointed and has nurtured a standing committee to promulgate pattern jury instructions. The Maryland Criminal Pattern Jury Instructions (hereafter, MPJI) binder is thus commonly used and in fact some of its instructions are mandated by Court rulings. *See, e.g.*, Ruffin v. State, 394 Md. 355 (2006) (requiring the use of the MPJI Reasonable Doubt instruction in all criminal jury trials).

The MPJI contains two instructions which apply to the area of eyewitness Identifications. MPJI 3:10 addresses the credibility of witnesses and 3:30 deals specifically with identification of a defendant by an eyewitness. The court gave both of these instructions at trial. (T6.22-23, 28-29).[4] As for the identification instruction, there can be no dispute that the eyewitness identification testimony was the most critical element of the State's case and that questions as to the reliability and accuracy of the identifications were generated by the defense thus requiring that the instruction be given in accordance with Gunning v. State, 347 Md. 332, 347 (1997).

However, MPJI 3:30 as propounded to the jury in the case *sub judice*, did not fairly cover the factors which modern science has shown to be significant in evaluating the accuracy of identification testimony. The language of MPJI 3:10 and 3:30 have remained unchanged for many years. Research into the science of memory and specifically as to the cause of misidentification has shown that the current instructions are deficient and do not fairly cover factors such as lighting conditions, the distance between witness and suspect, witness stress levels, weapon focus, and the length of time between event and identification. (*See* State v. Henderson, 27 A.3d 872 (N.J. 2011) for an extensive review of case law

[4] The full language of MPJI 3:10 and 3:30 are included within the "pertinent provisions" portion of this brief (pp. 36-37). The transcript of the judge's instructions to the jury is included within the appendix (App. 16-17).

and current research in the area of eyewitness identification and memory). As the Court of Appeals recognized in Bomar, a modified instruction could "educate juries about the vagaries of eyewitness testimony and safeguard against wrongful convictions based on misidentifications." 412 Md. at 418.

One of the prime sources of eye witness misidentification has been found to be poor lighting and distance conditions. For example, experts in eyewitness psychology have shown that the lighting conditions at the time the witness views the suspect substantially impacts the witness's ability to later identify the suspect. *See* Elizabeth F. Loftus et al., Eyewitness Testimony: Civil and Criminal § 2-4 at 16-30 (4th ed. 2007). Some courts have recognized that lighting conditions should be an express factor which the trial court must instruct the jury to consider in evaluating an identification. *See, e.g.*, State v. Henderson, 27 A.3d 872, 906 (N.J. 2011) ("poor lighting makes it harder to see well…and poor lighting conditions can diminish the reliability of an identification"); State v. Long, 721 P.2d 483, 492 (Utah 1986) (providing instruction on lighting conditions, among other considerations, would "sensitize the jury to the factors that empirical research have shown to be of importance in determining the accuracy of eyewitness identifications").

Similarly, the distance between the witness and suspect affects his or her ability to later identify the suspect. In Henderson, the court recognized the common sense notion that "a person is easier to recognize

when close by, and the clarity decreases with distance." Henderson, 27 A.3d at 905. *See* R.C.L. Lindsay et al., How Variations in Distance Affect Eyewitness Reports and Identification Accuracy, 32 LAW & HUM. BEHAV. 526, 533 (2008) (while "Identification choosing rates were not affected by distance, decision accuracy declined with distance"). While the instruction given in the case *sub judice* suggested that the jury consider the witness's "opportunity to observe the criminal act and the person committing it…" there was no mention of lighting or distance, the specific factors measured and deemed meaningful by the research.

The instruction given to the jury in this case also made no mention of the critical effect which witness stress levels have on the accuracy of a subsequent identification. In high stress situations, a person's nervous system is not fully functioning, which may prevent sensory messages from "getting through." Loftus, Eyewitness Testimony, *supra*, at 26. Even "under the best viewing conditions, high levels of stress can diminish an eyewitness's ability to recall and make an accurate identification." Henderson, 27 A.3d at 903. The court in Henderson described a field experiment in which military personnel were split into either a high or low-stress interrogation-style interview. When asked to identify the interrogator the very next day, more than twice the personnel exposed to a low-stress interview could correctly identify their interrogators in a lineup than those exposed to the high-stress interview. Charles A. Morgan III et al., Accuracy

of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress, 27 INT'L J.K. & PSYCHIATRY 265 (2004). The report concluded that

> contrary to the popular conception that most people would never forget the face of a clearly seen individual who has physically confronted them and threatened them for more than 40 minutes… the data provides robust evidence that eyewitness memory for persons encountered during events that are personally relevant, highly stressful, and realistic in nature may be subject to statistical error.

Id. at 269-70.

The clear impact of stress levels on the accuracy of eye witness identifications has caused a witness's stress level to be included as a factor in the identification instruction given to juries in the United States Court of Appeals, Third Circuit. *See* Third Circuit Jury Instructions, §4.15, at 26-32 (2010) (Listing, among many other factors for the jury to consider, "whether the witness was under stress while observing the person who committed the crime").

Weapon focus is another specific well recognized factor in the accuracy and reliability of an eyewitness identification. When a visible weapon is used during a crime, "it can distract a witness and draw his or her attention away from the culprit." Henderson, 27 A.3d at 904. According to the court in Henderson, a meta-analysis of 19 weapons focus studies revealed an average identification decrease of about 10% when a weapon was present. Nancy M. Steblay, A Meta-Analytic Review of the Weapon

Focus Effect, 16 LAW & HUM. BEHAV. 413, 415-17 (1992). This effect is significantly enhanced the shorter the duration of the crime and therefore the witness's exposure to the suspect to be identified. Id. *See also* Neil v. Biggers, 409 U.S. 188, 199-200 (1972) ("the factors to be considered in evaluating the likelihood of misidentification include… the witness' degree of attention"); Long, 721 P.2d at 492 ("the witness's degree of attention to the actor at the time of the event" is one of the factors which the jury should be instructed to evaluate in determining the reliability of an eye witness identification).

