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Concomitant Effect on Eyewitness Credibility*

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## Note

### ***DICKEY v. STATE: JURY INSTRUCTION ON DRUG USE AND ITS CONCOMITANT EFFECT ON EYEWITNESS CREDIBILITY***

RACHEL M. WITRIOL\*

In *Dickey v. State*,<sup>1</sup> the Court of Appeals of Maryland considered whether a trial court is obliged to give a requested jury instruction on the credibility of testimony given by a witness who is addicted to drugs or was abusing drugs at the time of the alleged crime.<sup>2</sup> The Court of Appeals held that the subject matter of the requested instruction had already been addressed by other instructions given to the jury, and that the requested instruction was an incorrect statement of the law because it called for examination of addict-witness testimony under a heightened standard of scrutiny.<sup>3</sup> The court's holding resulted from its misapplication of the three-part test based on Maryland Rule 4-325, under which a trial court must consider several factors in assessing whether it must give a requested instruction to the jury.<sup>4</sup> The court also neglected to address the specific facts of the *Dickey* case in its analysis of addict-informant instructions.<sup>5</sup> Although the court properly affirmed *Dickey*'s conviction, its holding left an unclear rule that appears to give trial courts broad discretion to deny requests for addict-witness instructions when in fact certain circumstances should require a trial judge to instruct the jury on a witness's relationship with drugs and the effect of drug use on credibility.<sup>6</sup>

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\* Rachel M. Witriol is a second-year law student at the University of Maryland School of Law where she is a staff member for the *Maryland Law Review*. She is greatly appreciative to Emily Chase Dubansky, Notes and Comments Editor, and to Heather R. Pruger, Executive Notes and Comments Editor, for their support, guidance, and encouragement throughout the writing process. The author would also like to thank Professor Abraham Dash for the wisdom and insight he imparted from his experience in the field of criminal law.

1. 404 Md. 187, 946 A.2d 444 (2008).

2. *Id.* at 196, 946 A.2d at 449.

3. *Id.* at 201, 946 A.2d at 452.

4. *See infra* Part IV.A.

5. *See infra* Part IV.B.

6. *See infra* Part IV.C.

I. THE CASE

Petitioner Desmond Ellison Dickey was charged with first degree murder and other related felonies in connection with a fatal shooting that occurred on August 12, 2001, in Baltimore, Maryland.<sup>7</sup> Anthony Carlest was killed in the shooting and Carlest's cousin, Melvin McCallister, was wounded.<sup>8</sup> Four eyewitnesses, including McCallister, identified Dickey as the shooter.<sup>9</sup> Dickey was subsequently charged in the Circuit Court of Maryland for Baltimore City.<sup>10</sup>

During Dickey's trial, eyewitness Earl Price admitted to having a history of drug abuse, that he was currently addicted to heroin, and that he occasionally used cocaine.<sup>11</sup> He also stated that he had used heroin on the day of the shooting, but asserted that the drug use did not affect his ability to perceive and recall the events to which he testified.<sup>12</sup> Price further testified that police told him they would drop the drug possession charges stemming from his arrest on October 4, 2001, in exchange for his testimony at Dickey's trial.<sup>13</sup>

After the conclusion of the evidence, Dickey requested a jury instruction stating that the testimony of a witness who either used drugs or was addicted to drugs "must be examined with greater scrutiny than the testimony of any other witness."<sup>14</sup> The circuit court denied the request, reasoning that the issue had already been dealt with during Price's cross-examination regarding his drug abuse problems and his ability to remember the events, as well as by other jury instructions given regarding witness credibility and accuracy of witnesses' recollection.<sup>15</sup> The jury later

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7. *Dickey*, 404 Md. at 189, 195, 946 A.2d at 445, 449.

8. *Id.* at 189, 946 A.2d at 445. The shooting was apparently the result of a dispute between McCallister and Dickey's cousin, Juan Tucker. *Id.*, 946 A.2d at 446.

9. *Id.* at 189-91, 946 A.2d at 446. McCallister identified Dickey as the shooter out of a police line-up. *Id.* at 190, 946 A.2d at 446. Anna Boxer also identified Dickey as the shooter, and testified that he was the driver of the white Caravan involved in the shooting. *Id.* William McLain witnessed the shooting and wrote down the license plate number of the van in which he saw the shooter leave the scene, which was registered to Dickey. *Id.* at 190-91, 946 A.2d at 446. Earl Price, a long-time acquaintance of Tucker and Dickey, testified that Dickey was the shooter, and that after the shooting ended he saw Dickey and Tucker get into a white car together. *Id.* at 191, 946 A.2d at 446-47.

10. *Id.* at 189, 946 A.2d at 445.

11. *Id.* at 192, 946 A.2d at 447.

12. *Id.*

13. *Id.*

14. *Id.* at 193, 946 A.2d at 447. This jury instruction is derived from the Modern Federal Jury Instructions. *Id.* at 193 n.2, 946 A.2d at 447 n.2 (citing 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS ¶ 7-91 (2006)).

15. *Id.* at 193-94, 946 A.2d at 448.

returned a verdict of guilty on all counts and Dickey was sentenced to life plus thirty years imprisonment.<sup>16</sup>

The Court of Special Appeals of Maryland affirmed Dickey's conviction.<sup>17</sup> The Court of Special Appeals held that the trial court erred by refusing to give the requested instruction.<sup>18</sup> The court reasoned that Price's testimony regarding his drug use and addiction entitled Dickey to a specialized instruction as a matter of law.<sup>19</sup> However, the Court of Special Appeals found the error was harmless due to the abundance of other evidence connecting Dickey to the shooting, as well as the jury's knowledge of Price's drug use and addiction from his testimony on direct and cross-examination.<sup>20</sup> Thus, the court affirmed Dickey's conviction.<sup>21</sup>

The Maryland Court of Appeals granted certiorari to decide whether the circuit court erred by denying Dickey's request for a jury instruction requiring heightened scrutiny of drug-addict witness testimony and, if so, whether such an error was harmless beyond a reasonable doubt.<sup>22</sup>

## II. LEGAL BACKGROUND

Maryland Rule 4-325 governs whether a trial court is required to give a requested jury instruction in a criminal trial.<sup>23</sup> The Maryland Court of Appeals has devised a three-part test interpreting Rule 4-325.<sup>24</sup> The Maryland Court of Special Appeals, the only Maryland appellate court to have addressed jury instructions on drug-addict witness testimony prior to *Dickey*, requires a trial judge to grant a request for a specific jury instruction addressing a witness's relationship with drugs and its effect on that witness's testimony.<sup>25</sup> Maryland law is more settled on what jury instruction a trial court must give in the case of testimony by accomplice witnesses or witnesses promised a benefit for testifying: The Maryland Court of Appeals requires a trial court to instruct jurors tasked with determining the credibility of such witnesses to consider their testimony "with caution."<sup>26</sup>

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16. *Id.* at 195, 946 A.2d at 449.

