DONTAE SPIVEY,	*	IN THE
Petitioner	*	CIRCUIT COURT
v.	*	FOR BALTIMORE CITY
STATE OF MARYLAND	*	POST-CONVICTION NO.:
	*	9759
	*	ORIGINAL CASE NOS.:
	*	198300048
	*	199029053
	*	199029055

* * * * *

TRANSCRIPT OF PROCEEDINGS

POST-CONVICTION HEARING

BALTIMORE CITY, MARYLAND

JANUARY 23, 2013

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A P P E A R A N C E S

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P R O C E E D I N G S

(At 2:06:56 p.m., on the record.)

MR. GIBLIN: (Inaudible) waiting for the defendant.

THE COURT: Okay.

MR. GIBLIN: Apologize.

THE COURT: That's all right. Now, there's some preliminary matters I guess we can discuss if you want to call the matter, please.

MR. GIBLIN: Yes, ma'am. Your Honor, this is in hearing, we're appearing today on the matter of the post-conviction of Dontae Spivey, arising out of case numbers 198300048, 199029053 and 55.

MR. LEEDY: Assistant State's Attorney Michael Leedy, also for the State, Your Honor.

THE COURT: All right.

MR. GIBLIN: Donald Giblin for the State.

THE COURT: All right.

MS. KAMINS: Rachel Kamins for Mr. Spivey.

MR. SMITH: May I please this Honorable Court, Edward Smith, Jr. appearing on behalf of Dontae Spivey, the Petitioner.

THE COURT: Okay. All right, this is actually a continuation of post-conviction proceedings that began on November the 30th, 2011. And I do understand there've been some additional filings in reference to at least one of these cases and I believe that's case number 198300048, Mr. Smith?

MR. SMITH: Yes, Your Honor, that is correct. Your Honor, after looking at the file and in conjunction with the information received, we were of the impression that the Court would take up the DNA matter which had previously been filed in this case and of course, in that regard, Mr. Spivey asked me to represent him on that particular aspect of the case.

I attempted to contact the Assistant State's Attorney by phone and when that was unsuccessful, I contacted him by letter on December

the 20th, 2012.

THE COURT: Well, you know Mr. Smith, we really don't even have to go that far. It's this Court's procedures and it may have been this particular Court's mistake in giving that impression, but the DNA issues for, in post-conviction matters are heard in Part 30. In Part 30, only.

MR. SMITH: Yes, I did receive a letter from Judge Murdock that my letter, and this is why I was going the way I was going, because there may be a need for further investigation as to how this came about. I sent, I received a letter from Judge Murdock a couple of days ago with respect to that information saying that she had received my letter of December the 20th, which was sent to Mr. Giblin.

THE COURT: Mm-hmm.

MR. SMITH: With no G.

MR. GIBLIN: Thank you.

MR. SMITH: And Mr. Giblin, I saw Mr. Giblin in the Courthouse a couple of times and he

told me that Mr. Leedy would be handling the DNA portion of the case. I sent a fax to, and a letter to, Judge Murdock on January the 18th, 2013 asking how had my letter come to her attention and today, before I left, about two minutes before I left, I received the letter from Judge Murdock indicating that the Clerk had sent my letter of December the 30th 2013, 2012, to her.

And I just wanted to go back and to check my letter to find out if I had sent a copy of my letter to the Clerk's office and I find that even though it was addressed to Mr. Giblin, it was only sent to Counsel and to Mr. Spivey and not to the Clerk's office.

So, I haven't had a chance to query further of, and I do understand, I asked for the Bench's policy on Part 30 and all cases going in because under Title 17 in requesting to know all dispositions as it relates to DNA as well as to Unger matters that have been set in to Part 30 because I do believe that I have a duty on Mr.

Spivey's behalf to find out what's going on.

THE COURT: All right.

MR. SMITH: And that's why I just wanted to set that up. But, I do understand the Court's policy. The Court has made that, made it clear to me that that's the Bench policy without seeing any documents and I accept that. The problem was, of course, that I had an obligation to appear on behalf of Mr. Spivey today before Your Honor --

THE COURT: Understood.

MR. SMITH: -- to be ready to go in the event that you still maintain jurisdiction of the case. Excuse me, may I have just a moment with Mr. Spivey, Your Honor?

THE COURT: Certainly. Certainly.

(Off the record discussions between Mr. Smith and Mr. Spivey)

MR. SMITH: Your Honor, one of the things procedurally, I think that we need to take up, and I do understand different jurisdictions have different protocols --

THE COURT: Mm-hmm.

MR. SMITH: -- as to how they intend to handle this matter. It's seems to me, that as a matter of procedure under the statute, the Court, this Court, has jurisdiction and of course Mr. Spivey has indicated to me that he wishes me to preserve all rights to have the case heard before You and as much as on December the 30th, that was his intention and he believes that the statute clearly indicates that that should in fact be the case here.

Despite the fact that there are certain local procedures which do not amount to rules of Court. But they certainly are guided by the law, the statute and also the law as I understand it as it relates to DNA matters. And so, I say that just in abundance of caution to preserve any procedural defect as a result of the situation which Judge Murdock brought to my attention.

Also, I see that on her letter, she copied yourself --

THE COURT: Mm-hmm.

MR. SMITH: -- and Judge Williams as well as counsel, Mr. Giblin. And so, I've been asked by Mr. Spivey to make that clear to the Court and he's pointing to his right to counsel under the post-conviction appeals in Criminal Procedure, Section 8-201 as it relates the disposition in this matter.

THE COURT: Well, I'm looking at the Final Supplemental Petition for Post-Conviction.

MR. SMITH: Yes.

THE COURT: And there's not a DNA issue in there. Is it? Or did I miss it? There's no DNA issue raised in that Supplemental Petition dated November the 4th, 2011. So the issue with regards to the DNA, I believe, is that a Motion for New Trial for new discovered evidence?

MR. SMITH: That was the second pleading that I filed, Your Honor, I believe, which would have been in some time in December. I do believe, however, Your Honor, that I saw a pleading somewhere along the line where the DNA was raised

prior to December the 20th when I entered the case, on or about.

MR. LEEDY: If I may, Your Honor?

THE COURT: Mm-hmm.

MR. LEEDY: Your Honor, the State's perception of the proceedings are that Ms. Kamins did file a Petition under 8-201 --

THE COURT: Mm-hmm.

MR. LEEDY: -- on, which was received by the Court on October 6th of 2011. And that the State subsequently, in lieu of filing a response as required by both the statute and the rules, the State decided, which is also permitted by the rules to enter into a Consent Order for the testing as opposed to an answer --

THE COURT: Okay.

MR. LEEDY: -- to which the answer that the State's required to provide --

THE COURT: Go ahead.

MR. LEEDY: -- the answer that the State's required to provide pursuant to the rule is

relevant with regard to any search conducted by the State and whether the State is opposing any testing.

THE COURT: Okay, bottom line, that was a separate filing with regards to the DNA?

MR. SMITH: It was. That preceded my filing and obviously, they entered into an Agreement before I got into the case.

THE COURT: Okay.

MR. SMITH: However, I did file --

THE COURT: Okay.

MR. SMITH: -- which I would assume would be --

THE COURT: And now I see how and why it was split. And generally, excuse me, it's my understanding that that's not an unusual situation.

MR. SMITH: Well, it may be unusual in the application to the statute based on our local policy.

THE COURT: Okay. In any event, this Court has already begun its proceedings with

regards to the post-conviction hearing based upon a Supplement to Petition for Post-Conviction Relief that was time-stamped and dated November the 4th, 2011 and that was the document compiled by Ms. Kamins.

MS. KAMINS: That's correct, Your Honor.

THE COURT: In which the Court instructed her to put everything in one document because there was several supplements out there. And we have eleven allegations under ineffective assistance of counsel and also a Brady violation, is that right?

MS. KAMINS: That's correct.

THE COURT: Okay. So, that's where we are and that's what this Court is addressing here in this post-conviction proceedings. And we've already had witnesses called as well.

MR. SMITH: I do understand.

THE COURT: So this is a continued proceeding.

MR. SMITH: Yes, Your Honor. And of course, since these matters under the rules as they

related to post-conviction petitions are amended liberally, and I understand you want some finality in the issues which have been presented by counsel that I'm getting the impression that I am probably an unwanted fly in the soup at this particular moment and that perhaps I need to put my things in my case and leave. And that's all right. That's all right. I understand that. I would just indicate to the Court that I have been contacted by Mr. Spivey to put forth additional issues.

MR. SPIVEY: Can I speak? Can I speak cause I don't want them to say that I waived anything.

THE COURT: Wait. You have two lawyers here. Let them speak first.

MR. SPIVEY: Okay.

THE COURT: And then if you feel that these two attorneys here, who probably have, I don't know, fifty years of experience doing this, have not said what you believe needs to be said, then you think about it first --

MR. SPIVEY: Mm-hmm.

THE COURT: -- talk to them before you say anything to the Court. Mr. Smith, go ahead please.

MR. SMITH: Yes, well, thank you, Your Honor. Probably in the interest of brevity and because we really need to get right to it since there are Mr. Spivey's feelings, I thank you for the opportunity to be heard.

THE COURT: Thank you.

MR. SPIVEY: Can I speak now?

THE COURT: Ask your lawyer first before you say something to the Court.

MR. SPIVEY: Can I speak now?

MR. SMITH: Yes, of course.

MR. SPIVEY: I want, I'm not no lawyer and I don't want to try seem like --

THE COURT: Stand up.

MR. SMITH: Your Honor, may he, he has a cane.

THE COURT: Oh, he has, you have a

problem standing? If you have a medical issue standing, sit, no, go ahead and sit down. I'll understand that. I just need to make sure.

MR. SPIVEY: I don't want to say that I waived anything.

THE COURT: Mm-hmm.

MR. SPIVEY: And I know I'm not a lawyer. And I don't want the Court to seem like it's a lawyer. But under 8-201 statute, I know it says, (i), under (i) disposition upon receipt of results. It say if results come back in the post-conviction in favor of defendant, 8-201 must be presented as a 7-102.

THE COURT: Mm-hmm.

MR. SPIVEY: And this is my 7-102. So, basically, intertwine. If I leave this Courtroom and it goes somewhere else, it go in front of the Court of Appeals, they might, you don't know what they gonna see. That's why the issues supposed to be dealt together, the post, 8-201 petition has the same post-conviction number. Both of them have the

same number. There's nothing different. The number is, the post-conviction number is (brief pause) 9759. That's the post-conviction number the Clerk made for the 8-201.

THE COURT: Mm-hmm.

MR. SPIVEY: And that's supposed to go together. It doesn't go to a separate issue. And it was a case, the case is Douglas Airey v. State. They said that. Under 8-201 supposed to be listed as a 7-102 if it come back in my favor. It shouldn't be separated. It shouldn't be two different issues. It's one issue. And if you look under the statute, under (i), the 8-201 statute, it say it in that too.

