Circuit Court for Montgomery County
Case No.: 132117C

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

Nos. 1007 & 2445

September Term, 2024

JAMES POLK JACKSON

v.

STATE OF MARYLAND

Graeff,
Shaw,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw, J.

Filed: September 15, 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 Maryland Rule 1-104(a)(2)(B).

This is a consolidated appeal (No. 1007, Sept. Term, 2024). The first is a belated direct appeal by James Jackson from his 2018 conviction for second-degree murder. The second appeal (No. 2445, Sept. Term, 2024) is by the State, and it is an appeal of the post-conviction court's order awarding the belated direct appeal in No. 1007.

Jackson presents one question:

1. Did the trial court commit plain error in asking compound voir dire questions that required jurors to assess their own impartiality?

The State presents one question:

1. Did the post-conviction court err in ruling that Jackson's trial counsel rendered ineffective assistance by not objecting to compound voir dire questions, and err in granting, as post-conviction relief on that basis, a belated second appeal for Jackson to present a plain error claim as to the voir dire questions?

For reasons explained below, we hold that the post-conviction court erred in granting post-conviction relief in the form of a belated appeal. We, therefore, reverse the decision of the post-conviction court in No. 2445 and we dismiss the appeal in No. 1007.

BACKGROUND

In January 2018, a jury sitting in the Circuit Court for Montgomery County found James Polk Jackson, appellant/cross-appellee, guilty of second-degree murder for the stabbing death of Sulaiman Jalloh. Jackson was tried jointly with his co-defendant Ruben

Ortiz who was similarly convicted.[1] On May 1, 2018, the court sentenced him to thirty years' imprisonment.

Below is a summary of the evidence adduced during Jackson's and Ortiz's joint trial. It is taken from Jackson's previous direct appeal, and we have modified it slightly for readability and conciseness:

A. Trial Testimony of Shanee Cox

> On the evening of May 27th into the morning of May 28, 2017, Shanee Cox ("Cox") and her boyfriend[ ], Ruben Ortiz ("Ortiz"), [who was also the father of Cox's children] were selling marijuana in downtown Silver Spring, Maryland. After exchanging phone numbers with a group of potential buyers, Cox and Ortiz went to the grounds of the Days Inn ("the hotel") on 13th Street in Silver Spring to complete the sale of marijuana to those prospective purchasers. When Ortiz displayed the marijuana, the group of "purchasers" told him to walk into an alley. While in the alley, the "purchasers" grabbed the marijuana and punched Ortiz in the face. Ortiz ran down the alley, away from his attackers. The attackers also fled, and Cox ran inside the hotel to call the police. After the police arrived, Ortiz emerged from the alley bleeding. He was missing both his shoes as well as the outer shirt he had been wearing over a T-shirt.
>
> When the police left, Ortiz called his brother, Antonio, to tell him he had just been assaulted. Ortiz and Cox then walked back to the hotel because Ortiz wanted to confront his attackers and to recover what had been stolen. En route, they met with several other friends who offered their assistance. One of those friends was [Jackson].
>
> Near the hotel, Ortiz saw one of the men who attacked him, standing outside a room while smoking a cigarette. The two began fighting. The other individuals with Ortiz and Cox rushed up to assist, and the first man ran back into his hotel room. As Ortiz's friends, including [Jackson], began banging on the hotel door, someone in the Ortiz group threw a stick through a window, shattering the glass. The Ortiz group did not get into the room,

[1] The jury acquitted both defendants of first-degree murder and armed robbery. The court sentenced Ortiz to thirty years' imprisonment with all but twenty-four years suspended.

however, and eventually most of them left the hotel area when the police arrived. Nevertheless, the Ortiz group left someone to wait and watch the room until the police left.

Ortiz, [Jackson,] and others next entered into a plan to go back to the room that was occupied by the people who had stolen the marijuana, to get Ortiz's belongings.

After the police left the scene for the second time, Cox went to use the bathroom in a nearby restaurant. She returned to the hotel and saw [Jackson] across the street, in the hotel's parking lot, talking to [Sulaiman Jalloh,] the man who was later murdered . . . . While Cox stood with Ortiz and his brother, Antonio, Cox learned from Antonio that [Jalloh] told [Jackson] he would return Ortiz's belongings. Nevertheless, Ortiz "was still upset" and "still wanted to fight."

