APPENDIX

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State of Maryland v. Christopher Mann, No. 29, September Term, 2019

INEFFECTIVE ASSISTANCE OF COUNSEL – PREJUDICE PRONG – PURPORTED ALIBI WITNESSES – Court of Appeals held that petitioner for postconviction relief failed to establish that his trial counsel rendered ineffective assistance of counsel by not requesting alibi jury instruction, as petitioner had failed to satisfy prejudice prong of test set forth in Strickland v. Washington, 466 U.S. 668 (1984), *i.e.*, burden to prove that there was reasonable probability, or substantial or significant possibility, that jury would have acquitted him if his trial counsel had requested alibi jury instruction and trial court had given instruction. Circumstance that petitioner's trial counsel did not request alibi jury instruction did not prejudice petitioner because, upon closer inspection, none of four purported alibi witnesses' testimony led to conclusion that petitioner could not have been at murder scene when victim was killed, and trial court's giving of instructions on State's burden to prove guilt beyond a reasonable doubt undercut claim of prejudice.

Circuit Court for Baltimore City
Case No. 104002009 to 104002014
Argued: October 31, 2019

IN THE COURT OF APPEALS

OF MARYLAND

No. 29

September Term, 2019

STATE OF MARYLAND

v.

CHRISTOPHER MANN

Barbera, C.J.
McDonald
Watts
Hotten
Booth
Harrell, Glenn T., Jr. (Senior Judge, Specially Assigned)
Greene, Clayton, Jr. (Senior Judge, Specially Assigned),

JJ.

Opinion by Watts, J.
Barbera, C.J., and Hotten, J., dissent.

Filed: December 19, 2019

An alibi is "[a] defense [that is] based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time." *Alibi*, Black's Law Dictionary (11th ed. 2019). An alibi is not an affirmative defense—that is, a defense that "[t]he defendant bears the burden of proving[.]" *Affirmative Defense*, Black's Law Dictionary. "An alibi is not an affirmative defense" because it "simply negates an element of the crime"—namely, the allegation that the defendant was the one who committed the crime, which the State has the burden of proving beyond a reasonable doubt. Harris v. State, 458 Md. 370, 411 n.31, 182 A.3d 821, 845 n.31 (2018) (citations omitted).

Maryland Criminal Pattern Jury Instruction 5:00, addressing alibis, provides:

> You have heard evidence that the defendant was not present when the crime was committed. You should consider this evidence along with all other evidence in this case. In order to convict the defendant, the State must prove, beyond a reasonable doubt, that the crime was committed and the defendant committed it.

Although Maryland Criminal Pattern Jury Instruction 5:00 is known as an "alibi jury instruction," it does not use the word "alibi" because doing so could "incorrectly suggest that alibi is an affirmative defense." MPJI-Cr 5:00 cmt. Where an alibi jury instruction is applicable under a case's facts, on request, a trial court must give an alibi jury instruction. See Smith v. State, 302 Md. 175, 180-81, 486 A.2d 196, 198-99 (1985).

This case requires us to determine whether a petitioner for postconviction relief has satisfied, under Strickland v. Washington, 466 U.S. 668 (1984), the burden of proving that he was prejudiced by his trial counsel not requesting, and the trial court not giving, an alibi jury instruction where purported alibi witnesses testified at trial.

In the Circuit Court for Baltimore City, the State, Petitioner, charged Christopher "Crack" Mann, Respondent, with first-degree felony murder, kidnapping, conspiracy to kidnap, and other crimes. At trial, the State offered evidence of the following events. On April 22, 2003, sometime between 6:43 p.m. and 7:03 p.m., Mann and two of his friends, Tayvon "Tay" Whetstone and Kenneth "Kane" / "Kenny" Fleet,[1] confronted the victim, Ricky "Little Rick" Prince, at a McDonald's on Liberty Road near its intersection with Rolling Road, about him having been a witness for the State in a criminal case. Fleet got into Prince's vehicle and drove away. Whetstone told Prince that he would take Prince to his vehicle. Mann, Whetstone, and Prince got into a vehicle. Ultimately, Whetstone drove to the area behind a nightclub called "Fantasies," which is in the Curtis Bay neighborhood of Baltimore City. There, in Mann's presence, sometime during the evening of April 22, 2003, Whetstone shot Prince.

Mann's trial counsel called four alleged alibi witnesses, who purported to account for Mann's whereabouts from approximately 7:30 p.m. or 7:45 p.m. on April 22, 2003 to the morning of April 23, 2003. Mann's trial counsel did not request, and the circuit court did not give, an alibi jury instruction.

After being convicted and pursuing an unsuccessful direct appeal, Mann petitioned for postconviction relief, contending that his trial counsel provided ineffective assistance of counsel by not requesting an alibi jury instruction. The circuit court agreed and ordered

[1]Mann and Whetstone were charged with first-degree felony murder and were tried separately. Fleet was charged with, and pled guilty to, carjacking. Neither Mann, Whetstone, nor Fleet testified in this case.

a new trial. The State successfully applied for leave to appeal, and the Court of Special Appeals affirmed. The State filed a petition for a writ of *certiorari*, which this Court granted.

Before us, the State contends that an alibi jury instruction would not have significantly affected the jury's deliberations. Mann responds that it is reasonably possible that, in the absence of an alibi jury instruction, the jury believed that he had the burden to prove an alibi or did not consider the purported alibi witnesses' testimony at all. We hold that Mann has failed to satisfy the burden to prove that there is a reasonable probability, or a substantial or significant possibility, that the jury would have acquitted him if his trial counsel had requested an alibi jury instruction and the circuit court had given the instruction. The circumstance that Mann's trial counsel did not request an alibi jury instruction did not prejudice Mann because, upon closer inspection, none of the four purported alibi witnesses' testimony indicated that Mann could not have been at the murder scene when Whetstone shot Prince, and the circuit court's giving of other instructions regarding the State's burden to prove guilt beyond a reasonable doubt diminishes the claim of prejudice.

BACKGROUND

Trial and Direct Appeal

At trial, as a witness for the State, Detective Kevin Klimko of the Baltimore County Police Department testified that, on April 15, 2003, Jerrard "Tick" Bazemore pled guilty to the murder of Charles Edward Sharp. During Mr. Bazemore's guilty plea hearing, the prosecutor in that matter proffered that, had there been a trial, Prince—the murder victim

in this case—would have testified that he provided Bazemore with the gun that was used to fatally shoot Sharp. After Bazemore said that he was pleading guilty, two individuals in the gallery "stood up and said[:] 'You don't have to go down like that, man,' and pretty much objected to the fact that he was pleading guilty." The two individuals then left the courtroom. Detective Klimko testified that he would not recognize the two individuals if he saw them again.

As a witness for the State, Detective Gerald D'Angelo of the Baltimore County Police Department testified that, on April 23, 2003, he interviewed Mann, who said that, on the evening of April 22, 2003, he went to the McDonald's to get something to eat and saw Prince there. Mann said that he and Prince calmly talked about Prince having been a witness against Bazemore, and that, while they were talking, someone got into Prince's vehicle and drove away. Detective D'Angelo responded that he did not believe that Mann had told the truth. Detective D'Angelo also said that he knew that Mann had gone to the McDonald's with two other individuals, and that his conversation with Prince had been heated. During the interview, Mann acknowledged that he had not told the truth. Mann said that he had been driving a Ford Escort that belonged to his girlfriend, Tanea Jenkins, and needed to return it to her before her shift at a Target[2] ended. Mann said that two of his friends, Whetstone and Fleet, gave him a ride from the Target to the McDonald's in a black 1991 Chevrolet Caprice that belonged to Whetstone's girlfriend. Mann acknowledged that he had gotten into a heated argument with Prince about Prince having been, as Mann put

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[2]Multiple witnesses' testimony indicated that the Target in question is on Reisterstown Road.

it, a "snitch" against Bazemore. Mann said that Fleet got into Prince's vehicle, a Toyota Corolla, and drove away, and that he told Prince that that he would get Prince's vehicle back for him. Mann said that he and Whetstone went to Mann's father's house,[3] and then returned to the McDonald's.

While testifying, Detective D'Angelo read aloud a statement that Mann had handwritten and signed. In his written statement, Mann alleged the following events, which we summarize. On April 22, 2003, at 11 a.m. or 11:30 a.m., Mann drove Jenkins to the Target. Afterward, Mann visited one of his friends, Jeffrey Johnson, at his house.[4] At approximately 1:45 p.m. or 2 p.m., Mann left Johnson's house. At approximately 4:30 p.m. or 5 p.m., Mann went to his mother's house.[5] Mann met with Whetstone and Fleet, who followed him to the Target. At approximately 6:30 p.m. or 6:45 p.m., Mann dropped Jenkins's vehicle off at the Target. Jenkins gave Mann six dollars, and he, Whetstone, and Fleet left the Target. At approximately 7 p.m., Mann, Whetstone, and Fleet arrived at the McDonald's. There, Mann talked to Prince about Bazemore. While Mann was talking to Prince, Fleet got into Prince's vehicle and drove away. Mann and Whetstone went to Mann's father's house, where they stayed for at least five to ten minutes. Afterward, Mann and Whetstone went to Johnson's house. After that, Mann and Johnson's girlfriend went

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[3]Detective D'Angelo testified that Mann's father lived at 3411 Kimble Road. Another law enforcement officer testified that Mann's father's house was approximately two blocks from the McDonald's.

[4]Johnson testified that he lived approximately a mile-and-a-half from the McDonald's.

[5]Detective D'Angelo testified that Mann's mother lived at 1516 Lester Morton Court, in east Baltimore City.

to Mann's mother's house. Mann requested a ride from Jenkins, who picked him up, dropped one of her friends off, and drove to Mann's father's house, where they spent the night.

As a witness for the State, Detective Raymond Laslett of the Baltimore City Police Department testified that he recovered a recording that was made on April 22, 2003 by at least one surveillance camera at the Target where Jenkins worked. The recording was played during Detective Laslett's direct-examination, and he testified that it showed the following events, which we summarize. In the Target's parking lot, a black Ford Escort followed a black Chevrolet Caprice. Afterward, Mann, Whetstone, and Fleet appeared together. Then, Mann and Jenkins appeared together. At 6:43 p.m., the Caprice left the Target's parking lot. According to Detective Laslett, the Escort that appeared in the recording belonged to Jenkins, and the Caprice that appeared in the recording belonged to Whetstone's girlfriend.

As a witness for the State, Jackie Davis, Prince's mother, testified that, on the evening of April 22, 2003, Prince borrowed her burgundy Toyota Corolla so that he could pick up his paycheck from a Checkers. At approximately 6:45 p.m., while Davis was at her house, Prince telephoned her, sounding "anxious and talking fast[.]" According to Davis, Prince said that someone had "approached him and said that he had snitched" against Bazemore, and that someone had taken the Corolla. Prince also said that "one individual out there was" Mann. After hanging up, Davis telephoned 911 and reported the Corolla's theft. Two law enforcement officers arrived at Davis's house and took her to a gas station on Liberty Road. Along the way, Davis and the officers passed by the

McDonald's. Davis, who was looking for Prince, did not see him in the area of the McDonald's.

As a witness for the State, Officer Morris Gardner of the Baltimore County Police Department testified that, on April 22, 2003, at 7:03 p.m., he heard about a report of a theft of a burgundy Toyota Corolla in the area of the McDonald's. Officer Gardner drove to the area, saw a burgundy Toyota Corolla, contacted his supervisor, and confirmed that the license plate was that of the stolen Corolla. The Corolla pulled into a gas station, and the driver, Fleet, exited the Corolla. Officer Gardner parked his vehicle and arrested Fleet. Davis was brought to the gas station and said that she did not recognize Fleet.

As a witness for the State, Derrick Harper ("Mr. Harper")[6] testified that he had known Prince, Mann, Whetstone, and Fleet. On April 25, 2003, Whetstone asked Mr. Harper to move the Caprice (*i.e.*, Whetstone's girlfriend's vehicle) because Whetstone did not want it to get towed and did not have a driver's license. That was the first occasion on which Mr. Harper had seen the Caprice. Mr. Harper started driving the Caprice, and officers initiated a traffic stop and arrested Mr. Harper.

From the night of April 25, 2003 to the morning of April 26, 2003, officers questioned Mr. Harper, who handwrote certain answers on a document. The circuit court admitted the document into evidence, and the prosecutor read certain excerpts of it aloud while direct-examining Mr. Harper. The document indicated that Mr. Harper wrote that Mann had alleged the following events, which we summarize. When Mann was with

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[6]Derrick Harper was a witness for the State, and Rhonda Harper was a witness for Mann. As far as the record reveals, Mr. Harper and Ms. Harper are unrelated.

Whetstone and Fleet at the McDonald's, they encountered Prince. Fleet punched Prince twice, Mann kicked Prince, and Fleet got into Prince's vehicle and drove away. Whetstone was afraid that he would get implicated in Fleet's theft of Prince's vehicle. Mann wanted to scare Prince into not telling anyone about Fleet's theft of Prince's vehicle. Whetstone told Prince that he would take Prince to his vehicle. Mann, Whetstone, and Prince got into Whetstone's vehicle, which was in the area of the McDonald's, and Whetstone drove away. While Whetstone was driving, Mann tried to persuade Prince not to tell anyone about Fleet's theft of Prince's vehicle, and Prince promised not to do so. Mann was satisfied with Prince's promise, but Whetstone was not. Whetstone shot Prince in the head.

During Mr. Harper's cross-examination, Mann's trial counsel asked: "If you don't take the beltway[,] and you go from [the] McDonald's on Liberty Road to the 5[5]00 block of Pennington Avenue,[7] it would take about an hour, would it not?" Mr. Harper responded: "Around. I mean, that's past Cherry Hill, Patapsco[Avenue], and all that."

As a witness for the State, Officer Mark William Rejrat of the Baltimore City Police Department testified that, on April 23, 2003, at approximately 4 p.m., he went to the area behind a nightclub called "Fantasies," which is at 5520 Pennington Avenue in the Curtis Bay neighborhood of Baltimore City. Officer Rejrat explained that the area behind Fantasies is a former "city dump" that is "commonly known as . . . 'bloody pond.'" In a ditch near the pond, Officer Rejrat found a deceased man's body. A detective found a driver's license with Prince's name inside a wallet on the deceased man's person.

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[7]Prince's body was found near 5520 Pennington Avenue. While cross-examining Mr. Harper, Mann's trial counsel inadvertently referred to 5200 Pennington Avenue.

As a witness for the State, Jack Titus, M.D., the Deputy Chief Medical Examiner, was admitted as an expert in forensic pathology and postmortem examination. Dr. Titus testified that, on April 24, 2003, he autopsied Prince's body. Prince had a gunshot entry wound on the back of the right side of his head, and a gunshot exit wound on the left side of his forehead. Dr. Titus opined that the cause of death was a gunshot wound to the head, and the manner of death was homicide. Dr. Titus estimated that the time of death was the evening of April 22, 2003, "roughly." Dr. Titus cautioned that he could make only a "[r]eal general approximation" as to the time of death because there were "just too many variables to say an exact hour."

As a witness for Mann, Johnson testified that, on April 22, 2003, sometime between 12 p.m. and 2 p.m., Mann arrived at Johnson's house. For approximately fifteen minutes, Mann and Johnson talked; afterward, Mann left. At approximately 7:30 p.m. or 7:45 p.m., Mann returned to Johnson's house and said that Whetstone had just dropped him off. For approximately forty-five minutes, Mann and Johnson played a video game. At approximately 8:30 p.m., Mann and Johnson left Johnson's house. At approximately 8:45 p.m., Mann and Johnson arrived at Mann's mother's house. Shortly afterward, Johnson left.

