

Circuit Court for Prince George's County  
Case No. CT170546X

UNREPORTED\*

IN THE APPELLATE COURT

OF MARYLAND

No. 0323

September Term, 2023

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STATE OF MARYLAND

v.

MARLON JERMAINE MARSHALL

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Nazarian,  
Zic,  
Robinson, Dennis M., Jr.,  
(Specially Assigned),

JJ.

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Opinion by Nazarian, J.

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Filed: March 28, 2024

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

After trial before a jury in the Circuit Court for Prince George’s County, Marlon Jermaine Marshall was found guilty of seven counts arising from a stabbing and killing. Mr. Marshall filed a petition for post-conviction relief in which he argued that his trial counsel performed deficiently by failing to investigate the inconclusive analysis of DNA found on the knife that the State alleged was the murder weapon and that this failure prejudiced his defense because further investigation would have excluded Mr. Marshall as a contributor to that DNA. The circuit court vacated Mr. Marshall’s convictions and granted him a new trial on the ground that counsel’s failure to provide the jury with a complete understanding of the inconclusive DNA results rendered the verdict unreliable. On appeal, the State argues that the post-conviction court erred in granting relief on a theory that Mr. Marshall did not assert. We vacate the judgment of the circuit court and remand for further proceedings.

## I. BACKGROUND

On February 7, 2017, just before noon, two individuals attacked Jamal Barnes at an Exxon gas station in Seat Pleasant, Maryland. One of the attackers, who was wearing a “bucket hat,” struck Mr. Barnes repeatedly in his left rib cage. Sometime later, Officer Charles Lane arrived on the scene and saw Mr. Barnes lying in the grass nearby. Officer Lane noticed that Mr. Barnes’s “clothes [we]re bloody” and that there were “cut wounds on his body.” Mr. Barnes was taken to a local hospital where he was pronounced dead. An autopsy of Mr. Barnes’s body revealed that he died of “[s]harp and blunt force injur[ies]” that included a “stab wound [on his] left chest.”

Security cameras from nearby businesses recorded the attack. Police reviewed the surveillance footage and saw that minutes before the attack, a silver Lexus registered to Mr. Marshall drove slowly through the Exxon station without stopping for gas. The surveillance footage also showed Mr. Marshall walking across the parking lot of a Food Mart located next door to the Exxon.

Police also interviewed Mr. Marshall's girlfriend at the time, Kimberly Benjamin. They showed Ms. Benjamin still photographs from the surveillance footage and she identified Mr. Marshall as the individual wearing a bucket hat, noting that she recognized "[his] hat and tennis shoes." At trial, however, Ms. Benjamin retracted the identification and testified that she identified Mr. Marshall from the surveillance footage photographs only because "[she] was scared." She explained that when "[she] got home and looked at the photo real good, [she] couldn't tell" who the person was.

The night before police interviewed Ms. Benjamin, she and Mr. Marshall stayed together at a hotel because, according to Ms. Benjamin, Mr. Marshall learned that the police were looking for him and he wanted to talk to a lawyer before turning himself in. Shortly before the interview, police searched Ms. Benjamin's car and found a bag containing both male and female clothing and shoes. Police also found a pocket knife in the car, and the State's medical examiner later determined that knife to be "consistent with" the stab wound on Mr. Barnes's chest. After investigation by police, Mr. Marshall was charged with first-degree murder, second-degree murder, first-degree assault, second-

degree assault, carrying a dangerous weapon with intent to injure, conspiracy to commit murder, and first-degree assault.

**A. DNA Evidence At Trial.**

The lead investigator, Detective Lidia Ramos, testified that the pocket knife found in Ms. Benjamin’s car had been tested for Mr. Barnes’s and Mr. Marshall’s DNA, and that the test results were “inconclusive.” On cross-examination, Mr. Marshall’s trial counsel elicited testimony reiterating that the results were inconclusive:

[COUNSEL FOR MR. MARSHALL:] [T]he knife that came out of Ms. Benjamin’s car was tested for DNA, wasn’t it?

