IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2000

NO. 923

ADNAN SYED,

Appellant

v.

STATE OF MARYLAND,

Appellee

APPEAL FROM THE CIRCUIT COURT
FOR BALTIMORE CITY
(Wanda Keyes Heard, Judge)

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellee, the State of Maryland, accepts the Statement of the Case set forth in the brief of Appellant, Adnan Syed.

QUESTIONS PRESENTED

1. Was there any violation of *Brady v. Maryland* where Syed was able to cross-examine State's witness, Jay Wilds, about all relevant aspects of his plea agreement and the manner in which he obtained the assistance of private counsel?

2. Did the trial court properly exercise discretion in permitting a witness to read a portion of a letter written by the victim and addressed to Syed?

3. If preserved, did the trial court properly exercise discretion in admitting the victim's diary into evidence?

STATEMENT OF FACTS

The State accepts the Statement of Facts set forth in the brief of Syed, with the following additions and corrections.

Police recovered a page torn from a map in the rear seat of the victim's, Hae Lee, vehicle. (1/31/00, 58). The page included the map area of Leakin Park, the location where Lee's body was found. (1/31/00, 60). Syed's fingerprint was found on an identification card in the glove compartment of the car. (2/1/00, 24-25).[1] Syed's palm print was found on the back cover of the map recovered from the car. (2/1/00, 27). Syed's fingerprints were also found on floral paper recovered from the back seat of the car. (2/1/00, 29). Two hairs recovered from the victim's body matched Syed's physical characteristics, but did not match his hair exactly. (2/1/00, 117).

Jay Wilds was the State's primary witness. Wilds testified before the jury on direct examination on February 4, 2000. (2/4/00, 115-164). Wilds was cross-examined by Syed on February 4, 2000, (2/4/00, 164-246), February 10, 2000, (2/10/00, 13-159, 169-189), February 11, 2000, (2/11/00, 65-107), February 14, 2000, (2/14/00, 40-162), and February 15, 2000, (2/15/00, 10-133). Wilds's redirect examination occurred on February 15, 2000, (2/15/00,

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[1] Jay Wilds testified that after they buried Hae Lee, Syed was "flipping through her wallet." (2/4/00, 156).

133-150), and he was subject to re-cross examination by Syed the same day. (2/15/00, 150-162).

Pertinent to the issues raised by Syed, on direct examination, Wilds identified the plea agreement that he signed in which he admitted to being an accessory after the fact to the murder of Hae Lee. (2/4/00, 162-63; State's Ex. 35). Asked about his understanding of the agreement, Wilds replied:

> Well, if I tell any kind of lie, it voids it and it's no good. It's a truth agreement, and that's about it, a cap. As long as I tell the truth, I can only get a certain amount of years.

(2/4/00, 163).

The plea agreement was admitted without objection. (2/4/00, 163). On cross-examination, Wilds testified that he signed the agreement on September 7, 1999. (2/4/00, 165). Wilds agreed that the agreement did not contain a recitation of the underlying facts of the crime. (2/4/00, 167). Wilds also agreed that there was no recitation of facts at his plea hearing. (2/4/00, 194).[2] On continued cross-examination of Wilds, Syed's counsel inquired further as to the procedures used and questions asked at Wilds's hearing. (2/4/00, 212-20). Wilds testified that he understood that he faced up to five years in prison as an accessory after the fact. (2/4/00, 216). Wilds also testified that he understood there would be "both a guilty plea and a disposition sometime far in the future," and that would occur after the State determined whether he had fulfilled his obligation under the agreement. (2/4/00, 217). Wilds also

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[2] A transcript of that hearing, before the Honorable Joseph P. McCurdy, was identified and is in the record, and that transcript indicates that the prosecutor informed the court that it would provide a written statement of facts at the time of disposition on Wilds's plea. (9/7/99, 2-3; 2/22/00, 48-50).

testified that he did not swear an oath at the hearing before Judge McCurdy. (2/4/00, 218).[3] Also during Wilds's cross-examination, in response to Syed's leading question, Wilds testified that Mr. Urick, the prosecutor, helped provide him with an attorney. (2/10/00, 156). Wilds testified before the jury that this assistance was provided before Wilds was charged in the case with accessory after the fact to murder. (2/10/00, 156).

Additionally, on the fifth and final day of cross-examination of Wilds, Syed extensively cross-examined Wilds concerning all the details surrounding the plea agreement and how he came to be represented by Ms. Benaroya. (2/15/00, 39-133). Wilds testified before the jury that before September 6, 1999, he spoke with the Public Defender's Office, but they would not provide him with representation until he had been charged. (2/15/00, 39-40). Wilds testified that when police came to pick him up on September 7, 1999, he did not know that day that he would be entering a plea. (2/15/00, 42). The police did not tell Wilds that he was being taken to the State's Attorney's Office, and Wilds had never been in the prosecutor's, Mr. Urick's, office before that day. (2/15/00, 51). Wilds confirmed that prior to meeting Mr. Urick, he had not been charged, he had not been before a Commissioner, and he had not seen a judge. (2/15/00, 56-57). Police did not tell Wilds that he had to work out a deal, if there was to be one, with Mr. Urick. (2/15/00, 57). Wilds then answered the following questions on cross-examination before the jury:

> Q. And Mr. Urick introduced himself to you, you of course asked him now when am I going to get charged?
>
> A. No, ma'am.

---

[3] The transcript of the proceeding indicates to the contrary. (9/7/99, 3).

Q. And did he express questions himself?

A. He told me that he had someone he would like me to meet.

Q. He had somebody – the very first thing he said was there's somebody that I want you to meet?

A. Yes, ma'am.

Q. And at that point he had introduced himself to you. Had you spoken back to him?

A. I believe I said hello.

Q. And did you ask him for help with picking a lawyer?

MR. URICK: Objection.

THE COURT: Overruled.

A. No, ma'am.

Q. Did you ask for any assistance from him at all?

A. No, ma'am.

Q. Did you tell him you wanted a lawyer, even though you might not have asked for his help?

A. I believe he told me I was going to need one.

Q. He told you that you were going to need one, and then he told you there's somebody he'd like you to meet?

A. Yes, ma'am.

(2/15/00, 58-59).

The person Urick wanted to introduce was not in the same office, but was nearby. (2/15/00, 59). Wilds testified that he did not ask Urick why he needed a lawyer because he believed he was going to be charged in connection with the murder. (2/15/00, 60). Urick then took Wilds to meet a person that Urick described as "a very good lawyer, defense attorney, and that she takes – she does some pro bono work." (2/15/00, 61). Wilds then testified before the jury that he knew nothing about this other lawyer, nothing about her reputation or experience, and had never met her before that day. (2/15/00, 61-62). He was then asked the following questions before the jury by Ms. Gutierrez:

> Q. Now, you understood what pro bono meant, did you not?
>
> A. Yes, ma'am.
>
> Q. When he said it you knew that that meant without a fee, did you not?
>
> A. I understood that, yes.

(2/15/00, 63).

Wilds's cross-examination on this subject continued:

> Q. And, sir, did you come to understand that that lawyer was available to you pro bono?
>
> A. Yes, ma'am.
>
> Q. And you needed that, did you not, if you needed a lawyer?
>
> A. Yes, ma'am.

Q. And you couldn't have afforded your own lawyer could you of?

A. No, ma'am.

Q. That's why you had called the Public Defender's Office, didn't you?

A. Yes, ma'am.

Q. Because you thought if you needed a lawyer you had to get a lawyer that wasn't going to cost you any money?

A. Correct.

Q. Because you couldn't have afforded to go out and hire a lawyer back then?

A. No, ma'am.

(2/15/00, 65).

After meeting with Benaroya for approximately one hour and thirty minutes, Benaroya, Urick, and Wilds discussed a plea agreement. (2/15/00, 71). At the end of another hour, Wilds signed the plea agreement, which he previously called a "truth agreement," in his testimony. (2/15/00, 72). Wilds testified this was the first instance when he had been presented with a plea agreement. (2/15/00, 73). Wilds testified that some alterations were made to the plea agreement. (2/15/00, 74). Wilds testified that he observed his lawyer make these alterations. (2/15/00, 75). Wilds also testified that the alterations were "minor," and concerned the terms of how he was to go to court, and apparently, boilerplate language about whether the case was a drug case.

(2/15/00, 76, 78-79). At the end of this meeting, the plea agreement had been totally negotiated. (2/15/00, 77-78).[4]

After the plea was signed, the parties went to the courthouse. (2/15/00, 83-84). Wilds again repeated earlier testimony that the agreement outlined certain obligations on his part, and certain statements on the part of the State. (2/15/00, 117). Wilds repeated that he committed to tell the truth, that he would testify when the State told him to, and that on those occasions, he would tell the truth. (2/15/00, 118). Wilds then was asked if his understanding was that, under the agreement, whether Mr. Urick would be making certain recommendations at Wilds's sentencing. (2/15/00, 121). Wilds testified as follows:

> Q. Well, sir, you understood that one of the recommendations, one of the agreements in this agreement that obligates Mr. Urick is that if you complete all of the terms and conditions stated in the agreement to the satisfaction of the State, that's Mr. Urick, right, the State?
>
> A. Yes, ma'am.
>
> Q. And you understood that then, didn't you?
>
> A. Yes, ma'am.
>
> Q. That the State will recommend the sentence of five years –

---

[4] Wilds was then questioned about paragraph 1-A of the plea agreement, which concerned whether Wilds had been truthful in all prior interviews. (2/15/00, 81). The court sustained objections to Syed's argumentative questions about whether Wilds informed Urick "about all of the times you had already lied?" (2/15/00, 80-82).

MR. URICK: Objection.

Q. – to the Department of Correction with all but two years suspended?

THE COURT: Overruled. Is that your understanding?

THE WITNESS: Yes, ma'am.

(2/15/00, 121-22).

Wilds then was asked to review the agreement, and Syed asked the following, still on cross-examination:

Q. Okay. And, in fact, item D says that if you fail to complete each and every obligation under the agreement the State will recommend a sentence as follows, five years to the Department of Correction; is that correct?

A. Yes, ma'am.

(2/15/00, 123).

Further:

Q. And you also, sir, understood that actually what sentence you receive at any point in time when you come up for sentencing when your guilty plea is concluded, is really up to the judge?

A. Yes, ma'am.

Q. And that ultimately only the judge gets to decide?

A. Yes, ma'am.

Q. Right? But that the determinations of whether or not you met your obligations will always be up to Mr. Urick?

MR. URICK: Objection.

THE COURT: Overruled.

Q. Will it not?

THE COURT: Is that your understanding?

THE WITNESS: Yes, ma'am.

(2/15/00, 124-25).

Next, Syed finally concluded cross-examination of Wilds before the jury with several questions concerning representation by Benaroya. The exchange began:

> Q. Now, Mr. Wilds, the plea agreement, the Truth Agreement as you call it, doesn't say anything about the benefit of having a lawyer, does it?
>
> MR. URICK: Objection.
>
> THE COURT: Overruled. Does the agreement say anything about the benefits of having a lawyer?
>
> THE WITNESS: No, ma'am.
>
> Q. And, sir, when you signed that agreement on the 7th of September, did you regard it as a benefit provided to you?
>
> A. No, ma'am.
>
> Q. Did you think that it was a good thing?
>
> A. Having a lawyer?
>
> Q. Yes.
>
> A. Yes, ma'am.

Q. That day?

A. Yes, ma'am.

Q. And did you think it was something that Mr. Urick had provided?

MR. URICK: Objection.

THE COURT: Overruled. What did you think?

Q. In your mind?

A. At that point in time, yes.

Q. Yes. And did Mr. Urick ever tell you that that was a benefit that he was providing you?

A. No, ma'am.

Q. Did you not come to regard it at some point as a good thing that you got a free lawyer?

A. Yes, ma'am.

Q. And did you not come to think of it as something that was sort of part of a whole deal?

A. No, ma'am.

Q. Did you think that having a lawyer went with in any way the plea agreement that you signed?

A. No, ma'am.

(2/15/00, 127-28).

Wilds was then asked about his feelings after September 7,1999, about the manner of retention of Benaroya. The following occurred before the jury:

Q. Yes. Mr. Wilds, when there came the time that you had questions about her, you also had questions about the plea that had gone down that day, did you not?

A. Yes, ma'am.

Q. You thought, in your words, that things smelled fishy, did you not?

A. Yes, ma'am.

Q. And by the use of that term you meant they didn't smell quite right, did you not?

A. No, ma'am.

Q. Well, I want to make sure.

A. I'm agreeing with you.

Q. That they didn't smell right?

A. Yes, ma'am.

Q. And by not smelling right, they didn't make you feel too good, did they?

A. No, ma'am.

Q. You came to have questions about how it was that Mr. Urick provided you a lawyer, did you not?

MR. URICK: Objection.

THE COURT: Overruled.

Q. Did you not?

THE COURT: Is that the reason that you thought it smelled fishy?

THE WITNESS: No, ma'am.

Q. Well, sir, you had thought like it sure felt like a conflict, did you not?

A. Yes, ma'am.

Q. That was the word that you used, was it not?

A. Yes, ma'am.

Q. That the conflict was that it didn't appear to you that the lawyer was going to be for your interests, isn't that right?