As a witness for Mann, Jenkins, his girlfriend, testified that, on April 22, 2003, she worked at the Target from 11 a.m. to 7 p.m. At approximately 6:43 p.m. or 6:44 p.m., Mann, Whetstone, and Fleet came to see Jenkins. Mann gave Jenkins the key to her vehicle. Shortly afterward, Mann left. After leaving the Target, Jenkins went to her house, then picked up one of her friends, Nikita Peay. Afterward, Jenkins and Peay "just drove

around." At approximately 9 p.m., Mann telephoned Jenkins and asked her to pick him up from his mother's house. At approximately 9:30 p.m., Jenkins arrived at Mann's mother's house. For approximately two hours, Mann, Jenkins, and Peay "just drove around[.]" Afterward, Jenkins dropped Peay off and drove herself and Mann to his father's house, where they spent the night.

As a witness for Mann, Peay testified that, on April 22, 2003, at 8 p.m., Jenkins picked her up. Peay and Jenkins "drove around for a while[.]" Mann telephoned Jenkins and asked her to pick him up. At 9:30 p.m., Jenkins picked Mann up. Afterward, Mann, Jenkins, and Peay "drove around." At 11:15 p.m., Jenkins dropped Peay off at her house.

As a witness for Mann, Rhonda Harper ("Ms. Harper"), Mann's cousin, testified that she lived with his father. On April 22, 2003, sometime after 7 p.m., Ms. Harper left Mann's father's house to give a friend a ride. At approximately 11:30 p.m. or 11:45 p.m., Ms. Harper returned to Mann's father's house, and saw Mann and Jenkins sitting outside.

During the State's initial closing argument, the prosecutor addressed the purported alibi witnesses, in pertinent part, as follows:

> Johnson [is] the one [whom] you should actually look for -- look at [] most closely, because this murder[--] we know that [Prince] was taken right away from [the] McDonald's, because we know that[,] when [Davis] gets there[,] [Prince is] not there. Neither is [] Mann.
>
> Who had the motive and the opportunity? [Mann] and [] Whetstone. Who else was there at the time? And[,] ladies and gentlemen, this murder happened as soon as it -- as long as it takes to get from [the] McDonald's to Curtis Bay; in that time period. So[,] did [] Jenkins pick up [Mann] at 9:30[p.m.]? Maybe. And ride around with [Peay] in the [Escort]? Sure. Maybe. After the murder. Did [Ms.] Harper see [] Jenkins and [Mann] at [his father's] house that night? Sure. Maybe. Was [Mann] with [] Johnson at his house? I submit to you, no.

During Mann's closing argument, his trial counsel addressed Mr. Harper's and Johnson's testimony, in pertinent part, as follows:

> [Mr.] Harper[] was arrested with the [] Caprice [] in [Baltimore C]ity. And he tells the police . . . that there's a problem with the hood latch[,] and he can't take it on the highway. . . . . To go from [the] McDonald's on Liberty Road and Rolling Road to Curtis Bay, [twenty] miles on the [b]eltway[,] will take you probably a half[-]hour. If you have to go to the side streets[,] it will take you probably an hour to an hour[-]and[-]a[-]half. Why is that important? Because the time doesn't fit. . . . [Mann] was at [] Johnson's house.

During the State's rebuttal closing argument, the prosecutor alleged the following events, which we summarize. At 6:43 p.m., Mann, Whetstone, and Fleet left the Target. Afterward, Mann, Whetstone, and Fleet arrived at the McDonald's and encountered Prince. Mann, Whetstone, and Prince got into a vehicle, and it took an hour to drive through Baltimore City and reach Curtis Bay. At approximately 8 p.m., Prince was killed. Afterward, Whetstone drove Mann to Whetstone's house,[8] and Mann walked a short distance to his mother's house. At 9 p.m., Mann telephoned Jenkins and asked her to pick him up from his mother's house.

Mann's trial counsel did not request, and the circuit court did not give, an alibi jury instruction. While preliminarily instructing the jury at the start of the trial, the circuit court stated in pertinent part: "[T]he defendant may or may not call witnesses. The defendant has no obligation to call witnesses. The State has the burden of proving the defendant's guilt beyond a reasonable doubt. The defendant does not have to prove innocence." While instructing the jury at the conclusion of the trial, the circuit court stated in pertinent part:

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[8]Mr. Harper testified that Whetstone lived on Lester Morton Court, "around the Caroline and Monument area[,]" in Baltimore City.

"The State has the burden of proving the guilt of the Defendant beyond reasonable doubt. The burden remains on the State throughout the trial. The Defendant is not required to prove his innocence." After instructing the jury at the conclusion of the trial, the circuit court initiated a bench conference and asked counsel: "Is there anything [that] you want me to add or subtract?" Mann's trial counsel responded: "No exceptions."

The jury found Mann guilty of first-degree felony murder, kidnapping, and conspiracy to kidnap. Mann appealed, and the Court of Special Appeals affirmed.

Petition for Postconviction Relief

On June 9, 2014, almost ten full years after his conviction, in the circuit court, while representing himself, Mann filed a petition for postconviction relief. On October 6, 2015, on Mann's behalf, his postconviction counsel filed a supplemental petition for postconviction relief. Both the petition and supplemental petition included the contention that Mann's trial counsel rendered ineffective assistance of counsel by not requesting an alibi jury instruction. On September 27, 2017, the circuit court conducted a hearing on the petitions.

At the hearing, as a witness for Mann, his trial counsel testified that, at trial, on Mann's behalf, he pursued an alibi defense. Mann's postconviction counsel asked: "If you [did not] request an alibi [jury] instruction, is that something that you would have had reason for not requesting?" Mann's trial counsel responded: "No. I mean, the defense was alibi." Mann's postconviction counsel asked: "It would have been your expectation that there would have been an alibi [jury] instruction in this case?" Mann's trial counsel responded: "Irrespective of whether or not it was requested, yes. Because that was the

defense."

At the conclusion of the hearing, the circuit court took the petition under advisement. On February 12, 2018, the circuit court issued a Statement of Reasons and Order of Court in which it granted the supplemental petition in part, granted Mann's request for a new trial, and denied his requests for other forms of postconviction relief. The circuit court granted postconviction relief on the ground that Mann's trial counsel rendered ineffective assistance of counsel by not requesting an alibi jury instruction, and denied postconviction relief on all other grounds. Addressing the performance prong, the circuit court stated:

> [F]our defense witnesses[—*i.e.*, Johnson, Jenkins, Peay, and Ms. Harper—]and [Mann]'s [] statement[s to Detective D'Angelo] supported an alibi jury instruction[,] and [Mann's] trial counsel was objectively deficient in [not] request[ing an alibi jury] instruction[, which] fully encapsulated [Mann]'s theory of the case. . . . [I]t cannot be said that [Mann's trial] counsel's actions were [the] result of any [] trial strategy, and [Mann's trial counsel] testified as [m]uch. . . . [Mann's] trial counsel's omission . . . could not have been a result of reasonable professional judgment[.]

(Citation omitted). Addressing the prejudice prong, the circuit court reasoned:

> Without the [alibi jury] instruction, . . . it is reasonably possible that the jury might have placed the burden of proof on the defense with respect to "proving" the alibi. . . . Alternatively, it is reasonably probable that the jury may not have considered, as they were not instructed to, the defense theory of the case at all. . . . [T]rial courts commit reversible error [in] failing to give an alibi jury instruction when there is evidence [] to support it. . . . [I]t follows that . . . it [was] prejudicial to [Mann] when [his] trial counsel [did not] request a[jury] instruction that epitomize[d] the only theory of the defense.

(Cleaned up). Addressing both the performance prong and the prejudice prong, the circuit court concluded:

> Based on the number of alibi witnesses, the substance of their

> testimony. [Mann's] trial counsel's [] testimony that he did not have a strategic reason for not requesting an alibi [jury] instruction, and the State's lack of direct and circumstantial evidence linking [Mann] to [Prince's murder], . . . [Mann's] trial counsel was deficient in [not] request[ing an alibi jury instruction], and there is a reasonable probability that the omission influenced the verdict[s.]

(Footnote omitted).

Opinion of the Court of Special Appeals

The State filed an application for leave to appeal, which the Court of Special Appeals granted. On May 1, 2019, the Court of Special Appeals affirmed the circuit court's judgment, stating: "Given the heightened sensitivity [that has been] expressed by Maryland courts concerning the importance of [an] alibi [jury] instruction, we hold that the failure (*not the disinclination but the failure*[]) of [Mann's] trial counsel to request the [alibi jury] instruction in this case constituted ineffective assistance of counsel." State v. Mann, 240 Md. App. 592, 606, 207 A.3d 653, 661 (2019) (emphasis in original).

Addressing the performance prong, the Court of Special Appeals determined that Mann's trial counsel not requesting an "alibi jury instruction fell below the 'broad range of reasonable professional judgment' standard . . . and therefore constituted deficient performance." Id. at 602, 207 A.3d at 658-59 (citation omitted). The Court of Special Appeals stated that "there [was] no question [] that Mann generated an alibi[.]" Id. at 600, 207 A.3d at 658. The Court of Special Appeals observed that the State conceded that Mann's trial counsel did not request an alibi jury instruction because of an oversight, as opposed to strategy. See id. at 601, 207 A.3d at 658. The Court of Special Appeals reasoned that "the record here is devoid of any strategic reason for not requesting an alibi

[jury] instruction[,]" and that Mann's trial counsel not requesting an alibi jury instruction was not because of a "'disinclination' to request [an] alibi [jury] instruction[.]" Id. at 601, 207 A.3d at 658 (citation omitted).

Addressing the prejudice prong, the Court of Special Appeals concluded that "Mann was prejudiced because he did not receive the benefit of [an] alibi [jury] instruction as a result of his [trial] counsel[not] request[ing] it." Id. at 606, 207 A.3d at 661. The Court of Special Appeals reasoned:

> [T]here exists a strong concern that a jury will assume that a criminal defendant bears some burden of proof by introducing alibi evidence, even if the word "alibi" is never uttered in the courtroom. . . . By providing an alibi [jury] instruction, [a] trial court sufficiently relieves these concerns. Here, where an alibi [jury] instruction was not given because [Mann's] trial counsel [did not] request it, there is a substantial or significant possibility that the verdict[s were] affected.

Id. at 605-06, 207 A.3d at 661 (cleaned up).

Petition for a Writ of *Certiorari*

On May 29, 2019, the State petitioned for a writ of *certiorari*, raising the following issue: "Did the Court of Special Appeals err when it held that [Mann's trial] counsel[not] request[ing] an alibi jury instruction was prejudicial . . . when the presence of [an alibi jury] instruction would not have presented a likelihood of a different outcome of the trial?" On July 12, 2019, this Court granted the petition. See State v. Mann, 464 Md. 588, 212 A.3d 396 (2019).

DISCUSSION

The Parties' Contentions

The State contends that an alibi jury instruction would not have significantly

affected the jury's verdict, as it would have simply reminded the jury that it had heard testimony that Mann was not at the murder scene, that the jury should consider that testimony along with the rest of the evidence, and that the jury should not find Mann guilty unless the State proved guilt beyond a reasonable doubt. The State asserts that, contrary to the circuit court's reasoning, Mann's trial counsel pursued multiple defenses in addition to an alibi—specifically, Mann's trial counsel indicated that the forensic work was insufficient; that Prince could have been murdered in a robbery gone wrong; that Mr. Harper could have murdered Prince; and that people other than Mann had a motive to murder Prince for being a witness against Bazemore.

Mann responds that he was prejudiced by his trial counsel not requesting an alibi jury instruction. Mann contends that, if his trial counsel had requested an alibi jury instruction, the circuit court almost certainly would have given it, and, if not, the circuit court not giving an alibi jury instruction would have been reversible error. Mann argues that it is reasonably possible that, in the absence of an alibi jury instruction, the jury believed that he had the burden to prove the alibi or did not consider the testimony of the purported alibi witnesses at all.

Standard of Review

In reviewing a trial court's ruling on a petition for postconviction relief, an appellate court reviews for clear error the trial court's findings of fact, and reviews without deference the trial court's conclusions of law, including a conclusion as to whether the petitioner received ineffective assistance of counsel. See Newton v. State, 455 Md. 341, 351-52, 168 A.3d 1, 7 (2017), cert. denied, ___ U.S. ___, 138 S. Ct. 665 (2018).

Ineffective Assistance of Counsel Generally

In Strickland, 466 U.S. at 687, the Supreme Court set forth a two-prong test for resolving a claim of ineffective assistance of counsel. "The first prong is known as 'the performance prong,' and the second prong is known as 'the prejudice prong.'" Ramirez v. State, 464 Md. 532, 560, 212 A.3d 363, 380 (2019) (cleaned up). "Generally, where a petitioner alleges ineffective assistance of counsel, the burden rests on him or her to satisfy both the performance prong and the prejudice prong." Id. at 562, 212 A.3d at 381 (cleaned up).

To satisfy the prejudice prong, a petitioner "must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, [*i.e.*,] a trial whose result is reliable." Strickland, 466 U.S. at 687. More specifically, a petitioner "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 [that is] sufficient to undermine confidence in the outcome." Id. at 694. In State v. Syed, 463 Md. 60, 86-87, 204 A.3d 139, 154 (2019), cert. denied, No. 19-227, ___ S. Ct. ___ (Nov. 25, 2019), this Court stated: "We have interpreted ['reasonable probability'] to mean 'there was a substantial or significant possibility that the verdict . . . would have been affected.'" (Quoting Bowers v. State, 320 Md. 416, 426, 578 A.2d 734, 739 (1990)) (emphasis omitted). In Strickland, 466 U.S. at 695-96, the Supreme Court explained how to assess prejudice as follows:

[A] court [that is] hearing an ineffectiveness claim must consider the totality

> of the evidence [that was] before the . . . jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences [that were] to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict [that is] only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court [that is] making the prejudice inquiry must ask [whether] the [petitioner] has met the burden of showing that the decision [that was] reached would reasonably likely have been different absent the errors.

In Syed, 463 Md. at 104-05, 204 A.3d at 165, this Court held that, although a petitioner's trial counsel's performance was deficient for not investigating an alibi witness, trial counsel's deficient performance did not prejudice the petitioner. In that case, the petitioner, who was a high school student at the time of the crime, was convicted of murdering a fellow student, his former girlfriend who had recently broken off the relationship and begun dating another person. See id. at 89, 67, 204 A.3d at 156, 143. On the date of the murder, at 2:15 p.m., the school day ended. See id. at 92, 204 A.3d at 157. A witness for the State testified that, on that date, while he and the petitioner were in a parking lot, the petitioner showed him the victim's body. See id. at 89, 204 A.3d at 155-56. The State's witness testified that, later on that date, at approximately 7 p.m., he saw the petitioner bury the victim's body at a certain park, where her body was ultimately found. See id. at 88, 204 A.3d at 155. Consistently, the State offered evidence that, at 7:09 p.m. and 7:16 p.m., the petitioner's cell phone received calls while it was in the area of the park. See id. at 88, 204 A.3d at 155.