THE COURT: Okay.

MR. SMITH: Your Honor, just one more thing. Because things have kind of unraveled the way they have unraveled and looking at Arrington and actual innocence, I contacted the United States Attorney's Office and spoke to Mr. Welch who is a United States Attorney, and I put it in one of my

footnotes in my papers as to the investigation in the Jermaine Bell case, and I don't want this issue to be waived either, and I think I have a duty to bring it forward to the Court that there are documents which may have a direct bearing in the Jermaine Bell case, which was the United States' case involving issues that intersect with the issues in this case and the death of the victim. And I have attempted to get those documents prior to this --

THE COURT: In reference to the DNA?

MR. SMITH: No, Your Honor. This has to do with the first part of Arrington as it relates to actual innocence and your analysis if it goes to the second form, second issue.

THE COURT: Okay, well, here's the issue Mr. Smith. The post-conviction number is the 9759.

MR. SMITH: It is.

THE COURT: Those are the, that's the case number that we're here on. The actual innocence or request for a new trial based on

actual innocence or DNA is a separate issue and the Court has not, this Court has not received those filings. Some of them we have. Some of them we haven't. We may have some of this. We may have some of that. And that's why, because they're separated and because the actual innocence raises issues that aren't necessarily raised in post-conviction, they're separated.

Particularly with regards to DNA. And that's the policy of this Bench. So, without this Court deeming any rights waived by the Defendant, that matter, with regards to the actual innocence and with regards to the results of any DNA will be before Part 30. This Court will address only what's contained in what it considers the final filing in this post-conviction matter, post-conviction number 9759, dated November 4th, 2011.

MR. SMITH: Yes, Your Honor, just because I do understand how these things are received by the Clerk's office and how they are designated in the Clerk's office, often times they receive the

papers in the original case number, which Mr. Spivey has already quoted for you, and then they assign the post-conviction number to the original file.

Unfortunately, being around for almost forty years, I have picked up, at least that much, of the procedure. One has to just note that. Everything that should obviously be before Your Honor in the post-conviction situation is also a part of the original base file. But if they have separated it, then then it was done in error, I would think. Or, it was done by misadventure.

THE COURT: Okay. All right. That being said, let's continue with the post-conviction hearing.

MR. SPIVEY: There's one more thing I've got to say. My post-conviction, it was supposed to be an ineffective assistance issue, ineffective as far as DNA issues or not. Mr. Middleton, it hasn't been filed yet.

THE COURT: Okay.

MR. SPIVEY: And I need that to be filed. I'm asking for a postponement cause my other lawyer hasn't done it, so it's not, it hasn't been --

MS. KAMINS: Your Honor --

THE COURT: Sit down.

MS. KAMINS: You want me to sit down as well?

THE COURT: Yes.

MS. KAMINS: Okay.

THE COURT: Yes. All right, your request is denied.

MR. SPIVEY: Okay. Well, as far as my Pro Se Petition that I put in, it was a issue as far as the State say something about that I abandoned or waived the issues. I don't want to abandon, I want it to be known that I don't want to abandon or waive no issues in my Pro Se Petition because I'm a layman with no legal training, I relied on my attorney. I put all the issues in my Petition. So I want it to be known that I'm not abandoning no issues.

THE COURT: Mr. Spivey, this is not a brand new hearing. This is merely a continuation of a hearing where testimony had begun on November the 30th, 2011 and we only continued it until today because of the lateness of the hour.

MR. SPIVEY: And DNA issue. Remember it was postponed until the outcome of the DNA issue?

THE COURT: No, I don't recall that in this hearing.

MR. SPIVEY: I had a video that showed that. It was postponed because remember we got into a issue of whether or not we could continue it cause the DNA issue. You said, okay, it's already gonna be continued. Cause for the DNA reason, you asked why would whatever Judge Rasin did? What was going on with that Petition? It was continued for that reason. I have the video right here to show that.

THE COURT: Okay, but that wasn't on November 30th.

MR. SPIVEY: Yes it was on November the

30th. I have the video to show.

THE COURT: Do you have that Madam Clerk, anything about DNA. What is he talking about?

MR. GIBLIN: Your Honor, Ms. Kamins, if I'm interpreting this wrong. We had an issue last time. I believe Petitioner's counsel at that time was trying to make the point that if in fact the DNA testing came back in a way that could be construed as favorable to Mr. Spivey, then they would wish to add that to their argument that Mr. Middleton was incompetent by not requesting DNA testing prior to the trial. I'm prepared to argue that point today.

MR. SPIVEY: I'm not prepared because the Petition not in.

MR. GIBLIN: Well, it's a simple Strickland analysis that's called for in that case, Your Honor.

THE COURT: Right.

MR. GIBLIN: Did he or did he not make the testing. We're conceding that he didn't. Was

that a violation of his professional standard and if so, was it fitting --

THE COURT: Substantial probability that it would, yeah.

MR. GIBLIN: -- second prong of Strickland. And I'm ready to argue that now.

THE COURT: Mr. Spivey, Mr. Smith, somebody. Who -- who represents Mr. Spivey --

MR. GIBLIN: That's the other point I was going to make.

THE COURT: -- in this matter?

MS. KAMINS: Your Honor, I represent Mr. Spivey on the Post-Conviction petition or the supplement that Your Honor referred to that was filed on November 4th and as far as I'm concerned, although there's obviously a great deal of confusion, I represent him solely with respect to the claims that we began to litigate last November.

THE COURT: Okay.

MS. KAMINS: There was, in fairness to Mr. Spivey, there was the possibility that that

Petition would be amended if the results of the DNA testing came back in his favor, and if certain other prerequisites were met.

THE COURT: Okay.

MS. KAMINS: Which they were not. The results came back in his favor but other prerequisites that would have enabled me, in good faith, to amend the Petition, either in writing or verbally, were not met and therefore, while Mr. Spivey and I were sort of determining whether or not we were going to be supplementing the Petition and if so, how, he then retained another attorney, who I was told was taking all the DNA issues under his --

THE COURT: Mm-hmm.

MS. KAMINS: -- domain. So, that was the last I was told. I confirmed that by e-mail correspondence with Mr. Smith; that he's the DNA guy as far Mr. Spivey's case goes and he said that's correct. So I then abstained from filing any supplemental pleadings. I'm not prepared to

argue that issue. It seemed to me that in order to even get to that point, we would have to have admission of the DNA results and I'm not sure if I hear Mr. Giblin --

MR. GIBLIN: No. No.

MS. KAMINS: To not be opposing their admission, but I assumed from prior dealing that they would be so I'm, bottom line is, I'm not handling any DNA issues concerning this case. That's exclusively in Mr. Smith's domain and so --

THE COURT: And that's this Court's understanding. That DNA, Mr. Smith, is your domain with regards to Mr. Spivey. And by proceeding in the manner in which this Court has envisioned, Mr. Spivey is not waiving any arguments in reference to the DNA.

The ineffective assistance of counsel with regards to the DNA, I do believe will still be preserved. If not, I will sign an Order to that effect if he wishes to raise ineffective assistance of counsel specifically with regards to the

ordering or not ordering of DNA to be heard with this huge DNA issue. Am I out here on the island by myself or is that what, is that your understanding?

MR. GIBLIN: Yes, Your Honor, I --

THE COURT: Mr. Leedy, what about you?

MR. LEEDY: Yes, Your Honor.

THE COURT: Ms. Kamins?

MS. KAMINS: Not to muddy things Your Honor, but may I propose just --

THE COURT: No proposals. Is that your understanding?

MS. KAMINS: No.

THE COURT: Okay, what is your understanding?

MS. KAMINS: My understanding would be that were there to be a claim of ineffective assistance of counsel, vis-à-vis counsel not seeking pre-trial DNA testing, that that would have to be raised in this proceeding. But I'm not raising it because I was told not to raise it.

THE COURT: Well, why would it have to be raised in these proceedings if the Court deems that they're not waived because they weren't raised and they can be raised if they wish in the proceeding regarding the actual DNA. Does that make too much sense?

MS. KAMINS: Actually, Your Honor, I agree that that makes a lot of sense, but I'm afraid procedurally that Mr. Spivey would be precluded from raising a claim of ineffective assistance of counsel under the Sixth Amendment in a proceeding governed by 8-201 and my guess would be the prosecution would agree with me on that.

MR. LEEDY: Your Honor this, and I think this clarifies or illustrates the State's concern with this. As the State's indicated, this amalgamation of 7-104 and 8-201 proceedings. The post-conviction DNA statute is a stand-alone proceeding and it's clear from the reading of the statute that whether a post-conviction had been held previously or had not been held previously,

that the proceeding under 8-201 proceeds on its own merits.

And that what happened here, a mistake the State is not likely to make again, is that counsel had wanted DNA testing done for the ineffective assistance claim. I'll make this clear. The State's position has always been that DNA testing is only appropriate under 8-201 and if the results are possibly construed as being favorable to the Defendant, that any analysis is governed by 8-201. And that you don't use 8-201 to get DNA testing for which you then use the results to have --

THE COURT: An ineffective assistance claim.

MR. LEEDY: -- an ineffective assistance claim. And that has always been the State's position but the State has always recognized that because Ms. Kamins, October 6th of 2011, petitioned for DNA testing, did --

THE COURT: Hand me that Petition Madam

Clerk, the October 6th.

MR. LEEDY: -- did cite to 8-201.

THE COURT: Mm-hmm.

MR. LEEDY: And that State's recognition, and for reasons that -- for reasons of --

THE COURT: Give me the Petition. Don't give me all that crap.

MR. LEEDY: -- prosecutorial economy and to ensure that the State could have control over the evidence, the State entered into a Consent Order whereby swabs of the evidence were sent out instead of the evidence itself and the testing was done.

And the State expects that, at the appropriate time, under 8-201, a Court, in this case, Judge Murdock, will evaluate -- will evaluate whether or not those results create a substantial or significant possibility that the outcome would have been different.

THE COURT: Give me the file.

MR. LEEDY: And that it's, not only is it

inappropriate but there is no necessity of having an ineffective assistance of counsel claim with regard to the DNA testing and not to even suggest to Petitioner's counsel how this should go, but if the test under 8-201 is a substantial or significant possibility that the outcome would have been different, is the same as just the performance prong, I'm sorry, the prejudice prong, of an ineffective assistance of counsel claim that all we need to do with the DNA test results is proceed under 8-201 because it is a simple, single-pronged test which mirrors only, I'm sorry, the prejudice prong under an ineffective assistance of counsel claim.

And proceeding under 8-201 actually relieves Petitioner of any necessity of even proving deficient performance under Strickland's ineffective assistance of counsel claim and we simply proceed only on what would be the prejudice prong of an ineffective assistance claim or which is the same as the standard set out in 8-201

itself. So, if that was in any way a clarification, but it does put the State's position on record with proceeding under an 8-201 separate from a regular post-conviction, Your Honor.