A. Yes, ma'am.

Q. And you had suspicions that because of the appearance of things that the lawyer might be working for his interest?

MR. URICK: Objection.

THE COURT: Overruled.

Q. Did you not?

THE COURT: Is that what you were thinking, Mr. Wilds?

THE WITNESS: Somewhat.

Q. Somewhat. And you knew that it wasn't quite right if the lawyer is working for his interest but acting as your lawyer, isn't that correct?

A. Yes, ma'am.

Q. And that's what you meant by it smelled fishy, is it not?

A. Yes, ma'am.

Q. And you questioned, in fact, whether or not this lawyer that you met in the prosecutor's office who was prosecuting you was just brought in to make you make the plea, did you not?

A. Yes, ma'am.

Q. That's what you thought?

A. Yes, ma'am.

Q. In your mind?

A. Yes, ma'am.

Q. Even after this day, isn't that correct?

A. Which day?

Q. The 7th of September.

A. Yes, ma'am.

MS. GUTIERREZ: No more questions.

(2/15/00, 130-33).

On redirect examination, Wilds testified that he felt he had a choice in selecting his attorney. (2/15/00, 148). Wilds testified that the attorney that he had, Benaroya, was because of his own choice. (2/15/00, 148). Wilds was then asked whether he was satisfied with Benaroya, and he replied, "[v]ery much so." (2/15/00, 148).

Other facts may be supplemented and modified in the following Argument.

ARGUMENT

I.

THERE WAS NO VIOLATION OF *BRADY V. MARYLAND* WHERE SYED WAS ABLE TO CROSS-EXAMINE STATE'S WITNESS, JAY WILDS, ABOUT ALL RELEVANT ASPECTS OF HIS PLEA AGREEMENT AND THE MANNER IN WHICH HE OBTAINED THE ASSISTANCE OF PRIVATE COUNSEL.

In his first issue on appeal, Syed claims that the State violated the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose certain information pertinent to the impeachment of Jay Wilds prior to trial. (App. Br. 29). The complaints primarily fall into two categories: (A) whether there was a *Brady* violation when the prosecutor failed to disclose that he had recommended Wilds obtain an attorney; and (B) whether there was a *Brady* violation when the prosecutor failed to disclose all the circumstances surrounding Wilds's plea agreement. As will be explained, these arguments are without merit, primarily for the reason that Syed was able to elicit all this information effectively by way of cross-examination. Thus, the information was before the jury, and the jury had knowledge of all the things complained about by Syed in order to judge Wilds's credibility.

A. General Principles

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that:

> [S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Conyers v. State, 367 Md. 571, 584 n. 18 (2002) (quoting *Brady*, 373 U.S. at 87); *accord Wilson v. State*, 363 Md. 333, 345-47 (2001).

The Maryland Court of Appeals has stated:

> To establish a *Brady* violation, the defendant must establish (1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense – either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness – and (3) that the suppressed evidence is material.

Ware v. State, 348 Md. 19, 38 (1997); *see also Strickler v. Greene*, 527 U.S. 263, 280 (1999) (duty to disclose such evidence applies even when no request by accused, and encompasses impeachment evidence as well as exculpatory evidence).

Evidence is considered material, and relief is therefore appropriate, if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Ware*, 348 Md. at 46 (quoting *State v. Thomas*, 325 Md. 160, 190 n. 8 (1992)); *see also Strickler*, 527 U.S. at 281 ("strickly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a

different verdict."); *Stevenson v. State,* 299 Md. 297, 308 (1984) (new trial not warranted where evidence not material to the outcome of the case).

The Supreme Court further explained that it is the Petitioner's burden to establish a reasonable probability of a different result. *Strickler*, 527 U.S. at 291. To that end, the Court has held:

> As we made clear in *Kyles*, the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. *Id.*, at 434-435, 115 S.Ct. 1555. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*, at 435, 115 S.Ct. 1555.

Strickler, 527 U.S. at 290.

The Supreme Court majority further explained what does *not* constitute the proper standard to be applied to the materiality determination:

> The District Court was surely correct that there is a reasonable *possibility* that either a total, or just a substantial, discount of Stoltzfus' testimony might have produced a different result, either at the guilt or sentencing phases. Petitioner did, for example, introduce substantial mitigating evidence about abuse he had suffered as a child at the hands of his stepfather. As the District Court recognized, however, petitioner's burden is to establish a reasonable *probability* of a different result. *Kyles*, 514 U.S., at 434, 131 L.Ed.2d 490, 115 S.Ct. 1555.

Strickler, 527 U.S. at 291 (emphasis in original).

Both federal and Maryland cases discussing *Brady* have stated that there is no violation of due process where the alleged suppressed exculpatory evidence is disclosed during trial. In *United States v. Smith Grading &*

Paving, Inc., 760 F.2d 527 (4th Cir. 1985), *cert. denied*, 474 U.S. 1005 (1985), the defendants argued that the government failed to disclose exculpatory evidence from an engineer who testified he purposefully under-estimated a public works project's cost, which would have tended to illustrate defendants' claim that their bids for the project were not excessively high. The Fourth Circuit ruled:

> Even if we assume that the engineer's testimony is exculpatory, its belated disclosure does not constitute reversible error. No due process violation occurs as long as *Brady* material is disclosed to a defendant in time for its effective use at trial. *United States v. Higgs*, 713 F.2d 39 (3rd Cir. 1983). In this case, the exculpatory information was put before the jury during cross-examination of the very first trial witness. The information was available for use in the defendant's cross-examination of all further government witnesses as well as in the defendants' case in chief. The disclosure of this exculpatory evidence, at trial, does not rise to the level of a constitutional violation.

U.S. v. Smith Grading & Paving, Inc., 760 F.2d at 532; *see also United States v. Elmore*, 423 F.2d 775, 779 (4th Cir. 1970) ("disclosure to be effective must be made at a time when the disclosure would be of value to the accused."), *cert. denied*, 400 U.S. 825 (1970); *United States v. Beckford*, 962 F. Supp. 780, 788 (E.D.Va. 1997) ("[t]he determination of the precise time at which *Brady* material must be disclosed is necessarily governed by the specific nature of the *Brady* material at issue – *i.e.*, whether it is exculpatory or merely impeachment evidence."); *United States v. Shifflett*, 798 F. Supp. 354, 355 (W.D.Va. 1992) (no constitutional violation to disclose criminal records of witnesses after they testified on direct examination because the nature of the materials permitted its effective use if available for cross-examination); *Jones v. State*, 132 Md.

App. 657, 675 (2000) ("[t]he *Brady* sin is hiding something and keeping it hidden, not hiding something temporarily in order to surprise someone with a sudden revelation"); *Stewart v. State*, 104 Md. App. 273, 286-88 (1995) (no suppression of evidence where defense witness "fully able to apprise the defense of what happened" at an identification procedure); *Yeagy v. State*, 63 Md. App. 1, 22 (1985) (information complained about was already known by appellant and prevented invocation of *Brady* doctrine).

B. There was no Brady violation where Syed effectively impeached Jay Wilds and elicited all relevant information about Wilds's plea agreement during five days of cross-examination.

All the material which Syed claims was suppressed related to the impeachment of Jay Wilds, not whether the alleged suppressed information was exculpatory. On appeal, Syed relies heavily upon two recent Court of Appeals cases, *Conyers*, *supra*, and *Wilson*, *supra*. In *Conyers*, the Court of Appeals found that information regarding "the commencement and course of [a witness's] negotiations for a benefit was withheld from Petitioner until the post conviction hearing," a proceeding which took place three (3) years after Petitioner's trial. *Conyers*, 367 Md. at 602-03. In *Wilson*, although the State argued that information regarding the plea agreements had been substantially disclosed at trial, the *Wilson* Court based its holding upon the postconviction court's finding, some twenty (20) years after the trial, that there were written plea agreements that were never disclosed to the defense. *Wilson*, 363 Md. at 348. Here, in contrast, everything that Syed complains about with respect to Jay Wilds's written plea agreement, including the actual written plea

agreement, was before the jury prior to deliberations. Thus, there was no violation of *Brady*.[5]

During cross-examination of Wilds, Syed focused on whether Wilds had actually pleaded guilty to accessory after the fact, primarily based on whether there was compliance with Maryland Rule 4-242. (2/4/00, 194-95). The jury was excused from the courtroom, and Syed's counsel argued:

> What I am seeking to get out and what I think I am entitled to for two reasons, this witness has been presented to this jury as not only a witness who has entered a plea agreement which then makes that the subject of impeachment, what the agreement was, how much it was limited to, whatever. But he has now been presented in direct as a witness who has pled guilty. In terminology, this witness has acceded he understands because he freely answered those questions, and there were four of them following that about the when [sic] he pled guilty.
>
> In fact, this witness has not entered a guilty plea.

(2/4/00, 198).[6]

The trial court responded:

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[5] In arguing before this Court, Syed argues preliminarily that the undisclosed circumstances surrounding the plea agreement constitute a *Brady* violation, and then argues eight sub-issues which concern whether the trial court abused its discretion in certain evidentiary-related rulings. The evidentiary rulings cannot be taken out of context, and can not be treated non-chronologically. Thus, Appellee's response will mirror the testimony and rulings as they actually happened at trial, and will not follow the same order of issues presented in Syed's brief.

[6] Syed proffered that there was a videotape of the plea hearing. (2/4/00, 198). Syed viewed that tape during a break in the cross-examination of Wilds. (2/11/00, 113).

> THE COURT: But, Ms. Gutierrez, isn't it a fact that the purpose of your questions is to determine whether or not he has any bias, motive, interest in testifying one way or another based on promises he believes that he has, not whether –
>
> MS. GUTIERREZ: Yes, sir [sic], and I plan to get there.
>
> THE COURT: Wait a minute. Not whether, in fact, they are promises, whether or not they are, in fact, promises that will be kept to him, but whether or not they are influencing his testimony today. So in that regard, it really doesn't matter whether they called it a guilty plea or not but, rather, whether or not you have the latitude to inquire into any promises that have been made.

(2/4/00, 201-02).

The prosecutor responded to further argument by informing the court that Wilds pleaded guilty under oath. (2/4/00, 203). Syed argued that Wilds's guilty plea was not valid because of failure to comply with Md. Rule 4-242, and the trial court responded, "Ms. Gutierrez, you are arguing Mr. Wilds' point on appeal of his guilty plea. If, by some reason, Judge McCurdy did not follow the 4-242 litany, that's for another day and another court to decide." (2/4/00, 204). The court then ruled:

> THE COURT: Ms. Gutierrez, may I make a suggestion then, in light of your argument, that we will do the following: I will allow you to inquire as to what this witness recalls being done during his guilty plea proceeding. That is, he has already said he wasn't under oath, and anything else that you would like to draw out. Then in the instructions to the jury, I will be happy to advise the jury what a guilty plea is under the rules. And if you would like to structure an instruction –
>
> MS. GUTIERREZ: I will do so.

> THE COURT: – that would outline what a guilty plea is, and then we can utilize it in that fashion, because I think what you are trying to do is, at this juncture, argue the law mixed with a witness who may not know that certain procedures under 2-242 [sic] may or may not have been followed.

(2/4/00, 205).

The court further clarified its ruling prior to the resumption of cross-examination:

> I know that the State may not agree but the court's concern is that if this witness believes that he was engaged in a guilty plea and that, as a result of that guilty plea, that this promise is binding in some fashion and that is directing his testimony, the defense has a right to inquire as to the basis for that belief. And if for some reason it is a faulty belief, then the jury is entitled to hear what it is that may have happened during a guilty plea that this witness does not either recall or may have forgotten or was not done, and opens him up to a challenge to his credibility.

(2/4/00, 209).

As detailed above in the statement of facts, Syed was then permitted to continue cross-examination on the plea hearing, (2/4/00, 212-20), and Wilds testified that he understood that he faced up to five years in prison as an accessory after the fact, and that the ultimate disposition in his case would occur after the prosecutor determined whether Wilds had kept up his end of the bargain, *i.e.*, to provide truthful testimony at Syed's trial. (2/4/00, 216-17).

The issue concerning the plea hearing and Wild's plea agreement did not again arise until several days later, after the court took testimony from another witness, during Wild's resumed cross-examination. During that testimony before the jury, Wilds testified that Mr. Urick, the prosecutor, helped provide him with an attorney. (2/10/00, 156). Wilds testified before

the jury that this assistance was provided before Wilds was charged in the case with accessory after the fact to murder. (2/10/00, 156). As will be discussed in more detail below, the trial court then denied Syed's requests: (1) to call Mr. Urick, the prosecutor, as a witness, (2/11/00, 56); (2) to strike Wilds's testimony, (2/11/00, 34); and, (3) to compel disclosure of communications between Wilds and his attorney. (2/11/00, 44).

