Circuit Court for Baltimore City
Case Nos. 114281016, 114281017

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1271

September Term, 2023

DAMON LAWSON

v.

STATE OF MARYLAND

Friedman,
Shaw,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.
Dissenting Opinion by Friedman, J.

Filed: August 19, 2024

In 2015, Damon Lawson, appellant, pleaded guilty in the Circuit Court for Baltimore City to two counts of robbery with a dangerous weapon and one count of use of a firearm in the commission of a felony or crime of violence. The court sentenced appellant to terms of imprisonment totaling twenty-five years, with all but ten years suspended, the first five years without the possibility of parole, to be followed by five years' probation. Although the court advised him, among other advisements, of his right to file a motion for modification within ninety days of sentencing and his right to the assistance of counsel in doing so, appellant did not file such a motion.

In 2021, appellant filed a post-conviction petition, claiming that trial counsel had been ineffective in failing to file a motion for modification and in failing to consult with him about the advisability of doing so. Had trial counsel consulted with him, he claimed he would have requested that a motion be filed. Following a hearing, the post-conviction court denied appellant's petition. Appellant filed an application for leave to appeal, which we granted, transferring the matter to the regular appellate docket. We shall affirm the judgment of the post-conviction court denying appellant's claim.

BACKGROUND

The Robbery

On 16 September 2014, at approximately 4:30 in the afternoon, Baltimore City Police officers responded to a Rent-A-Center store on Frederick Road after receiving a call from a panic alarm. Upon arriving, the officers encountered two store employees, Shavonne Anderson and Matthew Kitt, who told them that they had been robbed at gunpoint by two men. One suspect went "behind the counter and grabbed [Ms. Anderson]

by [her] neck, while the other suspect pointed a black handgun at Mr. Kitt and ordered him to the floor." Ms. Anderson surrendered $438 from the store's cash register and another $80 from her purse.

The robbers fled with the money. The following day, police detectives, acting on surveillance video and descriptions of the suspects that the victims provided, found appellant "in a separate related incident[.]"[1] Appellant was shown "pictures from the surveillance camera, and identified both himself and" the other robber, co-defendant Anthony Howard, in the photographs.

The Charges

In October 2014, three indictments were filed in the Circuit Court for Baltimore City, charging appellant with robbery with a dangerous weapon and related firearms offenses.[2] Indictment No. 114281016 charged appellant with fifteen counts: armed robbery (Count 1); conspiracy to commit armed robbery (Count 2); robbery (Count 3); conspiracy to commit robbery (Count 4); assault in the first degree (Count 5); conspiracy to commit assault in the first degree (Count 6); assault in the second degree (Count 7); conspiracy to commit assault in the second degree (Count 8); reckless endangerment (Count 9); theft of property having a value less than $1,000 (Count 10); conspiracy to commit theft of property having a value less than $1,000 (Count 11); use of a firearm in

[1] Although the prosecutor did not elaborate in the statement of facts in support of appellant's guilty plea, it appears that the "separate related incident" was a traffic stop, which led to the recovery of two BB pistols, believed to have been used in the robbery the previous day.

[2] Identical charges were filed against co-defendant Howard.

the commission of a felony or crime of violence (Count 12); conspiracy to use a firearm in the commission of a felony or crime of violence (Count 13); wearing, carrying, or transporting a handgun on the person (Count 14); and conspiracy to wear, carry, or transport a handgun on the person (Count 15). Indictment 114281017 charged appellant with fifteen identical counts alleging offenses against the other victim. Indictment 114281018 charged appellant with three counts of illegal possession of a regulated firearm based upon various statutory disqualifications.

Plea Hearing

In March 2015, appellant appeared in the Circuit Court for Baltimore City for a plea hearing. At the outset of the plea hearing, the prosecutor called all three indictments[3] and explained that she had offered appellant (and his co-defendant) a total sentence of forty years' imprisonment, with all but twenty years suspended, the first ten years without the possibility of parole, and presumably, a period of probation, in exchange for guilty pleas. As part of the proposed agreement, the prosecutor would decline to seek an additional

[3] The prosecutor also called the indictments against co-defendant Howard, but he did not agree to plead guilty at that time. Less than two weeks later, Howard pleaded guilty separately to one count of robbery with a dangerous weapon and one count of use of a firearm in the commission of a felony or crime of violence. All remaining charges were nolle prossed. Howard was given concurrent sentences on those charges (by a different judge). Howard, through counsel, filed timely a motion for modification of sentence and asked that it be held *sub curia*. In February 2020, the circuit court granted that motion. Thereafter, Howard filed a motion to correct an illegal sentence (on what grounds we cannot determine from the docket entries), which was granted, with the result that Howard's sentence for the robbery was reduced to twenty years' imprisonment, with all but seven years suspended, to be followed by five years' probation, to be served concurrently with a term of five years' imprisonment without the possibility of parole for illegal use of a firearm.

ten-year mandatory sentence for which appellant was eligible. Because, however, a police witness suddenly became unavailable, the prosecutor sought a postponement.[4]

Co-defendant's trial counsel explained to the judge that there were "some legal issues" he might raise in a motion to suppress evidence. He informed the judge that the purported handguns that police had seized from the defendants "were BB guns[,]" which, he contended, was a mitigating factor the judge should consider.

The judge requested "the State's response to all of this" and declared his willingness to impose a straight sentence, "15 years, the first five without [parole]." The prosecutor replied that "if we're just going to go for a straight deal offer, the State would request . . . the bottom of the guidelines with the two victims would be 20 years. The top of the guidelines would be 30 years."

The judge replied, "[H]ow about 25, suspend all but 15, the first five without. The first without. That's the mandatories." Trial counsel interjected to ask for a more lenient sentence for his client. Ultimately, the judge agreed to offer him twenty-five years' imprisonment, with all but ten years suspended, the first five years without the possibility of parole, to be followed by five years' probation.