Cox testified that she watched as [Jalloh] went back inside the hotel room, and then emerged with Ortiz's shoes and money, which he then proceeded to hand over to [Jackson]. In response, [Jackson] dropped the items and hit [Jalloh] in the face. Cox and the two Ortiz brothers then ran across the street and the Ortiz brothers joined [Jackson] in attacking [Jalloh].

During the fight, [Jalloh] fell down and Ortiz started trying to take [Jalloh's] shoes. At the same time, as Antonio Ortiz was kicking [Jalloh], both Ortiz and [Jackson] were punching the victim while he was down. [Jalloh] was not fighting back at that point and was "breathing heavily[.]"

Cox saw [Jalloh] grab [Jackson's] shirt in a failed attempt to get up and saw that [Jalloh's] face was covered in "a lot of blood." [Jackson] then "like yanked at [Jalloh's] hand to get him off his shirt . . . ." Cox explained that [Jackson] was "like you know, like get off me, like nah, you're not getting up, type of thing." She then saw [Jackson] punch [Jalloh] twice more in the face, before [Jalloh] managed to get up. But when [Jalloh] did so, he was bleeding and "struggling to breath[e]." As [Jalloh] walked towards his hotel room, Cox and her group left the scene.

Afterwards, Cox saw blood on [Jackson's] shirt. [Jackson] announced to the group that he hoped [Jalloh] "doesn't die and stuff." It was at that point that Cox learned that [Jackson] had stabbed [Jalloh] with a knife. [Jackson] confided to the group that he stabbed [Jalloh] "repeatedly," just below his ribcage. [Jackson] said he planned on going back to the scene because he threw away his knife in the bushes as he had fled. [Jackson] also admitted to Cox that he took [Jalloh's] watch.

During her testimony, Cox was shown a surveillance video from the 7-11 convenience store located across the street from the Days Inn. From the video, she identified for the jury the participants in the fight. She also testified that she was originally charged in the subject case with murder but had entered a plea agreement with the State wherein she pled guilty to first-degree assault in exchange for her truthful testimony against Ortiz and [Jackson].

B. Trial Testimony of Officer Morgan Dailey

The State called Morgan Dailey, one of the correctional officers responsible for supervising [Jackson] while he was in pretrial detention awaiting trial in this case. [She] testified that [Jackson], on July 2, 2017, told her that he "stabbed a man and killed him." [Jackson] then clarified that statement by asserting that he had stabbed the man in the stomach area, multiple times.[] After he stabbed the victim, [Jackson] said that he threw the knife in a bush and ran away but went back to retrieve the knife the next day.

Officer Dailey also testified that [Jackson] told her that she would "make a really good witness," and that he hoped she would not testify against him.

C. Trial Testimony of Officer Stephen Magliaro

Correctional Officer Stephen Magliaro testified that [Jackson], on July 16, 2017, while in pretrial detention, told him he went to a hotel in Silver Spring and "stabbed the individual in the abdomen and chest area approximately 30 times." [Jackson] also told him that he had spoken to Officer Dailey, and that, if the officer were to tell anyone what she knew, "he would send somebody in his family after her."

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D. Defense Witnesses and Arguments

Montgomery County Detective Dimitry Ruvin testified that when he responded to the scene of the stabbing, he heard over his radio a description of potential suspects. According to Ruvin, "[v]ia the clothing description and the generic description, it matched Antonio Ortiz."

Christopher Morefield, who was incarcerated in the detention center along with [Jackson], testified that he was on West 22 (the pod in which [Jackson] was jailed) on July 2 and July 16, 2017, and that he did not observe [Jackson] discussing his charges on those days or on any day in July. On cross-examination, Morefield admitted that he was not paying particular attention to any inmate's conversation with correctional officers.

