

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2254

SEPTEMBER TERM, 1999

STATE OF MARYLAND

v.

THOMAS WAYNE JONES

Moylan,*
Hollander,
Bishop, John J.
(Retired, specially
assigned)

JJ.

Opinion by Hollander, J.

Filed: December 22, 2000

*Moylan, J. participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

In this appeal brought by the State as appellant, we must decide whether the Circuit Court for Prince George's County erred in granting post conviction relief to Thomas Wayne Jones, appellee, pursuant to the Maryland Post Conviction Procedure Act, Md. Code (1957, 1996 Repl. Vol.), Art. 27, § 645A. The circuit court's ruling grew out of a trial in December 1996, at which appellee and a co-defendant, Donald Gutrick,¹ were charged with the 1993 murders of Jamal Johnson and Gary Gulston, and related offenses involving Michelle Gulston ("Michelle") and Jeannette Gulston ("Jeannette").² As to Gary Gulston, Jones was convicted of first degree felony murder, kidnapping, robbery with a deadly weapon, robbery, and use of a handgun in a felony.

¹ Gutrick is not a party to this appeal. Derrick Smith was also convicted in this case but was tried separately.

² We shall refer to these witnesses by their first names, in order to avoid confusion. Throughout the record and the briefs, the first name of J. Gulston is spelled alternately as "Jeannette" and "Jeanette." Moreover, in its application for leave to appeal, the State used both spellings. At trial, the witness only provided the spelling of her last name. Therefore, we shall use the spelling that was used in an earlier opinion of this Court.

In addition, he was found guilty of housebreaking with respect to Jeannette's residence, as well as robbery and robbery with a deadly weapon of Michelle. The jury did not reach a verdict against Jones as to the charges of murder of Mr. Johnson, and those charges were subsequently nol prossed.

On January 31, 1997, the trial court sentenced Jones to life without parole for the felony murder of Mr. Gulston, and imposed consecutive sentences of twenty years each for the handgun offense and the armed robbery of Michelle. The other convictions were merged for sentencing purposes. In an unreported opinion authored by Judge Harrell, we affirmed Jones's convictions. See *Jones v. State*, No. 222, September Term, 1997 (filed January 21, 1998) ("*Jones I*"). Jones did not file a petition for certiorari.

On November 12, 1998, Jones filed a Petition for Post Conviction Relief (the "Petition"), claiming ineffective assistance of counsel at both the suppression hearing and the trial, ineffective assistance of appellate counsel, and trial court error. After a hearing held on May 20, 1999, the court granted post conviction relief on August 19, 1999, based on ineffective assistance of trial and appellate counsel, as well as trial court error. The State's Application for Leave to Appeal was granted by order dated April 12, 2000. On appeal,

the State presents one issue for our consideration:

Did the post conviction court err in granting Jones a new trial and a new appeal?

Appellee has moved to strike a portion of the State's reply brief. For the reasons discussed below, we shall grant appellee's motion and affirm the post conviction court.

FACTUAL BACKGROUND

A. The Trial

On the afternoon of July 16, 1993, Jamal Johnson and Gary Gulston were murdered in Prince George's County. Johnson, who was 16 years old, was found in an apartment at 6804 Alpine Street in District Heights, where Michelle lived with her cousin, twenty-three year old Gary Gulston. Gulston's body was found that day at the home of his mother, Jeannette, who resided at 6509 Cricket Place in Forestville.

We begin our factual summary by repeating the "Facts" as set forth by the Court in *Jones I*.³ We shall then supplement those facts with additional information pertinent to the second appeal. In *Jones I*, we said:

FACTS

³ We note that the Court's factual summary in *Jones I* was augmented by the Court in the course of its legal discussion. But, we shall include here only those facts presented in the opinion under the heading of "FACTS."

Michelle Gulston testified that on 16 July 1993 she was in her apartment at 6804 Alpine Street in District Heights, Maryland, with her son. On that day her cousin, Gary Gulston, who also lived in the apartment, received a page on his beeper. Ms. Gulston heard him respond in his return telephone call that he was on his way. Mr. Gulston then left the apartment.

Ms. Gulston was in her bedroom watching television with her son when she heard Mr. Gulston return eight or ten minutes later. Ms. Gulston overheard several people talking, then two men burst into her room yelling that it was a "stick-up." Ms. Gulston testified that she did not see the men's faces clearly because her face was in a pillow and their faces were covered with hoods. The men tied her hands together with a phone cord, and then asked her for money. The men also asked questions about Mr. Gulston, including where he kept his money. She said that she did not know, and the men ransacked her room, taking keys and jewelry.

Ms. Gulston heard other men in the living room asking Mr. Gulston questions about money and drugs. She heard Mr. Gulston say that there was money at his mother, Jeannette Gulston's, house, and that he knew how to disable the alarm at her house. The men took Mr. Gulston with them and left Ms. Gulston's apartment.

Before they left, the men put Jamal Johnson on the bed^[1] next to Ms. Gulston's son. Two men remained in the apartment while the others took Mr. Gulston to his mother's house. Fifteen to twenty minutes later, the men returned without Mr. Gulston. Ms. Gulston, whose hands were still restrained by a phone cord, heard someone come into the bedroom, take Mr. Johnson into the living room, turn up the volume on the television, and fire what sounded like two gunshots. Ms. Gulston could not see who fired the shots or how many people were in the apartment because she was still restrained in the bedroom. After the men left the apartment Ms. Gulston freed herself and called police.

¹ The record does not indicate whether Jamal Johnson was restrained or unconscious when placed in the room with Ms. Gulston.

After the incident, Mr. Gulston's car, which had been parked in front of the apartment, was found one block away. Ms. Gulston testified that the men had taken Mr. Gulston's car keys and her house keys when they left to go to Jeannette Gulston's house. In addition, a .25 caliber pistol belonging to Ms. Gulston was stolen.

When officers responded to 6804 Alpine Street, they found Mr. Johnson's body with bullet wounds to his back and to the back of his head. At trial, evidence showed that Mr. Johnson was killed by bullets from a .25 caliber pistol. Officers also recovered .25 caliber bullets and shell casings, a scale, 179 grams of suspected crack cocaine, a shoe box containing plastic baggies and razor blades, a pager, and \$2,500.00 cash from Ms. Gulston's apartment. Officers checked Mr. Gulston's car for fingerprints but did not recover any prints.

Officers who responded to 6508 Cricket place, Jeannette Gulston's house, discovered Mr. Gulston's body in the basement. Mr. Gulston was lying on his stomach with a pillow over his head, concealing a gunshot wound to the head. At trial, the State introduced evidence that the bullet recovered from Mr. Gulston's body was fired from a .9mm pistol.

Jeanette Gulston testified regarding the condition of her house. She was out of town at the time of the shooting and returned to find her house ransacked and her previously locked safe unlocked. The contents of the safe, including certificates of deposit, \$10,000.00 in savings bonds, and approximately \$4,000.00 in cash, were missing.

On 2 August 1993, at approximately 7:00 p.m., appellant was arrested after officers stopped the car in which he was a passenger. Appellant was acting strangely; one officer testified that appellant seemed "very hyper." Officers took appellant to the police

station and placed him in an interview room. Detective Kenneth O'Berry read appellant his rights and had appellant sign a waiver form. Appellant wrote on the form that he had used PCP and weed (marijuana). Shortly thereafter, Detective Brian Hickey called Detective O'Berry, who had been questioning appellant, out of the interview room and told him that his supervisor wanted to stop questioning appellant until he slept off the effects of the PCP. Detective O'Berry testified that appellant became loud and boisterous several times while in the interview room.

