Circuit Court for Harford County
Case No. 12-K-11-000887

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0392

September Term, 2017

STATE OF MARYLAND

v.

MARK EDMUND CHRISTIAN, II

Meredith,
Kehoe,
Arthur,

JJ.

Opinion by Meredith, J.

Filed: October 26, 2018

The State of Maryland, appellant, appeals the postconviction order of the Circuit Court for Harford County that granted Mark Edmund Christian, II, appellee, a new trial.

In March 2012, a jury sitting in the Circuit Court for Harford County found Christian guilty of first degree murder, attempted armed robbery, conspiracy to commit armed robbery, and use of a handgun in the commission of a felony or crime of violence. He was sentenced to life plus 30 years' incarceration. On direct appeal to this Court, we affirmed his convictions, and the Court of Appeals denied certiorari review. *Mark Christian, II, v. State of Maryland*, No. 636, September Term, 2012 (filed Sept. 23, 2013) (unreported), *cert. denied*, *Christian v. State*, 434 Md. 312 (2013) (Table).

On January 14, 2016, Christian filed a petition in the Circuit Court for Harford County seeking postconviction relief. The court held a hearing, and on March 24, 2017, the court granted Christian's petition in part and ordered a new trial. After timely filing a Motion for Leave to Appeal, the State then filed a Motion to Reconsider the postconviction court's order which was denied by the circuit court. We granted the State's Motion for Leave to Appeal on September 27, 2017, and the case was transferred to the regular appeal docket.

QUESTIONS PRESENTED

The State presents the following questions for our review:

1. Did the post-conviction court abuse its discretion when it granted Christian post-conviction relief?

2. Did the post-conviction court abuse its discretion when it denied the State's motion for reconsideration and request for hearing?

Because we do not find that the postconviction court abused its discretion, we shall affirm.

FACTS AND PROCEDURAL BACKGROUND

After Christian's trial, he filed a direct appeal and presented the following four questions for review:

I. Was the evidence legally insufficient to sustain the convictions?

II. Did the trial court commit plain error in its instructions to the jury?

III. Did the trial court commit plain error in propounding certain questions in voir dire examination of prospective jurors?

IV. Does [a]ppellant stand acquitted of use of a handgun in the commission of a felony or crime of violence?

We affirmed the trial court's judgments and held the following:

I. a rational trier of fact had sufficient evidence, if believed, to draw the inferences necessary to find Christian guilty of the crimes charged;

II. the trial judge was, at best, mistaken in one clause of his jury instructions when he said that the jurors were the judges of the law and the facts, but the argument was not preserved, and we declined to conduct plain error review;

III. the CSI *voir dire* question was erroneous, but was harmless due to the trial court's curative questions;

IV. Christian's conviction for using a handgun in the commission of a felony was not subject to the double jeopardy prohibition.

On December 30, 2015, Christian filed a petition for postconviction relief and claimed that his convictions were in violation of his Sixth and Fourteenth Amendment rights for two reasons. First, he alleged that his counsel had "an actual conflict of

interest" because Christian was represented by the Office of the Public Defender at the same time Christian's co-defendant, Brown, was also represented by the Office of the Public Defender on violation of probation proceedings, which, Christian argued, were related to the victim's murder. The postconviction court denied this claim.

Second, Christian claimed ineffective assistance of counsel because of his attorney's failure to do the following:

> 1. discover, investigate, and introduce several sources of exculpatory evidence;
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> 2. request a "missing evidence" instruction;
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> 3. object to an "anti-CSI" *voir dire* instruction, resulting in a violation of Mr. Christian's Sixth Amendment right to an impartial jury; and
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> 4. object to a clearly unconstitutional *Unger* instruction that improperly told the jurors that they were the "judges of both the law and the facts."[1]

On March 24, 2017, the postconviction court granted Christian a new trial based on three of the asserted claims of ineffective assistance of counsel, holding:

> The relief requested shall be granted as to that Petitioner's claims of ineffective assistance of counsel regarding the "anti-CSI" voir dire question, the Unger jury instruction, the missing evidence instruction, and the cumulative ineffectiveness of counsel.

