Circuit Court for Baltimore County
Case No. 03-K-09-004384

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3206

September Term, 2018

NICHOLAS HARRIS

v.

STATE OF MARYLAND

Meredith,*
Kehoe,
Gould,

JJ.

Opinion by Meredith, J.

Filed: October 21, 2020

*Meredith, Timothy E., J., now retired, participated in the hearing of this case while an active member of this Court, and after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

On July 2, 2010, a jury found Nicholas Harris, appellant, guilty of first-degree rape, first-degree sexual offense, and other related offenses. He was sentenced to life imprisonment, with all but 50 years suspended. In an unreported opinion, this Court affirmed the judgments of the circuit court on direct appeal. *Nicholas Jermaine Harris v. State*, No. 1706, September Term 2010 (filed July 31, 2012).

On August 8, 2016, Mr. Harris filed a petition for post-conviction relief in the Circuit Court for Baltimore County, alleging that he had received ineffective assistance of counsel during his trial and that the State had withheld material impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The post-conviction court denied relief. This Court granted Mr. Harris's application for leave to file this appeal.

QUESTIONS PRESENTED

Mr. Harris presents these four issues (which we have reordered) for our review:

> 1. The issue that the trial counsel was ineffective in his preparation by failing to obtain evaluations on Mr. Harris for the reverse waiver hearing was never raised and fully and finally litigated and decided on the merits on appeal.
>
> 2. The [post-conviction] court erred in concluding that there was no Brady violation on the part of the [S]tate.
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> 3. The circuit court erred in denying Mr. Harris's post-conviction relief [regarding] trial counsel's failure to object to the State's improper comment during closing argument.
>
> 4. The post-conviction court abused its discretion when it erred in denying Mr. Harris a belated motion to modify sentence by misinterpreting case law.

For the reasons set forth herein, we agree that Mr. Harris should be granted the right to file a belated motion for modification of his sentence, and we shall remand for further proceedings in that regard. Otherwise, we affirm the post-conviction court's denial of relief.

FACTS AND PROCEDURAL HISTORY

On August 9, 2009, Mr. Harris—who was then 15-years-old—along with three other teenagers, were accused of sexually assaulting a woman at knifepoint. Mr. Harris was the first to have intercourse with the woman. When confronted by the police, Mr. Harris did not deny having sex, but contended that it was consensual. One of his three cohorts, however, corroborated the woman's account that she did not consent, but was raped.

Mr. Harris was charged with multiple offenses, including rape in the first-degree and sexual offense in the first-degree. Because both rape in the first-degree and sexual offense in the first-degree are crimes punishable by life imprisonment, Mr. Harris was charged as an adult despite his youth at the time of the offenses.[1]

[1] Maryland Code (1973, 2009 Supp.), Courts and Judicial Proceedings Article ("CJP"), § 3-8A-03(d)(1) states that the juvenile court does not have jurisdiction over "[a] child at least 14 years old alleged to have done an act which, if committed by an adult, would be a crime punishable by death or life imprisonment, as well as all other charges against the child arising out of the same incident, unless an order removing the proceeding to the court has been filed under § 4-202 of the Criminal Procedure Article[.]"

Maryland Code (2002, 2009 Supp.), Criminal Law Article ("CL"), § 3-303(d) makes rape in the first-degree punishable by life imprisonment. CL § 3-305(d) makes sexual offense in the first-degree punishable by life imprisonment.

On October 5, 2009, trial counsel for Mr. Harris filed a Motion for Order Waiving Jurisdiction to Juvenile Court for Baltimore County, moving to transfer the case to juvenile court, a procedure commonly known as "reverse waiver." *See King v. State*, 36 Md. App. 124, 128 (1977). In such cases, Maryland Code (1974, 2009 Supp.), Criminal Procedure Article ("CP"), § 4-202(b) provides that a circuit court, when "exercising criminal jurisdiction in a case involving a child," has discretionary authority to transfer the case

> to the juvenile court before trial or before a plea is entered under Maryland Rule 4-242 if:
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> (1) the accused child was at least 14 but not 18 years of age when the alleged crime was committed;
>
> (2) the alleged crime is excluded from the jurisdiction of the juvenile court under § 3-8A-03(d)(1), (4), or (5) of the Courts Article; and
>
> (3) the court determines by a preponderance of the evidence that a transfer of its jurisdiction is in the interest of the child or society.

CP § 4-202(d) states that the circuit court, when "determining whether to transfer jurisdiction" to juvenile court, "shall consider" the following five factors:

> (1) the age of the child;
>
> (2) the mental and physical condition of the child;
>
> (3) the amenability of the child to treatment in an institution, facility, or program available to delinquent children;
>
> (4) the nature of the alleged crime; and
>
> (5) the public safety.