Detective Andrew Rostich testified that he was in the interview room next to appellant's the night of 2 August 1993. Detective Rostich heard appellant causing several disturbances. At one point, the detective removed all the chairs in appellant's interview room because appellant had been throwing them around. Later, at approximately 2:15 a.m. on 3 August, Detective Rostich hear [sic] another disturbance. He discovered appellant trying to climb into the ceiling panels from the table in the interview room. The detective pulled appellant down from the table. As he was falling, appellant hit his head on the table, thereby injuring his left eye.

Detective Hickey testified that at 4:00 a.m. on 3 August 1993, he returned to the interview room with some food for appellant. Appellant stated that he wanted to sleep. Detective Hickey noticed that appellant's left eye was red and swollen. Although appellant refused medical treatment the detective took him to the hospital. When appellant returned to the police station from the hospital at approximately 6:45 a.m., Detective Hickey stated that appellant appeared calm.

Detective Richard Delabrer testified that at 7:30 a.m. he entered the interview room to talk to appellant. Detective Delabrer stated that he knew appellant from past cases and had a good rapport with him. The detective read appellant his rights. Appellant indicated that he understood his rights and was not under the influence of drugs or alcohol. Appellant gave a statement implicating himself in the murders of Gary Gulston and Jamal Johnson and the

robberies of Michelle Gulston and Jeannette Gulston. Detective Delabrer testified that appellant wrote a statement, then the detective asked appellant a series of questions, and had appellant write down his answers. Appellant reviewed the statement and signed it. The statement was completed by approximately 2:00 p.m. on 3 August 1993.

Derrick Smith, a convicted co-defendant in the case, testified that he made a statement to police regarding the night of 16 July 1993. Mr. Smith, however, denied participation in the murders and testified that the police coerced him into giving a statement implicating himself and appellant. Nevertheless, Mr. Smith's statement was admitted into evidence.

Jones I, slip op. at 2-6 (footnote omitted).

In addition to the foregoing, the following factual information is relevant.

Baltimore City Police Officer Etiene Jones responded to Ms. Gulston's residence at around 1:54 p.m. on the afternoon of July 16, 1993. It was Officer Jones who discovered Johnson lying on the floor of the apartment in the bedroom, face down, with a blanket that had bullet holes and powder burns nearby. In addition to the shot to the victim's back from a .25 caliber semi-automatic handgun, a ballistics expert testified that Johnson was shot in his head with a .45 caliber semi-automatic handgun. Around 3:15 on the same afternoon, Police Officer Joseph Holmes proceeded to Jeanette's home, where the front door was ajar. A washtub in the basement contained Gutrick's

fingerprint.

On the evening of August 2, 1993, Jones was arrested in connection with the murders. At the time of his arrest, Jones was apparently under the influence of PCP and was later taken to an area hospital for an injury to his eye. Several hours after Jones's arrest, when the effects of the PCP had evidently worn off, he gave a written, incriminating statement to the police. Prior to trial, Jones filed a motion to suppress his written statement. In connection with that motion, he was represented by William H. Murphy, Jr., Esquire and Joseph Niland, Esquire, the Public Defender for Prince George's County. The court denied the motion to suppress Jones's written statement. When the case proceeded to trial, Jones was represented only by Niland.

Detective Richard Delabrer testified at Jones's trial concerning Jones's written statement to police after his arrest. Because Jones' written statement was introduced in evidence, we quote from it.

A few weeks ago I was over this girl named T's house getting high talking when all of a sudden don [sic] [Gutrick] called me back to the bedroom and asked me was I trying to get some quick money so I said yes then he told me that we were going to rob some dude named Gary [Gulston. S]o me, Don [Gutrick], Jason [Pinkney] and Derrick [Smith] waited until the next morning and went to hill top apartments and parked[.] [s]o me and Don went in some woods waiting for [G]ary while Jason and Derrick was in the car, and

[G]lary pulled up and went in the house[. S]o me and Don went to get Jason and Derrick but by [the] time we got back to his building he was leaving so we waited in his building until he came back and when he came back we took him into the apartment and laid everyone down and asked wheres [sic] the money and drugs and [G]lary told us it was over his mothers [sic] house but he said he would have to take us there because there was a [sic] alarm on the door [s]o me and Don took him there and found a safe and four thousand [. S]o Don kept on saying this aint [sic] all the money and [G]lary [kept] on saying its [sic] some more but I dont [sic] know where its [sic] at because my brother hid it and Don thought he was lying and went and got a pillow and we is about to kill you and I told Don no let's take him back and call his brother and Don said no give me the gun[.] I'll do it[.] Just put the pillow over his head[. S]o I did it and Don shot him once in the head[. S]o we left and went back to hilltop and I told Don Ill [sic] get the car ready while he go get them and when he upstairs I heard two shots and they came running out to the car and we went over to Jasons [sic] house in Seat Pleasant and split the money 4 ways and Derrick had a 25 that he got.

Jones also said that Gutrick had a .45 caliber gun and that Smith found a .25 caliber gun in the apartment. In addition, Jones wore a hood over his face in the apartment, and stated that he was in the car when the second shooting occurred.

Derrick Smith was also charged with various offenses arising from the same murders. Smith gave a written statement to Detective Rostich after his arrest, in which he admitted his participation in the murders. The following portion of Smith's statement is particularly central to this appeal:

Q. Did Don [Gutrick] or T.J. [i.e., appellant] say anything when they came back [to Michelle's residence]?

A. When Don came back upstairs Jason asked him where the other person was at and *he said we killed him* [i.e., Gulston].

(Emphasis added).

Smith's case was severed for trial and, by the time of Jones's trial, Smith had already been convicted.⁴ The State then called Smith as a witness at Jones's trial. The following colloquy at the outset of Smith's testimony is pertinent here:

[PROSECUTOR]: Mr. Smith, where are you presently residing?

[SMITH]: Prison.

[PROSECUTOR]: I'm sorry.

[SMITH]: Prison.

[PROSECUTOR]: Department of Corrections?

[SMITH]: Yeah.

[PROSECUTOR]: And you have previously been convicted in this case; is that correct, Mr. Smith?

[SMITH]: Yeah.

Both the prosecutor and the defense were surprised when Smith denied knowledge of or participation in either murder. In fact, Niland said to the court: "We thought he was going to testify," and he expressly acknowledged that he was "surprised" by Smith's testimony. As a result of Smith's testimony, the

⁴ The record before us does not contain any information as to the criminal proceedings against Smith.

prosecutor directed Smith to his written statement.

The prosecutor initially asked Smith to verify both his signature at the bottom of the written statement and his handwriting on the document. Although Smith acknowledged his signature and handwriting, he claimed that the police had made him give the statement. At the bench, the prosecutor then offered Smith's statement in evidence. Niland responded: "Well, I think we're a ways from that yet." A lengthy bench conference ensued, at which the State argued, *inter alia*, that Smith had already authenticated the document. Niland observed, however, that Smith denied the truth of the content of his written statement, adding:

He hasn't been asked any questions about any purported admission made to him by the defendant or perhaps more importantly any observation that he made with respect to the defendant that's contained in this statement.

I think the only things that would be admissible from the statement, if any of it was admissible . . . is it either admissible hearsay exception to the hearsay [sic] or I believe in this statement there's someplace where he says he was involved with others with regard to one of these shootings and that - and then the only thing, only other thing, he says I think is that the defendant, he may have some observations that he actually personally made with regard to the defendant that wouldn't ordinarily be admissible.

So I think the next thing that has to happen here is that there be an isolation and a denial on his part or refusal on his part with regard to admissible areas of the statement.

The court essentially agreed with the defense. The judge said to the prosecutor: "You're offering [the statement] en mass and I'm rejecting [it] en mass."