After being convicted and pursuing an unsuccessful direct appeal, the petitioner

petitioned for postconviction relief. See id. at 68, 204 A.3d at 143. The petitioner contended that, among other things, his trial counsel was ineffective in not investigating a certain alibi witness or calling her at trial. See id. at 68-69, 204 A.3d at 144. In an affidavit, the alibi witness averred that, on the date of the murder, from 2:30 p.m. to 2:40 p.m., she was with the petitioner at a public library. See id. at 91, 204 A.3d at 157. A trial court vacated the petitioner's convictions and ordered a new trial, concluding that, although the petitioner's trial counsel's conduct in not investigating the alibi witness or calling her at trial did not constitute ineffective assistance of counsel, the petitioner's trial counsel had rendered ineffective assistance of counsel with regard to another matter. See id. at 70, 204 A.3d at 144-45. The Court of Special Appeals affirmed the order for a new trial, reasoning that, although the petitioner waived his contention that his trial counsel provided ineffective assistance of counsel with regard to the other matter, the petitioner's trial counsel rendered ineffective assistance of counsel in not investigating the alibi witness or calling her at trial. See id. at 70-72, 204 A.3d at 145-46.

This Court reversed the Court of Special Appeals's judgment with instruction to reverse the trial court's order for a new trial. See id. at 105, 204 A.3d at 165. This Court concluded that, although the petitioner's counsel was deficient in not investigating the alibi witness, the lack of investigation did not prejudice the petitioner. See id. at 104-05, 204 A.3d at 165. Addressing the prejudice prong, this Court determined that, even if the alibi witness was truthful in stating that, from 2:30 p.m. to 2:40 p.m., she was with the petitioner at a public library, that circumstance did "little more than to call into question the time that the State claimed [that the victim] was killed[,] and [did] nothing to rebut the evidence

establishing [the petitioner]'s motive and opportunity to kill" the victim. Id. at 91, 204 A.3d at 157. This Court explained that, in other words, even if the petitioner's trial counsel had called the alibi witness at trial, and even if the jury had found her credible, "the jury could have disbelieved that [the petitioner] killed [the victim] by 2:36 p.m., as the State's timeline suggested, yet still believed that [the petitioner] had the opportunity to kill [the victim] after 2:40 p.m." Id. at 91-92, 204 A.3d at 157. This Court noted that the alibi witness's testimony could not have led to an acquittal because it would not have negated the petitioner's guilt, given that the alibi witness did not account for the petitioner's whereabouts after 2:40 p.m. See id. at 92, 204 A.3d at 157.

Alibi Jury Instructions Generally

Maryland Rule 4-325(c) states in pertinent part:

> [A trial] court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. . . . The [trial] court need not grant a request[for a jury] instruction if the matter is fairly covered by [the jury] instructions [that are] actually given.

This Court has explained that Maryland Rule 4-325(c)

> requires [a] trial court to give a requested [jury] instruction under the following circumstances: (1) the requested [jury] instruction is a correct statement of the law; (2) the requested [jury] instruction is applicable under the facts of the case; and (3) the content of the requested [jury] instruction was not fairly covered [by] the jury instruction[s that were] actually given.

McMillan v. State, 428 Md. 333, 354, 51 A.3d 623, 635 (2012) (cleaned up).

In Pulley v. State, 38 Md. App. 682, 690-91, 382 A.2d 621, 626 (1978), the Court of Special Appeals held that a trial court erred in denying a defendant's request for an alibi jury instruction. In that case, the defendant, his cousin, and his cousin's wife testified that,

on the date of the crime, the defendant spent the evening at his cousin's and his cousin's wife's house. See id. at 686, 382 A.2d at 624. The trial court instructed the jury regarding the presumption of innocence and the burden of proof. See id. at 690, 382 A.2d at 626.

The defendant was convicted, and the Court of Special Appeals reversed and remanded for a new trial. See id. at 684, 382 A.2d at 622. The Court of Special Appeals concluded that the trial court should have granted the defendant's request to give an alibi jury instruction because the defense witnesses' testimony, "if believed, would have been sufficient to establish an alibi for the entire period during which the sequence of events [that was] related by the State's witness[] unfolded." Id. at 688, 382 A.2d at 625. The Court of Special Appeals rejected "the State's contention . . . that the requested alibi [jury] instruction was 'fairly covered' by the [jury] instructions with respect to the presumption of innocence and the burden of proving the [defendant] guilty beyond a reasonable doubt." Id. at 690, 382 A.2d at 626.

In Smith, 302 Md. at 177, 486 A.2d at 196, this Court held that a trial court erred in denying a defendant's request for an alibi jury instruction. In that case, the defendant testified that he was in Texas when the crimes were being committed in Maryland. See id. at 177, 486 A.2d at 196. The defendant was convicted, and the Court of Special Appeals affirmed, reasoning that, "for a defendant to be entitled to an alibi [jury] instruction, his [or her] alibi testimony must be corroborated." Id. at 178, 486 A.2d at 197.

This Court reversed and remanded for a new trial. See id. at 183-84, 486 A.2d at 200. This Court concluded that a "defendant's uncorroborated testimony[] that he [or she] was at some other place at the time of the crime[] is sufficient to generate" an alibi jury

instruction. Id. at 180-81, 486 A.2d at 198-99. This Court "agree[d] with the holding of the Court of Special Appeals in" Pulley, 38 Md. App. at 690, 382 A.2d at 626, that,

> when the evidence in a criminal case generates the issue of alibi, and when the defendant requests an instruction specifically addressed to the matter of alibi, the defendant is entitled to a[n] alibi [jury] instruction, and [] the [jury] instructions concerning the [] burden of proof, etc., are not deemed to "fairly cover" the matter of alibi.

Smith, 302 Md. at 180, 486 A.2d at 198 (citations omitted).

In Robertson v. State, 112 Md. App. 366, 370, 685 A.2d 805, 807 (1996), the Court of Special Appeals held that a trial court erred in denying a defendant's request for an alibi jury instruction. In that case, the defendant "premised his alibi [] on a [State's] witness who testified as to exculpatory statements" that the defendant made to him. Id. at 378, 685 A.2d at 811. The defendant was convicted, and the Court of Special Appeals reversed and remanded for a new trial. See id. at 388, 685 A.2d at 816. The Court of Special Appeals observed that Robertson was "readily distinguishable from" Pulley, 38 Md. App. 682, 382 A.2d 621, and Smith, 302 Md. 175, 486 A.2d 196, because, in Robertson, the defendant "did not offer any evidence of alibi[,] either in the form of an alibi witness or with his own testimony." Robertson, 112 Md. App. at 378, 685 A.2d at 811. The Court of Special Appeals, however, determined that, on request, a trial "court must give [an] alibi [jury] instruction . . . where there is some evidence . . . to support the position that the defendant was elsewhere when the crime occurred. . . . [T]he defendant, him[- or her]self, need not introduce alibi evidence . . . to generate . . . an [alibi jury] instruction[.]" Id. at 381-82, 685 A.2d at 813. The Court of Special Appeals explained that, in Robertson, the defendant was entitled to an alibi jury instruction on request because "there was some evidence . . . from

which a jury could have inferred that [the defendant] was not at the murder scene at" the time of the crime. Id. at 385, 685 A.2d at 814.

Ineffective Assistance of Counsel and Alibi Jury Instructions

In State v. Matthews, 58 Md. App. 243, 248, 472 A.2d 1044, 1046 (1984), the Court of Special Appeals held that a petitioner's trial counsel did not render ineffective assistance of counsel by not pursuing an alibi or requesting an alibi jury instruction. In that case, the victim testified that, at approximately 12 a.m., in Annapolis, a masked man attacked her; afterward, he forced her to drive to a remote location in Anne Arundel County, raped her, and then fled on foot. See id. at 245, 472 A.2d at 1044-45. The evidence showed that the abduction occurred near the petitioner's workplace, and that the rape occurred near his home. See id. at 245-46, 472 A.2d at 1045. After law enforcement officers made multiple unsuccessful attempts for the victim to identify the rapist, she identified the petitioner in a lineup after the men therein took off their shirts; although the victim did not see the rapist's face on the night of the crime, she identified the petitioner by his body. See id. at 245-46, 472 A.2d at 1045.

The petitioner testified that, on the night of the rape, at 9 p.m., he left his workplace. See id. at 246, 472 A.2d at 1045. According to the petitioner, afterward, he went home, borrowed a vehicle from someone, and drove to Baltimore City, where he visited his girlfriend of several months, who was a prostitute who worked on Baltimore Street. See id. at 246, 472 A.2d at 1045. The petitioner, however, did not know his girlfriend's last name or address, and law enforcement officers were unable to locate her. See id. at 246, 472 A.2d at 1045. Officers interviewed the person who had allegedly loaned a vehicle to

the petitioner, and that person did not say anything that was relevant to the case. See id. at 246, 472 A.2d at 1045. No evidence corroborated the petitioner's alibi testimony. See id. at 246-47, 472 A.2d at 1045.

After being convicted and pursuing an unsuccessful direct appeal, the petitioner petitioned for postconviction relief. See id. at 244, 472 A.2d at 1044. A trial court ordered a new trial on the ground that the petitioner's trial counsel was ineffective in not requesting an alibi jury instruction. See id. at 244-45, 472 A.2d at 1044. The State applied for leave to appeal. See id. at 245, 472 A.2d at 1044.

The Court of Special Appeals granted the application and vacated the trial court's order for a new trial. See id. at 248, 472 A.2d at 1046. The Court of Special Appeals determined that, as a matter of trial strategy, it was reasonable for the petitioner's trial counsel not to pursue the alibi, and instead exclusively focus on the victim's identification of the petitioner by his body. See id. at 247-48, 472 A.2d at 1046. The Court of Special Appeals pointed out that the person who had allegedly loaned a vehicle to the petitioner essentially denied doing so, and that the petitioner's "scanty knowledge of his 'girlfriend' must have raised a doubt as to whether she existed." Id. at 247, 472 A.2d at 1045-46. The Court of Special Appeals explained that it was "possible that[,] rather than helping the defense, the very questionable alibi [] may have actually weakened the [petitioner]'s case." Id. at 248, 472 A.2d at 1046. The Court of Special Appeals noted that, by exclusively focusing on the victim's identification of the petitioner by his body, the petitioner's trial counsel "may have succeeded in diverting the jury from thinking about how weak the alibi [] was." Id. at 247-48, 472 A.2d at 1046.

In Schmitt v. State, 140 Md. App. 1, 37, 779 A.2d 1004, 1024, cert. denied, 367 Md. 88, 785 A.2d 1291 (2001), the Court of Special Appeals held that a petitioner's trial counsel did not provide ineffective assistance of counsel by not requesting an alibi jury instruction. In that case, the State's evidence showed that, between 1:45 a.m. and 2 a.m., the victim was fatally shot across the street from a motel. See id. at 32, 779 A.2d at 1022. A purported alibi witness testified that, between 1:30 a.m. and 2 a.m., he and the petitioner checked into the motel; the witness went into their motel room's bathroom and closed the door; while he was in the bathroom, he heard gunshots; and, when he came out of the bathroom, the petitioner was in their motel room. See id. at 32-33, 779 A.2d at 1022. The witness, however, did not specify how much time had passed between him hearing the gunshots and him coming out of the bathroom. See id. at 33, 779 A.2d at 1022.

After being convicted and pursuing an unsuccessful direct appeal, the petitioner petitioned for postconviction relief. See id. at 6-7, 779 A.2d at 1006. A trial court granted the petitioner's request for a belated appeal as to certain issues but denied his request for a new trial on the ground of ineffective assistance of counsel. See id. at 6, 779 A.2d at 1006-07. The petitioner noted the belated appeal, and separately appealed from the trial court's denial of his request for a new trial. See id. at 6-7, 779 A.2d at 1007.

In both appeals, the Court of Special Appeals affirmed. See id. at 6, 48, 779 A.2d at 1007, 1031. In the appeal that pertained to ineffective assistance of counsel, writing for the Court of Special Appeals, the Honorable Charles E. Moylan, Jr. addressed the performance prong as follows: "Was an alibi defense generated in this case? It is a close call, but technically it may have been. It was not, however, so unmistakably identifiable

as an alibi defense from way down the glen as to brand the failure to recognize it as a mark of lawyerly incompetence." Id. at 33, 779 A.2d at 1022. Judge Moylan pointed out that the petitioner's trial counsel testified that he did not request an alibi jury instruction because it would have simply directed the jury "to consider and apply the evidence along with any other evidence in the case. To me that tells the jurors absolutely nothing." Id. at 34, 779 A.2d at 1023 (internal quotation marks omitted). Judge Moylan emphasized the need to defer to the petitioner's trial counsel's strategic choice, explaining:

> The entitlement to an instruction if you want one does not imply that you are derelict for not wanting one. By analogy, a defendant is constitutionally entitled to an instruction that his failure to take the stand will not be held against him. It is perfectly sound trial strategy, however, to wish to forego such an instruction so as not to draw the jury's attention to the inevitably suspicious failure to take the stand. In this case, counsel may not have wanted to raise any specter possibly suggested by the word "alibi."
>
> Alternatively, he may not have wanted to clutter the minds of the jurors with a lot of legal gobbledygook that he deemed meaningless. Some attorneys, of course, like the scattershot approach: spray the jury with every bit of verbal grapeshot you have in your arsenal. Other equally good attorneys prefer to keep the attack simple and to hammer at one or two of the enemy's perceived weak points. It is quintessentially a matter of strategic choice. It is George B. McClellan versus Ulysses S. Grant and who will presume to post-mortem the battle?
>
> Counsel had available to him *Pulley v. State* and *Smith v. State* but he chose not to use them. They are, of course, opinions worthy of precedential respect. In terms of what they accomplish in a courtroom, however, they are not necessarily five-star decisions that inspire trial advocates to snap to attention and salute. Counsel did not think they would help him. Who are judges to second-guess such an on-the-spot assessment by a combatant on the field?

Schmitt, 140 Md. App. at 34-35, 779 A.2d at 1023 (cleaned up). Judge Moylan addressed the prejudice prong as follows: "Having found no deficiency in the performance component, it follows that there can be no prejudice flowing from a deficient performance."

Id. at 37, 779 A.2d at 1024.

Analysis

Here, we conclude that Mann has failed to satisfy the burden to prove that there is a reasonable probability, or a substantial or significant possibility, that the jury would have acquitted him if his trial counsel had requested, and the circuit court had given, an alibi jury instruction. The circumstance that Mann's trial counsel did not request an alibi jury instruction did not prejudice Mann because none of the four purported alibi witnesses' testimony led to the conclusion that Mann could not have been at the murder scene when Whetstone shot Prince. Additionally, the trial court twice instructed the jury that the burden of proving the defendant guilty beyond a reasonable doubt remains on the State throughout the trial, thereby undermining Mann's claim of prejudice with respect to trial counsel's failure to request an alibi jury instruction.[9]

The question of whether prejudice resulted from Mann's trial counsel's failure to request an alibi instruction involves a fact-specific analysis. In this case, Mann premised his alibi on the testimony of four witnesses— Johnson, Jenkins, Peay, and Ms. Harper— who purported to account for his whereabouts from 7:30 p.m. or 7:45 p.m. through the

[9]As the Supreme Court explained in Strickland, 466 U.S. at 697, "a court need not determine whether counsel's performance was deficient before examining the prejudice [that was] suffered by the [petitioner] as a result of the alleged deficiencies." Consistently, in each of multiple cases, this Court concluded that a petitioner had failed to prove prejudice, and thus did not address the performance prong. See Newton, 455 Md. at 366, 168 A.3d at 15; Gross v. State, 371 Md. 334, 355, 809 A.2d 627, 639 (2002); Yoswick v. State, 347 Md. 228, 246, 700 A.2d 251, 259 (1997). We do the same here because the State did not include a question presented as to the performance prong in the petition for a writ of *certiorari*, and because, in its brief, the State indicates that it "does not challenge the [performance] prong before" us.

night of April 22, 2003. Even if the purported alibi witnesses' testimony was deemed to be credible and the circuit court had given an alibi jury instruction, that would have done nothing to rebut the circumstance that Mann's whereabouts from approximately 6:45 p.m. or 7 p.m. on the evening of April 22—the time that he left McDonald's with Whetstone and Prince—to 7:30 p.m. or 7:45 p.m.—the time that he allegedly arrived at Johnson's house—was unaccounted for. Similarly, Mann's whereabouts from 8:45 p.m.—the time that Johnson left Mann at Mann's mother's house—to 9:30 p.m.—the time that Jenkins picked him up from his mother's house—was unknown. In other words, even if the circuit court had given an alibi jury instruction and the jury had believed the purported alibi witnesses, the jury could still have believed that Mann had the opportunity to participate in the kidnapping and killing of Prince, and found Mann guilty.

