> fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* *See Napue*, 360 U.S. at 272, 79 S.Ct. 1173, 1179, 3 L.Ed.2d 1217. In cases where there is no false testimony but the prosecution nonetheless fails to disclose favorable evidence, the standard for materiality, in the language of the Supreme Court, is whether "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." *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481. *See Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed. 2d 490 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). [] Materiality is assessed by considering all of the suppressed evidence collectively. *See Kyles*, 514 U.S. at 436, 115 S.Ct. at 1567, 131 L.Ed.2d 490. The question, therefore, "is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same," *id.* at 453, 115 S.Ct. At 1575, 131 L.Ed.2d 490, which is determined in reference to the sum of the evidence and its significance for the prosecution. *See id.*

Wilson v. State, 363 Md. 333, 346-47, 768 A.2d 675 (2001); *see also Conyers v. State*, 367 Md. 571, 790 A.2d 15 (2002).

Both federal and Maryland cases discussing *Brady* have made it clear that there is no due process violation if the allegedly suppressed exculpatory evidence is disclosed in time for effective use at trial. In *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527 (4th Cir. 1985), *cert. denied*, 474

U.S. 1005, 88 L.Ed.2d 457, 106 S.Ct. 524 (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 support the defendants' contention that their bids for the project were not excessively high. The appellate court 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 defendant's case in chief. The disclosure of this exculpatory evidence, at trial, does not rise to the level of a constitutional violation.

Smith Grading & Paving, Inc., 760 F.2d at 532. *See also United States v. Elmore*, 423 F.2d 775, 779 (4th Cir.), *cert. denied*, 400 U.S. 825, 27 L.Ed.2d 54, 91 S.Ct. 49 (1970); *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 on cross-examination); *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."); *Hall v. United States*, 30 F. Supp. 2d 883, 890 (E.D. Va. 1998); *see also Pantazes v. State*, 141 Md. App. 422, 446 (2001), *cert. denied*, 368 Md. 241, 792 A.2d 1178 (2002)("failure to disclose this lie detector information was not a *Brady* violation because that information was disclosed during trial"); *Jones v. State*, 132 Md. App. 657, 675, 753 A.2d 587, *cert. denied*, 360 Md. 487, 759 A.2d 231 (2000)(*Brady* violations involve "withholding from the knowledge of the jury, right through the close of the trial, exculpatory evidence which, had the jury known of it, might well have produced a different verdict. ... [*Brady*] contemplates the ultimate concealment of evidence from the jury, not the tactical surprise of opposing counsel").

Appellant relies heavily on *Marshall v. State*, 346 Md. 186, 695 A.2d 184 (1997), for the proposition that Judge Heard erred when she declined to permit appellant to cross-examine Wilds about every aspect of the plea agreement and the circumstances surrounding it. The *Marshall* Court, in pertinent part, stated:

> The constitutional right of confrontation includes the right to cross-examine a witness about matters which affect the witness' bias, interest or motive to testify falsely. *Ebb [v. State]*, 341 Md. [578] at 587, 671 A.2d [974] at 978 [(1996)]. An attack on the witness' credibility "is effected by means of

cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis*, 415 U.S. at 316, 94 S.Ct. at 1110, 39 L.Ed.2d at 354. The Supreme Court recognized in *Davis* that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Id.* at 316-317, 94 S.Ct. at 1110, 39 L.Ed.2d at 354; *see Smallwood v. State*, 320 Md. 300, 306, 577 A.2d 356, 359 (1990).

* * *

The right to cross-examination, however, is not without limits. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674, 683 (1986); *Smallwood*, 320 Md. at 307, 577 A.2d at 359. The trial judge retains discretion to impose reasonable limits on cross-examination to protect witnesses safety or to prevent harassment, prejudice, confusion of the issues, or inquiry that is repetitive or marginally relevant. *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435, 89 L.Ed.2d at 683; Smallwood, 320 Md. at 307, 577 A.2d at 359. "The Confrontation Clause of the Sixth Amendment is satisfied where defense counsel has been 'permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of witnesses.'" *Restivo*, 8 F.3d at 278 (quoting *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347, 355 (1974)). The trial court's discretion to limit cross-examination is not boundless. It has no discretion to limit cross-examination to such an extent as to deprive the accused of a fair trial. *See State v. Cox*, 298 Md. 173, 183, 468 A.2d 319, 324 (1983).