The prosecutor asked for a recess so that she could seek the victims' assent to the court's offer. She returned shortly and told the judge that she had spoken with Ms. Anderson, who thought that the proposed plea deal "was too low." The judge replied that

[4] The prosecutor explained that the police detective who had shown the photographic arrays to the victims "left the state unexpectedly because of" the illness of a parent.

he was "happy to hear from" Ms. Anderson, emphasizing that "[s]he has a right" to be heard and that "she [could] come over."[5]

The judge continued, "I'm willing to bind myself to it, so." Appellant's trial counsel leapt at the offer, exclaiming, "Mr. Lawson would accept the plea." Co-defendant's trial counsel told the judge that he was unsure whether his client would accept the offer (which, in his case, entailed five additional years of active incarceration), and he asked for some time to confer with Howard.[6]

The judge then severed the two cases. After ascertaining that appellant would invoke his right not to testify in his co-defendant's case, the judge called a brief recess so that the victims could be brought in to testify at appellant's sentencing.

When proceedings resumed, the prosecutor called two counts of Indictment No. 016, robbery with a dangerous weapon and use of a firearm in the commission of a felony or crime of violence, and one count of Indictment No. 017, robbery with a dangerous weapon. The following then occurred:

> THE COURT: Okay. And your recommendation [speaking to the prosecutor], I believe, was 40 years, suspend all but 20 years, was it the first 10 without?
>
> [PROSECUTOR]: The first 10 without, Your Honor.
>
> THE COURT: The first 10 without?

[5] The Circuit Court for Baltimore City operates from two separate courthouses. The crime victims were in the other courthouse.

[6] The judge explained that Howard was offered a less lenient deal because he had two prior robbery convictions. As we noted previously, Howard appeared ultimately before a different judge and received a more lenient sentence than appellant. *See supra* note 3.

[PROSECUTOR]: Yes, Your Honor.

THE COURT: Okay. The Court's willing to bind itself to 25 years, suspend all but 10 years, the first five of which is without the possibility of parole, followed by five years probation. So counsel, is that your understanding of what the plea is?

[TRIAL COUNSEL]: That's my understanding of the plea, Your Honor.

THE COURT: All right. And Mr. Lawson, is that your understanding of the plea?

MR. LAWSON: Yes.

As the defendant was about to be qualified to enter his plea, the following occurred:

THE CLERK: Just so the clerk is clear, Your Honor. Is it 25 to Count I, VII and --

THE COURT: Well, let's see. 25 deadly, that's the max. So it would be 25 suspend all but 10 years, five years probation for Count I in both indictments. And then in Count XII, it will just be 10 years, first five without, concurrent.

[PROSECUTOR]: And Your Honor, I just want to make sure that we were adding the numbers up correctly. Because 20, I believe, is the maximum for robbery with a dangerous weapon.[7]

THE COURT: All right. I apologize. All right. So -- okay. All right. So I'll just have to make one of the robberies consecutive. Let's make it five years suspended, make it consecutive for a total sentence. Madam Clerk, so it will be -- thank you for pointing that out. The first count in the indictment 016 would be 20 years, suspend all but 10 years, okay?

THE CLERK: Okay.

[7] The prosecutor was correct. *See* Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article, § 3-403(b) (providing that a person found guilty of the felony of robbery with a dangerous weapon "is subject to imprisonment not exceeding 20 years").

THE COURT: The 12th count would be just 10 years, the first five without, concurrent. And then the first count of the indictment ending in 017 would be five years, I will suspend it, but that will be consecutive to the sentence of Count I of 016.

THE CLERK: Okay.

THE COURT: Okay. So the end result is 25 years, suspend all but 10 years, first five without, followed by five years probation.

THE CLERK: Okay.

THE COURT: Counsel, does everyone understand? I apologize for the confusion.

[TRIAL COUNSEL]: Yes, Your Honor.

[PROSECUTOR]: Thank you, Your Honor.

Appellant was examined then in open court, and thereafter, the court determined and announced on the record that his plea was entered "voluntarily with an understanding of the nature of the charge and the consequences of the plea." The prosecutor then recited facts sufficient to support a finding of guilt. After eliciting appellant's acknowledgment that the facts recited were correct, the court entered guilty verdicts in accordance with the plea agreement.

The victims then were afforded an opportunity to give victim impact statements. Ms. Anderson demurred, but Mr. Kitt made a brief statement, concluding by stating, "But the hardest thing is, I'll probably never be able to move past this."

The court afforded the prosecutor one more opportunity to address the court:

[PROSECUTOR]: Your Honor, the State would just again state for the record, Mr. Lawson in this case does have a record. He has an October of 2011 second-degree assault upon a DOC employee. And is currently on

> probation for a January 2012 first-degree assault. Your Honor, the facts of this case speak for themselves. The State has nothing further.

The judge then confirmed from the prosecutor that the defendants were stopped by police shortly after the robberies and were found with "BB guns that look like handguns[.]" Appellant was afforded an opportunity to exercise his right to allocution, but declined the offer. The judge imposed sentence in accordance with the plea agreement. At the conclusion of the sentencing hearing, the court advised properly appellant, as relevant here, that he had ninety days to file a motion for modification of sentence and that, in doing so, he "ha[d] a right to be represented by an attorney." When asked whether he understood his post-sentencing rights, appellant replied. "Yes." No motion for modification of sentence was filed on appellant's behalf.

Post-conviction Proceedings

In November 2021, appellant filed a petition for post-conviction relief, alleging that trial counsel, in 2015, had rendered ineffective assistance because he had "failed to consult with" appellant "regarding a motion for modification, and failed to file such a motion within 90 days of the disposition" of Cases No. 016 and 017. As a remedy, appellant requested permission to file a belated motion for modification of sentence.

In his petition, appellant relied upon *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), *State v. Adams*, 171 Md. App. 668 (2006), *rev'd on other grounds*, 406 Md. 240 (2008), *overruled by Unger v. State*, 427 Md. 383 (2012), and *Moultrie v. State*, 240 Md. App. 408 (2019), *overruled on other grounds by Franklin v. State*, 470 Md. 154 (2020). In *Flores-Ortega*, the Supreme Court of the United States held that

> counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

528 U.S. at 480. In *Adams*, we said in dictum that "other than an express directive from" a defendant "not to file a motion for modification, there [is] no conceivable reason why" such a motion would not be filed, because, under what is now Maryland Rule 4-345(e), there is "no downside" to filing the motion, which cannot result in an increase in sentence.[8] 171 Md. App. at 716. In *Moultrie*, we repeated this "nothing to lose" rationale in the context of trial counsel's failure to file an application for review of sentence under circumstances where the panel could not increase the defendant's sentence.[9] 240 Md. App. at 427. Synthesizing these authorities, appellant asserted that trial counsel rendered deficient performance in failing to consult with him about filing a motion for modification of sentence, where "it is clear that a rational defendant would have wanted a motion for modification to be filed." Regarding prejudice, appellant asserted that his loss of the

[8] Rule 4-345(e)(1) provides, in relevant part, that a circuit court "has revisory power over the sentence except that it may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it may not increase the sentence."

