**IN THE**

**COURT OF SPECIAL APPEALS OF MARYLAND**

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**SEPTEMBER TERM, 2014**

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**No. 660**

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**GEORGE JOHNSON**

*Appellant*

**v.**

**STATE OF MARYLAND**

*Appellee*

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**APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY**
**(The Honorable Judge Timothy Doory presiding with a Jury)**

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# BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

Appellant was charged by way of indictment with first degree murder, conspiracy to commit first degree murder, use of a handgun in the commission of a crime of violence, and possession of a handgun after being convicted of a disqualifying crime in the Circuit Court for Baltimore City, Maryland. (R.9).

A jury trial began on March 18, 2014, the Honorable Judge Timothy Doory presiding. On March 26, 2014, appellant was convicted of all counts under Indictment numbers 111196018 and 019. (T6.161-167).[1]

On May 2, 2014, the trial court sentenced appellant as follows:

Indictment Number: 111196018

| Count | Charge | Sentence |
|---|---|---|
| 1 | First Degree Murder | Life Imprisonment |
| 2 | Use of a Handgun in the Commission of a Crime of Violence | 20 years, first 5 years without parole (consecutive) |
| 3 | Possession of a Firearm After Being Convicted of a Disqualifying Crime | 5 years (consecutive) |

Indictment Number: 111196019

| | | |
|---|---|---|
| 1 | Conspiracy to Commit First Degree Murder | Life Imprisonment (concurrent) |

(T7.103-104)

On May 9, 2014, Appellant noted an appeal to this Court. (R.144).

[1] "T1" refers to the trial transcript for proceedings occurring on March 18, 2014.
"T2" refers to the trial transcript for proceedings occurring on March 20, 2014.
"T3" refers to the trial transcript for proceedings occurring on March 21, 2014.
"T4" refers to the trial transcript for proceedings occurring on March 24, 2014.
"T5" refers to the trial transcript for proceedings occurring on March 25, 2014
"T6" refers to the trial transcript for proceedings occurring on March 26, 2014.
"T7" refers to the trial transcript for proceedings occurring on April 23, 2014.
"T8" refers to the trial transcript for proceedings occurring on May 2, 2014.

## QUESTIONS PRESENTED

I.

Whether Appellant was denied his right to a fair trial, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments, when the prosecution called his separately tried and convicted co-defendant as a witness in its case in chief with full knowledge that the witness would invoke a valid Fifth Amendment privilege and refuse to testify?

II.

Whether the trial court erred in denying appellant's motion for new trial when the prosecution,

(a) improperly called appellant's separately tried and convicted co-defendant as a witness with full knowledge that the witness would invoke his Fifth Amendment privilege and refuse to testify;

(b) committed a *Brady* violation by failing to disclose impeachment information relating to a critical prosecution witness;

(c) improperly displayed a firearm to the jury, which was not admitted into evidence or forensically linked to the crime, in support of its closing argument asserting that the firearm was, in fact, the murder weapon used by appellant?

## STATEMENT OF FACTS

On July 30, 2008, at approximately 6:00 a.m., the body of Ralph Hall was discovered in the parking lot of the Kipp Academy school located at 4701 Greenspring Avenue in Baltimore City. (T2.192, T5.53). Baltimore City Police and medical personnel responded to the location and Hall was pronounced dead at the scene. (T5.53). Baltimore City Crime Lab technicians processed the Kipp

Academy parking lot for evidence; no weapon or bullet casings were found. (T5.196).

The same day, Assistant Medical Examiner, Dr. Melissa Brassell, conducted an autopsy on Hall and determined the cause of death to be two gunshot wounds: one to his right upper chest and the other to the right side of his mid-back. (T2.270, 277). Hall's death was ruled a homicide. (T2.270). Two projectiles were recovered from Hall's body and later submitted for ballistic analysis. (T2.283, 286).

Baltimore City Firearms Examiner Christopher Faber examined the projectiles recovered from Hall's body and determined that they were of the .38/ .357 caliber class. (T4.212). Neither of the projectiles were jacketed and consisted only of lead bullets. (T4.212).

Ralph Hall's girlfriend, Ms. Faaizah Seals, testified that she and Hall were co-owners of "Muscles's Bail Bonds," which operated out of a home office on Bel Air Road in Baltimore City. (T2.81, 142). She testified that people generally referred to Hall by his nickname, "Muscles." (T2.85).

Seals testified that she last saw Hall at their home on July 29, 2008. (T2.91). Hall had been napping and she noticed that a call had come in on his cell phone and gone to voicemail at approximately 7:00 p.m. (T2.92). Suspecting that the call might be related to the business, Seals woke Hall and told him to check his voicemail. (T2.92). Seals explained that Hall forwarded the business phone, which was posted on signage outside of their door, to his cell phone. (T2.142).

