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

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 13

September Term, 2021

MARK EDMUND CHRISTIAN, II

v.

STATE OF MARYLAND

Kehoe, C.**
Arthur
Kenney, James A, III,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Kehoe, J.

Filed: April 11, 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 Md. Rule 1-104(a)(2)(B).

** Kehoe, Christopher B., now retired, participated in the hearing of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

In 2019, the Supreme Court of Maryland[1] remanded Mark Edmund Christian, II's post-conviction action to the Circuit Court for Harford County for that court to determine whether the transcript of Mr. Christian's trial "differs from what actually occurred and, if appropriate, conform the record accordingly." *State v. Christian*, 463 Md. 647, 652 (2019) ("*Christian III*") (quoting Md. Rule 8-414(b)(2)). The post-conviction court held such a hearing, made findings of fact, and ordered the record to be modified to reflect its findings. Based on the modified record, the court denied Mr. Christian's petition for post-conviction relief. He has appealed.

In their briefs, the parties present nine issues. After oral argument, both parties accepted our invitation to file supplemental briefs to address an issue that arose at argument. We have consolidated and reworded the issues as follows:

> 1. Did the post-conviction court have the authority to correct the transcript of Mr. Christian's 2012 trial?
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> 2. Did the post-conviction court err in its determination of the scope of its authority on remand?
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> 3. Did the post-conviction court err when: (i) it took judicial notice of practices followed by the judge who presided over Mr. Christian's trial, and (ii) relied on its personal knowledge of the trial judge's practices in criminal jury trials?

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[1] At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland and the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name changes took effect on December 14, 2022. We will refer to each tribunal by its current name.

Appellant's briefs use the terms "he," him," and "his" in reference to Mr. Christian. We will do the same.

4. Were the changes to the transcript ordered by the post-conviction court consistent with the evidence presented at the hearing?

5. Did the court reporter's failure to accurately transcribe Mr. Christian's trial deprive him of his right to a fair trial and meaningful appellate review?[2]

[2] Mr. Christian's version of the issues:

1. Did the post-conviction court err by taking judicial notice of and relying on its personal knowledge to resolve a critical and disputed evidentiary issue?

2. Did the post-conviction court err in its determination of the scope of remand and by refusing to consider the legal implications of its factual determinations?

3. Was Mr. Christian deprived of his right to a fair trial and meaningful appellate review due to the court reporter's failure to accurately transcribe his trial?

4. Does Maryland law allow a post-conviction court to change the record of the underlying criminal proceeding and, if so, what standard should be used?

The State's issues:

1. Did the circuit court permissibly take "judicial notice" of Judge Waldron's habits as a circuit court judge?

2. Did the circuit court rule within the scope of the Court of Appeals' remand?

3. Did Christian have a fair opportunity to appeal, notwithstanding an error by the court reporter that had no effect upon the trial itself?

4. Do the interests of justice not demand a new trial for Christian?

5. Did the remand court have the legal authority to correct the record, and did it also have the authority to invoke this Court's decision in this case as a reason to deny post-conviction relief on other grounds?

After oral argument, this Court the parties filed supplemental briefs to address two additional matters:

We will reverse the judgment of the post-conviction court and remand this case for further proceedings consistent with this opinion.

BACKGROUND

In 2012, and after a five-day jury trial in the Circuit Court for Harford County, Mr. Christian was convicted of first-degree felony murder and related charges arising out of the 2007 death of Robert Hemphill.[3] The Honorable Stephen M. Waldron was the presiding judge. In his direct appeal, Mr. Christian raised several issues, including whether the trial court committed plain error by giving an "*Unger* instruction" that is, telling the jury that it was the judge of the law as well as the facts.[4]

A panel of the Appellate Court of Maryland affirmed the convictions. *See Christian v. State*, No. 636, 2012 Term, slip op. at 22 (filed June 4, 2013), *cert. denied*, 434 Md. 312

> (1) Whether the changes to the trial transcript ordered by the post-conviction court were consistent with the evidence presented to the court at the evidentiary hearing; and
>
> (2) If the answer to the previous question is no, what is the appropriate appellate remedy?

[3] The circumstances of Mr. Hemphill's murder and the lengthy, multi-jurisdictional police investigation that eventually focused on Mr. Christian and an alleged accomplice are described in detail in *Christian v. State*, No. 636, 2012 Term, slip op. at 1–11 (filed June 4, 2013), *cert. denied*, 434 Md. 312 (2013) ("*Christian I*").