[9] An application for review of sentence differs fundamentally from a motion for modification of sentence in that a review panel generally may, after a hearing, increase a sentence. Md. Code (2001, 2018 Repl. Vol.), Criminal Procedure Article, § 8-105(c)(3)(ii)1; Md. Rule 4-344(f). Thus, only under limited circumstances is it a risk-free proposition to file an application for review of sentence. Examples of such circumstances include where a defendant has been sentenced already to the statutory maximum and where a defendant has been sentenced pursuant to a binding plea agreement. For an illustration of the latter circumstance, see the seminal decision in *Dotson v. State*, 321 Md. 515 (1991).

opportunity to file the motion was sufficient to establish prejudice under *Strickland*,[10] and he asserted further that his failure to instruct trial counsel to file the motion should not be held against him in light of trial counsel's failure to consult.

In its response, the State began by purporting to correct a procedural point that appellant had mentioned in his petition. Appellant recited that he had entered guilty pleas "[p]ursuant to a binding plea" agreement. The State asserted that it adopted

> the procedural history provided by [appellant], with the sole correction that the plea bargain [appellant] entered into was not, in fact, binding. Although the Court agreed to be bound by its offer to [appellant], the offer was not ABA binding because the State was not party to the agreement; the Court actually reiterated this just before [appellant] agreed on the record to plead guilty, noting that the State had asked for a much higher sentence and the Court conveyed a different offer.

As to the merits of appellant's claim, the State noted that *State v. Flansburg*, 345 Md. 694 (1997), held that trial counsel's failure to file a motion for modification of sentence *upon request* is ineffective assistance of counsel. According to the State, the "creation of a bright-line rule in *Flansburg* was an exception because it addressed a situation where a defendant has given an instruction to his counsel, and counsel has ignored it; when counsel ignores the direct instructions of their client, their conduct cannot meet an objective standard of reasonableness and therefore satisfies the performance prong of [the] *Strickland* analysis."

Appellant conceded, however, in his post-conviction petition that he did not ask trial counsel to file a motion for modification of sentence. Furthermore, the State contended,

[10] *Strickland v. Washington*, 466 U.S. 668 (1984) (setting forth the test for evaluating claims of ineffective assistance of counsel).

appellant claimed neither "that he gave instructions which his counsel ignored," nor did he "claim that he attempted to consult with counsel and was rebuffed," nor did he claim not to understand the sentencing judge's advisement of rights, which, the State averred, was presented "in simple language on the record, and which [appellant] said at the time he understood."

And finally, the State contended that "there were in fact rational reasons to not request a modification." According to the State, appellant and trial counsel "were aware" that the judge had just imposed "a very generous sentence[,]" which undercut "significantly" the State's offer, and they therefore "could have reasonably believed" that the judge "was profoundly unlikely to grant a modification on the sentence he had just imposed[.]"

The circuit court convened a hearing on appellant's petition. At the outset, post-conviction counsel informed the court that appellant would be the only witness called on his behalf. Counsel then purported to "correct" appellant's petition, agreeing with the State that appellant's 2015 guilty plea was "not binding."

Appellant testified about his age and education; at the time he entered his guilty plea, he was twenty-three years old,[11] had a tenth-grade education, and had been a special education student. He claimed that, prior to his 2015 plea hearing, he had met trial counsel "[o]nce." According to appellant, they did not discuss post-sentencing motions, either during that one-off meeting or on the day of the hearing. Appellant claimed further that he

[11] As indicated on the indictments, appellant was born in August 1991. He entered his guilty plea on 30 March 2015.

"didn't understand" anything about post-sentencing motions. And finally, appellant testified that, after the plea hearing, he tried to contact trial counsel by letter, but received no reply. When asked why he did not request that trial counsel file a motion for modification of sentence, appellant replied, "'Cause he ain't explain and if'n I knew I would have asked him."

Trial counsel was not called to testify. When the court asked post-conviction counsel where he was, she replied cryptically, "Not here."

The post-conviction court denied appellant's petition on the ground that he failed to prove deficient performance. Regarding the claim based upon trial counsel's failure to consult, the court distinguished *Flores-Ortega* on two grounds; first, that case addressed trial counsel's duty to advise whether to take a direct appeal, rather than to file a motion for modification of sentence, which, the court declared, is a different context "in many ways"; and second, because *Flores-Ortega* rejected a bright-line rule as appellant was proposing.

The post-conviction court ruled further that, even were it to apply *Flores-Ortega*, appellant failed to show that trial counsel performed deficiently. The court, relying upon *Knowles v. Mirzayance*, 556 U.S. 111 (2009), reasoned that the Supreme Court of the United States rejected appellant's "nothing to lose" rationale, concluding that the decision whether to file a motion for modification was not, in fact, risk-free. According to the post-conviction court, such a motion could have been deemed "frivolous and, arguably, imprudent[,]" and it could have led the trial court to consider any future motions appellant

might file in a negative light.[12] Moreover, according to the post-conviction court, appellant failed to show "that he ever 'reasonably demonstrated' that he was interested in a motion to modify."

Regarding the claim based upon trial counsel's failure to file the motion, the post-conviction court observed that "Maryland courts generally require proof that the [defendant] directed trial counsel to file the motion." Appellant conceded that he did not request trial counsel to file a motion for modification, and, moreover, he did not call trial counsel to testify at the post-conviction hearing "about his reasoning for not filing a motion for modification[.]" Under these circumstances (which included, according to the post-conviction court, the purportedly "frivolous" nature of a motion for modification in this case), appellant "failed to sustain" his burden to show that trial counsel performed deficiently.

Appellant filed an application for leave to appeal from the post-conviction court's order. After ordering the State to respond, we granted the application and transferred the matter to the regular appellate docket.