17. *Dickey v. State*, No. 1184, slip op. at 32 (Md. App. Feb. 21, 2007).

18. *Id.* at 12.

19. *Id.*

20. *Id.* at 12, 15.

21. *Id.* at 32. The Court of Special Appeals remanded the case to the circuit court after vacating Dickey's sentence for unrelated reasons. *Id.* at 27.

22. *Dickey v. State*, 404 Md. 187, 196, 946 A.2d 444, 449 (2008).

23. *See infra* Part II.A.

24. *See infra* Part II.A.

25. *See infra* Part II.B.

26. *See infra* Part II.C.

A. *Based on Maryland Rule 4-325, the Court has Devised a Three-Part Test for Determining Whether a Trial Judge is Required to Give a Requested Instruction*

Maryland Rule 4-325 governs whether a trial judge must give a requested jury instruction during a criminal trial.<sup>27</sup> Specifically, Maryland Rule 4-325(c) states: “The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding . . . . The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.”<sup>28</sup> The Maryland Court of Appeals has interpreted this rule to require the court to give an instruction when it meets three pre-conditions: (1) it is a correct statement of the law, (2) it is applicable to the facts of the case, and (3) it is not covered by other jury instructions.<sup>29</sup>

The court has long asserted the principle that a trial judge is not required to give a requested instruction as long as other instructions given to the jury “‘fairly cover’ the subject matter of the requested instruction.”<sup>30</sup> In *Gunning v. State*,<sup>31</sup> the court granted certiorari in two cases, both involving a defendant convicted based on a single eyewitness’s uncorroborated identification.<sup>32</sup> In both cases, the defense was mistaken identification, and both defendants requested a jury instruction on eyewitness identification, which the trial judge refused to give to the jury.<sup>33</sup> The court emphasized that a trial judge has discretion when deciding whether to give a requested instruction, but that failure to exercise such discretion is considered error.<sup>34</sup> In each case, the court found the trial judge failed to exercise his discretion by denying the requested instruction based on an incorrect assumption that identification instructions are per se inappropriate.<sup>35</sup> The court explained that a trial judge properly exercises judicial discretion by making an individualized determination—based on the facts and evidence—of whether the requested instruction is necessary, and whether other instructions “‘fairly cover’” the subject matter of the requested instruction.<sup>36</sup>

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27. MD. R. 4-325.

28. *Id.* 4-325(c).

29. *See infra* notes 30–49 and accompanying text.

30. *Gunning v. State*, 347 Md. 332, 348, 701 A.2d 374, 382 (1997); *Grandison v. State*, 341 Md. 175, 211, 670 A.2d 398, 415 (1995); *England v. State*, 274 Md. 264, 276, 334 A.2d 98, 105 (1975).

31. 347 Md. 332, 701 A.2d 374.

32. *Id.* at 335, 701 A.2d at 375.

33. *Id.*

34. *Id.* at 345, 348, 352, 701 A.2d at 380, 383–84.

35. *Id.* at 351, 701 A.2d at 383.

36. *Id.* at 353, 701 A.2d at 384.

This inquiry is articulated in both *Patterson v. State*<sup>37</sup> and *Thompson v. State*.<sup>38</sup> In both cases, the Court of Appeals noted that it has consistently interpreted Maryland Rule 4-325(c) to oblige a trial judge to give a party's requested instruction where the instruction is "(1) a correct statement of the law; (2) applicable under the facts of the case;" and where "(3) the content of the requested instruction [is] not fairly covered elsewhere" in the instructions actually given to the jury.<sup>39</sup> In *Patterson*, the defendant was convicted of possession of cocaine with intent to distribute based on evidence that cocaine was found inside a jacket located in the trunk of his car.<sup>40</sup> The defendant's defense at trial was that the jacket did not belong to him.<sup>41</sup> The prosecution entered only a picture of the jacket into evidence at trial because law enforcement had lost the jacket.<sup>42</sup> The defendant requested a "missing evidence" instruction at trial, stating that the jury could infer that the prosecution did not offer the jacket into evidence because the jacket was exculpatory.<sup>43</sup> The court found the trial judge was not required to give the instruction, in part because there was no evidence that law enforcement intentionally destroyed the jacket or that the jacket was exculpatory.<sup>44</sup>

In *Thompson*, the defendant was convicted of assault, reckless endangerment, and several firearms offenses.<sup>45</sup> Evidence adduced at trial showed that the defendant attempted to flee on his bicycle when he was approached by a detective.<sup>46</sup> The trial court granted the State's request for a flight instruction over defense counsel's objection.<sup>47</sup> The Court of Appeals held that the trial court abused its discretion by giving the flight instruction because the facts showed that the defendant did not flee from the detective due to a guilty conscience relating to the crimes he was charged with at trial.<sup>48</sup> In both *Patterson* and *Thompson*, the court acknowledged

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37. 356 Md. 677, 683–84, 741 A.2d 1119, 1122 (1999).

38. 393 Md. 291, 302–03, 901 A.2d 208, 214 (2006).

39. *Thompson*, 393 Md. at 302–03, 901 A.2d at 214; *Patterson*, 356 Md. at 683–84, 741 A.2d at 1122 (citing *Ware v. State*, 348 Md. 19, 58, 702 A.2d 699, 718 (1997)); see also MD. R. 4-325.

40. *Patterson*, 356 Md. at 680–81, 741 A.2d at 1120–21.

41. *Id.* at 682, 741 A.2d at 1121.

42. *Id.* at 681–82, 741 A.2d at 1121.

43. *Id.* at 682, 741 A.2d at 1121.

44. *Id.* at 697–99, 741 A.2d at 1129–30.

45. *Thompson v. State*, 393 Md. 291, 300, 901 A.2d 208, 213 (2006).

46. *Id.* at 295, 901 A.2d at 210.

47. *Id.* at 298–300, 901 A.2d at 212–13.