> At trial, [Jackson's] counsel contended that Ms. Cox was a biased witness who should not be believed. Her bias was in favor of Ortiz because he was her boyfriend and the father of her children. According to [Jackson's] counsel, that bias motivated Cox to testify falsely that it was [Jackson] who stabbed [Jalloh]. [Jackson]'s counsel also maintained that [Jackson] never confessed that he stabbed the victim to either of the correctional officers.

Jackson v. State (*Jackson I*), No. 498, Slip Op. at 1-6 (Md. App. June 18, 2020). Jackson and Ortiz appealed their convictions to this Court.[2] In Jackson's appeal, we rejected all four of his appellate contentions and affirmed his conviction. *Jackson I*, slip op. at [1], *cert. denied*, 471 Md. 119 (2020). About a month after we decided *Jackson I*, we reversed Ortiz's convictions because we found plain error in certain *Dingle*[3]-violative voir dire questions the trial court posed during jury selection to which neither co-defendant had objected and which only Ortiz challenged on appeal. We also found that the trial court erred in not instructing the jury on the uncharged lesser included offense of first-degree assault. *Ortiz v. State*, No. 628, 2020 WL 4018312, at *1 (Md. App. July 16, 2020).

In light of our decision in *Ortiz*, Jackson filed a motion asking us to reconsider our affirmance of his convictions in *Jackson 1*. He argued that he was denied his right to effective assistance of appellate counsel because his appellate counsel made a prejudicial serious attorney error in failing to argue, as plain error, that the allegedly *Dingle*-violative voir dire questions were erroneous. On August 12, 2020, we issued an order, wherein,

[2] On appeal, neither Jackson nor Ortiz raised any of the same claims as the other.

[3] *Dingle v. State*, 361 Md. 1 (2000), and its progeny, prohibit compound voir dire questions that require prospective jurors to self-assess whether they can be fair and impartial.

we declined to reconsider our decision in *Jackson 1* because (1) claims of ineffective assistance of counsel are better litigated in a post-conviction proceeding, and (2) even if we were to consider such a claim, we decided that Jackson could not have established prejudice as "there was no significant or substantial possibility that the voir dire questions at issue affected the outcome of the case."[4]

In 2022, Jackson filed a petition for post-conviction relief, and a supplement thereto, in the circuit court, raising claims of ineffective assistance of both trial and appellate counsel regarding the *Dingle*-violative voir dire questions.[5] Jackson contended that his trial counsel made a prejudicial serious attorney error in failing to object to the voir dire questions posed. Jackson asserted that his appellate lawyer made a prejudicial serious attorney error in failing to raise the unpreserved *Dingle*-violative voir dire issue as plain error on direct appeal as his co-defendant, Ortiz, had successfully done.

After holding a hearing on the petition, the post-conviction court granted Jackson's petition, in part, finding ineffective assistance of trial counsel for failing to object to the voir dire questions. Noting that trial counsel's statements made during trial indicated that she was unaware of *Dingle*, the post-conviction court found that she had

[4] In the *Ortiz* appeal, the State sought reconsideration of our conclusion that the *Dingle*-violative voir dire amounted to plain error. The State noted that, even if we were to reconsider our opinion as it suggested, Ortiz's conviction would still be reversed because of the other trial court error we found for the court's failure to have instructed the jury on a lesser-included offense. On November 4, 2020, we summarily denied the State's request for reconsideration in *Ortiz*.

[5] Neither of the parties contend that the voir dire questions at issue were not *Dingle*-violative. We shall assume, without deciding, that they were.

performed deficiently within the meaning of *Strickland*. The court found that while prejudice could not be presumed, there was actual prejudice. The court stated, "… that had trial counsel objected to the use of *Dingle*-violating voir dire questions, the trial judge would have either corrected the error, or had he not, [Jackson]'s appellate counsel would have had a high likelihood of success on appeal."

The post-conviction court also found that the "law of the case" doctrine[6] did not dictate the outcome of Jackson's claim. The court determined that this Court's ruling in *Ortiz* and our Order denying Jackson's motion for reconsideration on direct appeal, to the effect that Jackson could not establish *Strickland* prejudice given the weight of the evidence against him at trial, was dicta. The court awarded Jackson post-conviction relief in the form of the right to take a belated appeal "with leave to argue the voir dire issue in the same posture that Mr. Ortiz argued it[.]"