[DETECTIVE RAMOS:] Yes.

[COUNSEL FOR MR. MARSHALL:] And with all the bleeding that Mr. Barnes did, unfortunately, at the time that he got stabbed, Mr. Barnes’[s] DNA was not found on the knife that was recovered from Ms. Benjamin’s car, was it?

[DETECTIVE RAMOS:] The reports—results were inconclusive.

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[COUNSEL FOR MR. MARSHALL:] [T]he DNA results were inconclusive; is that right?

[DETECTIVE RAMOS:] Yes.

[COUNSEL FOR MR. MARSHALL:] So there’s no evidence to show that that knife had anything to do with the death of Jamal Barnes, is there?

[DETECTIVE RAMOS:] It’s inconclusive.

The State did not reference the results of the DNA testing on the knife during closing argument, although it argued that the knife was consistent with Mr. Barnes’s stab wound.

On the other hand, Mr. Marshall’s trial counsel emphasized the absence of DNA evidence on the knife in his closing argument:

[T]his is 2018. They have got the most sophisticated crime technicians ever known in the history of man.

So, don’t you think if Marlon Marshall had stabbed Jamal Barnes with the knife that they took out of Kimberly Benjamin’s car—this is no real unique knife or anything. Don’t you think in 2018 they would have been able to get D. N. A. off of there?

If Marlon Marshall had used that knife and had handled that knife to stab somebody, don’t you think they would have gotten his fingerprints?

[The prosecutor] is going to tell you, oh, well, you know, it was almost a week or so later. He could have wiped the knife off. They didn’t find D. N. A. Well, they can find D. N. A. from the stuff from 20 years before.

[PROSECUTOR:] Objection.

THE COURT: Sustained.

[COUNSEL FOR MR. MARSHALL:] But we don’t have any kind of D. N. A. So, the fact that they don’t have D. N. A. means that there is no evidence . . . of D. N. A. No evidence of fingerprints in this case based upon which you can find Marlon Marshall guilty. And the lack of evidence is the reason why you must find him not guilty.

## **B. Procedural History.**

The jury found Mr. Marshall guilty on all counts. The court sentenced Mr. Marshall to life imprisonment for first-degree murder, a consecutive but suspended term of life imprisonment for conspiracy to commit first-degree murder, and a concurrent term of three years’ imprisonment for carrying a dangerous weapon with intent to injure. His other convictions merged for sentencing purposes. On direct appeal, this Court affirmed his convictions. *Marshall v. State*, No. 0884, Sept. Term 2018 (filed July 29, 2019).

On July 16, 2021, Mr. Marshall filed a Petition for Post-Conviction Relief. He argued that his convictions must be vacated on multiple grounds, including a violation of his right to effective assistance of counsel. Mr. Marshall argued that his trial counsel was ineffective because he “did not conduct even a cursory investigation of the DNA evidence” on the knife recovered from Ms. Benjamin’s car. He emphasized that his trial counsel could have consulted with an expert to review the evidence but chose not to despite Mr. Marshall’s request and Mr. Marshall’s mother’s offer to pay any necessary expert fees. Mr. Marshall contended that an investigation into the DNA results would have revealed that the results “excluded [Mr.] Marshall and [Mr.] Barnes as sources of any DNA found on the knife.” He argued, therefore, that the failure to investigate the DNA evidence was unreasonable and prejudiced his defense.

The State responded that “[Mr. Marshall’s] ineffective assistance of counsel claim is without merit.” The State posited that “[t]rial counsel had no reason to doubt the accuracy of [the DNA results]” and that “[t]he ability to argue that there was no DNA evidence connecting the knife to either [Mr. Marshall] or the victim was sufficient for trial counsel’s trial strategy.” Therefore, the State contended, “it was not un-reasonable for trial counsel to decline to hire an independent DNA expert to re-examine the reports.” The State also argued that to prove prejudice, Mr. Marshall “ha[d] the burden to show the investigation would have produced admissible evidence that would have exonerated him.”