48. *Id.* at 313–15, 901 A.2d at 221–22. In fact, the defendant admitted to police that he fled from the detective because he had drugs in his possession. *Id.* at 313, 901 A.2d at 221. The defendant was not being tried for drug possession, so this fact was not admitted into evidence at trial. *Id.* at 314, 901 A.2d at 221. The court found that the defendant may have been prejudiced by the flight instruction, and thus the trial judge abused his discretion. *Id.* at 315, 901 A.2d at 222.

the importance of the three-prong test in the trial court's determination of whether to give the requested instruction.<sup>49</sup>

At the same time, the Court of Appeals has also consistently asserted a rule that is seemingly incompatible with the three-prong test.<sup>50</sup> In *General v. State*,<sup>51</sup> the Court of Appeals reiterated the rule that “[w]hether a particular instruction must be given depends upon whether there is any evidence in the case that supports the instruction.”<sup>52</sup> This rule is often incompatible with the three-prong test because it presents a different standard for whether a trial judge must give a requested instruction. In *General*, the defendant was charged with and convicted of a hit and run.<sup>53</sup> At trial, his defense was that he believed he struck a trash bag, not a person.<sup>54</sup> He requested a specific jury instruction regarding the defense of mistake of fact, but the trial court denied the request, giving only knowledge and proof of intent instructions to the jury.<sup>55</sup> The Court of Appeals reversed, holding that “[t]he knowledge and intent instructions, while sufficiently informing the jury of the required mental element, did not expressly direct the jury’s attention to the defense of mistake of fact.”<sup>56</sup> The court reasoned that the defendant was entitled to the instruction because there was evidence that he believed he struck a bag, not a person.<sup>57</sup>

Thus, under this alternative rule articulated in *General*, if there is some evidence that generates a requested instruction, the trial court is required to give that instruction.<sup>58</sup> In determining whether sufficient evidence exists to generate an instruction under this rule, the evidence is viewed in the light most favorable to the defendant.<sup>59</sup> This rule is seemingly incompatible with the three-prong test, under which a trial judge is not required to give a

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49. *Thompson*, 393 Md. at 302, 901 A.2d at 214; *Patterson*, 356 Md. at 683–84, 741 A.2d at 1122.

50. *See, e.g.*, *General v. State*, 367 Md. 475, 486–87, 789 A.2d 102, 108–09 (2002) (“Whether a particular instruction must be given depends upon whether there is any evidence in the case that supports the instruction.”); *Binnie v. State*, 321 Md. 572, 582, 583 A.2d 1037, 1041 (1991) (“[A] defendant is entitled to have the jury instructed on any theory of defense that is fairly supported by the evidence.”); *Bruce v. State*, 218 Md. 87, 97, 145 A.2d 428, 433 (1958) (“It is incumbent upon the court . . . when requested in a criminal case, to give an advisory instruction on every essential question or point of law supported by the evidence.”).

51. 367 Md. 475, 789 A.2d 102.

52. *Id.* at 486–87, 789 A.2d at 108–09.

53. *Id.* at 478–79, 789 A.2d at 104.

54. *Id.* at 483, 789 A.2d at 106.

55. *Id.* at 480–81, 789 A.2d at 105. The Court of Special Appeals affirmed, holding that there was no error because the requested instruction was “fairly covered” by the general intent instruction given to the jury. *Id.* at 482–83, 789 A.2d at 106.

56. *Id.* at 490, 789 A.2d at 111.

57. *Id.* at 488, 490, 789 A.2d at 109, 111.

58. *Id.* at 486–87, 789 A.2d at 108–09.

59. *Id.* at 487, 789 A.2d at 109.

requested instruction if other instructions cover the subject matter of the requested instruction.<sup>60</sup>

*B. The Maryland Court of Special Appeals Requires a Trial Court to Give a Drug-Addict Witness Instruction on Credibility, While Federal Courts Sometimes Require Addict-Informant Instructions*

In *Allen v. State*,<sup>61</sup> the Maryland Court of Special Appeals first examined the issue of whether a trial judge is required to give a specific jury instruction related to drug-addict witness testimony.<sup>62</sup> Defendant William Allen, a dentist, was convicted of solicitation to commit murder for soliciting an undercover police officer to murder a Deputy State's Attorney.<sup>63</sup> Allen apparently held a grudge against Deputy State's Attorney Barry Levine after Levine brought charges against him for drug related offenses, to which Allen later pled guilty.<sup>64</sup> At trial, Allen's friend, Larry Westwood, testified that Allen confided in him that he wanted to kill Levine.<sup>65</sup> Westwood admitted during his testimony that he abused drugs, including valium and triazolam (a drug used to treat insomnia), and used cocaine, alcohol, and marijuana.<sup>66</sup> Allen requested a jury instruction regarding Westwood's drug use, but the trial court denied the request.<sup>67</sup>

On appeal, the Court of Special Appeals held that a trial court must give an instruction on drug use and addiction when evidence of a witness's drug addiction or drug abuse is "abundant."<sup>68</sup> The Court of Special Appeals reasoned that the trial court's general instructions on witness credibility did not cover the specific circumstances surrounding the testimony of such a witness.<sup>69</sup> The *Allen* court found that the trial court committed error by not giving the requested instruction regarding drug use and its "concomitant effect on [witness] credibility."<sup>70</sup> The Court of Special Appeals, however, ultimately held that the trial court's error was harmless due to the combination of the jury's awareness of the witness's drug abuse and addiction that came out during his testimony and the general

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60. See *supra* note 39 and accompanying text.

61. 91 Md. App. 705, 605 A.2d 960 (1992).

62. *Id.* at 709, 605 A.2d at 962.

63. *Id.* at 707-08, 605 A.2d at 961.

64. *Id.* at 709-11, 605 A.2d at 962-63.

65. *Id.* at 712-13, 605 A.2d at 963-64.

66. *Id.* at 711 n.4, 605 A.2d at 963 n.4.

67. *Id.* at 739, 605 A.2d at 977.

68. *Id.* at 742, 744, 605 A.2d at 978-79.

69. *Id.*

70. *Id.* at 742, 745, 605 A.2d at 978, 979.



instruction the jury received on witness credibility.<sup>71</sup> The Maryland Court of Appeals denied certiorari.<sup>72</sup>

Maryland courts often look to the federal courts when Maryland case law provides little direction on a particular issue. While most federal courts have not directly addressed drug-addict witness instructions, many have dealt with a similar issue: the addict-informant instruction.<sup>73</sup> Federal circuit courts are split on whether it constitutes error to refuse to give an addict-informant instruction.<sup>74</sup>

For example, the United States Court of Appeals for the District of Columbia Circuit in *United States v. Kinnard*<sup>75</sup> and the United States Court of Appeals for the Sixth Circuit in *United States v. Griffin*<sup>76</sup> both held that a trial court's refusal to give an addict-informant instruction may constitute error depending on the circumstances.<sup>77</sup> In *Kinnard*, defendants Darnell Kinnard and Mahlon Payne were both convicted of drug possession, failure to pay taxes, and sale of heroin for their involvement in a drug transaction arranged by a government informant who was a known drug user.<sup>78</sup> The D.C. Circuit reversed and held that when such a witness testifies, the trial court must instruct the jury to consider the testimony with "extreme caution" if it is uncorroborated in any material way, because addict-informants have a motive to fabricate the truth.<sup>79</sup>

In *Griffin*, the defendant was convicted of unlawfully receiving and concealing narcotic drugs, and buying and selling narcotic drugs.<sup>80</sup> The government's informant for the case was an admitted drug addict, but the trial court failed to give an addict-informant instruction.<sup>81</sup> The Sixth Circuit reversed the conviction and held that Griffin had a right to have the jury instructed to carefully evaluate the addict-informant's credibility.<sup>82</sup>

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71. *Id.* at 745, 605 A.2d at 979.