Hall checked the voicemail and then told Seals that he was going to meet someone he referred to as "G" to talk about insurance for the business. (T2.93). Hall left the house at about 7:30 p.m. and told Seals that he would be right back. (T5.63). When Hall did not return that night Seals started calling around looking for him; the next morning she received a visit from Detective Michael Moran who advised her that Hall had been killed. (T2.94, T5.61).

At appellant's trial, Detective Moran testified that Hall's bail bonds business was "not legit" because he did not have the requisite insurance and was not licensed. Detective Moran further testified that Hall was "piggybacking off of another business" and that he "took some of their business." (T5.200). Hall needed insurance before he could become licensed. (T5.200).

In September, 2008, Detective Moran received information from an unnamed female who advised that Travis Brach had murdered Ralph Hall. (T5.103-104, 225). The female stated that Travis Brach was a rival bail bondsman and that he killed Hall because Hall was stealing all of his business. (T5.103-104, 225-227). Detective Moran testified that he found the female to be not credible, but that he interviewed Brach "for ten or fifteen minutes" and eliminated him as a suspect based on his physical characteristics. (T5.103-104, 225-227). Detective Moran testified that he did not charge Brach because "he didn't do it." (T5.103-104).

During the course of the investigation, Moran listened the voicemail message received by Hall before he left his home on July 29, 2008. The voicemail was played at appellant's trial and reflected the following:

> "Hey, (indiscernible), hey Mike told me he – I would net to (indiscernible). I mean, what if I don't meet you (indiscernible)? But I'll try to catch up w/ (indiscernible). I'll probably give you a call back later. I'll call you (indiscernible), I'll give you a call back in the next hour or so. (Indiscernible) I'll talk to you later."
>
> (St. Ex. 9) (T3.221).

Detective Moran testified that the source of the call could not be traced. (T5.64).

Detective Moran also reviewed surveillance video footage obtained from the Kipp Academy where Hall's body was found. (T5.69). The video, which was in black and white and had a "grainy" quality to it, was played at appellant's trial. (T5.73,125; T6.111) . According to Detective Moran's narrative at trial, the portion of the video relating to Hall's murder began on July 29, 2008 at 8:30 p.m. (T5.69).

Detective Moran testified that the video showed a dark colored vehicle pull into and park in front of the Kipp Academy on Greenspring Avenue and park. Two individuals – the driver and passenger – got out. The passenger got into the driver's seat; the driver walked around the school toward a large SUV that was parked with its lights on in the Kipp Academy lot. The individual walked up to the passenger side of the SUV and got inside. The SUV moved to another area of the lot and stopped, facing Greenspring Avenue. A few minutes later, the driver's door flew open and a body fell to the ground. The other individual got out of the

passenger side, shut the door, and walked over to the body lying on the ground. The person bent down for a few seconds, then got into the SUV and drove away, leaving the body in the parking lot. (T5.69-73). On July 31, 2008, Hall's SUV was located in the 2800 Block of Roslyn Avenue, not far from the Kipp Academy. (T5.65).

The prosecution's star witness was James Nelson, who testified that appellant had confessed to killing Ralph Hall. Nelson, who was serving a thirteen-year jail sentence, appeared before the jury in a prison uniform (T3.189, 191) and told the jury that he had been incarcerated twice between the time that Ralph Hall was killed and when he testified at appellant's trial. Nelson was incarcerated in 2008 after Hall was killed and testified that he served "almost four years" in jail. (T3.190). He was released from prison in 2011 and then committed additional crimes, which violated his parole, and resulted in him being arrested again in September of 2013. (T3.189-190, 254). He was sentenced to thirteen years for drug and robbery charges. (T3.254).

Nelson identified appellant in court and testified that appellant went by the nickname "Face." (T3.192). Nelson testified that he was one of three people appellant spent time with on a regular basis during the summer of 2008, along with Kelly Toomer and his father, Derrick Toomer. Nelson testified that during this time he, appellant, Kelly Toomer, and Derrick Toomer were together nearly every day "breaking the law" and that they traveled around in either a burgundy Crown Victoria or a blue Mercury. (T3.194-195).

Nelson testified that appellant told him that Michael Hayes, known generally as "Credit Card Mike," paid Derrick Toomer to have Hall killed because Hall had set Mike up to be robbed a few months earlier. (T3.201).[2] Nelson also testified that appellant told him that he shot Hall in a truck with a .38 revolver because Mike paid him to do it. (T3.201, 205).

