Circuit Court for Prince George's County
Case No.: CT07-1096X
Argued: September 12, 2022

IN THE COURT OF APPEALS

OF MARYLAND

No. 64

September Term, 2021

ANTONIO MCGHEE

v.

STATE OF MARYLAND

Fader, C.J.
Watts
Hotten
Booth
Biran
Gould
Eaves,

JJ.

Opinion by Biran, J.

Filed: October 24, 2022

Appendix
A

Antonio McGhee v. State of Maryland, No. 64, September Term, 2021.
Opinion by Biran, J.

CRIMINAL LAW – INEFFECTIVE ASSISTANCE OF COUNSEL – "CSI-EFFECT" VOIR DIRE QUESTION – During jury selection at Petitioner's 2007 murder trial, Petitioner's attorney did not object to a voir dire question that asked: "Does any member of this panel believe that the State has got to present fingerprint evidence, DNA, blood sample evidence, ballistic evidence, any scientific evidence in order to convince you of the defendant's guilt? In other words, do you think the State has a requirement to do that in all cases?" The jury found Petitioner guilty. In a trilogy of cases that the Court of Appeals decided in the years following Petitioner's trial, the Court held that so-called "CSI-effect" voir dire questions and similar jury instructions can improperly intrude on the province of the jury. *Charles v. State*, 414 Md. 726 (2010); *Atkins v. State*, 421 Md. 434 (2011); *Stabb v. State*, 423 Md. 454 (2011). In 2014, Petitioner filed a post-conviction claim alleging that his trial counsel provided ineffective assistance of counsel by not objecting to the CSI-effect voir dire question at his trial. The Court of Appeals held that, under the prevailing professional norms that existed in 2007, defense counsel's failure to object to a CSI-effect voir dire question did not render counsel's performance constitutionally deficient under *Strickland v. Washington*, 466 U.S. 668 (1984). The Court declined to address the retroactivity of *Charles*, *Atkins*, and *Stabb* in determining whether counsel's conduct was objectively unreasonable, because *Strickland* requires a post-conviction court to assess an attorney's performance based on the prevailing professional norms at the time of the contested conduct. Cases that are decided after a defendant's trial do not shed light on the professional norms that existed at the time of the defendant's trial.

This case arises from a post-conviction court's grant of a new trial to Petitioner Antonio McGhee based on ineffective assistance of counsel. In December 2007, a jury in the Circuit Court for Prince George's County convicted McGhee of the murder of Keith Dreher. The basis of McGhee's ineffective assistance of counsel claim is his counsel's failure to object to what courts and commentators have called a "CSI-effect" voir dire question.

The "CSI effect" describes the theorized impact of television crime scene dramas on jurors. The theory suggests that, based on the proliferation of programs such as *CSI*, jurors in criminal cases now expect the prosecution to produce DNA evidence and/or other forensic evidence to prove a defendant's guilt, and that juries are prone to wrongfully acquit criminal defendants where the prosecution does not produce such evidence. *See, e.g.*, *Robinson v. State*, 436 Md. 560, 570 n.11 (2014) (citing Donald E. Shelton, *Juror Expectations for Scientific Evidence in Criminal Cases: Perceptions and Reality About the 'CSI Effect' Myth*, 27 T.M. COOLEY L. REV. 1, 3 (2010)).

In 2010 and 2011 – more than two years after McGhee's trial – this Court considered three cases related to the CSI effect, and held in each that a CSI-effect message from the bench constituted reversible error. *See Charles v. State*, 414 Md. 726 (2010); *Atkins v. State*, 421 Md. 434 (2011); *Stabb v. State*, 423 Md. 454 (2011). One of the questions before this Court is whether to apply these three cases retroactively in the context of an ineffective assistance of counsel claim.

In *Strickland v. Washington*, the Supreme Court set out the controlling test for evaluating an ineffective assistance of counsel claim under the Sixth Amendment. 466 U.S.

668 (1984). The *Strickland* test requires a petitioner claiming ineffective assistance of counsel to make two showings. First, the petitioner must show that counsel's performance was deficient. *Id.* at 687. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, "the defendant must show that the deficient performance prejudiced the defense." *Id.*

Under *Strickland*, in considering the first "performance" prong of the test for ineffective assistance, we are bound to evaluate defense counsel's conduct according to professional norms that existed at the time of the contested action (or inaction). *Id.* at 689. This analysis precludes us from evaluating counsel's conduct based on law that did not exist at the time. Thus, we do not assess counsel's performance at McGhee's trial as if it occurred after this Court decided *Charles*, *Stabb*, and *Atkins*. Under the professional norms that existed at the time of McGhee's trial, defense counsel's failure to object to a CSI-effect voir dire question did not render her performance constitutionally deficient.

I

Background

A. Maryland Jurisprudence Concerning the "CSI Effect"

1. CSI-Effect Jury Instructions

The term "CSI effect" emerged in 2002. *Robinson*, 436 Md. at 570. Due to the popularity of forensic crime scene television series such as *CSI: Crime Scene*

Investigation,[1] commentators speculated that such programs may heighten juror expectations for forensic evidence. *Id.* at 570-71 (citing Jenny Wise, *Providing the* CSI *Treatment: Criminal Justice Practitioners and the CSI Effect*, 21 CURRENT ISSUES CRIM. JUST. 383, 383-84 (2010); Simon A. Cole & Rachel Dioso-Villa, *Investigating the 'CSI Effect' Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1338-39 (2009)). Studies that considered whether viewing CSI-type programs affected jurors' verdicts yielded inconclusive results. *See Robinson*, 436 Md. at 571-72.

Nevertheless, some courts began giving jury instructions to guard against a potential CSI effect. These were sometimes referred to as "anti-CSI effect" instructions. *See id.* at 572. The advent of these jury instructions generated unique questions about the interaction of pop culture, the role of the jury, and the State's burden of proof, prompting consideration in Maryland's appellate courts.

In 2007, the Court of Special Appeals considered for the first time whether the giving of a CSI-effect jury instruction constituted reversible error – specifically, whether the instruction relieved the State of its burden of proof. *Evans v. State*, 174 Md. App. 549

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[1] *CSI: Crime Scene Investigation* aired on CBS from 2000 through 2015. Set in Las Vegas, *CSI* was immensely popular and spawned several spinoff series, including *CSI: Miami*, *CSI: NY*, and *CSI: Cyber*. *See CSI: Crime Scene Investigation*, Editors of Encyclopaedia Britannica, BRITANNICA, available at https://perma.cc/WA85-DK3A; *see also Atkins v. State*, 421 Md. 434, 457-58 (Harrell, J., concurring) (observing that the "success of 'forensic' dramas … skyrocketed in 2000 with the debut of *CSI: Crime Scene Investigation*, referred to as 'the most popular television show in the world' at one time" and noting that, in a 2006 Nielsen rating, 30 million people watched *CSI* in one night; 70 million people watched one of the three *CSI* shows then in production; and 40 million people watched two other forensic dramas, *Without a Trace* and *Cold Case*) (citations omitted). In 2021, the Las Vegas iteration of the *CSI* franchise returned to television as *CSI: Vegas*. *See CSI: Vegas*, CBS, available at https://perma.cc/B9F6-ENEJ.

(2007). The State charged Evans and another man with possession and distribution of heroin after conducting an undercover "buy bust" operation. *Id.* at 552-53. At trial, Evans's attorney cross-examined the investigating detective concerning specific investigative techniques that the detective had not used, including the failure to capture the drug transaction through the use of video or audio recording equipment. *Id.* at 562. This line of cross-examination prompted the trial court to instruct the jury as follows:

> During this trial, you have heard testimony of witnesses and may hear argument of counsel that the State did not utilize a specific investigative technique or scientific test. You may consider these facts in deciding whether the State has met its burden of proof. You should consider all of the evidence or lack of evidence in deciding whether a defendant is guilty. However, I instruct you that there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case. Your responsibility as jurors is to determine whether the State has proven, based on the evidence, the defendants' guilt beyond a reasonable doubt.

Id. Evans's trial counsel did not object to the giving of this instruction. *Id.* at 564-65.

In his closing argument, Evans's counsel highlighted the detective's failure to record the alleged transaction. *See id.* at 562-63. The co-defendant's attorney echoed this point in his closing argument, also noting the lack of forensic evidence: "You have a situation where there are absolutely no scientific tests that implicate my client in any way. There's no audio. There's no video. There's no fingerprints. There is nothing." *Id.* at 563-64.

On appeal, Evans argued that the instruction concerning specific investigative techniques and scientific tests improperly relieved the State of its burden to prove his guilt beyond a reasonable doubt. *Id.* at 562. Because Evans had failed to preserve this issue through objection in the trial court, the Court of Special Appeals held that it was precluded

from considering it. *Id.* at 566. In dicta, the intermediate appellate court noted that the jury instruction was a correct statement of the law and that it did not relieve the State of its burden of proof. *Id.* at 570. However, the court "stress[ed] that the salutary effect of the instruction is found in the advisement that the absence of such evidence should be factored into the juror's determination of whether the State has shouldered its burden if, *and only if*, the absence of such evidence, itself, creates reasonable doubt." *Id.* at 571. The court continued: "The risk is greatest that such an instruction will run afoul of the prohibition against relieving the State of its burden where the instruction is predominant in the overall instructions and its relation to the reasonable doubt standard unclear." *Id.* Thus, the court advised, "the preferable practice is for the ... instruction to be promulgated in conjunction with the explication of the State's burden to prove the defendant guilty beyond a reasonable doubt." *Id.*

Between 2007 and 2011, no Maryland appellate court addressed the CSI effect in the context of a jury instruction.[2] In 2011, this Court considered such an instruction for the first time in *Atkins v. State*, 421 Md. at 434. Atkins was charged with three counts of assault after he was involved in an altercation during which he stabbed three people. *See id.* at 438-39. Three days after the incident, police executed a search warrant at Atkins's home and found a large, non-foldable "Rambo-type" knife in Atkins's bedroom. *Id.* at 439, 439 n.3. Police did not perform any scientific or forensic tests on the knife, and there was no witness testimony at trial linking that knife to the stabbings. *Id.* at 439. Nevertheless, the

[2] As discussed below, in 2010 this Court considered a CSI-effect voir dire question in *Charles v. State*, 414 Md. 726 (2010).

State told the jury in its opening statement that Atkins used the knife found in his bedroom in the stabbings. *Id.* at 439, 439 n.4. During cross-examination of a detective who found the knife in Atkins's bedroom, defense counsel probed the lack of DNA testing conducted on the knife. *Id.* at 440. In his defense case, Atkins testified that, as he was being punched and kicked during the fight, he took a pocketknife out of his pocket, opened it, and swung it at his attackers in self-defense. *Id.* at 438-39.