72. *Allen v. State*, 327 Md. 625, 612 A.2d 256 (1992).

73. 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 7.01[3], at 7-55, 7-56 (2008).

74. *Id.*

75. 465 F.2d 566 (D.C. Cir. 1972).

76. 382 F.2d 823 (6th Cir. 1967).

77. *Kinnard*, 465 F.2d at 569 (holding that an addict-informant instruction is required if requested); *Griffin*, 382 F.2d at 829 (holding that an instruction is required if an addict-informant witness's testimony is the only evidence connecting the defendant to the crime). In subsequent Sixth Circuit cases in which a drug-addicted witness was *not* also an informant, the Sixth Circuit held that a drug-addict instruction is not required per se. *United States v. Warner*, 955 F.2d 441, 455 (6th Cir. 1992); *United States v. Brown*, 946 F.2d 1191, 1194-95 (6th Cir. 1991).

78. *Kinnard*, 465 F.2d at 568.

79. *Id.* at 572.

80. *Griffin*, 382 F.2d at 824.

81. *Id.* at 828-29.

82. *Id.* at 829.

However, these cases are more the exception than the rule. The majority of federal courts have found no reversible error for a trial court's refusal to give an addict-informant instruction because reliability issues are sufficiently highlighted during witness testimony, by other instructions given to the jury, or both.<sup>83</sup> Among these is the Seventh Circuit, which held in *United States v. Rodgers*<sup>84</sup> that it was not error to deny an addict-informant instruction where the defendant's main concern was the witness's "ability to perceive and relate the truth" rather than the risk that the addict-informant witness would lie on the stand.<sup>85</sup>

*C. Maryland Courts Have Long Treated with Apprehension the Testimony of Accomplice Witnesses and Witnesses Promised a Benefit for Testifying*

For nearly 100 years, Maryland courts have recognized the necessity of a specific jury instruction advising jurors to consider "with caution" the testimony of accomplice witnesses and witnesses promised a benefit for testifying. In 1911, the Court of Appeals acknowledged in *Luery v. State*<sup>86</sup> that testimony of an accomplice witness is "universally received with caution" and should be "weighed and scrutinized with great care."<sup>87</sup> The defendant in *Luery*, a junk dealer, was convicted of receiving stolen

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83. See *United States v. Rodgers*, 755 F.2d 533, 549–50 (7th Cir. 1985) (holding that the trial court did not err by denying an addict-informant instruction where the concern was witness perception, not risk of perjury). See also *Scott v. Mitchell*, 209 F.3d 854, 882–83 (6th Cir. 2000) (holding that the trial court did not err by rejecting addict-informant instruction where no evidence of the witness's addiction was introduced during trial); *United States v. Bryan*, 122 F.3d 90, 92 (2d Cir. 1997) (finding that a refusal to give an addict-informant instruction did not prejudice the defendant's substantial rights); *United States v. Vgeri*, 51 F.3d 876, 881 (9th Cir. 1995) (finding that an addict-informant instruction was not required absent evidence that the witness used drugs during the events testified to, and because the informant was cross-examined regarding his drug use and the jury received other relevant instructions); *United States v. Yarbough*, 55 F.3d 280, 283–85 (7th Cir. 1995) (finding that the trial court did not err by refusing to give an addict-informant instruction); *United States v. Solomon*, 856 F.2d 1572, 1577–79 (11th Cir. 1988) (finding that the trial court did not err by failing to give an addict-informant instruction when the court provided ample jury instructions on the informant's credibility); *United States v. Williams*, 809 F.2d 75, 87 (1st Cir. 1986) (holding that there was no per se rule for giving addict-informant instructions); *United States v. Smith*, 692 F.2d 658, 660–61 (10th Cir. 1982) (holding that the defendant was not prejudiced by the trial court's refusal to give an addict-informant instruction); *United States v. Hoppe*, 645 F.2d 630, 633 (8th Cir. 1981) (holding that the trial court did not err by refusing to provide an instruction where informant's drug-addiction was disputed); *United States v. Gregorio*, 497 F.2d 1253, 1261–63 (4th Cir. 1974) (finding that the trial court did not err by denying a request for an addict instruction); *Gov't of Virgin Islands v. Hendricks*, 476 F.2d 776, 779–80 (3d Cir. 1973) (holding that the trial court did not err by not giving an instruction regarding the reliability of an addict-informant).

84. 755 F.2d 533.

85. *Id.* at 549–50.

86. 116 Md. 284, 81 A. 681 (1911).

87. *Id.* at 292, 81 A. at 684.

goods.<sup>88</sup> An employee of the United Railways & Electric Company of Baltimore admitted to stealing the goods from his employer, pled guilty to larceny, and testified as an accomplice against the defendant.<sup>89</sup> While the court affirmed the defendant's conviction, it did so by formulating the rule that a conviction based solely on uncorroborated accomplice testimony should be disallowed.<sup>90</sup>

*Brown v. State*<sup>91</sup> reaffirmed the rule first established in *Luery* requiring corroboration of accomplice testimony to sustain a conviction.<sup>92</sup> In *Brown*, the defendant was convicted of second degree murder based on uncorroborated testimony of an accomplice witness.<sup>93</sup> Even though an instruction cautioning the jury to examine accomplice witness testimony "with care and [to] view[] [it] with suspicion" was not at issue in *Brown*, the Maryland Court of Appeals nonetheless recognized that such an instruction accomplished a similar purpose to that of the *Luery* rule.<sup>94</sup> The court affirmed the conviction on the basis that the "accomplice's testimony was adequately corroborated."<sup>95</sup>

The Court of Appeals again affirmed in 2004 use of the "with caution" standard in *Archer v. State*.<sup>96</sup> The defendant in *Archer* was convicted of felony murder and attempted murder.<sup>97</sup> A witness to the murder pled guilty for his involvement in the crime and testified at trial on the State's behalf in exchange for leniency.<sup>98</sup> On appeal, the Court of Appeals approved of the trial court's specific instruction to the jury regarding a witness who was promised a benefit in exchange for his testimony.<sup>99</sup> The instruction stated that such testimony "should [be] consider[ed] . . . with caution."<sup>100</sup> Therefore, the Court of Appeals has consistently recognized that the testimony of accomplice witnesses or witnesses who are promised a benefit for their testimony should be treated with apprehension.

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88. *Id.* at 285, 81 A. at 681.

89. *Id.*

90. *Id.* at 292–95, 81 A. at 684–85.

91. 281 Md. 241, 378 A.2d 1104 (1977).

92. *Id.* at 246, 378 A.2d at 1108.

93. *Id.* at 241–42, 378 A.2d at 1105.

94. *Id.* at 246, 378 A.2d at 1108.

95. *Id.*

96. 383 Md. 329, 859 A.2d 210 (2004).

97. *Id.* at 335, 859 A.2d at 214.

98. *Id.* at 371–72 n.4, 859 A.2d at 235–36 n.4.