Thereafter, the trial judge, *sua sponte*, undertook a review of Smith's statement to determine whether it needed to be redacted. Neither the State nor the defense made any suggestions to the court as to what, if anything, to redact. Nevertheless, the judge concluded that the following statement constituted inadmissible "hearsay within hearsay" and had to be redacted: "So Don [Gutrick] told TJ [i.e., appellant] about some guy named Gary [Gulston] that he [i.e., Gutrick] had robbed before." Other than that statement, the court indicated that "the rest of the statement certainly would be admissible"⁵ Then, the court asked Niland his "position" about the rest of the statement, and Niland initially said: "If the witness wrote this, then I don't have any objection to the contents of it period." Niland indicated only that he wanted "to clarify" and "make sure" that Smith actually wrote the text of the statement. He also wanted to determine who wrote the questions and answers that were part of the statement. Later, Niland

⁵ The record only contains the redacted copy of Smith's statement. Therefore, we have relied on the transcript to ascertain the wording of those portions of Smith's statement that were redacted.

asked the court to redact one question and answer at the top of page 4 of Smith's statement. According to the transcript, it read: "[Question]: Did TJ and Don say what happened when they were gone? [Answer]: That they left him [i.e. the victim] over his mother's." The court readily agreed to the defense request. Again, the court invited counsel to identify any other concerns, stating: "Now let's deal with any other issues you wish to deal with." Niland merely responded: "The document itself should not be admitted. The contents, if you're going to admit, should be read to the jury" (Emphasis added). Niland explained that he was concerned that the jury would place "greater weight" on a written document. The court opted to defer ruling on that issue until after the voir dire of Smith.

Thereafter, the lawyers conducted a voir dire of Smith as to his role in making or writing the statement. Although Smith acknowledged that, with respect to the question and answer portion, he wrote the answers that appeared in his statement, he claimed that the content of the statement and the answers to the questions were inaccurate. Subsequently, Niland renewed his request that the court permit the prosecutor to read the statement, but bar the State from "physically" admitting the document. The State disagreed with that position. When the State then offered Smith's redacted statement, the defense

objected "on the grounds previously stated." The judge reserved ruling, telling the State that it had "to explore a little further an evidentiary basis to show there is an inconsistency."

In his trial testimony, Smith maintained that he did not participate in the murders and was not a witness to what occurred. He also denied talking to Jones about the matter. When the State again offered Smith's statement, the court said it would rule "after cross." On cross-examination, the following occurred:

[NILAND]: Your testimony now is that you did not participate in either one of these shootings that took place at Alpine Street and Cricket Place that is the subject of this case?

[SMITH]: Yeah.

[NILAND]: And you're the same Derrick Smith who was convicted in a trial by jury of both those murders?

[SMITH]: Yes.

[NILAND]: Well, how is it that on December the 2nd, 1993, when the police took this statement from you that you were able to tell them all these things?

[SMITH]: They forced me to write a statement. They told me what to say.

* * *

[NILAND]: *The last question on page 6 says, "Did Don or TJ say anything when they came back?"*

The answer says, "When Don came back upstairs

Jason asked him where the other person was at and he said we killed him."

See that?

[SMITH]: Yes.

[NILAND]: That's in your writing?

[SMITH]: Yes.

[NILAND]: *Did the policeman tell you to write that?*

[SMITH]: *No, I heard that somewhere.*

[NILAND]: You heard that somewhere?

[SMITH]: Yeah.

[NILAND]: *You heard that Don had killed the guy?*

[SMITH]: Yeah.

(Emphasis added).

On redirect examination, Smith insisted that the police had tried to "frame" him. He also claimed that the police dictated half of his statement and he made up the other half. Moreover, Smith maintained that the content of the statement was not true, and said: "I don't lie." Later, the judge said: "You have offered [the statement], I'll reserve ruling. We'll discuss it at a later time."

After the State recalled Detective Rositch, who took Smith's statement, the State again moved Smith's written statement into evidence. The following transpired:

[THE COURT]: Other than the objection you have placed on the record do you have any additional objections? Any reasons why we should not receive [the written statement]?

[DEFENSE ATTORNEY]: No your honor.

[THE COURT]: Objection is overruled. [The statement] is admitted.

The foregoing exchanges demonstrate that Niland did not specifically challenge Smith's reference to Gutrick's assertion, even though the court had invited defense counsel to challenge objectionable portions of the statement, and had even alerted Niland to a concern about "hearsay within hearsay." Moreover, Niland actually highlighted for the jury the portion of the statement in issue, because he specifically questioned Smith about it.

Smith's written statement to Detective Rositch was then introduced in evidence. There, Smith said, in part:

Me and Don [Gutrick], T.J. [i.e., appellant], and Jason meet [sic] over Tee's house and then Don called T.J. in the back room. * * * *^[6] So we went to Gary [sic] house and robbed him. We was looking for some drugs and money. But there was no money there so Don and T.J. left the apartment with Gary and they did not come back with him. So me and Jason was waiting for them to come back. So went [sic] they came back Don came up stairs and said are you ready to go and we said yes, but before we left we asked him did they get anything and he said yes so we rolled. And then we went over Jason's house to count the money. We counted about 5000 dollar [sic] and we all got about

⁶ The sentence is omitted because it was redacted at trial.

1100 dollars a peace [sic].

In his statement, Smith also said that the robbery had been planned the day before it occurred and that the group arrived at Gulston's apartment in appellant's car. Further, Smith recounted that Gutrick and appellant were the ones who first approached Gulston outside the apartment. Smith also stated: "When Don came back up stairs Jason asked him where the other person was at and he said we killed him." Moreover, Smith initially said Gutrick shot the person in the apartment, but later admitted that he also shot Johnson, because "he seen everybody [sic] face."

Thereafter, the jury found Jones guilty of the offenses specified earlier, including first degree felony murder of Gary Gulston. In his direct appeal with respect to those convictions, appellant was represented by Leonard L. Long, Jr., Esquire, who raised three issues: the denial of Jones's motion to suppress, the sufficiency of evidence, and the State's Notice of Intention to Seek Life without Parole.

As to the motion to suppress, appellant presented several grounds to support his claim that the trial court erred in denying his motion. In *Jones I*, the Court thoroughly considered the issue and concluded that the "trial court properly denied" the motion. With respect to the sufficiency issue, the Court in

Jones I recognized the importance of Smith's statement to the prosecution, stating, in part:

Although Michelle Gulston was not able to identify the robbers, and no fingerprints were recovered from the crime scenes, appellant's statement and Mr. Smith's statement corroborate Ms. Gulston's testimony and provide sufficient evidence for a jury to find beyond a reasonable doubt that appellant kidnapped Gary Gulston, robbed Michelle Gulston, and broke into Jeannette Gulston's house.

Furthermore, as to appellant's use of a handgun, in his statement he admits that he had a gun, which he handed to Don so that Don could kill Gary Gulston while appellant held a pillow over his head.

Finally, as to the question of whether Gary Gulston was killed while in the process of committing a felony, we find ample evidence that Gary Gulston was killed during the commission of his kidnapping and robbery with a deadly weapon. Appellant claims that because Don killed Mr Gulston after the robbery, it was an independent and separate act. Appellant's argument has no merit.

* * *

Finally, we note that although a jury could find beyond a reasonable doubt that appellant was a principal offender in the robberies and murder, appellant's convictions could also stem from his participation as an accomplice.

Jones I, slip op. at 24-25 (emphasis added).

B. Post-Conviction Proceedings

On November 12, 1998, Jones filed the underlying Petition, asserting ineffective assistance of trial counsel, ineffective

assistance of appellate counsel, and prejudicial error by the court in admitting Smith's redacted statement. On May 7, 1999, Jones filed a supplement to his Petition. Shortly thereafter, on May 20, 1999, the court held an evidentiary hearing at which Jones was represented by Fred Bennett, Esquire. Testimony was obtained from Murphy, Niland, and Long, who were Jones's prior attorneys.