The trial court granted the State's request for a CSI-effect jury instruction over defense objection. The court instructed the jury:

> During this trial, you have heard testimony of witnesses and may hear argument of counsel that the State did not utilize a specific investigative technique or scientific test. You may consider these facts in deciding whether the State has met its burden of proof. You should consider all of the evidence or lack of evidence in deciding whether the defendant is guilty. However, I instruct you that there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case. Your responsibility as jurors is to determine whether the State has proven based upon the evidence the defendant's guilt beyond a reasonable doubt.

Id. at 441-42 (emphasis omitted). The jury convicted Atkins of the assault charges, and the Court of Special Appeals affirmed the convictions, discerning no error in the CSI-effect jury instruction. *See id.* at 442.

This Court reversed, concluding that Atkins's case was distinguishable from *Evans*. We observed that, in *Evans*, the defense "distorted the law" through its extensive cross-examination concerning the lack of video or audio evidence of the drug purchase, *id.* at 451, and through its "robust and vehement closing argument" in which it improperly suggested that the prosecution was *required* to produce such evidence. *Id.* at 450 (quoting *Evans*, 174 Md. App. at 570). Whereas, in *Evans*, the defense's cross-examination and

closing argument made a curative jury instruction proper, *see id.* at 450-51, in *Atkins* defense counsel "merely pointed out" during cross-examination the lack of specific forensic tests, which made a curative instruction unnecessary. *Id.* In addition, the instruction in *Evans* was improper because it invaded the province of the jury, suggesting the inferences they should draw from the State's failure to test the recovered knife for DNA evidence. *Id.* at 453-54. However, the Court stated that its "conclusion that the instruction as given was invalid [was] based on the particular facts in this case," and explained that it was "not hold[ing] that an investigative techniques instruction would never be proper." *Id.* at 454. Consistent with *Evans*, this Court observed that "the key to producing a valid jury instruction is ensuring that the State is properly held to its burden, and any instruction regarding what the State must produce in proving its case must be properly related to the reasonable doubt standard." *Id.*

A few months later, in *Stabb v. State*, this Court again considered a CSI-effect jury instruction case, and again held that the giving of the instruction constituted reversible error. 423 Md. at 471-72. Stabb was charged with a third-degree sex offense involving a minor. *See id.* at 457. After the alleged assault was reported to law enforcement, the authorities did not refer the victim for a Sexual Assault Forensics Exam ("SAFE"). *Id.* at 458-59. At trial, Stabb's defense counsel "argued properly and without undue emphasis the lack of corroborating physical evidence of the crime, and questioned [two detectives] as to the likelihood of the existence of such evidence and why a SAFE was not performed, but did not 'harp' impermissibly on the lack of physical evidence in its case-in-chief or during

closing arguments." *Id.* at 471. Nevertheless, the trial court issued a preemptive CSI-effect jury instruction. *Id.* at 471-72.

This Court held that the use of a preemptive CSI-effect instruction was improper, again distinguishing *Evans*. *See id.* at 471. We noted that, after defense counsel's cross-examination of the detectives, "[t]he State responded, during recross-examination of witnesses and in closing arguments, to defense counsel's implication regarding the lack of a SAFE, i.e., why a SAFE was not administered and the unlikelihood that a SAFE, had it been administered, would have yielded testable DNA or fingerprints." *Id.* at 472. We observed that "[r]ebuttal by the State was the proper approach." *Id.* However, "[w]hen the trial judge injected the pertinent instruction into the jury's calculus, it had more force and effect than if merely presented by counsel, and could have influenced impermissibly the drawing by the jury of inferences regarding the absence of physical evidence." *Id.* (internal quotation marks and citation omitted). We concluded:

> In giving the "anti-CSI effect" instruction to the jury, the trial court directed effectively the jurors not to consider the absence of a SAFE or corroborating physical evidence. The trial court invaded impermissibly the province of the jury deliberations with the given "anti-CSI effect" instruction under the circumstances. The "anti-CSI effect" jury instruction given, in the circumstances of this case, was improper because it relieved the State of its burden to prove Stabb was guilty beyond a reasonable doubt, invaded the province of the jury, and, thus, violated Stabb's constitutional right to a fair trial.

Id. We warned prosecutors that the use of a CSI-effect jury instruction is "fraught with the potential for reversible error," *id.* at 473, and advised that it should be "confined to situations where it responds to correction of a preexisting overreaching by the defense, i.e., a curative instruction." *Id.*

Most recently, this Court decided *Taylor v. State*, 473 Md. 205 (2021). In *Taylor*, we held that the trial court erred by giving a CSI-effect jury instruction *sua sponte* in anticipation of a potential defense objection. *Id.* at 222, 231. *Taylor* involved a complicating factor: Although Taylor's trial had occurred in 2008, no timely appeal was filed on his behalf. *Id.* at 224. A post-conviction court granted Taylor relief in the form of a belated appeal more than eight years later. Thus, the case came to this Court as a direct appeal, rather than on collateral review. *See id.* at 224-25. One of the questions presented to us in *Taylor* was which law to apply: the law as it existed in 2008 at the time of Taylor's trial (i.e., only the dicta from *Evans*) or the law as it existed at the time we were considering his belated appeal (i.e., *Atkins* and *Stabb*). We did not reach this question, however, because we held that either way the jury instruction in Taylor's trial was improper. *Id.* at 233-34.

2. CSI-Effect Voir Dire Questions

An alternative iteration of the CSI effect emerged in Maryland courtrooms concerning voir dire questions. In 2010 in *Charles v. State*, the State convicted two defendants of second-degree murder and use of a handgun in the commission of a felony or crime of violence. 414 Md. 726 (2010). During voir dire, over defense counsel's objection, the trial judge asked the jurors: "[I]f you are currently of the opinion or belief that you cannot convict a defendant without 'scientific evidence,' regardless of the other evidence in the case and regardless of the instructions that I will give you as to the law, please rise." *Id.* at 730 (emphasis deleted).

This Court held that the trial court erred by using non-neutral language that suggested the only option was to convict the defendant, without mention of the option to

acquit. *Id.* at 738; *see also McFadden v. State*, 197 Md. App. 238, 250-51 (2011) (holding non-neutral CSI-effect voir dire question deprived defendant of right to fair and impartial jury), *abrogated in part on other grounds by State v. Stringfellow*, 425 Md. 461 (2012). *Charles* did not focus on the appropriateness of the CSI-effect message when posed to the jury pool during voir dire. Rather, it focused on the appropriateness of non-neutral language in comments from the bench. *See Charles*, 414 Md. at 733.

In 2018, the Court of Special Appeals considered a CSI-effect voir dire question in the context of an ineffective assistance of counsel claim. *State v. Armstead*, 235 Md. App. 392 (2018). After reflecting on *Evans*, *Charles*, *Atkins*, and *Stabb*, the intermediate appellate court concluded that trial counsel's failure to object to a CSI-effect voir dire question did not amount to ineffective assistance of counsel. The *Armstead* Court reasoned that, at the time of Armstead's trial in 2009, CSI-effect voir dire was permissible, and arguably even "favored," under Maryland common law (presumably referring to *Evans*). *Id.* at 406. That being the case, it could not be said that Armstead's trial counsel fell short of the professional norms that prevailed at the time. *See id.* at 417 ("It is unreasonable to require trial counsel to see the change that remained beyond the horizon.").

Equipped with an understanding of the development of CSI-effect case law in Maryland, we turn now to the CSI-effect voir dire question that the trial court asked in the present case.

B. McGhee's Trial and the Contested Voir Dire Question

McGhee's murder trial went forward in December 2007. During voir dire, the trial court asked the potential jurors the following question related to the CSI effect:

> Does any member of this panel believe that the State has got to present fingerprint evidence, DNA, blood sample evidence, ballistic evidence, any scientific evidence in order to convince you of the defendant's guilt? In other words, do you think the State has a requirement to do that in all cases?

McGhee's attorney did not object to this question.

After selection of the jurors, the State presented evidence that, on the evening of March 17, 2007, Keith Dreher was killed by a gunshot to the head outside a Papa Johns restaurant in Oxon Hill, Maryland.

Detective Paul Dougherty testified that after the shooting, the Assistant Manager of the restaurant, Jerrone Joyner,[3] gave a statement to him, in which Jerrone said that he saw the shooter and the victim in the restaurant for approximately 20 minutes prior to the shooting. He also told Detective Dougherty that he would be able to identify the shooter if he were shown a picture of him. One month later, Detectives Andre Brooks and Michael Delaney met with Jerrone and presented him a photo array. When Jerrone saw McGhee's photograph he asked, "[w]as that the guy?" Detective Delaney responded, "I couldn't tell you that. I wasn't there." The detectives testified that Jerrone then identified McGhee and said he was "a hundred percent" certain that McGhee was the shooter.

Jerrone's testimony at trial differed from that of Detectives Dougherty, Brooks, and Delaney. Jerrone recalled giving a statement to Detective Dougherty the night of the shooting, in which he described the shooter. He recalled telling Detective Dougherty that it was possible he could identify the shooter, but he did not recall telling police that the

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[3] Because two of the witnesses share the last name Joyner, we will refer to them by their first names. We mean no disrespect.

shooter was in the restaurant before the shooting. Additionally, while Jerrone remembered identifying McGhee to police, he testified that he only did so because he "knew the other guys" and did not know McGhee. He also disputed that he made the identification with certainty. While acknowledging that he saw the barrel of the gun, he said that he did not get a good look at the shooter and did not see the shooting.

Two other witnesses who were at the Papa Johns restaurant at the time of the shooting – Shamell Joyner and Demetrius Young – knew McGhee personally. Shamell, who was working at the Papa Johns on the night of the murder, testified that he saw McGhee in the restaurant shortly before the shooting. He recalled hearing an argument going on outside before the gunshot, but he did not know who was arguing or what the argument was about.

Young testified that he was at the Papa Johns restaurant the night of the shooting waiting for Shamell to get off work, when he saw McGhee enter the restaurant. Young saw McGhee ask Dreher for a cigarette before Dreher went outside. He heard a gunshot two minutes later.

On March 21, 2007, Shamell accompanied Detective Delaney to Martin Luther King Elementary School in Washington, D.C., where he identified McGhee. After members of the Prince George's County Police Department warrant squad identified themselves to McGhee as police, McGhee ran from them. Detective Wayne Martin saw McGhee running into a wood line with a gun protruding from McGhee's clothing. Martin testified that he lost sight of McGhee for approximately 15 to 30 seconds during the chase.

A short time later, Martin apprehended McGhee. McGhee did not have a gun on his person at that time.

An evidence technician for the Prince George's County Police Department testified that he recovered a loaded, "reasonably clean" sawed-off shotgun from underneath leaves along a fence at the rear of the school on March 21, 2007. Although the gun was submitted for DNA analysis, there was not sufficient genetic material on it from which to develop a genetic profile. Similarly, latent fingerprints lifted from the weapon did not contain enough characteristics for an examination to be conducted. However, Detective Martin testified that the recovered firearm appeared to be the gun he saw in McGhee's possession while McGhee was running.