* * *

Where the 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.

Marshall, 346 Md. at 194-198. *See also Churchfield v. State*, 137 Md. App. 668, 684, 769 A.2d 313, *cert. denied*, 364 Md. 536, 774 A.2d 409 (2001)("To determine whether the trial court abused its discretion in limiting the cross-examination of the State's witnesses, the test is whether the jury was already in possession of sufficient information to make a discriminating apprisal of the particular witness's possible motives for testifying falsely in favor of the government.")(citations and quotation marks omitted).

In the case at bar, appellant had a full and fair opportunity to cross-examine Wilds for five days about his prior statements to police, the manner in which he came to be represented by his attorney, the plea agreement, and the plea hearing. Moreover, in contrast to *Marshall*, the jury was made aware of Wilds' plea agreement and the details of that agreement. The jury was aware that Wilds gave inconsistent statements to the police, and that his prior inaccurate statements were discussed between him and the prosecution team. The jury was apprized of the circumstances surrounding the retention of Wilds' attorney. We are persuaded that there was no *Brady* violation. We are also

persuaded that the jury's verdict would have been the same even if the State had disclosed the information in a more timely manner.

B. Calling the Prosecutor as a Witness

Appellant argues that Judge Heard erred when she declined to permit appellant to call the prosecutor as a witness. We disagree. During appellant's cross-examination of Wilds, the following occurred at a bench conference:

[Appellant's Counsel]: 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?

[Appellant's Counsel]: That in fact [the prosecutor], 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.

Judge Heard ruled that appellant could continue to question Wilds along these lines, but that she would not hold a *voir dire* proceeding outside the presence of both the jury and the prosecutor. The next day, when appellant requested permission to call the prosecutor as a witness, Judge Heard ruled:

> I find that there must be a compelling reason to call [the prosecutor] 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 detail 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 the 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 [sic] the credibility of Mr. Wilds' testimony with regard to anything [the prosecutor] may have 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 [Wilds' attorney] 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 [the prosecutor] as a witness in this case and with that, with regard to that motion your motion is denied....

In *Raines v. State*, 142 Md. App. 206, 788 A.2d 697 (2002), while rejecting the contention that the trial court erred when it prohibited the appellant from calling the prosecutor as a defense witness, this Court stated:

> It is well established in Maryland that a prosecuting attorney is competent to serve as a witness. *Johnson v. State*, 23 Md. App. 131, 140, 326 A.2d 38 (1974), *aff'd*, 275 Md. 291, 339 A.2d 289 (1975); *Wilson v. State*, 261 Md. 551, 569, 276 A.2d 214 (1971), *Murphy v. State*, 120 Md. 229, 235, 87 A. 811 (1913). Courts usually are reluctant, however, to permit a prosecutor to serve as a witness in a case he is prosecuting, except in extraordinary circumstances. *Johnson v. State, supra*, 23 Md. App. at 141 (citing *Gajewski v. United States*, 321 F.2d 261, 268

(8th Cir. 1963)); *see also United States v. Dempsey*, 740 F.Supp. 1295, 1297 (N.D. IL. 1990); *Robinson v. United States*, 32 F.2d 505, 510 (8th Cir. 1928). Often that reluctance stems from a "concern that jurors will be unduly influenced by the prestige and prominence of the prosecutor's office and will base their credibility determinations on improper factors." *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998). In general, courts have held that in those cases in which the prosecutor is a necessary witness for the prosecution, it is within the sound discretion of the trial court to require the prosecutor to withdraw from the case, and testify as a witness. *United States v. Johnston*, 690 F.2d 638, 646 (7th Cir. 1982); "Prosecuting Attorney as a Witness in Criminal Cases," 54 A.L.R.3d 100, §5(a)(1973, Suppl. 2001).