Subsequently, after further cross-examination of Wilds, Syed's counsel had an opportunity to view a videotape of Wilds's plea hearing. (2/11/00, 113). Syed stated that all that occurred at the plea hearing was the litany on whether Wilds was entering a knowing plea, but that no verdict was entered on the plea. (2/11/00, 114). The trial court agreed, and stated that the file indicated that Wilds's guilty verdict on the plea was held *sub curia*. (2/11/00, 122). The court agreed with Syed that Wilds's file was "very, very odd and unusual and I can see why would [sic] Ms. Gutierrez would start to wonder." (2/11/00, 123). The prosecutor then argued that the plea statute does not require the plea to be conducted in one proceeding, an argument to which the trial court agreed. (2/11/00, 127). It then became apparent that there was a subsequent proceeding, apparently in chambers with Judge McCurdy, where Wilds and his attorney were present, and to which the prosecution waived its presence. (2/11/00, 134). The trial court then determined that Syed had a valid complaint, as follows:

> She has a witness on the stand, there's been a hearing involving this witness that may or may not reflect on the credibility of this witness, we don't know if the proceeding was under oath, we don't know what he said during the proceeding, we don't know what he was asked during the proceeding, but he is your star witness in your case. She's reviewed a statement, it's the guilty plea, but there was another hearing held involving this very

> same witness for which she has no clue what it's about and to ask or inquire blindly means she doesn't know what she's dealing with. Perhaps we could bring him in and ask him. Perhaps he knows. But you [THE PROSECUTOR] can understand why she might want that information as a lawyer.

(2/11/00, 138-39).

The court then excused the jury for the remainder of the day and the court, Syed's counsel, and the prosecutor, questioned Wilds on his plea agreement. (2/11/00, 145-215). The court began by making clear that it was not seeking to learn about any conversations between Wilds and his attorney. (2/11/00, 146). Wilds testified that he appeared before Judge McCurdy, in court, for a guilty plea. (2/11/00, 147). A subsequent hearing was set for January 4, but Wilds said that hearing did not take place because disposition would depend upon what Wilds did at Syed's trial. (2/11/00, 148). Wilds testified that he met with Benaroya and Judge McCurdy after his plea hearing in chambers. (2/11/00, 150, 153). Wilds had called Judge McCurdy's clerk on his own when he, Wilds, could not get in touch with his lawyer. (2/11/00, 154). Wilds then testified that no one from the State's Attorney's Office was present at this meeting in chambers, that he did not know if the State's Attorney's Office knew about the meeting, and that no one from the State's Attorney's Office had asked him about what happened at that meeting. (2/11/00, 155).

Syed then was permitted to inquire of Wilds, and extensively questioned him about: why he was concerned about Benaroya's representation, (2/11/00, 158-61, 198); who he spoke to in Judge McCurdy's chambers about

that concern, (2/11/00, 162)[7]; whether Wilds indicated that he wanted to withdraw or alter the plea agreement, (2/11/00, 162-63, 202-03)[8]; whether, after Benaroya told him to be in Judge McCurdy's chambers the next day, Wilds spoke to any detectives or anyone from the State's Attorney's Office, (2/11/00, 163-65, 202-04, 207-08)[9]; who was present at this meeting in chambers, (2/11/00, 165-66)[10]; what Wilds's concerns were, including whether he was concerned that his lawyer was not representing his best interest, (2/11/00, 168-69, 173-74)[11]; whether he told Judge McCurdy about those concerns and whether he told Judge McCurdy if he wanted a different lawyer, (2/11/00, 170-72, 205, 209)[12]; the circumstances surrounding his first meeting

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[7] Wilds left a voice mail message directly on Judge McCurdy's voice mail. (2/11/00, 162). He also testified that he contacted the State because he believed they would have Benaroya's telephone number. (2/11/00, 204-05). He testified he spoke with the assistant prosecutor, Ms. Murphy, who informed him that she would try to get Benaroya's number for Wilds. (2/11/00, 207).

[8] Judge McCurdy did ask Wilds if he wanted to withdraw the plea agreement. (2/11/00, 202, 208-09). Wilds testified he did not indicate that he wanted any such alteration or withdrawal of the plea. (2/11/00, 162-63).

[9] Wilds testified he did not speak to any police or anyone connected with the State's Attorney's Office. (2/11/00, 164-65).

[10] Wilds testified it was just him, his lawyer, and Judge McCurdy, and that a video camera was turned on during the conversation. (2/11/00, 166).

[11] Wilds testified he was concerned about who Benaroya was representing. (2/11/00, 169).

[12] Wilds testified that he had told Judge McCurdy that he thought "things smell fishy." (2/11/00, 171). Wilds also testified that prior to the meeting in chambers, he and his lawyer had talked and that Wilds's concerns (continued...)

with his lawyer and the manner in which he was informed of the pending charges that were going to be filed against him, (2/11/00, 175-182, 186-90); when he was charged, (2/11/00, 182-83)[13]; whether Wilds understood that Benaroya's *pro bono* representation, meant that he would not be charged for her services, which he did understand, (2/11/00, 183-84, 190-93, 196-97); whether Wilds understood that there were other lawyers that he could have selected, (2/11/00, 195-96); what his lawyer may have told Judge McCurdy about how she came to represent Wilds, (2/11/00, 200)[14]; and, finally, how long the in chambers meeting lasted. (2/11/00, 212).[15]

Upon inquiry by the State, Wilds testified that the Public Defender's Office would not represent him until he had been charged with a crime. (2/11/00, 213). He also testified he was very satisfied with Benaroya's

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[12](...continued)
had been "laid to rest." (2/11/00, 170). Wilds also testified that he did not want a different lawyer representing him. (2/11/00, 172). Wilds also explained that his concern was that Benaroya did not keep in touch with him. (2/11/00, 211).

[13] Wilds testified that he was first given his charging documents, and then taken up to meet Mr. Urick, who introduced him to Ms. Benaroya. (2/11/00, 180, 182-83). Wilds also explained that Benaroya "wasn't forced on me. It wasn't like they said, this is your lawyer. They asked me, they said well, you can meet with her and see if you want her to be your lawyer." (2/11/00, 178-79).

[14] Wilds testified that Benaroya told Judge McCurdy that she had been contacted by the State and that she looked at Wilds's case before deciding whether to take his case. (2/11/00, 200-01).

[15] Wilds testified it was about fifteen to twenty minutes altogether. (2/11/00, 212).

representation. (2/11/00, 213). Wilds also testified that that satisfaction was conveyed to Judge McCurdy. (2/11/00, 213). Wilds also testified that Benaroya informed Judge McCurdy that she came to represent Wilds because "she does pro bono work and that she found a case where she felt there was a need where someone needed help." (2/11/00, 215).

Following argument, the trial court ruled that Syed would be permitted to continue cross-examination of Wilds, (2/11/00, 221, 225), but that the circumstances surrounding the in chambers meeting was "a dead end," and that "there is nothing there." (2/11/00, 223). The court found that such inquiry was a "totally collateral area none of which would be admissible." (2/11/00, 229). However, the court made clear that any questions Syed had about Wilds's concerns about his attorney could be asked in front of the jury. (2/11/00, 225). The next trial date, the court stated what types of questions would be permitted upon renewed cross-examination of Wilds:

> Mr. Wilds on cross, Ms. Gutierrez may ask and I believe we stopped short of these particular questions, can ask whether or not he picked his lawyer. She can ask whether he wanted to keep his lawyer. She can ask whether or not there was – at any time he was concerned about his lawyer, whether or not that concern was clarified in some way.

(2/14/00, 5).

After hearing further argument from the prosecutor, the court explained why it was allowing such continued cross-examination:

> Now, if Ms. Gutierrez wants to ask those very same questions so that the jury gets the benefit of hearing that, I have no problem with that because it does go into the mind he had at the time he was making a decision to plea guilty. It affected him and as I explained to you I view that as a benefit that was

derived, some assistance that the State's Attorney got – used in helping him secure a lawyer.

It doesn't mean you bought the lawyer for him. It doesn't mean you paid the lawyer. It just means that you did certain things. The State did certain things and as a result of what you did it made it easier for Mr. Wilds to select a lawyer, but ultimately he selected the lawyer, and that information did not come out in front of the jury, and if Ms. Gutierrez wants to bring that out or if you want to clarify that information in front of the jury. It goes to his state of mind, his contemplation as to what he was getting in exchange for pleading guilty and assisting the State, and to the extent defense counsel wants to argue it was a benefit and you want to argue it wasn't a benefit, the jury could decide what benefit, if any, has affected the witness's credibility.

(2/14/00, 11-12).[16]

As detailed in the above statement of facts, Syed was able to extensively cross-examine Wilds on his prior statements to police, the manner in which in came to be represented by Ms. Benaroya, the plea agreement, and the plea hearing.[17] The Confrontation Clause of the Sixth Amendment requires

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[16] Syed continued to argue that he was entitled to this information before trial. (2/14/00, 16). The court agreed, but stated "I will reiterate is because we got or you got this information at this juncture, that you still have the ability because the witness is still on the stand . . . to inquire of the benefit from him." (2/14/00, 16). The court specifically found that Syed was not harmed by any belated disclosure of this information. (2/14/00, 19).

[17] Syed argues that the court restricted his cross-examination of Wilds, in part, because he was unable to elicit what effect his "previous lies in prior statements to police had on the plea agreement." (App. Br., 44). As will be explained, not only is this argument without merit, but it is also not preserved, because in neither of the instances cited by Syed on appeal did Syed assert that (continued...)

that a defendant be permitted to cross examine witnesses on matters affecting their credibility, memory, knowledge or relationship to the parties. *Lyba v. State*, 321 Md. 564, 569 (1991); *see also Ebb v. State*, 341 Md. 578, 587 (the Sixth Amendment and Article 21 of the Maryland Declaration of Rights recognize the right of confrontation guaranteed to a criminal defendant, which includes the right to cross-examine witnesses against him), *cert. denied*, 519 U.S. 832 (1996). However, once a defendant has reached his "constitutionally required threshold level of inquiry," *Lyba*, 321 Md. at 570, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant," *Id.; accord Smallwood v. State*, 320 Md. 300, 307 (1990); *Stouffer v. State*, 118 Md. App. 590, 625 (1997) ("The allowance of questions on cross-examination and determination of their relevance are reserved for the sound discretion of the trial court."), *aff'd in part, rev'd in part, on other grounds*, 352 Md. 97 (1998). Such limitations will be considered erroneous only when some unfair

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[17](...continued)
the court was erroneously restricting his right to cross-examination, or that *Brady* was somehow implicated. (2/10/00, 157; 2/15/00, 79). *See, generally, Mack v. State*, 300 Md. 583, 603 (1984) ("[T]he question of whether the exclusion of evidence is erroneous and constitutes prejudicial error is not properly preserved for appellate review unless there has been a formal proffer of what the contents and relevance of the excluded evidence would have been."); *accord Green v. State*, 127 Md. App. 758, 766 (1999). The same is true of the other instances cited by Syed because, at the time the objection was sustained, Syed did not proffer that *Brady* was being violated or that his cross-examination was being restricted. (2/15/00, 68, 75).

prejudice inures to a defendant. *Smallwood*, 320 Md. at 308. Without the exercise of such discretion, cross-examination "can reduce itself to a discussion of collateral matters which will obscure the issue and lead to the fact-finder's confusion." *State v. Cox*, 298 Md. 173, 178 (1983).

Here, Syed's five-day cross-examination of Wilds included examination on the underlying terms and conditions of his plea agreement, as set forth in the above statement of facts, and thus, was not unduly restricted. As for Syed's other claim, that he was prevented from learning what changes Wilds sought to the plea agreement and whether Ms. Benaroya had been paid any money for her representation, the trial court had earlier ruled such information was privileged. (2/11/00, 44-45).[18] Further, after the objections were sustained, the court explained that the objections were sustained because Syed was attempting to pierce the attorney/client privilege between Wilds and Benaroya. (2/15/00, 96-97). *See Cutchin v. State*, __ Md. App. __, No. 195, Sept. Term, 2001 (filed March 1, 2002) (slip op. at 8-18) ("[t]he attorney-client privilege is a rule of evidence that prohibits disclosure of a communication made in confidence by a client to an attorney to obtain legal advice").[19]

In his brief, Syed relies upon *Marshall v. State*, 346 Md. 186 (1997) when discussing the evidentiary rulings. In that case, Barry Edwards was the sole eyewitness to a murder which he claimed had been committed by appellant. *Marshall*, 346 Md. at 190. Prior to trial, Edwards entered a plea to

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[18] As noted in the statement of facts, Syed was able to elicit before the jury that Wilds witnessed his attorney make alterations to the agreement, and that the alterations were "minor." (2/15/00, 74-79).

[19] Syed repeatedly attempted to elicit privileged communications throughout Wilds's cross-examination. (2/15/00, 66-69, 73-75, 82-83).

an unrelated charge concerning an entirely unrelated incident. *Id.* at 189. A condition of that plea agreement was that Edwards testify at Marshall's trial. *Id.* at 190. The trial court in *Marshall* granted the State's motion *in limine* preventing the defense from inquiring about the other plea agreement because it was not a final conviction and because it was in an unrelated case. *Id.* at 190-91.

The Court of Appeals first stated the general rule that the "constitutional right of confrontation includes the right to cross-examine a witness about matters which affect the witness's bias, interest or motive to testify falsely." *Id.* at 192. However, the right of cross-examination is subject to reasonable limits. *Id.* at 193. The Court stated that:

> The trial judge retains discretion to impose reasonable limits on cross-examination to protect witness safety or to prevent harassment, prejudice, confusion of the issues, or inquiry that is repetitive or marginally relevant.

Id.