Susan Lee, a Prince George's County Police Department firearms examiner, testified that plastic wadding and shell fragments recovered from Dreher's body were consistent with material contained within the cartridges that were loaded in the shotgun at the time it was recovered on March 21; however, she could not conclude that the recovered shotgun was the murder weapon.

Finally, the State presented evidence of incriminating statements McGhee made to police officers on April 5, 2007. Detective Delaney testified that, in the course of McGhee's swabbing for DNA on that date, he asked McGhee if he had an attorney. According to Delaney, McGhee said his family would be wasting their money on an attorney because the police had the "pump." Delaney understood this to mean a sawed-off shotgun. Additionally, Delaney testified that McGhee asked about cooperating with the investigation and that Delaney said he could not make any promises.

McGhee presented an alibi witness, Dayontae Duncan, who testified that McGhee was with him at a party on the evening of the shooting and that they spent the night at Duncan's home. McGhee also testified that he was with Duncan at the time of the shooting and was not at the Papa Johns restaurant that night. He testified that he ran from the police on March 21, 2007, because police had "been coming around our neighborhood harassing young dudes because of the colors we wear," and he suspected police thought he was affiliated with a gang. He admitted telling police at the time of the DNA swabbing that he thought his family was hiring an attorney, but he denied saying the attorney was a waste of money because the police had "the pump," and he denied making any other statements to police during that interaction.

The jury found McGhee guilty of first-degree murder, and he was sentenced to life in prison on January 18, 2008. The Court of Special Appeals affirmed McGhee's conviction on direct appeal, *McGhee v. State*, Sept. Term, 2007, No. 2827, and this Court denied McGhee's petition for certiorari. *McGhee v. State*, 410 Md. 561 (2009).

C. Post-Conviction Proceeding

On June 10, 2014, McGhee filed a *pro se* petition for post-conviction relief. Defense counsel later supplemented this petition with additional issues. McGhee contended that he received ineffective assistance of counsel based on:

1. trial counsel's failure to object to the trial court's "CSI-effect" voir dire question;
2. appellate counsel's failure to raise the preserved issue that the trial court erred in admitting testimony about inconclusive forensic evidence; and
3. trial counsel's failure to object to incomplete or missing jury instructions.

The post-conviction court held a hearing, at which McGhee's trial counsel testified. She explained that "[t]he defense in this case was that Mr. McGhee was not the shooter in the incident, that he was not present at the place and time in which the decedent was killed." Trial counsel did not recall the CSI-effect voir dire question.

On June 11, 2020, the post-conviction court granted McGhee's petition for post-conviction relief and ordered a new trial. The court stated that "[a]lthough at the time of [McGhee's] trial, the CSI question was allowed, the Court believes the question must still be analyzed based on its prejudicial effect on the jury." The post-conviction court found that, in this case, the lack of scientific evidence was material to the question of McGhee's guilt. For this reason, the court held that the failure to object to the CSI-effect question constituted ineffective assistance of counsel. The post-conviction court also determined that McGhee's trial counsel provided ineffective assistance by failing to object to certain incomplete or missing jury instructions. The court held that McGhee's appellate counsel was not ineffective.

The Court of Special Appeals reversed the post-conviction court's decision with respect to McGhee's trial counsel in an unreported opinion. *State v. McGhee*, Sept. Term 2020, No. 638 (Md. Ct. Spec. App. Nov. 30, 2021). The intermediate appellate court reasoned:

> As in *Armstead*, appellee presented no evidence establishing that the prevailing professional norm at the time of his trial was to object to "CSI effect" messages to the venire or jury. Consequently, we conclude that trial counsel's failure to object to the trial court's "CSI effect" voir dire question in this case was not deficient performance.

Slip op. at 12. The Court of Special Appeals also held that the post-conviction court erred in alternatively granting relief to McGhee based on trial counsel's failure to object to missing or incomplete jury instructions. *Id.* at 13-26.

McGhee petitioned this Court for a writ of certiorari, which this Court granted on March 8, 2022. *McGhee v. State*, 478 Md. 187 (2022). McGhee presents the following questions for our review, which we have rephrased slightly:[4]

1. Do *Charles v. State*, 414 Md. 726 (2010), *Atkins v. State*, 421 Md. 434 (2011), and *Stabb v. State*, 423 Md. 454 (2011), which concern the propriety of CSI-effect voir dire questions and jury instructions, apply to cases that became final before those decisions were issued?

2. Did McGhee's trial counsel render ineffective assistance of counsel when, at McGhee's 2007 trial, she failed to object to a CSI-effect voir dire question?

II

Standard of Review

"This Court reviews 'a post-conviction court's findings regarding ineffective assistance of counsel [a]s a mixed question of law and fact. The factual findings of the post-conviction court are reviewed for clear error. The legal conclusions, however, are reviewed *de novo*.'" *Wallace v. State*, 475 Md. 639, 653 (2021) (quoting *State v. Syed*, 463 Md. 60, 73 (2019)).

[4] McGhee did not seek further review of the portion of the Court of Special Appeals' opinion which held that trial counsel's failure to object with respect to several jury instructions did not constitute ineffective assistance of counsel. Therefore, we consider only whether counsel's failure to object to the CSI-effect voir dire question violated McGhee's right to effective assistance of counsel.

III

Discussion

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee criminal defendants the right to "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. at 686 (internal quotation marks and citation omitted); *Taylor v. State*, 428 Md. 386, 399 (2012). To meet their burden on an ineffective assistance of counsel claim, a petitioner must make two showings. First, the petitioner "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." *Taylor*, 428 Md. at 399 (quoting *Strickland*, 466 U.S. at 687).

Under the first, "performance" prong, a defendant must show that "counsel's alleged acts or omissions, ... 'viewed as of the time of counsel's conduct,' fell 'outside the wide range of professionally competent assistance.'" *Taylor*, 428 Md. at 399 (quoting *Strickland*, 466 U.S. at 690). Under the second, "prejudice" prong, a 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." *Id.* at 399-400 (quoting *Strickland*, 466 U.S. at 694).

McGhee argues that his trial counsel's failure to object to a CSI-effect voir dire question violated both the performance prong and prejudice prong of the *Strickland* test. McGhee contends that *Charles*, *Atkins*, and *Stabb* apply retroactively to cases on collateral

review. According to McGhee, with the benefit of the *Atkins/Charles/Stabb* trilogy of CSI-effect cases, it is clear both that his counsel's failure to object to the CSI-effect voir dire question was deficient performance and that this error prejudiced him because an appellate court would have reversed his conviction under *Charles*, *Atkins*, and *Stabb*. McGhee alternatively argues that, even if the Court considers only the CSI-effect case law that existed at the time of his trial – i.e., *Evans* – his counsel should have extrapolated from *Evans* that it was necessary to object to the CSI-effect voir dire question that the trial court put to the potential jurors.

The State argues that McGhee's retroactivity argument is incompatible with an analysis of the performance prong under *Strickland*, which requires a reviewing court to consider counsel's acts or omissions *at the time* of the contested conduct, not with the benefit of hindsight. According to the State, that analysis leads to the conclusion that McGhee's trial counsel acted consistently with the professional norms that existed at the time of McGhee's trial in late 2007.

We agree with the State.

A. The Issue of Retroactivity

The retroactivity doctrine in criminal law considers whether a change in law should be applied to a conviction that occurred before the change. *See Wiggins v. State*, 275 Md. 689, 698-99 (1975) (describing the "genesis of the modern retroactivity doctrine"). When confronted with a question of whether a new case applies retroactively, this Court's precedent considers whether a new decision sets out a "new principle of law." *State v. Daughtry*, 419 Md. 35, 78 (2011) (quoting *Houghton v. Cnty. Comm'rs of Kent Cnty.*, 307

Md. 216, 220 (1986)); *Denisyuk v. State*, 422 Md. 462 (2011), *abrogated on other grounds by Miller v. State*, 435 Md. 174 (2013). When the decision announces a new principle of law, it does not necessarily apply retroactively. *See Daughtry*, 419 Md. at 78. In contrast, "where a decision has applied settled precedent to new and different factual situations, the decision always applies retroactively." *Potts v. State*, 300 Md. 567, 577 (1984) (citation omitted).

The Supreme Court has not explicitly addressed whether the principle of retroactivity may be applied within an ineffective assistance of counsel claim, such that a new rule of law would render counsel's conduct defective *even if* the conduct was reasonable and appropriate at the time. McGhee asks this Court to dive into the substance of this analysis and determine whether *Charles*, *Atkins*, and *Stabb* applied settled precedent to new facts or announced a new principle of law. Thus, McGhee implicitly asks this Court to conclude that such an application of retroactivity principles is compatible with a *Strickland* analysis. For the reasons set out below, we conclude it is not.

Strickland's performance prong requires this Court to assess trial counsel's performance based on prevailing professional norms *at the time* of the contested conduct. *Strickland*, 466 U.S. at 689-90. At the outset, this appears incompatible with the notion of retroactivity.

McGhee disclaims that he is asking this Court to judge his trial counsel's conduct based on future case law. Instead, McGhee suggests the practical effect of applying these cases retroactively in an ineffective assistance of counsel claim is only that a post-conviction court can assume the direct appeal would have been successful. Applied

here, McGhee argues, the Court of Special Appeals on direct review of McGhee's conviction would have held that the failure to object to a CSI-effect voir dire question was reversible error, had it had the benefit of *Charles*, *Atkins*, and *Stabb*. It necessarily follows (according to McGhee) that his counsel provided constitutionally deficient performance.

McGhee's argument thus verges into the second *Strickland* prong, the prejudice prong. McGhee argues this is appropriate when evaluating trial counsel's failure to preserve an issue for appeal. In such a situation, the "performance and prejudice prongs naturally overlap because the questions of whether counsel's performance was adequate and whether it prejudiced the petitioner both will turn on the viability of the omitted claims." *Gross v. State*, 371 Md. 334, 350 (2002).

However, it does not follow from *Gross* that we consider "the viability of the omitted claims" based on case law that did not exist at the time of the attorney's challenged performance. To the contrary, doing so is inconsistent with *Strickland*. McGhee has identified no post-*Strickland* precedent of the Supreme Court or this Court that would countenance such an application of the *Strickland* test.

The Supreme Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), informs our analysis. In *Fretwell*, a defendant received a death sentence based on an aggravating circumstance (murder committed for pecuniary gain), *id.* at 366, which was improper under then-existing law because the aggravating circumstance was also an element of the underlying crime. *Collins v. Lockhart*, 754 F.2d 258, 265 (8th Cir. 1985) (holding such "double counting" was impermissible), *overruled in Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989). By the time the defendant brought his habeas corpus petition alleging

ineffective assistance of counsel, *Collins* had been overruled by *Perry*. *Fretwell*, 506 U.S. at 368. Thus, the Supreme Court considered which law the federal district court should have applied to an ineffective assistance of counsel claim on collateral review: the law as it existed at the time of Fretwell's trial (*Collins*) or the law as it existed when Fretwell's post-conviction petition was filed (*Perry*). Notably, the parties had agreed that trial counsel's conduct was deficient under *Strickland*'s performance prong, so the Court's inquiry was focused solely on the prejudice prong. *Id.* at 369 n.1.