When the defense seeks to call the prosecutor as a witness, the issue of prejudice to the defendant comes into play. *Carr v. State*, 50 Md. App. 209, 215, 437 A.2d 238 (1981). We first addressed the propriety of a trial court's refusal to allow a defendant to call the prosecutor as a witness in *Johnson v. State, supra*, 23 Md. App. at 131. In that case, the defendant appealed his conviction for first degree murder in the death of his brother, arguing, *inter alia*, that the trial court had erred in refusing to permit him to call the prosecutor as a witness. 23 Md. App. 141. The same prosecutor had prosecuted the defendant's brothers in an earlier trial in which the defendant had testified as a witness and had confessed to killing the third brother in self-defense. That testimony became the State's primary evidence against the defendant in his own murder trial. Defense counsel sought to call the prosecutor to testify that the State had "rejected" the defendant's admission of guilt in the earlier trial. 23 Md. App. 141.

In *Johnson*, we concluded that the decision whether to allow the defense counsel to call the prosecutor to testify is within

"the broad discretionary right of the trial judge to control the trial of th case." 23 Md. App. 142 (internal citations omitted). The exercise of this discretion must be guided, however, by "an accused's right to call relevant witnesses and to present a complete defense," so that the accused's right to a complete defense "may not be abrogated for the sake of trial convenience or for the purpose of protecting [the prosecutor] from possible embarrassment while testifying, *if he possesses information vital to the defense.*" *Id.* (emphasis supplied in *Johnson*)(citing *Gajewski v. United States, supra*, 321 F.2d at 268-69). The prosecutor's "testimony must be relevant and material to the theory of the defense; it must not be privileged, repetitious, or cumulative." *Johnson v. State, supra*, 23 Md. App. at 142. In *Johnson*, we affirmed the lower court' ruling that the proffered evidence, that the State had "rejected" the defendant's testimony at the earlier trial, was not relevant or material to a finding of the defendant's guilt or innocence. 23 Md. App. at 143.

* * *

Under the standard articulated in *Johnson*, a trial court will not be said to have abused its discretion in ruling that a prosecutor need not testify as a witness when the testimony would be "repetitious, or cumulative." *Johnson v. State, supra*, 23 Md. App. at 142. *See also United States v. Roberson*, 897 F.2d 1092, 1098 (11th Cir. 1990)(when another witness could testify as to a conversation between the defendant and the prosecutor, the defendant did not show a compelling need to call the prosecutor as a defense witness); *State v. Colton*, 663 A.2d 339, 346, 234 Conn. 683, 701 (1995), *cert. denied, Connecticut v. Colton*, 516 U.S. 1140, 133 L.Ed.2d 892, 116 S.Ct. 972 (1996)(defendant wishing to call prosecutor as witness must show that the testimony is necessary, rather than merely relevant, and that all other sources of comparable evidence

have been exhausted).

Raines, supra, 142 Md. App at 212-15.

In the case at bar, Judge Heard did not abuse her discretion by denying appellant's request to call the prosecutor as a witness because the testimony that appellant sought to elicit from the prosecutor would have been merely cumulative to Wilds' testimony.

C. Motion to Strike Wilds' Testimony

Appellant argues that Judge Heard erred when she refused to strike Wilds' testimony. Judge Heard ruled:

> 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 [the prosecutor] may have done in assisting him in getting counsel and that is anything that came out through Mr. Wilds' testimony of what he believed, not what may in fact have occurred, but what he believed happened. Because it's his belief that controls 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.

We agree with that ruling. In Maryland, the law is clear that "even given a discovery violation, the choice of an appropriate sanction is entrusted to the trial judge." *Jones v. State*, 132 Md. App. 657, 677, 753 A.2d 589 (2000) (*citing Evans v. State*, 304 Md. 487, 499 A.2d 1261 (1985); *Aiken v. State*, 101 Md. App. 557, 647 A.2d 1229 (1994)).