DISCUSSION

Standard of Review

We review a post-conviction court's "findings regarding ineffective assistance of counsel as a mixed question of law and fact." *Wallace v. State*, 475 Md. 639, 653 (2021)

[12] During the post-conviction hearing, the court alluded to the possibility that the trial court might take into account negatively a purportedly frivolous motion for modification in deciding whether to grant a subsequent request for a commitment under the Health-General Article.

(cleaned up). We defer to that court's factual findings unless they are clearly erroneous, but we review its legal conclusions without deference. *Id.*; *Newton v. State*, 455 Md. 341, 351-52 (2017). We thus "exercise our own independent analysis as to the reasonableness, and prejudice therein, of counsel's conduct." *Wallace*, 475 Md. at 653 (cleaned up).

Parties' Contentions

Appellant contends that trial counsel rendered ineffective assistance in failing to consult about and then failing to file a motion for modification of sentence. Relying upon the analytical framework set forth in *Flores-Ortega* (which is a case where trial counsel failed to consult a defendant about the advisability of filing a notice of appeal), appellant asserts that his trial counsel had a duty to consult with him about the advisability of filing a motion for modification of sentence because a rational defendant in his position would have wanted to file the motion. Moreover, according to appellant, there is a reasonable probability that, but for trial counsel's failure to fulfil his duty to consult, appellant would have directed that a motion be filed, which, he claims, establishes prejudice.

Appellant maintains that the post-conviction court erred in ruling that *Flores-Ortega* is inapplicable merely because that case addressed the failure to consult with a defendant about filing a notice of appeal, rather than a motion for modification of sentence. He maintains further that the post-conviction court erred in ruling, in the alternative, that even if the analysis of *Flores-Ortega* were applicable, trial counsel did not perform deficiently. According to appellant, there were "no possible adverse consequences" to filing a motion for modification, and therefore, trial counsel's failure to do so "cannot be viewed as a trial tactic." He asserts further that there was "no basis in the record to believe[,]" as the post-

conviction court maintained, that filing a motion for modification of sentence "would have been 'frivolous' or 'imprudent.'" And finally, according to appellant, it was precisely because trial counsel failed to advise him that he failed to request that a motion for modification be filed, and therefore, his failure to request that trial counsel file the motion should not be held against him.

The State counters that "no reported Maryland appellate decision has applied *Flores-Ortega*'s analysis concerning the duty to consult about whether to file an appeal to the issue of whether counsel performs deficiently in not consulting about whether to file a motion for modification of sentence." Rather, avers the State, "the decisions of this Court and the Supreme Court of Maryland have applied the standard of whether the defendant requested that a motion be filed." Here, of course, appellant did not request that a motion be filed. The State cites *Rich v. State*, 230 Md. App. 537, 551 n.5 (2016), *aff'd on other grounds*, 454 Md. 448 (2017), for its passing observation that the defendant's failure to request that trial counsel file a motion for modification was fatal to his ineffective assistance claim based upon trial counsel's failure to file the motion.

The State points out additionally that trial counsel was not called to testify at appellant's post-conviction hearing, and therefore, we should presume that trial counsel had a reasonable basis for declining to file a motion for modification. According to the State, because the trial court imposed a sentence that was "more favorable by half than the State had requested[,]" the sentencing court could have regarded a motion for modification as (in the words of the post-conviction court) "'frivolous and, arguably, imprudent[.]'" Therefore, according to the State, appellant failed to rebut the presumption that trial counsel

acted reasonably. And finally, according to the State, even if the *Flores-Ortega* standard were applicable to this case, appellant's ineffective assistance claim would fail still because he cannot show that there was "nothing to lose" in filing a motion for modification, nor did he demonstrate reasonably to trial counsel that he wanted a motion for modification to be filed.

Analysis

Ineffective Assistance Generally

The right to the effective assistance of counsel is a trial right guaranteed by the Sixth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, as well as Article 21 of the Maryland Declaration of Rights. *State v. Thaniel*, 238 Md. App. 343, 360, *cert. denied*, 462 Md. 93 (2018), *cert. denied*, 587 U.S. __, 139 S. Ct. 2027 (2019); *Smallwood v. State*, 237 Md. App. 389, 402 (2018). In addition, the Maryland Public Defender Act confers a right to counsel that is broader than the constitutional right, and the Supreme Court of Maryland has held that the right to counsel conferred by statute also is the right to the effective assistance of counsel. *Flansburg*, 345 Md. at 698-703.[13] Thus, under Maryland law, a claim that counsel was ineffective, whether based on a constitutional or a statutorily conferred right, is reviewed under the two-pronged test articulated in *Strickland v.*

[13] KeyCite marks *Flansburg* with a red flag and states that it is superseded by statute, as stated in *State v. Schlick*, 465 Md. 566 (2019). For our purposes here, however, *Flansburg* is still "good law."

Washington, 466 U.S. 668 (1984). *Powell v. State*, 258 Md. App. 436, 449-51 (2023); *Thaniel*, 238 Md. App. at 370-71.

"A claim of ineffective assistance of trial counsel comprises two elements: that counsel's performance was objectively unreasonable 'under prevailing professional norms,'" *Thaniel*, 238 Md. App. at 360 (quoting *Strickland*, 466 U.S. at 688), "and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). "The petitioner bears the burden of proof." *Id.* (citing *Strickland*, 466 U.S. at 687).

In assessing whether counsel's performance was objectively unreasonable, we begin with a "strong presumption" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689-90. We "judge the reasonableness" of counsel's actions "as of the time of counsel's conduct[,]" and we make "every effort" to "eliminate the distorting effects of hindsight[.]" *Id.*

In assessing whether counsel's deficient performance resulted in prejudice sufficient to establish a reasonable probability of a different outcome, we note that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. On the other hand, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* "Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the

defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* at 696.

"Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* at 697.