Nelson testified that appellant told him in detail how Hall was killed. According to Nelson, appellant told him that Derrick Toomer drove appellant in a blue Topaz to meet Hall "on Greenspring somewhere." (T3.206). Appellant told Nelson that when they got there, he talked to Derrick for a minute and then walked over to Hall's car and talked to him; he then pulled out a gun and shot him. (T3.207). Appellant did not tell Nelson what part of Hall's body was shot but said that he pulled Hall out of the car, got in the driver's seat, and drove away. (T3.207). Nelson said that appellant told him he drove Hall's car down the street, got out, and wiped it down. (T3.233). Nelson testified that appellant never told him how much he was paid to kill Hall, but that he saw Derrick Toomer and appellant exchange money on different occasions after the murder. (T3.208).

The prosecution admitted two photo arrays, signed by Nelson, wherein Nelson identified Derrick Toomer and appellant. (T3.227). The arrays were shown to Nelson while he was in custody on May 1, 2009. (T3.263-264). In addition to the identification of Derrick Toomer and appellant in the arrays,

[2] Detective Moran identified Michael Hayes as "Credit Card Mike." Moran testified that Mike ran scams involving fake credit cards etc. (T5.85).

Nelson wrote out lengthy statements about what each had told him about the murder. In each of the statements, Nelson indicated that Derrick Toomer and appellant had admitted to killing Hall and that Mike (Hayes) had set it up. Nelson stated that appellant bragged about how easy it was to kill Hall and that they had lured him there by telling him they wanted to talk about insurance. Each of Nelson's photo array statements was read to the jury at appellant's trial. (T3.224-225, 226-230).

On cross-examination appellant's counsel established that Nelson was in custody when he made the photo array identifications and had been writted out of jail to Baltimore City Homicide by Detective Moran. (T3.263-64). Nelson had testified at appellant's first trial that he did not remember signing the photo array and that he had been using drugs heavily. (T4.15, 9-13).[3] Although Nelson initially denied it, appellant's counsel also established that Nelson previously testified that Detective Moran showed him the surveillance video of the murder during their interview. (T4.16).

Prior to calling Nelson to testify, the prosecution called Kelly Toomer as a witness and questioned him about a .38 revolver he had been arrested with on August 31, 2008. (T3.93-94). During the course of his testimony, the prosecution introduced a plea agreement with Kelly Toomer, which detailed the circumstances under which the gun had been seized. (T3.93-94). At the time of his guilty plea to illegal gun possession and other charges, Kelly Toomer agreed to

[3] Appellant's first trial ended in a mistrial on March 29, 2013.

a statement of facts which set out that he and appellant had driven to the 2300 block of Biddle Street in Baltimore City in a burgundy Crown Victoria. Police officers in the area received a report that two black males had robbed someone in the area at gunpoint. The officers saw Kelly Toomer walking away from the Crown Victoria and approached him to investigate. Their investigation led to a search of the vehicle and, ultimately, to the discovery of a .38 caliber revolver in the glove box. Toomer was arrested and charged with illegal possession of the firearm. Appellant was observed exiting the vehicle but was not approached by police. (T3. 93-94). The prosecution produced the .38 caliber revolver, marked as State's Exhibit 20 but not admitted into evidence, and showed it to Kelly Toomer at appellant's trial. (T3.85). Kelly Toomer identified the revolver as his gun. (T3.85, 97).

Nelson identified a photograph of Kelly Toomer's .38 caliber revolver and testified that he was familiar with it because he used it all the time. (T3.211). Nelson testified that on the day Kelly Toomer was arrested (August 31, 2008), he heard appellant tell Kelly to be careful because the gun was "dirty." (T3.211). Kelly Toomer denied that appellant or anyone else ever made that comment to him. (T3.128-129).

Derrick Toomer was also called as a witness by the prosecution at appellant's trial. Derrick Toomer had been tried and convicted of Ralph Hall's murder prior to appellant's trial; his case was on appeal at the time he was called

to testify. (T5.38-39). Derrick Toomer invoked his Fifth Amendment privilege in front of the jury and refused to testify. (T5.39).

Firearms Examiner Christopher Faber testified that he had compared the .38 revolver that was seized from Kelly Toomer to the projectiles recovered from Hall's body. (T4.210-211). While Faber testified that while not many other weapons could have fired the bullets, he could only say that the bullet specimens had the same class characteristics, i.e., caliber, and could not conclude that the bullets were fired by Toomer's revolver. (T4.216).