On April 21, 2017, the State filed in this Court a Motion for Leave to Appeal. On June 5, 2017, the State filed in the circuit court a Motion to Reconsider Post-Conviction

[1] *See Unger v. State*, 427 Md. 383, 417 (2012) (instructions "telling the jury that all of the court's instructions on legal matters were 'merely advisory,' were clearly in error, at least as applied to matters implicating federal constitutional rights").

Relief, alleging that the official transcript's quotation of the jury instruction alleged to be in violation of *Unger* was inaccurate, and that the actual instruction the judge gave at trial did not include the offending language. The postconviction court denied the State's Motion to Reconsider, explaining that only a defendant may seek to reopen a postconviction proceeding, and that, in any event, under Maryland Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJ"), § 12-308, the court was "divested of jurisdiction" over the matter because the State had filed an application for leave to appeal. The postconviction court observed that the State might be able to "seek leave to correct the record" on appeal.

We granted the State's application for leave to appeal on September 27, 2017, and transferred the case to our regular docket.

STANDARD OF REVIEW

"The review of a postconviction court's findings regarding ineffective assistance of counsel is a mixed question of law and fact." *Newton v. State*, 455 Md. 341, 351 (2017). In *State v. Gross*, 134 Md. App. 528, 558-59 (2000), *aff'd*, 371 Md. 334 (2002), we described appellate review of a postconviction court's rulings as follows:

> In reviewing a hearing judge's determination on a claim of ineffective assistance of counsel, we will, of course, extend great deference to the hearing judge's findings of disputed, first-level, historic facts, but will nonetheless make our own independent decision with respect to the ultimate legal significance of those facts. *Strickland v. Washington*, 466 U.S. at 698, 104 S.Ct. 2052, was emphatic in this regard:
>
> > *Ineffectiveness is not a question of "basic, primary, or historical fac[t]*." Rather, . . . it is a mixed question of law and fact. . . . *[B]oth the performance and prejudice*

> *components of the ineffectiveness inquiry are mixed questions of law and fact.*

(Citations omitted; emphasis supplied).

Within a year after *Strickland* was decided, Judge Orth, writing for the Court of Appeals, in *Harris v. State*, 303 Md. 685, 698 (1985), set out the process to be followed by a court conducting appellate review:

> [I]n making our independent appraisal, we accept the findings of the trial judge as to what are the underlying facts unless he is clearly in error. We then re-weigh the facts as accepted in order to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed. *Walker v. State*, 12 Md. App. 684, 691–95, 280 A.2d 260 (1971)[.]

See also State v. Thomas, 328 Md. 541, 559 (1992); *State v. Purvey*, 129 Md. App. 1, 10 (1999); *Cirincione v. State*, 119 Md. App. 471, 485 (1998).

In her dissent in *Syed v. State*, 236 Md. App. 183, 287-88 (2018) (Graeff, J., dissenting), Judge Graeff explained our application of the *Strickland* standards on appellate review as follows:

> In *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court stated that the "benchmark" for judging a claim of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy a two-prong test: "First, the defendant must show that counsel's performance was deficient." *Id.* at 687, 104 S. Ct. 2052. Second, the defendant must show that counsel's deficient performance prejudiced the defense, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. 2052. The defendant must make both showings. *Id.* at 687, 104 S. Ct. 2052. If he or she fails to show either

prong, "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

The Supreme Court has made clear that "'[s]urmounting *Strickland's* high bar is never an easy task.'" *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L.Ed.2d 624 (2011) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010)). The *Strickland* test "must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." *Id.* (quoting *Strickland,* 466 U.S. at 689-690, 104 S. Ct. 2052).

. . . To show that counsel's performance was deficient, the defendant must show that "counsel's representations fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 104 S. Ct. 2052. The performance prong "is satisfied only where, given the facts known at the time, counsel's 'choice was so patently unreasonable that no competent attorney would have made it.'" *State v. Borchardt*, 396 Md. 586, 623, 914 A.2d 1126 (2007) (quoting *Knight v. Spencer*, 447 F.3d 6, 15 (1st Cir. 2006)). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington*, 562 U.S. at 105, 131 S. Ct. 770 (quoting *Strickland*, 466 U.S. at 690, 104 S. Ct. 2052).

