

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2012

September Term, 2015

DAVID P. BROWN

v.

STATE OF MARYLAND

Krauser, C.J.,
Meredith,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: December 5, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 1969, Applicant was convicted by a jury in the Circuit Court for Baltimore County of first degree murder. In 2014, Applicant filed a motion to reopen his petition for post-conviction relief, in which he contended “[t]hat ‘advisory only’ jury instructions were given at this trial including instructions that the jury was to decide both the law and the facts of the case.” The court denied the motion.

In *State of Maryland v. James Leslie Adams-Bey, Jr.*, 449 Md. 690 (2016), the Court of Appeals, reaffirming its holding in *State v. Waine*, 444 Md. 692 (2015), stated: “Lest there be any doubt, a jury instruction advising the jury that it is the judge of the law is an advisory only instruction. Such an instruction 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.” *Adams-Bey*, 449 Md. at 705 (citations omitted). The Court concluded: “Having confirmed that the trial court gave an advisory instruction, [Adams-Bey] is necessarily entitled to a new trial, and it would be an abuse of discretion to deny [him] relief in light of *Waine*.” *Adams-Bey*, 449 Md. at 708 (citation omitted). The Court further concluded that Md. Code, § 7-109 of the Criminal Procedure Article “grants the Court of Special Appeals the authority to reverse or remand a circuit court’s decision to deny a motion to reopen” a petition for post-conviction relief, and “therefore provides the Court . . . the authority to determine that the circuit court had abused its discretion and to afford the appropriate relief.” *Id.* at 703 (emphasis omitted).

Although, as Applicant concedes, “no transcript of [his trial] currently exists nor could any be located despite diligent efforts by several counsel,” the *Adams-Bey* Court

noted that “trial courts at the time . . . were *required* to give an advisory instruction under both Article 23 and Maryland Rule 757b.” *Id.* at 709 (footnote omitted) (emphasis in original). The Court concluded: “It is virtually certain that a court during that era would have given such an instruction and not effectively nullify it immediately thereafter by informing the jury of the binding nature of its instructions on constitutional matters.” *Id.* (citation omitted).

In light of *Adams-Bey*, this Court ordered Respondent to show cause why the above-captioned application for leave to appeal should not be granted, the circuit court’s order denying Applicant’s motion to reopen his post-conviction proceeding should not be reversed, and the case should not be remanded with instructions to the circuit court to reopen Applicant’s post-conviction proceeding, vacate Applicant’s convictions, and award him a new trial. Respondent “avers that [it] is unable to show cause,” and “acknowledges that . . . the jury” at Applicant’s trial “was instructed in a manner equivalent to the instructions found to be structural error in” *Adams-Bey*.

We therefore hold that the circuit court abused its discretion in denying Applicant’s motion to reopen his post-conviction proceeding. Accordingly, we order that Applicant’s application for leave to appeal be and hereby is granted, the circuit court’s order denying Applicant’s motion to reopen his post-conviction proceeding be and hereby is reversed, and the case is remanded, with instructions to the circuit court, to

reopen Applicant’s post-conviction proceeding, vacate Applicant’s conviction, and award him a new trial.

APPLICATION FOR LEAVE TO APPEAL GRANTED. JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY DENYING MOTION TO REOPEN POST-CONVICTION PROCEEDING REVERSED. CASE REMANDED WITH INSTRUCTIONS TO GRANT MOTION TO REOPEN POST-CONVICTION PROCEEDING, VACATE APPLICANT’S CONVICTION, AND AWARD A NEW TRIAL. COSTS TO BE PAID BY BALTIMORE COUNTY.