The post-conviction court denied Jackson's claim that his appellate counsel's performance was deficient. The court determined that appellate counsel acted according to sound appellate strategy in deciding which claims to raise on direct appeal. The court noted appellate counsel's affidavit, wherein, he averred that, while he noticed the *Dingle*-violative voir dire questions, he believed them to be unpreserved for appeal. The post-conviction court concluded: "Because appellate attorneys are not expected to raise every conceivable argument on appeal … and the voir dire argument seeking plain error review

[6] Under the "law of the case" doctrine, once an appellate court rules upon a question presented on appeal, the parties and lower courts become bound by the ruling. *Scott v. State*, 379 Md. 170, 183 (2004).

did not appear to have a high likelihood of success, such argument was not required to meet the minimum standard of competence by prevailing professional norms." The court found that appellate counsel made no serious attorney error.

Jackson noted his belated appeal (No. 1007).[7]

The State, appellee/cross-appellant, sought leave to appeal from the post-conviction court's decision to award Jackson a belated appeal, which we granted. The case was transferred to our regular appellate docket as No. 2445, Sept. Term, 2024, and consolidated with Jackson's belated appeal (No. 1007, Sept. Term, 2024).

DISCUSSION

Claims of ineffective assistance of counsel are governed by a two-part test, established in *Strickland v. Washington*, 466 U.S. 668 (1984), 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). To prove a deficiency in performance, "a petitioner must show that the acts or omissions of counsel were the result of unreasonable professional judgment and that counsel's performance fell below an objective standard of reasonableness considering prevailing professional norms." *Id*. A petitioner must also overcome the presumption that the challenged conduct might be considered sound trial strategy. *Oken v. State*, 343 Md. 256, 283 (1996). To show that trial counsel's deficient performance prejudiced the

[7] Jackson did not seek leave to appeal in this Court from any aspect of the post-conviction court's decision.

defense (putting aside those few situations in which prejudice is presumed), a petitioner must show a substantial possibility of a different result at trial absent the error. *Bowers v. State*, 320 Md. 416, 426-27 (1990). The burden remains on the petitioner to "demonstrate prejudice at the appellate level by showing that had the unraised argument been raised, the appeal would probably have been successful." *Gantt v. State*, 241 Md. App. 276, 290 (2019) (citing *Smith v. Robbins*, 528 U.S. 259 (2000)).

Appellant urges us to recognize plain error and reverse his convictions based on the unpreserved claim that the trial court erred in asking the prospective jurors *Dingle*-violative voir dire questions during jury selection. He contends that the outcome of the Ortiz appeal is the law of the case and, therefore, controls the outcome of this case. Specifically, Jackson argues that the following six voir dire questions were objectionable on *Dingle*-based grounds because they were compound questions asking the jurors to identify their own bias and self-assess whether they could remain fair and impartial despite the bias:

> Does any member of the prospective jury panel have political, religious, or philosophical beliefs about our system of criminal justice which interfere with your ability to sit as a fair and impartial juror in this case?
>
> Does anyone know of any reason whether—why he or she cannot sit as a juror in this case and render a fair and impartial verdict on the law and the evidence as you will hear it?
>
> Mr. Jackson is an African-American. Will this in any way affect your ability to render a fair and impartial verdict in this case?
>
> Does anyone here have any, such strong feelings about the crimes charged in this case – homicide and robbery – that you cannot render a fair and impartial verdict? I don't think anybody's here in favor of any of these crimes, but do you have such strong feelings that it would affect your

> ability to render a fair and impartial verdict based upon the evidence that you hear and the instructions that I give?
>
> I don't know what the evidence is going to be, but again, it's a homicide case, so there may be autopsy photos in this case. Would that have – any type of graphic photos being presented affect your ability to render a fair and impartial verdict in this case?
>
> Is there anything that I have not covered which would affect your ability to be fair and impartial in this case?