99. *Id.*

100. *Id.*

### III. THE COURT'S REASONING

In *Dickey v. State*,<sup>101</sup> the Court of Appeals of Maryland affirmed Desmond Ellison Dickey's conviction and held that the trial court did not err by refusing to give the defendant's requested jury instruction regarding the credibility of drug-using or drug-addicted witnesses.<sup>102</sup> In doing so, the court affirmed the judgment of the trial court, but gave different justifications than the Court of Special Appeals for its affirmation.<sup>103</sup> In reaching its conclusion, the court relied on the three-prong test originating from Maryland Rule 4-325, which governs criminal jury instructions.<sup>104</sup> In applying the test, the court found that the trial court was not required to give the requested instruction because it did not meet two of the three conditions.<sup>105</sup> While it noted that the requested instruction was applicable to the facts of the case, the court found that the instruction did not correctly state the law and other jury instructions "fairly covered" the issue.<sup>106</sup>

The court reasoned that an instruction that the jury should scrutinize a drug-abusing or drug-addicted witness's testimony "with more caution" than other witnesses and "with greater scrutiny" was not a correct statement of Maryland law.<sup>107</sup> The court pointed out that the scrutiny standard for instructions regarding testimony of a witness who has a motive to lie is "merely 'with caution,'" and does not require an elevated standard of scrutiny.<sup>108</sup> According to the court, there was no case law to support Dickey's assertion that the testimony of a drug-abusing or drug-addicted witness required more scrutiny than that of a witness who is promised a benefit in exchange for testimony, or of a witness with any kind of

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101. *Dickey v. State*, 404 Md. 187, 946 A.2d 444 (2008).

102. *Id.* at 189, 946 A.2d at 445.

103. *Id.* While the Court of Special Appeals found that the trial court committed error by not giving the specific instruction, it affirmed the conviction because it found the error was harmless. *Id.* at 189 n.1, 946 A.2d at 445 n.1. The Court of Appeals did not find that the trial court erred at all. *Id.*

104. *Id.* at 197-98, 946 A.2d at 450; *see also* MD. R. 4-325. The test requires that a trial court give a requested instruction when three conditions are met: "(1) the instruction is a correct statement of the law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given." *Dickey*, 404 Md. at 197-98, 946 A.2d at 450 (citing *Thompson v. State*, 393 Md. 291, 302-03, 901 A.2d 208, 214 (2006); *Patterson v. State*, 356 Md. 677, 683-84, 741 A.2d 1119, 1122 (1999)).

105. *Dickey*, 404 Md. at 199, 946 A.2d at 451.

106. *Id.* at 199 & n.6, 946 A.2d at 451 & n.6.

107. *Id.* at 200, 946 A.2d at 452.

108. *Id.*

problematic perception issues.<sup>109</sup> As a result, the court concluded that the requested instruction was an incorrect statement of law.<sup>110</sup>

The court also found that the requested instruction was already covered by other instructions given to the jury.<sup>111</sup> The court reasoned that precedent dictated careful consideration of a defendant's request for a jury instruction regarding eyewitness testimony unless other instructions given similarly guided the jury.<sup>112</sup> Under this standard, whether other instructions sufficed was a question for the trial court and, as long as the judge considered whether the requested instruction had already been sufficiently addressed, it was not error for the judge to deny the request.<sup>113</sup> Here, the court found that the trial judge appropriately exercised his discretion in deciding not to give the requested instruction.<sup>114</sup>

The court further agreed with the trial court that the instructions given regarding the credibility of witnesses<sup>115</sup> and the identification of the defendant<sup>116</sup> sufficiently covered the issue of a drug-addicted or drug-abusing witness's ability to perceive and recall events.<sup>117</sup> The court found that these instructions, in addition to Price's testimony and Dickey's ability to raise the issue of Price's drug use and addiction during closing arguments, gave the jury "ample guidance . . . to make credibility assessments."<sup>118</sup> Thus, the court found that the issues raised in Dickey's requested jury instruction were "fairly covered" by other instructions given by the trial court.<sup>119</sup> In so finding, the court concluded that two of the three conditions of the three-prong test were not met, and therefore the trial court was not required to give the requested instruction.<sup>120</sup>

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109. *Id.*

110. *Id.* at 201, 946 A.2d at 452. The court emphasized that the trial court was not required to give the instruction at all, and that if it had given the instruction, the trial court itself may have committed error. *Id.*

111. *Id.*

112. *Id.* at 201–02, 946 A.2d at 452–53 (citing *Gunning v. State*, 347 Md. 332, 354–55, 701 A.2d 374, 385 (1997)). The court further noted that eyewitness identification instructions were not required per se. *Id.* at 201, 946 A.2d at 452.

113. *Id.* at 202 & n.7, 946 A.2d at 453 & n.7.

114. *Id.* at 204, 946 A.2d at 454.

115. The instruction used is found in Maryland Criminal Pattern Jury Instruction 3:10. *Id.* at 202, 946 A.2d at 453.

116. The instruction used is found in Maryland Criminal Pattern Jury Instruction 3:30. *Id.*

117. *Id.* at 201, 946 A.2d at 452.

118. *Id.* at 203, 946 A.2d at 453–54.

119. *Id.* at 204, 946 A.2d at 454.

120. *Id.* at 207, 946 A.2d at 456.

IV. ANALYSIS

In *Dickey v. State*, the Court of Appeals of Maryland improperly affirmed the trial court's denial of Dickey's request for a special jury instruction on drug-addicted and drug-abusing witnesses.<sup>121</sup> In doing so the court misapplied Maryland's established three-prong test to hold that the requested instruction was fairly covered by other instructions given and that it was an incorrect statement of law.<sup>122</sup> When applying the three-prong test, the court should have instead substituted its own "with caution" standard in the requested instruction, rather than rejecting the instruction altogether.<sup>123</sup> The court should also have discussed the significance of Earl Price's status as a drug-addict and as a witness promised a benefit for testifying in its analysis of addict-informant instructions.<sup>124</sup> Finally, the court should have explicitly approved use of a specific instruction regarding drug-addict witness testimony that incorporates the "with caution" standard, particularly where such a witness is the sole eyewitness to an alleged crime with little corroborating evidence.<sup>125</sup>

A. *The Court Misapplied the Three-Prong Test*

The court failed to correctly apply Maryland's three-prong test in two ways. First, in holding that the trial court's general jury instructions "fairly covered" the subject matter of the requested instruction, the court did not consider the special circumstances that drug-addict witness testimony presents.<sup>126</sup> Second, the court should have substituted the "with caution" standard to modify the proposed instruction so that it would have met the court's three-part test.<sup>127</sup>

The trial court's general jury instructions in *Dickey* did not "fairly cover" the subject matter of the requested instruction regarding drug-addict

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121. See *infra* Part IV.A–C.