In questioning Niland, Bennett focused on various portions of Smith's trial testimony. The following colloquy is relevant:

[BENNETT]: Is there any tactic or strategy that you can relate to the Court at this time as to why you would not have objected to a prior conviction of a severed co-defendant for the same crime for which the defendant was on trial?

[NILAND]: Well, I think at the time I thought that this man, Smith, admitting that he was convicted of both of these homicides tended to reenforce my theory that alienated the defendant from these homicides or alienated the defendant from participation in these homicides and so I didn't think it was harmful. I thought it was probably - I think my thinking at the time- well, there were a number of things caught up in all of this. Smith surprised me by not testifying. I had been informed before this trial started that both Smith and Gulston [sic] were going to testify against the defendant.

[BENNETT]: Derrick Smith and Don Gulston?^[7]

[NILAND]: Yes.

[BENNETT]: All right.

⁷ Presumably, Niland and Bennett meant Donald Gutrick, not Gary Gulston, as Gulston was one of the homicide victims.

[NILAND]: And of course I was prepared to--I assume they were going to testify in the most unfavorable possible ways that I could imagine.

[BENNETT]: Now, let me stop you there. Such as implicating the defendant?

[NILAND]: Yeah. I was there and saw the defendant and saw the defendant participate in killing this guy.

* * *

[BENNETT]: Now, you said a minute or so ago one of the reasons you may not have objected is the fact that he admitted, that is, Derrick Smith for being convicted of the same crime that the defendant was on trial might give some distance between the defendant and Derrick Smith, right?

[NILAND]: Yes, and conclusions you might reach about who really were the killers in this case.

Bennett then inquired about Smith's written statement to police, and Niland's failure to object to the portion of Smith's statement in which Smith quoted Gutrick as saying "we killed him."⁸ The following testimony is relevant:

[BENNETT]: All right. Now, so far we've identified from the transcript that your objection was based on you did not want a written statement to go in front of the jury, correct? That's as far as we got so far?

[NILAND]: I think I objected because I didn't want any of the statement to go in front of the jury. *I don't know that I ever was given an opportunity to go into whether the statement conformed to admissibility based on the rule. I don't even know if he let me get*

⁸ As we indicated earlier, the "we" apparently referred to Jones and Gutrick, and the "him" referred to the victim, Gary Gulston.

into that. The judge--I started on this statement. I did say what you said which is if you're going to let any of this in it should be testimonial. It shouldn't be the document itself.

* * *

[NILAND]: You're characterizing it by saying that my objection was limited to me--to the written part not coming in as opposed to me indicating that it's OK to leave, to have the--I think that was a secondary objection I made. *I think I objected to the statement coming in.* And then when I saw the writing on the wall, that is that the statement was coming in, I tried to get my half a yard instead of my whole yard, and I asked for him not to let the written part in. So I don't think, I don't think that's wrong. That's all I did. Now, you're right. *In retrospect you have shown me some things in the statement that I could have specifically objected to--*

[BENNETT]: And that's where I'm going to next.

[NILAND]: *--and I didn't. But I don't think that means I didn't object to this whole statement coming.*

[BENNETT]: I agree that you clearly objected to the statement coming in. You're saying that was a fall back. Your first objection was the statement shouldn't come in at all, but if it does, it should be in a Q and A form and not in the document itself; is that a fair statement?

[NILAND]: Yes, that's a fair statement, yes.

(Emphasis added).

The following testimony is also pertinent:

[BENNETT]: *Would you not agree that that statement was a direct out-of-court statement implicating the defendant in the crime for which he was ultimately convicted?*

[NILAND]: *Yes, it was.*

[BENNETT]: Now, you were aware, were you not, of the Nance case at the time of this trial, right?

[NILAND]: Yes.

[BENNETT]: And were you aware in footnote nine in the Nance decision where it says "assuming that a prior inconsistent statement can come in, you have a separate objection to a line-by-line statement to portions of the prior inconsistent statements that are hearsay."

[NILAND]: To tell you--I can only say that I had probably by that time read Nance a dozen times, reviewed it, given seminars on it, discussed it, considered various ramifications of Nance because it was a problem in the defense case at the time. Now, it's maybe a problem in the State's case. But the--I guess the bottom line answer is yes.

I think that the case indicates that if there is extraneous hearsay that the whole thing is based upon hearsay, the whole statement is hearsay. But if there is extraneous or as you say second-hand hearsay or double hearsay or triple hearsay, then that's objectionable because it loses the reliability of being subject to cross[-]examination of the person who it's being attributed to on the part of the defendant. So yes--and that would fall--this would fall clearly into that category. No question about it.

[BENNETT]: Now, you've testified a few minutes earlier that your goal is to keep this out generally. You objected. First, don't let it in under Nance and don't let it in the written statement. So your goal at trial was to keep the statement out?

[NILAND]: My goal--when it came up at trial, *this wasn't part of my pretrial preparation because I didn't think it would happen. But once it happened my goal was to keep it out if I could.*

[BENNETT]: *That would include a goal of keeping out a portion of the statement that would be multiple hearsay had you recognized it, correct?*

[NILAND]: *I would think so, especially this piece of hearsay.*

[BENNETT]: So is it fair to say that it was an oversight on your part?

* * *

[BENNETT]: It was an oversight on your part in not recognizing the last question on page six to be multiple hearsay, i.e., It's multiple hearsay, Your Honor. It doesn't qualify even under -

[NILAND]: *I can't attribute it to anything other than an oversight on my part that I wouldn't have objected to that on that basis.*

[BENNETT]: Is it also accurate to say evidence against the defendant at trial consisted generally-- that is, the harmful evidence at trial of his statement and the statement of Derrick Smith. They had no fingerprints, did they?

[NILAND]: No, I don't think so. *I don't think there was any kind of physical evidence that tied the defendant to either one of the homicides that I can recall, not that I can recall. So yeah, his statement.*

[BENNETT]: And the [Smith] statement?

[NILAND]: And this statement--*frankly, overall I didn't consider this statement as particularly harmful.* I mean, I guess I was looking at it in its totality at the time.

(Emphasis added).

Appellee's attorney also inquired as to why Niland did not refer the trial court to the Court of Appeals's decision in *Matusky v. State*, 343 Md. 467 (1996). The following testimony is relevant:

[BENNETT]: . . . From what we've gone over so far, you did not object to the document, that is, the physical document or a Q and A on the basis that it was hearsay since it included portions that were not contrary to the penal interests of Derrick Smith, didn't you? That was based on the *Matusky* case?

[NILAND]: Right. I didn't raise that, no.

* * *

[NILAND]: I'm certain I was aware of the *Matusky* case by the time this case came to trial. Now, did I consciously analyze this statement in light of the *Matusky* opinion? I can't say I did, but I might have considered it. But I don't have any recollection.

* * *

[BENNETT]: Now, would there be any trial tactic or strategy involved not to object based on a recent Court of Appeals case [*Matusky*] that would be favorable to your client that you're aware of since you were trying to keep it out?

[NILAND]: Well, I think you would have to ask me about any particular thing that's in here before I can answer that.

On the related issue of the ineffectiveness of appellate counsel, the question of "hearsay within hearsay" was also examined. The State questioned Long, Jones's appellate attorney, about his preparation for the appeal. Long said: "I read the transcript, the suppression hearing transcripts as well as the trial transcripts, researched and reviewed relevant case law, visited Mr. Jones, had a conversation with Mr. Jones and prepared the appeal." On cross-examination, however, Long

admitted that he did not review Smith's statement to the police, nor did he speak with Niland before filing the appeal. Bennett also inquired as to why, on appeal, Long had not challenged the admission of Smith's statement to police. The following is noteworthy:

[BENNETT]: You said you didn't do so because after review of the motions hearing and the trial transcript you found that there was no merit to that issue, correct?