Studies have also shown that there is a direct correlation linking misidentifications with lengthier delays between the event observed and the later identification of the suspect. Here again, there is no surprise that studies show that memories fade with time, and that memory decay is irreversible. Henderson, 27 A.3d at 907. Studies confirm that "memory strength will be weaker at longer retention intervals than at briefer ones." Kenneth A. Deffenhacher et al., Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation, 14 J. EXPERIMENTAL PSYCHOL: APPLIED 139, 142 (2008). Memories do not restore or improve, so the mere passage of time between the commission of the crime and an identification potentially effects the reliability of the identification. *See also*, Bomar, 412 Md. at 416 (the effects of stress and time are generally known to exacerbate memory loss).

In the absence of a more detailed instruction suggesting that jurors evaluate the specific factors affecting the reliability of an eyewitness identification, jurors will often overemphasize the eyewitness's expressed degree of certainty in his or her identification. In fact, studies show that jurors often focus solely on a witness's confidence in lieu of all other objective factors when making their evaluations. Gary Wells et al., Eyewitness Identification Procedures, Recommendations for Lineups and Photospreads, 22 J. LAW AND HUM. BEHAV. 6, 15 (1998). There is "consistent evidence to indicate that the confidence that an eyewitness expresses in his or her identification during testimony is the most powerful single determinant of whether or not observers of that testimony will believe that the eyewitness made an accurate identification." Id. Counter-intuitively, studies show no correlation between a witness's confidence in an identification and its accuracy.

An earlier comprehensive study of juror behavior resulted in the following conclusions:

> Jurors appear to overestimate the accuracy of identifications, fail to differentiate accurate from inaccurate eyewitnesses—because they rely so heavily on witness confidence, which is relatively nondiagnostic – and are generally insensitive to other factors that influence identification accuracy. Furthermore, this picture is even gloomier when one considers that eyewitness confidence proves to be highly malleable.

Brian L. Cutler, et al, Juror Sensitivity to EyeWitness Identification Evidence, 14 J. LAW AND HUM. BEHAV. 185, 186-87 (1990).

The list of jurisdictions which have expanded its pattern instructions on witness identifications to include these factors is growing quickly. Some examples include Utah, which many years ago found that the identification instruction used in that jurisdiction was “so short and superficial as to be of little utility.” Long, 721 P.2d at 492. More recently, the United States Court of Appeals for the Sixth Circuit remarked that "[t]oday, there is no question that many aspects of perception and memory are not within the common experience of most jurors, and in fact, many factors that affect memory are counter-intuitive." United States v. Smithers, 212 F.3d 306, 312 n. 1 (6th Cir. 2000). The Court further acknowledged that "[j]urors tend to overestimate the accuracy of eyewitness identifications because they often do not know the factors they should consider when analyzing this testimony." Id. In 2002, a Commission from the Illinois Governor’s office recommended that its courts should provide enhanced jury instructions to properly enumerate identification reliability factors. ILLINOIS GOVERNOR’S COMM’N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT 1 (April 15, 2002).[5] Most recently, as mentioned above, the New Jersey Court of Appeals, after comprehensively reviewing the findings of a Special Master it had appointed and reviewing the research and case law, mandated new court procedures for determining

[5] Available at http://www.idoc.state.il.us/ccp/ccp/reports/commission _ report/ complete_report.pdf.

the admissibility of identifications and asked its Committee on Model Criminal Jury Charges to have new draft instructions ready within 90 days after its opinion was issued. Henderson, 27 A.3d at 925-26. As discussed above, the Court of Appeals has recently suggested that Maryland should be the next jurisdiction to adopt a modified instruction. Bomar, 412 Md. at 418.

In the case *sub judice*, the trial court erred in refusing to give the customized jury instruction which the Defendant requested rather than MPJI 3:30. The defense's proposed instruction included the content of 3:30 plus the factors discussed *supra* which were not fairly covered by 3:30 nor any other instruction. The requested instruction asked the jury to consider:

> (1) The length of time the witness had to observe the person committing the offense ***(this factor is already included in MPJI 3:30)***,
> (2) the distance between the witness and the person committing the offense,
> (3) the lighting conditions at the time,
> (4) the witness's state of mind at the time of the offense, including whether the witness was experiencing a high level of stress at the time she observed the offense ***("the witness's state of mind" is already included in MPJI 3:30)***,
> (5) the witness's degree of attention to the person during the commission of the offense, and
> (6) whether the witness had previously known or seen the person.[6]

[6] The full language of both the requested jury instruction and the Maryland Pattern instruction are included in the appendix to this brief (pp. 37-39).

The instruction further suggested common factors which could be considered in evaluating an out-of-court photographic identification procedure, in addition to those included in MPJI 3:30:

> (1) The level of certainty or lack of certainty expressed by the witness at the time the photograph was identified, bearing in mind that a person may be certain without being accurate, ***("the witness's certainty or lack of certainty" is already included in MPJI 3:30)***
> (2) the length of time between the offense and the photographic identification,
> (3) any statements made by police officers prior to or during the identification procedure,
> (4) the number of photographs shown to the witness,
> (5) the state of mind of the witness at the time of the identification,
> (6) the similarities between the photograph and any prior descriptions of the person given by the witness ***("the accuracy of any prior description" is already included in MPJI 3:30)***, and
> (6) whether the witness identified photographs of other individuals in addition to the photograph of the Defendant.[7]

Given the nature of the prior out of court photo identification at the heart of the State's case and the two previously undisclosed and unexpected in-court identifications, the standard instruction did not provide the jury with enough guidance to fairly and fully evaluate the accuracy of