THE COURT: Anybody else want to say anything?

MR. SMITH: Well, it's a sticky wicket. There's no doubt about that. And because you're kinda between the devil and the deep blue sea as it arose --

THE COURT: What if I hang around on shore and make this proposal, okay? We're gonna go forward with the post-conviction hearing. The hearing will not be concluded today but we're going to do everything that we can do today and whatever doesn't get done will not be concluded. There'll be ample time to have it taken care of. Can we all read between those lines?

MR. SMITH: It's reminiscent --

THE COURT: Can we all read between those lines?

MR. SMITH: It's reminiscent of Rodney King, can we all get along? Yes.

THE COURT: Can we -- can we all follow that thinking?

MR. LEEDY: Yes, Your Honor.

MR. SMITH: Yes, Your Honor. Would you like the tape? I do have it.

THE COURT: I don't want to see me in tape. I have an Order. I found the Order that I signed here. I have here, it's an Unopposed Motion for Continuance and in it, it indicates that the State does not oppose and that was, it was a request the Court continue the above matter as yet unspecified future date to enable the results of the DNA testing already underway. And that was filed September the 7th, 2012 and I signed an Order September the 14th, setting it in for today.

So, the same thing, the same Order, could be filed yet again, or the request could be filed yet again and the same Order filed. But instead of having to go through, I don't know, five, twelve

things at the next hearing, we could knock those twelve things out today. And we won't conclude the hearing because if we conclude it then we'll preclude, perhaps, the argument of ineffective assistance of counsel for not filing for the DNA.

MR. SMITH: Solomon couldn't do any better.

THE COURT: So, let's just move it on and do what we're doing, how about that?

MR. SMITH: I like it.

THE COURT: All right.

MR. SMITH: Now, that just, ask one question of you, Your Honor.

THE COURT: Why did I know that, Mr. Smith?

MR. SMITH: No, no. And my brother counsel and my sister counsel, since I have no part in this, may I be excused?

THE COURT: Absolutely.

MR. SMITH: Thank you, Your Honor.

THE COURT: And Ms. Kamins, which one of

you two, Mr. Smith or Ms. Kamins, will file that motion to have it set at a later date?

MR. SMITH: Me.

THE COURT: For that ineffective assistance of counsel --

MR. SMITH: Oh, you.

THE COURT: Make sure you all figure that out and make sure it's hand-delivered to my chambers.

MR. SMITH: Sure.

THE COURT: And the Clerk's office. But make sure I get it so I can rule on it. State will have no objection, will you State?

MR. GIBLIN: No, ma'am.

THE COURT: All right. Here we go. You got that Mr. Spivey? You don't need to get the tape. All right?

MR. SPIVEY: Put all on the record, already cause I don't want nobody to say I waived anything.

THE COURT: And isn't that what I said

before you, twenty minutes ago? I think I said, that you will not waive and it will not be deemed waived. It's not. All right. Take this Madam Clerk.

MR. SMITH: Your Honor, may I have your leave to withdraw from the Courtroom?

THE COURT: Sure. Let me give everybody a chance. Ms. Kamins, get yourself all situated there. You want to move that chair for me please, Officer? And take (inaudible) everybody get yourself together. Mr. Leedy, does that mean you have to, we don't want any DNA, no DNA will be spoken here.

MR. LEEDY: I, because of some other issues that Mr. Giblin's going to address, I'm going to step back to the bench, but I will remain in the Courtroom.

THE COURT: And you sure Mr. Giblin you don't need his assistance up here?

MR. GIBLIN: I think I can muddle through with (inaudible).

THE COURT: All righty, looking at my notes, on November the 30th, 2011, Mr. Spivey spoke, testified briefly and because the lay witness was here or the attorney at the time, Mr. Middleton, was here, he testified forever. And we finished re-direct with Mr. Middleton and that's where we stopped.

MS. KAMINS: That's correct.

THE COURT: Okay, is that your recollection Mr. Giblin?

MR. GIBLIN: Yes, ma'am.

THE COURT: All right. So, where do we begin today, one minute, let me write my notes, Attorney Smith to file for continuance on ineffective assistance of counsel matter, counsel issue regarding DNA. Let me see that file, please. See Defense Motion of -- see Defense Motion of 9/7/12 and Court Order. All right.

(Off the record discussions between Judge and Clerk).

MR. SMITH: Thank you, Your Honor.

THE COURT: Thank you.

MR. SMITH: Have a good day.

THE COURT: All righty. All right.

MS. KAMINS: You Honor, may I proceed?

THE COURT: Yes, please.

MS. KAMINS: So, as Your Honor recounted, we had finished with the evidentiary portion of the hearing and all that was left --

MR. GIBLIN: Now, that's not true. I wasn't asked if I had any witnesses I wished to offer.

THE COURT: Right, we had just, we only did one witness.

MR. GIBLIN: I never got to put --

THE COURT: Right.

MR. GIBLIN: -- my case on.

THE COURT: I don't even know if they had finished. So --

MS. KAMINS: My review of the videotape was that I did rest my case and I'm sorry if I misunderstood but I thought the tape reflected that

Mr. Giblin said that he had no witnesses.

THE COURT: Well, you know what, it's great that you all have this time to review all these videotapes but I didn't review the videotapes. And I just have notes. And my notes just indicate that it was the end of direct examination. So, are you telling me now that the Petitioner rests?

MS. KAMINS: Yes, Your Honor.

THE COURT: All right.

MR. SPIVEY: We don't rest. We don't rest.

THE COURT: Talk to your client, Ma'am.

MR. SPIVEY: We still got the Brady issue.

(Off the record discussions between Mr. Spivey and Ms. Kamins)

MS. KAMINS: Your Honor, the Petitioner rests.

THE COURT: With regard --

MS. KAMINS: With regard to the

evidentiary portion of the case. In other words, we have no further witnesses. Mr. Spivey was concerned that I was not going to argue the case but I am prepared to give argument on all the issues assuming, after the State presents its witnesses.

THE COURT: Well (inaudible) --

MS. KAMINS: If it has witnesses.

THE COURT: Well, then the Petitioner does not rest.

MS. KAMINS: In terms of presentation of witnesses, Your Honor. That's all I meant.

THE COURT: I --

MR. GIBLIN: Your Honor --

MS. KAMINS: We haven't argued this case yet.

MR. GIBLIN: Your Honor, the State has no witnesses. State is prepared to move to argue.

THE COURT: Okay. Okay.

MS. KAMINS: Is Your Honor willing to hear argument on the Petition?

THE COURT: With regards to evidence.

MS. KAMIN: With regard to the evidence, that was the case last year.

THE COURT: Okay. Wait a minute -- wait a minute. Look, I'm making sure my notes are specific this time because I don't have time to review the videotapes. And if I hear that again, it'll probably make me sick. Okay, with regards to argument, and are you going to follow the Petition?

MS. KAMINS: Yes.

THE COURT: Okay.

MS. KAMINS: With respect to Claim A in the Petition, that is a claim of ineffective assistance of counsel that has numerous subparts, numerous examples of what we maintain are ineffective assistance against the backdrop of the fact that Mr. Middleton, who is counsel in the case, had been, for conduct that was occurring during the timeframe in which he was representing Mr. Spivey, he had been reprimanded and ultimately suspended from the practice of law for various

misdeeds, during the course of criminal cases that were handled prior to and for a short period of time after, Mr. Spivey's case.

The incompetence cited in the Court of Appeal's decision, and I would remind Your Honor that you took judicial notice of the attachments to the Petition that we filed and the attachments, Attachment A, is the documentation of the basis for Mr. Middleton's suspension from the practice of law.

THE COURT: Okay, let's make it relevant to this case and I think we had this issue, we started to have this issue at the hearing before. Let's make it relevant to this case.

MS. KAMINS: Yes, Your Honor. I believe that I did that in the Petition and the particular instances of ineffective assistance of counsel for which Mr. Middleton was suspended --

THE COURT: No, no, no.

MS. KAMINS: Okay.

THE COURT: In this case, tell me what he

did, okay?

MS. KAMINS: Your Honor, I was attempting to finish my sentence which bore directly on what he did in this case. I mean, I'm trying to do preciously what you're asking me to do, Your Honor, which is to talk about what Mr. Middleton failed to do or did incorrectly in this case.

THE COURT: Get to it then. Do it. Do it.

MS. KAMINS: Thank you, Your Honor. The broad categories of his misdeeds in this case, included the lack of trial preparation, the failure to pursue --

THE COURT: Okay, which one of these? I thought you were going to follow your allegations?

MS. KAMIN: Allegation One, the failure to request Voir Dire questions regarding the jurors' strong feelings about drugs, murder by handgun and murder in general. Trial counsel testified at the hearing that he had no specific recollection but he generally believed that the

Court's Voir Dire other questions generally covered the topics.

Mr. Middleton conceded he was not aware of the dispositive case law that requires particular jury instructions to be propounded upon request of defense counsel, in seeking to determine whether any of the prospective jurors have such strong feelings against certain types of cases, certain types of crimes. Specifically, there's been Court of Appeal's case law, recently, subsequent to Mr. Spivey's case, that makes it definite that all crimes are subject to this question if defense counsel asks. Meaning, that, do you have a particularly strong feeling towards child abuse or towards handgun murders or towards narcotics cases? And that's State v. Shim.

State v. Thomas, which was a case out of the Court of Appeals in 2001, dealt specifically with narcotics. Of course, in Mr. Spivey's case we have use of handgun. We have the crime of murder. We also have a narcotics offense. And there is

also a Court of Special Appeal's case from 2006 dealing specifically with handgun murders. All of these cases say that they are not setting forth new law but they're all rooted in previous law that pre-dated Mr. Spivey's case.

In this, at this trial, Mr. Middleton did not ask the Court to give any instruction during Voir Dire process designed to root out jurors who had such strong feelings towards any of those offenses that it would render them incapable of making a fair and partial decision.

With respect to number two cited in our Petition, the failure to object to the reasonable doubt instruction, trial counsel was asked about this question at the hearing last year and he stated he did not recall. And what in fact occurred was that the trial Court gave an instruction that deviated from the pattern jury instruction and also included language that the rules committee took out of the instruction based on its finding that that language rendered the

reasonable doubt instruction confusing.

And that language had been taken out of the instruction earlier in the year that Mr. Spivey was tried. And trial counsel should have been aware of the fact that that instruction language was no longer permitted to be given in jury instruction cases. I mean, in reasonable instructions in criminal cases.

And furthermore, the case law that was then in effect at the time long pre-dating Mr. Spivey's trial, admonished Courts from embellishing on the definition of reasonable doubt out of dangers that it would confuse, mislead or prejudice the defendant. And in fact, that is what happened in Mr. Spivey's case.