"The burden is on the juvenile to demonstrate that under these five factors, transfer to the juvenile system is in the best interest of the juvenile or society." *Whaley v. State*, 186 Md. App. 429, 444 (2009). *See generally Gaines v. State*, 201 Md. App. 1, 9-11 (2011) (reviewing standards for waiver from juvenile court and for reverse waiver from circuit court).

At the reverse waiver hearing, counsel for Mr. Harris relied upon reports that had been submitted to the court by Renetta Cole, an employee of the Department of Juvenile Services ("DJS") responsible for preparing waiver summaries for juveniles charged with various crimes. She recommended that the circuit court waive jurisdiction and transfer the case from the criminal system into the juvenile system. Ms. Cole testified at the hearing as the only witness. It was her opinion that Mr. Harris was amenable to treatment in the juvenile system. She explained that his age and his amenability to treatment were the two statutory factors under CP § 4-202(d) which weighed in his favor. She explained that he "was cooperative," that his parents "were cooperative and supportive of him," that he was only "15 years old," and that he had had "no prior contacts either formal or informal in the juvenile judicial system." But she conceded that, under CP § 4-202(d), three of the five factors weighed against waiving jurisdiction into the juvenile system; she acknowledged that the serious nature of the alleged crime, the possible danger to public safety, and the fact that Mr. Harris had no mental or physical impairments all weighed in favor of retaining jurisdiction in the criminal system.

At the end of the reverse waiver hearing, the court agreed that Mr. Harris's age would "mitigate in his favor." But the court was not persuaded by Ms. Cole's recommendation that Mr. Harris would be amenable to treatment if the case was transferred, and the court emphasized the court's "responsibility to protect the public and in this situation to make a determination of where this juvenile or how this defendant should be treated." The court denied the motion for transfer, stating: "[S]ince the defense bears the burden, the request for reverse waiver is denied."

On June 30, 2010, the case proceeded to trial. At trial, Mr. Harris's trial counsel made the following argument to the court with respect to his discovery request for impeachment information about the complaining witness pursuant to Maryland Rule 4-263(d)(6): "[I]n my request for discovery, I asked for all information in reference to [the victim], in reference to arrests, outstanding warrants, criminal record and in the State's discovery they refer[red] me to [the Maryland Case Search] site." Mr. Harris's trial counsel argued that the State failed to provide the discovery that was required. But the witness was permitted to testify.

During closing argument, in rebuttal, the prosecutor responded to concern that the jury might be motivated by sympathy for Mr. Davis on account of his youthful age, telling the jury that it would be "human of you" to say "come on, he is only 15; . . . look what he is facing here." The prosecutor followed that up by saying: "I'm not asking you to ignore your emotions. Not asking you to ignore who you are." The prosecutor reminded the jury that its job is to "apply the facts to the law" and to "uphold the law,"

and urged the jury to "think of the only thing that makes sense" regarding what happened in the case. No objection to the argument was made at trial.

After the jury found Mr. Harris guilty, Mr. Harris's trial counsel filed a motion for a new trial. That motion was denied, and the court sentenced him as follows: on the count of first-degree rape, life imprisonment, suspend all but 50 years; on the count of first-degree sex offense, 50 years concurrent; on the count of false imprisonment, 10 years concurrent, all to be followed by 5 years of supervised probation upon his release. Immediately after the announcement of the sentences, defense counsel advised Mr. Harris as follows on the record:

> Mr. Harris, you have 90 days to ask the judge to reconsider his sentence, 30 days to file an appeal to the Court of Special Appeals, and 30 days to ask a three judge panel to review your sentence. The three judge panel may increase your sentence, may decrease your sentence or leave it the same. They may consult with [the trial judge] but he would not be on that panel. If you wish to exercise any of those rights, you must do so by notifying the clerk of the Court in writing.

On September 14, 2010, Mr. Harris's trial counsel filed a notice of appeal. As noted above, this Court affirmed the judgments of the circuit court on direct appeal.

On August 8, 2016, Mr. Harris filed a petition for post-conviction relief asserting seven claims of ineffective assistance of counsel and one claim that the State committed prosecutorial misconduct in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding impeachment evidence of the victim's prior criminal conduct. On August 1, 2018, a hearing was held. On September 12, 2018, the circuit court denied all of Mr.

Harris's claims for post-conviction relief. Mr. Harris filed an application for leave to appeal, which this Court granted. This appeal followed.