---

[7] These photographic identification factors have been regularly recognized as affecting the suggestiveness and/or reliability of identification procedures. *See* Simmons v. United States, 390 U.S. 377 (1968); Biggers, 409 U.S. 188; Jones v. State, 395 Md. 97 (2006); Webster v. State, 299 Md. 581 (1984); Evans v. State, 304 Md. 487 (1985); Mendes v. State, 146 Md. App. 23 (2002). *See also* Xxxxx P. Sullivan, Preventing Wrongful Convictions – A current Report from Illinois, 52 DRAKE L REV. 605, 608-09 (2004); Wells, Eyewitness Identification Procedures, *supra*, at 10-13; U.S. DEPARTMENT OF JUSTICE, EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT (2003); TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999).

the identifications. The additional factors included in the customized instruction would have provided a full framework for the evaluation of the identifications.

During examination of the witnesses who identified the Defendant, many of these additional factors were brought out and would have provided ample material for juror discussion as to the accuracy of the identifications made pre-trial and in court. For example, Jasmine Solano described the very poor lighting conditions and that she saw the shooter late at night outside. (T5.160). Further, she only viewed the shooter from a distance as the shooter was standing across the street from her. (T5.162). She admitted to never having seen the shooter before, that she saw him for a total of less then a second, that she was not focused solely on the shooter's face because she was looking at his gun. (T5.184). She admitted to a high stress level as she was scared and experiencing a high heart rate. (T5.187-88). Finally, and perhaps most importantly, her later photographic identification of the Defendant from a six-photo spread was delayed by over a month. (T5.172). Rather than focus on these highly relevant factors, the jury, as juries have been proven to do, very likely focused on Ms. Solano's steadfast confidence in her identification as highlighted in closing argument by the Assistant State's Attorney when she

argued that seeing the shooter was “a moment that she is not going to forget”.[8] (T6.48).[9]

Likewise, Ron Ofori’s cross examination also called into question the accuracy and therefore reliability of his identification. He had never seen the Defendant before the night in question. (T5.124). He only briefly viewed the man he claimed was the Defendant at his party. (T5.143). He did not make his in-court identification until December 1, 2011, which he acknowledged was the first time he had seen the Defendant’s face since June 19, 2010. (T5.144). Furthermore, the identification was made in as suggestive an atmosphere as possible; the Defendant was sitting at the defense table next to his attorney in court during his murder trial.

John Griffin similarly testified in trial that he had never seen the defendant’s face before the night of the incident. (T4.216). He also testified that he did not see his face between that night, June 19, 2010, until the day of trial Tuesday, November 29, 2011. (T4.240). Once again, the identification was made under extremely suggestive circumstances, with the Defendant sitting as the only African American at the defense table during the murder trial.

---

[8] In actuality, the study referenced earlier demonstrates that an eye-witness in a high-stress situation is prone to forget the face of the stress-inducing individual. Morgan, *supra*.

[9] T6 refers to the December 2, 2011 trial transcript.

Given the questionable nature of these identifications, the defense's proposed instruction was certainly applicable, not fairly covered by the instruction given, and would have provided an appropriate analytical framework within which the jury could fully evaluate the identification testimony. Furthermore, the identifications were critical to the State's case as the only other evidence of Defendant's involvement came from an accomplice who substantially benefited by his testimony. The identifications were needed to corroborate his testimony per Ayers v. State, 335 Md. 602, 637 (1994) ("a person accused of a crime may not be convicted on the uncorroborated testimony of an accomplice").

The trial court erred when it rejected the Defendant's custom witness identification instruction and instead gave MPJI 3:30. The customized instruction was a correct statement of law, providing a full and modern framework for evaluating the accuracy of an eyewitness identification and was not fully covered by instructions given in the case. Finally, the requested instruction was clearly applicable under the facts of the case. As such, a new trial should be ordered.

II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S PRE-TRIAL MOTION IN LIMINE AS TO IDENTIFICATION TESTIMONY AND IN LATER PERMITTING THE IN-COURT IDENTIFICATION OF THE DEFENDANT BY TWO WITNESSES WHO HAD NOT BEEN DISCLOSED AS IDENTIFICATION WITNESSES AT ANY POINT PRIOR TO TRIAL.

Prior to trial, the Defendant filed a Motion *In Limine* asserting that the State should not be permitted to introduce identification testimony during trial which had not been disclosed to the Defense during the discovery process prior to trial. The Motion was denied upon the State's representations to the Court that it was not aware that any witness other then Antwone Brown and Jasmine Solano would identify the Defendant at trial. Nevertheless, at trial, over renewed objection, two additional witnesses, Ron Ofori and John Griffin, also identified the Defendant. The Court denied the Defendant's Motion for Mistrial after each witness testified based upon the State's professed surprise. In the end, the Court erred in refusing to limit the State's identification evidence and in denying the Motion for Mistrial when the evidence was unfairly heard by the jury.

Pursuant to Maryland Rule 4-263(d)(7)(B), the State is required to disclose "All relevant material or information regarding pretrial identification of the defendant by a State's Witness." MD. R. 4-263(d)(7)(B). Moreover, the state must disclose any prior "failure of the witness to identify the defendant" MD. R. 4-263(d)(6)(G). The rule makes these disclosures

mandatory, even when the Defendant has not made a specific request for this discovery.