With respect to issue three, the failure to challenge the reliability of the State's gunshot residue evidence and to present its own expert in rebuttal, trial counsel testified that number one, he didn't feel there was enough gunshot residue to matter one way or the other in this case. Two,

that it was his perception that the cost of an expert would be prohibitive to Mr. Spivey. And three, that the decision not to pursue independent gunshot residue testing was tactical because of certain statements made by Petitioner to him.

And we would submit Your Honor that to the extent trial counsel asserts his decision to forgo that testing was tactical, that tactic was unreasonable. The State's evidence at trial raised significant questions -- significant questions regarding the contamination and the failure to preserve the gunshot evidence, the gunshot residue evidence.

The gunshot residue evidence in fact was the only physical evidence and it was a critical importance to the State's case contrary to what Mr. -- contrary to what Mr. Middleton recalls. In fact, the State relied on the gunshot residue evidence in closing argument by saying, these guys had gunshot residue evidence all over their hands. So, it clearly was an important point to the State

and therefore, it's not a reasonable conclusion on the part of trial counsel that the evidence was not important.

Had the defense pursued an expert in the field of gunshot residue, that expert could have testified to the significance of the miniscule amount of particles found on the defendant's hands. He could have also opined as to other sources of gunshot residue, the contamination possibilities inherent in the testing procedures done, how the evidence was not preserved whatsoever and also, he could have testified, he or she, could have testified to the type and the size of the gun that was utilized in this case and the discharge and the pattern of gunshot powder as expelled from that type of weapon.

At the very least, an expert could have pursued independent testing and come up with a different particle count that may in fact have been helpful or exculpatory to Mr. Spivey.

THE COURT: And you know in fact that a

different particle count would have been --

MS. KAMINS: If the particle count, for instance, had been --

THE COURT: Oh, if it had been different. Okay.

MS. KAMINS: If it had been different, it could have been exculpatory. It could have been -- could have been not exculpatory, but we can't know without independent testing.

THE COURT: Could have been more though, right?

MS. KAMINS: Absolutely.

THE COURT: Okay.

MS. KAMINS: Trial counsel, bottom line, did not present Mr. Spivey with the option of retaining an expert or explain to him the significance of what an expert could do for him at the trial. And considering that, this again, was the only physical evidence or scientific evidence that even remotely tied Mr. Spivey to the case, its importance was -- was great.

With respect to issue four, the failure to object to improper closing argument by the State, trial counsel testified at the hearing that he has no independent recollection, but he did say that generally speaking, sometimes he doesn't object for tactical reasons. He finds, for instance, that it might not be in the client's best interest to do so.

Here the particular instances of improper closing argument we maintain refer to facts that were not in the evidence and through inferences that were not in fact fairly drawn from the facts that were in evidence. The first example of that is subsection A, the State asserted that out of, there were two suspects, one suspect carried the drugs and the other carried the keys and the gun.

This was contrary to any evidence that was introduced in the case and we would submit it was the State's effort to explain how the evidence was found in terms of its geographical location scattered over a fairly wide area, that that was an

effort to bolster its theory that the two defendants acted in concert when it was not really sure who played what role in the case. This was a way to make sure that they were both connected to the offense and that was not based on any evidence nor was it a fair inference to draw from the evidence.

Subsection B is that, as referenced earlier, the prosecution said to the jury that the suspects had GSR, literally all over their hands. This was of course not accurate. Now perhaps one could argue that the State's allowed to embellish or use oratorical flourish in their closing arguments. But, at the very least, this should have been cause for trial counsel to seek a curative instruction reminding the jury to rely on its own recollection as to that characterization. In fact --

THE COURT: And did the Court give that instruction?

MS. KAMINS: No, Your Honor, it wasn't

requested.

THE COURT: No instruction was given to the jury that said you must rely on your own --

MS. KAMINS: At that particular juncture is what I'm referring to Your Honor when that evidence.

THE COURT: But before that, that was given, correct?

MS. KAMINS: As a general cautionary instruction at the beginning of the trial, yes.

THE COURT: Okay, and it was said that if the juror's recollections were different from the Court's or the attorney's, they have to rely on their own?

MS. KAMINS: Yes, Your Honor.

THE COURT: And did the Judge also tell the jury that closing arguments were not evidence?

MS. KAMINS: I assume -- I assume he did.

THE COURT: Okay.

MS. KAMINS: Or she did, yes.

THE COURT: Okay.

MS. KAMINS: But there are, of course, not withstanding instructions given at the outset of trial or given prior to jury deliberations, there are numerous instances where curative instructions, or the failure to give curative instructions, even if they reiterate those general instructions, can be reversible error.

Subsection C, the State argued facts to the jury that supported the charge of the robbery of cocaine despite the fact that the Court had granted a Motion for Judgment of Acquittal finding that to reach that conclusion, that there had been a robbery of the cocaine, called for sheer speculation and that was why the Court was granting the Motion for Judgment of Acquittal on that particular count. And notwithstanding that, the State went ahead and argued those facts to the jury, which again, Mr. Middleton did not object to.

Subsection D, the Court denied the Motion for Judgment of Acquittal as to the robbery of the car keys on the basis that, in the Court's view,

the evidence showed that the victim had been shot in one location, or the evidence could show, the victim was shot in one location and was driven to a second location. And this in and of itself would show that there had been a robbery of the car keys. But, in closing argument, the State argued the converse to the jury, which was that the victim drove himself to the second location.

And if this was so, there could not have been by definition a robbery of the car keys. And trial counsel should have highlighted that either by objection to the State's closing argument or utilized that in his own closing argument to show that the State had contradicted its own evidence.

Subsection five deals with the State's vouching for the credibility of its fingerprint examiner. Trial counsel testified at the hearing last year that either he did not agree that this was witness vouching or that he did not object for tactical reasons but he couldn't articulate which of the two possibilities had occurred and the

language utilized by the prosecutor was, I quote, that man, referring to the fingerprint examiner, exuded professionalism. He's literally the pro from Dover. He's the one who trains people down there. You saw how he testified. He explained everything.

This Petitioner submits constitutes witness vouching because it is the prosecutor essentially expressing his own opinion about the expert's credibility and it implied personal knowledge that somehow Mr. fingerprint examiner, whose name I can't remember, his credibility was somehow known or accepted in the community as a fact that wasn't subject to dispute and that crossed the line into witness vouching.

With respect to Section six in the Petition, the failure to cross examine Dr. Moog about the clothing worn by the perpetrators. Dr. Moog was a witness who claimed to have seen two individuals in the vicinity of the crime scene; very important witness at trial. Trial counsel

could not remember Dr. Moog at all when questioned at the hearing last year.

THE COURT: Let me ask you this, Counsel, and I hope my recollection is correct. If not, I'm sure you will remind me because I know you watched it on tape, isn't it true that the witness was never given a copy of the transcript?

MS. KAMINS: No, Your Honor, that's not true.

THE COURT: Didn't the witness testify that he wasn't privy to the transcript?

MS. KAMINS: Yes, Your Honor, he did say that he didn't read the transcript and he says that he would have liked the transcript, however, he refused to take the transcript from me. He said he didn't have any time to read the transcript and he evaded my subpoena the first three times I tried to serve it, so --

THE COURT: Okay, so what does that have to do with, all I'm just saying is that --

MS. KAMINS: He was not willing to read

the transcript, Your Honor. I did provide it to him.

THE COURT: Okay, listen to my question. The witness had not read the transcript, correct?

MS. KAMINS: That's correct.

THE COURT: Okay. And when did this trial take place?

MS. KAMINS: In 1998.

THE COURT: Okay. I just want to make sure because --

MR. SPIVEY: 99.

MS. KAMINS: 1999. I'm sorry.

THE COURT: -- I mean, it would be a lot for, okay.

MS. KAMINS: I certainly wouldn't expect the witness to have independent recollection, which is why I provided him with a fifty page pleading, exhibits and offered him the transcript that he declined to refresh his recollection and, but, I would agree with Your Honor that it wouldn't be reasonable to suggest that he would remember

independently. So, unfortunately, we were essentially stuck with the witness not being able to give any explanations based on recall.

And his recollection wasn't refreshed because he didn't read the transcript. So, his testimony was of little value, either way in view of that. But I do have to point out what it was because we did have a hearing on that.

So, as I was saying, trial counsel could not remember Dr. Moog. He did remember various other parts of the case and various other witnesses but he did not remember Dr. Moog, therefore, he could not speak to this issue in particular but I would submit that the record itself establishes the ineffective assistance of counsel because Dr. Moog, as is clear from the transcript, gave the Police a very detailed description of what the perpetrators, or what the people he saw near the scene had been wearing.

And despite the fact that the State actually introduced into evidence the clothes that

it claimed the perpetrators had been wearing, which was two pairs of shorts, two shirts and a hat, at no time did defense counsel ask the witness whether these clothes matched or looked like, or were the clothing worn by the people that he saw near the scene. And depending on the answer, this could have of course, been an important issue on criminal --

THE COURT: But what if the answer was yes? That's the exact pair of shorts. I never could have described it. But those are the shorts. And yes, those are the shirt. Right, the defendant was wearing these -- these shorts. The other guy wore that one. The defendant was wearing this shirt and the other guy -- what if he said that?

MS. KAMINS: Your Honor, a good trial attorney wouldn't ask a question --

THE COURT: No, no, no.

MS. KAMINS: -- that he wouldn't know the answer to ahead of time.

THE COURT: Oh, thank you. Thank you.

MS. KAMINS: Pretrial investigation, Your Honor.

THE COURT: So, maybe Mr., what's the defense, maybe the defense attorney knew the answer to the question perhaps?

MR. GIBLIN: And one thing, Your Honor, if I, and not to interrupt Counsel, but this is the second time that she's made reference to an allegation of inadequate pretrial investigation. That's not in the Petition. That wasn't in the Petition when Mr. Middleton was on the stand. He wasn't asked about it on the stand. And most importantly, the State did not have a chance to cross examine him on that issue. So, I don't know why we're talking about it.

THE COURT: Going on to number seven.

MS. KAMINS: Yes, Your Honor. Failure to seek a missing witness instruction and to argue the missing witness inference to the jury; trial counsel had no recollection and reading, and he testified that reading the Petition on this claim

specifically did not refresh his recollection. But the record shows that there was an anonymous citizen who pointed out the handgun lying in the grass to a Police Officer after the scene, after the suspects had been taking into custody.

Counsel for Mr. Spivey's co-defendant, tuned into this and took exception to the Court's failure to propound a missing witness instruction. Trial counsel for Mr. Spivey, however, did not object to the failure to give a missing witness instruction and this in fact was a viable appellate issue for direct appeal that Counsel's failure to raise precluded Mr. Spivey's appellate counsel from raising.