Hall's vehicle was processed for fingerprints and DNA. Appellant's DNA profile was present in a vacuum extraction from the steering wheel cover of Hall's vehicle. (T4.96). Vacuum extractions were also taken from Hall's jeans, which yielded a mixture of DNA profiles. Appellant could not be included or excluded from that extraction. (T4.166).

Additional facts will be supplied as necessary.

## ARGUMENT

### I.

Appellant was denied his right to a fair trial, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments when the prosecution called his separately tried and convicted co-defendant as a witness in its case in chief with full knowledge that the witness would invoke a valid Fifth Amendment privilege and refuse to testify.

The prosecution improperly called Derrick Toomer, appellant's separately tried co-defendant, as a witness with full knowledge that he would invoke his valid Fifth Amendment privilege and refuse to testify.

Derrick Toomer had been convicted in his own trial relating to Hall's murder and was pending appeal. (T5.38-39). Derrick Toomer was transported to court on March 25, 2014, at the behest of the State, and appeared in court with his appellate counsel, Celia Davis. The State formally called him as a witness and began to question him. The following transpired in front of the jury:

MR. VIGNARAJAH: Good morning, Mr. Toomer.

DERRICK TOOMER: Okay.

MR. VIGNARAJAH: Mr. Toomer, could you tell the members of the jury your full name once again?

DERRICK TOOMER: Derrick Toomer.

MR. VIGNARAJAH: How old are you, Mr. Toomer?

DERRICK TOOMER: Forty-three.

MR. VIGNARAJAH: Where were you born?

DERRICK TOOMER: Baltimore City.

MR. VIGNARAJAH: Have you always lived in Baltimore City?

DERRICK TOOMER: Yes.

MR. VIGNARAJAH: You're presently incarcerated. Is that correct?

DERRICK TOOMER: Yes.

MR. VIGNARAJAH: Where are you currently incarcerated?

DERRICK TOOMER: North Branch Correctional Institution.

MR. VIGNARAJAH: Mr. Toomer, you currently have an appeal pending is that right?

DERRICK TOOMER: Yes.

MR. VIGNARAJAH: And you have an attorney representing you with respect to that appeal, correct?

DERRICK TOOMER: Yes.

MR. VIGNARAJAH: Do you know her name?

DERRICK TOOMER: Celia Anderson Davis.

MR. VIGNARAJAH: And is she present in the courtroom today?

DERRICK TOOMER: Yes.

MR. VIGNARAJAH: You had an opportunity to talk with her before you took the stand today?

DERRICK TOOMER: Yes.

MR. VIGNARAJAH: Has the State promised you anything in exchange for you taking the stand today?

DERRICK TOOMER: No.

MR. VIGNARAJAH: Ms. Davis asked, in your presence, if the State would offer you anything and you recall the State indicating that we would not offer you anything. Is that right?

DERRICK TOOMER: Yes.

MR. BIVENS: I think I should object.

THE COURT: Overruled. Let's just get passed this and get moving.

MR. VIGNARAJAH: Thank you.

MR. BIVENS: Judge, I'm sorry—

MR. VIGNARAJAH: Mr. Toomer, you were originally charged in the murder –

MR. BIVENS: -- let me be clear.

DERRICK TOOMER: I am invoking my Fifth Amendment right. I'm not answering any questions, sir.

MR. BIVENS: Judge, I just want to say she stood up. That's why I objected. I apologize. I don't mean she disrespectfully. I mean his lawyer stood up, his counsel.

THE COURT: Ms. Davis is here, yes.

MR. BIVENS: Okay.

THE COURT: He acknowledged it. Ms. Davis is here.

MR. VIGNARAJAH: Mr. Toomer, the State indicated to you that if you wish to invoke your Fifth Amendment privilege, the State was prepared to give you use and derivative use immunity to ensure that you would be compelled to testify. Do you recall that?

MR. TOOMER: I'm trying not to waste your time. I'm not answering any questions. I respectfully decline. I'm not going to answer any questions from this point on.

MR. VIGNARAJAH: Your Honor, I can do this on the record in the presence of the jury, or I can do it at the bench to extend what I believe would compel him to testify.

MR. BIVENS: I'm going to object, Judge.

THE COURT: Let's excuse the jury again for a few minutes and see if we can get this all straightened out.

(T5.37-41).

The jury was excused from the courtroom and a discussion ensued wherein Toomer and his counsel made clear that he would refuse to answer questions pursuant to his Fifth Amendment Privilege. (T5.41-48). Ms. Davis argued that he could not be compelled to testify because he was pending appeal and added that he would have no immunity from federal prosecution. (T5.41-42). When the jury returned to the courtroom, Derrick Toomer and his attorney were gone and the trial proceeded with other witnesses. (T5.48).