This rule and the State's erroneous disclosure of a Police Officer's inability to identify the Defendant in Williams v. State, 364 Md. 160 (2001) led the Court of Appeals to grant a new trial. The trial court allowed the Officer to identify the Defendant at trial in spite of the discovery disclosure that he could not do so, in large part due to the accepted claim by the prosecutor that he was taken by surprise by the Officer's testimony. However, the Court of Appeals noted that the State's compliance with Rule 4-263(d)(7)(b) is "never discretionary" and that disclosures are necessary "to assist defendants in preparing their defense and **to protect them from unfair surprise**." Id. at 171-72 (emphasis added). In the end, whether intentional or not, the State's violation of the discovery rule prejudiced the defendant and subjected him to unfair surprise. Id. at 178.

During discovery in this case, the State notified the Defendant of its intent to elicit identification evidence only from Jasmine Solano and Antwone Brown. Thus, in anticipation of eyewitness Identification being the real issue at the trial of this matter, and because the discovery contained no information about identifications made by any other witness, the Defense filed a Motion *In Limine* seeking to bar the State from eliciting in-court identification evidence from any witness other than Jasmine Solano and Antwone Brown. At the very least, the Defense hoped to learn, in

advance of opening statement, whether any other witness had professed the ability to identify someone involved in the shooting or had provided a description to the police at the time of the shooting.

At the pretrial hearing on the motion, the State claimed to be unaware of any other identifications of the Defendant and that it was unaware of whether the two additional witnesses in question would be able to identify the Defendant at trial. (T2.5-6).[10] The Court denied the Motion *in Limine*, specifically ruling that the State is not required to "disclose to a defendant whether a State witness will be giving an in court identification." (T2.8). However, at the end of the hearing, the State agreed to ask the two witnesses if they would speak with the Defense investigator prior to trial.

Prior to the start of the trial on November 28, 2011, the State informed the Court that at least one of the witnesses did not want to speak to Defense counsel or the Defense investigator. (T3.3-4). Thus, trial proceeded and opening statements were made without any knowledge of the ability of these two witnesses to identify the Defendant.

On the second day of trial, John Griffin was called to testify. He was not asked to identify the Defendant on direct or cross-examination. However, during redirect examination, when asked to describe the group of people who had been involved in an altercation at the party, Mr. Griffin pointed to the Defendant and said "he was there." (T4.233). At this time

[10] T2 refers to the November 2, 2011 motions hearing transcript.

Defense counsel objected, noting that the response was beyond the scope of cross-examination, and moved for a mistrial while also noting that this identification in trial without any prior notice was extremely prejudicial. (T4.233-34). The State reiterated that no member of the prosecutor's team had been aware prior to trial that the witness could identify the Defendant. (T4.234). Quite simply, no one ever asked him. The trial court denied the Defendant's motion, as well as his motion to strike the witness's testimony. (T4.237). The witness was later permitted to clarify that he was identifying the Defendant as being one of the individuals at the party.

Ron Ofori testified on the next day of trial. When asked by the State on direct examination to describe the people he saw at the party, Mr. Ofori pointed to the Defendant and stated "He was one of them." (T5.119). Defense counsel objected on the same grounds, moved for a mistrial, and moved to strike the evidence. (T5.120-21). These motions were once again denied.[11]

In light of Williams, Defendant was unfairly surprised by the testimony of these two witnesses and the trial court's rulings were erroneous. The Court of Appeals' holding in Williams was premised on preventing a defendant from being subjected to prejudicial surprise at trial:

[11] Interestingly, after the second identification, the trial court instructed the State to tell any future witnesses that they were not to, unless asked directly, state whether they could identify anyone in the courtroom (T5.123).

> Identification testimony may be outcome determinative and hence, any solid preparation of a defense demands this information. Furthermore, unlike statements made by the defendant, identification testimony naturally comes from third parties. As such, it is information with which, absent the State's disclosure, a defendant may never be familiar until trial. **To prevent unfair surprise, disclosure of identification testimony is required**. Id. at 174. (emphasis added).

To be sure, there are certain factual distinctions between the discovery violation before the Court in Williams and the failure to disclose identifications in the case *sub judice*. For example, the eye witness in Williams was a police officer, who the Court noted was in the exclusive "possession or control of the State's Attorney…" Williams, 364 Md. at 176-77, whereas the witnesses at issue in this case were civilians. However, as the record shows, the witnesses were in the exclusive control of the State just as the police officers in Williams were. (T3.3-4).[12]

Thus, the State was the only party who could determine, prior to trial, if the witnesses could identify the Defendant. As with the police officer in Williams, the Defendant was at the complete mercy of the State regarding any identification these witnesses might make. The State's claim of what

[12] This Court has twice previously addressed the priniciples set forth in Williams: Simons v. State, 159 Md. App. 562 (2004)(a discovery violation existed where the State failed to inform Defendant that a witness could identify the Defendant as someone he saw on the night in question); Murdock v. State, 175 Md. app. 267 (2007)(no discovery violation where State correctly informed Defendant that witness had narrowed photospread to the Defendant and one other photo, and then witness identified Defendant in court).

by that time amounted to willful blindness as to whether the witnesses could or could not identify the Defendant is no excuse to justify the extreme prejudice to the Defendant which ensued, particularly in light of Defendant's repeated requests for information. Regardless of whether the eye witness was a police officer or a civilian, the State's lack of diligence in failing to ask the witness in advance of trial and to disclose the information to the Defense caused the type of prejudice and unfair surprise Williams prohibits and is intended to guard against. Williams, 364 Md. at 177 ("It is clear that the discovery process in this case not only failed to assist Williams with his defense, but it failed to protect Williams from unfair surprise. Thus the objectives of discovery were not realized").

The State's failure to disclose any information about a potential in-court identification by witnesses exclusively in its control was contrary to the Court of Appeals holding in Williams v. State. The trial court's refusal, upon numerous pretrial and in-trial motions by the Defendant, to exclude the identification testimony, was error and prejudiced the Defendant. The lower court's decision should be reversed and this case should be remanded.