. . . We must begin our analysis with the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, 104 S. Ct. 2052, and that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690, 104 S. Ct. 2052. Courts apply a highly deferential standard "to avoid the *post hoc* second-guessing of decisions simply because they proved unsuccessful." *Evans v. State*, 396 Md. 256, 274, 914 A.2d 25 (2006).

It is the defendant's burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689, 104 S. Ct. 2052 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). The defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S. Ct. 2052.

The standard of review we apply when considering a trial court's denial of a motion to reconsider "remains abuse of discretion." *Wilson-X v. Dep't of Human Resources*, 403 Md. 667, 676 (2008). But judges "do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature." *Id.* at 675. "[A] failure to consider the proper legal standard in reaching a decision constitutes an abuse of discretion." *Paseur v. Skevofilax*, 396 Md. 405, 433 (2007).

DISCUSSION

I.

Preliminarily, the State now argues that, because only one of Christian's co-counsel testified at the hearing on his postconviction petition, the postconviction court could not possibly have determined the alleged errors were not trial strategy. The State did not make this argument during the postconviction hearing, and cites no case that imposes such a requirement. Indeed, the Court of Appeals has held that, although testimony from trial counsel may be helpful, such testimony is not required at a postconviction hearing to determine whether an attorney's actions were insufficient or part of a trial strategy. *Colvin v. State*, 299 Md. 88, 112-13 (1984).

Here, Christian did call one of his trial counsel to testify as a witness at the postconviction hearing. The postconviction court observed that trial counsel "testified that there was no strategy in her failing to object to the [*Unger*] instruction." Similarly, the postconviction court noted that trial counsel "testified that . . . there was no trial

strategy behind not objecting [to the anti-CSI *voir dire* question]," and "also testified that there was no trial strategy in failing to request a missing evidence instruction." The postconviction court credited this testimony, and found that the failure to object was not because of trial tactics or strategy. That finding was not clearly erroneous.

A. Anti-CSI *voir dire* question

The State challenges the post-conviction court's assessment that the trial court asked an improper "anti-CSI" *voir dire* question, and that Christian's counsel's failure to object amounted to ineffective assistance of counsel.

Voir dire "entails examination of prospective jurors through questions propounded by the judge . . . to determine the existence of bias or prejudice . . . ." *Charles & Drake v. State*, 414 Md. 726, 733 (2010). "Maryland disapproves of preemptive anti-CSI messages to the venire or the empaneled jury. *Stabb* [*v. State*], 423 Md. [454,] 473 [(2011)] (to the extent that such an instruction is requested, its use ought to be confined to situations where it responds to correct pre-existing overreaches by the defense, i.e., a curative instruction." *State v. Armstead*, 235 Md. App. 392, 414, *cert. denied*, 459 Md. 172 (2018).

During jury selection at Christian's trial, the court asked the following question:

> Is there any member of this panel who believes that the State can only prove its case through the use of scientific or forensic evidence such as, but not limited to, DNA, fingerprints or serology results?

Christian's counsel failed to object, and, on direct appeal, Christian urged us to consider the impropriety of the question "under 'plain error review.'" We *did* consider Christian's

unpreserved objection on direct appeal, and agreed with his argument that the trial court should not have asked the question on *voir dire*. We stated: "The question was not neutral because it mentioned the State exclusively and, therefore, was erroneous."

Having found that the trial court committed error, we said: "We, therefore, must consider whether the error was harmless." We concluded the improper *voir dire* question was harmless because the trial court "asked a series of other questions [we deemed curative] following the erroneous questions . . . ."