STANDARD OF REVIEW

In *State v. Syed*, 463 Md. 60, 73 (2019), *cert. denied*, ___ U.S. ___, 140 S.Ct. 562 (2019), the Court of Appeals summarized the standard of appellate review for post-conviction claims of ineffective assistance of counsel as follows:

> Our review of a post-conviction court's findings regarding ineffective assistance of counsel is a mixed question of law and fact. *Newton v. State*, 455 Md. 341, 351, 168 A.3d 1, 7 (2017) (citing *Harris v. State*, 303 Md. 685, 698, 496 A.2d 1074, 1080 (1985) ("[T]o determine the ultimate mixed question of law and fact, [we ask] namely, was there a violation of a constitutional right as claimed."). The factual findings of the post-conviction court are reviewed for clear error. *Id.* The legal conclusions, however, are reviewed *de novo*. *Id.* at 351-52, 168 A.3d at 7. The appellate court exercises "its own independent analysis" as to the reasonableness, and prejudice therein, of counsel's conduct. *Oken v. State*, 343 Md. 256, 285, 681 A.2d 30, 44 (1996).

With respect to appellate review of a finding relative to ineffective assistance of counsel, the Court of Appeals said in *Franklin v. State*, 470 Md. 154, 175 (2020):

> That inquiry presents a mixed question of fact and law. *See State v. Sanmartin Prado*, 448 Md. 664, 679-80, 141 A.3d 99 (2016). The reasonableness of counsel's conduct and whether a defendant suffered any prejudice as a result of alleged deficient performance are questions of law. Thus, we exercise our "own independent judgment" and "evaluate anew the findings of the [coram nobis] court" as to these questions. *Id*. (citation omitted).

DISCUSSION

In General

Criminal defendants are guaranteed the right to effective assistance of counsel by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. U.S. CONST. amend. VI; MD. DECL. OF RTS. Art. 21; *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (explaining that the "right to counsel is the right to the effective assistance of counsel").

"When a defendant advances an ineffective assistance of counsel claim, and requests that his or her conviction be reversed, he or she must meet a two-part test to succeed on his or her claim." *Syed*, 463 Md. at 75. "Under the first prong, the defendant must show that his or her counsel performed deficiently." *Id.* We assess this under an objective standard which is "highly deferential, and there is a strong (but rebuttable) presumption that counsel rendered reasonable assistance[.]" *In re Parris W.*, 363 Md. 717, 725 (2001). "Whether the attorney's performance was reasonable is measured by the 'prevailing professional norms'" at the time of representation. *Syed*, 463 Md. at 75 (quoting *Strickland*, 466 U.S. at 688).

"Next, the defendant must show that he or she has suffered prejudice because of the deficient performance." *Syed*, 463 Md. at 75 (citing *Strickland*, 466 U.S. at 687). "[A] defendant 'must show either: (1) a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; or (2) that the result of the proceeding was fundamentally unfair or unreliable.'" *Id.* at 86 (citations

omitted). A reasonable probability is "a probability sufficient to undermine the confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694; *see also Bowers v. State*, 320 Md. 416, 426 (1990) (interpreting reasonable probability to mean "there was a substantial or significant possibility that the verdict of the trier of fact would have been affected"). Our determination of the prejudice prong "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695.

"Failure to make the required showing of **either** deficient performance **or** sufficient prejudice defeats the ineffectiveness claim." *Id.* at 701 (emphasis added). Regarding this point, the Court of Appeals stated in *Newton*, 455 Md. at 356:

> *Strickland* also instructs that courts need not consider the performance prong and the prejudice prong in order, nor do they need to address both prongs in every case. *Id*. at 697, 104 S.Ct. 2052; *Oken v. State*, 343 Md. 256, 284, 681 A.2d 30 (1996). As the *Strickland* Court explained, "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052.

In *Franklin*, 470 Md. at 175-76, the Court of Appeals provided the following summary of what a defendant must show in order to prevail on a claim that counsel did not provide the effective assistance required by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights:

> The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights entitle criminal defendants to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Sanmartin Prado*, 448 Md. at 681-82, 141 A.3d 99. To prevail in an ineffective assistance claim, a defendant must establish two things: "First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel'

> guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.
>
> With respect to the performance prong of this test, the defendant must show that counsel's actions or omissions fell "outside the wide range of professionally competent assistance." *Id*. at 690, 104 S.Ct. 2052. We "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id*. In this regard, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. at 689-90, 104 S.Ct. 2052.
>
> As to the prejudice component, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694, 104 S.Ct. 2052; *see also Sanmartin Prado*, 448 Md. at 682, 141 A.3d 99.

I. Reverse Waiver Hearing

Mr. Harris's first assertion is that his trial counsel was ineffective for failing to "collaborate [with] or . . . effectively cross examine the DJS agent, Ms. Renetta Cole[,] to produce a more detailed, informative, effective and accurate report to support the DJS's recommendation" that the case be transferred to the juvenile court.