[4] A statement to a jury to the effect that the court's instructions on legal matters are advisory is often referred to as an "*Unger* instruction." *See, e.g., State v. Christian*, 463 Md. 647, 650 n.2 (2019) (citing *Unger v. State*, 427 Md. 383, 417 (2012). These instructions have also been termed "advisory only instructions." *See, e.g., State v. Adams-Bey*, 449 Md. 690, 693–94 (2016).

(2013) ("*Christian I*"). As to the *Unger* instruction, a majority of the panel concluded that: (1) because Mr. Christian's trial counsel did not object to the instruction, his contention that the instruction was erroneous was not preserved for appellate review, (2) the instruction was inadvertent, and (3) plain error review was unwarranted. *Christian I*, slip op. at 26.[5] The *Christian I* panel also held that Mr. Christian's other appellate contentions were unpersuasive. *See Christian I*, slip op. at 13–20, 29–31. Mr. Christian filed a petition for a writ of certiorari, which was denied.

In 2016, Mr. Christian filed a petition for post-conviction relief. After a hearing, the post-conviction court granted the petition. The court's decision was based on three grounds. The one that is most important in the context of this appeal is that the 2012 trial transcript indicated that the trial court instructed the jurors that they were the "judges of both the law and the facts," and that defense counsel failed to object to the instruction. The post-conviction court characterized the instruction as improper and concluded that the failure to object constituted ineffective assistance of counsel. The court also found that defense counsel had been constitutionally deficient in two other regards: first, defense counsel failed to object to an anti-CSI *voir dire* question and, second, counsel did not request a missing evidence jury instruction.

[5] Judge Alexander Wright dissented. He concluded that the jury instruction was both legally incorrect and prejudicial, that plain error review was appropriate, and that the convictions should be reversed. *Christian I*, dissenting op. at 4–5.

The State filed a motion for leave to appeal, which this Court granted. *See State v. Christian*, No. 392, Sept. Term, 2017, 2018 WL 5306987, at *2 (October 26, 2018), *vacated*, 463 Md. 647 (2019) ("*Christian II*"). After the motion for leave to appeal was granted, the State filed a motion to correct the record in the post-conviction court. The substance of the motion was that the 2012 trial transcript was in error because in fact no *Unger* instruction had been given to the jury. The post-conviction court denied the motion because the case was pending on appeal in this Court. *Id.* at *10. In its brief to this Court, the State contended that the post-conviction court erred in denying the motion. The *Christian II* panel found this contention to be unpersuasive for several reasons, including that the motion was not supported by an affidavit. *Id.* at *11 (citing Md. Rule. 8-414(b)).[6]

[6] Rule 8-414 states in pertinent part:

> (a) Authority of Appellate Court. On motion or on its own initiative, the appellate court may order that a material error or omission in the record be corrected. The court ordinarily may not order an addition to the record of new facts, documents, information, or evidence that had not been submitted to the lower court.
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> (b) Motion; Determination.
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> (1) Generally. A party seeking correction of the record shall file a motion that specifies the parts of the record or proceedings that are alleged to be omitted or erroneous. A motion that is based on facts not contained in the record or papers on file in or under the custody and jurisdiction of the appellate court and not admitted by all the other parties shall be supported by affidavit.
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> * * *

On the merits, the *Christian II* panel held that giving an *Unger* instruction was a structural error and trial counsel's failure to object required a new trial. *Id.* at *6-7 (citing *Newton v. State*, 455 Md. 341, 357 (2017); and *State v. Adams-Bey*, 449 Md. 690, 705 (2016)). The panel also concluded that neither the trial court's anti-CSI *voir dire* question nor defense counsel's failure to ask for a missing evidence instruction were grounds for post-conviction relief. *Christian II* at *7–8.

The State filed a petition for a writ of certiorari, raising two issues:

> 1. Did the post-conviction court and the intermediate appellate court err when each court declined to order a hearing to resolve serious and wide-spread concerns about the integrity of the transcripts in this case and in other criminal trials presided over by Judge Waldron over the course of his twenty-plus years on the Harford County Circuit Court bench?
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> 2. Did the post-conviction court err when it failed to consider whether Christian was prejudiced by his counsel's failure to object to instructions that told the jurors that the court's instructions were "binding" and that they "must apply" the law as the court explained and also told the jurors that they were the "judges of the law," and did the Court of Special Appeals err when it concluded that the instructions resulted in "structural error" and, consequently, that Christian had satisfied his burden to show that, but for counsel's failure to object to the instructions, there was a substantial possibility that the outcome of his trial would have been different?