Even though the State has not argued that this issue was fully litigated and, therefore, not open for review by the postconviction court, it clearly was addressed by us on direct appeal. *See* Maryland Code (2001, 2008 Repl. Vol.), Criminal Procedure Article ("CP"), § 7-102(b)(2) (providing that a person may seek postconviction relief only if "the alleged error has not been previously and fully litigated"). Although our opinion on direct appeal did not consider whether trial counsel provided deficient performance in failing to object to the *voir dire* question, we did effectively address the prejudice prong of the *Strickland* analysis by holding that the question was a harmless error in the context of Christian's trial. Because the trial court's error was held to be harmless on direct appeal, we are not at liberty to reach a different view with respect to the postconviction argument, and neither was the postconviction court.

Consequently, even though we agree with the postconviction court's conclusion that trial counsel rendered deficient assistance by failing to object to the ant-CSI *voir dire*

question, we are bound by the judgment of this Court on direct appeal concluding that the question was a harmless error, and not a basis for a new trial.

B. Failure to object to the *Unger* instruction

The State contends that the postconviction court abused its discretion in finding that Christian's counsel's failure to object to a jury instruction prohibited by *Unger* was ineffective assistance of counsel. In *Unger*, the Court of Appeals reiterated that the court's instructions on certain "bedrock" points of law are binding on the jury:

> [A] judge's instructions to the jury concerning the burden of proof, the presumption of innocence, proof beyond a reasonable doubt, and other matters implicating federal constitutional requirements, must be binding upon the jury.

Unger, *supra*, 427 Md. at 388 n.2. An instruction making it clear to a jury that "the jury is bound by the court's instructions on the law other than the substantive law of the crime — is necessary to render constitutional an advisory only instruction." *State v. Adams-Bey*, 449 Md. 690, 705 (2016). But, in the absence of that clarifying explanation, "a jury instruction advising the jury that it is the judge of the law is an advisory only instruction" which "constitutes structural error if the court does not also inform the jury that it is bound by the presumption of innocence and the beyond a reasonable doubt standard." *Id*.

At Christian's trial, the court gave the following jury instructions:

> As I have indicated, members of the jury, the time has come to explain to you the law that applies to this case. **The instructions that I give you about the law are binding**. In other words, you must apply the law as I explain it to you in arriving at your verdict.

(Emphasis added.)

But, according to the trial transcript, the judge later told the jury:

> . . . You are not partisans**. Since this is a criminal case, you are judges, judges of both the law and the facts.** Your sole interest is to ascertain the truth from the evidence in the case.

(Emphasis added.)

The State points to our unreported opinion on direct appeal of Christian's case where, in dicta, we said that the trial court "unequivocally told the jury that the instructions were 'binding,'" and, therefore, the State contends, the postconviction court erred in concluding the instruction was fatally defective. But, unlike the unpreserved objection to the anti-CSI *voir dire* question, we expressly declined to address the merits of Christian's unpreserved challenge to the jury instruction. Our holding was that we would "not overlook the preservation requirement of Md. Rule 4-325(e)." Consequently, the alleged error with respect to the jury instruction has not been fully litigated.

The State relies on this Court's decision in *Calhoun-El v. State*, 231 Md. App. 285 (2016), *cert. denied*, 452 Md. 527, *cert. denied*, 138 S.Ct. 457 (2017), where the defendant sought postconviction relief by challenging the validity of an advisory jury instruction given at his trial. After a lengthy explanation of the "tortured path of the law in Maryland regarding 'advisory' jury instructions," *Calhoun-El*, 231 Md. App. at 291, we held that, because *Stevenson v. State*, 289 Md. 167 (1980), had been issued prior to the defendant's trial, "there existed a reasonable basis for appellant to object at trial to the alleged advisory nature of the instructions." *Calhoun-El*, 231 Md. App. at 303. The defendant's failure to object therefore waived his right to raise the constitutional issue

directly by way of a postconviction petition, and we did not reach the merits of the claim, citing CP § 7-106(b). But there was no discussion of ineffective assistance of counsel in *Calhoun-El*.

