Circuit Court for Prince George's County
Case No. CT072422X

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 176

September Term, 2022

STATE OF MARYLAND

v.

ANDRE M. BEASLEY

Reed,
Shaw,
Albright,

JJ.

Opinion by Reed, J.

Filed: January 30, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

On August 11, 12, and 13, 2008, the Circuit Court for Prince George's County conducted a jury trial for Appellee, Andre Michael Beasley ("Beasley"). The State of Maryland ("State") charged Beasley with: (1) First-Degree Murder of Frank Abercrombie; (2) Use of a Handgun in the Commission of a Crime of Violence; and (3) Carrying a Handgun. The jury found Beasley guilty on all charges. On October 10, 2008, Beasley received the following sentences: "Count 1, an aggregate term of life; Count 2, 20 years to run consecutive to Count 1; with Count 3 merging into Count 2." On October 14, 2008, Beasley filed a motion for reconsideration of sentence, which was denied by the trial court on November 6, 2008. Beasley filed a notice of appeal on October 14, 2008, and this Court affirmed the circuit court's judgment in an unreported opinion.[1] Subsequently, Beasley filed for post-conviction relief at the trial court level. The Circuit Court for Prince George's County held a post-conviction hearing on May 20, 2021. There, Beasley argued that he received ineffective assistance because his trial counsel failed to object to a two-part "strong feelings" voir dire question and asked the Circuit Court to grant his petition for post-conviction relief. On November 24, 2021, the post-conviction court found in favor of Beasley, granting him a new trial. We granted the State's application for leave to appeal the decision of the post-conviction court.

In bringing their appeal, the State presents one question for appellate review:

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[1] *See Andre Michael Beasley v. State*, No. 2000, Sept. Term 2008 (Md. Ct. Spec. App. July 28, 2010). Subsequently, Beasley filed a petition for writ of certiorari on August 27, 2010, which was denied by the Supreme Court of Maryland. *See Andre Beasley v. State*, 417 Md. 126 (2010).

> I. Did the post-conviction court err in finding trial counsel ineffective for not objecting to a voir dire question that asked whether any member of the panel was "so offended by the alleged offense as to be unable to render a fair and impartial verdict?"

For the reasons outlined below, we reverse the decision of the post-conviction court.

FACTUAL & PROCEDURAL BACKGROUND

On August 29, 2007, Vincent Green ("Green") drove Frank Abercrombie ("Abercrombie") and Beasley, to a 7-11 store in Clinton, Maryland. Outside the 7-11, Abercrombie was shot multiple times, after an altercation, and subsequently passed away from his gunshot wounds. Police recovered footage from the 7-11 security cameras that captured portions of the altercation. The recording showed two men running in front of the 7-11 store with one man following the other. After looking at the footage, Green and Lahronda Brown ("Brown"), Green's sister, told police officers that Abercrombie and Beasley were the two men in the video. Specifically, Ms. Brown identified Beasley as the man chasing after the second man, that she identified as the decedent, Abercrombie.

As stated above, Beasley was ultimately charged with the murder of Abercrombie. Prior to trial, Beasley filed a motion to suppress Brown's testimony identifying Beasley. Beasley argued that her identification violated Maryland Rule 5-701, arguing that the rule "prohibits a lay witness from offering inferences or conclusions that the jury is capable of drawing for itself."[2] Beasley argued that Brown's testimony supplanted the role of the jury

[2] Md. Rule 5-701 states:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences

to decide who appeared in the video. The circuit court disagreed with Beasley's argument and denied the motion to suppress.

Jury selection for Beasley's trial began on August 11, 2008. During the voir dire process, the trial court asked the following question: "As I mentioned earlier, this case involved the charge of murder. Is there any member of . . . the panel who is so offended by the alleged offense as to be unable to render a fair and impartial verdict?" One person answered in the affirmative to this question and responded that they may not be able to be impartial "because of my judgment." During jury selection, the trial judge found a *Batson* violation and ultimately declared a mistrial.[3] Before the second venire, the trial court again presented the voir dire questions, including the subject of the instant appeal: "Is there any member of the panel who is so offended, as I mentioned previously this is a murder charge, is any of the panel so offended by the alleged offense as to be unable to render a fair and impartial verdict?" Six members of the jury panel responded alternatively that they could not be fair and impartial and were excused.[4]

At trial, the defense again objected to Green and Brown testifying to the identification of the persons in the video. The circuit court ruled that although Brown was

> which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

[3] The trial court found that six of the fourteen defense strikes were of Caucasian venire members. Therefore, the court found these strikes were racially motivated in violation of *Batson* and declared a mistrial. *See Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

[4] Jurors 29, 37, 40, 46, 50, and 57 responded to the question in the affirmative and were questioned individually by the trial court.

not an expert, her ability to watch the video and identify the parties was like anyone else who can look at a photo and identify the parties within in it, and as such, her identification of Beasley was allowed. Ultimately, the jury found Beasley guilty of first-degree murder and the two related handgun charges.