The Supreme Court held that defense counsel's failure to object to the pecuniary gain aggravating factor did not prejudice the defendant, even if the objection would have been meritorious at the time of the trial and direct appeal. The Court distinguished between the performance and prejudice prongs of the *Strickland* test for purposes of its analysis:

> Respondent argues that the use of hindsight is inappropriate in determining "prejudice" under *Strickland*, and that this element should be determined under the laws existing at the time of trial. For support, he relies upon language used in *Strickland* in discussing the first part of the necessary showing—deficient performance. We held that in order to determine whether counsel performed below the level expected from a reasonably competent attorney, it is necessary to "judge ... counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066.
>
> Ineffective-assistance-of-counsel claims will be raised only in those cases where a defendant has been found guilty of the offense charged, and from the perspective of hindsight there is a natural tendency to speculate as to whether a different trial strategy might have been more successful. We adopted the rule of contemporary assessment of counsel's conduct because a more rigid requirement "could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Ibid.* But the "prejudice" component of the *Strickland* test does not implicate these concerns. It focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally

> unfair. Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him. As we have noted, it was the premise of our grant in this case that *Perry* was correctly decided, *i.e.*, that respondent was not entitled to an objection based on "double counting." Respondent therefore suffered no prejudice from his counsel's deficient performance.

Id. at 371-72 (citation omitted). The *Fretwell* Court's reiteration of the importance of contemporaneous assessment of counsel's conduct under the performance prong is significant. *See also Williams v. Taylor*, 529 U.S. 362, 391 (2000) (observing that *Fretwell* did not "modif[y] or in some way supplant[] the rule set down in *Strickland*").

McGhee relies on dicta in *Allen v. State*, 204 Md. App. 701 (2012), to support the applicability of a retroactivity analysis in this context. The *Allen* Court considered whether the *Atkins* and *Stabb* holdings applied to cases that were pending on direct appeal at the time *Atkins* and *Stabb* were decided. *Id.* at 706. The intermediate appellate court answered this question affirmatively. *Id.* at 721-22. McGhee focuses on dicta in *Allen* which suggested – based on *Denisyuk* – that *Atkins* and *Stabb* also would apply retroactively to cases on collateral review:

> In *Denisyuk*, a post conviction appeal, the Court of Appeals concluded that the Supreme Court's decision in *Padilla v. Kentucky*, —— U.S. ——, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), that defense counsel is constitutionally ineffective by failing to advise a criminal defendant that deportation is a likely consequence of a guilty pleas, applied settled principles to new factual situations, and thus, it applied to convictions that were final. 422 Md. at 481-82, 30 A.3d 914.... The *Denisyuk* analysis and result appears to be applicable to *Atkins* and *Stabb*.

Id. at 723.

We disagree with this dictum in *Allen* to the extent it might be thought to apply to an ineffective assistance of counsel claim. The potential application of *Charles*, *Atkins*, and

Stabb retroactively is inconsistent with a proper analysis under *Strickland*'s performance prong. Adopting McGhee's argument, in practice, would require attorneys not only to comply with prevailing professional norms of the time, but also to predict future developments in case law. Neither the Sixth Amendment of the United States Constitution nor Article 21 of the Maryland Declaration of Rights imposes such a requirement on counsel. *See, e.g.*, *Strickland*, 466 U.S. at 690; *State v. Calhoun*, 306 Md. 692, 735 (1986) ("There was no duty on counsel to foresee that we might hold as we held in [future] case[s]."); *State v. Davis*, 249 Md. App. 217, 230 (2021) (post-conviction court erred in applying this Court's 2014 holding in *Pearson v. State*, 437 Md. 350 (2014), retroactively when assessing trial counsel's performance in 2007); *Toledo v. United States*, 581 F.3d 678, 681 (8th Cir. 2009) ("Counsel is not accountable for unknown future changes in the law."). We do not read *Denisyuk* as holding otherwise.[5] Accordingly, we decline McGhee's request to apply *Charles*, *Atkins*, and *Stabb* in assessing the performance prong of McGhee's ineffective assistance of counsel claim.[6]

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[5] Notably, this Court abrogated *Denisyuk* in *Miller v. State*, 435 Md. 174 (2013), following the Supreme Court's holding in *Chaidez v. United States*, 568 U.S. 342 (2013), that *Padilla v. Kentucky* does not apply retroactively to cases on collateral review. In any event, we agree with the analysis of *Denisyuk* that the State provided in its brief: "The issue in *Denisyuk* was not that defense counsel should have predicted *Padilla*'s holding about what constitutes ineffective assistance – it was that defense counsel should have known that Denisyuk's plea would subject him to deportation under statutory law that was perfectly clear at the time of the plea.... [*Denisyuk*] does not involve whether counsel is ineffective for failing to predict future legal developments."

[6] Because we conclude that a retroactivity analysis is inapplicable in this context, we do not decide whether *Charles*, *Atkins*, and *Stabb* articulated a new principle of law or applied settled precedent to new facts.

B. Application of the *Strickland* Test to Trial Counsel's Failure to Object to the CSI-Effect Voir Dire Question at McGhee's Trial

The right to effective assistance of counsel aims to ensure a fair trial. As such, 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.

The petitioner bears the burden to overcome the presumption of effective assistance of counsel by satisfying both prongs of the *Strickland* test. Failure to prove either of the two *Strickland* prongs is fatal to the claim. *State v. Syed*, 463 Md. 60, 75 (2019) (citing *Strickland*, 466 U.S. at 687). As explained below, we hold that McGhee failed to meet his burden to prove that his trial counsel's failure to object to a CSI-effect voir dire question in 2007 fell below an objective standard of reasonableness. Because McGhee has not satisfied the first prong of the *Strickland* test, we decline to address the question of prejudice.

When scrutinizing counsel's conduct, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. A "fair assessment of attorney performance requires" a court to "reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time," considering all the surrounding circumstances. *Newton v. State*, 455 Md. 341, 355 (2017) (quoting *Strickland*, 466 U.S. at 689). In conducting this analysis, the court "must be highly deferential" and take care to avoid "the distorting effects of hindsight." *Strickland*, 466 U.S. at 689.

As McGhee bears the burden to overcome the presumption of reasonableness, we now consider the arguments and evidence he presented: (1) that any reasonable attorney should have extrapolated from *Evans* the need to object to a CSI-effect voir dire question; (2) that McGhee's trial counsel acted contrary to her express trial strategy; and (3) that other objective indicia indicate counsel's conduct was objectively unreasonable. We conclude that, under the totality of the circumstances, McGhee has failed to meet his burden to overcome the presumption of effective assistance of counsel.

1. Case Law in 2007

First, McGhee directs our attention to the only reported opinion at the time of McGhee's trial in 2007, *Evans v. State*.[7] As discussed above, in *Evans* the Court of Special Appeals in dicta discerned no error in the trial court's instruction to the jury that "there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case." *Evans*, 174 Md. App. at 562, 570. This opinion, notably, did not use the phrase "CSI effect." Yet McGhee contends that any reasonable attorney should have extrapolated from *Evans* that they were required to object to a CSI-effect voir dire question. We disagree.

In order to satisfy McGhee's standard of objectively reasonable representation, an attorney in December 2007 would have to have been familiar with the budding controversy surrounding CSI-effect jury instructions. They would have to have been aware of the one Court of Special Appeals opinion from May 2007 that touched on the CSI effect, but

[7] The Court of Special Appeals issued its opinion in *Evans* on May 3, 2007. McGhee's trial occurred in December 2007.

without referring to it as the "CSI effect." Assuming they were familiar with the *Evans* opinion, the attorney would have to have looked past the fact that the *Evans* Court *upheld* the CSI-effect jury instruction in that case. They also would have to have looked past the fact that the intermediate appellate court's discussion of this issue was dicta. From there, they would have to have extrapolated that dicta related to jury instructions also applied to voir dire questions. We do not believe it is reasonable to expect an attorney in December 2007 to have made all of these connections.

However, McGhee notes that defense counsel in *Charles* objected to a similar voir dire question in a trial that occurred at approximately the same time as McGhee's trial. McGhee contends that his trial counsel therefore should have known to object as well. While Charles's attorney apparently had the knowledge and foresight in December 2007 to object to a CSI-effect voir dire question, we are not prepared to say that dicta in *Evans* set a "prevailing professional norm," such that the failure to object rendered McGhee's counsel's performance constitutionally deficient in late 2007. As the Court of Special Appeals noted in *Armstead*, merely showing that some attorneys were objecting and others were not does not establish a prevailing professional norm. *See Armstead*, 235 Md. App. at 422-23.

The logical conclusion of McGhee's argument is that *any attorney* who failed to object to a CSI-effect message between the time *Evans* was decided in 2007 and 2010, when this Court decided *Atkins*, provided constitutionally deficient representation. McGhee attempts to avoid this "floodgate" effect by pointing this Court to McGhee's

post-conviction hearing, in which his trial counsel testified about her trial strategy. We consider this argument next.

2. Trial Counsel's Strategy

During the post-conviction hearing, McGhee's trial counsel testified that the defense at trial was that "Mr. McGhee was not the shooter in the incident, that he was not present at the place and time in which the decedent was killed." McGhee contends it was clear that a voir dire question that insinuated the State need not present forensic evidence to obtain a conviction undermined his defense counsel's express trial strategy. Thus, McGhee argues, even if it was not generally a professional norm at the time to object to a CSI-effect voir dire question, his attorney should have recognized that the CSI-effect voir dire question the trial court put to McGhee's potential jurors might prejudice McGhee.

However, trial counsel's theory of the case that McGhee was not the perpetrator does not change matters. Trial counsel's testimony at the post-conviction hearing does not overcome the presumption that her conduct fell within "the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 689. As discussed above, *Evans* would have led a reasonably competent attorney to believe that an objection to the voir dire question at issue would not have been meritorious. *See Armstead*, 235 Md. App. at 406 (explaining that, at the time of Armstead's trial in 2009, CSI-effect voir dire was permissible, and arguably even "favored," under Maryland law).[8]

[8] At oral argument, McGhee contended that counsel's objection to a jury instruction concerning specific investigative techniques demonstrates that she knew or should have known CSI-effect messages were problematic in voir dire. However, counsel objected to the specific investigative techniques jury instruction not based on the contention that it

In response, McGhee argues that, separate and apart from *Evans*, other objective indicia lead to the conclusion that a reasonably competent attorney in 2007 should have known to object to a CSI-effect voir dire question. We now consider that contention.