III. THE STATE ENGAGED IN A SYSTEMATIC PATTERN OF DISCRIMINATORY PEREMPTORY CHALLENGES IN VIOLATION OF THE LAW.

The State's use of its peremptory challenges during jury selection in this case impermissibly focused on black males in violation of Batson v.

Kentucky, 476 U.S. 79 (1986) and the equal protection clause of the United States Constitution. Defense counsel timely objected to the discriminatory challenges, noting that there appeared to be no basis for striking a number of the prospective jurors other than their race, age, and gender (T3.236). After explanation by the State's Attorney, the trial court denied the Defendant's challenge. The trial court erred in denying the challenge as the State's conduct constituted an impermissible practice of discriminatory peremptory challenges.

Prior to 1986, there was no limit in many U.S. jurisdictions to how a criminal defense attorney used his or her peremptory challenges. Id. However, the Supreme Court's decision in Batson for the first time placed a caveat to this discretion. The Court reasoned,

> although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. Id. at 89.

Upon a finding of a discriminatory challenge, the Batson Court instructs a trial judge either to discharge the entire venire and select a new jury from a panel not previously associated with the case or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated in the venire. Id. at 90 n. 24.

In Maryland, upon a "Batson" motion made by counsel during jury selection, a three-step process is followed. Edmonds v. State, 372 Md. 314, 332 (2002). First, the petitioning party must make a prima facie case showing that the opposing party's challenges were racially motivated. Id. Second, the challenged party must offer race-neutral explanations for striking the jurors. Id. A neutral explanation is "an explanation based on something other than the race of the juror. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral." Hernandez v. New York, 500 U.S. 352, 360 (1991). Finally, the challenging party must demonstrate that the explanations offered are merely a pretext for a discriminatory intent, and the trial court evaluates whether "the opponent of the strike has met his or her burden of proving purposeful discrimination." Edmonds, 372 Md. at 330.

A discriminatory purpose may be inferred from the totality of the circumstances and the relevant facts. Hernandez, 500 U.S. at 363. Factors the court may consider in determining whether there has been a discriminatory intent are: the disparate impact of the prima facie discriminatory strikes on any one race; the racial makeup of the jury; the persuasiveness of the explanations for the strikes; the demeanor of the attorney exercising the challenge; and the consistent application of any stated policy for peremptory challenges. Id. at 363-64. The decisive

question is “whether counsel’s race-neutral explanation for a peremptory challenge should be believed.” Id. at 365.

In the case at hand, the prosecutor used five peremptory challenges on young black men. When prompted by the court to explain the challenges, the State claimed that two of the stricken jurors (39 and 50) had not answered any of the voir dire questions, another juror (8) was “smiling and nodding at the Defendant,” another juror (22) had a brother in jail for attempted murder, and the final juror (12) had a family member in jail for being with someone else who committed murder (T3.237-39).

The explanations for the discriminatory peremptory challenges do not satisfy the Batson requirements as they were unpersuasive and called into question the prosecutor’s true motivations. For example, while the State claims to have stricken jurors 39 and 50 for not answering any questions, the State had no problem with seating jurors 21, 28, 29, 30, 33, 44, and 46, all of whom also did not answer any questions during voir dire. For African American jurors 39 and 50, the State failed to support its explanation with a consistent application of its stated policy, striking jurors who did not answer voir dire questions.

Further, the State’s Attorney claimed to have stricken juror number 22 and 12 for having family members convicted of crimes, but the State still seated juror 1 whose brother was convicted of a crime (T3.40) and juror 41, whose family member also was convicted of a crime (T3.85).

Once again, the State's Attorney's claimed policy was applied inconsistently, revealing actual alternative motives behind the peremptory strikes. The reasons provided by the State for its peremptory strikes of five young black men should not be accepted. The court's ruling should be reversed and the case remanded for a new trial.

IV. THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION AGAINST THE DEFENDANT FOR CONSPIRACY TO COMMIT FIRST-DEGREE MURDER.

After the State closed its case and again at the close of all evidence, the Defense moved for a judgment of acquittal (T6.3). Defense counsel noted that the evidence did not establish a specific intent to commit murder by any specific individual with whom the Defendant had made an agreement. The motion was denied. The Court erred as the evidence was not sufficient to sustain a conviction for conspiracy to commit first-degree murder.

When appellate courts review a claim that the evidence at trial was insufficient to sustain a conviction, "[t]he critical inquiry . . . is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Smith v. State, 415 Md. 174, 184 (2010).

In this case, a rational trier of fact could not have found the Defendant guilty of conspiracy to commit first-degree murder. In order to prove this count, the state had to prove that the Defendant agreed with at

least one other person to commit first-degree murder and that the Defendant entered into the agreement with the intent that the parties actually commit first-degree murder. MPJI 4:08. Under these circumstances, the State would have to prove that the Defendant conspired to willfully, deliberately, and with premeditation cause the death of someone.

To be convicted of first-degree premeditated murder in Maryland, "the design to kill must have preceded the killing by an appreciable length of time." Ferrell v. State, 304 Md. 679, 684 (1985). Further, there must be an appreciable period of time during which the defendant "after having formed a specific purpose and design to kill had full and conscious knowledge of the purpose to do so." Id.

Conspiracy to commit first-degree murder is a specific intent crime. Mitchell v. State, 363 Md. 130, 146 (2000). The parties to a conspiracy must, at the very least, have (1) "given sufficient thought to the matter, however briefly or even impulsively, to be able to mentally appreciate or articulate the object of the conspiracy – the objective to be achieved or the act to be committed," and (2) "whether informed by words or gesture, understand that another person also has achieved that conceptualization and agrees to cooperate in the achievement of that objective or the commission of that act." Id. at 145-46.