In his prior appeal, Beasley asked this Court to determine whether the circuit court violated Maryland Rule 5-701, which prohibits lay witnesses from offering inferences or conclusions that the jury can draw themselves, and challenged the sufficiency of the evidence. *Andre Michael Beasley v. State*, No. 2000, Sept. Term 2008, slip op. at 2–3 (Md. Ct. Spec. App. July 28, 2010). In reviewing Beasley's first contention, we applied principles from *Ricks v. State*, 312 Md. 11 (1988) and *Tobias v. State*, 37 Md. App. 605 (1977) to affirm the circuit court's decision to allow Green and Brown's video testimonies. *Id.* at 12. Particularly, we reasoned that "common sense teaches that witnesses with such familiarity are better able than jurors who lacdk [sic] such familiarity to identify whether it was Beasley following Abercrombie in the video." *Id.* at 13. And as such, because Green and Brown were "intimately familiar" with Abercrombie and Beasley's appearance, they should be able to identify them. *Id.* In sum, we reasoned that the circuit court did not abuse its discretion by including Brown and Green's testimony because such evidence would be helpful to the jury. *Id.*

Secondly, we affirmed the circuit court's decision and concluded that the evidence at trial was sufficient to convict Beasley of first-degree murder. *Id.* at 15. We held that a jury could have rationally found that Beasley shot Abercrombie. *Id.* In considering the totality of the circumstances, such as Green's testimony that Beasley and Abercrombie

rode with him to the 7-11; Beasley's fingerprint's on Green's car; and the 7-11 camera footage, a jury could rationally find that Appellant shot the decedent. *Id.* at 14–15.

Subsequently, on January 2, 2018, Beasley submitted a Pro-Se Petition for Post-Conviction relief, which the State responded to on March 19, 2019. On January 24, 2020, Beasley submitted a Supplemental Post-Conviction Petition, and a Second Supplemental Post-Conviction Petition on January 27, 2021, which the State responded to on March 25, 2021.

On May 20, 2021, the Circuit Court for Prince George's County held a post-conviction hearing on Beasley's various contentions that he received ineffective assistance of counsel. Particularly, Beasley asked the circuit court to assess whether his trial counsel's failure to object to the compound question constituted ineffective assistance of counsel.

During the post-conviction hearing, Beasley's trial counsel, Robert Moscov, testified that he recalled the question to the panel and did not object because he "didn't see anything objectionable to it." As of August 2008, at the time of Beasley's trial, Moscov worked as a criminal defense lawyer for eight years and had tried about five to ten murder cases.

On November 24, 2021, the circuit court issued a written order and opinion granting Beasley's petition and awarding him a new trial. The post-conviction court ruled that trial counsel's failure to object to the compound "strong feelings" question constituted

ineffective assistance of counsel.[5] The post-conviction court concluded that Beasley's trial counsel's performance satisfied both aspects of the *Strickland* standard for ineffective assistance, specifically that counsel's performance was deficient, and that Beasley suffered prejudice as a result of such performance. The court reasoned that the "strong feelings" question posed to the jury panel in the instant case was similar to the question in *Dingle*. *Dingle v. State*, 361 Md. 1 (2000). Therefore, the compound form of the question "improperly shifted the burden to the individual jury member to determine their own impartiality." In the court's estimation, counsel's "failure to object" to this question qualified as deficient performance.[6] As for the prejudice prong, the post-conviction court reasoned that the jury pool was tainted by those individuals who determined themselves to be impartial. This taint was not cured by the trial court and continued into the impaneled jury. The court ultimately concluded that Beasley was prejudiced by his counsel's failure to object to the question.

The State applied for leave to appeal the post-conviction court's ruling. On March 29, 2021, this Court granted the State's application and transferred this case to its regular docket.

STANDARD OF REVIEW

[5] The post-conviction court also concluded that Beasley's trial counsel committed ineffective assistance when he failed to file a petition for a three-judge panel. The State did not appeal this facet of the post-conviction court's decision. Therefore, we will not address this issue.

[6] We note that Beasley's counsel proposed the voir dire question at issue in the instant case.