3. Other Objective Indicia

Although there were no Maryland cases in 2007 that would have suggested that CSI-effect voir dire questions were inappropriate, McGhee may attempt to meet his burden to show that his counsel's performance violated professional norms by directing our attention to other sources, such as news articles and scholarly articles, to the extent such sources shed light on the general consciousness of defense counsel in 2007. In *Charles*, this Court conducted a review of the state of literature and case law related to the CSI effect in and around 2007. 414 Md. at 731-32. Of the articles the *Charles* Court located, only one law review article and two news articles were published before McGhee's trial. *See* Cynthia Di Pasquale, *Beyond the Smoking Gun*, THE DAILY REC. (Sept. 7, 2006), available at https://perma.cc/Y2G8-LX52 (noting a potential danger to prosecutors, while observing that "[d]efense attorneys don't seem to know what all the fuss is about"); Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 YALE L.J. POCKET PART 70 (2006) (advocating that "judges acknowledge the CSI effect and take steps during voir dire to prevent biased jurors from improperly influencing the jury"); Jeffrey Toobin, *The CSI*

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would relieve the State of its burden of proof, but rather because the trial court had ruled that the State would be permitted to introduce expert testimony concerning DNA evidence, and therefore the instruction was not warranted under the circumstances.

Effect: The Truth About Forensic Science, The New Yorker (May 7, 2007), available at https://perma.cc/2NCV-U2EJ (criticizing forensic inductive sciences in general).

These articles do little to advance McGhee's argument. First, they show that Maryland defense attorneys in 2006 did not view the CSI effect as a problem, as they did not "seem to know what all the fuss [was] about." Second, if the CSI effect was generally known to any extent, it was understood to be a phenomenon that harms prosecutors, not defendants.

The Court of Special Appeals concluded in *Armstead* that it was not a prevailing professional norm at the time of Armstead's trial in March 2009 to object to CSI-effect voir dire questions. We find *Armstead*'s reasoning on this point to be persuasive. It follows that it was not a professional norm to object to a CSI-effect voir dire question when McGhee went to trial in December 2007, 15 months earlier.

In sum, we conclude that McGhee's counsel performed within the accepted professional norms of 2007, which did not require objecting to the CSI-effect voir dire question in this case. Thus, McGhee's claim of ineffective assistance of counsel fails on the performance prong, and we need not address McGhee's arguments concerning the prejudice prong.

IV

Conclusion

Because McGhee's trial occurred in December 2007, we do not assess his counsel's performance under *Charles*, *Atkins*, and *Stabb*, which were all decided in the years that followed. McGhee failed to demonstrate that, under the professional norms that existed at

the time of his trial, his attorney provided constitutionally deficient representation by failing to object to a CSI-effect voir dire question. Thus, the post-conviction court erred in determining that McGhee received ineffective assistance of counsel.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED; COSTS TO BE PAID BY PETITIONER.

Circuit Court for Prince George's County
Case No.: CT071096X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 638

September Term, 2020

STATE OF MARYLAND

v.

ANTONIO MCGHEE

Friedman,
Wells,
Eyler, James R.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Eyler, James R., J.

Filed: November 30, 2021

Appendix B

Following a December 2007 trial in the Circuit Court for Prince George's County, a jury found Antonio McGhee, appellee, guilty of first-degree murder. On January 8, 2008, the court sentenced appellee to life imprisonment. Appellee appealed to this Court, which affirmed the judgments of the circuit court. *McGhee v. State*, No. 2827, Sept. Term 2007 (filed June 23, 2009).

Thereafter, appellee filed a petition for post-conviction relief under the Maryland Uniform Postconviction Procedure Act, seeking to vacate his convictions. In his petition, appellee alleged two instances in which he had been denied his right to effective assistance of trial counsel: *first*, in failing to object to what has become known as a "CSI effect" voir dire question asked during juror selection; and *second*, for failing to object to missing or incomplete jury instructions.

On June 11, 2020, the post-conviction court, after holding a hearing on the petition, filed a memorandum opinion and order finding both of appellee's claims meritorious and granting post-conviction relief in the form of a new trial. The State then sought leave to appeal from the post-conviction court's judgment in this Court, which we granted.[1] We then transferred the case to our regular appellate docket. *State v. McGhee*, CSA-ALA-0473-2020.

In this appeal, the State of Maryland, appellant, raises two issues, which we have

[1] In his petition for post-conviction relief, appellee also raised a claim that he had been denied his right to effective assistance of appellate counsel for not raising a preserved issue on direct appeal of his conviction. Because the post-conviction court declined to grant appellee relief on that issue, the propriety of that ruling was not contained in the State's application for leave to appeal; therefore, it is not before us.

rephrased:

1. Did the post-conviction court err in concluding that appellee was denied his right to effective assistance of trial counsel when his trial counsel failed to object when the trial court asked a "CSI-effect" voir dire question during jury selection?

2. Did the post-conviction court err in concluding that appellee was denied his right to effective assistance of trial counsel when his trial counsel failed to object to missing or incomplete jury instructions?

For the reasons set forth below, we answer these questions in the affirmative, and therefore, we shall reverse the judgment of the circuit court.

FACTUAL BACKGROUND

On the evening of March 17, 2007, Keith Dreher, the victim, was shot and killed by a single sawed-off shotgun blast to the head while standing outside of a pizzeria smoking a cigarette.

Jerrone Joyner (Jerrone[2]), who, at the time of the shooting was the assistant manager of the pizzeria, testified at trial that he was outside smoking a cigarette with the victim when he heard a "chit chit," which sounded to him like a gun. He looked up, saw what appeared to him to be a "sawed off," and heard someone say "empty your pockets." Jerrone testified that he then slowly walked back inside. Although he acknowledged that he described the shooter to the police as between five feet seven to five feet nine inches tall, wearing a black coat and blue jeans, dark skinned, with perhaps a goatee, he testified that he did not, and could not, identify him. He also testified that he did not remember telling the police that he saw appellee and the victim inside the pizzeria on the night of the

[2] We refer to some of the witnesses by their first names for clarity.

shooting.

Detective Paul Dougherty testified at trial that he took a statement from Jerrone on the day of the shooting. In that statement, which Jerrone signed, Jerrone said that both the victim and appellee were in the restaurant for approximately 20 minutes prior to the shooting. In addition, the detective testified that Jerrone told him that, if the police could show him a photograph of the shooter, "he would guarantee" that he could identify him.

Demetrius Young (Young) testified that he went to the pizzeria on the night of the shooting to meet Shamell Joyner (Shamell) to go to a party. He said that he saw appellee, who he knew as "Dip," ask the victim for a cigarette, who said "he ain't had none." The victim then left the pizzeria and "Dip" followed him. About two minutes later, Young heard what he believed to be a gunshot.

Shamell was at work making pizzas at the time of the shooting. He testified that he saw appellee, who he also knew as "Dip," in the pizzeria that night. He heard an argument in the pizzeria and testified that a "gunshot went off[, w]e turned around, saw there was blood[, t]hat's all I know." Four days after the shooting, on March 21, 2007, Shamell accompanied Detective Michael Delaney to an elementary school and pointed out "Dip" to the detective.

Several other police officers responded to the elementary school at Detective Delaney's request for assistance in apprehending appellee. When two plain-clothes police officers with their badges around their necks identified themselves to appellee and his companion, and asked them to talk, appellee ran. The police officers radioed this information to Detective Delaney.

Detective Wayne Martin overheard on the radio that appellee had fled and testified that he gave chase when he saw appellee running. He also said that he saw a gun protruding from appellee's clothing. When appellee was eventually apprehended and searched, there was no gun. The police searched the area and found a sawed-off shotgun on the ground in a wooded area behind the elementary school where appellee had been seen running. Detective Martin testified that the shotgun "appeared to be the same gun" that he had seen protruding from appellee's clothing.

Susan Lee, a firearms examiner, testified that the firearm recovered by the police, a bolt-action 20-gauge shotgun, was operable. The shotgun had two unspent shells in its magazine. She explained that she took apart the unspent shells to examine the shot pellets and wadding. In her opinion, the wadding and shot pellets recovered from the victim's head during an autopsy were consistent in their design and construction with the wadding and shot pellets she found inside the shotgun shells that she disassembled. Moreover, the wadding recovered from the autopsy was consistent with 20-gauge wadding. Because no fired shells were found at the scene of the shooting, the firearms examiner could not positively state that the shotgun recovered by police after they chased appellee was the one used in the shooting.

After appellee was arrested, the police photographed him and created a photographic array. A month after the shooting, on April 17, 2007, police detectives showed the photographic array to Jerrone who selected appellee's photograph and, according to Detective Andre Brooks, said "I'm a hundred percent that's the one who shot the victim." Detective Delaney said that, before selecting appellee's photograph, Jerrone

asked "was that the guy," to which the Detective responded, "I couldn't tell you that. I wasn't there." Then Jerrone said "that's him[, t]hat's the guy that did it." At trial, Jerrone testified that he only selected appellee's photograph because appellee was the only person in the array that he did not recognize. He also testified that he never told the police that appellee was the shooter. In fact, Jerrone testified that he "never seen nobody shoot nobody."

Detective Delaney testified that, on April 5, 2007, he, along with another police detective, visited appellee in the detention center to execute a court ordered DNA search warrant on appellee. After Detective Delaney asked appellee whether he had an attorney, appellee responded that he believed that his family had retained an attorney, but he thought "they would be wasting their money because [the police] got the pump."[3] Detective Delaney testified that he believed that the "pump" was a reference to the sawed-off shotgun that the police recovered after the chase that resulted in appellee's arrest.

The State also presented evidence that the shotgun had been inspected for fingerprints and DNA. Mark Danus, a forensic analyst, testified at trial that there was not enough DNA on the shotgun to do a genetic profile, and Mertina Davis, a fingerprint specialist, testified at trial that the fingerprints recovered from the shotgun were not usable.

Dayontae Duncan (Duncan) testified for the defense that he knew appellee from the

[3] This statement of appellee was suppressed prior to trial because of a *Miranda* violation. However, after appellee testified inconsistently with the statement on direct examination, the State called the detective as a rebuttal witness to testify to appellee's prior statement to impeach appellee's credibility. A statement obtained by a *Miranda* violation may be used as impeachment evidence. *Harris v. New York*, 401 U.S. 222 (1971).

neighborhood and was with appellee on the night of the shooting. According to Duncan, he met appellee and several others at a party around 7:45 p.m. on March 17, 2007. The group remained at the party for approximately two and a half hours. Appellee then accompanied Duncan back to Duncan's house where the two went to bed. Duncan testified that appellee went to bed early because he had a toothache. On cross-examination, Duncan testified that his brother had called him the day after the shooting and reported that appellee had been "apprehended with a gun." He also testified that he was not asked to be an alibi witness until seven months after the shooting.