[LONG]: Yes, in my understanding of the law.

[BENNETT]: Your understanding of the law. How could you make a determination that there was no merit to the question of the admissibility into evidence as a physical exhibit, the statement in toto without having reviewed the substance of the statement?

[LONG]: I didn't say I didn't review it. I said I don't recall reviewing it.

[BENNETT]: But on direct you were asked what you did and it did not include reviewing the exhibits and talking to the trial attorney?

[LONG]: Correct.

[BENNETT]: And the best you said is you don't recall; is that correct?

[LONG]: Correct.

[BENNETT]: Sir, in reaching that determination that the issue had no merit, that is, the question of the admissibility of the Derrick Smith statement, are you basing that on a Maryland evidence rule or case law or both?

[LONG]: Maryland evidence rule.

[BENNETT]: Is that the rule dealing with the

admissibility of prior inconsistent statements that is codified after the *Nance* case, *Nance* versus State.

[LONG]: Yes.

[BENNETT]: Sir, . . . are you aware in *Nance* that even if [a] portion of the statement came in a portion may not?

[LONG]: Yes. And I was satisfied that the portion that came in did not contain any opinions or conclusions of the declarant.

On August 19, 1999, the post conviction court issued a written opinion and order, amended on August 25, 1999, granting Jones's Petition; it awarded Jones a new trial and a belated appeal.

With regard to ineffective assistance of trial counsel, the court found two prejudicial errors. First, it found that trial counsel was ineffective because he failed to object to the evidence of Smith's conviction in the same case, and the error was not harmless. Second, the court found that "defense counsel probably should have objected" to the admission of Smith's statement to police, in which Smith attributed to Gutrick the statement, "we killed him."⁹ Relying on *Strickland v. Washington*, 466 U.S. 668 (1984), the post-conviction court said:

⁹ The court also noted the arguments relating to trial counsel's failure to request a limiting instruction informing the jury that Smith's conviction was admissible only in regard to the credibility of the witness and not as substantive evidence against the accused. The court did not address whether this dereliction was deficient performance, however.

With the benefit of hindsight, the Court agrees with [Jones] that certain mistakes were made . . . Counsel's trial performance, although generally excellent, did fall below a standard of reasonableness when he failed to object to the admission of the multiple hearsay statement. This, when combined with the cumulative effects of the other, more minor mistakes did result in prejudice to the defendant.

Further, the post-conviction court found ineffective assistance of appellate counsel, stating:

Petitioner argues that there are three things that an appellate attorney should do, as a matter of course: 1) review the transcripts, 2) review the trial exhibits, and 3) confer with tr[ia]l counsel. . . Appellate counsel . . . testified that after reading the transcripts, he did not see a basis for raising the issue of the inadmissibility of the redacted statement of Derrick Smith. Appellate counsel admitted that he did not review the exhibits, and did not speak to trial counsel . . . The Court agrees that appellate counsel was deficient, said deficiency excuses Petitioner's failure to raise allegations on direct appeal, and that, at a minimum, Petitioner is entitled to a new appeal.

Additionally, the post-conviction court found that the trial judge committed prejudicial error in failing to redact the portion of Smith's statement in which he quoted Gutrick as saying "we killed him."

Thereafter, we granted the State's motion for leave to appeal. We shall include additional facts in our discussion.

DISCUSSION

I.

Preliminarily, we consider appellee's motion to strike a portion of the State's reply brief. Jones complains that the State improperly raised an argument in its reply brief that it did not present earlier, either at the post-conviction hearing or in the State's opening appellate brief.

Jones notes that in the State's initial brief, the State argued that Smith's statement was admissible under *Nance v. State*, 331 Md. 549 (1993), and Md. Rule 5-802.1(a), because it was reduced to writing and was signed by the declarant, who was present at trial and subject to cross-examination. At that time, the State did not advance the alternative argument that the statement was admissible based on the co-conspirator exception to the hearsay rule. As Jones points out, that argument was made for the first time in the State's reply brief.

The State does not contest that it never raised the issue of the co-conspirator hearsay exception in its opening brief. Nevertheless, in its opposition to Jones's motion to strike, the State argues that we should overlook its omission, because the State raised the argument of the co-conspirator exception before the post conviction court and in the Application for Leave to Appeal. Relying on *State v. Purvey*, 129 Md. App. 1, 12 (1999), *cert. denied*, 357 Md. 483 (2000), the State argues that Jones

was not prejudiced, because the State merely amplified in the reply brief an argument that it had previously presented.

The State has referred us to the following colloquy at the post-conviction hearing to support its position that the matter was raised below:

[THE STATE]: And if he had kept out the statement by . . . Mr. Smith [, Jones] still would have been convicted, because the one statement and all the other corroborating evidence . . .

[THE COURT]: Does what you say fly in the face of *Carr [v. State, 50 Md. App. 209 (1981)]*, which was the law?

[THE STATE]: *Carr* has some qualifications to it, Your Honor. It indicates that if the State can prove that it was harmless or the evidence was cumulative, then the State can prevail. *Carr*--it's qualified, its a qualified case, and it was a conspiracy case also. The difference is this; in a conspiracy case you have to conspire with somebody, and if one person is convicted of conspiracy, then normally the jury will say, well, if he's been convicted of conspiracy he must have conspired with everybody.

It's logical to conclude that the defendant is guilty, but that's not true. . . .*[T]his is not a conspiracy case*

(Emphasis added).

As we see it, the foregoing colloquy does not establish that the State raised the issue of the co-conspirator exception at the post-conviction hearing. Nor does it appear to us that the court below ever considered the issue.

It is true, however, that, in its Application For Leave To Appeal, the State mentioned the co-conspirator exception.

There, it asserted:

It is clear from the context of this statement and the other evidence presented at trial that Donald Gutrick's remark to Derrick Smith was made before the criminal enterprise that started at 6804 Alpine St. was over . . . The remark was clearly admissible as a statement of a coconspirator made during the course of and in furtherance of the conspiracy.

Nevertheless, we do not consider the State's reference to the co-conspirator exception in its Application for Leave to Appeal as an adequate substitute for the State's failure to raise the argument below or to include the argument in its opening brief in this Court.

We are left with several unassailable facts: the State did not advance the co-conspirator hearsay exception at the hearing below, or in its opening brief, and the post conviction court had no opportunity to address the merits of the State's alternative legal argument.

Ordinarily, if an argument is not raised below, it is not preserved for appellate review. Maryland Rule 8-131(a). It is also well settled that we will not address arguments that an appellant has not raised in an opening brief submitted to this Court. In *Health Servs. Cost Review Comm'n v. Lutheran Hosp.*, 298 Md. 651, 664 (1984), the Court said: "[A] question not presented or argued in an appellant's brief is waived or abandoned and is, therefore, not properly preserved for review."

See *Conaway v. State*, 108 Md. App. 475, 484-85, *cert. denied*, 342 Md. 472 (1996); *Monumental Life Ins. Co. v. United States Fid. & Guar. Co.*, 94 Md. App. 505, 544, *cert. denied*, 330 Md. 319 (1993); *Holiday Universal Club v. Montgomery County*, 67 Md. App. 568, 570 n.1, *cert. denied*, 307 Md. 260 (1986), *appeal dismissed*, 479 U.S. 1049 (1987). In this regard, we are guided by *Federal Land Bank of Baltimore, Inc. v. Esham*, 43 Md. App. 446 (1979). There, we observed:

[I]t is necessary for the appellant to present and argue all points of appeal in his initial brief. As we have indicated in the past, our function is not to scour the record for error once a party notes an appeal and files a brief.

In prior cases where a party initially raised an issue but then failed to provide supporting argument, this Court has declined to consider the merits of the question so presented but not argued.

Id. at 457-58(citations omitted).