We review a post-conviction court's conclusion regarding ineffective assistance of counsel as "a mixed question of law and fact." *State v. Syed*, 463 Md. 60, 73 (2019) (citing *Newton v. State*, 455 Md. 341, 351 (2017)). We review the factual findings of the post-conviction court for clear error. *Id.* (citation omitted). We review the legal conclusions *de novo*. *Id.* (citation omitted). We exercise our "own independent analysis" as to the reasonableness and any prejudice of trial counsel's conduct. *Id.* (quoting *Oken v. State*, 343 Md. 256, 285 (1996)).

DISCUSSION

A. Parties' Contentions

The State argues that the post-conviction court erred by misapplying the two-pronged *Strickland* test. Specifically, the State contends that Beasley's trial counsel was "not deficient for not objecting" to the strong feelings question because compound voir dire questions were allowable at the time of Beasley's trial. In support of this proposition, the State relies on *State v. Davis*, 249 Md. App. 217 (2021), *cert. denied*, 474 Md. 637 (2021). Secondly, the State argues that Beasley failed to prove actual prejudice, and as such, did not satisfy the *Strickland* test. Finally, the State asks this Court to reverse the post-conviction court's decision.

Beasley contends that the post-conviction court's judgment is correct according to *Dingle v. State*, 361 Md. 1 (2000). He argues that the trial court is not authorized to shift their burden of determining juror bias to the individual juror. As such, Beasley argues that the post-conviction court properly concluded that his trial counsel's performance was deficient. Beasley presents a litany of Maryland jurisprudence to support his contention

that shifting the burden to decide impartiality onto members of the jury panel had been disavowed at the time of his trial. Also, Beasley contends that *Davis* is distinguishable in the instant case. Beasley asks this Court to affirm the post-conviction court's judgment.

B. Analysis

I. <u>Ineffective Assistance of Counsel Standard of Review</u>

The Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights grant a criminal defendant the right to effective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984); *see also Harris v. State*, 303 Md. 685, 695 n.3 (1985); *Mosley v. State*, 378 Md. 548, 556 (2003). In *Strickland*, the United States Supreme Court articulated a two-part test to analyze an ineffective assistance of counsel standard in a death penalty case. 466 U.S. at 687. The Court held that for an ineffective assistance claim, the defendant must show: (1) "that counsel's performance was deficient"; and (2) "that the deficient performance prejudiced the defense." *Id.* The defendant bears the burden of proving both elements to prevail. *Id.*

Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Counsel's performance is analyzed by considering "reasonableness under prevailing professional norms." *Id.* at 688. Additionally, the defendant must show that the counsel's actions or omissions did not constitute "sound trial strategy." *Id.* at 689 (internal quotation and citation omitted). Upon review, a court must be "highly deferential" to trial counsel's performance and ultimately determine "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688–89. In resolving a deficient

performance analysis, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

Prejudicial performance "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. The Supreme Court further stated "[t]he 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. Maryland courts have stated that prejudice may be presumed in three circumstances: "(1) the petitioner was actually denied the assistance of counsel; (2) the petitioner was constructively denied the assistance of counsel; or (3) the petitioner's counsel had an actual conflict of interest." *Ramirez v. State*, 464 Md. 532, 541 (2019). If prejudice is not presumed, the defendant must prove "either: (1) a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; or (2) that the result of the proceeding was fundamentally unfair or unreliable." *Syed*, 463 Md. at 86 (quoting *Newton*, 455 Md. at 355).

II. Review of Voir Dire Jurisprudence

Before we turn to the merits of the instant appeal, we will give a summary of the convoluted landscape of voir dire jurisprudence in Maryland. A defendant is entitled to "an impartial jury." U.S. Const. amend. VI; Md. Decl. of Rts. Art. 21. Maryland uses a system of "limited voir dire", which is intended "to ensure a fair and impartial jury by determining the existence of cause for disqualification." *Washington v. State*, 425 Md. 306, 312 (2012)

(internal citations omitted). Generally, the trial court is empowered with "broad discretion" in conducting voir dire. *Dingle*, 361 Md. 13–14.

We will begin with the decision in *Dingle* by Maryland's highest state court.[7] In *Dingle,* the Supreme Court of Maryland held that the trial court abused its discretion in asking compound questions during voir dire that shifted the responsibility to decide bias from the trial court to the potential jurors themselves. *Id.* at 21. The trial court asked the jury pool:

> Have you or any family member or close personal friend ever been a victim of a crime, and if your answer to that part of the question is yes, would that fact interfere with your ability to be fair and impartial in this case in which the state alleges that the defendants committed a crime?