The State argues that this claim of error is moot because no effective remedy can be granted given the fact that Mr. Harris is currently twenty-five years old and could not now be tried in the juvenile system. A "question is [rendered] moot if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide." *Alston v. State*,

433 Md. 275, 285 (2013) (citations omitted). But we note that the Court of Appeals declined to dismiss an appeal as moot in a case in which defendants had aged out of the normal jurisdiction of the juvenile court in *In re Miles*, 269 Md. 649 (1973). In that case, the defendants had been convicted of robbery and burglary when they were seventeen and charged as adults without a waiver hearing. *Id.* at 651. At the time of the appeal, they were over twenty-one and the State argued that the juvenile system could not exercise jurisdiction over them. *Id.* at 654. The Court of Appeals nevertheless decided to "remand the four cases to the Circuit Court of Baltimore City (not the Division of Juvenile Causes) in order that the chancellor may determine whether waivers should or should not have been ordered." *Id.* at 657. *See also In re Glenn S.*, 293 Md. 510, 514 n.8 (1982) ("[U]nder certain unusual circumstances where the juvenile court has lost jurisdiction, the circuit court, sitting in equity, may hold a hearing to determine whether a transfer of jurisdiction to the criminal side of that court is proper."). We are not persuaded that the issue of whether counsel rendered ineffective performance at the reverse waiver hearing is moot.

But, on the merits, Mr. Harris's ineffective assistance of counsel claim fails under both prongs of a *Strickland* analysis for the reasons the post-conviction court explained:

> [T]here is no merit to Petitioner's claim that Trial Counsel was ineffective in failing to summons and collaborate with Ms. Cole to produce a more detailed and effective report. This Court finds that Trial Counsel did not act unreasonably, as Ms. Cole, through her DJS report, served to support his argument that Petitioner's case should be transferred to juvenile court. Similarly, this Court rejects Petitioner's contention that Trial Counsel's cross-examination of Ms. Cole was deficient. Petitioner argues that Trial Counsel was ineffective "in failing to properly cross examine [Ms. Cole] in

> such a way as to reveal all the errors contained in the report." Because Ms. Cole was recommending that Petitioner be tried as a juvenile, it would be inimical to the interest of [Mr. Harris] for Trial Counsel to attack the accuracy of her report, the soundness or her recommendations, and her credibility. *See Evans v. State*, 396 Md. 256, 274-75 (2006) (declaring that "judicial scrutiny of counsel's performance be 'highly deferential' in order to avoid the *post hoc* second-guessing of decisions simply because they proved unsuccessful, and . . . that 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). In addition to not meeting his burden of proving deficiency as it pertains to the reverse waiver proceedings, and the alleged failure to inform Petitioner of the two DJS reports, [Mr. Harris] has failed to prove that but for counsel's performance "he would have been tried as a juvenile." Therefore, this Court concludes that Trial Counsel's conduct was neither unreasonable nor was Petitioner prejudiced.

At the reverse waiver hearing, Ms. Cole explained that two of the five factors weighed in Mr. Harris's favor: his age and amenability to treatment in the juvenile system. But Ms. Cole conceded, and the court found, that the other three statutory factors weighed against him: the nature of the alleged offenses, the risk to public safety, and the fact that he had no mental or physical impairments.

No witness was called at the post-conviction hearing to express an opinion about the allegedly deficient performance of trial counsel in connection with his representation at the reverse waiver hearing. As noted above, it was the burden of Mr. Harris to prove that his counsel performed deficiently at the reverse waiver hearing, and it was his burden to rebut the strong presumption that counsel rendered reasonable assistance as measured by prevailing professional norms. *Strickland*, 466 U.S. at 689-90.

In light of the post-conviction judge's assessment that trial counsel may well have made a strategic decision not to undermine the expert witness from DJS who was urging

the court to transfer the case to juvenile court, we agree with the post-conviction court that the evidence was insufficient to overcome the presumption of reasonable representation. *See Strickland*, 466 U.S. at 689 ("[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' *See Michel v. Louisiana*, *supra*, 350 U.S., at 101, 76 S.Ct., at 164."). As the post-conviction court observed, the Court of Appeals stated in *Evans*, 396 Md. at 274-75: "The [*Strickland*] Court directed . . . that judicial scrutiny of counsel's performance be 'highly deferential' in order to avoid the *post hoc* second-guessing of decisions simply because they proved unsuccessful, and required that 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" (quoting *Strickland*, 466 U.S. at 689). Based upon the evidence introduced at the post-conviction hearing, the post-conviction court did not err in concluding that Mr. Harris did not prove that, but for this alleged error of trial counsel, there is a reasonable probability that the result of the reverse waiver hearing would have been different. *See Syed*, 463 Md. at 86.