The State's discussion of the argument in its reply brief does not remedy the situation. The reply brief serves a limited purpose. See *Fed. Land Bank*, 43 Md. App. at 459. An appellant is supposed to use the reply brief to respond to the points and issues asserted in the appellee's brief which, in turn, are ordinarily offered by the appellee in response to the appellant's contentions in the opening brief. See *Mayor and City Council v. New Pulaski Co. Ltd. P'ship*, 112 Md. App. 218, 233-34 (1996), *cert. denied*, 344 Md. 717 (1997); *Berkson v.*

Berryman, 63 Md. App. 134, 140-41, *cert. denied*, 304 Md. 296 (1985). If an appellant is permitted to interject new claims or issues in a reply brief, this may well result in a "fundamental injustice upon the appellee, who would then have no opportunity to respond in writing to the new questions raised by appellant." *Fed. Land Bank*, 43 Md. App. at 459.

In our view, the State's reliance on *Purvey*, *supra*, 129 Md. App. 1, does not advance its position. In *Purvey*, the State appealed a decision granting post conviction relief to the appellee. In reviewing the issue regarding effective assistance of trial counsel, the Court considered whether to address certain issues raised by the State in its *opening* brief that the appellee claimed were not preserved for appeal because they were not raised during the post conviction proceeding. We determined that the "new" arguments regarding ineffective assistance of trial counsel were merely an expansion or "fleshing-out . . . of the skeletal theories" that had, indeed, been raised below. *Id.* at 12. Therefore, in *Purvey*, unlike in this case, we were satisfied that the State did not present a new argument on appeal. Instead, it amplified an argument that had been raised earlier. Moreover, even if the State had asserted a new argument in *Purvey*, it did so in its *opening* brief, not in its reply brief, so that the appellee had a chance to respond.

Accordingly, we shall grant appellee's motion to strike that portion of the State's reply brief concerning the co-conspirator exception to the hearsay rule. For this reason, we decline to discuss the issue. Nevertheless, in the event of a re-trial of Jones, our ruling is without prejudice to the right of the State to timely assert the co-conspirator hearsay exception as a basis to support the admission in evidence of Smith's written statement to the police.

II.

Three of the four grounds upon which the post conviction court granted relief concern the performance by Jones's trial and appellate attorneys. The right to effective assistance of counsel in a criminal trial is guaranteed by the Sixth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). As Judge Moylan recently stated for this Court in *State v. Gross*, 134 Md. App. 528, 550 (2000), the case of *Strickland v. Washington*, 466 U.S. 668 (1984), is "[t]he fountainhead" in post-conviction claims of ineffective assistance of counsel. In *Strickland*, the Supreme Court set forth the standard to assess whether the legal representation afforded to a defendant comports with the requirements of the Sixth Amendment. See also *Williams v.*

Taylor, 529 U.S. 362, 120 S. Ct. 1479, 1511-13 (2000). It said that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

The *Strickland* Court established a two-pronged test for the "ineffectiveness inquiry," consisting of a "performance component" and a "prejudice component." *Id.* at 687. But, the reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697. This is because "[t]he object of an ineffectiveness claim is not to grade counsel's performance." *Id.*

To establish that trial counsel's representation "was so deficient as to undermine the adversarial process," *Gross*, 134 Md. App. at 551, a defendant must show that: (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. But, *Strickland* requires review of defense counsel's

performance "as of the time of counsel's conduct." *Id.* at 690. Moreover, review of counsel's performance "must be highly deferential." *Id.* at 689. Put another way, the defendant must demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

To be sure, the Supreme Court recognized that "[t]here are countless ways to provide effective assistance in any given case" and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 689. Accordingly, a defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted). Moreover, "the defendant must show that counsel's representation fell below an objective standard of reasonableness," as measured by "prevailing professional norms." *Id.* at 688. In that calculation, "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689; see *Cirinione v. State*, 119 Md. App. 471, 492, *cert. denied*, 350 Md. 275 (1998).

As we noted, the second prong of the *Strickland* test

requires the defendant to establish that the deficiencies in counsel's conduct were prejudicial to the defense. *Strickland*, 466 U.S. at 692. In other words, even if counsel made "a professionally unreasonable" error, *id.* at 691, this alone would "not warrant setting aside the judgment of a criminal proceeding [unless] the error had [an] effect on the judgment." *Id.* Instead, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; see also *Williams*, 529 U.S. 362 (2000); *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

Maryland has consistently applied the *Strickland* test to determine if counsel has rendered ineffective assistance. See, e.g., *Wiggins v. State*, 352 Md. 580, 602-605, *cert. denied*, 120 S. Ct. 90 (1999); *Oken v. State*, 343 Md. 256, 283-295 (1996), *cert. denied*, 519 U.S. 1079 (1977); *Gilliam v. State*, 331 Md. 651, 664-686 (1993), *cert. denied*, 510 U.S. 1077 (1994); *State v. Thomas*, 325 Md. 160, 170-73 (1992), *cert. denied*, 508 U.S. 917 (1993); *Purvey*, 129 Md. App. at 8-11. In order to establish the requisite degree of prejudice in Maryland, the defendant

must show "a substantial possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Oken*, 343 Md. at 284. Therefore, "[a] proper analysis of prejudice . . . should not focus solely on an outcome determination, but should consider 'whether the result of the proceeding was fundamentally unfair or unreliable.'" *Id.* (quoting *Lockhart*, 506 U.S. at 369).

Similarly, a defendant claiming ineffective assistance of appellate counsel is bound by the *Strickland* standard. *Smith v. Robbins*, 528 U.S. 259, 120 S. Ct. 746, 764 (2000); *Gross*, 134 Md. App. at 556. As this Court said in *Gross*, "[a]lthough the basic principles enunciated by *Strickland* remain the same, whether applied to a trial performance or an appellate performance, the juridicial events to which those principles apply obviously differ somewhat depending on the operational level being scrutinized." 134 Md. App. at 556. For example, in *Jones v. Barnes*, 463 U.S. 745 (1983), the Supreme Court emphasized "the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." *Id.* at 752. Similarly, in *Smith v. Murray*, 477 U.S. 527 (1986), the Supreme Court underscored as "the hallmark of effective appellate advocacy" the role of appellate counsel in "'winnowing out weaker arguments on appeal and

focusing on' those more likely to prevail" *Id.* at 536 (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)).

The standard of review of the lower court's determinations regarding issues of effective assistance of counsel "is a mixed question of law and fact" *Strickland*, 466 U.S. at 698; see *Gross*, 134 Md. App. at 559-60. Therefore, on review we accept the fact findings of the hearing judge unless clearly erroneous, and then make an independent analysis to determine the "ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed." *Harris v. State*, 303 Md. 685, 699 (1985). In other words, we must exercise our own independent judgment as to the reasonableness of counsel's conduct and prejudice. *Oken*, 343 Md. at 285. "Within the *Strickland* framework, we will evaluate anew the findings of the lower court as to the reasonableness of counsel's conduct and the prejudice suffered As a question of whether a constitutional right has been violated, we make our own independent analysis by reviewing the law and applying it to the facts of the case.'" *Gross*, 134 Md. App. at 559-60 (quoting *Purvey*, 129 Md. App. at 10) (emphasis added in *Gross*); *Cirincione*, 119 Md. App. at 485 (stating that "we will defer to the post-conviction court's findings of historical

fact, absent clear error," but "we [will] make our own, independent analysis of the appellant's claim.").

III.

Jones asserted numerous claims of error in connection with the trial and the appeal, many of which are not relevant here. As noted, the motion court found two critical instances in which the trial attorney erroneously failed to object to damaging evidence. The first concerned the following colloquy:

[PROSECUTOR]: Mr. Smith, where are you presently residing?

[SMITH]: Prison.