> 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 discovery rules is to "assist the defendant in preparing his defense, and to protect him from surprise." *Hutchins v. State*, 339 Md. 466, 473, 663 A.2d 1281 (1995)(*quoting Mayson v. State*, 238 Md. 283, 287, 208 A.2d 599 (1965)). On appeal, we are limited to determining whether the trial court abused its discretion." *Aiken* [*v. State*], 101 Md. App. 557, 577, 647 A.2d 1229 (1994)).

Rosenberg v. State, 129 Md. App. 221, 259, 741 A.2d 533 (1999).

In the case at bar, Judge Heard exercised her discretion, weighing the testimony given, the reports involved, and the potential prejudice to the defendant. We are persuaded that Judge Heard did not abuse her discretion in refusing to strike Wilds' testimony.

D. Motion to Compel Disclosure of Documents

Appellant argues that Judge Heard erroneously denied a motion to compel disclosure of documents and information in the State's possession. We disagree. Appellant moved for "full disclosure" of the manner in which Wilds obtained legal representation, and Judge Heard ruled:

> 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....

When appellant's counsel continued for disclosure of

information regarding the role that the prosecutor played in helping Wilds obtain counsel, Judge Heard explained:

> 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....

In response to further argument from appellant's counsel, Judge Heard stated:

> 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.
>
> 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 to do that and after reviewing the tape if you feel 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.

We agree with that analysis. "It is generally held that a request for the production of documents in the possession or control of the State is ordinarily within the sound discretion of the trial court; and where inadequate reasons are assigned for disclosure, the request is properly denied being in the nature of a 'fishing expedition.'" *Couser v. State*, 282 Md. 125, 140, 383 A.2d 389 (1978)(citing *McKenzie v. State*, 236 Md. 597, 204 A.2d 678 (1964)). *See also Bing Fa Yuen and Shui Ping Wu v. State*, 43 Md. App. 109, 116-118, 403 A.2d 819 (1979), *cert. denied*, *Shui Ping Wu v. State*, 444 U.S. 1076, 62 L.Ed.2d 759, 100 S.Ct. 1024 (1980)("[T]he Court of Appeals did not extend criminal discovery or *Brady* demands to "fishing expeditions" or require

prosecutorial open files").

In the case at bar, we are persuaded that appellant's request to inspect any documents concerning communications between the State, Wilds and Wilds' attorney was nothing more than a "fishing expedition" for needlessly cumulative evidence.[17]

D. Motion to Re-Call Wilds and Call Wilds' Attorney as a Witness

Appellant argues that Judge Heard erred when she prohibited appellant from (1) recalling Wilds to testify, and (2) calling Wilds' attorney. We disagree. Following the five days of Wilds' cross-examination, Judge Heard conducted a hearing (outside the presence of the jury) on appellant's motion to call Wilds' attorney as a witness. At this hearing, appellant's counsel was permitted to ask Wilds' attorney how she came to represent Wilds.

Wilds' attorney testified as follows. The prosecutor had introduced her to Wilds, and she made the independent determination to represent Wilds. Wilds' attorney explained that the prosecutor did not ask her to represent Wilds, rather, only to come and meet him:

> Not about representing him. I had about - just [the prosecutor] had been really,
>
> perhaps deliberately vague about what he wanted me to do. He asked me to come to the

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[17] We could decline to review this issue on the ground that appellant failed to make a proffer as to what the evidence sought would provide. *See Green, supra*, 127 Md. App. at 766.

> office and talk to the young man. That was really about the extent of it. He had not asked me to represent him.

She told Wilds that she did *pro bono* work. During the two or three hour conversation between Wilds' attorney and Wilds, no one from the State's Attorney's Office bothered them. She had no independent knowledge of the case other than what Wilds told her. She spoke to Wilds before he had been formally charged. Once he was charged, she was representing him and informed him that she would represent him *pro bono*.