On May 2, 2014, Celia Davis testified at appellant's hearing on his motion for new trial. Ms. Davis testified that on March 24, 2014, sometime after 5:00 p.m., she received a telephone call from Assistant State's Attorney, Thiruvendran Vignarajah, one of the prosecutors in appellant's case. (T8.15). Mr. Vignarajah advised that Derrick Toomer had been transported from the Division of Correction to the Baltimore City Homicide office and that they wanted to speak with him. (T8.16). Ms. Davis asked to speak to Mr. Toomer, who was yelling that he was not going to talk. (T8.17). Ms. Davis testified that Derrick Toomer was adamant that he was not going to talk with the police. (T8.17).

Ms. Davis testified that the next day, on March 25, 2014, Derrick Toomer was taken to the courthouse and Ms. Davis met with him in person. (T8.18). Ms. Davis explained that she had spoken with Mr. Vignarajah that morning, prior to Toomer being called to the stand, and testified that "at the end of the discussion, I told Mr. Vignarajah that my client would not testify. That he would invoke his Fifth Amendment rights. That he was not interested in signing the immunity

agreement, and he was well aware that he could be held in contempt." (T8.18). Ms. Davis further stated that there was "no confusion" about her client's decision and that she conveyed that decision to Mr. Vignarajah "very clearly." (T8.19).

"When the prosecutor knows [a] witness will invoke the Fifth Amendment when called, it is improper for the State to call the witness before the jury to invoke the privilege so as to take advantage of the adverse inference the jury naturally will draw from the assertion." *Johnson v. State*, 156 Md. App. 694, 707 (2004)(citing *Allen v. State*, 318 Md. 166, 179-80 (1989); *Adkins v. State*, 316 Md. 1, 14-15 (1989); *Vandergrift v. State,* 237 Md. 305, 309 (1965).

"A witness who has been found guilty and sentenced on criminal charges is entitled to claim the privilege against self-incrimination with regard to matters underlying those charges while the time for appeal or sentence review is running, or while a direct appeal or sentence review is pending. *Ellison v. State*, 310 Md. 244, 253-54 (1987)."

"The Supreme Court has identified two principal theories in analyzing prejudicial error where it is known that a witness will refuse to testify based on the privilege against self-incrimination. First, 'error may be based upon a concept of prosecutorial misconduct, where the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege. Second, it may be appropriate to consider whether 'inferences from a witness' refusal to answer added critical weight to the prosecution's case." *Adkins*

*v. State*, at 5-6 (quoting *Namet v. United States*, 373 U.S. 179, 186, 83 S.Ct. 1151, 1154-55 (1963).

The Court of Appeals, in *Vandergrift v. State*, 237 Md. 305 (1965), "set forth five factors to be considered in determining whether the calling before the jury of a state's witness who invokes the privilege constitutes reversible error:

> 1. That the witness appears to have been so closely implicated in the defendant's alleged criminal activities that the invocation by the witness of a claim of privilege when asked a relevant question tending to establish the offense charged will create an inference of the witness' complicity, which will, in turn, prejudice the defendant in the eyes of the jury;
>
> 2. That the prosecutor knew in advance or had reason to anticipate that the witness would claim his privilege, or had no reasonable basis for expecting him to waive it, and therefore, called him in bad faith and for an improper purpose;
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> 3. That the witness had a right to invoke his privilege;
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> 4. That defense made timely objection and took exception to the prosecutor's misconduct; and
>
> 5. That the trial court refused or failed to cure the error by an appropriate instruction or admonition to the jury.

*Id.* The Court of Appeals pointed out in *Adkins*, supra, that it does not "require the satisfaction of all five factors in order to support a reversal of a defendant's conviction." *Adkins*, 316 Md. at 13.

By the time Derrick Toomer was called to testify, the jury had heard much about his alleged involvement in the murder through the testimony of James Nelson. Derrick Toomer was closely implicated in the murder as Nelson testified that he knew about the murder, was alleged to have driven appellant to the Kipp

Academy to meet Ralph Hall, had been paid for his participation, and that he admitted his involvement to Nelson. Further, while Toomer's testimony in front of the jury was short, the jury was informed that he was incarcerated in the Division of Correction and was pending appeal, and watched him invoke his Fifth Amendment privilege just as the prosecutor asked him if he had been convicted of murder. (T5.38-40). Counsel objected to the questioning, which the trial court overruled and stated, "Let's just get passed (sic) this and get moving." (T5.39). Counsel continued to object until the jury was ultimately excused from the courtroom. (T5.40).