II. *Brady* violation.

Mr. Harris contends that the State did not disclose the victim's "lengthy criminal history in which she was charged under a different name," which amounted to a *Brady* violation. The State disagrees that the proffered evidence of other convictions of similar-named defendants were convictions of the victim, and the State denies that any impeachable conviction was suppressed.

In *French v. State*, 246 Md. App. 609, 624 (2019), we summarized the basis of a "*Brady* violation":

> In *Yearby* [*v. State*, 414 Md. 708 (2020)], the Court of Appeals addressed whether the State had committed a "*Brady* violation," 414 Md. at 711, 997 A.2d 144, and observed: "The Supreme Court held in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963), that 'the *suppression by the prosecution of evidence favorable to an accused* upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" *Id*. at 716, 997 A.2d 144 (emphasis added).
>
> In *Yearby*, the Court recognized that cases decided subsequent to *Brady* have "reliev[ed] the accused of the burden of making a request" for the favorable information when the evidence is highly probative of innocence. *Id*. "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; *that evidence must have been suppressed by the State*, either willfully or inadvertently; and prejudice must have ensued." Id. at 717, 997 A.2d 144 (emphasis added) (citations omitted). "There can be no *Brady* violation where there is no suppression of evidence." *Id*. at 725-26, 997 A.2d 144 (citations and quotation marks omitted).

In this case, the proffered evidence about the victim's alleged other convictions was less than clear. During the post-conviction hearing, Mr. Harris introduced testimony from Anthony Wilson, a paralegal hired by Mr. Harris's family. Mr. Wilson testified that he investigated the victim using the Maryland Case Search website. He testified that he believed the victim had pled guilty to forging a prescription for a CDS in 1995. He also testified that the victim had been convicted of battery, illegal entry, and escape. The post-conviction court stated in a footnote that the court "finds his testimony credible."

Mr. Wilson also expressed the opinion that the victim had been arrested under many different aliases. Our review of Case Search suggests the aliases did not relate to

the victim in this case. The victim did, however, assault another woman on September 1, 1997, who, coincidentally, had the same first name and middle name as the victim, and that coincidence may have led to confusion regarding the use of aliases.

In any event, the post-conviction court made this finding regarding Mr. Wilson's testimony:

> During the post-conviction hearing, Petitioner called a paralegal, Anthony Wilson, as a witness who investigated the criminal record of the State's witness. He testified to the State's witness's criminal record as it existed prior to Petitioner's trial, identifying five total convictions. Among them, this Court finds only one impeachable conviction that was "infamous" or "relevant to the witness's credibility," *see* Md. R. 5-609(a), which was a 1995 conviction for obtaining a prescription by fraud or forgery. This Court concludes that this information is not material as contemplated by Maryland case law, as it would not have substantially or reasonably affected the outcome of Petitioner's trial.

Accordingly, even if we assume arguendo that the 1995 conviction for forgery of a prescription was in fact a conviction of the victim, we agree with the post-conviction court's conclusion that the State did not suppress that information (which was available on Case Search) and that introducing evidence of that 15-year-old conviction at Mr. Harris's trial in 2010 would not have affected the outcome of the trial.

Mr. Harris's brief cites case law but fails to specify the acts or convictions which the State failed to disclose. We assume Mr. Harris is referring to the 1995 conviction for forgery of a CDS prescription which the post-conviction court determined to be the "only one impeachable conviction that was 'infamous' or 'relevant to the witness's credibility'" under Maryland Rule 5-609(a). We agree with the post-conviction court's conclusion that the 1995 conviction was not highly probative of Mr. Harris's innocence and was not

material in this case. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *U.S. v. Bagley* 473 U.S. 667, 682 (1985).

Had the 1995 conviction been used to impeach the victim, there is not a reasonable probability that the outcome of the trial would have been different. The State acknowledged at trial that the victim had mental health issues, but the State argued that the victim's testimony was nevertheless credible because it was corroborated by the other evidence in the case. As the prosecutor emphasized during closing arguments, the victim's testimony about the encounter with Mr. Harris was very similar to that of one of the co-defendants—a person whom the victim had never previously met. It was also bolstered by the physical evidence at the scene. We conclude that there is not a reasonable probability that the result of the trial would have been different if Mr. Harris would have been able to introduce evidence that the victim had pled guilty to the 1995 charge of forgery of a prescription. *See Syed*, 463 Md. at 86.

III. Closing argument.

Mr. Harris argues that his trial counsel was ineffective for failing to object when the prosecutor told the jury during the rebuttal portion of closing arguments: "I am not asking you to ignore your emotions." Mr. Harris asserts that this argument improperly encouraged the jury to decide the case based upon their emotions and to abandon the objectivity their oaths required. Mr. Harris argues in his brief: "With this statement, the

State gave the jury the impression that they could render a verdict by using their emotions concerning the case, the Appellant, and the victim."