The only change in the plea agreement was to delete some boiler plate language in the standard form because this was not a narcotics case. It was her understanding that there was a mutual right to withdraw the plea; the State could withdraw if Wilds testified untruthfully at trial, and Wilds could also withdraw the plea. At a chambers hearing before Judge McCurdy, which was held to address Wilds' concerns, Wilds was told that "if [he] 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." At the conclusion of this hearing, Wilds wanted to continue pursuant to the plea and wanted his attorney to continue representing him.

The following transpired when appellant's counsel continued to question Wilds' attorney about details of the plea agreement:

The Court: 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 -

[Appellant's Counsel]: 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 [the prosecutor] on the 7th.

The Court: It's already before the jury.

[Appellant's Counsel]: No, Judge, it is not.

The Court: The defendant's -

[Appellant's Counsel]: Mr. Wilds did not testify to that.

The Court: Mr. Wild's [sic] 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 the 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 [a] hearing based on a truth agreement.

[Appellant's Counsel]: 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.

[Appellant's Counsel]: Judge, the deal is not there, the plea agreement is before the jury as being the only

deal that obligates [the prosecutor] 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: [Appellant's counsel], that is not a side deal because, as a matter of law, as a matter of law, it doesn't matter what [the prosecutor] and Wilds' attorney and the defendant agreed to. The [c]ourt is not bound by his piece of paper. The [c]ourt is bound by 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 [the prosecutor] can't give a benefit that he doesn't have to give. It's not his benefit.

When appellant's counsel continued to argue that Wilds' attorney should be called as a witness, Judge Heard ruled:

> 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.

At the next trial date, appellant's counsel requested permission to recall Wilds to inquire whether Wilds believed that he could withdraw his plea agreement. Judge Heard ruled:

> As I indicated previously, I believe that

> calling [Wilds' attorney] 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 his 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....

We agree with that ruling. "The general rule, well settled in Maryland, is that the trial judge has wide discretion in the conduct if a trial and that the exercise of discretion will not be disturbed [on appeal] unless it has been clearly abused." *State v. Hawkins*, 326 Md. 270, 277, 604 A.2d 489, 493 (1992)(citing *Crawford v. State*, 285 Md. 431, 451, 404 A.2d 244, 254 (1979)). "The principle that the overall direction of the trial is within the sound discretion of the trial judge encompasses the admission of evidence." *Id.* *See also Oken v. State*, 327 Md. 628, 669 (1992), *cert. denied*, 507 U.S. 931 (1993)("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").

In the case at bar, we are persuaded that Judge Heard did

not err or abuse her discretion in concluding that calling Wilds' attorney or recalling Wilds served no purpose because their testimony at this point in the trial would have added nothing whatsoever.

F. Motion to Call the Public Defender as a Witness

Appellant argues that Judge Heard erred when she denied appellant's motion to present the testimony of Elizabeth Julian, a member of the Office of the Public Defender, who would testify that it was unusual for a prosecutor to recommend a lawyer for a State's witness. Judge Heard explained:

> . . . 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.

* * *

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.

* * *

You have the fact that [the prosecutor] 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 [Wilds' attorney] 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 [the prosecutor] 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 [Wilds' attorney] 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.
>
> * * *
>
> 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 [Md. Rule] 5-403.

In Maryland, trial judges have discretion to prohibit the introduction of relevant but otherwise cumulative evidence. Md. Rule 5-403.[18] *See Merzbacher v. State*, 346 Md. 391, 414-15, n.8, 697 A.2d 432 (1997); *see also State v. Broberg*, 342 Md. 544, 575 n.6, 677 A.2d 602, 617 n.6 (1996). Assuming *arguendo* that appellant's counsel made a sufficient proffer of what Ms. Julian would have said if allowed to testify, and thus, we are persuaded

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[18] Maryland Rule 5-403 provides:

> 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.

that Judge Heard did not err or abuse her discretion when she concluded that testimony from Ms. Julian would be cumulative.

G. Prosecutorial Misconduct

Appellant argues that he is entitled to a new trial because of the State's prosecutorial misconduct.