Based on Ms. Davis's testimony at the new trial hearing, the clear evidence is that the prosecutor, Mr. Vignarajah, was fully aware that Derrick Toomer would exercise his Fifth Amendment privilege if called to testify, a fact not discovered by appellant's counsel until after the trial. Derrick Toomer, as promised, invoked his privilege in dramatic fashion before the jury, prompting both his and appellant's counsel to object. While the trial court did not compel Toomer to testify any further, the damage was done and the court took corrective action after Toomer was excused. The jury returned to the courtroom to find that Toomer and his lawyer were gone, and were left to draw further inferences from their absence. All of these facts comport with the factors set out in *Vandergrift*. The prosecution's act of calling Derrick Toomer to the stand with full knowledge that he would invoke his Fifth Amendment privilege was an attempt to add critical weight to its

case by bolstering the testimony of James Nelson and constituted flagrant misconduct. The result was prejudicial error, and the error was not harmless.

"The harmless error test is well established, and relatively stringent." *Dionas v. State*, 436 Md. 97 (2013). The Court of Appeals, in *Dorsey v. State*, 276 Md. 638 (1976) explained,

> [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. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of –whether erroneously admitted or excluded- may have contributed to the rendition of the guilty verdict.

*Id.* at 659.

"[O]nce error is established, the burden falls upon the State, the beneficiary of the error, to exclude this possibility beyond a reasonable doubt." *Dionas*, 436 Md. at 108 (citing Hunter *v. State*, 397 Md. 580 (2007)). *See Denicolis v. State*, 378 Md. 646, 658-59 (2003) (explaining that in order for the State to show that an error was harmless beyond a reasonable doubt, the record must affirmatively show that the error was not prejudicial.). In short, "harmless error review is the standard of review most favorable to the defendant short of an automatic reversal." *Dionas*, at 109 (quoting *Bellamy v. State*, 403 Md. 308, 333 (2008)). The error in this case was not harmless and reversal is required.

II.

**The trial court erred in denying appellant's motion for new trial.**

The denial of a motion for new trial is generally reviewed under an abuse of discretion standard. *Merritt v. State*, 367 Md. 17, 28 (2001). "However, there are some circumstances in which a trial court has seemingly no discretion to deny a motion for new trial and in those limited cases, the standard of review is not abuse of discretion, but whether the court erred." *Merritt, supra*, 367 Md. at 30-31. An example of such a situation would be if an error is committed during trial, and the losing party, due to no fault of his own, does not discover it until after the trial has concluded and files a motion for new trial. *Id.* at 31. In that circumstance, if the appellate court determines that error did occur, the issue of prejudice should be reviewed under the harmless error standard. *Id.*

Appellant moved for a new trial on three separate grounds: (a) the prosecutor's misconduct in calling Derrick Toomer for the purpose of invoking his Fifth Amendment Privilege in front of the jury; (b) the State's failure to disclose impeachment evidence relating to James Nelson; and, (c) the State's improper use of the .38 caliber revolver, which had not been entered into evidence, during its closing argument. (T7.6,10; T8.4-5). Appellant asserts that a new trial should have been granted on all three grounds individually and collectively.

A. Calling of Derrick Toomer to Invoke Fifth Amendment Privilege

As argued above, the testimony taken from Ms. Davis at the hearing on the motion for new trial clearly established that the prosecution knew that Derrick Toomer would invoke his Fifth Amendment privilege and refuse to testify in front of the jury. Further, appellant's counsel made clear that he did not discover the

information until after appellant's trial had concluded. (T7.10-13). Therefore, the standard of review for this issue is harmless error. See *Merritt*, supra. For the reasons advanced above, appellant asserts that the trial court erred in denying his motion for new trial and his convictions must be reversed.

B. *Brady* violation

Appellant also urged the trial court to grant him a new trial on the ground that the State had failed to disclose critical impeachment information relating to James Nelson. (T8.4-5). Specifically, the State failed to disclose the fact that Nelson was a State's witness against at least two other murder defendants whose cases (unrelated to appellant's) were pending at the time of his testimony. The prosecution conceded that Nelson was a State's witness in those cases: State of Maryland v. Dontaze Brown and Keith Spence (T8.39-40,48); however, the State proffered that no deals or promises had been made to Nelson in exchange for his agreement to testify in any of the cases. (T8.40). The State asserted that, because no deals or promises had been made, it was under no obligation to disclose the information to appellant pursuant to the Maryland discovery rules. (T8.40, 51).

In its denial of appellant's motion for new trial on this issue, the trial court agreed with the State and ruled that the State's proffer negated any obligation to disclose the information to the defense pursuant to the Maryland discovery rules. (T8.81).