* * *

[PROSECUTOR]: And you have previously been convicted in this case; is that correct, Mr. Smith?

[SMITH]: Yeah.

In *Clemmons v. State*, 352 Md. 49, 55 (1998), the Court of Appeals reiterated the well settled principle that, ordinarily, "the conviction or guilty plea of a co-perpetrator may not be used as substantive evidence of another's guilt." Although there are exceptions to the general rule, these have been "narrowly confined to situations where the evidence has a special relevance presented by the circumstances" *Id.* at 56. Subsequently, in *Casey v. State*, 124 Md. App. 331

(1999), we observed again that the "State is not entitled to present evidence of an alleged co-conspirator's guilty plea." *Id.* at 341.

Relying on *Casey*, the court below found that "the State improperly offered the fact of [Smith's] conviction, and that it was not harmless error. Defense counsel should have objected." The State disagrees with that conclusion. It contends that Niland's failure to object constituted reasonable trial strategy, not constitutionally defective assistance of counsel. We agree with the State.

Certainly, Smith's guilt did not necessarily mean that appellant was also one of the assailants. Moreover, although the State elicited that Smith was convicted in the same underlying case for which Jones was on trial, Smith did not offer direct testimony implicating Jones.

In any event, at trial, the defense conceded that Jones was involved in the robbery of Gary Gulston, but denied that he was a participant in either murder. In his opening statement to the jury, defense counsel argued:

[B]ut the involvement of Thomas Jones in this robbery ceased before any killing took place in this case totally unconnected to the carrying out of force that was exerted during the robbery by Mr. Gutrick. And in the case of Mr. Jamal Johnson, Thomas Jones was not even present when Mr. Johnson was killed.

Defense counsel also asserted to the jury: "[Y]ou may well

find him guilty of some offenses in this case including robbery or possibly kidnapping, but you cannot find him guilty of either of these murders." Similarly, in closing, Jones's lawyer argued that the robbery of Gulston was over before the killing occurred, Gutrick killed both men, and "Thomas Jones did not kill anybody in this case."

In his post conviction testimony, Niland was unwavering that he had evaluated the evidence of Smith's conviction and considered it helpful to his effort to separate Jones from the two homicides. As Niland recalled, his strategy was to "distance him, Thomas Jones, as much as I could from these other hoodlums." As we noted earlier, he also explained:

Well, I think at the time I thought that this man, Smith, admitting that he was convicted of both of these homicides tended to reenforce my theory that alienated the defendant from these homicides or alienated the defendant from participation in these homicides and so I didn't think it was harmful.

We are satisfied that Niland's performance represented a reasonable trial strategy. Therefore, in this respect, defense counsel's representation was not constitutionally deficient.

IV.

The post conviction court found ineffective assistance of counsel and trial court error based on the admission of the portion of Smith's statement to police in which he said: "When Don came back up stairs Jason asked him where the other person

was at and *he said we killed him.*" (Emphasis added). It concluded that Smith's statement contained "multiple hearsay," and thus trial counsel's performance "did fall below a standard of reasonableness when he failed to object to the admission of the multiple hearsay statement." Relying on *Matusky*, 343 Md. at 487, the court also found prejudicial error by the trial court in failing to redact that portion of Smith's statement.

We focus here on Jones's complaint to the post-conviction court that his trial attorney's performance was constitutionally ineffective because he did not object to the inadmissible hearsay within hearsay in Smith's statement. The State maintains that because Niland objected generally to the admission of Smith's entire written statement, the post-conviction court was clearly erroneous in concluding that defense counsel failed to object.¹⁰ Moreover, the State contends substantively that no error occurred, because the statement was properly admitted.

Maryland Rule 2-517(a) provides, in relevant part, that "[t]he grounds for [an] objection need not be stated unless the court, at the request of a party or on its own initiative, so directs." If a general objection is made, and neither the court

¹⁰ It seems that this assertion, if correct, would strengthen Jones's argument that his appellate counsel was ineffective in failing to raise the issue on appeal.

nor a rule requires otherwise, it "is sufficient to preserve all grounds of objection which may exist." *Grier v. State*, 351 Md. 241, 250 (1998); see *Ali v. State*, 314 Md. 295, 305-06 (1988).

As our detailed factual summary reveals, defense counsel never objected generally to the admissibility of the *content* of the statement. Rather, he quarreled with the physical admission of the actual document, urging the court only to permit the State to *read* Smith's statement to the jury. As we see it, an objection to the physical admission of the written statement does not constitute a general objection under Rule 2-517(a). Rather, it was a very specific objection that did not encompass an objection to a multiple hearsay statement.

The statement in issue is unmistakably a hearsay statement. Absent an applicable exception, "hearsay is not admissible." See Md. Rule 5-802. Moreover, the disputed portion is clearly hearsay within hearsay. Therefore, we must next determine whether a timely objection by defense counsel would have had merit.

The State devotes less than two pages of its brief to this issue, and summarily argues that the disputed portion of Smith's statement was admissible under *Nance v. State*, 331 Md. 549 (1993), "and its progeny," as well as Md. Rule 5-802.1(a). In

sum, it contends that the statement was properly admitted because Smith's statement was reduced to writing and signed by him, and he was present at trial and subject to cross-examination. Maryland Rule 5-802.1(a) does not apply, however, because the statement in issue was not given under oath at a prior court proceeding. Moreover, the State failed to address the hearsay within hearsay problem recognized by the Court in *Nance*.¹¹

Maryland Rule 5-802.1 provides, in relevant part:

Rule 5-802.1. Hearsay exceptions -- Prior statements by witnesses.

The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:

(a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement;

* * *

(e) A statement that is in the form of a

¹¹ We note that the State does not contend that Jones adopted or ratified Gutrick's statement. Nor does the State contend that Gutrick's statement was admissible based on the exception to the hearsay rule for a declaration against penal interest under Md. Rule 5-804(b)(3). See *State v. Matusky*, 343 Md. 467 (1996); see also *Williamson v. United States*, 512 U.S. 594 (1994); *State v. Standifur*, 310 Md. 3 (1987).

memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, if the statement was made or adopted by the witness when the matter was fresh in the witness's memory and reflects that knowledge correctly. If admitted, the statement may be read into evidence but the memorandum or record may not itself be received as an exhibit unless offered by an adverse party.

Maryland Rule 5-805 is also relevant here. It states:

Rule 5-805. Hearsay within hearsay.

If one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule.

We turn to consider the seminal case of *Nance v. State*, *supra*, 331 Md. 549. Nance and Hardy were convicted of murder and, on appeal, the Court considered various evidentiary issues that arose because of a "turncoat witness" at trial. *Id.* at 552. In particular, the Court addressed the admissibility, as substantive evidence, of signed witness statements given to police, grand jury testimony, and out-of-court identifications, all made by witnesses who had implicated the defendants prior to trial but recanted at trial. We focus here on the aspect of *Nance* concerning witness statements given to police.

The signed statements to the police were in the form of questions and answers, in which the witnesses identified the defendants as the assailants in the context of "larger

descriptions of what happened" *Id.* at 564. At trial, however, those statements "were repudiated . . ." *id.*, both by "positive contradictions and claimed lapses of memory." *Id.* n.5. The Court acknowledged that the prior statements given to police were hearsay. Nevertheless, the Court said: "We hold that the factual portion of an inconsistent out-of-court statement is sufficiently trustworthy to be offered as substantive evidence of guilt when the statement is based on the *declarant's own knowledge* of the facts, is reduced to writing and signed or otherwise adopted by him, and he is subject to cross-examination at the trial where the prior statement is introduced." *Id.* at 569 (emphasis added; footnote omitted). Of significance here, the Court added in a footnote that an otherwise admissible prior inconsistent statement "may contain inadmissible opinions or conclusions of the witness, or *hearsay*, in addition to a recitation of the facts about which the witness claimed first-hand knowledge." *Id.*, n.9. In that event, the Court admonished that the "inadmissible portions of the statement should be redacted." *Id.* That admonition is dispositive here.