The State argues that the post-conviction court erred in awarding Jackson a belated appeal. The State contends that the law of the case doctrine prohibited post-conviction relief, because this Court, in denying Jackson's motion for reconsideration on direct appeal, specifically found that Jackson could not establish prejudice from the *Dingle*-violative voir dire questions as "there was no significant or substantial possibility that the voir dire questions at issue affected the outcome of the case." The State also argues that the post-conviction court erred in finding prejudice based on the prospect of success on appeal had trial counsel objected to the faulty voir dire questions at issue. Finally, the State argues that we should decline to exercise our discretion to utilize plain error to reach Jackson's unpreserved claim concerning the voir dire questions.

Neither party has argued that the voir dire questions at issue were not violative of *Dingle*. Thus, the critical issue before this court is the impact or import of the trial court's failure to pose appropriate questions and whether law of the case principles apply. The post-conviction court found that neither decision of this Court amounted to law of the case. The court observed:

> [This Court's] decisions in *Ortiz* and *Jackson* entangle a fundamental pillar of the rule of law and the justice system of this state and nation: equal

> treatment for identically situated parties. Petitioner and Mr. Ortiz are poised to receive opposite results. It simply cannot be the case that the compound voir dire questions aimed at ferreting out bias or partiality rendered the same trial fundamentally unfair as to Mr. Ortiz but neutral and unbiased as to Petitioner. But, in essence, this is what the holdings of *Ortiz* and *Jackson*'s order denying reconsideration dictate.

The post-conviction court then examined whether Jackson had suffered prejudice and found "that had trial counsel objected to the use of *Dingle*-violating voir dire questions, the trial judge would have either corrected the error, or had he not, [Jackson]'s appellate counsel would have had a high likelihood of success on appeal." Having found both error and prejudice, the post-conviction court granted post-conviction relief in the form of a belated appeal "with leave to argue that the compound voir dire questions in violation of the *Dingle* doctrine should cause the Court to reverse his conviction and grant him a new trial." The court cited *Gross v. State*, in support of its determination.

In *Gross v. State*, trial counsel failed to preserve two issues for appeal by failing to object when certain DNA evidence was offered at trial. Trial counsel strenuously argued in a pre-trial motion in limine the inadmissibility of the DNA evidence, and then, during trial, failed to renew those objections thus failing to preserve the issue for direct appeal. *Id*. at 586. This Court found, in what we determined was a matter of first impression, that deficient performance of trial counsel in failing to preserve an issue for appellate review, can result in appellate prejudice if that issue "would have had 'a reasonable probability' of success at the appellate level, had it been preserved." *Gross*, 134 Md. App. at 585. We termed this a "hybrid analysis." *Id* at 584. We said:

> The two instances of ineffectiveness found by the post-conviction hearing judge do not concern any failure of trial counsel to challenge the evidence

> [during a pre-trial hearing] on November 29. Both findings of ineffective trial performance involve only the failure of counsel formally to renew the objection [at trial] on December 5 when Melissa Weber, the Senior Molecular Biologist at Cellmark Diagnostic, testified about the DNA PCR examination. There is no suggestion that the trial judge was going to rethink on December 5 his earlier ruling of November 29.

Id. at 582.

> We also observed that:
>
> In terms of any possible effect on the outcome of the trial *per se*, the renewal of the objection would have been nothing more than a procedural hiccough or a clearing of his throat by counsel. It was a gesture that would not even have been noticed, except by the record.

Id. at 584. We concluded that "any error of trial counsel in failing to preserve the two DNA-related issue for appeal was non-prejudicial because neither of those issues had a reasonable probability of success on appeal." *Id*. at 608-09. The Maryland Supreme Court granted certiorari in *Gross* and affirmed. *Gross v. State*, 371 Md. 334 (2002). The Court reiterated that, "[t]he principles governing ineffective assistance of counsel claims under the Sixth Amendment, both with regard to trial counsel and appellate counsel, are those set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) [and its progeny.]" *Id* at 348. The Court stated, "[t]he question of prejudice, in the context of an ineffective assistance of counsel claim for the failure to preserve or raise an appellate claim, necessarily requires a reviewing court to look at the merits of the underlying claim." *Id*. at 349-50 (citations omitted). The Supreme Court held that any error of counsel with respect to the DNA evidence was non-prejudicial. *Id*. at 351. With respect to the "hybrid analysis," the Court said: "Whether the [Appellate Court of Maryland] did or did not adopt a new 'hybrid' test for assessing ineffective assistance of counsel claims does not

determine the outcome of this case and need not be further explored by us." *Id*. at 348.