Appellee testified in his own defense that, on the evening of the shooting, he was playing basketball with friends when someone called one of his friends and told him about a party. The group then met Duncan at the party a little before 8 p.m. where they "chilled ... for a little while; ate some food and then ... left." Appellee testified that he went to Duncan's house after the party. Regarding his arrest a few days later, appellee testified that he did not have a gun on him when he ran from the police. In addition he said that he ran from the police "[b]ecause recently in the past times around the neighborhood, the police have been coming around our neighborhood harassing young dudes because of the colors we wear, and I had on blue that day[,] I guess they think we are in gangs." On cross-examination, however, he testified that he ran from the police because he did not know who they were at first, did not see their badges hanging around their necks, and did not hear them announce themselves as police officers. He denied making any statement to the effect that his family was wasting its money on a lawyer because the police had the "pump." Lastly, appellee denied going to the pizzeria where the shooting took place on March 17,

2007.

DISCUSSION

In *State v. Smith*, 223 Md. App. 16, 26–27 (2015), this Court set forth the applicable standard for reviewing claims of ineffective assistance of counsel on appeal from a grant of post-conviction relief:

> The Sixth Amendment to the United States Constitution guarantees all criminal defendants the right to the assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984). Both the United States Supreme Court and the Court of Appeals have recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970); *Mosley v. State*, 378 Md. 548, 557 (2003). In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish that trial counsel's performance was constitutionally deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687; *Mosley*, 378 Md. at 557.
>
> In discerning whether counsel's performance was deficient, we start with the presumption that he or she "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690; *Bowers v. State*, 320 Md. 416, 421 (1990). Our review of counsel's performance is "highly deferential." *Kulbicki v. State*, 440 Md. 33, 46 (2014). We look to whether counsel's "representation fell below an objective standard of reasonableness." *Harris v. State*, 303 Md. 685, 697 (1985). We assess reasonableness as of "the time of counsel's conduct." *Strickland*, 466 U.S. at 690.
>
> To satisfy the prejudice prong of *Strickland*, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The ultimate inquiry is whether "'counsel's errors were so serious as to deprive [the petitioner] of a fair trial, a trial whose result is reliable.'" *Oken v. State*, 343 Md. 256, 284 (1996) (quoting *Strickland*, 466 U.S. at 687).
>
> Determinations by the post-conviction court regarding ineffective assistance of counsel claims are mixed questions of law and fact. *State v. Purvey*, 129 Md. App. 1, 10 (1999). We will not disturb the factual findings

> of the post-conviction court unless they are clearly erroneous. *Evans v. State*, 151 Md. App. 365, 374 (2003); *State v. Jones*, 138 Md. App. 178, 209 (2001). We will make our own independent analysis, however, based on our own judgment and application of the law to the facts, of whether the State violated a Sixth Amendment right. *Jones*, 138 Md. App. at 209. Absent clear error, we defer to the post-conviction court's historical findings, but we conduct our own review of the application of the law to the defendant's claim of ineffective assistance of counsel. *Evans*, 151 Md. App. at 374 (citing *Cirincione v. State*, 119 Md. App. 471, 485 (1998)).

Thus, to prevail on a claim of ineffective assistance of counsel, a convicted defendant must show both that counsel's performance was deficient and that prejudice resulted.

I.

On the first day of appellee's December 2007 trial, during jury selection, the trial court asked, without objection, the following voir dire question:

> Does any member of this panel believe that the State has got to present fingerprint evidence, DNA, blood sample evidence, ballistic evidence, any scientific evidence in order to convince you of the defendant's guilt? In other words, do you think the State has a requirement to do that in all cases?

Such voir dire questions have been referred to as "CSI effect" questions and have been rejected by this Court and the Court of Appeals.

In *State v. Armstead*, 235 Md. App. 392 (2018), in a petition for post-conviction relief, the defendant claimed that he was denied his right to effective assistance of counsel when his trial counsel failed to object to a "CSI effect" voir dire question propounded during his trial. The post-conviction court granted Armstead relief. This Court reversed the post-conviction court's grant of relief because it determined that Armstead had not established that prevailing professional norms required his trial counsel to object to the voir

dire question at the time of his March 2009 trial. *Id.* at 424-25.

In *Armstead* we recounted the history of the appellate decisions discussing the "CSI effect," as follows:

> A CSI effect jury message received its initial reported appellate analysis in Maryland in *Evans v. State*, 174 Md. App. 549 (2007), which involved a *jury instruction*. It re-surfaced next in the context of a *voir dire question* in *Drake & Charles v. State*, 186 Md. App. 570 (2009), *rev'd sub nom. Charles & Drake v. State*, 414 Md. 726 (2010). Since then, the implications of CSI effect jury messages have tasked repeatedly both of our appellate courts to consider the potential for prejudice on the minds of jurors.
>
> As relevant to this appeal, *Stabb* [*v. State*, 423 Md. 454, 472 (2011)] and *Atkins* [*v. State*, 421 Md. 434 (2011)] (the present day standard-setters) make clear, based on the "inconclusive state of the scholarly legal and/or scientific research taken as a whole," that Maryland disapproves of preemptive anti-CSI messages to the venire or the empaneled jury. *Stabb*, 423 Md. at 473 (to the extent that such an instruction is requested, its use ought to be confined to situations where it responds to correct pre-existing overreaches by the defense, i.e., a curative instruction. The Court of Appeals may revisit the appropriateness of CSI messages when tailoring an "appropriate response through *voir dire* questions and/or jury instruction" when a demonstration of scholarly research has become more abundant); *State v. Stringfellow*, 425 Md. 461, 473–74 n. 4 (2012) ("*Stabb* and *Atkins* discuss when it may be permissible for courts to *pose a voir dire question* or a jury instruction to counter what has been referred to popularly as the 'anti-CSI effect.' Suffice it to say; these cases hold that it is erroneous to pose such a question or instruction as a pre-emptive measure." (emphasis added)). There must be, at minimum, some form of relevant misstatement(s) of law or conduct by counsel for the court to issue an appropriate and curative CSI effect jury instruction or similar anticipatory grounds to ask a *voir dire* question. *See Hall v. State*, 437 Md. 534, 540–41 (2014). Moreover, counsel's mere reference to, or argument regarding (or announced intent to argue), the absence or insufficiency of the State's scientific evidence to meet its burden of proof to convict a criminal defendant does not warrant automatically the court's issuance of a CSI message. *See Robinson v. State*, 436 Md. 560, 580 (2014).
>
> *Stabb*, "with a [clairvoyant] nod to the future," noted that there might be situations where CSI effect messages may be appropriate. *Stabb*, 423 Md. at 473. When those situations arise, the message must be neutral, i.e., the

> message must not convey to the jury that their only option is to *convict*, even if no forensic evidence linking the defendant to the crime(s) is adduced by the State. The message should (at least) include language indicating that a not guilty verdict is an alternative. *See Charles & Drake*, 414 Md. at 738, (noting the language of the *voir dire* question was not neutral, "using the term 'convict,' solely, rather than including its alternative"); *Samba v. State*, 206 Md. App. 508, 534 (2012) ("the anti-CSI effect instruction was fatally flawed for not advising the jury to *consider the lack of forensic* evidence in evaluating reasonable doubt").

235 Md. App. at 412–15 (footnotes omitted).

As noted earlier, appellee claimed in his petition for post-conviction relief that he was denied his right to effective assistance of counsel because his trial counsel erred in failing to object to the "CSI effect" jury voir dire question. In making this argument, appellee relied on *Charles & Drake v. State*, 414 Md. 726 (2010) and *McFadden & Miles v. State*, 197 Md. App. 238 (2011) – in which the appellate Courts held that the trial courts should not have given a voir dire question similar to the one in this case – and *Atkins v. State*, 421 Md. 434 (2011) and *Stabb v. State*, 423 Md. 454 (2011), in which the Courts held that the trial courts should not give preemptive "CSI effect" jury instructions.

Addressing the two voir dire decisions, the post-conviction court in this matter reasoned as follows:

> Petitioner cites to decisions made in *Charles & Drake* and *McFadden* which concluded the venire is poisoned by CSI effect voir dire questions, depriving Defendants of fair and impartial juries. However, *State v. Armstead*, 235 Md. App. 392 (2018) held *Charles & Drake* and *McFadden* holdings do not apply retrospectively, and therefore would not apply to Petitioner's 2007 trial. Although at the time of Petitioner's trial, the CSI question was allowed, the Court believes the question must still be analyzed based on its prejudicial effect on the jury.
>
> "When a trial court injects erroneously a CSI effect voir dire question, in order for a court to find harmless error, the court must be satisfied beyond

> a reasonable doubt that the abuse of discretion was harmless." *Armstead* at 425 (citing *Hall v. State*, 437 Md. at 540; *State v. Stringfellow*, 425 Md. at 474). To pass the *Strickland* prejudice prong, "the record must demonstrate that the reference to a lack of scientific evidence was not material to the contested issue." *Armstead*, at. 426. In the present case, the lack of scientific evidence was material to the question of Petitioner's guilt as the eye-witness who previously identified Petitioner as the one who shot the victim recanted on the stand. No forensic evidence tied Petitioner to the commission of this crime.
>
> In cases where the CSI question was given but was deemed harmless error, the prejudice injected by the question was subsequently ameliorated either by the trial judge or the attorneys. *Armstead*, at 427. *See Stringfellow* where the trial judge permitted Defendant's attorney during closing, over State's objection, to make the argument that the police officer's failure to request testing of the confiscated handgun for latent fingerprints created reasonable doubt. That is not the case in this trial. The jury instructions were woefully inadequate, and did not ameliorate any potential prejudice caused by the CSI instruction.

As earlier referenced, claims of ineffective assistance of counsel are governed by a two-part test, under which the petitioner bears the burden of demonstrating: (1) that counsel's performance was deficient; and (2) that, as a result, the petitioner was prejudiced. *Barber v. State*, 231 Md. App. 490, 515 (2017) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). We need not reach one part of the test if the other is dispositive; here, our analysis will focus on deficiency. *Armstead*, 235 Md. App. at 408 n.8 (2018) (citing *Strickland*, 466 U.S. at 697).

The post-conviction court effectively wrote the performance prong out of the *Strickland* standard. After recognizing that the "CSI effect" cases are not fully retroactive, and after recognizing that "at the time of Petitioner's trial, the CSI question was allowed," the court analyzed the prejudice prong of *Strickland*, stating that "the Court believes the question must still be analyzed based on its prejudicial effect on the jury."

As noted in *Armstead*, "[i]t has long been established that an attorney is not required ordinarily to be prescient as to changes in the law and act accordingly." *Armstead*, 235 Md. App. at 422 (citing *Maryland v. Kulbicki*, 577 U.S. 1 (2015) (*per curiam*); *Unger v. State*, 427 Md. 383, 409 (2012)). The party claiming ineffective assistance of counsel must therefore present "evidence establishing that the prevailing professional norm at the time of his trial was to object" and if no such evidence is presented we assume "that counsel's conduct fell within a broad range of reasonable professional judgment." *Armstead*, 235 Md. App. at 422-23 (cleaned up).