Id. at 5. The Court reasoned that such a voir dire inquiry "allows, if not requires, the individual venire person to decide his or her ability to be fair and impartial." *Id.* at 21. Instead of being a process where a potential juror self-evaluates any potential bias, the trial judge must "evaluate whether such persons are capable of conducting themselves impartially." *Id.* Compound questions such as the one in *Dingle* "distort[] and frustrate[]" the chief purpose of voir dire. *Id.*

Following their decision in *Dingle*, the Supreme Court was confronted with another voir dire issue in *State v. Thomas*, 369 Md. 202 (2002). In *Thomas*, the trial court refused to ask the following question during voir dire: "Does any member of the jury panel have such strong feelings regarding violations of the narcotics laws that it would be difficult for

[7] On December 14, 2022, the name of the Court of Appeals was changed to the Supreme Court of Maryland. *See* Md. Rule 1-101.1(a).

you to fairly and impartially weigh the facts at a trial where narcotics violations have been alleged?”[8] *Thomas*, 369 Md. at 204. The Court concluded that the trial court should have asked the question because the question was “aimed at uncovering a venire person’s bias because of the nature of the crime.” *Id.* at 214. In a footnote, the *Thomas* Court disagreed with the interpretation of the Appellate Court of Maryland and noted that the compound phrasing of the proposed question was “appropriate” because “the inquiry [was] into the state of mind or attitude of the venire with regard to a particular crime.” *Id.* at 204 n. 1. Furthermore, the Court said, “[w]e do not share the intermediate appellate court’s interpretation of *Dingle* as it relates to this case and, this, we do not believe the guidance it offers is necessary.” *Id.* In other words, “the state of the law appeared to be that *Dingle* did *not* apply to a ‘strong feelings’ compound question.” *Davis*, 249 Md. App. at 226 (emphasis in original). The Supreme Court relied on *Thomas* in another case in 2002. *See Sweet v. State*, 371 Md. 1, 9–10 (2002). In *Sweet*, the Court reiterated their holding in *Thomas* and held that the trial court abused its discretion when it declined to ask a compound “strong feelings” question during voir dire.[9] *Id.* The Court reasoned that the

[8] We will refer to this form of voir dire questioning as a compound “strong feelings” question “because it essentially combines two questions: one regarding whether the prospective juror has strong feelings about the charges; and, if so, one regarding whether those strong feelings would make it difficult for the prospective juror to be fair and impartial.” *Collins v. State*, 463 Md. 372, 377 (2019) (citing *Pearson v. State*, 437 Md. 350, 362 (2014)).

[9] The defendant requested that the trial court ask the jury panel: “Do the charges stir up strong emotional feelings in you that would affect your ability to be fair and impartial in this case?” *Sweet*, 371 Md. at 9.

proposed question was aimed at uncovering potential biases in the venire pool and should have been allowed. *Id*. at 10.

Following their decision in *Thomas* and *Sweet*, the Supreme Court turned to another voir dire issue in *White v. State*, 374 Md. 232 (2003). In *White*, the Court held the trial court did not abuse its discretion in using compound questions during voir dire when each individual juror was subjected to intensive individual voir dire.[10] *Id.* at 248. The Court

[10] In *White*, the trial court asked the following questions during general voir dire:

> Is there any prospective juror, or a relative of a prospective juror who has ever been employed in any fashion at any time by any type of law enforcement agency, either civilian or military, and because of that employment you believe that you could not render a fair and impartial verdict in this case? If your answer is yes, please stand now and give your juror call-in number only.
>
> Has any member of this jury panel ever served as a juror before either as a grand juror or a petit juror and, if so, that would render you incapable of making a fair and impartial verdict in this case, if you were selected? If you answer is yes, please stand now and give your juror call-in number only.
>
> Is there any prospective juror who has a relative, or you, yourself, who are presently or who formerly worked either as an attorney, a law clerk, a paralegal or attend a school relating to [the] field of law and because of that you believe you could not render a fair and impartial verdict in this case, if you were selected? If your answer is yes, please stand now and give your juror call-in number only.
>
> Is there any prospective juror who has any connection with the Maryland Crime Coalition, or other advocacy group or lobby group for victim rights or offender punishment, specifically handgun control, rape crisis counseling, victims rights organizations, for example, the Stephanie Roper Committee, child abuse advocates, spousal abuse, Mother Against Drunk Driving, Students Against Drunk Driving and, because of your participation with such an organization, you believe you could not render a fair and impartial verdict

reasoned that although the voir dire questions were in a compound form, the process of individual questioning after the general voir dire satisfied "the obligation and responsibility of the trial judge to ensure that the petitioner was tried by a fair and impartial jury." *Id.* at 239. The Court employed special attention to review the "record of the *voir dire* examination as a whole to determine whether the trial court abused its discretion." *Id.* at 243. Through *White*, the Supreme Court signaled that compound questions as contemplated by *Dingle* were impermissible during general voir dire but there were remedies that a trial court could take to ensure a fair and impartial jury. Notably, the Court did not address the specific issue of compound "strong feelings" questions in *White*.