The Court held that the trial court erred in limiting the cross-examination of the sole witness, Edwards. The Court held:

> Petitioner was prevented from asking the witness *any* questions about the terms of his plea agreement, and although the trial judge said defense counsel could ask about motive, the offer was, in reality, a hollow gesture. Where a witness has a "deal" with the State, the jury is entitled to know the terms of the agreement and to assess whether the "deal" would reasonably tend to indicate that his testimony has been influenced by bias or motive to testify falsely.

Id. at 197-98 (emphasis added).

The Court went on to find that the error was not harmless:

> Inasmuch as we conclude that defense counsel was denied the opportunity to cross-examine Edwards, a key prosecution witness, about the condition of Edwards's plea agreement that he testify at Petitioner's trial, *and that agreement was not otherwise made known to the jury*, we conclude that the jury lacked the opportunity to properly assess Edwards's testimonial motivation or potential bias.

Id. at 199 (emphasis added).

Here, in contrast, the jury did know that Wilds had a "deal" with the State. Indeed, that "deal" was admitted as State's Exhibit 35 without objection. (2/4/00, 163). Moreover, as explained above, Wilds testified to his understanding of the agreement, i.e., that it was a "truth" agreement, (2/4/00, 162-63, 211), and explained what he knew the possible sentence for accessory after the fact was, which was a cap of five years. (2/4/00, 162-63, 216). Additionally, Syed extensively cross-examined Wilds about the plea agreement. (2/4/00, 164-74, 191-95, 211-20; 2/15/00, 71-79, 83-84, 117-20, 121-25). Moreover, in regard to any suggestion that the jury was not aware that Wilds gave inconsistent statements to police, that complaint is belied by the record which indicates that Wilds was extensively cross-examined concerning these statements to the police, including, but not limited to, the extent to which he may have lied to police. (2/4/00, 220-23, 229-30; 2/10/00, 14-20, 35-62, 66-79, 82-85, 122-31, 133-40, 153-55, 169-77, 185-89; 2/11/00, 65-67, 70-84, 87-88, 93-102; 2/14/00, 40-52, 58, 61-79, 88-93, 97-103, 113-117, 120, 128-29, 136-144, 154-56; 2/15/00, 10-23, 27-39, 150-55, 156, 161-62).[20] Additionally, Syed was able to elicit during cross-examination that the

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[20] Furthermore, Detective McGilveary testified that Wilds was at times (continued...)

subject of his prior inaccurate statements to the police were discussed between him and the prosecution team. (2/10/00, 144, 155). Finally, Syed was also able to elicit many of the details concerning the retention of Wilds's attorney, Ms. Benaroya, in front of the jury so that the ultimate fact finders could independently assess whether Wilds thought he was receiving a benefit through her pro bono representation. (2/10/00, 156; 2/15/00, 39-40, 42, 51, 56-65, 127-28, 130-33)

Finally, as to Syed's complaint that the plea agreement cannot be considered legally valid where Wilds had given prior inaccurate statements to police, whether or not the agreement was legally valid, or would be upheld on some subsequent challenge by Wilds, has absolutely no bearing on the question under the Sixth Amendment of whether Syed was able to confront a witness against him, nor does it show that the State suppressed exculpatory material information. The jury knew, over and over again, that Wilds lied to police when he was first questioned. That goes directly to considerations of Wilds's credibility. Whether he had entered into a legally binding plea agreement, as opposed to whether he knew he had to tell the truth in order to get the benefit of that agreement, was not relevant to establish bias, motive to falsify, or anything else bearing on Wilds's credibility. Thus, Syed's claims that there was a *Brady* violation and that the trial court restricted his cross-examination are simply without merit.

C. The trial court properly exercised discretion in ruling that Syed could not call the prosecutor to testify regarding the same matters testified to by Jay Wilds.

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[20](...continued)
inconsistent and had lied to police. (2/18/00, 133-35, 166-69).

Returning to the remainder of Syed's evidentiary complaints, in the middle of the second day of cross-examination of Wilds, Syed asked to voir dire Wilds outside the presence of the jury, and in the absence of Mr. Urick. (2/10/00, 162-64). Notably, Syed's counsel claimed that this information concerning whether Urick assisted Wilds in obtaining counsel was a surprise, but informed the court:

> I will confess to you I've thought this for a long time but never, ever once did I ever think that they would say it, that I would ever be able to prove it.
>
> THE COURT: It being?
>
> MS. GUTIERREZ: That in fact Mr. Urick, the prosecutor of both this witness and my client provided a private lawyer for a witness in connection with a plea bargain and that having done so revealed the plea bargain without revealing the true benefit of having a lawyer.

(2/10/00, 162).

The court ruled that Syed could continue to inquire along these lines with Wilds, but it would not hold a voir dire proceeding outside the presence of both the jury and the prosecutor. (2/10/00, 166). The next day at trial, further argument was heard on the matter, and Syed informed the court that he was not requesting a mistrial. (2/11/00, 7). Syed wanted to call the prosecutor, Mr. Urick, to testify in front of the jury, and the court indicated that whatever information Syed wanted to obtain about the circumstances surrounding the plea agreement could be made by inquiring of Wilds's counsel, Ms. Benaroya, and not the prosecutor. (2/11/00, 9). Syed continued

to request that Mr. Urick take the stand in front of the jury. (2/11/00, 13).[21] Syed argued that providing Wilds with *pro bono* representation was a benefit, that went to the witness's credibility. (2/11/00, 12). The prosecutor responded that he believed that "assistance of counsel is a fundamental right under our constitution, hence it is not a benefit it is a right." The trial court disagreed with the prosecutor's argument that suggesting that Wilds obtain a certain counsel who would provide *pro bono* representation could not be perceived as a benefit, stating:

> As you said, but the benefit is still one which counsel could argue existed. Whether a jury, a finder of fact, believes in fact he benefited [sic], whether the finder of fact believes that if [sic] effects his credibility is an argument that Ms. Gutierrez will have and I do find that arguably it could be perceived as a benefit, could be.

(2/11/00, 56).

The trial court ruled:

> I find that there must be a compelling reason to call Mr. Urick as a witness in this case in order that you may be afforded the opportunity to challenge the credibility of Mr. Wilds with regard to any deal or benefit derived from the State through the presentation I'll call it, of an attorney for Mr. Wilds. I also find that first you made an argument, a rather compelling presentation of facts. When I say compelling I mean that you have available to you through your very argument to this Court those items in evidence to challenged the credibility of Mr. Wild's testimony with regard to anything Mr. Urick may have

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[21] Syed argued below, "It's a far different matter for the jury to hear Mr. Urick acknowledge that he got the lawyer for the man who's credibility is at the base of his case without which Judge, he has no case." (2/11/00, 13). Thus, contrary to Syed's argument on appeal, (App. Br., 50), it is apparent that the trial counsel for Syed wanted this questioning to occur in front of the jury.

> done to assist. The witness himself, Mr. Wilds provided you with that evidence and you readily used it in your argument to this Court. So I find that you have that availability.
>
> Secondly, you have the availability of calling Ms. Benaroya who I feel would offer you an additional opportunity to present evidence to attack the credibility of Mr. Wilds. For that reason I do not find a compelling reason to call or allow you to call Mr. Urick as a witness in this case and with that, with regard to that motion your motion is denied. . . .

(2/11/00, 22-23).[22]

It has been held that "the trial court is afforded great deference in its rulings on admissibility of evidence and that rulings as to relevancy will not be disturbed on appeal unless there is a clear abuse of discretion." *Ware v. State*, 360 Md. 650, 672-73 (2000), *cert. denied*, 121 S.Ct. 864 (2001). Further, a trial court's exclusion of evidence based on lack of relevancy should not be disturbed unless the finding was an abuse of discretion. *See Tuer v. McDonald*, 112 Md. App. 121 (1996), *aff'd*, 347 Md. 507 (1997); *Holt v. State*, 50 Md. App. 578, 581 (1982) (admission of evidence within the discretion of the trial court). Moreover, even if the proffered evidence was relevant, that would not prevent exclusion:

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[22] Syed notes that the trial court later ruled that he could not call Benaroya, and cites to one page of the trial. (App. Br., 50-51). Notably missing from Syed's brief before this Court is any mention that the trial court conducted an entirely separate hearing on the precise issue whether Benaroya could be called, before ruling that Benaroya's testimony would not be relevant, and would be cumulative to the testimony that Wilds gave before the jury concerning the agreement, stating, in part: "I don't believe this witness offers us any additional information. I don't believe that even if it's relevant that it does anything more than to confuse the jury or could be used to confuse the jury." (2/18/00, 46).

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Maryland Rule 5-403; *see also Tipton v. State*, 39 Md. App. 578, 585 (1978) (even if relevant, trial judge should weigh factors going to probative value, such as likelihood jury may be aroused by emotion or otherwise distracted; that evidence will consume an undue amount of time; and the danger of unfair surprise).

Even if Urick's testimony were relevant, the trial court had the discretion to decide whether to permit that information to come in through the witness on the stand, Wilds. After all, it was Wild's credibility that was at stake, not the prosecutor's. Besides being cumulative to that testimony, it was likely that having the prosecutor take the stand in the middle of the murder trial, not to mention be subject to the order of sequestration, would confuse the issues and ultimately mislead the jury. Thus, the trial court properly exercised discretion in denying Syed's request to call the prosecutor to the stand.

D. If preserved, the trial court properly denied Syed's motion to strike the testimony of Jay Wilds.

Sailing onto another tack, Syed then sought to strike Wilds's testimony, again based on the issue of how Wilds obtained legal counsel. (2/11/00, 31). The court denied the motion to strike, ruling:

> Motion to strike the testimony of Mr. Wilds is denied. However, I'm going to allow Counsel in closing argument to argue the credibility of Mr. Wilds being effected by anything that Mr. Urick may have done in assisting him in getting counsel and that is anything that came out through Mr. Wilds's testimony of what he believed, not what may in fact have

> occurred, but what he believed happened. Because it's his belief that controls his credibility, what he testified to, why he testifies in the way he testifies, why he signed the agreement and why he testified in this case.

(2/11/00, 34).[23]

There is no indication that Syed ever renewed this motion to strike following Wild's continued cross-examination after this ruling on February 10, 2000, nor on February 11, 14, and 15, 2000. Thus, this issue is not preserved as to those trial dates. *See Watkins v. State*, 328 Md. 95, 99-100 (1992) (where a party acquiesces in a court's ruling, there is no basis for appeal from that ruling); *Grandison v. State*, 305 Md. 685, 765, *cert .denied*, 479 U.S. 873 (1986) ("By dropping the subject and never again raising it, [appellant] waived his right to appellate review"). Moreover, even if preserved, the claim is without merit. This Court has stated:

> Assuming, *arguendo*, that the State violated the discovery rules, Maryland Rule 4-263(i) gives a trial court the discretion to fashion remedies for a discovery violation. The purpose of the discovery rules is to "assist the defendant in preparing his defense, and to protect him from surprise."

Rosenberg v. State, 129 Md. App. 221, 259, *cert. denied*, 358 Md. 382 (1999); *see also Johnson v. State*, 360 Md. 250, 265 (2000) (scope of pretrial disclosure mandated by the Rule must be determined in light of these underlying policies).

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[23] As noted in the Statement of Facts, Syed continued cross-examining Wilds for approximately two and a half more days concerning these very matters.

Further, "[t]he question of whether any sanction is to be imposed for a discovery violation, and if so what sanction, is in the first instance committed to the discretion of the trial judge, and . . . the exercise of that discretion includes evaluating whether the violation prejudiced the defendant." *Evans v. State*, 304 Md. 487, 500 (1985), *cert. denied*, 478 U.S. 1010 (1986); *accord Williams v. State*, 364 Md. 160, 178 (2001). Here, it is clear that the trial court properly exercised discretion in denying the motion to strike because the issue of the plea agreement was already before the jury, and Syed elicited that the prosecutor may have assisted Wilds in obtaining counsel. (2/10/00, 156). Further, although Syed claimed surprised, at the bench conference, it is apparent that Syed was not surprised about the issue, but was surprised "that I would ever be able to prove it." (2/10/00, 162). The court fashioned an appropriate remedy, commensurate with any alleged violation, that allowed Syed to argue Wilds's credibility based on the arrangement, because it was Wilds's "belief that controls his credibility." (2/11/00, 34). Thus, the motion to strike was properly denied.

E. The trial court properly exercised discretion in denying Syed's motion to compel.

Syed then made another motion, requesting full disclosure of the manner in which Wilds selected legal representation. (2/11/00, 41-44). The court denied that motion as well, ruling, in part:

> The motion is denied. The information that you are seeking to contain [sic] would be information that Mr. Wilds would have a privilege, that is how he chose a lawyer, the circumstances under which he chose a lawyer. . . .

(2/11/00, 44).

Syed continued to argue that he wanted information regarding the role Mr. Urick played in assisting Wilds obtain representation. (2/11/00, 46). The court stated:

> I understand your point, but as I stated before, I believe the information you wish to obtain can be obtained from another source, is readily available to you and the sum of substance of which has already been provided to you to allow you to adequately challenge the credibility of Mr. Wilds. . . .

(2/11/00, 47).