As can be discerned from the earlier recitation of the history of the "CSI effect" jury instruction and voir dire question cases, the only "CSI effect" case that had been decided at the time of appellee's December 2007 trial was *Evans v. State*, 174 Md. App. 549 (2007) in which this Court approved of a "CSI effect" jury instruction. As in *Armstead*, appellee presented no evidence establishing that the prevailing professional norm at the time of his trial was to object to "CSI effect" messages to the venire or jury. Consequently, we conclude that trial counsel's failure to object to the trial court's "CSI effect" voir dire question in this case was not deficient performance. *Armstead*, 235 Md. App. at 422-23.[4]

[4] Appellee also relied on *Allen v. State*, 204 Md. App. 701 (2012), in which this Court stated that *Atkins* and *Stabb* did not announce a new constitutional or statutory rule but rather applied settled constitutional guarantees to a new and different actual pattern. Thus, the holdings applied to all convictions. *Id.* at 722. Appellee argued that *Allen* stands for the proposition that *Atkins* and *Stabb* apply to this case. In *Armstead*, this Court rejected that exact argument and distinguished *Allen* from *Armstead*, pointing out that Allen was on direct appeal. In this case, the post-conviction court recognized this aspect of *Armstead* and, accordingly, ruled that the holdings of those cases were not to be given retrospective (continued...)

II.

As noted earlier, in his petition for post-conviction relief, appellee contended that he was denied his right to effective assistance of counsel when his trial counsel failed to object to missing or incomplete jury instructions. Those instructions were from Chapter 3 of the Maryland Criminal Pattern Jury Instructions titled "Evidentiary Instructions." Specifically, appellee contends the trial court did not give instructions MPJI-Cr 3:00 "What Constitutes Evidence," MPJI-Cr 3:18 "Statement of Defendant," and MPJI-Cr 3:30 "Identification of Defendant." In addition, according to appellee, the trial court left a sentence out of MPJI-Cr 3:19 "Prior Statements."

The post-conviction court agreed with appellee's argument and vacated his convictions for this reason in addition to the lack of objection to the "CSI effect" voir dire question. The post-conviction court failed to apply the *Strickland* test. Under that test, as noted earlier, the defendant has the burden to prove that (1) trial counsel made a serious attorney error, and (2) that the defendant suffered prejudice. *Strickland*, 466 U.S. at 687. We address below the post-conviction court's *Strickland* analysis of each of the jury instructions that appellee claims his trial counsel should have objected to, which, as previously mentioned, we review *de novo*. *Evans*, 151 Md. App. at 374.

A. MPJI-Cr 3:00 "What Constitutes Evidence"

The version of MPJI-Cr 3:00 "What Constitutes Evidence" in effect at the time of

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application. The appellee claims that *Armstead* was wrongly decided. Regardless of the result, we are bound by *Armstead*.

appellee's 2007 trial was as follows:

> In making your decision, you must consider the evidence in this case; that is
>
> (1) testimony from the witness stand;
>
> (2) physical evidence or exhibits admitted into evidence;
>
> (3) [stipulations;]
>
> (4) [depositions;]
>
> (5) [facts that I have judicially noticed.]
>
> In evaluating the evidence, you should consider it in light of your own experiences. You may draw any reasonable inferences or conclusions from the evidence that you believe to be justified by common sense and your own experiences.
>
> The following things are not evidence and you should not give them any weight or consideration:
>
> (1) charging document;
>
> (2) inadmissible or stricken evidence;
>
> (3) questions and objections of counsel.
>
> The charging document in this case is the formal method of accusing the defendant of a crime. It is not evidence against the defendant and must not create any inference of guilt.
>
> Inadmissible or stricken evidence must not be considered or used by you. You must disregard questions that I did not permit the witness to answer and you must not speculate as to the possible answers. If after an answer was given, I ruled that the answer should be stricken, you must disregard both the question and the answer in your deliberations.
>
> During the trial, I may have commented on the evidence or asked a question of a witness. You should not draw any inferences or conclusions from my comments or questions, either as to the merits of the case or as to my views regarding the witness.
>
> Opening statements and closing arguments of lawyers are not evidence in this case. They are intended only to help you to understand the

> evidence and to apply the law. Therefore, if your memory of the evidence differs from anything the lawyers or I may say, you must rely on your own memory of the evidence.

The post-conviction court addressed appellee's contention that his trial counsel should have objected to the trial court's failure to give the foregoing instruction as follows:

> MPJI-Cr 3:00, what constitutes evidence, is an essential jury instruction to aid in the proper deliberation of evidence in a case. Jurors consist of twelve people off the street who invariably have no formal legal training. Jurors must be directed to adhere to the law, and must be instructed as to which law to apply during deliberations, or they won't know what to do or what to consider.

That terse analysis does not sufficiently address either prong of *Strickland*. In any event, under our own independent appraisal of the claim, we discern neither deficient performance nor prejudice resulting from the failure to object. Although the trial court did not give this precise pattern instruction, most, if not all, of its content was given to the jury either in preliminary instructions at the outset of trial, or during the jury instructions prior to closing arguments.

At the outset of trial, the trial court told the jury:

> Now, in a minute or two you're going to hear opening statements from these lawyers and that's important. Opening statements are, but it's not evidence. So what you hear in opening statements is not evidence in the case. The only evidence that you are to consider is what comes from that witness stand in the form of answers.
>
> Questions are not evidence. The answers are. Sometimes there's an objection. It's my job to rule on objections. If an objection is made and I sustain the objection, it shouldn't be answered. Sometimes it is. Sometimes witnesses blurt out an answer to which I have sustained an objection. I have to ask you to strike it from your minds because it's not evidence. Same way with physical evidence. Physical evidence are documents, usually, and photographs and what not that you may see in this trial. But until that physical evidence is admitted, it's not something that you can use and deliberate on.

So it's got to be admitted into evidence before it becomes evidence. Those are pretty basic rules, but I want to explain that to you because that's what you base your decision on.

Eventually when you get this case, you will take into that jury room with you the evidence that you have heard and seen, the physical evidence that ha[s] been admitted and, of course, your own common sense and life experiences. All of that belongs in the deliberative process.

***

[A]t the end of the case you're going to hear what we call closing argument from counsel. They're going to talk to you about the case. And that's important, too, but it's not evidence. If your minds differ from something they say in closing arguments, you make the call collectively.

Moreover, the instructions that the trial court gave the jury just prior to closing arguments included the following:

When you deliberate, you base your decision on the evidence that you've heard and seen, the evidence that's been admitted into evidence. A lot of these documents and physical evidence have been [referred] to but not admitted, so don't ask me for them if you don't get them.

The case is over. And you take that with you and you take your own common sense and life experiences. You put that all together and that's how you arrive at a verdict.

***

You have heard and seen witnesses. You have to judge their credibility.

***

Also, there's a couple kinds of ways of looking at evidence. Direct evidence, you've all heard of. Eyewitness testimony. But there's another kind of evidence that's just as important and in the eyes of the law, carries just as much weight as direct evidence, and that's what we call indirect or sometimes called circumstantial evidence. A good example, you go to bed at night. The ground is dry. You get up in the morning. No snow. Circumstantial evidence.

***

> Now you've heard some talk about stipulations. That's evidence. I made that pretty clear at the time the stipulations were made.

Finally, after the State objected to a portion of appellee's closing argument, the trial court repeated its instruction to the jury that the closing argument was not evidence.

A comparison between what the trial court actually instructed the jury about what constituted evidence and the pattern instruction reveals that nearly every applicable aspect of the pattern instruction was included in what the trial court told the jury. Appellee points out the reference in the pattern instruction to the charging document, which was not covered by the actual instruction, but the charging document was not introduced into evidence. Trial counsel did not err in failing to object to the court's failure to have used the pattern instruction.

B. MPJI-Cr 3:18 "Statement of Defendant" & MPJI-Cr 3:19 "Prior Statements"

The following statements provide the context for these issues.

The State introduced into evidence Jerrone's pre-trial identification of appellee and a written statement by him to the police. The trial court advised the jury that they could consider the statements as substantive evidence.

In the defense's case, after appellee testified that he never mentioned a "pump" to police, the State introduced appellee's prior statement to police. Because appellee's prior statement to police had been suppressed because of a *Miranda* violation, the statement was admissible for impeachment.

Appellee argued to the post-conviction court that his attorney's performance was deficient in that the attorney did not object to the court's failure to advise the jury that

Jerrone's written statement was admitted only to assist the jury in determining whether to credit his trial testimony.

The trial court did not advise the jury that appellee's statement was admissible only on the issue of credibility. Defense counsel did not object, and the failure to object was not raised before the post-conviction court.

Because the post-conviction court blended the analysis of the court's failure to give both of these instructions, we will address them together. The version of MPJI-Cr 3:18 "Statement of Defendant" in effect at the time of appellee's 2007 trial provided as follows:

> Evidence has been introduced that the defendant made a statement to the police about the crime charged. The State must prove beyond a reasonable doubt that the statement was freely and voluntarily made. A voluntary statement is one that, under all circumstances was given freely. To be voluntary it must have not been compelled or obtained as a result of any force, promises, threats, inducements or offers of reward. In deciding whether the statement was voluntary, consider all of the circumstances surrounding the statement, including:
>
> (1) the conversations, if any, between the police and the defendant;
>
> (2) whether the defendant was warned of [his] [her] rights;
>
> (3) the length of time that the defendant was questioned;
>
> (4) who was present;
>
> (5) the mental and physical condition of the defendant;
>
> (6) whether the defendant was subjected to force or threat of force by the police;
>
> (7) the age, background, experience, education, character and intelligence of the defendant;
>
> [(8) whether the defendant was taken before a district court commissioner without unnecessary delay following arrest and, if not, whether that affected the voluntariness of the statement;]

(9) any other circumstances surrounding the taking of the statement.

[If you find that the statement was actually made, you may not consider it unless you find, beyond a reasonable doubt, that the statement was voluntary.]

If you find beyond a reasonable doubt that the statement was voluntary, give it such weight as you believe it deserves. If you do not find beyond a reasonable doubt that the statement was voluntary, you must disregard it.

The version of MPJI-Cr 3:19 "Prior Statements" in effect at the time of appellee's 2007 trial stated as follows, with the portion that the trial court omitted in italics:

PRIOR STATEMENTS

You have heard testimony that _____ made a statement [before trial] [at another hearing] [out of your presence]. Testimony concerning that statement was permitted only to help you decide whether to believe the testimony that the witness gave during this trial.

It is for you to decide whether to believe the trial testimony of _____ in whole or in part, *but you may not use the earlier statement for any purpose other than to assist you in making that decision.*

The post-conviction court addressed appellee's contentions that his trial counsel should have objected to the trial court's failure to give MPJI-Cr 3:18 "Statement of Defendant" and failure to include the last sentence of MPJI-Cr 3:19 "Prior Statements" as follows:

The record shows the trial Court allowed a prior statement of Defendant to be admitted into evidence when Detective Delaney testified that during a visit with Petitioner in the County Detention Center, he blurted out that [he] believed his family would be wasting their time hiring an attorney because the police already had the "pump," meaning the shotgun. Transcript Dec. 5, 2007 Vol. II, pg. 99-101. The given instruction on MPJI-Cr 3:19, Prior Statement of a Witness was meaningless without the last part instructing the jurors on "you may not use the earlier statement for any purpose other than to assist you in making that decision." The jury also should have been given the instruction on determination of the voluntariness

of the defendant's statement, which is explained in MPJI-Cr 3:18.