In this case, no evidence was generated at all that the Defendant entered into an agreement with another and formed a specific purpose to kill. No one claimed that the Defendant conspired with anyone to kill any particular individual. The testimony of Antwone Brown established, at best, that after leaving the party, Defendant asked "do you want to go back and do that to him?" (T4.43). When pressed by the State's Attorney, Mr. Brown opined that this meant he was planning on "shooting *somebody*" (T4.43). There was no indication by Antwone Brown that the Defendant and any others agreed to kill Aaron Leach or anyone else.

If believed, Antwone Brown's testimony still would not rise to the level of conspiracy to commit first-degree murder. At most, the testimony could demonstrate an agreement to inflict serious bodily harm on *someone*. Specifically, that conversation would constitute an agreement to an act that would equate to second-degree depraved heart murder. *See* Robinson v. State, 307 Md. 738 (1986) (When injury is intentionally inflicted, without intent to kill, and the victim subsequently dies as the result of the injury, the assailant may be found guilty of depraved heart murder). Shooting an individual without the intent to kill that results in death has been recognized as grounds for Depraved Heart Second-Degree murder. *See* Conyers v. State, 396 A.2d 157 (De. 1978), *followed by* Robinson, 307 Md. at 746. However, conspiracy to commit second-degree murder is

not a recognized offense in Maryland. Alston v. State, 414 Md. 92,117-18 (2011).

Because Mr. Brown's testimony did not provide proof of a specific plan to kill someone, a reasonable jury could not have convicted the defendant of Count 9. There was insufficient evidence to prove a conspiracy to commit murder in the first degree. An acquittal is warranted.

CONCLUSION

For the reasons stated above and based on the authorities cited, Appellant, Xxxxx Xxxxx Xxxxx respectfully submits that he should be acquitted as to Count 9, or, in the alternative, that he be granted a new trial as to Count 9.

Respectfully submitted,

RICHARD A. FINCI
JEREMY R. FELDMAN
Houlon, Berman, Bergman,
Finci, Levenstein & Skok, LLC
7850 Walker Drive
Suite 160
Greenbelt, Maryland 20770
Attorneys for Appellant

I hereby certify that the foregoing Brief has been prepared using Arial, 13 point font.

PERTINENT PROVISIONS

Maryland Criminal Pattern Jury Instruction 3:10, Credibility of Witnesses

You are the sole judge of whether a witness should be believed. In making this decision, you may apply your own common sense and life experiences.

In deciding whether a witness should be believed, you should carefully consider all the testimony and evidence, as well as whether the witness's testimony was affected by other factors. You should consider such factors as:

(1) the witness's behavior on the stand and manner of testifying;
(2) whether the witness appeared to be telling the truth;
(3) the witness's opportunity to see or hear the things about which testimony was given;
(4) the accuracy of the witness's memory;
(5) whether the witness has a motive not to tell the truth;
(6) whether the witness has an interest in the outcome of the case;
(7) whether the witness's testimony was consistent;
(8) whether other evidence that you believe supported or contradicted the witness's testimony;
(9) whether and the extent to which the witness's testimony in court differed from the statements made by the witness on any previous occasion; and
(10) whether the witness has a bias or prejudice.

You are the sole judge of whether a witness should be believed. You need not believe any witness, even if the testimony is uncontradicted. You may believe all, part or none of the testimony of any witness.

Maryland Criminal Pattern Jury Instruction 3:30, Identification of Defendant

The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it. You have heard evidence about the identification of the defendant as the person who committed the crime. You should consider the witness's opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness's state of mind, and any other circumstances surrounding the event. You should also consider the witness's certainty or lack of certainty, the accuracy of any prior description, and the witness's credibility or lack of credibility, as well as any other factor surrounding the identification.

Defendant's Requested Identification Jury Instruction

The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the Defendant is the person who committed it.

You have heard evidence that before this trial a witness who was shown six (6) photographs and identified the Defendant from those photographs. It is for you to determine the reliability of that identification and weigh it accordingly. The value of an identification depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later. A witness need not be lying or insincere to be mistaken about an identification.

You may give the identification as much weight or as little weight as you think it deserves. When considering the photographic identification made by the witness, you may wish to consider two different sets of circumstances: (1) the circumstances involved at the time the witness saw the person who committed the offense; and, (2) the circumstances of the photographic identification procedure.

In considering the circumstances involved at the time the witness saw the person, you may consider such things as the opportunity of the witness to observe the offense and the person committing the offense, including:

1. The length of time the witness had to observe the person committing the offense,
2. The distance between the witness and the person committing the offense,
3. The lighting conditions at the time;
4. The witness's state of mind at the time of the offense, including whether the witness was experiencing a high level of stress at the time she observed the offense;
5. The witness's degree of attention to the person during the commission of the offense; and
6. Whether the witness had previously known or seen the person

In addition, you may consider evidence of the circumstances of the photograph identification procedure, including the nature of the photograph itself, and any suggestiveness of the photograph or the circumstances surrounding its use that may have affected the identification.

Circumstances you may wish to consider include:

1. The level of certainty or lack of certainty expressed by the witness at the time the photograph was identified, bearing in mind that a person may be certain without being accurate;
2. The length of time between the offense and the photographic identification;
3. any statements made by the police officer(s) prior to or during the identification procedure;
4. The number of photographs shown to the witness
5. The state of mind of the witness at the time of the identification; and
6. the similarities between the photograph and any prior descriptions(s) of the person given by the witness; and
7. Whether the witness identified photographs of other individuals in addition to the photograph of the defendant

You may also consider the credibility of the identifying witness and any other facts and circumstances that you deem relevant to the reliability of the photographic identification.

Md. Rule 4-325 (2012)

(a) When given. The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate. In its discretion the court may also give opening and interim instructions.

(b) Written requests. The parties may file written requests for instructions at or before the close of the evidence and shall do so at any time fixed by the court.