Ineffective Assistance of Counsel in the Context of Failure to File a Motion for Modification of Sentence

In *State v. Flansburg*, *supra*, 345 Md. 694, the Supreme Court of Maryland held that trial counsel's failure to file a timely motion for modification of sentence when requested by a defendant is ineffective assistance.[14] *Id.* at 705. Notably, the Court adopted a rule of per se prejudice—once the defendant establishes deficient performance in failing to follow the defendant's express instruction to file a motion for modification of sentence, the prejudice sustained is the "loss of any opportunity to have a reconsideration of sentence hearing." *Id.* Therefore, the remedy is "permission to file a belated motion for reconsideration of sentence." *Id.* The defendant need not demonstrate a reasonable probability that the sentencing court would have granted a motion for modification had it been filed. *See Matthews v. State*, 161 Md. App. 248, 252 (2005) (holding that "when a

[14] *Flansburg* addressed further an antecedent question, which was whether a Maryland statute (the Public Defender Act) providing a broader right to counsel than the constitutional minimum entitled its beneficiary to the effective assistance of counsel. The Supreme Court of Maryland held that it does. *Flansburg*, 345 Md. at 703 (declaring that "[r]egardless of the source, the right to counsel means the right to the effective assistance of counsel").

defendant in a criminal case asks his attorney to file a motion for modification of sentence, and the attorney fails to do so, the defendant is entitled to the post conviction remedy of being allowed to file a belated motion for modification of sentence, without the necessity of presenting any other evidence of prejudice").

More recently, in *Franklin v. State*, *supra*, 470 Md. 154, the Supreme Court of Maryland addressed a related issue: whether trial counsel, after filing timely a motion for modification of sentence which the sentencing court then holds *sub curia*, has an ongoing duty to ensure that the court rules on the pending motion for modification prior to the expiration of the five-year limit provided in Rule 4-345(e). The Court declined to set forth a bright-line rule establishing such a duty, opting instead for the usual rule, requiring that a court addressing an ineffective assistance claim "in this context" consider "the specific facts and circumstances of the case before it." *Id.* at 179-80. *Accord Strickland*, 466 U.S. at 690 (stating that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case"). The Court, however, was moved to articulate a different bright-line rule regarding the five-year period of Rule 4-345(e):

> An attorney must ensure that his or her client knows there is a five-year period for consideration of a motion for modification of a sentence. If a defendant is not advised of the five-year period, the defendant may incorrectly believe that he or she has an unlimited amount of time to engage in rehabilitative efforts, and will neglect to notify the court (either through counsel or *pro se*) during the five-year period that the defendant wishes the court to consider a pending motion for modification.

Franklin, 470 Md. at 184.

The Court recommended "that sentencing courts add the five-year consideration period regarding a motion for sentence modification to the post-sentencing rights that they (and/or defense counsel) advise defendants about on the record following the imposition of a sentence." *Id.* If, however, a defendant is not so advised during the sentencing hearing, "defense counsel must advise" him, "either before or after the sentencing hearing, that the sentencing court will have five years from the imposition of sentence to consider a motion to modify the sentence." *Id.* at 184-85. Moreover,

> [i]f a defendant, whose timely motion was taken under advisement, proves that he or she failed to request a hearing within the five-year period because defense counsel neglected to ensure that the defendant was advised of the five-year consideration period, that factual finding by a post-conviction or *coram nobis* court will suffice to show that defense counsel performed deficiently under the Sixth Amendment and Article 21.

Id. at 185.

Moreover, the Court, in strong dictum, declared a rule of per se prejudice in a (hypothetical) case where a timely motion for modification is filed, held *sub curia*, and thereafter, the motion lapses because trial counsel should have requested a hearing on the motion, but failed to do so:

> [I]n a case where a court finds deficient performance in the failure of an attorney to request a hearing on a Rule 4-345(e) motion that has been held in abeyance, a post-conviction or *coram nobis* court generally should find the requisite prejudice under *Strickland* and provide the defendant with a reasonable opportunity to notify the court that the defendant wishes the court to rule on the motion. The post[-]conviction or *coram nobis* court also should allow the sentencing court a reasonable opportunity to hold a hearing (if it chooses to hold a hearing) and to rule on the motion. The sentencing court is under no obligation to hold a hearing after the defendant notifies the court that the defendant would like the court to take up the motion. A sentencing court always may deny a Rule 4-345(e) motion without holding a hearing. However, in this context, the "reasonable probability" of a different result,

> for purposes of prejudice, *see Strickland*, 466 U.S. at 694, is not the reasonable probability that the court will schedule a hearing, let alone ultimately grant the motion. Rather, the question is whether there is a reasonable probability that, had counsel not acted deficiently, the court would have exercised its discretion one way or the other, and either conducted a hearing or denied the motion without a hearing, within the five-year period.

Id. at 195. Continuing, the Court reiterated that

> the "different outcome" for purposes of *Strickland* prejudice in this context is not the ultimate reduction of the sentence, or even the scheduling of a hearing, but rather the exercise of the court's discretion to decide whether to hold a hearing in the first place. If counsel's deficient performance prevents a defendant from requesting a hearing on a Rule 4-345(e) motion that was previously held under advisement, a post-conviction or *coram nobis* court should "place the defendant in the position he would have been but for his counsel's ineffectiveness." [*State v. Schlick*, 465 Md. 566, 586 (2019)]. This requires the defendant to be able to request a hearing and for the court to be permitted to conduct a hearing, if it chooses to do so.

Id. at 197 (footnotes omitted).

An Exception to the Rule of Per Se Prejudice

In *Butler v. State*, 255 Md. App. 152 (2022), we addressed a *Flansburg* claim in a unique procedural posture. There, trial counsel filed a motion for modification of sentence beyond the ninety-day limit in Rule 4-345(e). *Butler*, 255 Md. App. at 157. The circuit court thereafter "filed an order denying [Butler's] motion for modification on its merits and without regard to the timeliness of the motion." *Id.* at 158.

Butler filed a post-conviction petition alleging ineffective assistance of counsel and requesting the opportunity to file a belated motion for modification. *Id.* He asserted that the untimely motion his trial counsel filed "was a legal nullity and the fact that the trial court denied it on its merits was therefore irrelevant." *Id.* The post-conviction court denied

Butler's petition, reasoning that, "although trial counsel made a serious attorney error in not timely filing the motion," Butler "did not establish prejudice from that error because the circuit court had treated the motion as timely filed and denied it on its merits." *Id.* at 159 (footnote omitted).

On appeal, we affirmed. We opined that the "'lost opportunity' *per se* prejudice analysis" in *Flansburg* and *Matthews* was "not applicable" because the record "affirmatively demonstrates that, even if trial counsel had timely filed the motion, the circuit court would have denied it." *Id.* at 162.