With respect to MPJI-Cr 3:18, appellee claims, and the post-conviction court found, that appellee was denied his right to effective assistance of counsel when trial counsel failed to object to the trial court's failure to give MPJI-Cr 3:18 which concerns the voluntariness of appellee's statement to the police that he believed his parents were wasting money hiring a lawyer because the police had recovered the "pump," meaning the shotgun.

In order to generate that instruction, the defense needed to put forth some evidence that the statement was made involuntarily. *See Hof v. State*, 337 Md. 581, 620 (1995) ("So long as there is some evidence which supports the defendant's claim that his confession was involuntary, the issue has been generated."). At appellee's trial, the defense never raised the issue that appellee's statement about the "pump" was involuntary. To the contrary, appellee testified that he never made the statement, not that he made it involuntarily. While it is true that appellee was in a room with two detectives who were there to execute a search warrant for appellee's DNA when he made the statement, the statement was, only barely, if at all, the product of the detective's question about whether appellee had an attorney. In short, if the instruction was generated, and if appellee's attorney had requested it and the trial court had given it, we are not persuaded that appellee was prejudiced. In sum, we conclude that appellee has not demonstrated error or prejudice within the contemplation of *Strickland* and its progeny.

Appellee also claims that his trial counsel erred in not objecting to the trial court's failure to give the last sentence of MPJI-Cr 3:19 which would have told the jury that they "may not use the earlier statement for any purpose other than to assist you in" determining

the credibility of the witness.[5]

With respect to Jerrone, a failure to instruct would have to rely on the fundamental premise that all of Jerrone's prior statements were admissible into evidence solely for impeachment purposes. To the contrary, his prior written statement and his oral identification of appellee as the shooter were admissible as substantive evidence. *See Nance v. State*, 331 Md. 549, 569 (1993); Md. Rule 5-802.1(b); and Md. Rule 5-802.1(c).

Consistent with those theories of admissibility, the trial court instructed the jury as follows:

> You also have heard testimony about Jerrone Joyner, that he made a written statement prior to trial and an oral statement of identification prior to trial. The written statement was introduced into evidence. The prior written statement as well as the oral statement of identification may be considered by you as what we call testimonial evidence, substantive evidence. It's for you to decide whether to believe the trial testimony of Jerrone Joyner in

[5] In his post-conviction petition, appellee complained that the trial court erroneously omitted the italicized portion of the instruction, and reasoned that appellee was prejudiced by this omission because, at trial, *Jerrone* was impeached with a prior inconsistent statement. At trial, Jerrone denied identifying appellee as the shooter, yet a police detective testified to a prior inconsistent statement whereby Jerrone positively identified appellee as the shooter. Under those circumstances, according to appellee, the jury, without the benefit of the final sentence of the jury instruction, allowed the jury to consider appellee's prior inconsistent statement as substantive evidence and not only as impeachment evidence.

The post-conviction court apparently believed that the subject of the instruction was *appellee*. The post-conviction court reasoned that appellee was prejudiced because the jury was left to believe that appellee's statement, that his family was making a mistake in hiring a lawyer because the police had the "pump," which he denied making at trial, was the statement at issue for this instruction. The finding that the subject of the prior statement jury instruction was appellee is clearly erroneous. Jerrone Joyner was the subject of that instruction.

On appeal, appellee now argues, consistent with the post-conviction court's ruling, that the subject of the prior statement instruction was him. Given that, during the post-conviction proceedings, appellee never raised this issue with respect to *his* prior statement, we decline to address it on appeal.

> whole or in part, and/or whether to believe the prior written statement in whole or in part, and/or whether to believe the oral statement of identification in whole or in part.

Hence, at least as far as Jerrone's prior statements are concerned, there was nothing objectionable about giving the instruction the trial court gave and not giving the one that appellee complains about. Trial counsel did not err with respect to this instruction.

C. MPJI-Cr 3:30 "Identification of Defendant"

The version of MPJI-Cr 3:30 "Identification of Defendant" in effect at the time of appellee's 2007 trial stated as follows:

> The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it. You have heard evidence regarding the identification of the defendant as the person who committed the crime. In this connection, you should consider the witness's opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness's state of mind, and any other circumstance surrounding the event. You should also consider the witness's certainty or lack of certainty, the accuracy of any prior description, and the witness's credibility or lack of credibility, as well as any other factor surrounding the identification. [You have heard evidence that prior to this trial, a witness identified the defendant by _____.]
>
> [The identification of the defendant by a single eyewitness, as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant. However, you should examine the identification of the defendant with great care.]
>
> It is for you to determine the reliability of any identification and give it the weight you believe it deserves.

The post-conviction court addressed appellee's contention that his trial counsel should have objected to the trial court's failure to give the foregoing instruction as follows:

> MPJI-Cr 3:30, identification of the defendant, was possibly one of the most important instructions in the present case, outside of MPJI-Cr 3:00. The evidence in the present case was largely circumstantial and the eyewitness

> identification of the defendant as the shooter in the murder of the victim was paramount to the State's case. Without a doubt, the key eyewitness, Mr. Jerrone Joyner, recanted on the stand his eye witness' testimony and directly contradicted his prior written and oral statements. Transcript Dec. 4, 2007 Vol. I, pg. 145 line 21-23. Jury instructions MPJI-Cr 3:19[6] on how the jury was to consider the eyewitnesses' testimony before and during the trial was imperative and should have been given to the jury.

The first sentence of the pattern instruction was fairly covered by the trial court's reasonable doubt jury instruction and its alibi jury instruction. In both of those instructions, the jury was reminded that the State had the burden to prove appellant's criminal agency.

Moreover, the remainder of the pattern instruction was fairly covered when the trial court instructed the jury on how to assess witness testimony even though the court's instructions were not specifically tied to the identification of appellee. The trial court instructed the jury as follows:

> You have heard and seen witnesses. You have to judge their credibility. That's your call. . . . How do you really assess the credibility of a witness? Well, we have some factors for you that might help. One is simply by looking at the witness and observing his or her demeanor and manner of testifying.
>
> Did the witness have a motive not to tell the truth, is a factor. Was the witness's testimony consistent[?] What was the accuracy of the witness's memory? Did the witness have some interest in the outcome of the case? Was the witness's testimony supported or contradicted by other evidence in the case? And did the witness have the ability to perceive the act about which the witness is testifying. And whether the witness in[-person] testimony before the court differed from something the witness said on some prior occasion.
>
> You don't have to believe the testimony of any witness, even though the witness's testimony is uncontradicted. So you can believe all, part or none of the testimony of any witness.

[6] We can only assume this is intended to reference MPJI-Cr 3:30.

As can be seen, although the court's instructions did not specifically address the identification of appellee, the instructions told the jurors to consider a variety of factors when assessing testimony of witnesses, including their demeanor, motive to tell the truth, the consistency and accuracy of their testimony, whether their testimony is contradicted by other evidence, and their ability to perceive what they are testifying about.

While it is true that, under some circumstances, the failure to give the MPJI-Cr 3:30 jury instruction upon request could amount to an abuse of discretion, *Gunning v. State*, 347 Md. 332 (1997), it does not follow that the failure to object to the trial court's failure to give such an instruction automatically amounts to deficient performance. Under the circumstances of this case, we conclude that trial counsel's failure to object was not deficient performance.

D. Prejudice

Lastly, the post-conviction court offered the following remarks at the conclusion of its analysis:

> The absence of these instructions in a trial where defendant has adamantly denied being the shooter, and the one person who allegedly stated he was, gives conflicting and inconsistent testimony, was key to his conviction. The State is correct, it is always speculative as to what the outcome of a trial would have been absence [sic] errors. But to characterize the evidence against Petitioner in this case as compelling and quite strong regardless of these missing instructions, and the CSI voir dire question, are without merit. This Court cannot fathom how the absence of giving these standard four instructions correctly did not have a prejudicial impact on the outcome of this trial. Petitioner is entitled to a fair trial, and due to the ineffectiveness of his trial counsel, did not receive one.

The post-conviction court's analysis presumes that appellee was prejudiced. Such a presumption is reserved for rare circumstances that are not present here. In fact, not even

a structural error, which is presumptively prejudicial on direct appeal, is necessarily presumptively prejudicial on a claim of ineffective assistance of counsel. *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). In *Weaver*, the Supreme Court had the opportunity to determine that all structural errors are presumptively prejudicial, but chose not to do so. *Id.* at 1911. In any event, none of the purported errors in this case constitute structural errors.

Although Jerrone recanted his identification to the police of appellee as the shooter at trial, the evidence of guilt was substantial. The State admitted into evidence Jerrone's prior written statement wherein he described appellee and said that he was in the pizzeria before the shooting, and that he saw the shooter with a sawed-off shotgun. The State's case also included evidence that Jerrone had identified appellee in a photographic array, which he explained with the comment that he only picked appellee's photograph because appellee was the only person in the array that he did not know. Two other witnesses, who were both familiar with appellee and knew him as "Dip," testified that appellee was in the pizzeria just prior to the shooting. One of them testified that "Dip" followed the victim outside. The other said that he heard an argument before the shooting.

Police officers testified that four days after the shooting, appellant ran when they approached him. One of them saw him with a firearm. After appellee was apprehended, the police found a sawed-off shotgun along appellee's path. That shotgun was of the same gauge, had the same size shot, and had the same wadding as the shotgun shell remnants removed from the victim's head during the autopsy.

The State presented evidence that appellee made a seriously incriminating

statement after being asked whether he had an attorney and appellee indicated he believed his family was wasting its money because the police had recovered the "pump." As the prosecutor noted during closing argument, in order to believe appellee's testimony that he never was in the pizzeria on the night of the shooting, multiple State's witnesses, including police officers, would have been testifying to the same lie.

To succeed on a claim of ineffective assistance of counsel, in addition to proving deficient performance of counsel, a defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Armstead*, 235 Md. App. at 425 (quoting *State v. Sanmartin Prado*, 448 Md. 664, 681-82 (2016)). Given the state of the evidence at appellee's trial, we are not persuaded that there is a reasonable probability that the result of his trial would have been different absent any of the alleged errors of counsel.

Consequently, we shall reverse.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. COSTS TO BE PAID BY APPELLEE.

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No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Antonio L. McGhee — PETITIONER
(Your Name)

VS.

State of Maryland — RESPONDENT(S)

PROOF OF SERVICE

I, Antonio L. McGhee #2971730 #348-865, do swear or declare that on this date, Feb 6th, 2023, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

States Attorney For Prince Georges County
14735 Main Street, Suite M3403
Upper Marlboro Maryland 20772

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Feb 6th, 2023

Antonio L McGhee
(Signature)