The State contends that, when read in context, the statement made by the prosecutor was an unobjectionable closing argument. Under the circumstances of this case, we agree with the State, as did the post-conviction court.

During closing arguments, the State argued as follows on rebuttal:

> [The victim] made a lot of bad decisions. She is not a very likable person, I guess. Hanging out with young kids, going out and drinking and smoking with them. None of us or people we love, I don't think, we would think would be put in that type of situation or put themselves in that type of situation. As [my co-prosecutor] said, if I'm walking down a bad street and bad neighborhood and someone robs me, does that exonerate the robber? Should we say, oh, he gets a free pass? Of course not. She put herself in this situation. She has problems, clearly. But it is people like her that get gang raped in laundry room floors by juveniles. She put herself in this situation and that is how it happened.
>
> So what the defense is hoping for is that you feel really bad for him. I understand he is fifteen. Who are we kidding? He is sixteen now. He was 15 at the time. He is big, six foot, 180 pounds. But he was fifteen at the time. And [my co-prosecutor] and His Honor can say to you all they want, you have to follow the rules and the law and the facts and it is the facts and the law and you have to follow it and punishment is not an issue and you can't consider punishment. Who are we kidding? Every one of us here is human. Every one of us here brings our life experiences when we go back there. And it will be human of you, I promise, it is not a bad feeling to say, come on, he is 15; come on, look what he is facing here. Punishment is not for you to decide.
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> You have seen His Honor preside over this case for three days. He is a very fair man. He is an excellent judge. He will do what he is supposed to do. But your job, ladies and gentlemen, as jurors is to uphold the law. It is to apply the facts to the law.
>
> **I'm not asking you to ignore your emotions.** Not asking you to ignore who you are. **But please, I ask you** when you go back and deliberate, **think of the only thing that makes sense**. How else would [a

> co-defendant and the victim], who had never seen each other before ever, had told the same exact series of events? How else would the physical evidence, the scientific evidence completely match up unless it wasn't [sic] true?

(Emphasis added.)

Although it is highly improper for counsel "to appeal to the prejudices or passions of the jurors . . . or invite the jurors to abandon the objectivity that their oaths require," *Mitchell v. State*, 408 Md. 368, 381 (2009) (citations omitted), the post-conviction court rejected the claim that this argument was an appeal to passion and prejudice. The post-conviction court stated: "Rather, the prosecutor recognized Petitioner's youth and reminded the jurors that their duty was to find the facts and apply the law as instructed."

We agree that, when viewed in context, the prosecutor's reference to the jurors' emotions acknowledged that it would be natural to feel sympathy for Mr. Harris because he was only fifteen at the time of the crime, but, in spite of that sympathy, their duty was to find the facts and apply the law as instructed. Because this was not an improper argument, Mr. Harris's trial counsel was not ineffective for declining to object. *See Oken v. State*, 343 Md. 256, 294 (1996) ("Because the prosecutor's comments were not improper, *a fortiori* [the defendant] was not prejudiced.").

IV. Motion to modify sentence.

Mr. Harris contends that his trial counsel owed him a duty to explain, in a manner that was sufficient for him to make an informed decision, the nature of a motion to modify the sentence pursuant to Rule 4-345(e). Mr. Harris asserts that, because his trial counsel did not explain the motion to him, counsel provided ineffective legal assistance,

and the post-conviction court should have granted Mr. Harris the right to file a belated motion. The State argues that Mr. Harris was expressly advised at the time of sentencing of his right to file a motion to reconsider, and, because Mr. Harris admitted that he never asked his trial counsel file a motion for modification, there was no ineffective assistance of counsel.

There is ample authority holding that an attorney's failure to file a motion for modification, *if requested to do so by the defendant*, "is a deficient act" for which the appropriate remedy is allowing the defendant to file a belated motion for modification. *Matthews v. State*, 161 Md. App. 248, 252 (2005) ("[']The failure to follow a client's directions to file a motion, when statutory provisions and rules expressly extend representation to such a motion, is a ground for the post-conviction remedy of permission to file a belated motion for reconsideration of sentence.[']" (quoting *State v. Flansburg*, 345 Md. 694, 705 (1997))). *See Franklin*, 470 Md. at 184, stating: "An attorney's failure to file such a motion after being asked to do so cannot be considered a strategic decision; rather, such a failure 'reflects inattention to the defendant's wishes,' *Flores-Ortega*, 528 U.S. at 477, 120 S.Ct. 1029, and is *per se* unreasonable."