At the post-conviction hearing, Mr. Marshall’s trial counsel testified that “his [trial] strategy was to get the detective to truthfully testify that [the DNA evidence] was

inconclusive” because that “[was] not an[y] evidence that Mr. Marshall stabbed [Mr. Barnes]” and “would be helpful to Mr. Marshall.” Mr. Marshall’s trial counsel emphasized as well that he had only “received a two-page report saying that the DNA was inconclusive.” Counsel explained that “had [he] received a voluminous report [indicating] that [Mr. Marshall] was excluded . . . then [he] would have made steps to get an extra DNA expert and to have the report examined and have other DNA tests done . . . .” Mr. Marshall’s trial counsel also noted that he was “not a DNA expert” and that “[his] DNA knowledge [was] rather limited.”

In addition, Mr. Marshall and the State both called experts in forensic DNA analysis to provide opinions about the DNA found on the knife. Mr. Marshall called Dr. Karl A. Reich, who opined that Mr. Marshall and Mr. Barnes were excluded as contributors to the DNA found on the knife. The State called Dr. Molly Rollo, who disagreed with Dr. Reich’s opinion and found that his methodology was not reliable because he “didn’t apply any thresholds” when analyzing peaks in the DNA data.

The court noted that “[t]hroughout the post-conviction hearing, the State repeatedly objected to the inclusion of Dr. Reich’s testimony . . . .” The court also acknowledged that the State “argued that *Rochkind v. Stevenson*, which adopted the federal *Daubert* standard, required th[e] [c]ourt to strike Dr. Reich’s testimony excluding [Mr.] Marshall’s DNA.” But the court allowed Dr. Reich’s testimony. The court explained that “[a]t minimum, Dr. Reich’s extensive qualifications and testimony as to what ‘inconclusive’ means in a scientific context . . . [would] help the ultimate trier of fact and warrant[ed] admissibility

in [the post-conviction] proceeding.” Accordingly, the court determined that “[i]t [wa]s unnecessary to address the reliability of Dr. Reich’s opinion excluding [Mr.] Marshall’s DNA.”

Ultimately, the court concluded that Mr. Marshall’s trial attorney rendered ineffective assistance of counsel. The court found that Mr. Marshall’s trial attorney’s “failure to further investigate the DNA results obtained from the knife and his failure to call a DNA expert fell under the level of reasonableness for prevailing professional norms.” It found that “a competent attorney [would] have done more to discredit, or even explain, the ‘inconclusive’ DNA result.” The court also found that “there [wa]s simply no reasonable explanation for, and certainly no specific trial strategy related to [the trial attorney’s] refusal to consult with an expert” given that the trial attorney’s “knowledge of DNA evidence [wa]s rather limited” and “[t]he pocketknife held a keystone’s significance to the State’s circumstantial case against [Mr.] Marshall.”

The court then found that Mr. Marshall’s defense was prejudiced by his trial attorney’s failure to present expert testimony to explain the “inconclusive” DNA results. The court explained that the lack of expert testimony left the jury without answers to the following “crucial questions:” “Was Marshall’s DNA found on the knife? Was Barnes’[s] DNA found on the knife? How many different DNA profiles were found?” The court concluded that Mr. Marshall’s trial counsel’s “failure to provide the jury a complete understanding of the ‘inconclusive’ DNA results through a qualified expert’s testimony[] render[ed] their decision both unfair and unreliable.”



The State appealed. We supply additional facts as necessary below.

## II. DISCUSSION

The State raises three issues on appeal:<sup>1</sup> *first*, whether the post-conviction court erred in granting relief on a theory of ineffective assistance of counsel that Mr. Marshall did not assert; *second*, whether the post-conviction court erred in finding that the failure to present the jury with a more “complete” understanding of the term “inconclusive” prejudiced Mr. Marshall’s defense; and *third*, whether Dr. Reich’s testimony was reliable enough to be admitted at the post-conviction hearing or at trial. We hold that that the court

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<sup>1</sup> The State phrased its Questions Presented as:

1. Did the postconviction court err in granting postconviction relief *sua sponte* on a theory of ineffective assistance of counsel that Marshall did not assert?
2. Did the postconviction court err in finding that trial counsel rendered ineffective assistance by failing to present the jury with a more “complete” understanding of the term “inconclusive”?
3. Was the testimony of Marshall’s DNA expert insufficiently reliable to be admitted at the postconviction hearing or at trial?

