

THE SUPREME COURT OF ARKANSAS HOLDS THAT TRIAL
COUNSEL’S FAILURE TO CHALLENGE THE CONSTITUTIONALITY
OF THE SEVENTY-PERCENT PAROLE LAW DID NOT CONSTITUTE
DEFICIENT PERFORMANCE OR PREJUDICE DEFENDANTS.

In *Myers v. State*,¹ the Supreme Court of Arkansas held that Appellants were not denied effective assistance of counsel because “possession of drug paraphernalia with intent to manufacture methamphetamine [was] not a lesser-included offense of manufacturing methamphetamine,” and intent to deliver is a not a necessary element of manufacturing.² Additionally, the Court held that trial counsel’s failure to challenge the unconstitutional repeal of the seventy-percent provision of Ark. Code Ann. § 16-93-611(a) did not prejudice Appellants nor constitute deficient performance.³

On May 23, 2003 criminal informations were filed against Appellants, charging them with “manufacturing methamphetamine, possession of drug paraphernalia with intent to manufacture methamphetamine, and possession of drug paraphernalia.”⁴ Myers was charged as a habitual offender.⁵ On January 26, 2004, the criminal informations against Myers and Hall were amended to add a charge of possession of methamphetamine with intent to manufacture.⁶

At trial, the State informed the court that it had intended to charge Appellants with possession of methamphetamine with intent to deliver, and the language stating “intent to manufacture” was an error.⁷ Counsel for Appellants’ told the court that he had noticed the error and knew it was a typo, and the trial court corrected Hall’s information by hand.⁸ Myers’ charge was reduced to simple possession of methamphetamine.⁹ Subsequently, “a jury found [A]ppellants guilty of manufacturing methamphetamine, possession of drug paraphernalia with intent to manufacture methamphetamine, and possession of drug paraphernalia.”¹⁰ “Myers was [also] found guilty of possession of methamphetamine, [while] Hall was found guilty of possession of methamphetamine with intent to deliver.”¹¹ Myers was sentenced to twenty-four years’ imprisonment, and Hall was sentenced to twenty years’ impris-

1. 2012 Ark. 143, ___ S.W.3d at ____.
2. *Id.* at 7–10, ___ S.W.3d at ____.
3. *Id.* at 13, ___ S.W.3d at ____.
4. *Id.* at 1, ___ S.W.3d at ____.
5. *Id.* at 1–2, ___ S.W.3d at ____.
6. Myers, 2012 Ark. 143, at 2, ___ S.W.3d at ____.
7. *Id.*, ___ S.W.3d ____.
8. *Id.* at 2, ___ S.W.3d at ____.
9. *Id.* at 2, ___ S.W.3d at ____.
10. *Id.* at 3, ___ S.W.3d at ____.
11. *Id.*, ___ S.W.3d ____.

onment.¹² Myers and Hall appealed their convictions, and the court of appeals affirmed on March 21, 2007.¹³ They both filed petitions for postconviction relief on July 2, 2007.¹⁴

Appellants both argued in their petitions for post conviction relief that their “trial counsel was ineffective for . . . failing to raise an objection to [their] convictions for both possession of drug paraphernalia with intent to manufacture methamphetamine and manufacturing methamphetamine, [because] possession of drug paraphernalia with intent to manufacture is a lesser-included offense of manufacturing.”¹⁵ Additionally they argued that their trial counsel was ineffective for “failing to object to [their] convictions for both possession of methamphetamine with intent to deliver and manufacturing methamphetamine, [because] possession of methamphetamine with intent to deliver is a lesser-included offense of manufacturing.”¹⁶ They also claimed their trial counsel was ineffective because of his failure to object to their conviction for possession of methamphetamine with intent to deliver, as they were not charged with that offense.¹⁷ Lastly, they asserted that their trial counsel was ineffective because he failed to object when their sentences were ordered to run consecutively.¹⁸

On September 3, 2008, Appellants amended their petitions to omit the consecutive sentences argument and added an argument that their “counsel was ineffective for not challenging the unconstitutional repeal of the seventy-percent provision of Ark. Code Ann. § 16-93-611(a).”¹⁹ In January 2010, Myers and Hall both filed a second amended petition arguing the same points as the previous petitions, but altering the first argument presented to assert that manufacturing methamphetamine was an element of the offense of possession of drug paraphernalia with intent to manufacture methamphetamine.²⁰ After a brief hearing on September 20, 2010, the court denied postconviction relief on October 4, 2010.²¹

An ineffective assistance of counsel claim is determined by the standard set forth in *Strickland v. Washington*.²² The *Strickland* standard requires a petitioner to prove that counsel’s performance was deficient, meaning that “counsel made errors so serious that [he] was not functioning as the ‘coun-

12. Myers, 2012 Ark. 143, at 3, ___ S.W.3d at ___.

13. *Id.*, ___ S.W.3d ___.