Appellant asserts that disclosure was required pursuant to Maryland Rule 4-263 and the U.S. Supreme Court's landmark decision in *Brady v. Maryland*, 373

U.S. 83 (1963). The information was critical impeachment evidence that related to the prosecution's star witness, Mr. James Nelson. The State's failure to disclose the information deprived appellant of his Sixth Amendment right to confront Nelson and his right to a fair trial. Further, it was the right to cross-examine the witness on the issue of an expected benefit for his testimony in all of the murder cases – not the State's proffer to the non-existence of an agreement - that was the critical inquiry.

"The Confrontation Clause of the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to confront the witnesses against him." *Martinez v. State*, 416 Md. 418, 428 (2010). Cross-examination is a right guaranteed by the common law, *Myer v. State*, 403 Md. 463, 475 (2008) and "is inherent in the right to confront witnesses." *Smallwood v. State*, 320 Md. 300, 306 (2005). "Implicit in the constitutional guarantee is the right to impeach the credibility of adverse witnesses by establishing bias, prejudice, a motive to testify falsely, or an interest in the outcome of the proceeding." *Maslin v. State*, 124 Md. App. 535, 541 (1999). *See Davis v. Alaska*, 415 U.S. 308, 316 (1974); *Martinez v. State*, 416 Md. 418, 428 (2010); *Marshall v. State*, 346 Md. 186, 192 (1997).

The Court of Appeals has made clear that, "it is of no consequence that the State had not offered to make any deal or bargain with [the witness] regarding his charges and his testimony in [the] case... Nor [is] it of consequence that the witness might not have admitted under cross-examination that his direct testimony

was motivated by self interest." *Martinez,* at 429. In *Calloway v. State,* 414 Md. 616, 637 (2010), the Court of Appeals explained:

> Questions alone can impeach. Apart from their mere wording, through voice inflection and other mannerisms of the examiner – things that cannot be discerned from the printed record – they can insinuate; they can suggest; they can accuse; they can create an aura in the courtroom that the trial judge can sense but about which we could not speculate. The most persistent details, even from articulate adult witnesses, may not suffice to overcome the suspicion they can engender.

*Id.* at 638 (quoting *Elmer v. State*, 353 Md. 1, 15 (1999)).

The fact that Nelson had become a full-time witness for the State in multiple murder cases was critical to the jury's assessment of his credibility and was improperly withheld by the prosecution. Moreover, the State's assertion, and the trial court's finding, that there was no obligation to disclose the information was patently incorrect.

Maryland Rule 4-263 (d) outlines the discovery obligations of a State's Attorney. Subsection (6) addresses impeachment information and specifically states a the State's Attorney is obligated to disclose, "all material or information in any form, whether or not admissible, that tends to impeach a State's witness, including... (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..." (Maryland Rule 4-263 West 2014).

In *State v. Williams,* 392 Md. 194 (2006) the Court of Appeals aptly stated,

> By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing an innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom...By its actions, the government can either contribute to or eliminate the problem. Accordingly we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery. Their responsibility includes the duty as required by *Giglio* to turn over to the defense in discovery *all* material information casting a shadow on a government witness's credibility.

*Williams*, at 205 (quoting *United States v. Bernal-Obeso*, 989 F.2d 331, 334 (9th Cir. 1993).

Rule 4-263(b)(6)(B) makes clear that the *relationship* between the State and a witness must be disclosed *in addition to* any circumstances of agreement, etc. The full extent of Nelson's relationship with the prosecution was not disclosed in violation of Rule 4-263(b)(6)(B), and prejudiced appellant.

In *Brady*, the Supreme Court "held that the Due Process Clause of the United State's Constitution imposes upon the State a duty and obligation to disclose 'evidence favorable to an accused upon request...where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Williams*, 392 Md. at 198 (quoting *Brady*, 373 U.S. at 87). An alleged *Brady* violation is a constitutional claim, based on the Due Process Clauses of the Fifth and Fourteenth Amendments. *Yearby v. State*, 414 Md. 708, 719 (2010) (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)).

The obligation of a prosecutor pursuant to *Brady* "extends to both exculpatory and impeachment evidence" *Id.* (citing *Giglio v. United States*, 405

U.S. 150, 154 (1972) and "applies whether or not there has been a request for such evidence by the accused. *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976). "There is no distinction between exculpatory evidence and impeachment evidence." *Ware v. State*, 348 Md. 19, 37 (1997) (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)).