(c) How given. The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

(d) Reference to evidence. In instructing the jury, the court may refer to or summarize the evidence in order to present clearly the issues to be decided. In that event, the court shall instruct the jury that it is the sole judge of the facts, the weight of the evidence, and the credibility of the witnesses.

(e) Objection. No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

(f) Argument. Nothing in this Rule precludes any party from arguing that the law applicable to the case is different from the law described in the instructions of the court stated not to be binding.

Md. Rule 4-263 (2012)

(a) Applicability. This Rule governs discovery and inspection in a circuit court.

(b) Definitions. In this Rule, the following definitions apply:

(1) Defense. "Defense" means an attorney for the defendant or a defendant who is acting without an attorney.

(2) Defense Witness. "Defense witness" means a witness whom the defense intends to call at a hearing or at trial.

(3) Oral Statement. "Oral statement" of a person means the substance of a statement of any kind by that person, whether or not reflected in an existing writing or recording.

(4) Provide. Unless otherwise agreed by the parties or required by Rule or order of court, "provide" information or material means (A) to send or deliver it by mail, e-mail, facsimile transmission, or hand-delivery, or (B) to make the information or material available at a specified location for purposes of inspection if sending or delivering it would be impracticable because of the nature of the information or material.

(5) State's witness. "State's witness" means a witness whom the State's Attorney intends to call at a hearing or at trial.

(6) Written Statement. "Written statement" of a person:

(A) includes a statement in writing that is made, signed, or adopted by that person;

(B) includes the substance of a statement of any kind made by that person that is embodied or summarized in a writing or recording, whether or not signed or adopted by the person;

(C) includes a statement contained in a police or investigative report; but

(D) does not include attorney work product.

(c) Obligations of the parties.

(1) Due diligence. The State's Attorney and defense shall exercise due diligence to identify all of the material and information that must be disclosed under this Rule.

(2) Scope of obligations. The obligations of the State's Attorney and the defense extend to material and information that must be disclosed under this Rule and that are in the possession or control of the attorney, members of the attorney's staff, or any other person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case.

(d) Disclosure by the State's Attorney. Without the necessity of a request, the State's Attorney shall provide to the defense:

(1) Statements. All written and all oral statements of the defendant and of any co-defendant that relate to the offense charged and all material and information, including documents and recordings, that relate to the acquisition of such statements;

(2) Criminal record. Prior criminal convictions, pending charges, and probationary status of the defendant and of any co-defendant;

(3) State's witnesses. The name and, except as provided under Code, Criminal Procedure Article, § 11-205 or Rule 16-1009 (b), the address of each State's witness whom the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony, together with all written statements of the person that relate to the offense charged;

(4) Prior conduct. All evidence of other crimes, wrongs, or acts committed by the defendant that the State's Attorney intends to offer at a hearing or at trial pursuant to Rule 5-404 (b);

(5) Exculpatory information. All material or information in any form, whether or not admissible, that tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged;

(6) Impeachment information. All material or information in any form, whether or not admissible, that tends to impeach a State's witness, including:

(A) evidence of prior conduct to show the character of the witness for untruthfulness pursuant to Rule 5-608 (b);

(B) a relationship between the State's Attorney and the witness, including the nature and circumstances of any agreement, understanding, or representation that may constitute an inducement for the cooperation or testimony of the witness;

(C) prior criminal convictions, pending charges, or probationary status that may be used to impeach the witness, but the State's Attorney is not required to investigate the criminal record of the witness unless the State's Attorney knows or has reason to believe that the witness has a criminal record;

(D) an oral statement of the witness, not otherwise memorialized, that is materially inconsistent with another statement made by the witness or with a statement made by another witness;

(E) a medical or psychiatric condition or addiction of the witness that may impair the witness's ability to testify truthfully or accurately, but the State's Attorney is not required to inquire into a witness's medical, psychiatric, or addiction history or status unless the State's Attorney has information that reasonably would lead to a belief that an inquiry would result in discovering a condition that may impair the witness's ability to testify truthfully or accurately;

(F) the fact that the witness has taken but did not pass a polygraph examination; and

(G) the failure of the witness to identify the defendant or a co-defendant;

(7) Searches, seizures, surveillance, and pretrial identification. All relevant material or information regarding:

(A) specific searches and seizures, eavesdropping, and electronic surveillance including wiretaps; and

(B) pretrial identification of the defendant by a State's witness;

(8) Reports or statements of experts. As to each expert consulted by the State's Attorney in connection with the action:

(A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;

(B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and

(C) the substance of any oral report and conclusion by the expert;

(9) Evidence for use at trial. The opportunity to inspect, copy, and photograph all documents, computer-generated evidence as defined in Rule 2-504.3 (a), recordings, photographs, or other tangible things that the State's Attorney intends to use at a hearing or at trial;

(10) Property of the defendant. The opportunity to inspect, copy, and photograph all items obtained from or belonging to the defendant, whether or not the State's Attorney intends to use the item at a hearing or at trial; and

(11) Evidentiary Statement and Identification of Materials in Capital Cases. If the defendant is charged with a first degree murder that is eligible for a sentence of death and the State filed a notice of intention to seek a death sentence pursuant to Code, Criminal Law Article, § 2-202 (a), (A) a statement of whether the material disclosed constitutes biological evidence or DNA evidence that links the defendant to the act of murder, a videotaped, voluntary interrogation and confession of the defendant to the murder, or a video recording that conclusively links the defendant to the murder, and, (B) if so, identification of the material that constitutes such evidence.

(e) Disclosure by defense. Without the necessity of a request, the defense shall provide to the State's Attorney:

(1) Defense witness. The name and, except when the witness declines permission, the address of each defense witness other than the defendant, together with all written statements of each such witness that relate to the subject matter of the testimony of that witness. Disclosure of the identity and statements of a person who will be called for the sole purpose of impeaching a State's witness is not required until after the State's witness has testified at trial.