In evaluating whether Mann was prejudiced by the omission of the alibi instruction, we must consider the totality of the evidence before the jury. See Strickland, 466 U.S. at 695. The giving of an alibi jury instruction would not have contradicted the evidence that Mann had a heated exchange with Prince at the McDonald's restaurant about Prince having been a "snitch" and left the premises before 7 p.m.[10] together with Prince and Whetstone, the person who was responsible for shooting Prince, and was not seen again until 7:30 p.m. or 7:45 p.m. that evening, or that Mann's whereabouts between 8:45 p.m. and 9:30 p.m.

[10]Davis, Prince's mother, testified that, at approximately 6:45 p.m., he telephoned her and said that he had encountered Mann, and that someone had stolen her Corolla, which Prince had borrowed. Davis testified that she telephoned 911 and reported the Corolla's theft. Officer Gardner testified that, at 7:03 p.m., he heard about the report of the Corolla's theft.

were unknown. Nor would an alibi jury instruction have undercut Mr. Harper's written statement that Mann told him he was present when Whetstone shot Prince. Nor would an alibi jury instruction have changed the medical examiner's testimony that the time of death was during the evening of April 22, 2003, and that that was only an approximation as to the time of death because there were too many factors to identify the exact hour. In sum, the purported alibi witnesses' testimony did little to harm the State's case and the failure to give an alibi jury instruction was not prejudicial.

Notably, the evidence includes inconsistent accounts of what Mann did immediately after Fleet stole the Corolla. Detective D'Angelo testified that Mann said that he told Prince that he would get the Corolla back for him, and that he and Whetstone went to Mann's father's house, and then returned to the McDonald's. But, Detective D'Angelo also testified that, in his written statement, Mann wrote that he told Prince that all he knew was that "Kane" was the name of the person who had gotten into the Corolla and driven away, and that Mann and Whetstone went to Mann's father's house, and then to Johnson's house.[11] And, Mr. Harper wrote that Mann said that Whetstone told Prince that he would take Prince to the Corolla. According to Mr. Harper, Mann said that he, Whetstone, and Prince got into the Caprice, which Whetstone drove away; and, at some later point,

[11]It is worth observing that no evidence corroborated the two inconsistent statements that Mann provided to Detective D'Angelo, given that neither Mann, his father, nor Whetstone testified. And, unlike the defendant in Smith, 302 Md. at 177, 486 A.2d at 196, who testified that he was in another state when the crime occurred, Mann gave no testimony at all at trial, and his handwritten statement and Detective D'Angelo's testimony concerning his statements were not offered for the purpose of establishing an alibi for Mann, but rather were offered by the State to demonstrate that Mann had been untruthful.

Whetstone shot Prince.

But most importantly, none of the purported alibi witnesses, including Johnson, provided an alibi—*i.e.*, none of them showed "the physical impossibility of [Mann]'s guilt by placing [him] in a location other than the [murder] scene [] at the relevant time." *Alibi*, Black's Law Dictionary. Simply put, the jury could have found all of the purported alibi witnesses credible, and still found Mann guilty. Given this circumstance, the absence of an alibi jury instruction did not prejudice Mann.

This case is on all fours with Syed, 463 Md. at 104-05, 92, 204 A.3d at 165, 157, in which this Court held that a petitioner was not prejudiced by his trial counsel not investigating an alibi witness; this Court explained that the alibi witness's testimony could not have led to an acquittal because it would not have negated the petitioner's guilt, given that the alibi witness did not account for the petitioner's whereabouts for the entire time frame in which he had the opportunity to murder the victim. Similarly, here, none of the purported alibi witnesses accounted for Mann's whereabouts immediately after Fleet stole the Corolla, but before Mann allegedly arrived at Johnson's house in the evening; and, in the interim, Mann had the opportunity to go with Whetstone and Prince, and be present when Whetstone shot Prince. And, none of the purported alibi witnesses accounted for Mann's whereabouts between 8:45 p.m. and 9:30 pm. on the evening of the murder. Just as there was no prejudice in Syed, there was no prejudice here.

Our conclusion is also supported by Matthews, 58 Md. App. at 248, 472 A.2d at 1046, and Schmitt, 140 Md. App. at 37, 779 A.2d at 1024, in each of which the Court of Special Appeals held that a petitioner's trial counsel did not render ineffective assistance

of counsel by not requesting an alibi jury instruction. In each case, there was purported evidence of an alibi, and, accordingly, the petitioner was arguably entitled to an alibi jury instruction on request. See Matthews, 58 Md. App. at 246-47, 472 A.2d at 1045; Schmitt, 140 Md. App. at 33, 779 A.2d at 1022. But, as Judge Moylan aptly explained, "[t]he entitlement to an instruction if you want one does not imply that you are derelict for not wanting one." Schmitt, 140 Md. App. at 34, 779 A.2d at 1023. In each case, the Court of Special Appeals determined that an alibi jury instruction had the potential to be ineffectual, or even prejudicial. See Matthews, 58 Md. App. at 247-48, 472 A.2d at 1046; Schmitt, 140 Md. App. at 35, 779 A.2d at 1023. Similarly, here, an alibi jury instruction would have been of little effect, given that none of the four purported alibi witnesses' testimony precluded guilt.

We are aware that during closing arguments Mann's trial counsel proceeded on the assumption that Whetstone would not have taken the beltway to reach the area behind Fantasies and thus there was not enough time for Mann to be present at the murder and return to Johnson's house by 7:30 p.m. or 7:45 p.m. Detective Laslett testified that Mr. Harper told him that the Caprice's hood was defective, and would pop up when it reached highway speed. During closing argument, Mann's trial counsel pointed out that Mr. Harper had told the detective that the Caprice could not go on the highway. Mann's trial counsel argued that, if one does not drive on the beltway, the trip from the McDonald's to Fantasies takes approximately an hour to an hour-and-a-half, and contended that Mann would not have had time to go with Whetstone and Prince to the area behind Fantasies, and then arrive at Johnson's house by approximately 7:30 p.m. or 7:45 p.m. In any event, the jury was not

bound to proceed on the assumption that Whetstone would not have taken the beltway to reach the area behind Fantasies. Indeed, the only evidence that Whetstone would not have taken the beltway was Detective Laslett's testimony that Mr. Harper told him that the Caprice's hood would pop up when it reached highway speed. Mr. Harper's statement did not establish that it was impossible for Whetstone to take the Caprice onto the beltway or that Whetstone did not take the Caprice on the beltway.

Tellingly, the record demonstrates that Mann's trial counsel pursued defenses other than an alibi defense at trial. During Mann's closing argument, among other things, his trial counsel pointed out that there was no forensic evidence, such as DNA, that linked Mann to Prince's murder. Mann's trial counsel also raised the possibility that Prince had been murdered in a robbery gone wrong, given that, when his body was found, he had no cash on him, he did not have the paycheck that he had told his mother that he was going to get that day, and he was not wearing anything from the waist up. Alternatively, Mann's trial counsel suggested that Mr. Harper had murdered Prince, given that Mr. Harper knew "Curtis Bay like the back of his hand," that officers arrested Mr. Harper after encountering him while he was driving the Caprice, and that one of Mr. Harper's statements to the officers was "suspicious." Finally, in addition to Mr. Harper, Mann's trial counsel indicated that other individuals could have murdered Prince, stating:

> How about . . . the names that are affiliated with [Sharp]'s group, as the prosecutor said? . . . How about [Sharp's brother] wanting to kill [] Prince because [] Prince supplied the gun that was used to kill [Sharp]? Or Chase Williams who was going to have his head busted open by [] Prince and [] Bazemore and others? Or Kurt Hamlet or Tavon Labertto? How about these people wanting to get [] Prince? Madam Prosecutor, just as plausible a motive as the one you suggest to this jury.

That Mann's trial counsel pursued additional defenses undermines the impact of his not requesting an alibi jury instruction.

Finally, the circumstance that the circuit court instructed the jury on the burden of proof twice—once preliminarily at the start of the trial, and once at the conclusion of the trial—undermines Mann's claim of having satisfied his burden to prove prejudice under Strickland. To be sure, jury instructions regarding the burden of proof and similar matters "are not deemed to 'fairly cover' the matter of alibi." Smith, 302 Md. at 180, 486 A.2d at 198 (quoting Pulley, 38 Md. App. at 690-91, 382 A.2d at 626). That said, in a direct appeal, a trial court's alleged error is reversible unless the State proves that it is harmless beyond a reasonable doubt; by contrast, in a postconviction proceeding involving a claim of ineffective assistance of trial counsel, the petitioner has the burden of proving that there is a reasonable probability, or a substantial or significant possibility, that the petitioner's trial counsel's alleged error would have resulted in an acquittal. Even were we to determine that an error occurred that would have required automatic reversal on direct appeal, that does not release Mann from the requirement to prove prejudice when raising an ineffective assistance of counsel claim. See Weaver v. Massachusetts, 137 S. Ct. 1899, 1912 (2017); Newton, 455 Md. at 356-57, 168 A.3d at 9-10. Here, the jury instructions regarding the State's burden of proof militate in favor of a determination that there was no reasonable probability, or substantial or significant possibility, that the omission of an alibi jury instruction, containing essentially the same information, affected the outcome of the trial.

For all of the above reasons, Mann has failed to satisfy the burden to prove that there

is a reasonable probability, or a substantial or significant possibility, that the jury would have acquitted him if his trial counsel had requested an alibi jury instruction. Mann's trial counsel did not render ineffective assistance of counsel by not requesting an alibi jury instruction.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AND REMAND WITH INSTRUCTION TO DENY THE SUPPLEMENTAL PETITION FOR POSTCONVICTION RELIEF. RESPONDENT TO PAY COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS.

Circuit Court for Baltimore City
Case Nos. 104002009 to 104002014
Argued: October 31, 2019

IN THE COURT OF APPEALS

OF MARYLAND

No. 29

September Term, 2019

STATE OF MARYLAND

v.

CHRISTOPHER MANN

Barbera, C.J.,
McDonald,
Watts,
Hotten,
Booth,
Harrell, Glenn T., Jr. (Senior Judge, Specially Assigned),
Greene, Clayton, Jr. (Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Hotten, J., which Barbera, C.J., joins

Filed: December 19, 2019

Respectfully, I dissent. The failure to request an alibi instruction, in light of the testimony from four possible alibi witnesses, constituted deficient performance under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), in the absence or acknowledgement on the record that the failure was rooted in trial strategy. I am persuaded that the deficiency was prejudicial against Mr. Mann and his defense. Additionally, I am persuaded that a general jury instruction regarding the burden of proof in a criminal case is insufficient to ensure the jury does not improperly place the burden on the defense to prove its alibi when an alibi defense is presented.

Trial Counsel's Failure to Request an Alibi Instruction was Deficient and Prejudicial

In *Strickland*, the United States Supreme Court outlined a two-prong test for determining whether a criminal defendant received ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution. 466 U.S. at 687, 104 S.Ct. at 2064. The defendant must initially demonstrate that trial counsel's performance was deficient. *Id.* If established, the defendant must then demonstrate that the deficiency resulted in prejudice to the defendant. *Id.* Under the prejudice prong of *Strickland*, a reviewing court must ascertain whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome." *Id.* This Court has further interpreted the "reasonable probability" standard to mean that there existed "a substantial or significant possibility that the verdict of the trier of fact would have been affected." *Bowers v. State*, 320 Md. 416, 426, 578 A.2d 734, 739 (1990). While the *Strickland* standard for proving

prejudice is high, and decidedly deferential to trial counsel's performance, it clearly requires the showing of merely "a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068.

I agree with the majority that we do not have to dissect the deficiency prong in the instant case. However, I am not persuaded that Mr. Mann was not prejudiced by trial counsel's failure to request an alibi jury instruction. I agree with the Court of Special Appeals that "the record here is devoid of any strategic reason for not requesting an alibi instruction." *State v. Mann*, 240 Md. App. 592, 601, 207 A.3d 653, 658 (2019). In reaching the conclusion that there was a Sixth Amendment violation, the Court of Special Appeals stated

> there exists a strong concern that a jury will assume that a criminal defendant bears some burden of proof by introducing alibi evidence, even if the word "alibi" is never uttered in the courtroom. . . . By providing an alibi [jury] instruction, [a] trial court sufficiently relieves these concerns. Here, where an alibi [jury] instruction was not given because trial counsel [did not] request it, there is a 'substantial or significant possibility that the verdict . . . [was] affected.'"

Id. at 605–06, 207 A.3d at 661 (internal citations omitted). At trial, the State was unable to pinpoint the time of Mr. Prince's death. The defense presented four alibi witnesses that were able to account for some of Mr. Mann's whereabouts on the evening in question. Guided by an alibi instruction, and weighing the credibility of the witnesses and the evidence presented, a jury could have determined that Mr. Prince was killed during the times accounted for by the alibi witnesses. Because the jury did not receive the alibi instruction and at least one juror could have incorrectly shifted the burden to the defense

to prove said alibi, there exists a reasonable probability that the verdict would have been affected. As such, Mr. Mann was prejudiced by his trial counsel's failure to request an alibi jury instruction.

An Alibi Jury Instruction is not Fairly Covered by a Court's General Jury Instructions

Regarding the assertion that providing the reasonable doubt instruction covers the matter of alibi, I disagree. You should not conflate an alibi instruction with an independent instruction addressing the burden of proof such as the reasonable doubt instruction.

> [W]hen the evidence in a criminal case generates the issue of alibi, and when the defendant requests an instruction specifically addressed to the matter of alibi, the defendant is entitled to a specific alibi instruction, and that the trial court's general instructions concerning the prosecution's burden of proof, etc., are not deemed to "fairly cover" the matter of alibi.

Smith v. State, 302 Md. 175, 180, 486 A.2d 196, 198 (1985); *see also Pulley v. State*, 38 Md. App. 682, 382 A.2d 621 (1978). Although the defense offers an alibi to "prove that it was impossible or highly improbable that the defendant was at the scene of the crime when it was alleged to have occurred[,]" the State still bears the burden of proof beyond a reasonable doubt that the defendant was actually at the scene of the crime when it occurred and that the defendant committed the crime. *State v. Syed*, 463 Md. 60, 77, 204 A.3d 139, 148 (2019). In other words, the State must disprove the defense's assertion of an alibi beyond a reasonable doubt.