Mr. Marshall phrased his Questions Presented as:

- I. Did the postconviction court correctly conclude that trial counsel was ineffective in failing to investigate the State’s DNA evidence, which was used at trial to implicate Appellee in the murder of Jamal Barnes?
- II. Did the postconviction court properly admit the expert testimony of Appellee’s DNA expert? Alternatively, is a remand appropriate where the State challenges the admissibility of scientific evidence, but the postconviction court never conducted either a *Daubert* or *Frye-Reed* hearing?

erred in granting post-conviction relief without addressing the theory asserted by Mr. Marshall, and that conclusion eliminates any need for us to decide the other issues. We vacate the court’s judgment and remand for further proceedings consistent with this opinion.

We review a post-conviction court’s findings on ineffective assistance of counsel as a mixed question of law and fact. *Newton v. State*, 455 Md. 341, 351 (2017) (citing *Harris v. State*, 303 Md. 685, 698 (1985)). “We will not disturb the factual findings of the post-conviction court unless they are clearly erroneous.” *State v. Sanmartin Prado*, 448 Md. 664, 679 (2016) (quoting *State v. Jones*, 138 Md. App. 178, 209 (2001), *aff’d*, 379 Md. 704 (2004)). But “[w]e ‘re-weigh’ the facts in light of the law to determine whether a constitutional violation has occurred.” *Newton*, 455 Md. at 352 (quoting *Harris v. State*, 303 Md. 685, 698 (1985)).

**A. The Circuit Court Erred By Failing To Address Mr. Marshall’s Argument That He Was Prejudiced By The Failure To Introduce Evidence That His DNA Was Excluded From The Knife.**

The State argues *first* that the post-conviction court “erred by granting relief based on a theory of ineffective assistance that [Mr.] Marshall never asserted.” The State contends that “[Mr.] Marshall’s consistent claim was that counsel rendered ineffective assistance by failing to investigate and consult with an expert to discern that the DNA analysis actually excluded him and the victim as contributors to the samples from the knife.” The State posits that the post-conviction court determined that Mr. Marshall’s trial counsel rendered ineffective assistance on a different ground: by failing to “present[] expert testimony to

explain the meaning of the term ‘inconclusive’” in regards to the knife’s DNA test results. In other words, the State argues that “Mr. Marshall’s claim was not that ‘inconclusive’ was confusing to the jury; it was that the results were not, in fact, inconclusive.”

Mr. Marshall counters that “[t]he postconviction court ruled on the precise claim advanced by [Mr.] Marshall: that trial counsel was ineffective for failing to investigate the State’s DNA evidence prior to trial, and subsequently challenge that evidence at trial.” Mr. Marshall argues further that “the State’s claim is based on the flawed premise that the court’s finding *as to the prejudice prong* of [Mr.] Marshall’s claim constitutes an entirely independent ineffective-assistance-of-counsel claim.” He contends that it was not reversible error to find prejudice on a different ground because “[t]he postconviction court was required to consider all the circumstances in assessing prejudice, and it was not limited to considering only the prejudice alleged by [Mr.] Marshall.”

A court ruling on a petition for post-conviction relief must “file or dictate into the record a statement setting forth separately each ground upon which the petition is based, . . . the court’s ruling with respect to each ground, and the reasons for the action taken thereon.” Md. Rule 4-407(a); *State v. Borchardt*, 396 Md. 586, 636 (2007) (“As a matter of law, [a] postconviction court [i]s required to rule globally and concurrently on each allegation raised . . .”). “The purpose of the requirement of a ruling with respect to each ground raised in the postconviction petition is to provide a comprehensive state-court review of a defendant’s claims and to eliminate delay and multiple postconviction hearings . . .” *Borchardt*, 396 Md. at 636–37.