122. See *infra* Part IV.A.

123. See *infra* Part IV.A.

124. See *infra* Part IV.B.

125. See *infra* Part IV.C.

126. See *Allen v. State*, 91 Md. App. 705, 742, 605 A.2d 960, 978, *cert. denied*, 327 Md. 625, 612 A.2d 256 (1992) (noting that drug-addict witness testimony presents the specific issue, not covered by a general witness credibility instruction, of the "concomitant effect" that a witness's relationship with drugs has on his credibility).

127. See *Dickey v. State*, 404 Md. 187, 207, 946 A.2d 444, 456 (2008) ("[H]ad counsel submitted a properly worded instruction advising the jury that if the jury found that Price was addicted to drugs and had been using drugs during the relevant time in question, the jury should consider Price's testimony with care and caution, it would have been within the court's discretion to give the instruction and would not have been error."). See also *infra* notes 135–136 and accompanying text.

witness testimony.<sup>128</sup> General witness credibility issues raised in Maryland Criminal Pattern Jury Instructions 3:10, 3:13, and 3:30, the source of the instructions given by the trial court, do not encourage a jury to consider such matters as the “concomitant effect” drugs have on a witness’s credibility.<sup>129</sup> Indeed, the Court of Special Appeals in *Allen* found that a general jury instruction given regarding witness credibility did not address the particular circumstance of the witness’s “relationship with drugs and the concomitant effect on his credibility as a witness.”<sup>130</sup> Similarly in *Dickey*, Earl Price’s relationship with drugs likely affected his credibility as a witness to the shooting.<sup>131</sup> Even the court in *Dickey* recognized that the rationale behind a specific drug-addict instruction is to alert the jury that drug abuse may have had “*perceptual* effects” on a witness’s capacity to accurately observe and relay what occurred.<sup>132</sup> In doing so, the court itself acknowledged the difference between the subject matter of general jury instructions on witness credibility and a “witness using or addicted to drugs”<sup>133</sup> instruction. While they are somewhat similar, the two subjects are distinct enough to warrant a specialized jury instruction.<sup>134</sup>

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128. *Cf. General v. State*, 367 Md. 475, 490, 789 A.2d 102, 111 (2002) (holding that general knowledge and intent instructions did not fairly cover a requested instruction on the mistake of fact defense that was generated by evidence). Compare *Allen*, 91 Md. App. at 742, 605 A.2d at 978 (holding that the trial court erred by failing to give a specific instruction regarding a State’s witness’s status as a drug abuser), with *England v. State*, 274 Md. 264, 276, 334 A.2d 98, 105 (1975) (holding that the trial court was not required to give a general instruction regarding identification because it was fairly covered by instructions given on burden of proof and weighing of evidence). See also Cross-Respondent’s Brief and Petitioner’s Reply Brief at 3–10, *Dickey*, 404 Md. 187, 946 A.2d 444 (No. 23) (arguing that other instructions given did not specifically address the witness’s ability to perceive and relate the events and that the enumerated factors of the instructions given misled the jury away from considering Price’s drug use and its effect on his testimony).

129. Maryland Criminal Pattern Jury Instructions §§ 3:10, 3:13, 3:30 (2007).

130. *Allen*, 91 Md. App. at 742, 605 A.2d at 978.

131. See *id.* (finding the witness’s relationship with drugs had a “concomitant effect on his credibility as a witness”). See also Bernie R. Burrus & Harry L. Marks, *Testimonial Reliability of Drug Addicts*, 35 N.Y.U. L. REV. 259, 259 (1960) (“[E]ven the temporary presence of drugs affects the functioning of the body’s organs, and thus bears directly on the credibility of the witness’ testimony.”); 28A C.J.S. *Drugs and Narcotics* § 408 (2008) (“[T]he addiction of the addict must be considered as having an important bearing on his or her credibility.”); 81 AM. JUR. 2D *Witnesses* § 840 (2008) (stating that drug use affects “the ability of the witness to perceive, recall, or relate . . . the event about which he is testifying if under drug influence at that time”).

132. *Dickey*, 404 Md. at 205, 946 A.2d at 454.

133. *Id.* at 203, 946 A.2d at 454 (“The purpose of the ‘Witness Using or Addicted to Drugs’ instruction is to direct the jury’s attention to the potential *perceptual* effects drug use or addiction might have on a witness’s ability to observe and relate events in the witness’s testimony . . .”).

134. See, e.g., 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 7-91 (2008). See also *Allen*, 91 Md. App. at 742, 605 A.2d at 978 (finding that a general witness credibility instruction did not adequately address a witness’s “relationship with drugs and the concomitant effect on his credibility as a witness”). The comments to the Modern Federal Jury Instructions discuss the distinction between the general witness credibility instruction and the addict instruction: “[T]he rationale for the addict instruction is different from [other

Second, instead of flatly rejecting the requested jury instruction, the court should have substituted its own “with caution” standard in the requested instruction to allow the instruction to meet the court’s three-prong test. The court correctly asserted that a “heightened standard of scrutiny” is an incorrect statement of Maryland law.<sup>135</sup> As the court acknowledged, however, the trial court may substitute its own language to correct a jury instruction that erroneously states the law.<sup>136</sup> Therefore, after the court determined that the “heightened standard of scrutiny” was an incorrect statement of Maryland law, it should have used its own “with caution” standard when conducting the requisite three-part analysis under Maryland Rule 4-325.<sup>137</sup> By reworking the requested instruction into a correct statement of law,<sup>138</sup> the court would have corrected the instruction’s statement of the law to enable the trial court to fulfill its obligation to

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instructions that] . . . go to the credibility of the witness, addiction itself relates primarily to the ability of the witness to perceive and relate observed events. It does not necessarily reflect on the truthfulness of the witness.” *Id.* Dickey also makes this point in his reply brief, stating that “the language of the [credibility] instruction, however broad it may be, cannot be read to cover perceptual impairment as a result of drug use or addiction.” Cross-Respondent’s Brief and Petitioner’s Reply Brief at 6, *Dickey*, 404 Md. 187, 946 A.2d 444 (No. 23).

135. *Dickey*, 404 Md. at 200–01, 946 A.2d at 452. *See also* *Archer v. State*, 383 Md. 329, 371–72 n.4, 859 A.2d 210, 235–36 n.4 (2004) (approving the court’s use of the “with caution” standard for instructing the jury on testimony of a witness promised a benefit); *Brown v. State*, 281 Md. 241, 246, 378 A.2d 1104, 1106–07 (1977) (stating that Maryland has traditionally used the “with caution” standard for accomplice testimony instructions); *Luery v. State*, 116 Md. 284, 292, 81 A. 681, 684 (1911) (“[T]he evidence of an accomplice is universally received with caution and weighed and scrutinized with great care.”). The court bolstered its argument that a “with caution” standard is more appropriate than the “heightened standard of scrutiny” by citing to criminal pattern jury instructions from Mississippi, Illinois, and Pennsylvania, without acknowledging that the requested instruction in *Dickey* came directly from a federal pattern jury instruction. *Dickey*, 404 Md. at 193 n.2, 200–01, 946 A.2d at 447 n.2, 452.