In 2006, the Supreme Court considered a case regarding a trial court's refusal to propound a compound "strong feelings" question in a robbery case.[11] *Curtin v. State*, 393 Md. 593, 599–600 (2006). In *Curtin*, the defendant proposed the following voir dire question: "Does anyone have any strong feelings concerning the use of handguns that they would be unable to render a fair and impartial verdict based on the evidence?" *Id.* at 597. The trial court declined to pose this question to the jury panel. *Id.* On appeal, the Court distinguished the charges in this case from other cases that may evoke strong feelings,

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> in this case, if you were selected? If your answer is yes, please stand now and give your juror call-in number only.

White, 374 Md. at 237–38.

[11] Curtin was charged with three counts of robbery with a deadly weapon, three counts of robbery, six counts of first degree assault, six counts of the use of a handgun in the commission of a crime of violence, and one count of conspiracy. *Curtin*, 393 Md. at 596.

specifically, "child molestation" in *Sweet* and "narcotics possession" in *Thomas*. *Id.* at 609–10; *see also Thomas*, 369 Md. at 205; *Sweet*, 371 Md. at 9–10. The Court concluded that "[w]hether a venireman has strong feelings about handguns would not render him more or less likely to convict Mr. Curtin of the charges on the evidence presented at trial." *Id.* at 613. The Supreme Court ultimately affirmed our decision that concluded that the trial court did not abuse its discretion to refuse to pose the "strong feelings" question. *Id.* Five years later, the Supreme Court in *Shim* stated that "*Curtin* should . . . be limited to its facts" because the handgun question was not directly related to the charge of robbery. *State v. Shim*, 418 Md. 37, 52–53 (2011).

Beasley points this Court to *Stewart v. State*, 399 Md. 146 (2007), where the Supreme Court held that the trial court properly declined to pose a large amount of defendant's proposed voir dire questions to the venire. *Id.* at 157–58, 167. Notably, none of the fifty-two proposed voir dire questions that the trial court declined to ask were phrased as compound "strong feelings" questions.[12] *Id.* at 152–57. In reaching its conclusion, the Court relied on principles found in *Dingle* and *White* about the importance to ensure a fair and impartial jury.[13] *Id.* at 158. Of note, in a footnote, the Supreme Court advised:

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[12] Defendant's trial counsel proposed two voir dire questions that were phrased as "strong feelings" questions but withdrew both of them because they inadvertently referred to "narcotics violations" even though Stewart was not charged with any drug-related crimes. *Stewart*, 399 Md. at 154 n.1, 157 n.2.

[13] Chief Judge Bell dissented from the majority opinion. *Stewart*, 399 Md. at 168 (Bell, C.J., dissenting). He argued that this decision highlighted "a lack of consistency in this Court's ruling regarding voir dire questions." *Id.* (Bell, C.J., dissenting). Later, he

> [W]e think it sound practice, and one trial judges should follow, to ask prospective jurors, when asked to do so, whether the fact that the defendant is charged with a particular crime would affect their ability to be fair and impartial in the case or whether they have such strong feelings about the crime charged that they could not be fair and impartial and decide the case based solely on the evidence presented.

Id. at 167 n.6 (emphasis added). In this footnote, the Supreme Court signals that it is "sound practice" for the Court to ask a compound "strong feelings" question during voir dire and for counsel to propose such a question. *Id.*

In 2009, the Supreme Court dealt with an appeal from a voir dire process where the trial court asked seventeen questions consecutively and then individually called up each venireperson to inquire if they had any responses. *Wright v. State*, 411 Md. 503, 506 (2009). One of the seventeen questions was a compound "strong feelings" question: "[d]oes any member of the panel have such strong feelings concerning controlled dangerous substances, that is CDS, that you would be unable to render a fair and impartial verdict based on the evidence and the law as I instruct you?" *Id.* at 511. The Court noted that the trial court's method for voir dire "did not properly engage at least some members of the venire panel" and concluded that this process "traveled beyond the limits of its discretion." *Id*. at 508, 515. The Court did not comment on the particular phrasing of the voir dire questions and, specifically, did not confront the viability of compound "strong feelings" questions. *Id.* at 511–15. Instead, the Court reasoned that it was "the multiplicity of the questions that [was] problematic." *Id.* at 514. Ultimately, the Court vacated Wright's

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characterized the state of the case law surrounding voir dire in 2007 as a "confusing and increasingly inconsistent line of cases." *Id.* at 173 (Bell, C.J., dissenting).

conviction and remanded the case for a new trial. *Id*. at 515.