Christian asserts that his attorney's failure to object to the trial court's erroneous instruction waived his right to challenge the instructions on direct appeal, and thereby deprived him of effective assistance of counsel. For the very reason that the defendant's claim for relief failed in *Calhoun-El* --- *i.e.,* his trial counsel's failure to object waived the issue --- we conclude that Christian's attorney did not act reasonably in failing to object when the trial judge instructed the jurors that they were "judges of both the law and the facts." As we observed in *Calhoun-El*, 231 Md. App. at 294, since *Stevenson* and *Montgomery* were decided in 1980 and 1981, attorneys have been on notice that it is no longer permissible to instruct jurors that they are the judges of the law irrespective of federal constitutional rights. Christian's trial took place in 2012, and his defense counsel was therefore on notice that failure to object to an unconstitutional advisory jury instruction would waive the objection. *State v. Adams*, 406 Md. 240, 266 (2008). On direct appeal, counsel's failure to object at trial was precisely the reason why we did not reach the merits of Christian's claim that the court's jury instruction was reversible error, and, therefore, we agree with the postconviction court's conclusion that Christian's counsel's "representation fell below an objective standard of reasonableness." *Harris v. State*, 303 Md. 685, 697 (1985).

Next, we must consider whether any prejudice resulted from trial counsel's deficient performance. It is structural error for the court not to advise the jury that it is bound by the presumption of innocence and the requirement of proof beyond a reasonable doubt. *State v. Adams-Bey*, 449 Md. 690, 705 (2016) (citing *Robertson v. State*, 295 Md. 688, 689 (1983) (per curiam)). In *Adams-Bey*, the offending language was as follows:

> ***I purposely use the term "advise" since in a criminal case, under Maryland law, you are the judges of both the law and the facts.***

Id. at 697 (emphasis in original).

Even though the trial court in Christian's case did not use the word "advise," we conclude that the instructions were essentially the same as those in *Adams-Bey* because the members of Christian's jury were told: "you are the judges of both the law and the facts." This erroneous instruction was given near the end of the court's instructions, and the jury was never explicitly told that the court's preceding instructions regarding Christian's presumption of innocence and the standard of proof were exceptions and were binding on them.

The State contends that the written jury instructions that were apparently provided to the jury did not contain the same error as the oral jury instructions, and cured any defect that may have existed. But we have been directed to nothing in the record that would confirm that the jurors ever consulted the written instructions, let alone that the jurors took note of the correct statements on this point of law. Furthermore, the statement

that "you are judges of both the law and the facts" came near the end of the judge's jury instructions, and was one of the last things the jurors heard before deliberating.

Advisory only jury instructions like those in *Adams-Bey* render a "trial fundamentally unfair." *Id.* at 707. "If the error is structural because it is fundamentally unfair, then it will satisfy the prejudice prong of *Strickland*." *Newton*, 455 Md. at 341. The erroneous instruction telling the jurors they were the judges of the law introduced a structural error, and we conclude that this satisfied the prejudice prong of *Strickland*.

C. The Missing Evidence Instruction

The State alleges that the postconviction court erred in finding that Christian's trial counsel's failure to request a missing evidence instruction amounted to ineffective assistance of counsel under *Strickland*.

Missing evidence instructions are a remedy for a defendant who is prejudiced by the State's failure to produce relevant evidence, but cannot demonstrate the high bar of "bad faith" required to prevail on a claim that the failure to produce the evidence violated due process of law. *Cost v. State*, 417 Md. 360, 378 (2010). A "party *generally* is not entitled to a missing evidence instruction." *Id.* at 378 (quoting *Patterson v. State*, 356 Md. at 694). But the Court of Appeals has explained that a "trial court abuses its discretion when it denies a missing evidence instruction and the 'jury instructions, taken as a whole, [do not] sufficiently protect the defendant's rights' and 'cover adequately the issues raised by the evidence.'" *Id.* at 382 (quoting *Fleming v. State*, 373 Md. 426, 431 (2003)).