> With respect to prosecutorial misconduct generally, actual `prejudice must be shown 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. 499 (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, 143 Md. App. 645, 667 (2002). Here, there was simply no unfair prejudice because appellant (1) was given the opportunity to cross-examine Wilds over a five day period, and (2) was able to elicit all relevant information concerning Wilds' plea agreement and the manner in which he was introduced to Wilds' attorney.

II.

Appellant argues that Judge Heard erred in admitting hearsay in the form of a letter from the victim to appellant. We disagree. At trial, Aisha Pittman, a friend of both the victim and appellant, testified that the front of State's Exhibit 38 was a letter from the victim to appellant, and the back of that

letter contained correspondence between appellant and Pittman. When the State moved to introduce the letter, appellant objected generally to its admission. Judge Heard noted the objection, then asked that a time frame be established as to when the letter was written. Pittman testified that the letter was written in early November. The letter was admitted into evidence over objection. When the State asked Pittman to read the letter, appellant again objected to the witness reading the letter and preferred that the jurors be permitted to read it. Judge Head overruled the objection and permitted Pittman to read the letter. Reading from the letter, Pittman stated:

[Ms. Pittman]: "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 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?

[Ms. Pittman]: There is.

The Court: Then say, "There's something I cannot read."

[Ms. Pittman]: 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, "[the victim]."

In *Gray v. State*, 137 Md. App. 460, 500 (2001), *rev'd on other grounds*, 368 Md. 529 (2002), we held that a murder victims' statements to others of her then-existing intention to tell her husband that she wanted a divorce were admissible to prove that she acted on her intention, explaining:

> Under Md. Rule 5-803, a hearsay statement reflecting the declarant's "state of mind" when the statement was made is admissible to prove, inter alia, the declarant's future action:
>
> > The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> >
> > (b)(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*,.... [(Emphasis in original.)]

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." *Robinson v. State*, 66 Md. App. 246, 257, 503 A.2d 725 (1986).

Md. Rule 5-803(b)(3) codifies "part of the holding in *Mutual Life Insurance Co. v. Hillmon*,[145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892)], under which the declarant's statement of intention is admissible to show that the *declarant* subsequently acted in accord with the stated intention." Lynn McLain, *Maryland Rules of Evidence* § 2.803.4(n)(1984)("McLain"); *see* [Joseph F.] Murphy [,Jr., *Maryland Evidence Handbook*], *supra*, § 803(D), at 312 [(3d ed.2000)]("The Rules Committee intended that, under Md. Rule 5-803(b)(3), statements of intent would be admissible for the limited purpose of proving the conduct of the declarant only,....).[][(Emphasis in original.)]

In *Kirkland v. State*, 75 Md. App. 49, 540 A.2d 490 (1988), we discussed the *Hillmon* doctrine and its use in Maryland. In that case, Kirkland argued that the trial court abused its discretion by admitting his statement that he intended to kill the victim, Andrew Church, as circumstantial evidence to prove that, in fact, he had killed Church. Rejecting his argument, we observed:

> [Professor John] McCormick states that "the probative value of a state of mind obviously may go beyond the state of mind itself." ... Indeed, it may go so far as to prove subsequent conduct:

> Despite the failure until fairly recently to recognize the potential value of statements of state of mind to prove subsequent conduct, it is now clear that out-of-court statements which tend to prove a plan, design, or intention of the declarant are admissible, subject to the usual limitations as to remoteness in time and perhaps apparent sincerity common to all statements of mental state, to prove that the plan, design, or intention of the declarant was carried out by the declarant.