The Present Case

We assume, without deciding, that the *Flores-Ortega* framework applies to an ineffective assistance claim based upon trial counsel's failure to consult with a defendant about the advisability of filing a motion for modification of sentence.[15] In this case, applying that framework, appellant contends that he failed to file a motion for modification, even though a rational defendant in his position would have done so, because of trial counsel's failure to advise him whether he should file the motion.[16] In *Flores-Ortega*, the Supreme Court of the United States said:

[15] The distinctions drawn by the post-conviction court, parroted by the State here, between filing a notice of appeal and filing a motion for modification of sentence are unconvincing. Specifically, there is no reason to believe that a purportedly "frivolous" motion for modification would poison the well and prejudice a sentencing judge's consideration of a motion for a Health-General commitment. One has absolutely nothing to do with the other.

[16] Appellant raises a secondary claim—that trial counsel was ineffective in failing to file a motion for modification, even though appellant never asked him to do so. This (continued…)

> In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal. We employ the term "consult" to convey a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes. If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal. See [*Strickland*, 466 U.S. at 477]. **If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance. That question lies at the heart of this case: <u>Under what circumstances does counsel have an obligation to consult with the defendant about an appeal?</u>**

528 U.S. at 478 (emphasis added). The Court answered the question it posed:

> [C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

Id. at 480.

The post-conviction court found that appellant did not satisfy the second alternative condition, that is, he did not demonstrate reasonably to trial counsel that he was interested in filing a motion for modification. That finding is not clearly erroneous, and we will not

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claim need not detain us long. This claim asks that we extend *Flansburg* to a circumstance to which it does not apply; the crux of *Flansburg* was that the defendant had asked counsel to file a motion for modification, but counsel ignored his request. 345 Md. at 696, 705. But here, appellant admits that he never made such a request. Trial counsel is not expected to be clairvoyant. *See Rich v. State*, 230 Md. App. 537, 551 n.5 (2016) (rejecting a *Flansburg* claim because the defendant "did not provide any evidence that he'd asked counsel to file a motion to modify his sentence"), *aff'd on other grounds*, 454 Md. 448 (2017).

disturb it. But the post-conviction court concluded further that a rational defendant would not have wanted necessarily to file a motion for modification of sentence. We have serious doubts about that conclusion. We need not further consider it,[17] however, because, as we shall explain, appellant cannot demonstrate prejudice under the circumstances of this case.

Was the 2015 Plea Agreement Binding?

We turn to whether appellant's plea agreement in 2015 was binding. If it was, then the State's agreement is required before a sentencing court may impose a sentence below the floor established by that agreement. *Smith v. State*, 453 Md. 561, 577 (2017); *Bonilla v. State*, 443 Md. 1, 15 (2015). *See* Md. Rule 4-243(c)(3) (providing that, "[i]f the plea agreement is approved, the judge shall embody in the judgment the agreed sentence, disposition, or other judicial action encompassed in the agreement or, with the consent of

[17] We digress briefly to address the "nothing to lose" rationale. In *Knowles v. Mirzayance*, *supra*, 556 U.S. 111, the Supreme Court of the United States declared that it had never adopted such a standard in the post-conviction context. *Id.* at 122. That decision concerned whether a federal appellate court had applied properly the deferential standard of 28 U.S.C. § 2254(d)(1), which prevents a federal habeas court from granting "a state prisoner's habeas application unless the relevant state-court decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Mirzayance*, 556 U.S. at 121. As an alternative holding, the Court denied Mirzayance's claim on its merits, concluding that he had failed to show either deficient performance or prejudice but without addressing directly the "nothing to lose" rationale. *Id.* at 123-28.

We need not adopt a "nothing to lose" rationale, however, to conclude that it is usually in a defendant's best interest to file a motion for modification of sentence. That vehicle provides, for most defendants, their best and, perhaps, final opportunity to have their sentences reduced, which is the principal concern for the overwhelming majority of defendants. Moreover, and crucially, under the express terms of Rule 4-345(e), a sentencing court cannot increase a sentence when considering a motion for modification.

the parties, a disposition more favorable to the defendant than that provided for in the agreement").[18]

Initially, appellant asserted in his post-conviction petition that his 2015 plea agreement was binding. The State's response declared that it was not "because the State

[18] Maryland Rule 4-243 provides in full:

(a) **Conditions for agreement. —**

(1) **Terms. —** The defendant may enter into an agreement with the State's Attorney for a plea of guilty or nolo contendere on any proper condition, including one or more of the following:

(A) That the State's Attorney will amend the charging document to charge a specified offense or add a specified offense, or will file a new charging document;

(B) That the State's Attorney will enter a nolle prosequi pursuant to Rule 4-247 (a) or move to mark certain charges against the defendant stet on the docket pursuant to Rule 4-248 (a);

(C) That the State's Attorney will agree to the entry of a judgment of acquittal on certain charges pending against the defendant;

(D) That the State will not charge the defendant with the commission of certain other offenses;

(E) That the State's Attorney will recommend, not oppose, or make no comment to the court with respect to a particular sentence, disposition, or other judicial action;

(F) That the parties will submit a plea agreement proposing a particular sentence, disposition, or other judicial action to a judge for consideration pursuant to section (c) of this Rule.

(2) **Notice to victims. —** The State's Attorney shall give prior notice, if practicable, of the terms of a plea agreement to each victim or victim's representative who has filed a Crime Victim Notification Request form or

(continued…)

submitted a request to the State's Attorney pursuant to Code, Criminal Procedure Article, § 11-104.

(b) **Recommendations of State's Attorney on sentencing. —** The recommendation of the State's Attorney with respect to a particular sentence, disposition, or other judicial action made pursuant to subsection (a)(1)(E) of this Rule is not binding on the court. The court shall advise the defendant at or before the time the State's Attorney makes a recommendation that the court is not bound by the recommendation, that it may impose the maximum penalties provided by law for the offense to which the defendant pleads guilty, and that imposition of a penalty more severe than the one recommended by the State's Attorney will not be grounds for withdrawal of the plea.