14. *Id.*, ___ S.W.3d ___.

15. *Id.* at 2–3, ___ S.W.3d at ___.

16. *Id.* at 3, ___ S.W.3d at ___.

17. *Id.*, ___ S.W.3d ___.

18. Myers, 2012 Ark. 143, at 3, ___ S.W.3d at ___.

19. *Id.*, ___ S.W.3d ___.

20. *Id.* at 3, n.2, ___ S.W.3d ___.

21. *Id.* at 3–4, ___ S.W.3d at ___.

22. 466 U.S. 668 (1984).

sel’ guaranteed . . . by the Sixth Amendment.”²³ There is a strong presumption in favor of counsel, and the burden can only be overcome by identifying specific acts and omissions of counsel that, “when viewed from [their] perspective at the time of the trial, could not have been the result of reasonable professional judgment.”²⁴ Additionally, a showing that the deficient performance prejudiced the defense is required.²⁵ A performance prejudices the defense when there is a reasonable probability, that but for counsel’s errors, the jury would have had a reasonable doubt regarding guilt, and the decision would have been different absent counsel’s errors.²⁶

Appellants urged the court to reverse the trial court’s denial of postconviction relief because “possession of drug paraphernalia with intent to manufacture methamphetamine is a lesser-included offense of manufacturing methamphetamine,” and their trial counsel should have objected to this because “being convicted of both charges is a double-jeopardy violation.”²⁷ In affirming the circuit court’s ruling on this point, the Court noted that a double-jeopardy claim requires a showing that the two offenses cannot survive the same-elements test.²⁸ This test, espoused in *Blockburger v. United States*,²⁹ is codified in Ark. Code Ann. § 5-1-110(b).³⁰ It states that “an offense is included in an offense charged only if the offense is established by proof of the same or less than all of the elements required to establish the commission of the offense charged.”³¹

The Court noted that possession of drug paraphernalia with the intent to manufacture methamphetamine requires proof “beyond a reasonable doubt that the defendant knowingly used or possessed with the intent to use drug paraphernalia to manufacture methamphetamine.”³² However, the Court explained that a charge of manufacturing meth requires proof that “the defendant knowingly or purposefully produced, prepared, propagated, compounded, converted, or processed, either directly or indirectly, by extraction from substances of natural origin or by means of chemical synthesis, packaged or repackaged or labeled or relabeled a container of methamphetamine.”³³ The Court explained that it had previously held in *Hester v. State*³⁴

23. Myers, 2012 Ark. 143, at 4, ___ S.W.3d at ___ (citing Sparkman v. State, 373 Ark. 45, 281 S.W.3d 277 (2008)).

24. *Id.*, ___ S.W.3d ___.

25. *Id.* at 5, ___ S.W.3d at ___.

26. *Id.* at 5, ___ S.W.3d ___.

27. *Id.* at 5, ___ S.W.3d at ___.

28. *Id.* at 6, ___ S.W.3d at ___.

29. 284 U.S. 299, 304 (1932).

30. See ARK. CODE ANN. § 5-1-110(b).

31. *Id.*

32. Myers, 2012 Ark. 143, at 7, ___ S.W.3d at ___.

33. *Id.*, ___ S.W.3d ___.

34. 362 Ark. 373, 208 S.W.3d 747 (2005).

that “possession of drug paraphernalia with intent to manufacture methamphetamine was not a lesser-included offense of manufacturing methamphetamine,” because possession of drug paraphernalia with intent to manufacture methamphetamine does not require the proof of engagement in the production, preparation, propagation, compounding, conversion, or processing of methamphetamine which a charge of manufacturing methamphetamine requires.³⁵ It therefore survives the same-elements test, and the Court additionally stated that Appellants did not demonstrate any reason why *Hester* should be overruled.³⁶

Appellants also made a similar argument, that possession of methamphetamine with intent to deliver is a lesser-included offense of manufacturing methamphetamine, which is a double-jeopardy violation.³⁷ The Court again affirmed the ruling of the circuit court, holding that it is not a lesser-included offense, thus not a double-jeopardy violation to which their trial counsel should have objected.³⁸ Hall asserted that intent to deliver is a necessary element of manufacturing, because “to ‘manufacture’ a controlled substance necessarily means that the substance is not for one’s own use,” and the term “‘manufacture’ includes an exception for the preparation or compounding of a controlled substance by an individual for his or her own use.”³⁹