Ultimately, the purpose of an alibi jury instruction is to avoid confusing the jury and prevent the jury from shifting the burden of persuasion in a criminal case. Regardless of whether the jury received information from other general instructions, the jury must

consider a separate alibi instruction if the circumstances warrant the instruction. Receiving this instruction clarifies the burden of proof when the defense presents alibi evidence. In this case, the absence of an alibi instruction prejudiced Mr. Mann because there is a reasonable probability that the jurors incorrectly placed the burden of persuasion on the defense rather than the State, which could have affected the verdict.

CONCLUSION

For these reasons, I dissent and would affirm the judgment of the Court of Special Appeals.

Chief Judge Barbera has authorized me to state that she joins in this opinion.

State of Maryland v. Christopher Mann, No. 80, September Term 2018. Opinion by Beachley, J.

INEFFECTIVE ASSISTANCE OF COUNSEL—FAILURE TO REQUEST ALIBI JURY INSTRUCTION

Defendant produced alibi evidence through himself and four witnesses to show that he could not have kidnapped and murdered the victim in this case. Nevertheless, at defendant's trial, the trial court did not provide the jury with an alibi jury instruction, and defendant's trial counsel unintentionally failed to request the instruction.

Following his convictions for murder and kidnapping, defendant filed a petition for post-conviction relief. Defendant sought a new trial on the basis that his trial counsel rendered ineffective assistance by failing to request the instruction. The post-conviction court granted defendant's petition and granted him a new trial. The State appealed.

Held: Judgment affirmed. Defense counsel's failure to request an alibi jury instruction constituted deficient performance where there was no strategic reason not to request such instruction. As to the prejudice prong in *Strickland v. Washington,* 466 U.S. 668 (1984), Maryland courts currently view the significance of the alibi instruction with a heightened sensitivity. Specifically, courts must address the concern that the jury will erroneously place a burden of proof upon the defendant when he or she provides alibi evidence. This concern can be alleviated by the trial court providing the instruction.

Circuit Court for Baltimore City
Case No. 000104002009

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 80

September Term, 2018

STATE OF MARYLAND

v.

CHRISTOPHER MANN

Meredith,
Friedman,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: May 1, 2019

This case concerns post-conviction proceedings following appellee Christopher Mann's convictions in the Circuit Court for Baltimore City. There, following a five-day jury trial which concluded on August 12, 2004, the jury convicted Mann of felony murder, kidnapping, and conspiracy to commit kidnapping. A panel of this Court affirmed Mann's convictions on direct appeal. *Mann v. State*, No. 1895, Sept. Term 2004 (filed Jan. 12, 2007). Mann subsequently filed a petition for post-conviction relief. In an order dated February 13, 2018, the post-conviction court granted Mann's motion and ordered a new trial on the basis that Mann's trial counsel rendered ineffective assistance by failing to request an alibi jury instruction. The State successfully applied for leave to appeal, and presents the following issue for our review:

> Did the [post-conviction] court err when it found that defense counsel had been constitutionally ineffective for failing to request a superfluous jury instruction?

We perceive no error and affirm.

BACKGROUND

Because the underlying facts of this case were fully developed in Mann's direct appeal and are not in dispute, we provide only a brief recitation for background. On April 22, 2004, between 7:00 p.m. and midnight, Ricky Prince was murdered. The State's theory of the case was that Mann and an accomplice kidnapped and murdered Prince in retaliation for Prince's cooperation with police and prosecutors in two other criminal prosecutions. At trial, Mann called four "alibi" witnesses who testified to his whereabouts on April 22, 2004, in an effort to show that he was not present when Prince was kidnapped and murdered. Despite the fact that four alibi witnesses testified in Mann's defense, Mann's

trial counsel did not request an alibi jury instruction. As stated above, the jury convicted Mann of felony murder, kidnapping, and conspiracy to commit kidnapping. The court sentenced Mann to life imprisonment for felony murder, and twenty years consecutive for conspiracy to commit kidnapping.[1]

In his post-conviction petition, Mann alleged, among other things, that his trial counsel rendered ineffective assistance of counsel by failing to request an alibi jury instruction.[2] At the hearing on Mann's post-conviction petition, Mann's trial counsel conceded that there was no reason not to request the alibi instruction. Indeed, as the State concedes in its brief, "there is no dispute of material fact. [Mann's] counsel simply overlooked requesting the 'alibi' jury instruction, notwithstanding his presentation of an alibi defense." As noted, the post-conviction court found that trial counsel rendered ineffective assistance by failing to request an alibi instruction and ordered a new trial.

STANDARD OF REVIEW

"The review of a postconviction court's findings regarding ineffective assistance of counsel is a mixed question of law and fact." *Newton v. State*, 455 Md. 341, 351 (2017)

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[1] Mann's kidnapping conviction merged into his felony murder conviction for sentencing purposes.

[2] Additionally, Mann alleged ineffective assistance of counsel because: trial counsel failed to object to "other crimes" evidence, trial counsel did not move for a mistrial, trial counsel did not move for modification of sentence, trial counsel did not file an application for review by a three-judge panel, and that the cumulative effect of these errors cast doubt upon the reliability of the verdict.

The post-conviction court rejected all of these allegations of error, but declined to address the "cumulative effect" argument because it was granting relief on the basis of the failure to request an alibi jury instruction.

(citing *Harris v. State*, 303 Md. 685, 698 (1985)). Because appellate courts do not make findings of fact, "we defer to the factual findings of the postconviction court unless clearly erroneous." *Id.* "But we review the [post-conviction] court's legal conclusion regarding whether the defendant's Sixth Amendment rights were violated without deference." *Id.* at 351-52.

DISCUSSION

The Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee all criminal defendants the right to the effective assistance of counsel. *Duvall v. State*, 399 Md. 210, 220-21 (2007). In order for a criminal defendant to successfully vacate his conviction on this basis, he must satisfy a two-prong test established in the landmark Supreme Court case *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The two-part test is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires 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. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. As we shall explain, the post-conviction court correctly determined that Mann's counsel rendered deficient performance, and because this deficient performance prejudiced Mann's defense, the result of Mann's trial is unreliable.

I. DEFICIENT PERFORMANCE

At the outset, we note that Maryland Rule 4-325(c) states that "The court may, and

at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." Regarding when the court must instruct the jury as to the applicable law, the Court of Appeals has held that "[a] requested jury instruction is applicable if the evidence is sufficient to permit a jury to find its factual predicate." *Bazzle v. State*, 426 Md. 541, 550 (2012). As to the burden of establishing that predicate, "the threshold is low, as a defendant needs only to produce 'some evidence' that supports the requested instruction[.]" *Id.* at 551.

In assessing *Strickland's* deficiency prong, the Court of Appeals has stated that

> the proper standard for attorney performance is that of reasonably effective assistance. "Prevailing professional norms" define what constitutes reasonably effective assistance, and all of the circumstances surrounding counsel's performance must be considered. Because it is "tempting" for both a defendant and a court to second-guess a counsel's conduct after conviction, courts must be "highly deferential" when they scrutinize counsel's performance. Reviewing courts must thus assume, until proven otherwise, that counsel's conduct fell within a broad range of reasonable professional judgment, and that counsel's conduct derived not from error but from trial strategy.

Mosley v. State, 378 Md. 548, 557-58 (2003) (internal citations and quotation marks omitted). In other words, the deficiency prong depends upon whether counsel's conduct was reasonable, and, in that analysis, a reviewing court will not assume error in counsel's performance.

In *Schmitt v. State*, 140 Md. App. 1, 26 (2001), Judge Charles E. Moylan, Jr., wrote for this Court and considered whether trial counsel's strategic decision not to request an alibi instruction constituted deficient performance under *Strickland*. There, Schmitt was charged with first-degree murder (and other charges) for a shooting that occurred at a motel

between 1:45 and 2:00 a.m. *Id.* at 32. At trial, Schmitt's alibi witness testified that he and Schmitt arrived at the motel between 1:30 and 2:00 a.m., but that Schmitt "was inside the motel rather than outside when the fatal shots were fired." *Id.* Judge Moylan noted, however, that Schmitt's alibi witness "was in the bathroom of their motel room when he heard shots. [The alibi witness] testified that [Schmitt] was in the motel room when he, [the alibi witness], came out of the bathroom. He never said how long he was in the bathroom." *Id.* at 32-33.

Addressing whether Schmitt's trial counsel rendered deficient performance by choosing not to request an alibi instruction, Judge Moylan began by noting that "Maryland's trial courts were through the early 1970's regularly referring to the alibi as an 'affirmative defense' and squarely allocating to the defendant the burden of persuasion as to such a defense by a preponderance of the evidence." *Id.* at 28. In *Robinson v. State*, 20 Md. App. 450, 459 (1974), an opinion Judge Moylan also authored, this Court definitively corrected that misconception, stating that "an alibi is not an affirmative defense, placing any burden upon a defendant beyond the self-evident one of attempting to erode the State's proof to a point where it no longer convinces the fact finder beyond a reasonable doubt."

Judge Moylan initially questioned whether the facts in *Schmitt* sufficiently constituted evidence of an alibi. Judge Moylan defined "alibi" to mean "[a] defense that places the defendant at the relevant time of crime in a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party." *Schmitt*, 140 Md. App. at 31 (quoting *Black's Law Dictionary* 71 (6th ed. 1990)). Because Schmitt's alibi witness placed him at the scene of the crime at the relevant time,

but simply inside rather than outside the motel room,[3] Judge Moylan pondered,

> Was an alibi defense generated in this case? It is a close call, but technically it may have been. It was not, however, so unmistakably identifiable as an alibi defense from way down the glen as to brand the failure to recognize it as a mark of lawyerly incompetence.

Schmitt, 140 Md. App. at 33. Although noting that it was a "close call," by proceeding to analyze *Strickland's* deficiency prong, Judge Moylan assumed that the evidence was sufficient to generate an alibi instruction.

Judge Moylan acknowledged the deference afforded to counsel's strategic trial decisions, noting that,

> The entitlement to an instruction if you want one does not imply that you are derelict for not wanting one. By analogy, a defendant is constitutionally entitled to an instruction that his failure to take the stand will not be held against him. It is perfectly sound trial strategy, however, to wish to forego such an instruction so as not to draw the jury's attention to the inevitably suspicious failure to take the stand[.]

Id. at 34 (citing *Lakeside v. Oregon*, 435 U.S. 333 (1978)).

Turning to Schmitt's case, Judge Moylan recognized that trial counsel intentionally chose not to request an alibi jury instruction because he believed that "[an] alibi instruction says you are to consider and apply the evidence along with any other evidence in the case. To me that tells the jurors absolutely nothing." *Id.* Judge Moylan acknowledged the reasonableness of this strategy, stating, "In this case, counsel may not have wanted to raise any specter possibly suggested by the word 'alibi.'" *Id.* at 35. Ultimately, Judge Moylan vindicated that strategic decision, holding that, "With respect to the disinclination (*not the*

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[3] As stated above, we noted that Schmitt's alibi witness could not definitely account for Schmitt's whereabouts when the shots were fired. *Schmitt*, 140 Md. App. at 32-33.

failure but the disinclination) of trial counsel to request a special alibi instruction, we see no deficiency in terms of his trial performance." *Id.* at 37 (emphasis added).

Schmitt is clearly distinguishable from the instant case. First, there is no question here that Mann generated an alibi defense. According to the State's case, Prince was in an altercation with Mann and others at a McDonald's at the corner of Liberty Road and Rolling Road shortly before 7:00 p.m. Following this altercation, Mann and a friend allegedly left the McDonald's with Prince and ultimately killed him. Mann's own statements to police confirmed that he was present at the McDonald's and had an argument with Prince that evening. Mann told police, however, that after someone stole Prince's car, Mann went to his father's house and then to the home of his friend, Jeffrey Johnson, before ultimately spending the rest of the evening with his girlfriend, Tanea Jenkins.

At trial, Johnson and Jenkins testified consistently with Mann's statement to the police. Jenkins testified that at approximately 6:44 p.m. on the night of the murder, Mann visited her where she worked at Target. Jenkins testified that she gave him some money for food during this visit. She also testified that Mann called her at approximately 9:00 p.m. later that evening, asking her to pick him up at his mother's house, and that the two were together from approximately 9:30 p.m. on April 22, 2004, until 11:00 a.m. on April 23, 2004.

Regarding the gap in time when Mann was not with Jenkins, Johnson testified that Mann came to his house at approximately 7:30 to 7:45 p.m. and that they played a video game until approximately 8:30 p.m., when Johnson drove Mann to Mann's mother's house, dropping him off at approximately 8:45 p.m. The testimony of these alibi witnesses, in

conjunction with Mann's own testimony, generated sufficient evidence to warrant the alibi jury instruction.[4] *See id.* at 27 (recognizing that "the defendant's uncorroborated testimony that he was at some other place at the time of the crime is sufficient to generate the issue") (quoting *Smith v. State*, 302 Md. 175, 180 (1985)).

Turning to the strategy in not requesting the instruction, the State concedes that there was none: "[T]here is no dispute of material fact. Defense counsel simply overlooked requesting the 'alibi' jury instruction, notwithstanding his presentation of an alibi defense." In fact, Mann's trial counsel testified at the post-conviction hearing that "If it's an alibi defense, you ask for an alibi instruction." Although Judge Moylan found no deficiency in counsel's "disinclination" to request the alibi instruction in *Schmitt*, here there was simply a "failure." *Id.* at 37. Unlike *Schmitt*, the record here is devoid of any strategic reason for not requesting an alibi instruction. Accordingly, we hold that counsel's non-strategic failure to request the alibi jury instruction fell below the "broad range of reasonable professional judgment" standard recognized in *Strickland* and its progeny, and therefore constituted deficient performance. *Mosley*, 378 Md. at 558.

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[4] In addition to Johnson and Jenkins, two other alibi witnesses testified in Mann's defense. Nikita Peay, Jenkins's friend, corroborated Jenkins's testimony. Peay testified that Jenkins picked her up at 8:00 p.m. on April 22, 2004, and that she, Jenkins and Mann were together from 9:30 p.m. to 11:15 p.m. on April 22, 2004. The other alibi witness was Rhonda Harper, who also corroborated Jenkins's testimony. Harper testified that she is Mann's father's first cousin, that she lived at Mann's father's house, and that Mann and Jenkins arrived at Mann's father's house at approximately 11:45 p.m. on April 22, 2004. Additionally, Harper stated that she saw both Mann and Jenkins again at Mann's father's house at approximately 6:00 a.m. the following morning.

II. PREJUDICE

Having established that counsel's failure to request an alibi instruction constituted deficient performance, we next turn to whether that performance constituted prejudice. Regarding *Strickland*'s prejudice prong, the Supreme Court has provided that "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." *Strickland*, 466 U.S. at 694. The Court of Appeals has interpreted the language "reasonable probability" to mean "there was a substantial or significant possibility that the verdict of the trier of fact would have been affected." *Bowers v. State*, 320 Md. 416, 426 (1990).

Regarding the Rule governing instructions to the jury, the State correctly notes that Rule 4-325(c) provides that "The court need not grant a requested instruction if the matter is fairly covered by instructions actually given." Relying on this language, the State argues that the trial court fairly covered the alibi instruction by instructing the jury: 1) to consider all testimony from all of the witnesses—which would include Mann's witnesses, 2) to consider all of the evidence in the case, and 3) that the State bore the burden of proof. In our view, Maryland law does not support the State's contention.