When raising an ineffective assistance of counsel claim, “the defendant must show: (1) that his or her counsel’s performance was deficient, and (2) that he or she suffered prejudice because of the deficient performance.” *Bailey v. State*, 464 Md. 685, 703 (2019). The deficiency prong “is satisfied only where, given the facts known at the time, counsel’s ‘choice was so patently unreasonable that no competent attorney would have made it.’” *Borchardt*, 396 Md. at 623 (quoting *Knight v. Spencer*, 447 F.3d 6, 15 (1st Cir. 2006)). “The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). Moreover, the defendant must prove that trial counsel’s actions were “‘not pursued as a form of trial strategy.’” *Newton*, 455 Md. at 355 (quoting *Coleman v. State*, 434 Md. 320, 331 (2013)). “‘A strategic trial decision is one that is founded upon adequate investigation and preparation.’” *Wallace v. State*, 475 Md. 639, 655–56 (2021) (quoting *State v. Syed*, 463 Md. 60, 75 (2019)).

To establish “prejudice” under the second prong, “[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.” *Strickland*, 466 U.S. at 694. The Supreme Court of Maryland has interpreted the “reasonable probability” standard to require “‘a substantial or significant possibility that the verdict of the trier of fact would have been affected.’” *Sanmartin Prado*, 448 Md. at 682 (quoting *Coleman*, 434 Md. at 331). We also “‘consider the totality of the evidence before the judge or jury.’” *Strickland*, 466 U.S. at 695.

If the State offers strong evidence of a defendant’s guilt at trial, it is unlikely that the defendant can prove that his or her trial counsel’s performance prejudiced him or her. *Ramirez v. State*, 464 Md. 532, 577 (2019).

The post-conviction court in this case addressed the deficiency of Mr. Marshall’s trial counsel, but never analyzed or ruled on Mr. Marshall’s prejudice argument. Mr. Marshall argued that his trial counsel performed deficiently because he “did not conduct even a cursory investigation of the DNA evidence.” The court agreed that his trial counsel’s performance was deficient, emphasizing that his trial counsel “took the State’s 3-page DNA report at face value” and “did no further investigation into the DNA results after receiving the 3-page report.” The court determined that his “failure to further investigate the DNA results obtained from the knife and his failure to call a DNA expert fell under the level of reasonableness for prevailing professional norms.” That conclusion is supported by the record developed at the post-conviction hearing, especially in light of the role that the knife—found only in Mr. Marshall’s girlfriend’s car, not on his person—played in connecting him (as identified by his girlfriend) to the crime.

But that finding covered only the first half of Mr. Marshall’s burden under *Strickland*, though, and with regard to prejudice he and the circuit court were not on the same page. In his petition, Mr. Marshall argued that had his trial counsel consulted with a DNA expert, “he would have known that the results excluded both [Mr.] Marshall and [Mr.] Barnes as contributors to the DNA found on the knife, and that [Detective] Ramos’s testimony that the results were ‘inconclusive’ was false and misleading.” Mr. Marshall

contended that his trial counsel “could have used that knowledge to impeach [Detective] Ramos’s testimony, or to object to its admission altogether,” either of which could have led to a different trial outcome. But the post-conviction court never addressed this argument. Instead, the court found that Mr. Marshall’s trial counsel could have “provide[d] the jury [with] a complete understanding of the ‘inconclusive’ DNA results through a qualified expert’s testimony,” and that the failure to do so prejudiced Mr. Marshall’s defense.

In coming to this conclusion, the court made no mention of whether it credited Dr. Reich’s testimony that Mr. Marshall and Mr. Barnes were excluded as contributors to the DNA found on the knife. Nor did the court address whether Mr. Marshall’s defense was prejudiced by his counsel’s failure to impeach Detective Ramos’s testimony at trial with information that Mr. Marshall and Mr. Barnes were or could be excluded as contributors. Indeed, the court made no reference at all to Mr. Marshall’s argument that he could be excluded as a contributor to the DNA found on the knife. Because the court failed to “set[] forth separately each ground upon which the petition [wa]s based . . . [and] the court’s ruling with respect to each ground” as required by Maryland Rule 4-407(a), we vacate its decision granting post-conviction relief on an (unargued and weaker) alternative ground and remand for further proceedings consistent with this opinion—most importantly, for the court to consider the post-conviction theory that Mr. Marshall actually raised.