During closing arguments, Christian's counsel emphasized the lack of physical evidence tying Christian to the crime scene. The defense urged the jury to construe this against the State. As Christian pointed out at his postconviction hearing, "argument by counsel to the jury will naturally be imbued with a greater gravitas when it is supported by a [sic] instruction on the same point issued from the bench." *Cost*, 417 Md. at 381. Christian persuaded the post-conviction court that, in addition to calling the jury's attention to the missing evidence, competent trial counsel would have also requested a missing evidence instruction. The postconviction court concluded that "[t]here is a reasonable possibility that, had the missing evidence instruction been requested by the trial counsel, the verdict may have been different."

But Christian could have suffered prejudice by his counsel's failure to request a missing evidence instruction only if the trial court would have been required to give such an instruction. "Whether to give a missing evidence instruction is a decision within the trial court's broad discretion," *Jarrett v. State*, 220 Md. App. 571, 592 (2014) (citing *Patterson v. State*, 356 Md. 677, 688 (1999)). The State argues that Christian failed to demonstrate that he would have been entitled to a missing jury instruction had his counsel requested one, and that the few appellate cases that have found error in a trial court's refusal to give a missing evidence instruction are inapplicable to the case at hand because they "all deal with situations where the State had evidence in its possession but did not *preserve* it." *Hajireen v. State*, 203 Md. App. 537, 561 (2012) (emphasis added). There

was no claim in this case that the State had disposed of evidence it had previously had in its possession.

Christian counters by analogizing his case to *Cost v. State*, where the Court of Appeals held that there are certain "exceptional circumstance[s] . . . which compel[] a missing evidence jury instruction relating to an evidentiary inference." 417 Md. at 378-79. In that case, the Court of Appeals explained three factors we look to when determining whether a missing evidence instruction is required: (1) the relevancy of the evidence and whether it goes to the heart of the case; (2) whether the evidence is the type usually collected and held exclusively by the state; and (3) whether that evidence is normally collected and analyzed. *Id.*

In *Cost*, the defendant, who was incarcerated, was charged with stabbing another inmate in the inmate's cell. *Id.* at 360. The crime scene allegedly contained blood-stained linens and clothing and dried blood on the floor, but none of it was preserved or presented at trial. *Id.* at 380. This evidence was highly relevant because a factual issue was whether the inmate had actually been stabbed, and whether the stabbing had caused significant bleeding. *Id.* It was the type of evidence "which normally would be collected and analyzed." *Id.* The Court of Appeals found that the defendant's inability to support his case with laboratory analysis of the discarded evidence went to the "heart of the case" and could have "created reasonable doubt as to [the defendant's] guilt." *Id.* Therefore, a missing evidence instruction was not merely discretionary, but was required under those specific circumstances. *Id.* at 381.

In this Court's decision in *Gimble v. State*, 198 Md. App. 610, 629 (2011), we observed that "trial courts *ordinarily* need not instruct the jurors on *most* evidentiary matters," and that *Cost* was an exception to the general rule. In *Gimble*, the defendant argued that the sheriff's department had disposed of a backpack found near the scene of a crash. *Id.* at 630. The backpack, and items found inside of it, could have been tested for fingerprints and a phone charger could have been tested to see if it was compatible with cell phones in the defendant's possession. *Id.* The defendant argued that, if these tests had been done, they would have exculpated him. *Id.* at 630-31. This Court held that, not only was the evidence not suitable for fingerprint analysis, but the defendant's contention that the test results could be exculpatory was speculative at best. *Id.* It was a "typical case, likely to be repeated, in which some piece of crime scene evidence, *not of major import*, was not retained or analyzed," and we held that the trial court did not abuse its discretion in not giving the missing evidence instruction. *Id.* at 632 (emphasis in original).

In *Jarrett v. State*, 220 Md. App. 571 (2014), the remains of the victim were released to the family who then had the remains cremated. Unlike in *Cost*, "the crime scene was preserved, evidence was submitted for testing, and the remains were subject to an autopsy." *Id.* This Court found that the Office of the Medical Examiner had a regular practice "to release remains to family members after an autopsy is completed." *Id.* We concluded that the State did not destroy the evidence, and that it was not an abuse of

discretion for the circuit court to decline to "propound a missing evidence instruction." *Id.* at 595.