136. *Dickey*, 404 Md. at 198 n.5, 946 A.2d at 450 n.5 (“[W]here a requested instruction is technically erroneous, but the subject is one in which the court is required to give an instruction, it is the duty of the trial court to include a correct instruction.” (citing *Noel v. State*, 202 Md. 247, 252, 96 A.2d 7, 10 (1953); *Gooch v. State*, 34 Md. App. 331, 337, 367 A.2d 90, 94 (1976))).

137. *See* *Gunning v. State*, 347 Md. 332, 350, 701 A.2d 374, 382–83 (1997) (“[A] trial judge is under no obligation to use the precise language suggested by counsel in submitting an instruction . . . [the trial court] is not preclude[d] . . . from fashioning its own instruction, provided that the judicially-crafted instruction is accurate and ‘fairly covers’ the requested instruction.”); *see also* Cross-Respondent’s Brief and Petitioner’s Reply Brief at 12, *Dickey*, 404 Md. 187, 946 A.2d 444 (No. 23) (“[I]f the court in the present case objected to the ‘greater scrutiny’ language in the requested instruction, it easily could have removed that language or substituted it with . . . a sentence directing the jury to examine the testimony of a witness who uses or is addicted to drugs ‘with caution.’”). Instead of properly making the focal issue of its opinion a specific instruction regarding drug-addict/user witness testimony, the court focused on the over-arching language of the instruction put forth by *Dickey*. *Dickey*, 404 Md. at 200, 946 A.2d at 452.

138. *See* *Dickey*, 404 Md. at 200–01, 946 A.2d at 452 (disapproving of the heightened standard of scrutiny in the requested instruction and finding it was an incorrect statement of law).



instruct the jury on the issue of Price's drug addiction because there was sufficient evidence to support the requested instruction.<sup>139</sup>

*B. The Court Failed to Recognize the Particular Applicability of its Addict-Informant Analysis to the Facts of Dickey*

The *Dickey* court explained in its opinion that issues involving the testimony of witnesses who are addicted to or using drugs most often arise in the context of witnesses who are both addicts and informants.<sup>140</sup> In its analysis, the court failed to discuss the pertinent facts surrounding Dickey's trial—mainly that Price was similarly situated as a witness.<sup>141</sup> Though not an informant, Price was nevertheless promised a benefit for testifying.<sup>142</sup> An analysis of these facts may have led the court to find that a special instruction on drug addiction was particularly applicable in situations like this one, where a witness is not only an accomplice, informant, or has been promised a benefit for testifying, but is a drug-addict or was using drugs at the time he witnessed the alleged crime.

The court itself understood the need for an instruction in such circumstances. In fact, the court cited the Seventh Circuit's decision in *United States v. Rodgers* that addict-informant instructions stem from "the concern that 'addict-informants are subject to powerful temptations that create a serious risk that they will lie on the stand.'"<sup>143</sup> However, the court did not address the fact that Price was offered a deal that may have tempted him to lie on the stand.<sup>144</sup> Although Price's status as a witness who was

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139. *Cf. General v. State*, 367 Md. 475, 486–87, 789 A.2d 102, 108–09 (2002) ("Whether a particular instruction must be given depends upon whether there is any evidence in the case that supports the instruction.").

140. *Dickey*, 404 Md. at 204, 946 A.2d at 454.

141. *See id.* at 192, 204–05, 946 A.2d at 447, 454 ("Price admitted that he was a heroin addict, an occasional cocaine user . . . that he had a long history of drug use . . . that he had used heroin on the day of the shooting . . . [and] that he was testifying at Dickey's trial as part of a deal to avoid charges following an arrest . . .").

142. *Id.* at 192, 946 A.2d at 447. Price was offered a deal in which the state would drop charges related to his arrest for possession of controlled dangerous substances in exchange for his testimony against Dickey. *Id.*

143. *Id.* at 204, 946 A.2d at 454 (quoting *United States v. Rodgers*, 755 F.2d 533, 549 (7th Cir. 1985)). *See also* Evan Haglund, *Impeaching the Underworld Informant*, 63 S. CAL. L. REV. 1405, 1412–13 (1990) (arguing that informants have a proclivity to lie); Alexander Penelas, Note, *Illinois v. Gates: Will Aguilar and Spinelli Rest in Peace?*, 38 U. MIAMI L. REV. 875, 899 (1984) ("Informants are frequently themselves criminals, drug addicts, or liars who give information for reasons other than the call of civic duty."); Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1383 (1996) ("Criminals are likely to say and do almost anything to get . . . out of trouble with the law. This willingness to do anything includes . . . committing perjury. A drug addict can sell out his mother to get a deal.").

144. *Dickey*, 404 Md. at 192, 201, 946 A.2d at 447, 452 (noting that "Price stated repeatedly on the record that he was testifying at Dickey's trial as part of a deal to avoid charges," but not

promised a benefit for testifying was not directly an issue on appeal, the court ignored an important fact by failing to incorporate the underlying facts of the case into its analysis.

The court's failure to address the facts underlying Price's testimony is evidenced by its approval of the *Rodgers* view of drug addict or user jury instructions.<sup>145</sup> The *Rodgers* court concluded that there was no error in refusing to give such an instruction because it "reflected a concern with the witness's ability to perceive and relate the truth, not with a deliberate misstatement because of the desire to please the government."<sup>146</sup> However in *Dickey*, due to Price's deal with the prosecutor, he may also have misrepresented his testimony as a result of his "desire to please the government."<sup>147</sup> Thus, had the court correctly acknowledged that Price was both an addict and a witness promised a benefit, its analysis could have more appropriately required the requested instruction in this case.

*C. The Court Appears to Give Broad Discretion to Trial Courts When, Under Maryland Law, Certain Circumstances Require a Trial Judge to Give a Requested Instruction on Drug-Addict Witness Testimony*

The Court of Appeals affirmed Dickey's conviction because the trial court's failure to give the requested instruction did not constitute error.<sup>148</sup> While the court did not reach its second question, whether an error to refuse to give the requested instruction was harmless beyond a reasonable doubt,<sup>149</sup> the Maryland Court of Special Appeals properly found that the failure to give the instruction in *Dickey* was harmless.<sup>150</sup> The abundance of other evidence, aside from Price's identification of Dickey as the shooter, was indeed sufficient to support the jury's verdict.<sup>151</sup> However, the *Dickey* court did not clearly instruct lower courts about how to apply its decision.<sup>152</sup> The court stated that it did not approve of the "heightened

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discussing this fact in its analysis because "the requested jury instruction [at issue] d[id] not deal with a motivation to lie").

145. *Id.* at 206, 946 A.2d at 455.

146. *Id.* (quoting *Rodgers*, 755 F.2d at 549).