It has been held that a trial court has inherent discretionary power to compel disclosure of information in control of the State. *See McKenzie v. State*, 236 Md. 597, 602-03 (1964) (no abuse of discretion to deny request for disclosure at trial of written statements of prosecution witnesses, as there was no showing that statements in fact existed or that they were material to case).[24] It is apparent in this case that the trial court did exercise discretion in considering whether to grant Syed's motion to compel discovery of this information. Indeed, in response to further argument on the matter by Ms. Gutierrez, the court crystalized its ruling:

> But the sum of substance of the plea agreement is contained therein. You also have the testimony of Mr. Wilds. Although the information that you have received by way of his testimony is one that has come through a course of a number of days. You've gotten it six or seven days ago on Friday, you got additional information yesterday and I find that you have an adequate amount of information in order so that you can one, prepare your defense and utilize the information.

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[24] Additionally, although not a basis for the lower court's ruling, Md. Rule 4-263 (f) includes a time limit for filing motions to compel discovery, and also suggests that the parties negotiate in good faith prior to a court having to consider a motion to compel.

> Two, challenge the credibility of the witness and utilize the information and three, fashion questions during your cross and in an attempt to get more information and four, if necessary, call an additional witness and have that additional witness provide you with additional information. So, I believe that all of those items are readily available to the Defense, I do not find that in any way it interferes with your client's due process rights or in any way interferes with his ability to have an effective and adequate representation by his attorney on this issue or that you have been in any way harmed by the delay in receiving some bits and parts of that information. That you still have the witness on the stand, that he still can be questioned, that the Court has given you latitude in that regard as well as latitude at some later point to view the tape which I have just directed Ms. Connelly to get because I understand it is available, that there's only one copy. I've also directed Ms. Connelly to get a video machine for your use and during the lunch and recess if you would like to view that tape it will be available for you do that and after reviewing the tape if you fell that there are some additional questions that the tape triggers you are welcome to ask those questions.
>
> But to the extent that I believe I have provided you with an opportunity to address these issues and adequately defend your client I don't believe his rights in any way have been abridged, interfered with or that his due process rights have been abridged or interfered with. That any notice requirements that arguably the benefit that appears to have developed through the testimony can be addressed adequately by your questions and the information that you've received at this time.

(2/11/00, 48-50).[25]

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[25] The court also granted Syed's motion to conduct a hearing whereby Wilds's counsel, Ms. Benaroya, would be questioned outside the presence of the jury. (2/11/00, 50). After that hearing, the court found that Benaroya's (continued...)

F. The trial court properly exercised discretion in denying Syed's request to recall Wilds after five days of cross-examination, and in denying Syed's request to call Wild's attorney as a witness.

Syed also asserts that the trial court erred in not permitting him to recall Wilds to the stand and to call Wilds's attorney, Ms. Benaroya. (App. Br. 43). Following the five days of cross-examination of Wilds, the trial court conducted a hearing, outside the presence of the jury on Syed's request to call Benaroya. (2/18/00, 2-54). Ms. Gutierrez was permitted to ask Benaroya how she came to represent Wilds. Benaroya testified that Mr. Urick had introduced her to Wilds, and Benaroya made the independent determination to represent Wilds. (2/18/00, 4). Benaroya explained that Urick did not ask her to represent Wilds, only to come and meet him. (2/18/00, 5-6). Benaroya testified:

> Not about representing him. I had about – just Mr. Urick had been really, perhaps deliberately vague about what he wanted me to do. He had asked me to come to the office and talk to the young man. That was really about the extent of it. He had not asked me to represent him.

(2/18/00, 5-6).

Benaroya told Wilds that she did pro bono work. (2/18/00, 7). During the two or three hour conversation between Benaroya and Wilds, no one from

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[25](...continued)
testimony was not relevant, would be cumulative, and would confuse the jury. (2/18/00, 46). This was an appropriate evidentiary ruling and the trial court properly exercised its discretion in denying Syed's request to call Ms. Benaroya to the stand. *See* Md. Rule 5-403 (even relevant evidence may be excluded if probative value outweighed by "confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

the State's Attorney's Office bothered them. (2/18/00, 12). Benaroya testified she had no independent knowledge of the case other than what Wilds told her. (2/18/00, 6-7). Benaroya testified that when she spoke to Wilds, he had not yet been formally charged. (2/18/00, 13). When formal charges were filed, Benaroya was representing Wilds. (2/18/00, 14). Benaroya told Wilds she would represent him pro bono. (2/18/00, 15). At some point after she had decided to represent Wilds, Benaroya told Urick that she would be representing Wilds pro bono. (2/18/00, 15).

Benaroya identified her signature on the plea agreement. (2/18/00, 24). Benaroya testified that the only change in the plea agreement was to boiler plate language in the standard form regarding narcotics cases, and this was not a narcotics case. (2/18/00, 25-26). Benaroya then testified that it was her understanding that there was a mutual right to withdraw the plea. (2/18/00, 27). She testified that the State could withdraw the agreement if Wilds testified untruthfully at trial. (2/18/00, 28). It was also her understanding that Wilds could withdraw the plea, and that information was passed on to Wilds. (2/18/00, 32). Benaroya told Wilds he could withdraw the plea in a hearing in front of Judge McCurdy. (2/18/00, 33).[26] Benaroya testified that the in chambers hearing before Judge McCurdy was to address Wilds's concerns, and that "if this gentleman did not want to continue in this, he had absolutely the right to withdraw the plea and he would be put right where he was before he had met me." (2/18/00, 34-35). At the conclusion of this hearing, Wilds

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[26] Pursuant to Md. Rule 4-242 (g), "[a]t any time before sentencing, the court may permit a defendant to withdraw a plea of guilty or nolo contendere when the withdrawal serves the interests of justice."

wanted to continue pursuant to the plea and wanted Benaroya to remain as his attorney. (2/18/00, 35-36).

Ms. Gutierrez then began inquiry into privileged communications between Benaroya and Wilds, and the court interrupted, informing Benaroya, who had been sequestered as a witness called by the defense, that her client had not waived his attorney-client privilege. (2/18/00, 39-40). Syed's counsel then began questioning Benaroya on whether withdrawal of the plea by Wilds was some sort of "side" agreement, and the court found that Benaroya's testimony would be cumulative and irrelevant. The court ruled, in part:

> Everything that you're talking about is already in front of the jury. In fact, the "it smelled fishy" is in front of the jury, and this witness –
>
> MS. GUTIERREZ: No, Judge. I think if you let me continue, what this witness will say is that she negotiated that benefit, the right to absolutely withdraw the plea at his option, with Mr. Urick on the 7th.
>
> THE COURT: It's already before the jury.
>
> MS. GUTIERREZ: No, Judge, it is not.
>
> THE COURT: The defendant's –
>
> MS. GUTIERREZ: Mr. Wilds did not testify to that.
>
> THE COURT: Mr. Wild's understanding of the plea, the plea that doesn't exist, the plea that's not really a guilty plea, the plea where the statement of facts has not been entered, the one that really isn't a guilty plea even if we want to call it a guilty plea, that thing, *that hearing he believes it to be a guilty plea.*
>
> He believes it was hearing based on a truth agreement.

MS. GUTIERREZ: Just I'm not disputing –

THE COURT: And all of that is in front of the jury. It's all there. You already have it. It's in, you can argue it.

MS. GUTIERREZ: Judge, the deal is not there, the plea agreement is before the jury as being the only deal that obligates Mr. Urick and Mr. Wilds. And that is a lie. And the lie is not in front of the jury. That is, that there is a little side deal that was negotiated at the same time as the plea.

THE COURT: *Ms. Gutierrez, that is not a side deal because, as a matter of law, as a matter of law, it doesn't matter what Mr. Urick and Ms. Benaroya and the defendant agreed to. The Court is not bound by his piece of paper. The Court is bound by the law.*

And the law says that if it was a guilty plea, if it was a guilty – and I say "if," – *if it was a guilty plea, the law says he can withdraw it.* And Mr. Urick can't give a benefit that he doesn't have to give. It's not his benefit.

(2/18/00, 42-44) (emphasis added).

Syed continued to request that Benaroya be called as a witness to testify concerning negotiations over the plea agreement. The court concluded:

I don't believe this witness offers us any additional information. I don't believe that even if it's relevant that it does anything more than to confuse the jury or could be used to confuse the jury.

And for that reason, I don't believe that it's going to be appropriate and it is not going to be permitted in this case.

(2/18/00, 46).

The next trial date, Syed informed the court that he wanted to recall Wilds for further examination. (2/22/00, 61). Syed wanted to inquire whether

Wilds could withdraw his plea agreement after September 7, 1999, which Syed continued to argue was a "side deal" and a benefit of the bargain. (2/22/00, 63-65). The court ruled that all the appropriate information there was to be had about the plea agreement was before the jury:

> As I indicated previously, I believe that calling Ms. [Benaroya] would not be appropriate and it would just take us off on a needless presentation of evidence. And I would find that the credibility of Mr. Wilds has been exhausted. The ability to cross-examine him and bring out those things that might have affected his testimony and his credibility was done, and I believe that clearly it was what was in the mind of the Defendant at the time that he – the Defendant meaning Wilds – entered into this agreement, and he testified as to that. He's not a lawyer, he doesn't know what the Rules of Maryland provide, that even with a guilty plea and even if he signed something, that a judge could allow him to withdraw his plea under circumstances where the Court determined it would be appropriate. . . .

(2/22/00, 74).[27]

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[27] Wilds testified before the jury previously that he understood the plea agreement to be a "truth agreement," and that if he held up his end of the deal, the State would recommend a certain disposition. (2/4/00, 163, 217) He testified that he understood that if he held up his end of the bargain, the State would recommend a sentence of five years, with all but two years suspended, and that, if the State was not satisfied, it would recommend five years in prison for Wilds. (2/15/00, 121-23). He also testified before the jury that at some point, Judge McCurdy did ask Wilds if he wanted to withdraw the plea agreement. (2/11/00, 202, 208-09). Wilds testified he did not indicate that he wanted any such alteration or withdrawal of the plea. (2/11/00, 162-63). It is apparent that by these responses Wilds believed he had entered into a valid plea agreement, and that, by the fact of Judge McCurdy asking if he wanted to withdraw the plea, that he knew he could withdraw if he so chose. Thus, all these facts were before the jury.

It is clear that the trial court properly exercised discretion in considering whether Syed could call Benaroya and recall Wilds. The court conducted a hearing outside the presence of the jury, and at the conclusion, determined that Benaroya's testimony added nothing to the case that was not already before the jury. *See* Md. Rule 5-403 (even relevant evidence may be excluded if probative value outweighed by "confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). Further, as to Syed's repeated insistence that there was some sort of "side deal" whereby Wilds could withdraw his plea at any time, the law specifically allows withdrawal of a guilty plea at any time before sentencing in "the interests of justice." Md. Rule 4-242 (g). Because the law permits withdrawal of a plea, that is not a benefit that requires disclosure, and the trial court properly exercised its discretion in denying Syed's request to recall Wilds and to call Benaroya. *See Thomas v. State*, __ Md. App. __, No. 255, Sept. Term, 2001 (filed March 1, 2002) (slip op. at 9) (the conduct of the trial "must of necessity rest largely in the control and discretion of the presiding judge," and an appellate court should not interfere with that judgment unless there has been error or clear abuse of discretion) (citing *Wilhelm v. State*, 272 Md. 404, 413 (1974); *Simpson v. State*, 121 Md. App. 263, 283 (1998)); *see also Oken v. State*, 327 Md. 628, 669 (1992) ("the scope of examination of witnesses at trial is a matter left largely to the discretion of the trial judge and no error will be recognized unless there is a clear abuse of discretion"), *cert. denied,* 507 U.S. 931 (1993).

G. The trial court properly denied Syed's request to call Elizabeth Julian as a witness to testify to the process by which a charged defendant applies for representation from the Public Defender.

Syed next argued that he wanted to call Ms. Elizabeth Julian, a member of the Office of the Public Defender, in order to testify that it was unusual for a prosecutor to recommend a lawyer for a State's witness. (2/23/00, 217). The court clarified, again, the testimony at trial. (2/23/00, 219). The court reiterated that Wilds testified he had contacted the Public Defender's Office before he was charged and was informed they could not represent him until he was charged. (2/23/00, 219). The court then indicated there was no further testimony by Wilds that he ever tried to contact the Public Defender's Office again. (2/23/00, 219). Syed then misrepresented the testimony, as he does on appeal, and claimed that the day he came to enter the plea, "a lawyer was provided to him by a prosecutor." (2/23/00, 219; App. Br. at 48). The court stated, "[t]hat wasn't what the testimony was." (2/23/00, 219). The facts established that Benaroya had not decided whether or not to represent Wilds, and Wilds had not decided at that time to accept Benaroya as his attorney. (2/23/00, 219). The trial court disagreed with Syed's characterization and stated, "to say that the State provided the lawyer assumes Mr. Wilds had no say in the decision." (2/23/00, 220). The court also noted that perhaps Ms. Julian's testimony would have been relevant "[i]f they called the public defender," and Wilds "didn't call the public defender." (2/23/00, 222). Further argument on the matter ensued, with Syed's attorney arguing that even the fact of the prosecutor introducing Benaroya to Wilds and vice versa was unusual, and that Ms. Julian would testify as to the manner in which

defendants charged with crime seek representation from her office. (2/23/00, 230-32). The trial court denied the request, ruling:

> Well, I think you're absolutely right, it doesn't resolve the issues, and I think the issues that we're discussing right now are for another day and another proceeding. It has nothing to do with Mr. Syed because I don't find that asking Ms. Julian any questions about what could have happened, what might have happened, what should have happened on a day that did not occur because Mr. Wilds did not choose to utilize the Office of the Public Defender – he did not choose to do that, that was his decision. He's testified already about his decision and why he made it and was cross-examined at length about why he did that. . . .
>
> For Ms. Julian, who had no contact with Mr. Wilds, to come in and talk about what could have, should have, might have happened had Mr. Wilds decided to make application to the Public Defender's Office is not relevant to this proceeding because he did not decide to do that. In fact, he decided not to do that by his decision to take the attorney that he interviewed, he questioned, and decided that he wanted. And to have Ms. Julian come in serves no purpose in the interest of justice or a furtherance of this case. . . .