In *Schmitt*, we expressly rejected the notion that the alibi instruction is fairly covered by other jury instructions describing the defendant's presumption of innocence and the State's burden of proof. 140 Md. App. at 30-31. There, we unequivocally stated, "We find no merit in the State's contention in the instant case that the requested alibi instruction was 'fairly covered' by the trial court's other instructions with respect to the presumption of

innocence and the burden of proving the [defendant] guilty beyond a reasonable doubt." *Id.* at 31 (quoting *Pulley v. State*, 38 Md. App. 682, 690 (1978), *aff'd on other grounds*, 287 Md. 406 (1980)). In fact, in *Smith*, 302 Md. at 180, the Court of Appeals expressly addressed this issue stating, "when the defendant requests an instruction specifically addressed to the matter of alibi, the defendant is entitled to a specific alibi instruction, and . . . the trial court's general instructions concerning the prosecution's burden of proof, etc., are not deemed to 'fairly cover' the matter of alibi."

These cases show that Maryland courts approach the alibi instruction with a heightened sensitivity. In *Schmitt*, Judge Moylan addressed the historical concerns related to "alibi" instructions:

> Since instructions today unequivocally place the burden of proving criminal agency (including presence at the scene when pertinent) on the State beyond a reasonable doubt, the value of an arguably redundant alibi instruction (restating the same thing in reverse terms) would seem to be, at most, one of emphasis. When the State proves beyond a reasonable doubt that the crime was committed and that the defendant committed it, it proves beyond a reasonable doubt that the defendant was present, which, *ipso facto*, proves beyond a reasonable doubt that the defendant was not elsewhere.
>
> *Because of the staying power, however, of the notion of an alibi in the public mind, even if that emotionally charged word were never uttered in the courtroom, Pulley v. State, 38 Md. App. 682, 686-91, 382 A.2d 621 (1978), concluded that it was better to err on the side of redundancy. That the word "alibi" possesses such a staying power in the public mind is clear.* The Maryland Pattern Jury Instruction on alibi, for instance, MPJI Cr 5:00, never mentions the word "alibi." The Comment to the instruction makes the reason clear:
>
> > The instruction does not contain the word "alibi" because it may incorrectly suggest that alibi is an affirmative defense.

Schmitt, 140 Md. App. at 30 (emphasis added).

We note that *Pulley* involved a trial court's refusal to provide a requested alibi instruction that did not even contain the word "alibi." 38 Md. App. at 686-87. The requested instruction simply provided, in relevant part:

> Evidence has been introduced in this case by the Defendant, [Pulley], tending to establish that at the time of the alleged offense he was elsewhere, specifically, at the home of his cousin [. . . .] In this regard . . . the burden of proving the Defendant guilty is upon the prosecution. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Id. In rejecting the request to give the instruction, the trial court stated that the instruction "is no longer a facet that requires special reference. It is one factor concerning presence at the scene of a crime, which the State either proves or doesn't prove[.]" *Id.*

On appeal, we reviewed other jurisdictions, including federal courts, and expressly disagreed with the trial court. Instead, we noted,

> The federal courts have been sensitive of the rationale for requiring an instruction on alibi. The due process clause of the Fourteenth Amendment protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. Since alibi is generally held not to be an affirmative defense, an alibi instruction removes the possibility that the jury will place the burden of proof upon the defendant with respect to the alibi.

Id. at 689 (citations omitted). The *Pulley* Court stressed the importance of giving an alibi instruction, citing *Wright v. Smith*, 434 F. Supp. 339, 344 (W.D.N.Y. 1977)[5] for the proposition:

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[5] We note that the United States Court of Appeals for the Second Circuit reversed *Wright v. Smith*, 434 F. Supp. 339 (1977) in *Wright v. Smith*, 569 F.2d 1188 (2nd Cir. 1978). Nevertheless, our opinion in *Pulley*, 38 Md. App. at 690, which cites to the reversed *Wright* case, currently remains good law in Maryland.

> When a defendant raises an alibi defense, he is entitled to jury instructions that specify that the Government must bear the burden of persuasion on this element of the offense as well. *The jury must be informed that, once a defendant has offered proof that he was not present at the time and place that the crime was committed, then the Government must convince the jury beyond a reasonable doubt that the defendant's alibi is not true, and that the defendant was in fact present at the scene when the crime was committed. If such specific instructions are not given when a defendant offers alibi evidence at trial, there is a likelihood that the jury will become confused about the burden of persuasion . . . .*

Id. at 690 (emphasis added) (internal citations and quotation marks omitted).

From this language we extract two important concepts. First, there exists a strong concern that a jury will assume that a criminal defendant bears some burden of proof by introducing alibi evidence, even if the word "alibi" is never uttered in the courtroom. *Schmitt*, 140 Md. App. at 30.[6] Second, if a defendant introduces alibi evidence, the State must overcome that evidence and prove beyond a reasonable doubt that the defendant committed the charged crime. *Pulley*, 38 Md. App. at 690. By providing an alibi instruction, the trial court sufficiently relieves these concerns. Here, where an alibi instruction was not given because trial counsel failed to request it, there is "a substantial or significant possibility that the verdict of the trier of fact [was] affected." *Bowers*, 320 Md. at 426. Here, Mann was prejudiced because he did not receive the benefit of the alibi instruction as a result of his counsel's failure to request it.

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[6] When Judge Moylan penned *Schmitt* in 2001, he recognized "the staying power . . . of the notion of an alibi in the public mind, even if that emotionally charged word were never uttered in the courtroom." 140 Md. App. at 30. He pondered, however, how long that "staying power" would last: "Once the reason for a rule disappears, the rule itself will linger for a decade or two (or three or four) but ultimately disappear itself. This temporary aberration will not last forever." *Id.* at 31.

Given the heightened sensitivity expressed by Maryland courts concerning the importance of the alibi instruction, we hold that the failure (*not the disinclination but the failure*) of trial counsel to request the instruction in this case constituted ineffective assistance of counsel. We therefore affirm the post-conviction court's judgment.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

CHRISTOPHER MANN	*	IN THE
Petitioner,	*	CIRCUIT COURT
v.	*	FOR
STATE OF MARYLAND	*	BALTIMORE CITY
Respondent.	*	Case Nos.: 104002009-14
	*	PC No.: 11249

* * * * * * * * * * * * *

STATEMENT OF REASONS AND ORDER OF COURT

Pending before the Court is Petitioner Christopher Mann's Petition for Post Conviction Relief pursuant to the Uniform Postconviction Procedure Act, Maryland Annotated Code, Criminal Procedure Article, § 7-101, *et seq.*, and Maryland Rule 4-401, *et seq.*, filed originally on June 9, 2014. The State responded with a Motion to Dismiss the petition on June 12, 2014, denied by Judge Stephen Sfekas on June 20, 2014. The State opposed the petition on November 24, 2014. Judge Sfekas granted Petitioner leave to file a supplemented petition by November 25, 2014 and the post conviction hearing was originally scheduled for December 11, 2014. The hearing was rescheduled and Petitioner's supplemental Petition for Post Conviction Relief was filed, by counsel, on October 6, 2015, with the State's Response in Opposition filed on October 27, 2015. On August 3, 2016, Petitioner's Supplemental Petition for Post-Conviction Relief was filed pro se.

After a number of postponements, responsive to the parties' requests to reschedule, a hearing on the Petition, as supplemented, was held on September 27, 2017. Assistant State's Attorney Charles Fitzpatrick appeared at the hearing on behalf of the State. Petitioner Mann, was represented by William Welch.

Petitioner Mann alleges ineffective assistance of trial counsel in that:[1]

- Counsel failed to request the pertinent jury instruction for an alibi witness which was generated by the evidence.
- Counsel failed to object to "other crimes" evidence, that trial counsel did not challenge the introduction of witness intimidation evidence attributed to defendant.
- Counsel did not make a motion for mistrial and preserve the record for appeal.
- Counsel did not file a motion for modification of sentence.
- Counsel did not file an application for review of sentence by a three-judge panel.
- The cumulative effect of the numerous errors in this case question the reliability of the verdict.[2]

Supp. Pet. at 4, 9, 17, 18, & 20. Petitioner seeks a new trial, leave to file a belated motion for modification, application for review of sentence by a three-judge panel, and notice of appeal.

Upon consideration of the Petition, as supplemented, the State's response, the arguments of counsel, with trial counsel's testimony on September 27, 2017, and upon review of the record generated over the course of Mann's criminal trial and his appeal to the Court of Special Appeals, the Court will grant Petitioner a new trial because of trial counsel's ineffective assistance upon failing to request an alibi jury instruction.

FACTUAL AND PROCEDURAL HISTORY

Factual History

This case arises from the April 22, 2004 kidnapping and subsequent murder of Ricky Prince. On the early evening of April 22, 2004, Ricky Prince drove his mother Jackie Davis' Toyota Corolla to McDonald's to pick up his paycheck. When Prince pulled into the parking lot, he encountered Petitioner, whom he knew personally, and Tavon Whetstone, with whom he was unfamiliar. Petitioner and Whetstone approached Prince and confronted him about his participation in the murder prosecutions of Jerrard Bazemore, a friend of Petitioner and Whetsone, and Girard Fenwick, Petitioner's half-brother. The

[1] Allegations of error are derived from Petitioner's October 6, 2015 Supplemental Petition for Post Conviction Relief as determined at the hearing on September 27, 2017.
[2] The Court will not address this allegation of error because requested relief will be granted based on specific allegations of error discussed below.

verbal confrontation quickly took a belligerent turn, resulting in a physical altercation, with Petitioner and Whetstone punching and kicking Prince, and then driving off in his mother's car. After the assault, Prince notified his mother that Petitioner and Whetstone drove off in her vehicle and explained that the physical assault was a result of Petitioner and Whetstone discontent about his cooperation in the Bazemore prosecution. Prince's mother instructed him to come home and it is unclear whether or not Prince made efforts to do so, but somehow, Petitioner and Whetstone inveigled Prince into his mother's vehicle and proceeded to drive to Curtis Bay, in South Baltimore, where Petitioner and Whetstone escorted Prince to a ditch and shot him in the back of the head.

The State presented no eyewitnesses or DNA evidence linking Petitioner to the crime. The State's case was based on hearsay discussions between Derrick Harper and Petitioner, purportedly recounted to a police detective in the days after the murder. While testifying at trial about the interview with the police detective, Harper disavowed, had trouble remembering, or straightforwardly denied much of what was discussed in his interview with the police.

Petitioner's theory of the matter at trial was that his involvement ended after he participated in a confrontation with Prince on April 22, 2004 in the McDonald's parking lot. Subsequent to the altercation, Petitioner contends that he was occupied with his friend, Jeffrey Johnson, girlfriend Tanea Jenkins and her friend, Nikita Peay throughout the afternoon and evening of the murder and the next morning. Petitioner's entire defense rested on the argument that he had an alibi and witnesses to account for his whereabouts during the time of the kidnapping and murder, casting a reasonable doubt on his guilt.

Procedural History

Petitioner was convicted, after a jury trial, of felony murder, kidnapping, and conspiracy to kidnap in the April 22, 2004 death of Ricky Prince. Judge Paul Alpert sentenced Petitioner to life imprisonment for felony murder and consecutive twenty (20) years for conspiracy. Petitioner filed a motion for a new trial on August 23, 2004 and the motion was denied by Judge Alpert after a hearing on

September 22, 2004. Petitioner filed an appeal to the Court of Special Appeals, in which his sentence and convictions were upheld in an unreported opinion by Judge Deborah S. Eyler. *Christopher Mann v. State of Maryland*, COSA No. 01895, Sept. Term 2004 (January 12, 2007).

At the September 27, 2017 Post Conviction Hearing, the main thrust of Petitioner's argument for relief was that none of Dominic Iamele's (Petitioner's trial counsel) errors were a result of any discernable strategic action. Mr. Welch called Mr. Iamele to testify and gleaned from his testimony that he "didn't have strategic reasons for failing to do certain things;" however, he testified that he believed he gave a "competent defense." In respect to the first allegation of error, the alibi jury instruction, Mr. Iamele testified that he could not remember requesting an alibi jury instruction, though he did include a question regarding alibi during voir dire. Further, Mr. Iamele lauded the attention to detail and fairness Judge Alpert demonstrated and declared that Judge Alpert's jury instruction were a "fair and reasonable representation of the facts." Regarding the "other crimes" evidence, Mr. Iamele recalled that his lack of objecting was not strategic, but he "did what a reasonably attorney would have done" in the circumstances. Mr. Iamele was not questioned about failing to make a motion for mistrial. Concerning post-trial motions, Mr. Iamele testified that the motion for a new trial, alone, was a strategic decision; upon weighing the gravity of the conviction, he was not hopeful that Judge Alpert would modify the sentence, adding that Judge Alpert was clear that he considered the crime "heinous and serious." Mr. Iamele also testified that he made a strategic decision not to pursue sentence review by a three-judge panel because Petitioner was not given the maximum sentence for conspiracy and there was a significant chance that his sentence would be increased if the application was filed. At the post conviction hearing, Petitioner's argument was clear that Mr. Iamele had no reasonable and/or strategic reason to make the errors alleged and that Mr. Iamele would admit to those errors without attributing them to any sound trial strategy.

LEGAL STANDARD

In order to prevail on a petition for post conviction relief, a criminal defendant must prove that his sentence "was imposed in violation of the Constitution of the United States or the Constitution or the laws of the State" or that the sentence is "otherwise subject to collateral attack on a ground of alleged error that would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy." Md. Code Ann., Crim. Proc. § 7-102. The petitioner bears the burden of proof in all post conviction proceeding, e.g., *Shelton v. Warden*, 4 Md. App. 368, 370 (1968) ("[I]t is the responsibility of the petitioner and his counsel to submit evidence in support of the contentions . . . ."). Even if an allegation of error can be proven, the petitioner is entitled to relief only if "the alleged error has not been previously and finally litigated or waived." Md. Code Ann., Crim. Proc. § 7-102(b)(2). Although a defendant's failure to assert an allegation of error at a prior proceeding generally serves to waive that allegation on post conviction, Maryland courts have carved out an exception for ineffective assistance claims. *See* e.g, *Smith v. State*, 394 Md. 184, 200 (2006) ("a claim of ineffective assistance of counsel generally should be raised in a post-conviction proceeding."); *Johnson v. State*, 292 Md. 405, 434 (1982) ("because the trial record does not ordinarily illuminate the basis for the challenged acts or omissions of counsel . . . a claim of ineffective assistance is more appropriately made in a post conviction proceeding [than on direct appeal]."); *Curtis v. State*, 284 Md. 132, 150 (1978) ("It is settled that a criminal defendant cannot be precluded from having [an allegation of ineffective assistance] considered because of his mere failure to raise the issue previously."). Petitioner's failure to allege the ineffective assistance of trial counsel prior to filing the instant petition does not prevent the Court from weighing his allegations on their merits.