(2) Reports or statements of experts. to each defense witness the defense intends to call to testify as an expert witness:

(A) the expert's name and address, the subject matter on which the expert is expected to testify, the substance of the findings and the opinions to which the expert is expected to testify, and a summary of the grounds for each opinion;

(B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and

(C) the substance of any oral report and conclusion by the expert;

(3) Character witnesses. As to each defense witness the defense intends to call to testify as to the defendant's veracity or other relevant character trait, the name and, except when the witness declines permission, the address of that witness;

(4) Alibi witnesses If the State's Attorney has designated the time, place, and date of the alleged offense, the name and, except when the witness declines permission, the address of each person other than the defendant whom the defense intends to call as a witness to show that the defendant was not present at the time, place, or date designated by the State's Attorney;

(5) Insanity defense. Notice of any intention to rely on a defense of not criminally responsible by reason of insanity, and the name and, except when the witness declines permission, the address of each defense witness other than the defendant in support of that defense; and

Committee note. -- The address of an expert witness must be provided. See subsection (e)(2)(A) of this Rule.

(6) Documents, computer-generated evidence, and other things. The opportunity to inspect, copy, and photograph any documents, computer-generated evidence as defined in Rule 2-504.3 (a), recordings, photographs, or other tangible things that the defense intends to use at a hearing or at trial.

(f) Person of the defendant.

(1) On request.On request of the State's Attorney that includes reasonable notice of the time and place, the defendant shall appear for the purpose of:

(A) providing fingerprints, photographs, handwriting exemplars, or voice exemplars;

(B) appearing, moving, or speaking for identification in a lineup; or

(C) trying on clothing or other articles.

(2) On Motion. On motion filed by the State's Attorney, with reasonable notice to the defense, the court, for good cause shown, shall order the defendant to appear and (A) permit the taking of buccal samples, samples of other materials of the body, or specimens of blood, urine, saliva, breath, hair, nails, or material under the nails or (B) submit to a reasonable physical or mental examination.

(g) Matters not discoverable.

(1) Notwithstanding any other provision of this Rule, neither the State's Attorney nor the defense is required to disclose (A) the mental impressions, trial strategy, personal beliefs, or other privileged attorney work product or (B) any other material or information if the court finds that its disclosure is not constitutionally required and would entail a substantial risk of harm to any person that outweighs the interest in disclosure.

(2) By the sefense (sic). The State's Attorney is not required to disclose the identity of a confidential informant unless the State's Attorney intends to call the informant as a State's witness or unless the failure to disclose the informant's identity would infringe a constitutional right of the defendant.

(h) Time for discovery. Unless the court orders otherwise:

(1) the State's Attorney shall make disclosure pursuant to section (d) of this Rule within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213 (c), and

(2) the defense shall make disclosure pursuant to section (e) of this Rule no later than 30 days before the first scheduled trial date.

(i) Motion to compel discovery.

(1) Time. A motion to compel discovery based on the failure to provide discovery within the time required by section (h) of this Rule shall be filed

within ten days after the date the discovery was due. A motion to compel based on inadequate discovery shall be filed within ten days after the date the discovery was received.

(2) Content. A motion shall specifically describe the information or material that has not been provided.

(3) Response. A response may be filed within five days after service of the motion.

(4) Certificate. The court need not consider any motion to compel discovery unless the moving party has filed a certificate describing good faith attempts to discuss with the opposing party the resolution of the dispute and certifying that they are unable to reach agreement on the disputed issues. The certificate shall include the date, time, and circumstances of each discussion or attempted discussion.

(j) Continuing duty to disclose. Each party is under a continuing obligation to produce discoverable material and information to the other side. A party who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly.

(k) Manner of providing discovery.

(1) By agreement. Discovery may be accomplished in any manner mutually agreeable to the parties. The parties shall file with the court a statement of their agreement.

(2) If no agreement. In the absence of an agreement, the party generating the discovery material shall (A) serve on the other party copies of all written discovery material, together with a list of discovery materials in other forms and a statement of the time and place when these materials may be inspected, copied, and photographed, and (B) promptly file with the court a notice that (i) reasonably identifies the information provided and (ii) states the date and manner of service. On request, the party generating the discovery material shall make the original available for inspection and copying by the other party.

(3) Requests, motions, and responses to be filed with the court. Requests for discovery, motions for discovery, motions to compel discovery, and any responses to the requests or motions shall be filed with the court.

(4) Discovery material not to be filed with the court. Except as otherwise

provided in these Rules or by order of court, discovery material shall not be filed with the court. This section does not preclude the use of discovery material at trial or as an exhibit to support or oppose a motion.

(l) Retention. The party generating discovery material shall retain the original until the earlier of the expiration of (i) any sentence imposed on the defendant or (ii) the retention period that the material would have been retained under the applicable records retention and disposal schedule had the material been filed with the court.

(m) Protective orders.

(1) Generally. On motion of a party or a person from whom discovery is sought, the court, for good cause shown, may order that specified disclosures be denied or restricted in any manner that justice requires.

(2) In Camera Proceedings. On request of a party or a person from whom discovery is sought, the court may permit any showing of cause for denial or restriction of disclosures to be made in camera. A record shall be made of both in court and in camera proceedings. Upon the entry of an order granting relief in an in camera proceeding, all confidential portions of the in camera portion of the proceeding shall be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

(n) Sanctions. If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

NOVEMBER TERM, 2012

NO. 00195

XXXXX XXXXX XXXXX,

Appellant

v.

STATE OF MARYLAND,

Appellee

APPEAL FROM THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY
(The Honorable Michael Whalen)

APPENDIX