In *Newton v. State*, 455 Md. 341 (2017) the Maryland Supreme Court addressed a claim of ineffective assistance of trial counsel for acquiescing to the presence of an alternate juror with the deliberating jury. Newton argued that he was prejudiced by the error because, "if his trial counsel had objected to the presence of the alternate, he would have been granted a new trial on appeal." *Id*. at 361. The Supreme Court stated that, because we "presume ... that the judge ... acted according to law[,] *Strickland*, 466 U.S. at 694[,] [w]e therefore must assume that if Newton's attorney had objected, the judge would have sustained Newton's objection and excused the alternate as required by Maryland Rule 4–312(g)(3)." *Id*. The Court concluded that the trial court would not have therefore erred in the face of an objection by counsel, and as a result, there would have been nothing to raise on appeal.

Jackson argues that while there is a presumption that a trial court knows and correctly applies the law, it was rebutted in his case because, during the voir dire process, the court seemingly raised, *sua sponte*, the *Dingle* issue with the parties. Jackson claims that "[t]he trial court's statements regarding the issue make clear that the court was aware of the Maryland case law disapproving of compound voir dire questions and yet did not act according to the law to rephrase and modify the voir dire questions into proper form." Jackson argues, "[i]t should not be presumed the trial court would have acted according to the law to sustain an objection to the improper questions when the trial court did not act according to the law to rephrase the questions in proper non-compound format."

During voir dire, when the court started to pose a question about prospective

jurors' connections to law enforcement, the court called a bench conference with counsel wherein the court raised the principle that voir dire questions should not require prospective jurors to "self-select":

> [THE COURT:] . . . All right. Again, if you've already answered this one, but I don't think I really asked this form of this question. Is there any member of the jury panel who has a, I'm – come on up. Approach, attorneys.
>
> (Bench conference follows:)
>
> THE COURT: I think this 13,[8] don't you just want me to ask them if they have members? Otherwise –
>
> [ORTIZ'S COUNSEL]: Yes, that's, that's fine.
>
> THE COURT: – that violates the self-selecting case. I don't know if you have this question or not. I haven't gone back over it again, the 1aw – do you have–
>
> [JACKSON'S COUNSEL]: The law enforcement?
>
> THE COURT: – family member in law –
>
> [JACKSON'S COUNSEL]: Yes, I –
>
> THE COURT: Sure.
>
> [JACKSON'S COUNSEL]: – I think I do. I'm trying to remember.
>
> THE COURT: I want to see how you –
>
> [JACKSON'S COUNSEL]: I apologize. I don't know the self-selecting case. I apologize. Which –

[8] As the State points out in its brief, the court was evidently referring to question #13 in Ortiz's proposed voir dire: "Is there any member of the jury panel who feels that because they have a close friend or relative employed by any law enforcement agency, State's Attorney's Office, United States' Attorney's Office, Attorney General's Office, or the Special State Prosecutor of Maryland's Office, he or she would give more weight to the testimony of a law enforcement officer, or the relationship would cause him or her to favor the State?"

THE COURT: Basically, would anybody – does anybody have members who are law enforcement and would that prevent you – better to call them up and then you find out –

[JACKSON'S COUNSEL]: Okay.

THE COURT: – you don't let them self-say whether –

[JACKSON'S COUNSEL]: Got it.

THE COURT: Herman Dawson's case from Prince George's County – picked a fast jury, but –

[JACKSON'S COUNSEL]: Yes, I do have it. So do –

THE COURT: I want to see how you phrase it.

[JACKSON'S COUNSEL]: Yes. No, I think it's the same. I think we're using the same template.

[ORTIZ'S COUNSEL]: My stuff is all original.

THE COURT: No, you –

[JACKSON'S COUNSEL]: No?

THE COURT: – you have a –

[JACKSON'S COUNSEL]: Do I?

THE COURT: – so you're not – they're not self-selecting in yours.

[JACKSON'S COUNSEL]: Okay.