Specific to ineffective assistance of counsel claims, *Strickland v. Washington*, 466 U.S. 668 (1984) provides the apt standard. *Strickland* requires a convicted defendant to satisfy a two-pronged test. *Strickland*'s 'performance' prong requires the defendant to demonstrate that his attorney acted in a manner "outside the wide range of professionally competent assistance." *Id.* at 690. To do so, the

defendant "must identify the acts or omissions of counsel that are alleged not to have been the product of reasonable professional judgment," *id.*, then adduce evidence sufficient to overcome the "heavy" presumption that counsel acted in a professionally competent manner, *Harris v. State*, 303 Md. 685, 697 (1985); *Premo v. Moore*, 562 U.S. 115, 126 (2011) ("[S]ubstantial deference must be accorded to counsel's judgment."); *Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("[T]he standard for judging counsel's representation is a most deferential one."); *Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential."); *State v. Thomas*, 325 Md. 160, 171 (1992) (discussing *Strickland*); *Bowers v. State*, 320 Md. 416, 421 (1990) (same). For example, if a petitioner fails to call counsel as a witness at his post conviction hearing and does not offer an explanation why counsel was not called, the Court may presume that trial counsel's tactical decision were professionally reasonable under the circumstances. *See Stovall v. State*, 144 Md. App. 711, 724, *cert. denied*, 371 Md. 71 (2002) and *Thomas*, 325 Md. at 173 ("[A] court deciding an actual ineffectiveness claim 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." (internal quotation marks omitted)).

In addition to showing that counsel's performance was deficient, the Petitioner must also establish that the deficient performance prejudiced the petitioner. Errors made by counsel, even if they are deemed professionally unreasonable, do not warrant vacation of a sentence if the error had no effect on the ultimate judgment.

> It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding, or that the errors impaired the presentation for the defense. Nor is the standard that counsel's deficient conduct more likely than not altered the outcome in the case.

Harris v. State, 303 Md. 685, 700 (1985). Essentially, prejudice, in a post conviction petition, means that there is a "substantial possibility" that the ultimate outcome of the proceeding would have been different. *Yorke v. State*, 315 Md. 578, 588 (1989).

The court's presumption that counsel rendered adequate assistance overshadows the *Strickland* analysis in the trusting that counsel's decisions are an "exercise of reasonable professional judgment." *State v. Tichnell*, 306 Md. 428, 456, *cert. denied* 479 U.S. 995 (1986). The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Essentially, trial counsel's errors must be "outside the wide range of reasonably competent legal assistance." *Bowers v. State*, 320 Md. 416, 427 (1990).

DISCUSSION

Petitioner alleges that trial counsel was ineffective for failing to properly request an "alibi" jury instruction and object to its absence. During trial, Judge Alpert invited objections to his jury instructions and the pertinent part reads:

Court: Now Counsel, please approach the bench. Okay. Is there anything you want me to add or subtract?
Ms. Ayres: No.
Mr. Iamele: No exceptions.
Court: Thank you.
Trial transcript, page 124, lines 15-22 (August 11, 2004).

Preliminarily, Petitioner may be precluded from asserting a challenge to the sufficiency of jury instructions if not raised at trial. *Walker v. State*, 343 Md. 629, 644-45 (1996) ("the failure to object to or otherwise challenge a jury instruction constitutes a waiver of the issue for purposes of the Maryland Post Conviction Procedure Act."). *Walker* addressed whether a collateral challenge to the accuracy of jury instructions concerning the elements of an offense were waived when trial counsel failed to object to them at trial. There, the Court cited Maryland Rule 4-325(e), stating that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection;" this, along with a "multitude of cases in this Court, make it clear that the failure to object to a jury instruction ordinarily constitutes a waiver of any later claim that the instruction was erroneous."

Although a defendant's failure to assert an allegation of error at a prior proceeding generally serves to waive that allegation on postconviction, *see* Md. Code Ann., Crim. Proc. § 7–106(b), Maryland courts have carved out an exception for ineffective assistance claims, *see, e.g*, *Smith v. State*, 394 Md. 184, 200 (2006) ("[A] claim of ineffective assistance of counsel generally should be raised in a post-conviction proceeding."); *Johnson v. State*, 292 Md. 405, 434 (1982) ("[B]ecause the trial record does not ordinarily illuminate the basis for the challenged acts or omissions of counsel, . . . a claim of ineffective assistance is more appropriately made in a post conviction proceeding [than on direct appeal]."); *Curtis v. State*, 284 Md. 132, 150 (1978) ("It is settled that a criminal defendant cannot be precluded from having [an allegation of ineffective assistance] considered because of his mere failure to raise the issue previously."). Because this is a post conviction challenge for denial of effective assistance of counsel, which is a fundamental right for a criminal defendant, this issue cannot be waived, as there is no showing that the Petitioner waived it "knowingly and intelligently" *McElroy v. State*, 329 Md. 136 (1993) (holding that if an allegation was included in the trial record and the petitioner was informed of his right to seek appellate review on the issue, his failure to pursue the appellate review was an intelligent and knowing waiver). Therefore, this allegation of error for ineffective assistance of counsel is properly before the Court.

The thrust of Petitioner's defense during trial was that he was not present during the commission of the crime and four alibi witnesses (Jeffrey Johnson, Tanea Jenkins, Nikita Peay, and Rhonda Harper) called by the defense could corroborate that alibi. Petitioner's written statement of his whereabouts the day of the murder, as elicited during questioning by Officer D'Angelo also was read into evidence. Each defense witness testified consistently with Petitioner's alibi narrative, though some witness testimony was impeached by the State. The relevant witness testimony follows.

Written Statement to Officer D'Angelo

In the days following the murder, Petitioner was taken in for questioning and wrote the following statement, which was read into evidence at trial:

> In the morning time, I took my girl [Jenkins] to work at Target, 11:00 or 11:30. After, I went to Jeffrey Johnson and stayed at his house until about 1:45 to 2:00. I went to my mother around 4:30, 5:00, met up with [Whetstone], and while taking Marty to get some food and met back with [Whetstone] and Kane. They followed me to Target. This time was about 6:00 to 6:45. I dropped her car off and got six dollars from her and left with [Whetstone] and Kane, went to McDonald's on Liberty and Rolling Road, and it was about 7:00 then. I talked to [Prince] about [Bazemore] and we talked and a couple of people were out there. While talking to [Prince], Kane jumped in [Prince's] car ... and pulled off at that time. [Prince] stated that it was his mother's car and I told him that all I know was his name was Kane. After that, I left with [Whetstone] and went to my father['s house] for at least five to ten minutes, and [Whetstone] took me to [Johnson's] and [Johnson's] girlfriend took me to my mother's house. I then called [Jenkins] to come get me and I left with her and we took her friend home, and we went to my father's and went to bed and got up, went to [Jenkins] home and waited for her mother to leave, and we went in her house and sleep until it was time for her to go to work.

Jeffrey Johnson

On April 22, 2004, Jeffrey Johnson, a friend of Petitioner testified that Petitioner spoke to him at his home for 15 minutes the afternoon of the murder, between 12:00pm and 2:00pm and returned, later in the evening, to play videogames. After playing video games, Johnson took Petitioner to his mother's home around 8:30 in the evening.

Tanea Jenkins

Tanea Jenkins, Petitioner's girlfriend testified that at 6:45pm on April 22, 2004, Petitioner, Tavon Whetstone, and Kenneth Fleet came to see her at Target to return her car keys. Later in the evening, around 9pm, Jenkins testified that she picked Petitioner up at his mother's house and drove around town with him and a friend, Nikita Peay, for the next two hours before dropping Peay at home and returning to Petitioner's father's home and sleeping for the rest of the evening.

Nikita Peay

Nikita Peay, Jenkins' friend testified consistently with Jenkins, stating that that Jenkins picked her up from her godmother's house around 8pm on April 22, 2004, picked up Petitioner around 9:30pm, and was dropped off at her home at 11pm.

Rhonda Harper

Rhonda Harper, Petitioner's cousin testified that on the day of the murder, she arrived at Petitioner's father's home in the late evening to find Petitioner and Jenkins sitting outside, waiting for anyone to arrive home so they could be let into the house. Harper testified that both Petitioner and Jenkins remained in the home for the rest of the evening and through the next morning.

Jury Instructions

Petitioner argues that trial counsel was ineffective for failing to request the Criminal Pattern Jury Instruction 5:00, for Alibi, which reads as follows:

> You have heard evidence that the defendant was not present when the crime was committed. You should consider this evidence along with other evidence in this case. In order to convict the defendant, the State must prove, beyond a reasonable doubt, that the crime was committed and the defendant committed it.

Petitioner argues that if trial counsel had requested the alibi jury instruction, there is a reasonable probability that the outcome of the case would have been different. The State argues that the failure to request the jury instruction was not so fatal or "so deficient as to undermine the adversarial process." *Schmitt v. State*, 140 Md.App.1 (2001).

There is no bright line rule outlining specific circumstances in which counsel's performance will or will not be deemed ineffective; each determination is a heavily fact intensive inquiry. The measure of such ineffectiveness and its probable effects on the reliability of the result of trial is the *Strickland* standard, that but for counsel's unprofessional error in failing to request the pertinent jury instruction, the result of the proceeding would have been different. *Id.*

On direct appeal, *Robertson v. State*, 112 Md. App. 366 (1996) addressed whether testimony regarding the defendant's alibi that was offered by the prosecution constituted enough evidence to warrant an alibi instruction. In *Robertson*, the Court determined that "to furnish support for an alibi instruction, the evidence must tend to show that the defendant was elsewhere when the crime he is charged with was committed. ... It follows, therefore, that a criminal defendant is entitled to have presented to the jury, instructions relating to a theory of defense for which there is sufficient support in the evidence, even though the evidence has been impeached or is otherwise controverted by evidence of the state." *Id.* at 384.

Essentially, a defendant is entitled to a specific jury instruction if there is *any* evidence in the record that, if believed by the jury, would support his argument. *McMillan v. State*, 428 Md. 333, 355 (2012). Jury instructions are critical because they are

> ...essential for safeguarding a defendant's right to a fair trial. The court's instructions should fairly and accurately protect an accused's rights by covering the controlling issues of the case. ... it is not the function of the trial judge to weigh the evidence and select some cases in which to give the alibi instruction. The instruction should be given in every case where there is sufficient evidence to take the issue to the jury.

Robertson, 112 Md.App. at 385.

In *Robertson*, State had more evidence (the defendant's confession to an undercover police officer and matching boot prints from the crime scene) directly implicating the defendant to the crime than the present case. The State also presented the only evidence that generated the alibi jury instruction, the defendant's statements to a police officer who testified that the defendant told him he was at various locations, nowhere close to the crime scene, the day the murder was committed. The defendant did not offer any alibi witness testimony. In the case *sub judice*, the State has no direct evidence and relied solely on Derrick Harper's testimony of what Petitioner and others in the community told him about the murder and Petitioner's potential involvement. At trial, the petitioner presented an alibi defense through themes interwoven in opening statements and closing arguments and through the testimony of four alibi witnesses; an alibi instruction was incontrovertibly warranted by the evidence presented.

It is axiomatic that the evidence introduced at trial through four defense witnesses and Petitioner's own statement supported an alibi jury instruction and trial counsel was objectively deficient in failing to request the instruction that fully encapsulated Petitioner's theory of the case. *Schmitt*, 140 Md.App. at 27 (explaining that "[w]itnesses testified that Petitioner was in the hotel room at the time the shots were fired. Trial counsel's primary defense was Petitioner's alibi. Trial counsel's failure to ask for the alibi instruction was deficient.").

Strickland does impose a strong presumption in favor of trial counsel using reasonable professional judgment, and that presumption is not abandoned in this case. However, in

reconstructing the circumstances of trial counsel's decision not to request an alibi jury instruction, it cannot be said that counsel's actions were a result of any strategic trial strategy, and Iamele, himself, testified as such during Petitioner's post conviction hearing. The Court determines that trial counsel's omission was not and could not have been a result of reasonable professional judgment and given the circumstances of the case, his omission fell below the objective professional norms in the moment that he did not request an alibi jury instruction and he did not object to its absence.

Turning to the prejudice prong of the *Strickland* analysis, the trial counsel's failure to request the proper jury instruction must be so detrimental as to "completely undermine the adversarial process." *Robertson* elaborates that deficient jury instructions, where issues supported by evidence are excluded, prevent the jury from deciding particular and pertinent issues of fact which ultimately affect the defendant's constitutional right to a jury trial. Specific to alibi, the purpose of the instruction is to ensure that the jury weigh the credibility of the alibi witnesses, the adequacy of the alibi defense, and question whether that created a reasonable doubt of Petitioner's guilt. Without the instruction, and any other equivalent instruction[3] fairly covering the purpose and substance of the alibi instruction, it is reasonably possible that the jury might have placed the burden of proof on the defense with respect to "proving" the alibi, which is an a incorrect interpretation of the law as alibi is not an affirmative defense. *Robertson*, 112 Md.App., at 386-7. Alternatively, it is reasonably probable that the jury may not have considered, as

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[3]In reading instructions of law to the jury, Judge Alpert stated the following regarding the witness testimony:

> In making your decisions you must consider the evidence in this case; that is, the testimony from the witness stand ... . You are the sole judge of whether a witness should be believed. ... In determining whether a witness should be believed you should carefully judge all the testimony and evidence and the circumstances under which the witness testified.

Trial Transcript, August 11, 2004, pages 116-124. This instruction does not fairly cover the issue of alibi warranted by the evidence presented at trial.

they were not instructed to, the defense theory of the case at all, which was manifestly detrimental and prejudicial to Petitioner.

Maryland courts have held consistently, that trial courts commit reversible error[4] for failing to give an alibi jury instruction when there is evidence presented to support it. *Robertson v. State*, 112 Md.App. 366 (1996) (holding that the court's refusal to grant the defendant's request for a specific alibi instruction was reversible error); *Pulley v. State*, 38 Md.App. 682, 689 (1978) ("'We join the majority of courts which hold that where there has been sufficient evidence to raise an issue of alibi, and an alibi instruction has been requested, the failure to so instruct constitutes prejudicial and reversible error.'" *quoting Ferguson v. State*, 488 P.2d 1032, 1038-39 (Alaska 1971)); *Wright v. State*, 70 Md.App. 616, 620(1987) ("[t]he 'bottom line' is that, if a *prima facie* case is generated on a particular point of law, the defendant is entitled to a jury instruction on that point.") (emphasis in original). The *Strickland* standard is a similar, but less rigorous standard than reversible error. Considering that, it follows that if it is reversible error to omit a pertinent jury instruction, it must also be prejudicial to the Petitioner when trial counsel fails to request an instruction that epitomizes the only theory of the defense.

Based on the number of alibi witnesses, the substance of their testimony, trial counsel's post conviction testimony that he did not have a strategic reason for not requesting an alibi instruction, and the State's lack of direct and circumstantial evidence linking Petitioner to the crime,[5] the Court concludes that an alibi instruction was warranted, trial counsel was deficient in failing to request one, and there is a reasonable probability that the omission influenced the verdict, prejudicing Petitioner.

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[4] Reversible error is

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Dorsey v. State, 276 Md. 638, 659 (1976).

[5] The State's case relied, in large part, on Derrick Harper's hearsay testimony, recounting conversations he had with Petitioner regarding his conflict with decedent.

For these reasons, the Court will grant post conviction relief on this ground.

"Other Crimes" Evidence, Discussion

Petitioner alleges that he received ineffective assistance of counsel because trial counsel failed to object to "other crimes" (behavioral propensity) evidence barred by Md. Rule 5-404(b), that suggested Petitioner was engaged in intimidation of a witness in his half-brother's unrelated criminal case and friend's criminal case. The State's theory of the case was that Petitioner murdered the victim in retaliation for being a witness in criminal trials. During trial, the State offered witness testimony consistent with that theory. Specifically, Petitioner claims that statements made in the State's opening, Jackie Davis' direct examination, Detective Raymond Lazlette's direct examination, Jeffrey Johnson's cross examination, and the State's closing argument contained inadmissible Md. Rule 5-404(b) evidence.