(2/23/00, 237-39).

Ms. Gutierrez continued to argue the trial court's ruling, and the trial court responded as follows:

> THE COURT: Why don't I state it very clearly? Whether or not the prosecutor having a defense attorney in his office through which a defendant might decide or not to decide to utilize the pro bono services of that lawyer, and that lawyer deciding to or not to represent that defendant, that circumstance being rare or not might be relevant, but I am finding is going to be excluded because I find that the probative value is substantially outweighed by confusing the issues and misleading the jury. It also is needless presentation of what I find to be

cumulative evidence. You have the facts in front of you which you can argue in closing.

MS. GUTIERREZ: Does the Court –

THE COURT: You have the fact that Mr. Urick was there. You have the fact that Mr. Wilds decided at the same time that he was presented with the plea agreement. You have the fact that he read through that and Ms. [Benaroya] was there. She was available. He decided, after talking to her and meeting with her, for whatever reason, to have her as his lawyer. You have before the jury all of that information which you can argue whatever inferences you want to argue are established by that evidence. You can argue that that's a benefit. You have the plea agreement which talks about the role of the state's attorney. You have the fact that it's signed by Mr. Urick and you can argue all the clauses that allow the State to do whatever the State could do if they don't like the way Mr. Wilds testified, and all the things that are contained.

All of that evidence you currently have before you by the witnesses who have testified. If you want to argue that, you are well within your right to argue that in closing, but you're not going to bring in collateral witnesses who don't have any personal knowledge to add to those facts, who have never talked to Mr. Wilds on this issue, nor Ms. [Benaroya] on this issue, who have no first hand knowledge.

And, in fact, whether this be rare or not, I find that even if it's relevant that it's rare, the evidence may be used improperly by this jury. So that the inferences stand as what they are and they can be argued by you or by the State or by both of you.

(2/23/00, 241-43).

Ms. Gutierrez continued to argue over the court's ruling and indicated that Ms. Julian would be called to testify that the introduction of Benaroya to

Wilds was "rare." (2/23/00, 244). The court issued a final ruling on whether it would permit Syed to call Ms. Julian:

> In order to assist counsel, let me make myself clear. Any witness that talks about the rareness of the procedure used in obtaining a lawyer that was present in the State's Attorney's Office and available to a defendant is not going to be admitted in this case, it will be excluded under 5-403.

Wilds testified before the jury that he spoke with the Public Defender's Office, but they would not provide him with representation until he had been charged. (2/15/00, 39-40). He explained that on the day that he met the prosecutor, the prosecutor informed him that he had someone he wanted Wilds to meet. (2/15/00, 58-59). After meeting with Benaroya, Wilds testified that he felt he had a choice in selecting his own attorney. (2/15/00, 148).

Further, as to any concern that the introduction between Wilds and Benaroya was rare, such an inference could have been properly drawn by Wilds's own testimony that he initially thought, after the plea hearing, that something "smelled fishy."(2/15/00, 130-33). The jury heard Wilds testify that, at some point, he thought Urick had provided him with a lawyer. (2/15/00, 127-28). Wilds also testified that he thought there might have been a conflict, and that, he was unsure if Benaroya had been brought in more for the prosecutor's benefit than for his. (2/15/00, 130-33). At the end of the day, however, Wilds was satisfied with Benaroya's representation. (2/15/00, 148).

There is no indication that Wilds ever contacted the Public Defender's Office after he was charged, and after he selected Benaroya to represent him. Thus, Ms. Julian's proffered testimony concerning the procedures by which a criminally charged, financially eligible, individual applied to the Public Defender's Office for representation was not relevant where Wilds did not

formally apply after he had been charged. Moreover, as for whether or not the procedure was "rare," the jury had before it testimony from Wilds himself that he thought, at some point, that things "smelled fishy." Ultimately, the trial court's decision pursuant to Md. Rule 5-403 in denying Syed's request to call Ms. Julian, a person with absolutely no personal knowledge of the case, was a proper exercise of discretion.

H. There was no prosecutorial misconduct in Syed's trial and Syed was not prejudiced by any belated disclosures of information concerning State's witness, Jay Wilds.

Finally, the last matter left unaddressed in this first issue is whether the prosecutor's actions herein constituted prosecutorial misconduct. This Court recently held:

> With respect to prosecutorial misconduct generally, actual prejudice must be show before the sanction of dismissal or reversal of a conviction can be properly imposed. *See Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988); *United States v. Hasting*, 461 U.S. 499 (1983); *United States v. Brockington*, 849 F.2d 872 (4th Cir. 1988). Even deliberate or intentional misconduct may not serve as grounds for dismissal absent a finding of prejudice to the defendant. *See United States v. Derrick*, 163 F.3d 799 (4th Cir. 1998).

State v. Deleon, __ Md. App. __, No. 866, Sept. Term, 2001 (filed April 3, 2002) (slip op. at 28).

Here, there was no actual prejudice because Syed was provided more than ample opportunity to cross-examine Wilds over five days of examination and was able to elicit all relevant information concerning the plea agreement and the manner in which he was introduced to Ms. Benaroya. In sum, the trial court properly exercised discretion in its evidentiary rulings with respect to Jay

Wilds, and there was no Brady violation given that all issues argued on appeal by Syed were completely before the jury prior to deliberations.

II.

THE TRIAL COURT PROPERLY EXERCISED DISCRETION IN PERMITTING A WITNESS TO READ A PORTION OF A LETTER WRITTEN BY THE VICTIM AND ADDRESSED TO SYED.

In his second issue presented, Syed claims that the trial court erred in permitting a witness to read a letter from Hae Lee to Syed, on the ground that "[t]he hearsay letter of the victim allegedly written over two months before her disappearance does not fall under any exception to the hearsay rule." (App. Br. 53-54). This argument is without merit.

At trial, Aisha Pittman, a friend of both Hae Lee and Syed, testified that the front of State's Exhibit 38 was a letter from Hae to Syed, and the back of that letter contained notes between Syed and Pittman. (1/28/00, 242-243).[28] After the exhibit was identified by Pittman, and when the State moved to introduce the letter, Syed objected generally to its admission. (1/28/00, 243). The trial court noted the objection, then asked that a time frame be established as to when the letter was written. (1/28/00, 243). Pittman testified the letter was written early November. (1/28/00, 244). The letter was admitted over objection. (1/28/00, 244). When the State asked to read the letter, Syed again

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[28] Pittman testified that the handwriting in pen on the back was Syed's, and that the handwriting in pencil was hers. (1/28/00, 243). Written in pen on the back was "I am going to kill." (1/28/00, 248). Pittman testified that phrase was not on the back of the letter when she was writing notes back and forth to Syed. (1/28/00, 253). On appeal, Syed does not challenge the admissibility of the back of the letter. Syed's complaint is as to the writings by the victim, Hae Lee.

objected to the witness reading the letter and preferred that the jurors be permitted to read it. (1/28/00, 245). The court permitted the witness to read from the exhibit. (1/28/00, 245-46).[29]

Pittman then read from the front of the letter as follows:

> A. "Okay. Here it goes. I'm really getting annoyed that this situation is going the way it is. At first I kind of wanted to make this easy for me and for you.
>
> "You know people break up all the time. Your life is not going to end. You'll move on and I'll move on. But apparently you don't respect me enough to accept my decision.
>
> "I really couldn't give damn [sic] about whatever you want to say. With the way things have been since 7:45 am this morning, now I'm more certain that I'm making the right choice.
>
> The more fuss you make, the more I'm determined to do what I gotta do. I really don't think I can be in a relationship like we had, not between us, but mostly about the stuff around us.
>
> I seriously did expect you to accept, although not understand. I'll be busy today, tomorrow, and probably till Thursday."
>
> THE COURT: Is there something that you cannot read?

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[29] Although Syed did not specifically object on the grounds of hearsay, it is apparent that the general objection preserves the issue for appeal. *See State v. Jones*, 138 Md. App. 178, 218 (2001) (if a general objection is made, and neither the court nor a rule requires otherwise, it "is sufficient to preserve all grounds of objection which may exist") (quoting *Grier v. State*, 351 Md. 241, 250 (1998)), *cert. granted*, 365 Md. 266 (2001) (argued December 3, 2001).

THE WITNESS: There is.

THE COURT: Then say, "There's something I cannot read."

THE WITNESS: There's something I can't read. "Other things to do. I better not give you any hope that we'll get back together. I really don't see that happening, especially now.

I never wanted to end like this, so hostile and cold, but I really don't know what to do. Hate me if you will, but you should remember that I could never hate you."

Signed, "Hae."

(1/28/00, 246-47).

Here, the letter was admissible under two alternate theories: (1) it was nonhearsay entered to show that Hae Lee and Syed had been in a prior relationship; and/or (2) it was evidence tending to show Hae Lee's future action of ending that relationship under Maryland Rule 5-803 (b) (3). Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Maryland Rule 5-801 (c). An out-of-court statement is admissible if it is not being offered for the truth of the matter asserted or if it falls within one of the recognized exceptions to the hearsay rule. *Conyers v. State*, 354 Md. 132, 158 (1999). In *Conyers*, the Court quoted from McLain on Evidence and stated that:

> Statements offered, not to prove the truth of the matters asserted therein, but as circumstantial evidence that the declarant had knowledge of or believed certain facts or had a particular state of mind, when that knowledge, belief, or state of mind is relevant, are nonhearsay.

Conyers, 354 Md. at 159.

Only if the statement is offered for the truth of the thing asserted is the credibility of the declarant called into question. *Holland v. State,* 122 Md. App. 532, 544, *cert. denied*, 351 Md. 662 (1998). Thus, if a statement is not offered for the truth of the matter asserted, the credibility of the declarant is irrelevant, and the admission of the statement does not implicate the Confrontation Clause. An out-of-court statement is nonhearsay if it is offered as narrative background or to explain a witness's actions. *See, e.g., Holland,* 122 Md. App. at 542 (the recounting of the statement, "[t]here they are," was nonhearsay and simply provided narrative background as to why the police officer arrested the appellant when he did); *Williams v. State,* 99 Md. App. 711, 725 (1994) (witness's recounting of statement made by the person being arrested would have been nonhearsay if offered to show the circumstances surrounding the attempted arrest at issue), *aff'd on other grounds*, 344 Md. 358 (1996).

Here, the letter established circumstantially that Syed and Hae Lee were in a boyfriend/girlfriend relationship. That they were in a relationship that ended tends to show, circumstantially, that Syed had a motive to kill Lee. "Motive is the catalyst that provides the reason for a person to engage in criminal activity." *Snyder v. State*, 361 Md. 580, 604 (2000) (evidence that the petitioner and victim had a "stormy" relationship, and that there was a fight between the two one night before the murder was "probative of a continuing hostility and animosity" toward the victim and therefore, of motive to murder); *see also Brown v. State*, 359 Md. 180, 184 (2000) (finding that purpose of murdering pregnant mistress was not wanting wife to discover infidelity); *Watkins v. State*, 357 Md. 258, 261-62 (2000) (determining that purpose of

robbery was greed); *Johnson v. State*, 332 Md. 456, 471 (1993) ("Like intent, motive is a mental state, the proof of which necessarily requires inferences to be drawn from conduct or extrinsic acts."); *Jones v. State*, 182 Md. 653 (1944) (evidence of previous quarrels and difficulties between a victim and a defendant is generally admissible to show motive)

Furthermore, the letter was admissible to show Hae Lee intended to end the relationship between herself and Syed. Maryland Rule 5-803 (b) (3) provides for an exception from the hearsay rule for :

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

This exception "is not monolithic, but embraces two subspecies: 1) a declaration of present mental or emotional state to show a state of mind or emotion in issue, and 2) a declaration of intention offered to show subsequent acts of declarant." *Gray v. State*, 137 Md. App. 460, 500 (2001) (quoting *Robinson v. State*, 66 Md. App. 246, 257 (1986)), *rev'd on other grounds*, __ Md. __, No. 37, Sept. Term, 2001 (filed April 11, 2002). "Generally speaking, the scope of examination of witnesses at trial is a matter left largely to the discretion of the trial judge and no error will be recognized unless there is an abuse of such discretion." *Oken v. State*, 327 Md. 628, 669 (1992), *cert. denied*, 507 U.S. 931 (1993). The textbook case on future intent is *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892), wherein the Supreme Court held: "The existence of a particular intention in a certain person at a certain

time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be." *Id.* at 295. In *McCray v. State*, 305 Md. 126 (1985), the Court of Appeals reaffirmed that:

> evidence of declarations of a plan, design or intention presently entertained by the declarant is, subject to the usual limitations as to remoteness in time and apparent sincerity common to all declarations of mental state, admissible when offered as evidence that the design was carried out by acts or omissions of the declarant.