Next, the Supreme Court of Maryland returned to the issue of a compound "strong feelings" voir dire question in the context of a murder case in *State v. Shim*, 418 Md. 37 (2011).[14] The Court ruled that the trial court abused its discretion by refusing to ask a compound "strong feelings" question because it was aimed at uncovering potential biases. *Id.* at 54. The Court instituted a clearer rule for voir dire and stated, "we will require *voir dire* questions which are targeted at uncovering these biases." *Id.* Moreover, "[w]hen requested by a defendant, and regardless of the crime, the court should ask the general question, 'Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts.'" *Id.*

Three years later, in *Pearson v. State*, the Supreme Court reversed course and amended the holding in *Shim*. 437 Md. 350, 363 (2014). For the first time, the Court expressly stated that "in *Shim* and its parent cases, the 'strong feelings' *voir dire* questions' phrasing were at odds with *Dingle*." *Id*. at 363 (citing *Dingle*, 361 Md. at 21). Furthermore, the Court clarified that *Thomas*, *Sweet*, and *Shim* did not supersede *Dingle* and did not specifically address the phrasing of compound "strong feelings" questions. *Id*. at 363–64 The *Pearson* Court disavowed asking a compound "strong feelings" question "in a way that shift[s] responsibility to decide a prospective juror's bias from the trial court to the prospective juror." *Id.* at 363. The Supreme Court sets forth that the proper form for a

[14] Shim proposed the following voir dire question: "Does any member of the jury panel have such strong feelings concerning the violent death of another human being that you would be unable to render a fair and impartial verdict based solely on the evidence presented?" *Shim*, 418 Md. at 42.

"strong feelings" question is "[d]o any of you have strong feelings about [the crime with which the defendant is charged]?" *Id.* at 364. Furthermore, the Court clearly states that the strictures of *Pearson* only apply prospectively. *Id.* at 370.

The Supreme Court of Maryland reaffirmed their holding in *Pearson* and held that "the circuit court abused its discretion by asking compound 'strong feelings' questions and refusing to ask properly-phrased 'strong feelings' questions during *voir dire*" in *Collins v. State*. 463 Md. 372, 379 (2019).[15] Furthermore, the Court concluded that the trial court could not substitute other questions for a properly phrased "strong feelings" question or purge the improper question by later asking a non-compound "strong feelings" question after voir dire and opening statements have already concluded. *Id*.

Most recently, we addressed a voir dire issue in the context of a post-conviction case. *State v. Davis*, 249 Md. App. 217 (2021). In *Davis*, the defendant filed a petition for post-conviction relief and argued that his trial counsel was ineffective by failing to object to a compound "strong feelings" question during voir dire before his trial in 2007. *Id.* at 219–20. During voir dire, the trial court posed the following question: "The charges, as you may have heard involve an allegation of attempted murder. Does the nature—and also kidnapping. Do the nature of the charges themselves, just alone, stir up such strong emotional feelings in you that you cannot be a fair and impartial juror in this case?" *Id.* at 219. At the post-conviction hearing, Davis' trial counsel testified that he was aware of

[15] This case originated from a trial that occurred in 2017 and arose from a direct appeal, not from a petition for post-conviction relief. *Collins*, 463 Md. at 386.

Dingle at the time of the trial and he did not recall why he did not object to the question.[16] *Id.* at 220. The post-conviction court ruled that the voir dire question violated *Dingle*, trial counsel was deficient, and presumed prejudice to the defendant. *Id.*

On appeal, this Court traced the history of voir dire jurisprudence in Maryland to "pinpoint[] Mr. Davis' trial on [the] continuum." *Id.* at 223. Ultimately, we reversed the decision of the trial court. *Id.* at 231. We reasoned that at the time of Davis' trial on August 27, 2007, the state of the law was that compound phrasing of "strong feelings" questions were "appropriate." *Id.* at 229; *Thomas*, 369 Md. at 204 n.1. This Court further stated that *Thomas* was the leading case in 2007. *Davis*, 249 Md. App. at 228–29. It was not until *Pearson* in 2014 that Maryland's highest court concluded that compound formatting of "strong feelings" questions was in contravention of *Dingle*. *Id.* at 230; *Pearson*, 437 Md. at 363. We concluded that because *Thomas* was the leading case, Davis' counsel was not deficient by failing to object to the voir dire question. *Davis*, 249 Md. App. at 230. Finally, we declined to address the prejudice prong of *Strickland* after answering the question of deficient performance in the negative. *Id.* at 230–31.