... The leading case for this proposition is *Mutual Life Insurance Co. v. Hillmon*, ... In *Hillmon*, the matter chiefly contested was the death of the insured, John Hillmon. The resolution of that issue depended upon whether the body found at Crooked Creek, Kansas was Hillmon's body or the body of his traveling companion Walters. The evidence sought to be admitted were letters written by Walters indicating his intention of traveling with Hillmon. The Court found these declarations of intent admissible to prove other matters which were in issue, *e.g.*, whether Hillmon went to Crooked Creek and whether the dead body was his. Maryland is in accord with *Hillmon*. ... Simply stated, the *Hillmon* doctrine provides that when the performance of a particular act by an individual is an issue in the case, his intention (state of

> mind) to perform that act may be shown. Kirkland's declaration indicated an intent to kill Andrew Church, who later died due to gunshot wounds inflicted by Kirkland. The *Hillmon* Doctrine allows the trial court to admit Kirkland's statement as circumstantial evidence that he carried out his intention and performed the act.
>
> *Id.* at 55-56, 540 A.2d 490 (citations omitted); *see also National Soc'y of the Daughters of the Am. Revolution v. Goodman*, 128 Md. App. 232, 238, 736 A.2d 1205 (1999).

Gray, 137 Md. App. at 493-494. *See also Farah v. Stout*, 112 Md. App. 106, 119 (1996), *cert. denied*, 344 Md. 567 (1997)("Under this exception [Md. Rule 5-803(b)(3)], certain forward-looking statements of intent are admissible to prove that the declarant subsequently took a later action in accordance with his stated intent").

In the case at bar, the letter established circumstantially that the victim followed through with her statement and did end the relationship with appellant. Moreover, this information is relevant because it established circumstantially that appellant and the victim were in a romantic relationship that ended in a negative manner, and arguably was the motive for appellant to murder the victim. *See Gray, supra*, 137 Md. App. at 500 (The evidence of victim's intent to divorce husband "was probative to the issue of motive"); *see also Johnson v. State*, 332 Md. 456, 472 n.7 (1993)("Evidence is relevant (and/or material) when it

has a tendency to prove a proposition at issue in the case.").
Under these circumstances, the letter was admissible under
Maryland Rule 5-803(b)(3).

III.

Appellant argues that Judge Heard erred when she admitted the victim's diary into evidence. This issue was not preserved for appeal.[19] We are persuaded, however, that Judge Heard did not err or abuse her discretion when she admitted the victim's diary into evidence.[20]

Appellant relies heavily on this Court's decision in *Banks*

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[19] "Improper admission of evidence will not be preserved for appellate review unless the party asserting the error objected at the time the evidence was offered or as soon thereafter as the grounds for the objection became apparent." *Dyce v. State*, 85 Md. App. 193, 196, 582 A.2d 582 (1990). *See* Md. Rule 4-323(a)("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."); *see also Malpas v. State*, 116 Md. App. 69, 87, 695 A.2d 588 (1997) (same). Here, on January 28, 2000, [the victim's] brother, testified that State's Exhibit Number 2 was [the victim's] diary. The diary was then offered into evidence, and received without objection.

Appellant argues that he preserved the issue for appeal when he objected to a witness reading excerpts from the diary nineteen days after the book was admitted into evidence. We disagree. Appellant's argument is that the trial court erred by "permitting the introduction of the victim's 62 page diary, which constituted irrelevant highly prejudicial hearsay." Clearly, appellant's counsel should have objected at that moment if the defense had problems with the contents of the writing.

Appellant also argues that the issue of the diary was brought to the attention of the lower court through the State's pre-trial Motion for Admission of Excerpts of Victim's Diary, and thus, it was preserved for appellate review. We also find no merit in this argument, and moreover, appellant's response to the State's pre-trial motion was that he had no objection to the admission of the diary, as long as it was admitted in its entirety.