In order to establish a *Brady* violation, "a defendant must show: (1) that the State suppressed or withheld evidence, whether inadvertently or willfully; (2) the evidence at issue was favorable to the defense, either because it was exculpatory, provided a basis for mitigation of sentence, or provided grounds for impeaching a witness; and (3) that the suppressed evidence was material to the guilt or punishment of the defendant, thereby prejudicing the defendant.'" *Elliott v. State*, 185 Md. App. 692, 730-31 (2009); see *Ware,* 348 Md. at 38. Impeachment evidence, as well as exculpatory evidence, is 'evidence favorable to an accused.' *Id.* at 346 (quoting *Bagley*, 473 U.S. at 676). See *Giglio v. United States*, 405 U.S. 150, 154 (1985).

Evidence is material under *Brady* when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict. *Williams*, 392 Md. at 229 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Moreover, '[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.*

In *Wilson v. State*, 363 Md. 333, 352 (2001), the Court of Appeals listed "a number of factors to be considered in assessing the materiality of non-disclosed evidence for purposes of *Brady*, among which are: the closeness of the case against the defendant and the cumulative weight of the other independent evidence of guilty; the centrality of the particular witness to the State's case; the significance of the inducement to testify; whether and to what extent the witness's credibility was already in question; and the prosecutor's emphasis on the witness's credibility in closing argument. *Harris v. State*, 407 Md. 503 (2009)(citing *Wilson*, supra); see also *Conyers v. State*, 367 Md. 571, 612 (2002).

Here, the prosecution suppressed critical impeachment information relating to the State's star witness, which was favorable to appellant and material to the jury's determination of appellant's guilt in this case.

There can be no dispute that James Nelson was the central witness in appellant's trial and that his credibility was of the utmost importance. The State leaned heavily on his testimony during its closing arguments, arguing that James Nelson had given the jury everything it needed to convict appellant. Nelson was the only witness to identify appellant as the person who shot Ralph Hall. He provided the context that was necessary for the State to argue that appellant had used Kelly Toomer's .38 revolver to shoot Hall, and for the presence of appellant's DNA inside Hall's vehicle. Had the jury known about Nelson's extensive relationship with the State as a repeated prosecution witness, it may

have rejected Nelson's testimony and the prosecution's case against appellant would have been in jeopardy.

For all of these reasons, appellant asserts that the prosecution committed a *Brady* violation, which only became apparent to the defense after the trial had been concluded. Because the information surfaced after trial, the appropriate standard of review is harmless error. See *Merritt*, supra. The error was not harmless beyond a reasonable doubt and appellant's convictions must be reversed.

C. Improper use of the revolver during closing argument

Appellant also raised in his motion for new trial the fact that the prosecution improperly used the .38 revolver in closing argument, which had not been admitted into evidence, in support of its assertion that it was the murder weapon used by appellant. In the motion for new trial, appellant's counsel argued that guns are inherently inflammatory and prejudicial and that the State was not entitled to use it demonstratively during its argument. (T7.6-9).

In response to appellant's motion for new trial on this ground, the State conceded that it had "waved the gun around" but claimed that it was entitled do so because there was circumstantial evidence indicating that it was the murder weapon. The trial court agreed that guns are inherently inflammatory and prejudicial but denied appellant's motion on the ground that the .38 revolver used by the State had been admitted into evidence and was "fair game." (T8.77). In fact, the gun was marked for identification only as State's Exhibit 20 during the testimony of Kelly Toomer, but was never admitted into evidence. (T3.85). The

trial court was incorrect in its finding that it had been admitted and, in basing its ruling on that finding, abused its discretion. Therefore, appellant's convictions must be reversed.

## CONCLUSION

For all of the foregoing reasons, appellant respectfully requests that this Honorable Court vacate the judgment of the trial court and remand the case for a new trial in the Circuit Court for Baltimore City.

Respectfully submitted,

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## PERTINENT AUTHORITY

CONSTITUTIONAL PROVISIONS

**United States Constitution, Amendment V.**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**United States Constitution, Amendment VI.**

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**United States Constitution, Amendment XIV.**

> **Section 1.**
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Maryland Declaration of Rights, Article 21.**

> That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defense; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

Maryland Rules

**Rule 4-263:**

Rule 4-263. Discovery in Circuit Court

(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.**

(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.* As to each State's witness the State's Attorney

intends to call to prove the State's case in chief or to rebut alibi testimony: (A) the name of the witness; (B) except as provided under Code, Criminal Procedure Article, § 11-205 or Rule 16-1009 (b), the address and, if known to the State's Attorney, the telephone number of the witness; and (C) all written statements of the witness 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.* As 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

(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) *By any Party.* 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 Defense.* 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, a person from whom discovery is sought, or a person named or depicted in an item sought to be discovered, 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 party, or a person from whom discovery is sought, or a person named or depicted in an item sought to be discovered, 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.

Md. Rule 4-263 (West 2013).