III. Deficient Performance

Following our discussion of the convoluted body of voir dire case law in Maryland,

[16] Davis' trial counsel testified that "I can't think of a reason why I wouldn't object to [the question] in this case." *Davis*, 249 Md. App. at 220. He further stated that "there are instances where I know a question is a *Dingle* question and I make an affirmative decision not to object. I don't recall in this case so I would be speculating." *Id.* He testified that sometimes he would not object intentionally and it "[d]epends on the jury, it depends on the charge, it depends on sort of how the trial is proceeding." *Id.* During cross-examination, trial counsel stated that choosing to not object to a question is sometimes an intentional trial tactic and sometimes "the result of inattention." *Id.*

we return to the discrete issues of the instant case. As stated *supra*, the State contends that the post-conviction court erred when it concluded that Beasley's trial counsel was deficient. The post-conviction court relied on *Dingle* and concluded that the compound question in this case "improperly shifted the burden to the individual jury member to determine their own impartiality." The post-conviction court ruled that the improper compound question "demonstrated deficiency in performance under *Strickland*." There is no question that the question in this case would be improper today under *Pearson*. However, we must analyze counsel's performance "on the facts of the particular case, as of the time of counsel's conduct." *Strickland*, 477 U.S. at 690.

As a preliminary matter, we find that the question at issue more closely resembles a "strong feelings" question rather than the compound "victim of crime" question in *Dingle*.[17] Beasley argues that the phrasing of the question in the instant case is "facially invalid" and supports the conclusion that his trial counsel was deficient. He posits that the use of the words "offended" and "unable" was deficient. We do not find this argument to be persuasive. Although, the phrase "is any of the panel so offended" is different from the typical phrasing of a "strong feelings" question, the sentiment is similar. Likewise, the use of "unable to render a fair and impartial verdict" does not rise to the level of deficient

[17] The trial court posed the following question to the venire in *Dingle*: "Have you or any family member or a friend been the victim of a crime, and if the answer to that part of the question is yes, would that fact interfere with your ability to be fair and impartial in this case?" *Dingle*, 362 Md. at 5–6.

performance.[18]

The parties have diverging views on the precedential value that *Davis* has in this case. Beasley argues that *Davis* "overlooked" *White*, *Wright*, and *Collins* while the State posits that *Davis* is controlling in the instant appeal. In reaching our decision, we do not rely on our opinion in *Davis* but nevertheless find it to be helpful. We disagree with Beasley that our decision in *Davis* overlooked *White* and *Wright*. In *White*, the Supreme Court did not deal with the specific issue of "strong feelings" questions but instead four other compound questions that the trial court asked. *See White*, 374 Md. at 237. *White* does contain distillations of the Court's earlier statements in *Dingle* concerning the problem of questions that impose a duty on jurors to decide their own impartiality. However, the Court only analyzed compound questions having to do with prior employment (i.e., in law enforcement, legal field, etc.), prior jury service, and group participation not strong feelings relating to the charge. *Id.* at 237–38. The inherent problem in burden shifting *voir dire* questions, as first articulated in *Dingle*, was not applied to "strong feelings" questions until *Pearson* in 2014. Beasley's reliance on *Wright* is misplaced. In *Wright*, the Supreme Court's primary concern was the procedure of asking seventeen questions in a row to the jury panel. *Wright*, 411 Md. at 506. The Court concluded that this process hamstrung the trial court from being able to effectively test potential jurors for bias. *Id.* at 513. *White* and *Wright* present general ideals that are relevant to this appeal, but their specific issues are

[18] As examples, the term "unable" was used in voir dire questions in *Curtin*, *Wright*, and *Shim*. *Curtin*, 393 Md. at 595; *Wright*, 411 Md. at 511; *Shim*, 418 Md. at 39. The Court did not seize onto the term "unable" in any of these cases.

not germane to this case.