[20] "The general rule, well settled in Maryland, is that the trial judge has wide discretion in the conduct of a trial and that the exercise of discretion will not be disturbed [on appeal] unless it has been clearly abused." *State v. Hawkins*, 326 Md. 270, 277, 604 A.2d 489 (1992)(citing *Crawford v. State*, 285 Md. 431, 451, 404 A.2d 244, 254 (1979)). "The principle that the overall direction of the trial is within the sound discretion of the trial judge encompasses the admission of evidence." *Id.*

v. State, 92 Md. App. 422 (1992), in which the State introduced statements made by the victim "at various times prior to his death, of fear of his killer." 92 Md. App. at 426. The State argued that the statements were admissible to show the victim's "state of mind" when he was stabbed. *Id.* at 434. This Court reversed, explaining:

> "Statements offered, not to prove the truth of the matters asserted therein, but as circumstantial evidence that the declarant had ... a particular state of mind, when that ... state of mind is *relevant*, are nonhearsay." McLain, § 801.10 at 282-83 (citations omitted)(emphasis added). Here, even if the statements were not being offered for their truth, but rather as evidence of [the victim's] state of mind, *i.e.*, fear of appellant, this would not resolve the issue of their admissibility because the evidence must also be both relevant and not unduly prejudicial. As Professor McCormick explains:
>
> > A recurring problem arises in connection with the admissibility of accusatory statements made before the act by the victims of homicide. If the statement is merely an expression of fear, i.e. "I am afraid of D," no hearsay problem is involved since the statement falls within the hearsay exception for statements of mental or emotional condition. *This does not, however, resolve the question of admissibility. Since nothing indicates that the victim's emotional state is in issue in the case, the purpose of the offer of the statement must be to suggest the additional step of inferring some further fact from the existence of the emotional state.*

> The obvious inference from the existence of fear is that some conduct of D, probably mistreatment or threats, occurred to cause the fear. *The possibility of overpersuasion, the prejudicial character of the evidence, and the relative weakness and speculative nature of the inference, all argue against admissibility as a matter of relevance.* Even if one is willing to allow the evidence of fear standing alone, however, the fact is that such cases seem to occur but rarely. In life, the situation assumes the form either of a statement by the victim that D has threatened him, from which fear may be inferred, or perhaps more likely a statement of fear because D has threatened him. In either event, the cases have generally excluded the evidence. Not only does the evidence possess the weakness suggested above for expressions of fear standing alone, but in addition it seems unlikely that juries can resist using the evidence for forbidden purpose in the presence of specific disclosure of misconduct of D.

[*McCormick on Evidence* § 296 at 853-54 (3d ed. 1984)(citations omitted)(emphasis added).]

Here, [the victim's] state of mind as a victim was irrelevant to the commission of the crime. (It was only appellant's state of mind that was relevant.) Further, any probative value of the statements as to the victim's state of mind would be outweighed by the extremely prejudicial nature of the evidence. Accordingly, the trial court erred in admitting the disputed testimony. *See Buckeye Powder Co. v. DuPont Powder Co.*, 248 U.S. 55, 65, 39 S.Ct. 38, 40, 63 L.Ed. 123 (1918)(where state of mind testimony is sought to be used in an attempt to demonstrate the truth of the underlying facts

> rather than solely to show state of mind, evidence must be excluded); *United States v. Day*, 591 F.2d 861, 881 (D.C. Cir. 1979)(testimony of threats made by defendant to victim excluded on grounds of "hearsay problems and questions of relevancy and prejudice"); *United States v. Brown*, 490 F.2d 758, 763 n.10 (D.C. Cir. 1973)(where state of mind testimony is sought to be used in an attempt to demonstrate the truth of the underlying facts rather than solely to show state of mind, evidence must be excluded); *Commonwealth v. DelValle*, 351 Mass. 489, 221 N.E.2d 922, 924 (1966)(testimony of threats made by defendant against victim inadmissible to rebut suicidal state of mind where introduced in State's case-in-chief and there was no evidence from the defense of victim's suicidal tendencies).

Banks, supra, 92 Md. App. at 434-36.

In the case at bar, unlike the situation in *Banks*, the victim's diary was admitted under Maryland Rule 5-803(b)(3) to show that the victim intended to terminate her romantic relationship with appellant. None of the entries in the diary indicated that the victim was in fear that appellant would harm her. Under these circumstances, Judge Heard did not err or abuse her discretion by admitting the diary into evidence.

JUDGMENT AFFIRMED;
APPELLANT TO PAY THE COSTS.