We find the facts in Christian's case to be more similar to *Gimble* and *Jarrett* than to *Cost*. In the case at hand, a lot of physical evidence was gathered by the State but never introduced at Christian's trial. The police gathered fingerprints from the crime scene, but did not run them through their Automated Fingerprint Identification System. The police swabbed the gun from Christian's car for DNA, but never tested it. The police took blood swabs from the crime scene, but never tested them against Christian's DNA. There was a bloody imprint of a boot left at the crime scene, but it was never photographed or analyzed. This evidence was arguably relevant to Christian's defense that he was not at the Keyser hotel and that the State had no physical evidence that could place him there. But, unlike in *Cost*, there is no indication here that the State discarded or destroyed any material evidence. There was testimony that the evidence was still available up through the trial. The State also offered testimony as to why much of the evidence was deemed of little evidentiary value. It is highly speculative whether any of the evidence would have been exculpatory. Under these circumstances, it would have been within the trial court's discretion to decline to give a missing evidence jury instruction, and therefore, Christian did not prove that he suffered any prejudice from trial counsel's failure to request a missing evidence instruction.

II.

The postconviction court entered its order (granting a new trial) on March 24, 2017. Over two months later, the State filed its Motion to Reconsider Post-Conviction Relief, "pursuant to [CP] § 7-104," asking the court to "reconsider its granting of post-conviction relief . . . ." The motion was not supported by an affidavit, but asserted that the jury instructions set forth in the official court transcript were not in fact an accurate transcription of the jury instructions the judge gave orally at Christian's trial. The State alleged in the motion that the offending "judges of the law" language in the transcript was a fluke result of being language that was "automatically populated" by the stenotype machine of the court reporter. In its motion, the State stated:

> 2) The State submits in this Motion to Reconsider that it has just learned that the transcript is not accurate and the offending language was never transmitted to the jury either orally or in writing during trial.
>
> 3) The State is prepared to call Judge Waldron [the trial judge] as a witness in a hearing if granted to testify that the official transcript was prepared by his then-assigned court reporter, Steven D. Perrine, copying verbatim, introductory language to the jury during final instructions that were automatically populated instructions no longer used by Judge Waldron that included the offending language. In other words, Judge Waldron had stopped using the offending language in writing and orally long before the Petitioner's trial, and did not use them in this instance and the transcription was not the instruction given. This transcription error may affect hundreds of cases in all stages of the legal process and will need to be pored over by the Office of the State's Attorney for Judge Waldron's cases, who undoubtedly has tried more criminal jury trials than any judge in the Circuit Court for the past 30 years.
>
> 4) [Based upon the official trial transcript,] Counsel for the Petitioner [Christian] submitted [that] the language used at trial was the following:

> The instructions that I give you about the law are binding upon you. In other words, you must apply the law as I explain it to you arriving at your verdict. On the other hand, any comments that I may make about the facts are not binding upon you and are advisory only . . . you are not partisans. Since this is a criminal case, *you are the judges, judges of both the law and the facts*. Your sole interest is to ascertain the truth from the evidence in the case.[2]

5) In truth, the language actually given to the jury was the following:

> The verdict must represent the considered judgement [sic] of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous. It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely based on the opinion of your fellow jurors, or for the mere purpose of returning a verdict. You are not partisans. Your sole interest is to ascertain the truth from the evidence in this case.

6) The State submits in this Motion to Reconsider that the attached jury instructions (Exhibit 1) were the actual instructions orally read to and provided in writing to the jury as reflected on Page 6.

7) Since the post-conviction court found a cumulative effect of ineffective assistance of counsel based on several factors, should the State's Motion be considered, it would in effect have to change the calculus of the post-conviction court especially in light of the fact that *Unger* was designed

[2] The language telling the jurors that they were judges of "both the law and the facts" was quoted twice in our unreported opinion filed in this case on June 4, 2013. *See* Slip op. at page 21 of the majority opinion, and page 2 of the dissenting opinion.