The state of the law at the time of Beasley's trial in 2008 allowed compound "strong feelings" questions during voir dire. Although *Dingle* was good law at the time of Beasley's trial, the landscape was much more convoluted regarding compound "strong feelings" questions. The most direct commentary on the issue from Maryland's highest court signaled that the usage of compound "strong feelings" questions was "appropriate" until the Supreme Court's definitive decision in *Pearson*. *Thomas*, 369 Md. at 204 n.1 (noting that it was "appropriate to phrase the question" as a compound "strong feelings" question). Five years later, in *Stewart*, the Court again noted that it was "sound practice" for trial judges upon request to ask, "whether the fact that the defendant is charged with a particular crime would affect their ability to be fair and impartial in the case or whether they have such strong feelings about the crime charged that they could not be fair and impartial?" *Stewart*, 399 Md. at 167 n.6. Admittedly, as the Supreme Court states in *Pearson*, *Thomas* and later cases did not address the phrasing of "strong feelings" questions directly but instead dealt with the question whether the refusal to ask the question was an abuse of discretion. *Pearson*, 437 Md. at 363–64. However, to a practitioner at the time of Beasley's trial, the Supreme Court had acknowledged the compound phrasing of "strong feelings" questions without confronting the perceived conflict with *Dingle*. Even though these comments by the Court were merely in footnotes, how was a practitioner to know that this form of questions was improper when the Supreme Court had not made such a

pronouncement and, indeed, would not until *Pearson* in 2014?[19]

Beasley advances a compelling argument that his trial counsel was deficient but ultimately, we disagree. Both the post-conviction court and Beasley conclude that the compound question improperly shifted the burden of deciding impartiality to members of the venire. This assertion is correct but incomplete in light of the scope of the legal landscape in 2008. The central tenets of *Dingle* were purportedly inconsistent with the phrasing of "strong feelings" questions at the time of Beasley's trial and in the actual posed question in his case. But most importantly, the burden-shifting analysis had not been applied to "strong feelings" questions in 2008. Maryland law had not advanced to the point of acknowledging that conflict. Therefore, we cannot impose the expectation on trial counsel after the fact to not propose the voir dire question. Particularly, when we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

By Beasley's arguments, we would hold his trial counsel to a standard that Maryland's highest court had not even conclusively held at the time of his trial in 2008. *See State v. Gross*, 134 Md. App. 528, 553 (2000), *aff'd*, 371 Md. 334 (2002) ("[C]ounsel is under no duty to anticipate a change in the case law" and on appeal, we analyze the performance of trial counsel based "upon the situation as it existed at the time of trial.")

[19] Although not dispositive of the issue, the Supreme Court of Maryland was still signaling approval of compound "strong feelings" questions in *Shim* in 2011. *Shim*, 418 Md. at 54 ("When requested by a defendant, and regardless of the crime, the court should ask the general question, 'Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts[?]").

(quoting *State v. Calhoun*, 306 Md. 692, 735 (1986)) (emphasis removed). Or as the Supreme Court of the United States said: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

We conclude that the state of the law in 2008 allowed compound "strong feelings" questions, even if it was not definitively blessed by Maryland's highest court. Applying an objective standard of reasonableness, Beasley's trial counsel's performance adhered to the prevailing professional norms at the time. Accordingly, we hold that Beasley's counsel's performance did not rise to the level of deficiency.[20]

IV. Prejudice

Turning to the prejudice prong, "there is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697; *see also Oken v. State*, 343 Md. 256, 284 (1996) (citing *Strickland*); *Newton v. State*, 455 Md. 341, 356 (2017) (analyzing only one prong of the *Strickland* standard). We decline to fully address the prejudice prong.

The State argues that the post-conviction court applied the wrong standard and improperly relied on *White*. The State contends that the case of *Ramirez v. State*, 464 Md. 532 (2019) applies in this case and Beasley did not prove "a reasonable probability of a

[20] Separately, we do agree with Beasley that the record does not support a conclusion that his trial counsel proposed the voir dire question as a part of specific trial strategy. Although Beasley's counsel had experience trying murder cases, he testified that he "probably would have relied mainly on my supervisor" to propose voir dire questions.

different outcome if his attorney had objected to the voir dire question at issue." Beasley counters that prejudice should be presumed in this case pursuant to *Wright* and that the post-conviction properly found prejudice.

We will note that both *White* and *Wright* are direct appeal cases and not appeals from a post-conviction petition. Pursuant to *Ramirez*, "a court should presume that trial counsel's performance prejudiced the petitioner only if: (1) the petitioner was actually denied the assistance of counsel; (2) the petitioner was constructively denied the assistance of counsel; or (3) the petitioner's counsel had an actual conflict of interest." *Ramirez*, 464 Md. at 572–73. If none of these factors apply, "the presumption of prejudice does not apply, and the petitioner must prove prejudice." *Id.* at 573. We will note that it is unlikely that any of the factors to presume prejudice applied in Beasley's case. Even if we had ruled differently as to the deficient performance prong, Beasley would have faced a large hurdle to prove prejudice.

CONCLUSION

Accordingly, we reverse the post-conviction decision of the Circuit Court for Prince George's County because the post-conviction erred in concluding that Appellee's trial counsel's performance was deficient.

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