While the Court had previously held in *Cothren v. State*⁴⁰ that possession of a controlled substance with intent to deliver is not a lesser-included offense of manufacturing a controlled substance, Hall urged the Court to hold that *Cothren* “unconstitutionally shifts the burden of proof [in] requiring the defendant to prove that he did not intend to deliver the methamphetamine.”⁴¹ The Court held that because *Cothren* had clearly decided the issue, Appellants’ trial counsel could not be ineffective for failing to raise an argument that had already been decided at the time of the trial.⁴²

Appellants asserted that their trial counsel was also ineffective for failing to object to their convictions for possession of methamphetamine with intent to deliver, because they assert that they were only charged with possession of methamphetamine with intent to manufacture, not intent to deliver.⁴³ In affirming the trial court’s ruling, the Court noted that Appellant’s argument plainly overlooked the fact that their criminal informations were

35. Myers, 2012 Ark. 143, at 7, ___ S.W.3d at ___.

36. *Id.* at 7, ___ S.W.3d at ___.

37. *Id.* at 8, ___ S.W.3d at ___.

38. *Id.* at 10, ___ S.W.3d at ___.

39. *Id.* at 10, ___ S.W.3d at ___.

40. 344 Ark. 697, 42 S.W.3d 543 (2001).

41. Myers, 2012 Ark. 143, at 9, ___ S.W.3d at ___.

42. *Id.* at 10, ___ S.W.3d at ___.

43. *Id.* at 11, ___ S.W.3d at ___.

amended at trial, and that their trial counsel had acknowledged the error as a typo.⁴⁴ Further, Myers' charge was later reduced to simple possession of methamphetamine, so his argument was not logical considering that he was not actually convicted of possession of methamphetamine with intent to deliver.⁴⁵ Hall's argument also fails because the court corrected his criminal information by hand at trial.⁴⁶

Lastly, Appellants argued that their trial counsel was ineffective because he failed to challenge the constitutionality and effect of the seventy-percent parole law that was included in a jury instruction at trial.⁴⁷ The instruction informed the jury that "if they sentenced [A]ppellants to a term of years for the manufacturing-methamphetamine and possession-of-drug-paraphenalia-with-intent-to-manufacture-methamphetamine charges, [A]ppellants would become eligible for parole or transfer to community punishment after they served seventy percent . . . of their sentence."⁴⁸ Appellants asserted that "Act 1782 of 2001 was an unconstitutional repeal of the sunset clause of the statutory provision that requires persons convicted of certain offenses to serve seventy percent of their sentence prior to being eligible for parole."⁴⁹ Further, they asserted that the seventy percent provision expired on April 30, 2002, "because the attempted repealer of the sunset provision was unconstitutional."⁵⁰ Therefore, their offenses were not subject to that provision and should not have been included in the jury instruction.

In response, the State argued that Appellants had not met the *Strickland* standard and had failed to show how the instruction had prejudiced their defense.⁵¹ Additionally, the State urged the Court that it was unlikely Appellants could prove prejudice, because their trial counsel relied on the seventy percent rule in his arguments.⁵² Therefore, his use of the seventy percent rule was a strategic decision.⁵³

The Court again affirmed the ruling of the trial court, holding that Appellants failed to meet their burden under the *Strickland* standard by showing that there was "a reasonable probability that, but for counsel's errors, the [jury] would have had a reasonable doubt [regarding] their guilt."⁵⁴ The Court emphasized that whether or not the Appellants were eligible for parole

44. *Id.*, ___ S.W.3d ____.
45. *Id.* at 11, ___ S.W.3d at ____.
46. *Id.* at 11, ___ S.W.3d at ____.
47. Myers, 2012 Ark. 143, at 11–12, ___ S.W.3d at ____.
48. *Id.* at 12, ___ S.W.3d at ____.
49. *Id.* at 12, ___ S.W.3d at ____.
50. *Id.*, at 12, ___ S.W.3d at ____.
51. *Id.* at 12–13, ___ S.W.3d at ____.
52. *Id.* at 13, ___ S.W.3d at ____.
53. Myers, 2012 Ark. 143, at 13, ___ S.W.3d at ____.
54. *Id.* at 13, ___ S.W.3d at ____.

was immaterial to whether the jury's decision would have been different absent the alleged errors.⁵⁵

This case underscores the high burden of proof an Appellant must meet to be successful in an ineffective assistance of counsel claim. It also demonstrates the futility of arguing that trial counsel was ineffective for following the law as it stood at the time of the trial, because it is unlikely that the court will overrule their precedent on issues that have been previously decided.

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55. *Id.* at 13, ___ S.W.3d at ___.