Similarly, there was an off-duty Police Officer who radioed in his sighting of two black men walking down Roland Avenue after the crime occurred and ultimately, another Police Officer stopped the defendant and the co-defendant. Their identity, the identity of this off-duty Police Officer was uniquely within the domain of the State

because in fact he was a Captain in the Police Department and his testimony bore directly on whether the Police apprehended the correct individuals as opposed to somebody else who happened to be in the vicinity at the time. So, that witness also qualified for both the instruction as well as the inference to be argued to the jury.

With respect to Claim eight, the failure to (inaudible) the jury instructions on murder and armed robbery. Trial counsel explained at the hearing below that he had tried very few homicides so he didn't come up with this issue often, if at all, and was not familiar with the law that governs it but to be brief, in this case Mr. Spivey was, based on the way the jury was instructed, there was a verdict of guilty as to both first degree premeditated murder as well as to felony murder. And there was no basis upon which to determine which type of first degree murder the conviction was based on.

And the Court sentenced Mr. Spivey to life plus twenty years consecutive. The twenty year consecutive sentence went to the robbery. If in fact the jury had reached a verdict of guilty as to felony murder and guilty as to robbery, the robbery sentence would merge into the felony and therefore there could not be a separate sentence for that. If however, it was first degree murder and not felony murder, then of course a separate sentence would be appropriate and I cited in my Petition, State v. Fry and Jones for that proposition.

The error in those cases as the error was in this case was with the jury instructions that did not ask the jury to articulate which type of murder it was convicting Mr. Spivey on and the law is clear that that ambiguity must be resolved in favor of the defendant. The relief of course on that plane would be simply to vacate the twenty year sentence imposed for robbery.

With respect to Claim nine, trial counsel

failed to point out in closing argument the inconsistencies with respect to the weight of the cocaine. There is also a possession of cocaine with intent to distribute conviction in this case. The Statement of Charges alleged that Mr. Spivey possessed two ounces of cocaine. But the testimony at trial through Detective Massey was that he possessed about four ounces of cocaine and according to the Detective, that particular quantity indicated a definite indication of intent to distribute.

And then at sentencing, the prosecutor reverted back to the two ounce amount and it would have been beneficial for trial counsel to have either cross examined Detective Massey about his testimony, perhaps it was incorrect considering that the State and the Police cited a two ounce amount and that could have undermined Mr., Detective Massey's assertion that it showed intent to distribute. That could have been the difference between the finding of intent to distribute versus

simple possession.

THE COURT: Are you aware that every argument you're making, is like you're going around in circles?

MS. KAMINS: No, Your Honor. I'm not.

THE COURT: Okay. Well, let me point that out to you because you're saying that the attorney should have asked the Detective to clarify that because if it was just two ounces, it may have made a difference. But what if it was, oh, you're right? It was the four ounces definitely. Wouldn't that have gone in the opposite way for your client later?

MS. KAMINS: Your Honor, our position is that --

THE COURT: No, that's my question.

MS. KAMINS: No.

THE COURT: Don't, no.

MS. KAMINS: That's my answer.

THE COURT: Okay.

MS. KAMINS: No.

THE COURT: All right.

MS. KAMINS: Our position is that it is incumbent upon trial attorneys to cross examine regarding inconsistencies in the evidence because that can inject reasonable doubt into a case.

THE COURT: And what if there was no, what if the defense attorney was in possession of, or had an indication that it was four ounces and not two?

MS. KAMINS: Are you asking me to answer that?

THE COURT: No, I want you to dance to it. What do you think I'm doing?

MS. KAMINS: Your Honor, I'm trying to argue a post-conviction case for my client.

THE COURT: Okay. Come up to the bench. Come up to the bench, Counsel. Take this please.

(Conference between Judge and attorneys at the bench)

THE COURT: I'm going to say this as nicely as I can, drop the attitude. Drop it. The

snippy, the snit. I ask you questions. I know what you're doing and I know what you're job is. I'm asking you questions because I have to make a decision. And I want to make sure I have all the information to make a proper decision. So, drop the attitude. It's not helping me to understand your position at all. Do we understand one another?

MS. KAMINS: I understand you. Yes, Your Honor. I feel that you're criticizing me in front of my client repeatedly.

THE COURT: I'm not criticizing you, ma'am. I'm trying to ask you questions but because of your attitude, you're making it a little difficult. I'm not criticizing you.

MS. KAMINS: Well, that's my perception, Your Honor and I feel that you're also giving essentially a verbal ruling as you did the last time on pretty much everything that I say.

THE COURT: I've not given a ruling on anything.

MS. KAMINS: Well, that's how, that's the perception that I have.

THE COURT: Okay, well you're misperceiving it. I'm asking that because I want you to address it. So I won't have --

MS. KAMINS: And I intended to answer you and Your Honor get angry with me.

THE COURT: You're doing it again. I'm not angry.

MS. KAMINS: I'm sorry. I'm trying to finish a sentence and defend myself.

THE COURT: I'm not angry. Okay, I'm not, you don't have to defend yourself from anything. All I'm saying is drop the attitude. I'm asking you these questions so I can address them in my mind. Generally, when the Court asks questions, there's something that the attorney might want to address.

MS. KAMINS: I attempted to argue, Your Honor, that it was incumbent upon trial counsel to point out these inconsistencies and Your Honor

would not allow me to say that.

THE COURT: You said it twelve different times.

MS. KAMINS: Okay. Well, then perhaps I'll just sit down since I'm essentially done and I'm obviously damaging my client's case.

THE COURT: You're not damaging your client's case. All you're doing --

MS. KAMINS: Well, Your Honor, I think I am.

THE COURT: Listen to me. You're not damaging your client's case. I don't care about you. I don't know you from Adam. I want to get information.

MS. KAMINS: You told me last time my --

THE COURT: I want to get the information.

MS. KAMINS: -- attitude was going to cause you to rule against me. And I think you're doing the same thing this time.

THE COURT: I'm asking you to drop the

attitude.

MS. KAMINS: Fine. I will drop the attitude. I will do that. I apologize for the attitude. I was trying to vigorously defend my client.

THE COURT: I can't imagine me saying that your attitude would cause me to rule against you. I can't imagine saying that. Is that exactly what I said?

MS. KAMINS: Yes, Your Honor.

THE COURT: I said, your attitude is going to cause me to rule against you?

MS. KAMINS: Yes.

THE COURT: Those were exactly my words?

MS. KAMINS: Your Honor, I'll play the tape for you if you want.

THE COURT: Those were my exact words?

MS. KAMINS: Yes.

THE COURT: Oh, okay.

MS. KAMINS: Actually it was, you're going to lose.

THE COURT: Oh, that's the argument. It's not the legal argument. It's when you give the snippy, snip, snip, snips, you lose. Not the argument and not your client. And it's not the client, it's you as the lawyer. See, you misunderstood.

MS. KAMINS: Oh, okay.

THE COURT: And that's what you're misunderstanding now. It's the attitude that means, when I say you lose, it's you as the alleged professional, not your client. Don't give me the attitude. That doesn't help you present your case.

And I have questions and I need to have them answered. That's why I ask. And it's not that you lose; it's the, if you have a verbal argument with the bench, you always lose. The lawyer always loses. It has nothing to do with the client or the position or the case. So let's make sure to get that straight now.

Because I know I would have never said that because I don't practice that way.

MR. GIBLIN: That was my impression, your impression, was, I vividly recall that.

THE COURT: Right.

MR. GIBLIN: It was like --

THE COURT: Don't argue with the Judge because you lose.

MR. GIBLIN: Right. Exactly.

THE COURT: And that's the argument. It's not the case. And that's what I think you're having a problem with separating. You need to get your personal feelings out of this, ma'am.

MS. KAMINS: I don't have any personal feelings. I'm representing Mr. Spivey. I don't know you. You don't know me. I have zero personal investment in this case. I don't have any personal feelings whatsoever. I'm simply trying to do my job and argue my case. That's all I've been trying to do from the beginning and for some reason, I'm rubbing you the wrong way.

THE COURT: Okay. All right, step back.

(Proceedings resume)

THE COURT: All right, you're talking about the weight of the cocaine and the inconsistencies.

MS. KAMINS: Moving on to Claim ten, this was the final substantive claim in the Petition and that was that Mr. Spivey ought to be entitled to the right to file a belated motion for reconsideration of sentence. And hopefully Mr. Giblin will recall conceding that point --

MR. GIBLIN: Absolutely.

MS. KAMINS: -- at the prior hearing so we don't have to litigate that. Finally, whether or not the Court finds that the individual claims themselves establish the prejudice prong under Strickland, our position is that there accumulative effect does in fact satisfy the Bower's standard for cumulative error and would warrant a new trial based on the claims viewed collectively, rather than individually.

With respect to the stand-alone independent Brady claim, that deals with the

failure of the State to disclose the widespread gunshot residue contamination at the Baltimore City Police Department at the time of the defendant's arrest.

I'm not going to belabor that point extensively because it really is laid out in the Petition as supplemented by Attachment B, which is the transcript of another defendant's proceeding which, rather than call of these witnesses again at this hearing, I'm referring Your Honor to the witness testimony and the evidence introduced at that hearing back in 04 when this issue, or this problem, in Baltimore City came to the forefront.

This was testing of Mr. Spivey's hands in the midst of this contamination epidemic there at Homicide. In 1998, Homicide was on the 6th Floor and it was a routine phenomenon that weapons would be test fired on the 5th Floor, which was about a hundred feet away from where these swabbings and testings were going on and as early as 1996, there were concerns raised about the possible

contamination in the laboratory where the GSR analysis was being performed.

And in fact, pursuant to a study that was conducted in response to those concerns being raised, gunshot residue particles were found in the interview room at Homicide and in most of the District stations.

And the point that we're making on this is had Counsel known about this contamination and about the fact that was very well-known among the Police and the Prosecutors at the time, he could have been equipped to challenge the finding of GSR on his client's hands and could have argued to the jury that that GSR could have come from a variety of different sources, such as the squad cars, the Officer's hands, the Officer's uniforms, or potentially any other surface with which Mr. Spivey had come into contact on the way to or at the Police Station.

And the absence of that disclosure, it is our position that Mr. Spivey's counsel was

inhibited from pursuing that claim that could have gone to convince the jury that he in fact did not have any gunshot residue on his hands from firing a weapon, but rather from other sources. That would be Mr. Spivey's argument.

THE COURT: Mr. Spivey, spell your first name.

MR. SPIVEY: D-O-N-T-A-E.

THE COURT: All right. Anything else Counsel?

MS. KAMINS: No, Your Honor.

THE COURT: State?