The disputed portion of Smith's statement constituted double hearsay. In Smith's out-of-court hearsay statement, he referred to the out-of-court statement made by Gutrick. Without

question, Gutrick's statement incriminated Jones.

Although the State had the right, under the circumstances, to use Smith's statement substantively, it could not introduce through that statement what it could not have elicited from Smith had he cooperated in his testimony on the witness stand. In other words, if Smith could not have testified in court to what Gutrick said, neither could his statement be used to do it for him. Thus, we are amply satisfied that trial counsel's performance was constitutionally deficient.

Under *Strickland*, however, deficient performance alone does not give rise to a presumption of prejudice. *Strickland*, 466 U.S. at 692. Rather, Jones must demonstrate "a reasonable probability that, but for his counsel's unreasonable errors, the result of the proceeding would have been different." *Id.* at 694. Accordingly, we next address "whether the result of the proceeding was fundamentally unfair or unreliable." *Purvey*, 129 Md. App. at 9 (quoting *Lockhart*, 506 U.S. at 369); see *Perry v. State*, 357 Md. 37, 80 (1997).

The State asserts that, in light of the "overwhelming evidence of Jones's guilt," defense counsel's performance "did not impact on the outcome of Jones's trial." In describing the case as overwhelming, the State points to the following: Jones's statement, in which he admitted placing a pillow over

Gulston's head while Gutrick shot him; Michelle's eyewitness account of the robbery by two masked men accompanied by others; and "physical evidence corroborating" the statements of Jones and Smith. We reject the State's characterization of the strength of its case. Moreover, in the context of this case, we are of the view that the admission of the multiple hearsay statement "'so upset the adversarial balance between the defense and prosecution that the trial was unfair and the verdict rendered suspect.'" *Perry*, 357 Md. at 87 (citations omitted). We explain.

No physical or forensic evidence ever linked Jones to the murder of Gulston or established his presence at Jeanette's home at the relevant time. To the contrary, as the Court noted in *Jones I*, appellant was tied to the murder of Gulston based primarily on two critical pieces of evidence: his own statement and Smith's statement. Yet Smith never said that he saw Jones kill Gulston. Indeed, the evidence showed that, at the time of Gulston's murder, Smith was at Michelle's residence, guarding her and Johnson, while Jones and Gutrick were at Jeanette's home with Gulston. Consequently, Smith had no personal knowledge of what Jones did at Jeanette's home. Rather, Smith included in his statement what Gutrick told him: "we killed him." Absent that portion of Smith's statement, the jury would have been left

with Jones's confession, along with corroboration of other aspects of the crimes. Yet Jones's confession was not so impregnable as to render harmless the erroneous admission of Gutrick's assertion. Again, we explain.

As the summary of facts demonstrates, before trial Jones unsuccessfully sought to suppress his confession. At trial, the detectives recounted that, in the period following Jones's arrest, he was under the influence of PCP and therefore the detectives did not question him immediately, because they wanted to "allow the effects of the PCP to wear off." Moreover, because of the drugs, they described Jones as "agitated," "incoherent," "boisterous," and "violent" and, at other times, "lucid." At one point, Jones tried to escape and was eventually taken to the hospital. When he was finally interviewed by police the next morning, he did not appear to the detectives to be under the influence of drugs.

At trial, Jones's lawyer renewed his objection to the admission of Jones's confession, based on "the prior litigation concerning the statement." Although the judge overruled the objection, the question of voluntariness was not specious, and the jury had to resolve the issue of voluntariness. The court instructed the jury as follows:

Evidence has been introduced that the defendant made a statement to the police about the crime

charged. The State must prove beyond a reasonable doubt that the statement was freely and voluntarily made.

A voluntary statement is one that under all the circumstances was given freely. To be voluntary it must not have been compelled or obtained as a result of any force, promises, threats, inducements, or offers of reward.

In deciding whether the statement was voluntary, consider all of the circumstances surrounding the statement including the conversations, if any, between the police and the defendant, whether the defendant was warned of his rights, the length of time that the defendant was questioned, who was present, the mental and physical condition of the defendant, whether the defendant was subjected to force or threat of force by the police, the age, background experience, education, character and intelligence of the defendant, whether the defendant was taken before a District Court Commissioner without unnecessary delay following arrest and, if not, whether that affected the voluntariness of the statement, any other circumstances surrounding the taking of the statement.

Although the evidence of Jones's guilt surely was legally sufficient to warrant submission of the case to the jury, and a jury may well have been persuaded of Jones's guilt beyond a reasonable doubt, based on his confession, we would hardly characterize such a case as "overwhelming." Under the circumstances attendant here, Gutrick's comment in Smith's statement may well have been an important factor in persuading the jury to conclude that Jones's confession was voluntary. Conversely, without Gutrick's comment, the jury might have reached a different conclusion as to the reliability, accuracy, or voluntariness of Jones's confession.

Certainly, Smith's statement to police was a central part of the State's case against Jones, as the Court noted in *Jones I*. Indeed, in his closing argument, the prosecutor relied on Smith's statement as well as Jones's statement. The prosecutor explained Smith's reluctance to testify by saying that "persons that testify in the courtroom such as this against another defendant are not favorably regarded in the Department of Corrections, but nonetheless you will have his statement and you can consider that."

We recognize that, in *Jones I*, the Court said that even if Smith was not a witness to the murder of Gulston, Jones could be found liable as an accomplice. That remains as true now as it was in *Jones I*. But, that potentiality does not obviate the palpable prejudice in a case such as this one. "[W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated.'" *Bell v. State*, 114 Md. App. 480, 503 (1997)(quoting *Dorsey v. State*, 276 Md. 638, 659 (1976))(emphasis added). Thus, a review of the record must reveal that the weight of the properly admitted evidence overcomes any prejudicial effect resulting from the erroneously

admitted evidence, rendering the prejudicial evidence insignificant or merely cumulative. *Carr*, 50 Md. App. at 212 (citing *Dorsey*, 276 Md. at 649).

We are mindful that, in the heat of battle, it is often difficult for an attorney to proceed flawlessly. In many ways, defense counsel here provided excellent legal representation, both before and during trial. But, we must focus on the occasional lapses. Given the degree of evidence tying Jones to Gulston's murder, we cannot deem insignificant the admission of Gutrick's assertion, contained in Smith's statement to police. Gutrick's statement provided an important piece of corroborating evidence that the jury may well have relied on to convict Jones. Because we cannot declare, beyond a reasonable doubt, that the admission of that assertion did not influence the jury's verdict, we must conclude that Jones was prejudiced by his trial counsel's failure to object to the hearsay portion of Smith's statement.¹²

¹² The post-conviction court also attributed error to the trial judge. In our view, it is difficult to fault the trial judge for what transpired. As the record reflects, the trial judge, *sua sponte*, reviewed the statement to ferret out any improper portions, repeatedly invited counsel to identify potential problems, was quick to strike anything that appeared problematic, and alerted counsel to the issue of multiple hearsay. Despite all of that, trial counsel never challenged the assertion now in issue. To the contrary, defense counsel directed the court to only one area of concern and, when he did, (continued...)

In light of our ruling, we decline to address the remaining issues.

**APPELLEE'S MOTION TO STRIKE
GRANTED; JUDGMENT OF THE CIRCUIT
COURT FOR PRINCE GEORGE'S COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**

¹²(...continued)

the court immediately granted his request to strike that particular portion of Smith's statement. Moreover, the defense attorney actually highlighted that statement for the jury, by specifically questioning Smith about it.