(c) **Agreements of sentence, disposition, or other judicial action. —**

(1) **Presentation to the court. —** If a plea agreement has been reached pursuant to subsection (a)(1)(F) of this Rule for a plea of guilty or nolo contendere which contemplates a particular sentence, disposition, or other judicial action, the defense counsel and the State's Attorney shall advise the judge of the terms of the agreement when the defendant pleads. The judge may then accept or reject the plea and, if accepted, may approve the agreement or defer decision as to its approval or rejection until after such pre-sentence proceedings and investigation as the judge directs.

(2) **Not binding on the court. —** The agreement of the State's Attorney relating to a particular sentence, disposition, or other judicial action is not binding on the court unless the judge to whom the agreement is presented approves it.

(3) **Approval of plea agreement. —** If the plea agreement is approved, the judge shall embody in the judgment the agreed sentence, disposition, or other judicial action encompassed in the agreement or, with the consent of the parties, a disposition more favorable to the defendant than that provided for in the agreement.

(4) **Rejection of plea agreement. —** If the plea agreement is rejected, the judge shall inform the parties of this fact and advise the defendant (A) that the court is not bound by the plea agreement; (B) that the defendant may withdraw the plea; and (C) that if the defendant persists in the plea of guilty, conditional plea of guilty, or a plea of nolo contendere, the sentence or other

(continued…)

was not party to the agreement[.]" At the outset of the post-conviction hearing, appellant's counsel agreed with the State, conceding that appellant's guilty plea was not pursuant to a binding agreement. We are not bound by the parties' concessions as a matter of law, which we review independently. *Coley v. State*, 215 Md. App. 570, 572 n.2 (2013) (declaring that "[a]n appellate court is not bound by a party's erroneous concession of error on a legal issue"). Nor can we look away from this point of law, despite how it was placed before us.

It is unclear whether the State and appellant reached an agreement prior to the plea hearing. The prosecutor summarized the State's offer, but then the judge entered the negotiations and drove a bargain more favorable to the defense. That left the prosecutor little choice but to acquiesce in the court's suggested sentence because it would have been

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> disposition of the action may be less favorable than the plea agreement. If the defendant persists in the plea, the court may accept the plea of guilty only pursuant to Rule 4-242 (c) and the plea of nolo contendere only pursuant to Rule 4-242 (e).
>
> (5) **Withdrawal of plea. —** If the defendant withdraws the plea and pleads not guilty, then upon the objection of the defendant or the State made at that time, the judge to whom the agreement was presented may not preside at a subsequent court trial of the defendant on any charges involved in the rejected plea agreement.
>
> (d) **Record of proceedings. —** All proceedings pursuant to this Rule, including the defendant's pleading, advice by the court, and inquiry into the voluntariness of the plea or a plea agreement shall be on the record. If the parties stipulate to the court that disclosure of the plea agreement or any of its terms would cause a substantial risk to any person of physical harm, intimidation, bribery, economic reprisal, or unnecessary annoyance or embarrassment, the court may order that the record be sealed subject to terms it deems appropriate.

pointless to assume the risk of a trial when the judge already had telegraphed the sentence he would impose likely after a guilty verdict.

In any event, the judge declared twice that he would bind himself to a particular sentence: twenty-five years' imprisonment, with all but ten years suspended, the first five years without the possibility of parole, followed by five years' probation. Trial counsel told the judge that his client accepted the offer. Appellant stated that the offer, as recited by the judge, was his own understanding of the plea agreement. And finally, appellant pleaded guilty in apparent reliance upon the judge's promise.

Although perhaps Rule 4-243(a)(1)(F) and (c) do not account for the procedure that was followed in this case (which, instead, appears to contemplate an agreement between the prosecutor and the defense, which then is submitted to the judge, either to be rejected or accepted[19]), one thing is reasonably clear. If, after eliciting appellant's guilty plea under these circumstances, the judge had changed his mind and imposed a greater sentence, appellant would have had a viable claim of an illegal sentence under the *Cuffley-Baines-Matthews* trilogy.[20] We think that a reasonable defendant in appellant's

[19] That certainly appears to be the thrust of the influential Standards promulgated by the American Bar Association. *See*, *e.g.*, ABA Standards for Criminal Justice Pleas of Guilty 14-3.3(d), at 128 (3d ed. 1999) (stating that a "judge should not ordinarily participate in plea negotiation discussions among the parties" but that, "[u]pon the request of the parties, a judge may be presented with a proposed plea agreement negotiated by the parties and may indicate whether the court would accept the terms as proposed and if relevant, indicate what sentence would be imposed").

[20] *Cuffley v. State*, 416 Md. 568 (2010); *Baines v. State*, 416 Md. 604 (2010); *Matthews v. State*, 424 Md. 503 (2012). *See Ray v. State*, 454 Md. 563, 573-76 (2017) (discussing the trilogy).

position, not versed in the niceties of sentencing law, would have understood that he had obtained the judge's agreement to impose the sentence as promised (as the judge did). *See Ray v. State*, 454 Md. 563, 579-80 (2017) (explaining that we apply an objective test in "'determining what the defendant reasonably understood at the time of the plea'"—"'what a reasonable lay person in the defendant's position and unaware of the niceties of the sentencing law would have understood the agreement to mean, based on the record developed at the plea proceeding'" (quoting *Cuffley v. State*, 416 Md. 568, 582 (2010))). The judge and appellant reached an agreement, with the prosecutor's perhaps grudging acquiescence, that required the judge to impose the sentence he had promised. Thus, at least in the most crucial respect, this was for all intents and purposes a binding plea agreement.

We find further support in a revision to the Maryland Sentencing Guidelines Manual, effective 1 April 2021. The Maryland State Commission on Criminal Sentencing Policy ("MSCCSP"), after a thorough review, determined that "the term 'ABA plea agreement' is not universally known and should be replaced with the more intuitive 'MSCCSP binding plea agreement.'" Changes to Guidelines-Compliant Binding Pleas, available at https://msccsp.org/Files/Reports/Enews/ENews16_2.pdf (last visited 25 July 2024). COMAR 14.22.01.02B(13) incorporates that revision and defines "MSCCSP binding plea agreement" to be a plea agreement that:

> (a) Is presented to the court in agreement by an attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, that a court has approved relating to a particular sentence and disposition;

(b) Includes agreement to a specific amount of active time (if any), not merely a sentence cap or range;

(c) The court has the discretion to accept or reject; and

(d) Is binding on the court under Maryland Rule 4-243(c) if the court accepts the plea.