MR. GIBLIN: Yes, Ma'am. Thank you. The State, the Court I believe has preempted my first argument which had to do with the attachment of the Opinion by the Attorney Grievance Commission as to Mr. Middleton, which took place, I believe, approximately one year after this trial. The purpose of the post-conviction in this case is to look at his delivery of legal services, his representation of Mr. Spivey, not to look at what

occurred in other cases.

And I would say, parenthetically, that of course Mr. Spivey's case wasn't mentioned anywhere in the Attorney Grievance Commission's findings as to Mr. Middleton. However, Counsel put it on there. And I think for a reason. The reason to say that, look at this, he was so horrible an attorney his license was suspended and therefore he must have been horrible in this case.

And Counsel does however say the record, and I'm quoting from her Petition, the record in Petitioner's case is replete with egregious examples of ineffective assistance of counsel.

Now, I have to make an admission to this Court. When we were here the last time, I was very angry when I came to Court. And I was angry over the use of particular adjectives that Counsel used throughout her Petition in describing both my conduct at trial and being descriptive of other situations.

And so, as we go along here, I'm going to

make reference to certain adjectives that are used, Your Honor, and I'm not angry anymore. However, I do believe that at times, the use of certain adjectives was both ill-advised and as it pertains to me, completely unfair and irresponsible.

I looked up what egregious means, Your Honor. So, Counsel was saying that Petitioner's performance in this case, is such that it is replete with examples of egregious ineffective assistance. Egregious means extraordinary in some bad way. So, we just don't have regular ineffective assistance of counsel, we have extraordinarily bad representation.

Let's go through the particular allegations. The Voir Dire; I will agree with Counsel when she cites cases that occurred in the year 2005 and onward. It is fashionable these days for defense attorneys in their Voir Dire to particularize the crime, to ask the Court to deliver particular questions with regard to the particular crime.

I would suggest to the Court, and the Court, I know, was practicing, I believe was still practicing in these Courts back in, in the late nineties and I would suggest to the Court, having been there as the Court knows, since this is my case, it wasn't a question that was normally asked by counsel then.

Whether it wasn't asked because it wasn't thought of, because it was unfashionable, I don't know. But, I do know that the practice was among most of the trial Courts and was the practice of Judge Heller here, was to give some description of the facts of the case to the jury panel when they first come in telling them what the case involves, whether it's a drug case or a robbery case, a burglary, or in this case, a murder case that also included other felonies.

I will also say that it was the practice then and is the practice now to include a catch-all question to the panel that, is there any reason that I haven't brought up or asked you as a panel

particularly, that would keep you from reaching a fair and impartial verdict in this case. So, to say that his failure to ask, and by the way, counsel cites a number of cases in here. None of those cases has to do with a filing that counsel was ineffective by not asking the question. Those cases stand for the principle that if you ask for it, it must be given. Not that it has to be asked for, okay?

So, let's be clear that those cases have no support of, there's no cases to support the position that to not ask is egregiously incompetent.

THE COURT: One second, please. (Brief pause). All right, counsel.

MR. GIBLIN: Your Honor, counsel in her Petitions states the follow; there is a significant possibility that had defense counsel requested appropriate Voir Dire questions targeting, targeted at uncovering such biases relating to the murder charge or the narcotics offense, the result of the

trial would have been different. Significant possibility. So, what counsel was saying is, had that question be asked, there wouldn't have been twelve people who were so biased in their views about murder that they would disregard the evidence and convict an innocent man.

Counsel complains about the reasonable doubt instruction. Counsel said Judge Heller, and I know this Court practice in front of Judge Heller, and I remember Judge Heller as, Counsel, you want your instructions, you don't have to give me requested Jury Instructions. All you have to do is give me the number of the Pattern Jury Instruction and that's what I do. I give Pattern Jury Instructions. So, when counsel in her argument said that the Judge deviated from the Jury Instructions, Pattern Jury Instructions, I was somewhat taken aback because I also didn't see that allegation in her Petition itself.

What she says in her Petition is, is that she used the words, fanciful, whimsical and

capricious and that somehow, or sometime during 1999 when this case was tried, the Pattern Jury Instructions were amended to remove those words. Jury Instructions are changed all the time. They're refined. If there are complaints; if there are concerns brought to the rules committee, or whatever committee there is down in Annapolis that deals with this, then there are changes made. And in fact, there were changes made.

Counsel, in fact, cites cases from 2006 that says, in fact, now if you deviate from the Pattern Jury Instructions, that's reversible error. Well, the Judge didn't deviate from this Pattern Jury Instruction. The Judge gave the Pattern Jury Instruction for reasonable doubt. Now, granted certain words were later amended, but that does not equal the fact, or that doesn't translate into a statement that obviously the Pattern Jury Instruction that was given then and the Instruction that Judge Heller gave in this case, was constitutionally deficient. Because if it was

constitutionally deficient, I'm sure counsel would have come in here with scores of cases from the Maryland Appellate Courts that found that Jury Instruction to be constitutionally defective. Because there would have been tens and twenties of lawyers who weren't egregiously ineffective in their representation who would have objected to it, preserved it for appeal and taken it up.

The fact remains that counsel can't cite one case to this Court that says that particular Jury Instruction is constitutionally deficient. And her citing cases, saying well, the Court's found this case bad. This case bad. This case bad. This case bad. If you look at the instructions that were given in those cases cited, they have absolutely no semblance to the instruction that Judge Heller gave.

And one could argue that's advocacy by counsel or one could be irresponsible and call it misleading the Court. Trial counsel was ineffective in failing to challenge the GSR and to

present an expert of its own. Now, you're Michael Middleton. You're meeting with Mr. Spivey. And Mr. Spivey's says, hey man, if I peed on my hands, will that get rid of GSR? Now, defense attorneys are in a very delicate position when they're talking to their clients. They want to know, but they don't really want to know.

Well, when Mr. Middleton is sitting there and gets that question from Mr. Spivey, it would be reasonable to assume that he drew certain conclusions from that question as to the involvement of Mr. Spivey in this case. So, when consideration is to be given as to whether, and Mr. Middleton mentioned in his testimony that there was not, they were financially or money-wise challenged at that point and time in terms of hiring experts. For Mr. Middleton, armed with what Mr. Spivey told him, to go out and hire another GSR expert, I think is sound tactical decision not to do it.

Now, counsel talks about, well, wait a minute, the GSR expert could come in here and they

might say this. They might say that. They might say this. They might say that. What this, that, this, that is are bald allegations. We have heard absolutely no evidence in this case, from an expert in those post-conviction hearing, that had they been called at that time, they would have come in with a different result. It's a bald allegation, Judge. And it's a, I don't even think you have to reach that far because I think it showed sound professional judgment on Mr. Middleton's part not to ask for it.

And if the Court reads the transcript, I'm not suggesting the Court hasn't or won't, if you read the transcript, you'll see that the GSR was in fact challenged. That there was questioning by both Mr. Middleton and Counsel for Mr. Harris, that there was a risk of transference. That there were very few particles drawn; that they, you know, there could have been mistakes made. It's not like there wasn't any challenge to the GSR. So to say that he was incompetent because he didn't go out

and buy another expert and to question further what I consider to be rather complete questioning of the State's expert, Mr. Harran, I think is wrong.

We move to my improper closing arguments. Now, I'm a trial lawyer, Judge. I've argued cases in front of a jury for thirty-eight years here. The Court was a trial lawyer. Trial lawyers think a certain way. Trial lawyers have certain methods. Trial lawyers know what's permissible in advocating their cases. Good trial lawyers who get convictions are particularly concerned about how they argue their cases cause they know they're going to win and they don't want to mess it up.

Now, quite honestly, the complaints of, as to my conduct in this case, seems to me to be the complaints of someone who isn't a trial lawyer, who doesn't know how trial lawyers work, who doesn't know what's permissible in trial. But what we have is certain allegations made against me. Improper closing argument. This is improper; there's evidence that drugs, keys and a gun were

found on the scene. Two of the items, I believe the gun, the evidence shows these guys are walking up a sidewalk on Roland -- Roland Avenue by where St. Mary's Seminary is.

On the left, there's a grassy strip. No, on the left there's a hedge. On the right, there's a grassy strip. When the items are ultimately found, some items are on the left, some items on the right. So, in fashioning a theory of the case, something that trial lawyers do all the time, I suggested to the jury during my closing argument that one of them had, the one on the left obviously, had the item or items that were on the left and the other one, who was on the right, had those items. Was that a reasonable inference to draw from the evidence, I believe it was. I believe I am entitled as a trial lawyer to advance theories of the case.

So, to say that I was misleading the jury by making those things and that was a deliberate attempt to do so, I think is unfair to me. But

then I take it even further and say, and you know what, when they were taken down, they had gunshot residue all over their hands. I did say that. Right at the end of my rebuttal argument, Judge.

The Court knows how rebuttal arguments go. The Court knows that some trial attorneys, some who exhibit some flourish in their arguments, they start talking very fast and they say a lot of things. And I said, yeah they had gunshot residue all over their hands. One could argue, well, the number of particles would not indicate that it was all over their hands.

What counsel doesn't point out to the Court, which is, if you look five minutes earlier in the argument, I spend far greater time talking about the fact that on the clients, or the defendants' hands, there are very small numbers. And I'm arguing it doesn't matter because even if Mr. Spivey only had one particle on his hand because it's a unique particle of lead, barium and antimony, that's all the matters.

So to suggest that the jury would be misled by my oratorical flourish at the end of my rebuttal closing, in light of the other arguments that were made by two defense attorneys and my own self, earlier, you know, before the jury, I think is asking too much. But I take umbrage at the statement that that was a flagrant attempt to bolster my case.

THE COURT: You don't think you were misleading the jury Mr. --

MR. GIBLIN: No, Your Honor, I mean, one could say I was misleading the jury the same as counsel was saying is misleading the Court when she says there wasn't any physical evidence, other physical evidence against my clients.

Now, I don't know what your definition of physical evidence is, but when the murder weapon, the keys to the car that the victim is found in and the drugs that the victim's sister threw out of the victim's house to the people who robbed and killed him, were found within twenty feet of the two

suspects, the two defendants, when they were captured, I think you can refer to those three items as physical evidence. It's not testimonial. It's physical evidence. The murder weapon is the greatest physical evidence you can have. So, if that's not misleading the Court than I say, GSR all over their hands isn't misleading either.

Now, next we talk about what I did when the Court threw out the cocaine case. They granted a motion to robbery of the cocaine cause they saw no evidence other than speculation that they robbed him of the cocaine.

THE COURT: Well, what about the vouching? You skipped that one.

MR. GIBLIN: Did I skip that?

THE COURT: The vouching for the credibility of your own witness.

MR. GIBLIN: No, I'm coming to that. That's next.

THE COURT: Oh, okay. I must have skipped one.

MR. GIBLIN: The pro from Dover remark?

THE COURT: Yes.