147. *Id.* at 192, 946 A.2d at 447. See also *supra* notes 142–143 and accompanying text.

148. *Dickey*, 404 Md. at 207, 946 A.2d at 456.

149. *Id.* at 196, 946 A.2d at 449.

150. *Id.* at 189 n.1, 946 A.2d at 445 n.1.

151. *Id.* at 189–91, 946 A.2d at 446–47.

152. *Id.* at 199–207, 946 A.2d at 451–56. The court discussed at length why the "heightened standard of scrutiny" in the requested instruction was an incorrect statement of the law and may have constituted error had the instruction been given. *Id.* at 199–201, 946 A.2d at 451–53. It was only at the very end of the opinion, however, that the court briefly stated that if the requested instruction substituted the correct legal standard the instruction would have fallen within the trial court's discretion to give and would not have constituted error. *Id.* at 207, 946 A.2d at 456.

standard of scrutiny” language in the requested instruction, and that an instruction utilizing a “with caution” standard would have been acceptable.<sup>153</sup> However, the court left it within the discretion of the trial court whether to give such an instruction to the jury.<sup>154</sup>

The court should have more explicitly refused to completely overrule prior case law that had approved instructions on drug-addict witness credibility so long as those instructions incorporated the court’s “with care and caution” language.<sup>155</sup> Rather, the court’s opinion implies that any instructions on drug use or addiction are unnecessary and should not be used.<sup>156</sup> The court’s analysis, particularly when viewed together with Maryland precedent, creates ambiguity at the trial court level.

The court further failed to consider that an instruction on drug use or addiction may be required under some circumstances, and cannot always be left within the discretion of the trial court.<sup>157</sup> The court neglected to discuss the alternate rule that, in Maryland, a requested instruction is necessary if there is “some evidence” to support it, and such evidence must be viewed in the light most favorable to the accused.<sup>158</sup> In *Dickey*, evidence regarding Price’s drug use at the time he witnessed the shooting and his struggle with drug addiction during the time of his testimony at Dickey’s trial adequately generated the requested instruction because such evidence supports Dickey’s claim that Price’s testimony might not have been credible.<sup>159</sup> Given the court’s misapplication of the three-part test under Maryland Rule 4-325, coupled with the evidence supporting Price’s drug-addiction and use, the court should have recognized that a drug-addict witness instruction was necessary in this situation.<sup>160</sup>

The court’s failure to discuss the pertinent *General* rule has negative implications for future defendants. Based on the *Dickey* court’s opinion, a trial judge faced with a case involving the sole eyewitness to an alleged crime—a far more likely scenario than having four eyewitnesses—where

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153. *Id.* at 207, 946 A.2d at 456.

154. *Id.*

155. *See supra* notes 152–153 and accompanying text.

156. *See supra* note 110.

157. *See, e.g., General v. State*, 367 Md. 475, 486–87, 789 A.2d 102, 108–09 (2002) (reasoning that a requested instruction must be given where there is “any evidence in the case that supports the instruction,” and that the trial court is required to give a requested instruction when it is “generated by the evidence”); *see also* Cross-Respondent’s Brief and Petitioner’s Reply Brief at 3 n.1, *Dickey*, 404 Md. 187, 946 A.2d 444 (No. 23).

158. *General*, 367 Md. at 486–87, 789 A.2d at 108–09.

159. *Dickey*, 404 Md. at 192, 946 A.2d at 447; *General*, 367 Md. at 487 n.8, 789 A.2d at 109 n.8 (quoting *Dykes v. State*, 319 Md. 206, 216–17, 571 A.2d 1251, 1257 (1990)) (discussing the “some evidence” requirement for generating an instruction).

160. *General*, 367 Md. at 486–87, 789 A.2d at 108–09. *See also supra* notes 126–127, 133–134 and accompanying text.

there is also at least some evidence of the witness's drug addiction or use, may find that he is *not* required to give an instruction on that witness's relationship with drugs and its effect on credibility.<sup>161</sup> However, the *General* rule may require an instruction in such circumstances, particularly if there is insufficient corroborating evidence and a refusal to give an instruction would *not* result in harmless error.<sup>162</sup> Nevertheless, the *Dickey* court's failure to explicitly approve a drug-addict or drug-user instruction substituting "with care and caution" language may result in lower courts improperly finding that such an instruction is per se an incorrect statement of the law and cannot be given.

## V. CONCLUSION

While the Maryland Court of Appeals appropriately affirmed *Dickey*'s conviction because the denial of the requested instruction was harmless error in the instant case,<sup>163</sup> the court failed to provide clear direction to lower courts regarding the use of specific instructions addressing testimony of drug-addict witnesses.<sup>164</sup> The court misapplied two of the three prongs of the Maryland Rule 4-325 test by failing to acknowledge that general witness credibility instructions do not adequately cover the subject matter raised in the requested instruction and by not substituting the "with caution" standard in the requested instruction to conduct its analysis.<sup>165</sup> The court further failed to incorporate the facts of *Dickey* into its addict-informant analysis by not recognizing Price's dual status as a drug-addict and a witness promised a benefit for testifying.<sup>166</sup>

Although the court reached the proper result, it failed to adequately instruct lower courts on the extent of a trial judge's discretion over giving a drug-addict witness jury instruction, including where there is sufficient evidence that a witness was under the influence of drugs.<sup>167</sup> The court's holding has particularly negative implications for lower courts in cases involving the testimony of a drug-addict eyewitness to an alleged crime

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161. *Cf. Dickey*, 404 Md. at 192, 207, 946 A.2d at 447, 456 (holding the trial court did not err by denying the requested drug-addict instruction even where there was evidence of Price's drug use). In *Dickey*, there was corroborating evidence from three other eyewitnesses. *Id.* at 189–91, 946 A.2d at 446. However, in the heat of a trial, a judge may not be able to discern this distinction. *See, e.g., Brown v. State*, 281 Md. 241, 241–42, 378 A.2d 1104, 1108 (1977) (affirming the trial court's jury conviction of a defendant for murder based on uncorroborated testimony of an accomplice witness, contrary to the *Luery* rule disallowing such convictions).

162. *See Dickey*, 404 Md. at 207, 946 A.2d at 456; *see also General*, 367 Md. at 487, 789 A.2d at 109.

163. *Dickey*, 404 Md. at 196, 946 A.2d at 449.

164. *See supra* Part IV.C.

165. *See supra* Part IV.A.

166. *See supra* Part IV.B.

167. *See supra* Part IV.C.

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where there is little evidence corroborating the testimony. Due to the court's holding in *Dickey*, a trial court faced with these circumstances may improperly deny a jury instruction on drug-addict witness credibility when it really matters. The court should have taken a more effective approach by clearly upholding the propriety of drug-addict witness instructions while recognizing that the failure to give such an instruction in this case was harmless error.<sup>168</sup>

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168. *See supra* Part IV.C.