Id. at 140; *see also* Lynn McLain, *Maryland Rules of Evidence* § 5-803, at 237 (1994) (Rule 5-803 codifies *Hillmon* in that "it approves the admissibility of the declarant's statement of intent, to prove the declarant's future action[.]"; *Kirkland v. State*, 75 Md. App. 49, 55-56 (1988) ("The *Hillmon* Doctrine allows the trial court to admit [defendant's] statement as circumstantial evidence that he carried out his intention and performed the act.").

This Court has stated that "[u]nder this exception, certain forward-looking statements of intent are admissible to prove that the declarant subsequently took a later action in accordance with his stated intent." *Farah v. Stout*, 112 Md. App. 106, 119 (1996), *cert. denied*, 344 Md. 567 (1997); *Carlton v. State*, 111 Md. App. 436, 445 (rule retains common law hearsay exception for "statements of a declarant's present state of mind that looks to the future"), *cert. denied*, 344 Md. 328 (1996); *see also Gray*, 137 Md. App. at 500 (murder victim's statements of "her then-existing intention to tell [defendant] that she wanted a divorce were admissible to prove that she did so."); *Case v. State*, 118 Md. App. 279, 283-85 (1997) (evidence that victim

had made statements that indicated her fear of appellant were relevant and admissible on issue of whether victim's death was an accident or a homicide).

Thus, the letter tended to establish that Hae Lee carried through with her statements and did, in fact, end the relationship with Syed. The fact that there may be other evidence which also established that Syed and Lee ended their relationship is of no moment. "Evidence is relevant (and/or material) when it has a tendency to prove a proposition at issue in the case." *Johnson v. State*, 332 Md. 456, 474 n.7 (1993). Further, a ruling on the relevance of evidence is "a matter which is quintessentially within the wide discretion of the trial judge." *Best v. State*, 79 Md. App. 241, 259, *cert. denied*, 317 Md. 70 (1989); *see also Snyder v. State*, 361 Md. 580, 591 (2000) ("[A] party seeking to establish the relevancy of proffered evidence does not have to demonstrate that the evidence is weighty enough to carry that party's burden of persuasion."); *Ware v. State*, 360 Md. 650, 672-73 (2000) (holding that statement by appellant asking person if he was "bulletproof," was properly admissible), *cert. denied*, 121 S.Ct. 864 (2001). Here, the letter was probative to an issue in the case, whether Syed had a motive to strangle Hae Lee to death based on the end of their relationship. The trial court properly exercised its discretion in admitting the evidence.

Moreover, any error was harmless beyond a reasonable doubt. *See Dorsey v. State*, 276 Md. 638, 659 (1976) (error will be harmless when reviewing court, upon independent review, is able to declare a belief beyond a reasonable doubt that there is no reasonable possibility that the error contributed to the verdict). The fact that there was a prior relationship between Syed and Hae Lee, a relationship which was established repeatedly throughout the trial by other evidence. (1/28/00, 140-41, 217-24; 1/31/00, 25-27; 2/3/00,

85-88; 2/16/00, 298-305; 2/17/00, 6-14, 24-30, 34-57, 119-21, 260-65; 2/23/00, 142). Additionally, that they broke up prior to the murder, in part due to differences over religion, was also repeatedly established at trial. (1/28/00, 140-42, 145, 218, 221-25; 1/31/00, 30-31; 2/3/00, 88; 2/16/00, 300-01; 2/17/00, 37-62; 2/23/00, 144-45). Thus, any error in letting the witness read the letter was harmless beyond a reasonable doubt.

III.

IF PRESERVED, THE TRIAL COURT PROPERLY EXERCISED DISCRETION IN ADMITTING THE VICTIM'S DIARY INTO EVIDENCE.

Syed's final contention on appeal is that the court erred by admitting Hae Min Lee's diary. (App. Br. 55). The issue is not preserved, and is without merit in any event. At trial, Hae Min Lee's brother, Young Lee, testified that State's Exhibit Number 2 was Hae Lee's diary. (1/28/00, 31). The diary was offered into evidence, without objection. (1/28/00, 32). Thus, this issue simply is not preserved for appellate review. *See* Md. Rule 4-323 (a) (requiring a timely objection when evidence offered); *Conyers v. State*, 354 Md. 132, 149-50 (1999) (relying on Rule 4-323 which describes the proper method for making objections at trial), *cert. denied*, 528 U.S. 910 (1999); *see also Caviness v. State*, 244 Md. 575, 578 (1966) (observing that "unless a defendant makes timely objections in the lower court or makes his feelings known to that court, he will be considered to have waived them and he can not now raise such objections on appeal"); *Davis v. State*, 189 Md. 269, 273 (1947) ("[S]ome objection [must] be made and . . . the court [must] rule upon the question. In the absence of such a ruling there is nothing for the Court of Appeals to review."); *Leuschner v. State*, 41 Md. App. 423, 436 (1979)

(holding that "[i]t is axiomatic that to preserve an issue for appeal some objection must be made or a party will be deemed to have waived an objection"); *Gaylord v. State*, 2 Md. App. 571, 575 (1967) (declaring that "a defendant in a criminal prosecution cannot raise for the first time on appeal an objection which was available to him at the trial and which he did not raise below).

Syed seeks to argue that the claim is preserved where, nineteen days later, counsel objected to a witness's reading of portions of the diary. (App. Br. 56-57).[30] Syed's objection to the witness's reading of excerpts from the diary is a general objection, and there is no indication why, nineteen days after the diary had been admitted without objection, Syed was objecting on this occasion. Nevertheless, even if a general objection was sufficient, general objections must still be timely. *See* Md. Rule 4-323 (a); *Conyers,* 354 Md. at 149-50; *see also Vandegrift v. State*, 82 Md. App. 617, 637-38 (objection to introduction of chemist's report came too late since a witness had already testified to its contents without objection), *cert. denied*, 320 Md. 801 (1990); *Grant v. State*, 76 Md. App. 165, 171-72 (1988) (although counsel objected on the grounds of hearsay by the time the evidence was offered into evidence, three other witnesses had already testified as to its contents), *rev'd on other grounds*, 318 Md. 672 (1990); *Holloway v. State*, 26 Md. App. 382, 389-96 (although error to admit third statement, since two earlier statements entered

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[30] Syed also indicates that the issue of the diary was before the lower court based on the State's pre-trial motion to admit excerpts from the diary. (App. Br. 58). Notably, that motion was filed before the first trial, and, in that first trial, Syed indicated he had no objection to the admission of the diary, so long as it was admitted in its entirety. (12/8/99, 9).

without objection, any error was harmless beyond a reasonable doubt), *cert. denied*, 276 Md. 745 (1975).[31]

Additionally, Syed points to an entirely different exchange, not dealing whatsoever with the diary, concerning the question of whether Hope Schab's testimony as to what Hae Lee told her, and what Syed told her, was inadmissible hearsay. (App. Br. 58). Syed's complaint with respect to Schab's testimony is that "the trial court previously ruled that hearsay of the victim is admissible." (App. Br. 57). Syed objected to Schab's testimony on the grounds of hearsay, that it was remote, that it was prejudicial, and that it was not relevant to establish motive. (1/28/00, 135-37).[32] First of all, Syed's objection to Schab's testimony is not even remotely an objection to the admissibility of the diary. *See Klauenberg v. State*, 355 Md. 528, 541 (1999) ("It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal"). The

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[31] Moreover, and not mentioned by Syed in his brief, although during this exchange with Warren, Syed objected to reading of the excerpts from May 14, 1998 and May 15, 1998, there was no objection when Warren read from other excerpts, including January 2, 1999, January 6, 1999, and January 12, 1999. (2/16/00, 305-11; 2/17/00, 138). This is further evidence of waiver of the issue.

[32] Notably, Syed does not cite the passage where counsel argued Schab's testimony concerning whether Hae Lee and Syed ended their relationship at Halloween was to tenuous to establish motive because "their own evidence that they've already put in indicates that they were still and item – the diary of Hae Min Lee – that they were still an item far into the third week of December, a period long past the time period that he's speaking of." (1/28/00, 135). This passage further supports Appellee's position that Syed did not object to admission of the diary at trial.

testimony of Schab came after the diary had been admitted without objection. Even if it somehow could be considered related, it is still an untimely objection and does not preserve the issue of whether the diary previously admitted without objection was admissible. *See Grant, supra*, 76 Md. App. at 171-72; *see also Vandegrift, supra*, 82 Md. App. at 637-38; *Holloway, supra*, 26 Md. App. at 389-96. Finally, Syed himself introduced evidence from the diary during his cross-examination of Deborah Warren. (2/17/00, 93-94). *See Hunt v. State*, 321 Md. 387, 433 (1990), *cert. denied*, 502 U.S. 835 (1991) ("a party waives his objection to testimony by subsequently offering testimony on the same matter"). Thus, the issue of admissibility of the victim's diary is not even remotely preserved for appellate review.

Moreover, even if preserved, the argument is without merit. On appeal, Syed points to no specific passage in the diary which he argues was hearsay; instead he argues generally that several passages "reflect in great detail Hae's feelings for Appellant, and how she was in love with Appellant, her own fear of being apart from him, and her anguish over the fact that dating is against Appellant's religious beliefs." (App. Br. 60). Syed's complaint is that these non-specified "entries" constitute inadmissible hearsay. (App. Br. 61).

In support of that argument, Syed relies upon *Banks v. State*, 92 Md. App. 422 (1992). Although *Banks* does discuss whether statements of a fear by a victim constitute, *inter alia*, nonhearsay, one of the bases for admission of the diary, the Maryland Rule which was at issue in *Banks* was Md. Rule 5-803 (b) (1), dealing with present sense impressions, and not Md. Rule 5-803 (b) (3), concerning then existing mental, emotional, or physical condition, the exception at issue in the case *sub judice*. *Banks*, 92 Md. App. at 436.

In *Banks*, the State attempted to introduce statements of the "victim at various times prior to his death, of fear of his killer." *Banks*, 92 Md. App. at 426. The State argued that the statements were admissible as "verbal acts," as nonhearsay to show the state of mind of the victim at the time he was stabbed, or as present sense impressions, pursuant to a different subsection of Md. Rule 5-803, and thus an exception to the rule against hearsay. *Id.* at 432-36. This Court rejected the argument that the statements of fear of appellant were verbal acts, because verbal acts are "operative legal facts which constitute the basis of a claim, charge or defense," and the fact that the victim made the statements, without more, did not establish their relevance. *Id.* at 432-33. This Court also ruled that, under the nonhearsay argument, even if the statements were not offered for their truth, but rather of the victim's state of mind establishing fear of appellant, the evidence of the victim's fear was irrelevant to the commission of the crime. *Id.* at 434-35. Finally, this Court rejected the notion that the statements established the present sense impression exception to hearsay because most of the statements at issue did not concern present sense impressions, and in the one that did arguably concern such an impression, there was nothing to indicate that the statement was made when the victim "was perceiving the event or immediately thereafter." *Id.* at 437.

In contrast, the diary was admitted, without objection, under either the theory that it was nonhearsay, or was an exception pursuant to Md. Rule 5-803 (b) (3). Unlike the situation in *Banks*, and looking to Syed's own description describing the contents of the diary, (App. Br. 60), the diary did not reflect any fear that Hae Lee believed Syed would harm her or kill her. The diary was relevant to establish circumstantially that Syed and Lee had been in a prior relationship. Thus, the diary was admissible as nonhearsay.

Additionally, Maryland Rule 5-803 (b) (3) provides for an exception from the hearsay rule for :

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), *offered to prove the declarant's then existing condition* . . . (emphasis added).

Under this exception, the diary was admitted to show Hae Lee's then existing mental and emotional condition, *i.e.*, that she and Syed were involved in an emotional relationship. In response, Syed asserts that the fact that the break up between Syed and Hae Lee was over religion, and that Hae had been dated another man was uncontested at trial. (App. Br. 61). Whether the issue was uncontested is of no moment. The question is whether the admission of the evidence was relevant. See *Johnson*, 332 Md. at 474 n.7 ("Evidence is relevant (and/or material) when it has a tendency to prove a proposition at issue in the case"). Thus, the diary was properly admitted at trial.

Recognizing the preservation problem present here, Syed seeks to have this Court invoke plain error review. Plain error is "error which vitally affects a defendant's right to a fair and impartial trial."*Cook v. State*, 118 Md. App. 404, 411-12 (1997) (quoting *State v. Daughton*, 321 Md. 206, 211 (1990)), *cert. denied*, 349 Md. 234 (1998). The appellate courts review only those very rare cases that are "'compelling, extraordinary, exceptional, or fundamental to assure the defendant a fair trial.'" *Richmond v. State*, 330 Md. 223, 236 (1993) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). In deciding whether to review an instruction absent an objection, this Court typically considers the egregiousness of the error, the impact upon the defendant, the lawyerly

diligence, and the potential of the case to serve as a vehicle for interpreting and molding the law. *Austin*, 90 Md. App. at 268-72.