> to apply retroactively while the other bases were not and would stand alone in analysis.
>
> 8) The reopening of the post-conviction under Md. Code. Ann., Crim. Pro. § 7-104 would be in the absolute interests of justice as the State is also entitled to a fair and accurate hearing based on new evidence contradictory to the official court transcript on which it relied in its case. To have a misleading recordation of the actual instructions given overturn a validated verdict holding the accused responsible for the murder of Robert Hemphill would be catastrophic to the interests of justice.

Christian opposed the State's motion for reconsideration, and argued that, under the Maryland Uniform Post Conviction Procedure Act, CP §§ 7-101 *et seq*., the State was not entitled to file a motion for reconsideration. Citing *Alston v. State*, 425 Md. 326, 328 (2012), Christian asserted that CP § 7-104 permits only a convicted defendant to file either a post-conviction action or a petition to reopen a post-conviction proceeding.

The postconviction court agreed with Christian's assertion that CP § 7-104 did not provide authority for the State to seek reconsideration of the court's order granting a new trial. The court quoted the passage from *Alston*, 425 Md. at 333, in which the Court of Appeals stated:

> Although § 7–104 itself does not contain language specifying who may file an application to reopen a previously concluded postconviction proceeding, the statute as a whole and the legislative history of § 7–104 make it clear that only a "convicted person" may bring either a postconviction proceeding or a petition to reopen a postconviction proceeding.

The postconviction court also commented that the State had already filed an Application for Leave to Appeal the March 24 order, and thereby "divested" the circuit

court of jurisdiction pursuant to CJ § 12-308. The court denied the State's motion, stating:

> Because relief under Crim. Pro. § 7-104 is not available to the State and because this Court is divested of jurisdiction, any relief sought by the State would have to be pursued through the Court of Special Appeals. As such, the State's Motion to Reconsider Post-Conviction Relief shall be denied.

After this Court granted the State's application for leave to appeal, the State filed a motion to correct the record and a motion to supplement the record in this Court, both of which were unopposed and granted. But neither of those motions sought to correct the trial transcript that allegedly does not accurately record the instructions that were actually given by the trial judge.

In its brief in this Court, the State argues that the postconviction court "erred in denying the State's motion for reconsideration." The State "acknowledges that in *Alston*, the Court of Appeals held that only a defendant has the statutory right to file a motion to reopen a post conviction proceeding." But, the State asserts, the postconviction court could have addressed "an irregularity in the proceedings" pursuant to Maryland Rule 2-535, and "[u]nder the circumstances, the court should have exercised its revisory power over its judgment and held a hearing to sort out the issue addressed in the motion."

It is troubling that it took so many years for the State to assert the belated claim that the specific challenged sentence in the trial transcript --- that has been the focus of appellate and postconviction review since at least the time it was raised on direct appeal in 2012 --- is simply an error in the transcript. It is also troubling that, even at this late

date, the State has not produced any affidavit from any person (neither the court reporter, nor the trial judge, nor the prosecuting attorney, nor any juror, nor any other person who might have been present during jury instructions) to assert under oath that the language in the transcript is incorrect.

It is also troubling that no motion to correct this portion of the transcript was ever filed in this Court pursuant to Maryland Rule 8-414, even though that rule states in subsection (a) that "the appellate court may order that a material error or omission in the record be corrected." As noted, no affidavit supporting the State's claim of error has ever been filed in these proceedings, and Rule 8-414(b)(1) mandates that "[a] motion that is based on facts not contained in the record or papers on file . . . **shall be supported by affidavit**." (Emphasis added.) Because that condition was not met in this case, this Court does not have a basis to refer the matter back to the lower court pursuant to Rule 8-414(b)(2).

Although we question the postconviction court's assumption that the mere filing of an application for leave to appeal divested the circuit court of jurisdiction as soon as the application was filed, the only authority for reconsideration that the State cited to the postconviction court was CP § 7-104, and the State now "acknowledges" that the Court of Appeals has held that "only a defendant has the statutory right to file a motion to reopen a post conviction proceeding." Because no other legal authority for reconsideration was cited to the postconviction court, we conclude that the postconviction court did not err in denying the State's motion.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY HARFORD COUNTY.