THE COURT: So I'm going to wait until I get to [Jackson's counsel's] and ask that question.

[JACKSON'S COUNSEL]: Okay.

[ORTIZ'S COUNSEL]: Fine, Your Honor.

THE COURT: Okay.

(Bench conference concluded.)

As we see it, it is clear from the record that the trial court recognized, and perhaps

telegraphed to the parties, that there was a potential *Dingle* problem, but when the parties seemed unaware of it, and did not press it, the court took no action. It appears that the trial court was receptive to a *Dingle*-based argument and, had any of the lawyers raised an objection, we can presume that the court would not have failed to cure the *Dingle* problem. As such, there is no basis in the record to conclude that the presumption was rebutted. We note, further, that trial counsel's failure to object was not a technical failure to preserve an issue for the record as in *Gross*. Thus, unlike *Gross*, looking at the merits of the claim, and based on an examination of the evidence presented, there was no prejudice.

Before the post-conviction court, both parties argued that law of the case principles applied but in different contexts. Jackson claimed that the *Ortiz* decision was law of the case and dictated the outcome of the case, and the State claimed that this Court's ruling on Jackson's motion for reconsideration on direct appeal dictated the outcome. In its opinion, the post-conviction court held:

> Both unreported appellate opinions discussed ineffective assistance of counsel, but in both cases, the Court of Special Appeals took pains to indicate that its rulings did not require findings of prejudice because the ineffective assistance of counsel claims were not properly before them. Before opining on ineffective assistance the *Ortiz* Court held that because the record was not fully developed or transcribed, it was not making a holding on ineffective assistance. *Ortiz* at*7. Meanwhile, the prejudice discussion in Petitioner's reconsideration denial opinion begins "assuming arguendo, we could somehow determine on this record that the performance of appellant counsel was deficient…This makes both courts' treatment of prejudice in the context of Strickland dicta, and pursuant to *Garner* and Rule 1-104, these discussions are not law of the case.

State of Maryland v. Jackson, Case No. 132117C (Cir. Ct. for Montgomery Cnty, at 13-14 [April 5, 2024], Order granting in part and denying in part post-conviction relief.

We agree with the post-conviction court that the *Ortiz* court's language was dicta because the remarks were merely hypothetical and provided insight into the court's reasoning. However, we do not agree that the final paragraph of this Court's order denying Jackson's motion for reconsideration was totally dicta. We stated:

> Were we to grant the extant motion, it would not suffice for us to agree with the panel of this Court that decided *Ortiz* that the trial judge committed plain error regarding the voir dire questions at issue. This court would need to conclude, under *Strickland v. Washington*, 466 U.S. 668 (1984) that Jackson's appellate counsel representation was deficient by not raising a fifth question presented in his brief and arguing that the trial judge committed plain error when he asked the questions . . . Assuming arguendo, we could somehow determine on this record that the performance of appellate counsel was deficient, and this "sub-par" performance led to structural error, this would not necessarily demonstrate that Jackson had shown the requisite prejudice under Strickland. There is no presumption of prejudice when a structural error is used by counsel's inadequate representation. Jackson would have to prove that the defective performance created a "substantial or significant possibility" that his second-degree murder conviction was affected by the deficient performance. In the instant case, the State present strong case of Jackson's guilt and therefore there was no significant or substantial possibility that the voir dire questions at issue affected the outcome of the case.

Jackson v. State, No. 498 at 2-3 (Md. App. Filed August 12, 2020). As we see it, the first sentence was dicta. However, in the final sentence, we concluded that there was "no significant or substantial possibility that the question affected the outcome of the case." *Id.* Thus, while we did not address the merits of the performance prong, we did address the issue of prejudice.

In sum, we hold that the post-conviction court erred. We, therefore, reverse and vacate the post-conviction court's order granting post-conviction relief in the form of a belated appeal. As a consequence, we dismiss the appeal in No. 1007.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. APPEAL IN *JACKSON V. STATE*, NO. 1007, SEPT. TERM, 2024 DISMISSED. COSTS TO BE PAID BY THE APPELLANT / CROSS-APPELLEE.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1007s24cn.pdf