MR. GIBLIN: Okay. I'm coming to that, Judge. Now, I freely admit the Judge said that -- that is not going to the jury. Counsel would have you believe then when a Judge says that the State didn't meet its burden, I'm not going to send that to the jury, that all evidence that in some way tangentially would be used as proof of that particular crime, is no longer there. No evidence, no testimony, was stricken from the record.

So, when she complains that I said, he didn't want to get off the phone, what does she say? Well, he was talking about the evidence. That's what she's complaining about; me talking about the evidence.

And the only other things I want to point out, and I think it most, it comes into effect really on this next matter, which is what trial lawyers also know. Trial lawyers also know that sometimes the worst thing you can do for your

client is to object to something the prosecution said, or something that a witness said. Because rather than dispel it from their minds, it draws attention to it.

So, when I get up there and I believe it was -- was either Robert Hurley or John French was on the witness stand and with an expert or with someone who is scientific, there to offer scientific evidence, it is common practice among trial lawyers to go into their background. To show their expertise, to show the qualifications they have. The Court even, Courts even instruct juries that when you want to decide the credibility of certain evidence, particularly scientific evidence, you want to look at the basis that they have to make those statements. And part of that is their credentials.

So, I get Mr. Hurley or Mr. French and I can't say I remember who it was, to say, well, I've been here this long. In fact, I train people when they first come to this unit. I'm the one who

trains them.

THE COURT: John French. Fingerprints?

MR. GIBLIN: John French.

THE COURT: John French.

MR. GIBLIN: Okay. So, when I get to my argument, what do I -- what mortal sin am I committing when I say, ladies and gentleman of the jury, you saw Mr. French, he exuded professionalism. He trains other people. He's the pro from Dover. To take those three statements and to say, based on those three statements, that, and I quote, I placed the prestige of the Government behind a witness through personal assurances of the witnesses' veracity or suggest that information not presented to the jury supports the witness testimony.

That's the definition of vouching for one's witness as cited by Counsel in her Petition. To take those three statements and to say that that's what they equal, I find to be laughable.

This Dr. Moog thing is very interesting

to me as a trial lawyer. Counsel was saying another example of the egregious incompetence of Mr. Middleton is that he didn't ask the question to the answer, he didn't ask for an answer that he didn't know what it was going to be. Now, I put on Dr. Moog. Dr. Moog has flown in from Utah. He was a physician. He was doing a residency out in Salt Lake City. Shortly he left town -- he left town shortly after the murder happened. He's flown back in. I put him on the witness stand. And he does his testimony. And Counsel and I -- I don't recall the order of proof from that case, but if Counsel says the items were introduced into evidence or pictures were shown, I would imagine I did that.

Here's Mr. Middleton when I say, no further questions. Now what does a trial lawyer think? Well, what a minute. Giblin didn't ask him if those were the clothes. Now, there are any number of possibilities. One is, he didn't ask the question because he knew the answer and it was bad. Okay, that's a possibility. Or, he forgot. And if

he forgot by me asking it, all I'm doing is correcting his mistake for him. I may have just caught a break here because Giblin forgot to ask the question. And that happens to even the best attorneys.

So, should I ask it? Cause if I ask it and he says, as the Court pointed out, absolutely. Well, I'm certainly not doing my client any good. There's a third possibility. Maybe Giblin remembered the question and deliberately didn't ask it. Not because it's bad, but because he's sandbagging us. He's setting us up. He doesn't need this with all the other evidence in the case.

You know, the gun, the keys and everything, all that business. He doesn't need to so maybe he's playing it smart. Or maybe he's trying to get a little fancy. Maybe he's setting me up. Hey, I'm not gonna get set up. So, what does a trial lawyer do? Does he ask the question whose answer he doesn't know? No, he doesn't.

What a good trial lawyer would do, which

is exactly what Mr. Middleton did, was he turns the tables. He doesn't say a word and when he gets up in closing argument, he attacks the State for not asking the witness to identify the items. Egregiously incompetent or well qualified competent in this case?

Now, the missing witness instruction, and here Counsel's, you know, she, I was flagrant and blatant, Judge Heller was patently erroneous in her ruling. Not just she was wrong. She was patently wrong. Any fool could see wrong in her ruling on the missing witness.

And for the life of me, and Judge Heller made a record of this, she pointed out that in order for the missing witness, you have to show that the person is available, exclusively available to the State. We couldn't call him because we didn't know who they were. The State could have called them but they didn't. They had exclusive access to them. Well, with regards to the first witness, the evidence was quite clear. We didn't

know who he was either. So, how could it be said, and the Court mentions this in her ruling, how could it be said that that requirement of the missing, in order to get the missing witness instruction, had been met?

We didn't have exclusive control. We didn't know who the person was either. Yet, she said Judge Heller was patently wrong for refusing that and while the other attorney accepted to her ruling and preserved it for appellate review, Mr. Middleton blew it big time, because, my gosh, if he had preserved it, I guess my client would be already awaiting a new trial.

Well, I got a post-conviction hearing on Mr. Harris coming up in the months ahead so something tells me that Mr. Harris wasn't very, one of two things, either he took it up on appeal and the Court of Appeals, or Court of Special Appeals properly said, this isn't even close to meeting the missing witness requirements or another egregiously incompetent appellate counsel said, that's not even

a close call. We're not going to waste our time by raising it. The fact remains, it was preserved by co-defendant. He's still in jail. He's still convicted. That's surprising given patent error of Judge Heller.

Now, we have another person who is this off-duty officer and it turns out through the testimony that this guy is identified as a Captain in the Baltimore City Police Department. And Counsel in her Petition says that if you're a cop, and I want to make sure I get the language correct, that as an Officer in the Department, he was uniquely available to the State. Uniquely available.

If you're a cop, you can't be called by Defense unless the State says, okay. Because you are uniquely available to the State. You're on our side and we're not going to let you testify. So, the Judge noted that too. Or actually, they didn't even ask for the missing witness instruction in that case. Perhaps after they were taken to school

by Judge Heller in making her first ruling, that they decided to argue that would be useless.

And this is the one that really, I don't understand at all. The murder and armed robbery and how my client shouldn't have that extra twenty on because there was no vehicle for the jury to decipher whether it was first degree or felony murder. And I agree with Counsel as to the law. If you can't tell, you don't get it. If you can show it's premeditated, you can tack on the ten. So, what did I do? I asked the Court to instruct as to both, which they did.

I asked the Court to put on the verdict sheet both cases, both charges, as the Court did. And what did the jury do? And I read it again today in the transcript. What is your verdict ladies and gentlemen as to first degree premeditated murder? Guilty. What is your verdict ladies and gentlemen as to first degree felony murder? Guilty. Poll the jury. Boom, Harkin. Boom. What's the -- what is confusing about that?

I don't understand why this is here because that's not what the transcript shows.

Here's another one. And this is the last one before the Brady. This is the cocaine. Now, first off, there was a stipulation in this trial, Your Honor. The stipulation which is commonly entered into when narcotic cases are folded into other charges. All right, we've got the report, you know, it's the analysis, it has the weight. I believe that in this case, it was one gram shy of four ounces. So, that would be, it's like a hundred and thirteen, a hundred and eleven rather than a hundred and twelve or something like that.

So, the stipulation entered into, agreed by all, was this was one gram short of four ounces. So, we're dealing with four ounces of coke. Now, Counsel, what Counsel says is, well, I looked at the Statement of Charges. You know, the Statement of Charges that are drawn up right after the case happens, before all the lab work is done and you gotta put an amount down. And when they wrote on

the Statement of Charges, they wrote two ounces.

Well, when we got to Court, we knew what it was and that's why there was a stipulation. But then Counsel goes, yeah, but it must have been two because later, at sentencing, Giblin talked of two ounces, not four ounces. I messed up. I used the wrong figure. So, what Counsel is saying, and I'm gonna -- I'm gonna actually read what I wrote. One of the mistakes made by Counsel during his egregiously ineffective representation of Mr. Spivey was his failure to anticipate that the Assistant State's Attorney would misspeak weeks later at the sentencing and combine that with what Counsel admits was an approximate weight listed on Statement of Charges to challenge the four ounce weight that was introduced into evidence by way of a stipulation.

And the purpose of all of this, would be to permit Counsel during closing argument, the time his credibility before the jury is of paramount importance; that four ounces of cocaine would be

with intent. But a mere two ounces, fifty-six grams of cocaine, must be for personal use.

The, Counsel mentions Tyrone Jones in her Brady argument. And she says, this was all broken by the Tyrone Jones Motion for New Trial that was litigated before the Honorable John Prevas in May of 2004. And it was a big to-do Judge. It was Michele Nethercott with the Innocence Project. It was our old colleges, Stephanie Royster, who was still in our office, litigating for the State and it was, you know, they called experts. They did everything. And she says, it was there that this contamination, this rampant contamination, was first brought to light. And she says, ah hah, Tyrone Jones' case took place right around the time as Mr. Spivey's case.

Well, that's not what Brady stands for. Brady doesn't stand for if five years later you find out there was something wrong that you got to, you've got to, you know, predict it and to give the Defense counsel evidence of your predictions.

That's not what Brady stands for. The fact remains that pursuant to that Motion for New Trial, there was a lot of stuff that was taken place. And one of the things resulted in a lot of memos that went from the laboratory division of the Baltimore City Police Department up the chain of command.

And it's, I can give you a timeline on this contamination. And the first date that the Police Department knew really anything about it was June 1st, 2001 when a mobile lab technician is advised by Detective Sergeant James Hagan that gunpowder contamination had been found in the Northeast District Stationhouse by Mr. Harrant, who as we know, testified in this case. This was 2001. Counsel says, well, I know, but what about the journal of forensic science 1995 article that (inaudible) possibility.

Well, what happened when the possibility of that happening is that they set up control strips in various locations, and at the time that this case took place, the trial of this took place,

those control strips showed no problems whatsoever. It wasn't until two years later, in 2001, that they came to the forefront. To try to stretch out the State's responsibility under the imputed knowledge rule to say that we had a Brady violation here is absolutely ridiculous.

And you know what the kicker is, Judge? After the Michele Netthercott, Innocence Project, full force of all their resources hearing in front of Judge Prevas, Judge Prevas denied the Motion for New Trial and found as a matter of fact that there was no contamination in Homicide and any GSR that showed up on Mr. Jones' hands, wasn't the result of the conditions in Homicide, which were basically the same as the conditions when Dontae Spivey had his hands dabbed on that either.

That's all I gotta say, Judge. Thank you.

THE COURT: Counsel, you get the last word.

MS. KAMINS: Thank you, Your Honor. Your

Honor, I'm not, I'm just gonna make a couple of isolated remarks. I don't have anything to say with respect to each -- each claim in rebuttal. Just with respect to Claim three and the gunshot residue and Mr. Giblin's assertion that it was tactical, part of his argument was that it was tactical on Mr. Middleton's part to not seek independent GSR testing based on Mr. Spivey's statement to him or question to him, what happens to GSR if I urinate on my hands.