Whatever else this definition encompasses, it implies necessarily that some binding plea agreements are not "MSCCSP binding plea agreements."[21] Arguably, that was the situation here. But the decisions holding that a sentencing court may not reduce a sentence below the floor established under a binding plea agreement are not limited to "ABA binding plea agreements" or "MSCCSP binding plea agreements," but apply rather to all plea agreements that are binding under Maryland Rule 4-243. *See Smith*, *supra*, 453 Md. at 577 (stating '"that when a sentencing court violates Rule 4-243(c)(3) by imposing a sentence below a binding plea agreement without the State's consent, the sentence is inherently illegal and subject to correction under Rule 4-345(a)"' (quoting *Bonilla*, *supra*, 443 Md. at 15)).

We conclude that the 2015 plea agreement was a binding agreement and that the sentencing court could not have reduced appellant's sentence without the State's consent. Because the State has opposed consistently appellant's attempt to have the court consider modifying his sentence (which, in the context of Rule 4-345(e), means necessarily a reduction), we can be certain that the sentencing court could not have reduced appellant's sentence. Therefore, applying *Butler*, we conclude that the "'lost opportunity' *per se*

[21] This conclusion follows because a binding plea agreement that does not satisfy any of conditions (a), (b), or (c) is not a "MSCCSP binding plea agreement."

prejudice analysis" in *Flansburg* and *Matthews* is "not applicable" because the record "affirmatively demonstrates that, even if trial counsel had timely filed the motion," the circuit court would have been compelled to deny it. *Butler*, 255 Md. App. at 162. Under the circumstances of this case, it is impossible for appellant to prove prejudice. Therefore, his ineffective assistance claim fails.[22]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS ASSESSED TO APPELLANT.

[22] The thoughtful dissent compels us to add this post-script. Had not the Majority been convinced by our analysis of the legal nature of the plea agreement reached in the trial court and its impact on Lawson's appellate arguments, we could have been persuaded by the reasoning of the dissent; however, in our view, Lawson's appeal is not the right case in which to reach the merits of his flagship issue.

Circuit Court for Baltimore City
Case Nos.: 114281016, 114281017

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1271

September Term, 2023

DAMON LAWSON

v.

STATE OF MARYLAND

Friedman,
Shaw,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Friedman, J.

Filed: August 19, 2024

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

The crux of this case is about the responsibilities of a lawyer to a client who is convicted of a crime. That lawyer has an obligation to fully inform the client about the client's post-trial rights, including the right to file a motion for modification of sentence under Rule 4-345(e). As part of this advisement, I believe that the lawyer must consult with the client about the tricky time limits that are part of the Rule, including both the ninety-day time limit for filing a motion and the five-year time limit within which the court must decide the motion. Failure to give these advisements and engage in this consultation is, to my way of thinking, *per se* ineffective assistance of counsel. To be clear though, no case has so held. Yet. But I think the logic is inescapable and if not in this case, I predict that in the not-too-distant future, there will be a case that will so hold.

In *Flansburg*, our State's highest court held that when a client asks the client's lawyer to prepare a motion for modification of sentence, if the lawyer fails to file the motion, it is *per se* ineffective assistance of counsel. *State v. Flansburg*. 345 Md. 694, 705 (1997). In *Franklin*, the Supreme Court of Maryland went one step further. *Franklin v. State*, 470 Md. 154, 184-85 (2020). There, the Court wrote—in strong *dicta*—that not only must the lawyer follow the client's instructions but must also consult with the client about the five-year time limit on motions for modification of sentence. *Id*. at 184-85. Thus, the *Franklin* Court transferred the duty from the client to the lawyer. The *Franklin* Court, however, was silent about the question presented by Lawson's case, whether the lawyer has a duty to consult with the client about the ninety-day time limit (or only has the duty to follow the client's instructions if given). In my view, there is no analytic difference between the ninety-day time limit and the five-year time limit. Thus, for me, it is a short

but obvious and necessary step that after *Franklin*, the lawyer's duty should be to consult with the client about *both* time limits so that the client has the information necessary to even make the request. That puts the onus where it belongs, on the lawyer, and not the client.

Here, the post-conviction judge decided the question from *Flansberg*: did Lawson ask his lawyer to file a motion for modification of sentence? Instead, I think he should have asked the question suggested by (but not addressed) in *Franklin*: did the lawyer consult with Lawson about the time limits for filing a motion for modification of sentence? I would return this case to the post-conviction court so that it can receive evidence and decide this question instead.

If Lawson is successful in persuading the post-conviction court that his lawyer did not consult with him, the post-conviction court should find that Lawson received ineffective assistance of counsel *per se*. And, following the logic of *Flansburg*, the post-conviction court should award Lawson the right to file a belated motion for modification of sentence. And then the trial court could, on well-established criteria, decide Lawson's belated motion for modification of sentence on its merits. Perhaps, Lawson would lose for the very reasons that my colleagues have suggested: that Lawson's plea agreement was a binding, ABA-style guilty plea that cannot now be reduced without the agreement of the State's Attorney, which is unlikely to be forthcoming. Slip. op. at 24-31. Or perhaps, Lawson could persuade the post-conviction court differently. After all, both the State's and Lawson's briefs seem to suggest that Lawson's plea deal was non-binding. Maybe, just

maybe, they were right. Whichever it was, however, should have been for the post-conviction court and not the appellate court to decide in the first instance.

Therefore, I respectfully dissent.[1]

[1] I appreciate that my proposed resolution of this case is inefficient in that I suggest remanding for a hearing that is likely futile for Lawson. While this is true, I suggest that it will create efficiencies in future cases both for the trial courts and appellate courts. At a post-conviction hearing, the court will have to hear evidence regarding one question—was the defendant advised? If the answer is yes, then that's likely the end of it. If the answer is no, then the court can proceed to consider the belated motion for modification on the merits rather than looking through the prism of ineffective assistance of counsel. And, on appeal, we wouldn't have to scour the record for evidence of futility (as the majority had to do here). In most cases, in fact, the disposition of a motion for modification of sentence is unreviewable. *Hoile v. State*, 404 Md. 591, 615-18 (2006).