**B. We Need Not Decide Whether The Failure To Explain The Term “Inconclusive” Constituted Ineffective Assistance Of Counsel.**

The State argues *second* that the post-conviction court erred on the merits of its own theory when it decided that Mr. Marshall’s trial counsel rendered ineffective assistance of counsel by failing to present the jury with a more complete understanding of the term “inconclusive.” The State posits that there is no evidence that reasonable counsel should have determined that the inconclusive results required further interpretation for the jury and that there is no reasonable probability that the results would have been different had the term “inconclusive” been explained better. Mr. Marshall responds that the post-conviction court did not err because a better explanation of the “inconclusive” results could reasonably have led to a different outcome at trial.

In light of our decision to vacate the circuit court’s judgment and remand, we need not decide this question. Mr. Marshall never argued in the circuit court that he was prejudiced by his trial counsel’s failure to present the jury with a better explanation of the term “inconclusive.” The court raised this issue all on its own. We acknowledge that the circuit court’s decision to go in that direction left the parties to challenge or defend that ruling, as well as Mr. Marshall’s contention on appeal that the post-conviction court “was not limited to considering only the prejudice alleged by [Mr.] Marshall.” But the court was not permitted to disregard the ground for prejudice that Mr. Marshall alleged, and the court’s assessment of prejudice on remand should address the allegations Mr. Marshall’s original post-conviction petition in fact raised. *See Strickland*, 466 U.S. at 695.

**C. We Will Not Decide Whether Dr. Reich’s Testimony Was Reliable Enough To Be Admitted At The Post-Conviction Hearing Or At Trial.**

*Third*, the State argues that “[Dr.] Reich’s expert opinion was insufficiently reliable to be admitted, either at the postconviction hearing or at a hypothetical new trial” and that the exclusion of Dr. Reich’s opinion “disposes of [Mr.] Marshall’s ineffective assistance claim, because counsel could not have performed deficiently, nor could [Mr.] Marshall have been prejudiced, by failure to procure an expert whose testimony would be inadmissible.” Mr. Marshall responds that the State has “cobble[d] together a post-hoc *Daubert* analysis [by asking] this Court to find Dr. Reich’s methodology unreliable” and that “it would be improper for this Court to engage in a *Daubert* analysis without further proceedings.”

We agree with Mr. Marshall. The post-conviction court never held a *Daubert* hearing or undertook any analysis of the reliability of Dr. Reich’s testimony because it found that “[i]t [wa]s unnecessary to address the reliability of Dr. Reich’s opinion excluding [Mr.] Marshall’s DNA.” There may or may not be issues about the scope, admissibility, or reliability of the DNA evidence either party might offer here—that is a notoriously complicated area. The one thing we can say with certainty as an appellate court, though, is that we are not equipped to assess whether, as the State argues, “[Dr.] Reich’s method flunks the *Daubert/Rochkind* standard by any measure.” The circuit court must decide in the first instance what evidence is or is not reliable or admissible to establish or dispute whether Mr. Marshall suffered prejudice from his trial counsel’s failure to



undertake an investigation of the State's DNA evidence and testimony. For us to opine on the merits of that question in either direction would require us either to assume the contents of a record that doesn't exist or to usurp the circuit court's role to develop and analyze the appropriate post-conviction record.

**JUDGMENT OF THE CIRCUIT COURT  
FOR PRINCE GEORGE'S COUNTY  
VACATED AND REMANDED FOR  
FURTHER PROCEEDINGS CONSISTENT  
WITH THIS OPINION. APPELLANT AND  
APPELLEE TO PAY COSTS EQUALLY.**