Mr. Harris conceded at the hearing on his post-conviction petition that he did not ask his counsel to file a motion for modification. So his case is not covered by the rule established by *Flansburg*. *See, e.g., Rich v. State*, 230 Md. App. 537, 551 n.5 (2016), a case in which we upheld a post-conviction court's denial of an ineffective assistance of counsel claim that was based upon failure to file a motion to modify sentence. We

concluded in *Rich* that the defendant "did not provide any evidence that he'd asked counsel to file a motion to modify his sentence," and we said we would "not find that his counsel rendered ineffective assistance on a silent record."

But it appears that the reported cases limiting relief to defendants who asked counsel to file a motion for modification all dealt with adult defendants, and Mr. Harris urges us to consider the adequacy of his counsel's advice regarding a motion for modification in light of the circumstances under which that advice was rendered in his particular case. In *Franklin*, 470 Md. at 183, the Court of Appeals reiterated that, "[i]n general, bright lines concerning what constitutes constitutionally deficient performance are disfavored." Instead, the assessment of counsel's performance must be made by "'considering all the circumstances.'" *Id.* (quoting *Strickland*, 466 U.S. at 688). Moreover, "a particular defendant's age, history, characteristics, or length of sentence may affect the analysis," particularly "[i]f the defendant is young, inexperienced, and sentenced to a lengthy prison term." 470 Md. at 189. *See also Moultrie v. State*, 240 Md. App. 408, 423, *cert. denied*, 466 Md. 208 (2019) (a case in which this Court observed that it was reasonable for a 16-year-old defendant to rely on counsel for advice about when to request a hearing on a motion for modification; but the scope and breadth of the *Moultrie* holding were limited by *Franklin*, 470 Md. at 184, which emphasized that each case must be decided on its particular circumstances). Accordingly, we will consider whether the perfunctory advice given to Mr. Harris at the sentencing hearing was effective assistance of counsel under the circumstances.

Mr. Harris testified that he did not even know that he could file a motion for modification, let alone that he needed to ask his trial attorney to file one. The transcript of the sentencing hearing confirms that the motion was mentioned after the sentences were announced. So, the question before us is whether that brief statement of counsel was sufficient, under the circumstances, to fulfill the obligation to provide effective assistance of counsel in this regard.

The record before the post-conviction court reflected that trial counsel's only advice regarding a motion for modification was provided under the following circumstances, at the end of the sentencing hearing:

> [THE COURT:] You are not a good person. I'm sorry you don't have your father in your life, but you had your grandmother. You say she is a good person and you just told me that you know right from wrong. Well, what you did that night was wrong.
>
> As to Count 1, first degree rape, I sentence you to life imprisonment, suspend all but 50 years. As to Count 4, first degree sex offense, 50 years concurrent. Count 10, the second degree assault merges. As to Count 11, false imprisonment, ten years concurrent.
>
> Upon your release you will be on five years['] supervised probation. You are not to use any CDS. You are to register as a sexually violent offender. Please advise your client. I will recommend Patuxent Institute for this young man.
>
> [DEFENSE COUNSEL]: Mr. Harris, you have 90 days to ask the judge to reconsider his sentence, 30 days to file an appeal to the Court of Special Appeals, and 30 days to ask a three judge panel to review your sentence. The three judge panel may increase your sentence, may decrease your sentence or leave it the same. They may consult with [the trial judge] but he would not be on that panel. If you wish to exercise any of those rights, you must do so by notifying the clerk of the Court in writing.
>
> Thank you, Your Honor.

THE COURT: Thank you.

[PROSECUTOR]: Thank you, Your Honor. That concludes my matters. If I may be excused?

[PROSECUTOR 2]: May I as well?

THE COURT: Yes. Have a good day.

(Conclusion of proceedings.)

So, immediately after hearing the judge say "I sentence you to life imprisonment" plus another 60 years "concurrent," this 16-year-old defendant was advised by his attorney: "you have 90 days to ask the judge to reconsider his sentence," and several other things. There was no mention of the possibility that trial counsel could assist with asking the judge to reconsider the sentence; there was no mention that trial counsel would prepare and file the request if asked to do so; and there was no explanation of the possibility that the court could defer ruling on that request for up to five years in order to give the defendant an opportunity to demonstrate some remorse and rehabilitation.

The guidance offered by the Court of Appeals in *Franklin* was not available at the time the post-conviction court ruled on Mr. Harris's petition. But it leads us to conclude that, under the circumstances, counsel's assistance to Mr. Harris was deficient with respect to the advising him of the right to file a post-judgment motion for modification pursuant to Rule 4-345(e).