Syed asserts that the diary was "overwhelming prejudicial" and contained information about the victim's "feelings, her love of her family, what other people said to her about her relationship with Appellant, and a plethora of other inflammatory material." (App. Br. 62). Most of the passages actually cited by Syed in his brief, (App. Br. 56-57), including the passage, "I'll probably kill myself if I lose him . . ." (App. Br. 62), are not prejudicial to Syed. Again, what this establishes is that there was a prior relationship between Syed and Hae Lee, a relationship which was established repeatedly throughout the trial by other evidence. (1/28/00, 140-41, 217-24; 1/31/00, 25-27; 2/3/00, 85-88; 2/16/00, 298-305; 2/17/00, 6-14, 24-30, 34-57, 119-21, 260-65; 2/23/00, 142). Thus, there is no issue with respect to admission of the diary in its entirety which warrants plain error review.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the judgment of the Circuit Court for Baltimore City be affirmed.

Respectfully submitted,

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PERTINENT PROVISIONS

Maryland Declaration of Rights, Article 21. Rights of accused; indictment; counsel; confrontation; speedy trial; impartial and unanimous jury.

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 defence; 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.

(1981 Repl. Vol.)

United States Constitution, Amendment VI - Right to speedy trial, witnesses, etc.

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 defence.

(1981 Repl. Vol.)

Rule 4-242. Pleas.

(a) *Permitted pleas.* A defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere. In addition to any of these pleas, the defendant may enter a plea of not criminally responsible by reason of insanity.

(b) *Method of pleading.* (1) Manner. A defendant may plead not guilty personally or by counsel on the record in open court or in writing. A defendant may plead guilty or nolo contendere personally on the record in

open court, except that a corporate defendant may plead guilty or nolo contendere by counsel or a corporate officer. A defendant may enter a plea of not criminally responsible by reason of insanity personally or by counsel and the plea shall be in writing.

(2) Time in the District Court. In District Court the defendant shall initially plead at or before the time the action is called for trial.

(3) Time in Circuit Court. In circuit court the defendant shall initially plead within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213 (c). If a motion, demand for particulars, or other paper is filed that requires a ruling by the court or compliance by a party before the defendant pleads, the time for pleading shall be extended, without special order, to 15 days after the ruling by the court or the compliance by a party. A plea of not criminally responsible by reason of insanity shall be entered at the time the defendant initially pleads, unless good cause is shown.

(4) Failure or refusal to plead. If the defendant fails or refuses to plead as required by this section, the clerk or the court shall enter a plea of not guilty.

(c) *Plea of guilty.* The court may accept a plea of guilty only after it determines, upon an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea. In addition, before accepting the plea, the court shall comply with section (e) of this Rule. The court may accept the plea of guilty even though the defendant does not admit guilt. Upon refusal to accept a plea of guilty, the court shall enter a plea of not guilty.

(d) *Plea of nolo contendere.* A defendant may plead nolo contendere only with the consent of court. The court may require the defendant or counsel to provide information it deems necessary to enable it to determine whether or not it will consent. The court may accept the plea only after it determines, upon an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, that the defendant is pleading voluntarily with understanding of the nature of the charge and the consequences of the plea. In addition, before accepting the plea, the court shall comply with section (e) of this Rule. Following the acceptance of a plea

of nolo contendere, the court shall proceed to disposition as on a plea of guilty, but without finding a verdict of guilty. If the court refuses to accept a plea of nolo contendere, it shall call upon the defendant to plead anew.

(e) *Collateral consequences of a plea of guilty or nolo contendere.* Before the court accepts a plea of guilty or nolo contendere, the court, the State's Attorney, the attorney for the defendant, or any combination thereof shall advise the defendant (1) that by entering the plea, if the defendant is not a United States citizen, the defendant may face additional consequences of deportation, detention, or ineligibility for citizenship and (2) that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequences of the plea. The omission of advice concerning the collateral consequences of a plea does not itself mandate that the plea be declared invalid.

(f) *Plea to a degree.* A defendant may plead not guilty to one degree and plead guilty to another degree of an offense which, by law, may be divided into degrees.

(g) *Withdrawal of plea.* At any time before sentencing, the court may permit a defendant to withdraw a plea of guilty or nolo contendere when the withdrawal serves the interest of justice. After the imposition of sentence, on motion of a defendant filed within ten days, the court may set aside the judgment and permit the defendant to withdraw a plea of guilty or nolo contendere if the defendant establishes that the provisions of section (c) or (d) of this Rule were not complied with or there was a violation of a plea agreement entered into pursuant to Rule 4-243. The court shall hold a hearing on any timely motion to withdraw a plea of guilty or nolo contendere.

(2001 Md. Rules)

Rule 4-263. Discovery in circuit court.

Discovery and inspection in circuit court shall be as follows:

(a) *Disclosure without request.* Without the necessity of a request, the State's Attorney shall furnish to the defendant:

(1) Any material or information tending to negate or mitigate the guilt or punishment of the defendant as to the offense charged;

(2) Any relevant material or information regarding: (A) specific searches and seizures, wire taps or eavesdropping, (B) the acquisition of statements made by the defendant to a State agent that the State intends to use

at a hearing or trial, and (C) pretrial identification of the defendant by a witness for the State.

(b) *Disclosure upon request.* Upon request of the defendant, the State's Attorney shall:

(1) Witnesses. Disclose to the defendant the name and address of each person then known whom the State intends to call as a witness at the hearing or trial to prove its case in chief or to rebut alibi testimony;

(2) Statements of the defendant. As to all statements made by the defendant to a State agent that the State intends to use at a hearing or trial, furnish to the defendant, but not file unless the court so orders: (A) a copy of each written or recorded statement, and (B) the substance of each oral statement and a copy of all reports of each oral statement;

(3) Statement of codefendants. As to all statements made by a codefendant to a State agent which the State intends to use at a joint hearing or trial, furnish to the defendant, but not file unless the court so orders: (A) a copy of each written or recorded statement, and (B) the substance of each oral statement and a copy of all reports of each oral statement;

(4) Reports or statements of experts. Produce and permit the defendant to inspect and copy all written reports or statements made in connection with the action by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment, or comparison, and furnish the defendant with the substance of any such oral report and conclusion;

(5) Evidence for use at trial. Produce and permit the defendant 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 State intends to use at the hearing or trial;

(6) Property of the defendant. Produce and permit the defendant to inspect, copy, and photograph any item obtained from or belonging to the defendant, whether or not the State intends to use the item at the hearing or trial.

(c) *Matters not subject to discovery by the defendant.* This Rule does not require the State to disclose:

(1) Any documents to the extent that they contain the opinions, theories, conclusions, or other work product of the State's Attorney, or

(2) The identity of a confidential informant, so long as the failure to disclose the informant's identity does not infringe a constitutional right of the

defendant and the State's Attorney does not intend to call the informant as a witness, or

(3) Any other matter if the court finds that its disclosure would entail a substantial risk of harm to any person outweighing the interest in disclosure.

(d) *Discovery by the State.* Upon the request of the State, the defendant shall:

(1) As to the Person of the Defendant. Appear in a lineup for identification; speak for identification; be fingerprinted; pose for photographs not involving reenactment of a scene; try on articles of clothing; permit the taking of specimens of material under fingernails; permit the taking of samples of blood, hair, and other material involving no unreasonable intrusion upon the defendant's person; provide handwriting specimens; and submit to reasonable physical or mental examination;

(2) Reports of experts. Produce and permit the State to inspect and copy all written reports made in connection with the action by each expert whom the defendant expects to call as a witness at the hearing or trial, including the results of any physical or mental examination, scientific test, experiment, or comparison, and furnish the State with the substance of any such oral report and conclusion;

(3) Alibi witnesses. Upon designation by the State of the time, place, and date of the alleged occurrence, furnish the name and address of each person other than the defendant whom the defendant intends to call as a witness to show that the defendant was not present at the time, place, and date designated by the State in its request.

(4) Computer-generated evidence. Produce and permit the State to inspect and copy any computer-generated evidence as defined in Rule 2-504.3(a) that the defendant intends to use at the hearing or trial.

(e) *Time for discovery.* The State's Attorney shall make disclosure pursuant to section (a) of this Rule within 25 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213. Any request by the defendant for discovery pursuant to section (b) of this Rule, and any request by the State for discovery pursuant to section (d) of this Rule shall be made within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213. The party served with the request shall furnish the discovery within ten days after service.

(f) *Motion to compel discovery.* If discovery is not furnished as requested, a motion to compel discovery may be filed within ten days after receipt of inadequate discovery or after discovery should have been received, whichever is earlier. The motion shall specifically describe the requested matters that have not been furnished. A response to the motion may be filed within five days after service of the motion. 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.

(g) *Obligations of State's Attorney.* The obligations of the State's Attorney under this Rule extend to material and information in the possession or control of the State's Attorney and staff members and any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have reported, to the office of the State's Attorney.

(h) *Continuing duty to disclose.* A party who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly.

(i) *Protective orders.* On motion and for good cause shown, the court may order that specified disclosures be restricted. 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.

(2001 Md. Rules)

Rule 4-323. Method of making objections.

(a) *Objections to evidence.* An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at

the request of a party or on its own initiative, so directs. The court shall rule upon the objection promptly. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court may admit the evidence subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of the condition. The objection is waived unless, at some time before final argument in a jury trial or before the entry of judgment in a court trial, the objecting party moves to strike the evidence on the ground that the condition was not fulfilled.

(b) *Continuing objections to evidence.* At the request of a party or on its own initiative, the court may grant a continuing objection to a line of questions by an opposing party. For purposes of review by the trial court or on appeal, the continuing objection is effective only as to questions clearly within its scope.

(c) *Objection to other rulings or orders.* For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

(d) *Formal exceptions unnecessary.* A formal exception to a ruling or order of the court is not necessary.

(2001 Md. Rules)

Rule 5-403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(2001 Md. Rules)

Rule 5-801. Definitions.

The following definitions apply under this Chapter:

(a) *Statement.* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* A "declarant" is a person who makes a statement.

(c) *Hearsay.* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(2001 Md. Rules)

Rule 5-803. Hearsay exceptions: Unavailability of declarant not required.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(a) Statement by party-opponent. A statement that is offered against a party and is:

(1) The party's own statement, in either an individual or representative capacity;

(2) A statement of which the party has manifested an adoption or belief in its truth;

(3) A statement by a person authorized by the party to make a statement concerning the subject;

(4) A statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment; or

(5) A statement by a coconspirator of the party during the course and in furtherance of the conspiracy.

(b) Other exceptions. (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

(5) Recorded recollection. See Rule 5-802.1(e) for recorded recollection.

(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with subsection (b)(6). Unless the circumstances indicate a lack of trustworthiness, evidence that a diligent search disclosed that a matter is not included in the memoranda, reports, records, or data compilations kept in accordance with subsection (b)(6), when offered to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind about which a memorandum, report, record, or data compilation was regularly made and preserved.

(8) Public records and reports. (A) Except as otherwise provided in this paragraph, a memorandum, report, record, statement, or data compilation made by a public agency setting forth

(i) the activities of the agency;

(ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report; or

(iii) in civil actions and when offered against the State in criminal actions, factual findings resulting from an investigation made pursuant to authority granted by law.

(B) A record offered pursuant to paragraph (A) may be excluded if the source of information or the method or circumstance of the preparation of the record indicate that the record or the information in the record lacks trustworthiness.

(C) A record of matters observed by a law enforcement person is not admissible under this paragraph when offered against an accused in a criminal action.

(D) This paragraph does not supersede specific statutory provisions regarding the admissibility of particular public records.

(9) Records of vital statistics. Except as otherwise provided by statute, records or data compilations of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. Unless the circumstances indicate a lack of trustworthiness, evidence in the form of testimony or a certification in accordance with Rule 5-902 that a diligent search has failed to disclose a record, report, statement, or data compilation made by a public agency, or an entry therein, when offered to prove the absence of such a record or entry or the nonoccurrence or nonexistence of a matter about which a record was regularly made and preserved by the public agency.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings,

inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and a statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document or the circumstances otherwise indicate lack of trustworthiness.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more, the authenticity of which is established, unless the circumstances indicate lack of trustworthiness.

(17) Market reports and published compilations. Market quotations, tabulations, lists, directories, and other published compilations, generally used and reasonably relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in a published treatise, periodical, or pamphlet on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation, prior to the controversy before the court, among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. (A) Reputation in a community, prior to the controversy before the court, as to boundaries of, interests in, or customs affecting lands in the community.

(B) Reputation as to events of general history important to the community, state, or nation where the historical events occurred.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere) that adjudges a person guilty of a crime punishable by death or imprisonment in excess of one year offered to prove any fact essential to sustain the judgment. In criminal cases, the State may not offer evidence of a judgment against persons other than the accused, except for purposes of impeachment. The pendency of an appeal may be shown but does not preclude admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the mater would be provable by evidence of reputation under subsections (19) or (20).

(24) Other exceptions. Under exceptional circumstances, the following are not excluded by the hearsay rule, even though the declarant is available as a witness: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

(2001 Md. Rules)