And I'm not sure I understand how that statement would have made it a bad idea to get -- to get GSR testing. I would, I'm not going to stand here and argue that perhaps, there would be some DNA problems with the urination, but I don't know that additional GSR testing on the hands based simply on that statement would have made it inherently a bad idea. And that's all I have to say on that.

With respect to my assertion that there was no physical evidence connecting Mr. Spivey, or

no physical evidence, I was simply attempting to say there's no physical evidence connecting Mr. Spivey to the crime. And by physical, I meant scientific. I did not mean, suggest there was no physical evidence recovered by the Police in the case. There certainly was. I was simply talking about fingerprint evidence, DNA evidence, evidence that actually put Mr. Spivey at the crime scene.

With respect to issue eight, on the legal issue that we have with the failure of the jury to differentiate between, although it found, I'm not sure that the argument really holds water to tell you the truth. But it seems to me that when you have a jury returning verdict of first degree murder guilty and felony murder, that they had to actually elect a theory as opposed to just convict on both. And that without knowing whether or not they were predicating their guilty finding on, and sometimes that's the way the jury, I mean, the way the verdict sheet is worded, is confusing and without articulating what theory, I would maintain

that the verdict was ambiguous.

And finally, with respect to the Brady claim, we were not suggesting that anybody was expected to make predictions, but rather that the information that was not disclosed was the occurrence of the test firing of the weapons in close proximity to where GSR was being performed, which ultimately did -- it ultimately did create contamination problems. The fact that it was going on is information that we're claiming was not disclosed. Thank you.

THE COURT: All right. Thank you Counsel.

MR. GIBLIN: Thank you, Your Honor.

MR. SPIVEY: What if I got something to say?

MR. GIBLIN: Can I leave?

THE COURT: Excuse me?

MR. SPIVEY: Can I say something, please?

THE COURT: Ask your attorney.

(Off the record discussion between Ms. Kamins and

Mr. Spivey)

MS. KAMINS: Your Honor, my client and I are having a disagreement over something so I don't know if you want me to represent what he is stating he wants the record to be clear about something. I don't agree with him as to his characterizations, something that happened at the last hearing. And that was that Your Honor secured from me, every which way, an assertion that all the claims that were being litigated in his post-conviction Petition are contained in the supplement that I filed.

And that you referred, Your Honor, to multiple Pro Se supplements in the file and I told Your Honor at the last hearing that my intention was to take all of those supplements and put them all together in one pleading for ease of everybody.

And I did exercise my professional judgment of what claims should be in the Petition while also trying to balance Mr. Spivey's desires to litigate other claims. He is now stating that

he adamantly does not wish to waive any of the issues that were presented in his Pro Se pleadings. And I indicated that it's my perception that we have in fact waived anything else by virtue of our statement, which I still stand by. That this -- this supplement to Petition contains everything that has been litigated and is ripe for decision by the Court. But I feel it incumbent upon me to say that he's not satisfied with that.

THE COURT: What issue do you want raised, Mr. Spivey?

MR. SPIVEY: The reason I'm saying this -- -

THE COURT: What issue do you want raised?

MR. SPIVEY: I don't have specifically right here because I didn't --

THE COURT: No. No. You knew you were coming to Court today. What issues did you want raised that were not raised today?

MR. SPIVEY: Can you give me a second?

THE COURT: Sure. Are you gonna help your client, Ma'am? All right, Mr. Spivey, I'm looking at a Petition from back in 2007, does that, have we discussed everything in that Petition you want to discuss?

MR. SPIVEY: I don't have specific dates, but I can tell you the specific issues.

THE COURT: Tell me the issues.

MR. SPIVEY: One is in reference to, as far as the robbery and the felony murder and --

THE COURT: Felony murder versus premeditated murder?

MR. SPIVEY: Yes.

THE COURT: That's what she said. She argued that.

MR. SPIVEY: But, she argued it but she didn't, she put in, the relief should be vacated, like the robbery should be vacated. It should be entitled to a new trial based on, in the Jones case, he only got found guilty one murder. That was either first degree murder or felony murder.

They didn't get found guilty both.

THE COURT: Yeah, but your case is different. You were found guilty of both.

MR. SPIVEY: That's the difference.

THE COURT: Right.

MR. SPIVEY: Don't nobody know what the jury come to, they didn't say whether it was first degree or felony murder. Can't say both.

THE COURT: So, what you're saying --

MR. SPIVEY: It should be entitled to a new trial instead of vacating just the robbery count.

THE COURT: Okay.

MR. SPIVEY: Secondly, it was, my other attorney briefly brung it up, it was the Jermaine Bell case in reference to U.S. Courts.

MR. GIBLIN: Your Honor, that's not in any of those Petitions.

MR. SPIVEY: Yes, it is.

MR. GIBLIN: Which one?

MR. SPIVEY: Hold up.

MR. GIBLIN: Your Honor, I also believe, excuse me, that the Court hit it on the head that that would, if there is an allegation on that, it has nothing to do with Mr. Middleton. It has to do with actual innocence which is not the proper, this is not proper forum for that.

THE COURT: Jermaine Bell, and you're talking about the DNA and all that?

MR. SPIVEY: No, it don't have nothing to do with DNA.

THE COURT: Okay.

MR. SPIVEY: But, it come to evidence in that case, it was a federal case, my case is the first person, (inaudible) first people to be arrested but in his case, it was a federal investigation for all these drugs.

THE COURT: Mm-hmm.

MR. SPIVEY: And murders that happened. And they saying this case was the proceeding, it started up all the murders and the drug investigations.

THE COURT: Right.

MR. SPIVEY: And it was evidence in that case to show that I wasn't an enemy of the victim, that I was a friend. I was not an enemy.

THE COURT: Okay.

MR. SPIVEY: And I did not have nothing to do with his murder.

THE COURT: Okay. So, you want to show that you were a friend of the victim's?

MR. SPIVEY: I wasn't an enemy. We was not enemies.

THE COURT: Okay.

MR. GIBLIN: Your Honor, in the transcript, Sharice Burell, this victim's sister testified that she knew Dontae Spivey as did her brother, the victim, which of course makes his appearance on Roland Avenue all the more coincidental.

THE COURT: Right.

MR. SPIVEY: But, in the Jermaine Bell case, it draws out, their investigation draws out

that I wasn't there as an enemy.

THE COURT: Okay, so that will be addressed to show that you were not an enemy of the victim.

MR. SPIVEY: Yes.

THE COURT: Okay.

MR. SPIVEY: And it shows that I wasn't involved with his murder.

THE COURT: Well, I doubt very well, and I'm not familiar with the Jermaine Bell case of the top of my head by name, I know them by scenarios and the proposition for which they stand, but I doubt very seriously that that case says, if you are not an enemy of a person, you could not have murdered that person.

MR. SPIVEY: I'm just gonna bring it up so that, just in case in the future, like if this case gets denied --

THE COURT: Got it.

MR. SPIVEY: -- anything in future reference, they won't say, you waived that issue

cause they --

THE COURT: Got it.

MR. SPIVEY: Another thing that was brought up about -- brought up about where the Judge lived at. It wasn't a point where we wanted to know where the Judge lived at.

THE COURT: We discussed that at the hearing previously.

MR. SPIVEY: Yeah, I'm trying to elaborate more, that's what I'm trying to explain to you. It was more, she excluded all the jurors that lived in the neighborhood. All the jurors that lived in the neighborhood was excluded from being on the jury because they lived in that neighborhood. And we don't know if she knew any of the witnesses or not. She never disclosed it or not.

THE COURT: Okay.

MR. SPIVEY: Give me a second here. And there's a part where Mr. Middleton never -- Mr. Middleton objected to a lesser included offense on

a simple assault being given to a jury as an option, possession with intent to distribute. There was an option of giving possession instead of possession with intent to distribute. He told them he didn't want that on there. He told them he just wanted possession with intent to distribute. A lesser included offense could've been put on there. They could have found me guilty of just simple possession.

Also, there was an issue of Mr. Middleton not objecting to the chain of command as far as the procedures for chain, I mean, chain of custody as far as the cocaine whereas they show that, the report showed they weighted, the cocaine was weighed two ounces. But then they said it was weighed four ounces. On a proper protocol, they supposed to give it to a chemist and he's supposed to weigh it.

THE COURT: They did. And that's what happened. Initially, the Police Officers just looked at it and guessed it weighed about two

ounces and then when they took it to the lab, the chemist weighed it and they said, oh my, that's not two, it's four ounces.

MR. SPIVEY: We don't know, there's no evidence, there is no way said, that they weighed it their self or just guessed. They just sayed.

THE COURT: It's in the, okay. So, chain of custody with regards to the weight of the cocaine?

MR. SPIVEY: Yes.

THE COURT: Okay.

MR. SPIVEY: Also, there's a cumulative effect as far as --

THE COURT: Excuse me?

MR. SPIVEY: Cumulative effect as far as how many statements the --

THE COURT: Calmative.

MR. GIBLIN: Cumulative.

MR. SPIVEY: Cumulative effect as far as the prosecutor had made improper closing arguments. And it's the case, I put it in there, Williams v.

State and State v. Bout, that was already in the Petition already.

THE COURT: Cumulative effect of improper closing arguments. Okay.

MR. SPIVEY: Yes.

THE COURT: By the prosecutor?

MR. SPIVEY: Yes. I had a date for which, that was printed in July 29th of 2009.

THE COURT: All right. All right, anything else Mr. Spivey?

MR. SPIVEY: Yes, there's another issue in reference to State switching the burden of proof to me in its closing arguments. When he said have him explain, it was on page, it was, yeah, May the 7th, 99 on transcript, page 40-41, closing arguments. He made reference to the gray shirt and hat when he said, he switched the burden of proof from them to me. And he said, have them explain to you, when they tried to explain that, it's all a mere coincidence, this particular set of circumstances, have them explain to you how the

coincidence of the murder weapon from being there. That wasn't my burden of proof. That was their burden of proof to show that I had, that I put the murder weapon there, or whatever he was trying to switch the burden of proof on. But that's it for right now. That's it.

THE COURT: All right. All right. Thank you.

MR. GIBLIN: Thanks, Your Honor.

MS. KAMINS: Thank you.

(At 4:17:32 p.m., off the record)

CERTIFICATE OF TRANSCRIPTION

State of Maryland;

County of Baltimore, to wit:

I, Sarah E. Wisthoff, a Notary Public in and for the State of Maryland, City of Baltimore, do hereby certify that the within proceedings were transcribed by me accurately to the best of my ability, knowledge, and belief.

As witness my Hand and Notarial Seal, this 23rd day of May, 2013.

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SARAH ELEANOR WISTHOFF

My Commission Expires:

December 8, 2013