In *Franklin*, the 35-year-old defendant *was* advised of the right to file a post-judgment motion requesting modification, and counsel did file such a motion. In that motion, defense counsel in *Franklin* reminded the trial court of her statement indicating a

willingness to consider modifying Franklin's sentence to probation before judgment if he successfully completed his term of probation and persuaded the judge that he had kept his record clean. Franklin's counsel also asked in the motion that the motion "not be denied outright," but that the court consider granting probation before judgment at the conclusion of Franklin's probationary period. The trial court handwrote "no action" on the motion and proposed order. But no one ever asked the court to set the motion in for a hearing. A little over five and a half years later, Franklin experienced an adverse employment action when his employer discovered the conviction. Franklin then filed a petition for writ of *coram nobis* seeking modification of his sentence so that he could apply for expungement. The circuit court denied relief. This Court affirmed that ruling. And the Court of Appeals also affirmed that denial, concluding that, "based on the specific facts and circumstances of the case before it," "Franklin failed to show that [his attorney] acted unreasonably by not renewing the request for a hearing within the five-year period." 470 Md. at 180.

The Court rejected Franklin's argument that *Flansburg* "compels the conclusion that an attorney who fails to renew a request for a hearing on a Rule 4-345(e) motion, before the expiration of the five-year period for consideration of the motion, *per se* provides constitutionally deficient representation." 470 Md. at 180. The Court explained:

> We do not believe it is reasonable in all cases to require a criminal defense attorney, on his or her own initiative, to request a hearing on a motion for modification of sentence that has been held under advisement. As discussed further below, in many cases, absent an instruction by the defendant to request that the court take up such a motion during the five-year period, an

> attorney will not perform deficiently if the attorney fails to make that request on the attorney's own initiative.

Id. at 184.

But, pertinent to Mr. Harris's case, the Court announced that it *did see* "the need for a different bright line rule regarding the five-year period." *Id.* The *Franklin* Court stated:

> **An attorney must ensure that his or her client knows there is a five-year period for consideration of a motion for modification of a sentence**. If a defendant is not advised of the five-year period, the defendant may incorrectly believe that he or she has an unlimited amount of time to engage in rehabilitative efforts, and will neglect to notify the court (either through counsel or pro se) during the five-year period that the defendant wishes the court to consider a pending motion for modification.
>
> We recommend that sentencing courts add the five-year consideration period regarding a motion for sentence modification to the post-sentencing rights that they (and/or defense counsel) advise defendants about on the record following the imposition of a sentence. However, **if the defendant does not receive such an advisement during the sentencing hearing, defense counsel must advise the defendant, either before or after the sentencing hearing, that the sentencing court will have five years from the imposition of sentence to consider a motion to modify the sentence. If a defendant, whose timely motion was taken under advisement, proves that he or she failed to request a hearing within the five-year period because defense counsel neglected to ensure that the defendant was advised of the five-year consideration period, that factual finding by a post-conviction or coram nobis court will suffice to show that defense counsel performed deficiently under the Sixth Amendment and Article 21.**

Id. at 184-185 (emphasis added; footnote omitted).

We view this statement in *Franklin* as directly pertinent to the facts of Mr. Harris's case, and conclude that there was no evidence that Mr. Harris was ever advised about the five-year period for consideration of a motion for modification filed within 90

days. *Franklin* states unequivocally that the absence of such advice "suffice[s] to show that defense counsel performed deficiently under the Sixth Amendment and Article 21." And there is no dispute that Mr. Harris was prejudiced by not being sufficiently informed to ask his attorney to file a motion. *Cf. Matthews*, 161 Md. App. at 252 (the deficient act "is prejudicial because it results in a loss of any opportunity to have a reconsideration of sentence hearing" "without the necessity of presenting any other evidence of prejudice").

We conclude that the appropriate remedy in a case like this is the same one granted in *Matthews* and *Flansburg*, *i.e.*, the right to belatedly file a motion for modification and request a hearing. *Flansburg*, 345 Md. at 705; *Matthews*, 161 Md. App. at 252. *Cf. Franklin*, 470 Md. at 197 ("If counsel's deficient performance prevents a defendant from requesting a hearing on a Rule 4-345(e) motion that was previously held under advisement, a post-conviction or *coram nobis* court should 'place the defendant in the position he would have been but for his counsel's ineffectiveness.' [*State v.*] *Schlick*, 465 Md. [566,] at 586, 214 A.3d 1139 [(2019)]. This requires the defendant to be able to request a hearing and for the court to be permitted to conduct a hearing, if it chooses to do so." (Footnote omitted.)).

On remand, Mr. Harris shall be afforded the opportunity to file a belated motion to modify his sentence.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

COSTS TO BE PAID THREE-FOURTHS BY APPELLANT AND ONE-FOURTH BY BALTIMORE COUNTY.