Md. Rule 5-404(b) (emphasis added) reads

> Evidence of other crimes, wrongs, or acts including delinquent acts as defined by Code, Courts Article, § 3-8A-01 is not admissible to prove the character of a person in order to show action in conformity therewith. *Such evidence, however may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.*

Petitioner's concerns about the State's arguments are misplaced when he targets those arguments for advancing "other crimes" evidence. Opening statements and closing arguments are not admissible evidence, they are merely the lawyer's arguments, and admonitions reiterating that fact are made by the trial judge before the statements are delivered. *State v. Lawson*, 886 Md. 876, 887-88 (2005) (explaining that "defense counsel objected [to statements made during closing argument] and the court overruled stating that 'the jury understand[s] that this of course is closing argument, and that they will [consider the statements to be] lawyer's arguments.'"). Judge Alpert explicitly stated that opening and closing statements are not evidence before they were delivered: "Court: You're now going to hear the opening statements of the lawyers, which is not evidence in the case." *Trial Transcript*, August 9, 2004, page 5, lines 17-19. Because the Maryland Rules of Evidence do not apply to these statements, this Court will not

address whether Rule 5-404(b) was violated by counsel's arguments. Nevertheless, a *Strickland* analysis is warranted as *Lee v. State*, 405 Md. 148, 165 (2005) establishes that "an improper allusion to facts not in evidence and [improper appeals] to the passions and prejudices of the jury is unduly prejudicial." In evaluating the prejudice, if any, in the State's opening and closing statements, the Court is cognizant that

> [t]he prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom. In this regard, [g]enerally, ... the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the [prosecution] produces.

Degren v. State, 352 Md. 400, 430 (1999). Additionally,

> [w]hile arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

Spain v. State, 386 Md. 145, 152–53 (2005).

In respect to the State's opening statement and closing arguments, the Court has not identified any improper allusions to facts not in evidence or that any such potential error was prejudicial so as to warrant post conviction relief. The trial evidence clearly reflected the State's theory of the case, that Petitioner murdered Ricky Prince in retaliation for being willing to testify and testifying against Petitioner's half-brother Jerrod Fenwick and friend, Girard Basemore. In support of that theory, the State anticipated the following in its opening statement:[6]

> *State*: This is a case about how this defendant, along with a friend of his named Tavon Wetstone, murdered a boy named Ricky Prince. Ricky Prince was a friend of the defendant. Rick Prince was also a witness in a case against this defendant's friend in Baltimore County. It was a murder case. Ricky Prince was also a witness against this defendant's half-brother in an unrelated case[.]
> *Trial Transcript,* August 9, 2004, page 8, line 24-page 9, line 4.

[6] The State's closing argument is virtually identical to the sections of the opening statement provided here.

> *State*: Also, in April of 2003, this defendant's brother, half-brother named Girard [Jerrod] Fenwick, had a shooting case against him in Baltimore County, an unrelated case. Rick Prince was on the State's witness list in that case.
> *Trial Transcript,* August 9, 2004, page 11, lines 3-7.

> *State*: I submit to you this is a classic case of "the other guy did it" because it was this defendant whose friend, Ricky Prince, was going to testify against him, not Tavon Whetstone, and it was this defendant's brother against whom Ricky Prince was going to be a witness; and it was this defendant that knew—you'll hear that Tavon Whetstone wasn't one of Ricky Prince's friends. So it was this defendant that Ricky Prince would have been able to pick out as being with the guy who stole his mother's car. So it was the defendant who would have the motive to get rid of Rick Prince.
> *Trial Transcript,* August 9, 2004, page 14, lines 4-15.

Petitioner takes issue with these remarks principally because he believes they allude to facts that were not presented in evidence and because they suggest he was engaged in witness intimidation. That contention fails upon noting that all witnesses called by the State (Derrick Harper, Mark Rejrat, Kevin Klimko, and Gerald D'Angelo) insinuated or made completely clear that Ricky Prince did or was willing testify against Jerrod Fenwick and Girard Basemore; the State's main witness, Derrick Harper, testified that Petitioner was close with both defendants, and the victim, Ricky Prince. Derrick Harper also testified, consistent with the interview conducted by Detective Lazlette, that hours before Ricky Prince's murder, Petitioner engaged in a physical altercation with Ricky Prince about his involvement of his half-brother and/or friend's trial. It is clear that the State's assertions in their opening statement were supported by evidence at trial via witness testimony, and there was no resulting prejudice to Petitioner in the State's opening or closing argument.

Petitioner takes issue with redirect examination of Jackie Davis, the victim's mother, because of the "other crimes" evidence elicited. The pertinent passage of Ms. Davis' redirect examination is found in the August 10, 2004 trial transcript on page 113, line 16-page 114, line 21:

> *State*: And when you say that you—you said that you got threats. What exactly were the threats?
> *Davis*: Well, the tone of the threats basically was that Rick [victim] testifying against Jarrod and they was going to get him.
> *State*: And was Ricky involved as a witness in any other ways in April of 2003?
> *Davis*: You talking about in April or—
> *State*: Well, in a pending case in April?

Davis: Yes, he was, he was on the witness list in another case.
State: On a what?
Davis: On another case.
State: And who was the name of the person in that other case?
Davis: Jarrod Fenwick [Petitioner's half-brother].
State: Also Jarrod?
Davis: Yes.
State: And do you know who Jarrod Fenwick is?
Defense Counsel: Objection.
Court: Do you have personal knowledge of who Jarrod Fenwick is?
Davis: No, not personal knowledge.
Court: I'm just going to ask you to say yes or no.
Davis: No.
Court: Wait a minute, hold it. No, I didn't ask the question.
Davis: Oh.
Court: I didn't ask the question. Did somebody tell you at some point who Jarrod Fenwick is?
Davis: My son.

Without the advantage of knowing, explicitly, the purpose of the State's particular questions to Ms. Davis, an understanding of the State's theory of the case (that Petitioner murdered Ricky Prince in retaliation for his testimony against Fenwick and Basemore) makes it likely that the testimony was proof of motive and intent; a purpose allowable under Md. Rule 5-404(b). As such, there was no "other crimes" evidence to which trial counsel would properly object. Even if there was, Maryland Courts have set out an exception in *Copeland v. State*, 196 Md. App. 309 (2010); evidence of threats to the victim and family are admissible as an purpose for which evidence of "other crimes, wrongs, or acts" can be presented.

Alternatively, Petitioner argues that Ms. Davis' testimony was objectionable because there was no evidence presented at trial to prove her testimony inferring that Petitioner or someone closely tied to him called Ms. Davis' household to threaten her son, Ricky Prince. Petitioner's argument is inconsistent with Maryland Rule 5-603 governing lay witnesses who lack personal knowledge. In pertinent part, the rule states that "a witness many not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." There was no indication in the contested testimony that Ms. Davis was testifying as to matters beyond her own individual knowledge. Ms. Davis was fully qualified to testify that she

received phone calls to her home that threatened the victim; when she began testifying about Mr. Fenwick, defense counsel objected and Judge Alpert interjected to confirm that her testimony remained within the confines of what is admissible in lay witness testimony.

Petitioner takes issue with the "other crimes" evidence elicited through Detective Lazlette's direct examination, the pertinent parts of which follow:

> *State*: Now you were asked several questions about Derrick Harper. During your investigation did you—you never came across any evidence that suggested he did this murder, correct?
> *Lazlette*: No.
> State: And throughout all your investigation and interviewing people, no one ever told you that Derrick Harper said he tricked Ricky Prince into the car, did they?
> *Lazlette*: No.
> *State*: And you were asked questions about interviewing people from another case. You also interviewed a Jerrod Fenwick didn't you?
> *Lazlette:* Yes, I did.
> *State*: And that is the defendant's half-brother, isn't he?
> *Lazlette*: That's correct.
> *State:* I have nothing further.
> *Trial Transcript*, August 11, 2004, page 46 line 3-46.

Petitioner asserts the State improperly introduced evidence accusing Petitioner of witness intimidation through Detective Lazlette's testimony. Again, this testimony is devoid of any Md. Rule 404(b) "other crimes" evidence and even if Detective Lazlette implied that Petitioner was involved in witness intimidation, the testimony would still be admissible as evidence of motive for Petitioner's underlying charges of murder and kidnapping.

Petitioner takes issue with Jeffrey Johnson's testimony in which the Petitioner alleges that "the State interjected the Fenwick case:"

> *State*: Did the Defendant tell you about anything that happened at McDonalds?
> *Johnson:* Yes.
> *State*: And he [Petitioner] told you that he was—that he confronted a kid named Rick about snitching?
> *Johnson:* He told me that while he was in an altercation with a guy named Rick.
> *State:* And that while he was in an altercation with Rick, a guy named Cane drove off in Rick's car, right?
> *Johnson:* Yes. He told me that a guy named Cane drove off in his care and that he was angry and left.
> *State*: And you didn't—did you know Rick?
> *Johnson:* did I know Rick? Did I know Rick? Yes.

State: You knew Rick as well?
Johnson: Yes.
State: And you were aware that he was a witness against Tick [Girard Bazemore], right?
Johnson: Yes.
State: He snitched against him?
Johnson: I didn't know that. I knew he was a witness, but I didn't know what went on as far as the case. I didn't go to his court case or none of that.
State: And you were aware that he was also a witness in a case against the defendant's half-brother, right?
Johnson: Yes.
State: And that's Jerrod Fenwick?
Johnson: Yes.
Trial Transcript, August 11, 2004, page 68, line 25-page 69, line 24.

Johnson's testimony is virtually identical with Detective Lazlette in that the State is making relational links between the victim, Ricky Prince, acting as a witness in Petitioner's half-brother's criminal case and the altercation between Ricky Prince and Petitioner at McDonalds the day of the murder. All of this testimony is allowable under Md. Rule 5-404(b) as evidence speaking to the Petitioner's motive.

The Court will deny post conviction relief on these grounds.

Motion for Mistrial, Discussion

Petitioner alleges ineffective assistance of trial counsel for failing to preserve the record for appeal upon failing to make a motion for mistrial during the State's examination of Detective Lazlette, Johnson, and Ms. Davis. Petitioner relies on *Gross v. State*, 371 Md. 334 (2002), which noted that an advocate renders ineffective assistance when they neglect to raise an issue that would have had a substantial chance of resulting in a reversal of petitioner's conviction on appeal. However, *Gross* also stands for the proposition that "[t]he Sixth Amendment does not require an attorney to argue every possible issue on appeal." *Gross 371 Md. at 350.*

When Petitioner argues that counsel was ineffective when he failed to make a motion for mistrial because of the improper questioning by the State, Petitioner does not elaborate on this point and provides no examples or citations to the trial transcript. Accordingly, the Court will not substantively address the allegation of mistrial for lack specifics offered by Petitioner. Even if the Court were provided with such examples, it is not required to address the allegation of ineffective performance, as this allegation fails for

lack of prejudice on the outcome of Petitioner's case. Through the multiday trial, both the State and Petitioner's counsel engaged in aggressive legal jockeying via objections to exhibits, witness examination, and opening and closing statements. Judge Alpert was particularly mindful and vocal about counsel falling into evidentiary pitfalls when presenting their case. For example, during a sidebar in the middle of Ms. Davis' direct examination, when she began to cry, trial counsel told Judge Alpert "I'm at the point of asking for a mistrial. This is simply not competent evidence." *Trial transcript*, August 10, 2004, page 84, lines 20-22. Judge Alpert determined that Ms. Davis' testimony was not inflammatory or designed to prejudice any jurors and that the testimony would continue.

Considering trial counsel's unyielding objections to State's various lines of questioning, his inclination to make a motion for mistrial, and the Judge Alpert's ruling on myriad objections through trial, trial counsel's performance could not have objectively fallen below the standards of a reasonable and competent attorney on the subject of this allegation.

The Court will deny post conviction relief on these grounds.

Motion for Modification and Application for Review of Sentence, Discussion

Petitioner alleges that trial counsel failed to file a motion for modification within 90 days, pursuant to Md. Rule 4-345 and an application for review of sentence within 30 days of imposition of sentence, pursuant to Md. Rule 4-344. There are two different standards established for evaluating whether a petitioner was denied effective assistance of counsel for failure of counsel to file a post-trial motion The first standard is premised on a petitioner's express request and the second is premised on a failure to file post-trial motions absent such an express request. Failure to follow a client's express direction to file the two post-trial motions at issue is a deficient act, and failure to do so prejudices the defendant because it results in a loss of any opportunity to have a sentence reconsideration hearing. *Matthews v. State*, 161 Md. App. 248, 252 (2005). Accordingly, the Petitioner must show trial counsel failed to comply with the Petitioner's request for a post-trial motion or that trial counsel's decision not to file the two motions at issue was so unreasonable that it constituted ineffective assistance of counsel.

There is no evidence cited in the Petition or provided at the post conviction hearing that the Petitioner asked trial counsel to file any post-trial motions. During Petitioner's post conviction hearing, trial counsel testified that after conferring with Petitioner about all of his post conviction options, they both agreed upon filing a motion for a new trial and an appeal in lieu of any post-trial motions because there was a slim chance that Petitioner's sentence would be modified given gravity of the allegations. Trial counsel also testified that he articulated that this failure to file an application for review of sentence was a strategic decision as there was a reasonable probability that a three judge panel would increase his sentence, as Petitioner did not receive the maximum sentence. There is nothing in the Court file nor any testimony from the post conviction hearing indicating Petitioner expressed any desire for a motion for modification or application for review of sentence. Under the circumstances, trial counsel did not act unreasonably or deficiently when he neglected to file the two motions; the decision was strategic and based on Petitioner's articulate desires.

The Court will deny post conviction relief on these grounds.

For the forgoing reasons, with applicable rules and authorities, it is this 18th day of February, 2018, hereby

ORDERED that Petitioner Christopher Mann's Supplemental Petition for Post Conviction Relief, filed October 6, 2015, is **GRANTED in pertinent part**; and

ORDERED that Petitioner's request for a new trial is **GRANTED**; and

ORDERED that all other relief is **DENIED.**

PAMELA WHITE - PART 7
JUDGE
THE JUDGES SIGNATURE APPEARS
ON THE ORIGINAL DOCUMENT
Circuit Court for Baltimore City

CC:
Assistant State's Attorney Charles Fitzpatrick
120 E. Baltimore Street
Baltimore, MD 21202

William Welch, Esq.
111 S. Calvert Street
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TRUE COPY
TEST
Marilyn Bentley
2-13-18 MARILYN BENTLEY, CLERK

CIRCUIT COURT FOR BALTIMORE CITY 1983

STATE OF MARYLAND	*	**IN THE**
	*	**COURT OF APPEALS**
	*	**OF MARYLAND**
v.		
	*	**No. 29**
CHRISTOPHER MANN	*	**September Term, 2019**

ORDER

The Court having considered the Respondent's Motion for Reconsideration filed in the above-captioned case, it is this 23rd day of January, 2020,

ORDERED, by the Court of Appeals of Maryland, that the motion for reconsideration be, and it is hereby, DENIED.

/s/ Mary Ellen Barbera
Chief Judge

*Judge Getty did not participate in the consideration of this matter.