In support of its petition, the State represented that, if given an opportunity to do so, it would call Judge Waldron as a witness. The State asserted that Judge Waldron would testify that he "had stopped using the offending language in writing and orally long before [Mr. Christian's] trial" but that the court reporter, Steven D. Perrine, used "automatically populated" text instead of transcribing what Judge Waldron actually told the jury. Petition for Writ of Certiorari at 3 n.2. Additionally, the State represented that "[t]his transcription

error may affect hundreds of cases in all stages of the legal process and [that] need to be pored [over] by the Office of the State's Attorney[.]" *Id.* Mr. Christian did not file a cross-petition.

The Supreme Court granted the State's petition. Prior to oral argument, the State filed a motion to correct the transcript in order to "'strike the offending language appearing in the . . . transcript of Christian's trial.'" *Christian III*, 463 Md. at 652. In contrast to the motion filed in the post-conviction court, the State's motion was supported by an affidavit, which was executed by Judge Waldron. He averred that "'none of the *Unger* type language was used at all' in Christian's trial." *Id.* Judge Waldron also stated that Mr. Perrine had not transcribed all of the jury instructions but "rather used an old template that included this questionable language." *Id.* Mr. Christian opposed the motion. *Id.*

The Supreme Court first concluded that the State's motion was properly before it. *Id.* at 653. The Court then addressed Mr. Christian's contention that the doctrine of *laches* precluded the State from asserting that the trial transcript was in error. The Court concluded that there had been no unreasonable delay on the State's part because it filed its motion once it had reason to believe that the 2012 transcript was inaccurate. Second, the Court stated that it was not "convinced that, even if the State's actions were considered 'unreasonably delayed,' Christian suffered any prejudice." 463 Md. at 653–54.

The Court then explained:

> The affidavit raises serious concerns about the practices of the court reporter who transcribed Christian's trial. The trial judge avers, essentially, that the court reporter had cut language from an old template, which included the improper *Unger* instruction, and pasted it into the trial transcript, rather than transcribing the jury instructions in real time. The trial judge declared under the penalty of perjury that he kept a verbatim copy of "the actual Instructions that were given to the jury" for each case he has presided over during his thirty-plus years on the bench and that no *Unger*-like instruction was given in this case. Such a statement made under penalty of perjury would appear to have some presumptive validity

Id. at 653 (cleaned up).

The Supreme Court stated that it was:

> not in the position at this juncture to rule upon the State's motion to correct the record; rather, a remand to the postconviction court is required. At that time, the parties will have the opportunity to present to the court relevant information, whether documentary or testimonial, that will facilitate the postconviction court's fact findings and ultimate determination of what the trial judge did, or did not, include in his instructions to the jury at Christian's trial.
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> Pursuant to Maryland Rule 8-604(d)(1),[7] we remand this case for further fact finding. Of course, any decision rendered on remand is subject to appeal.

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[7] Md. Rule 8-604(d) states in pertinent part:

> (d) Remand.
> (1) Generally. If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings

> *See* Md. Code (1973, 2013 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article.

Id. at 655.

The Court's judgment stated:

> Judgment of the Court of Special Appeals vacated with directions to remand the case to the Circuit Court for Harford County to render findings of fact and conclusions of law consistent with this opinion. Costs are to be split by the parties.

Id. (formatting altered.)

The Proceedings on Remand

After this case was remanded to the post-conviction court, Mr. Christian's current counsel entered their appearance on his behalf. The court held a teleconference with counsel, and the results were memorialized by a letter to counsel dated August 23, 2019. With the State's consent, the court granted counsel six months "to get up to speed" and to conduct discovery. Additionally, the court noted that there were "other cases with similar issues that are coming before the Court," and that if "either party believes that these matters should be dealt with cumulatively or that there should be a lead case, I would encourage you to file the necessary request with the Administrative Judge."

As part of their discovery efforts, Mr. Christian's counsel deposed both Judge Waldron and Mr. Perrine. After discovery was completed, the parties filed memoranda of law in

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> necessary to determine the action in accordance with the opinion and order of the appellate court.

support of their respective positions. The post-conviction court held a hearing on October 15, 2020. No witnesses testified at the hearing.

Before summarizing the relevant evidence, we will provide some background information for context:

Judge Waldron, the post-conviction court, and the parties differentiate between the "court file," which is maintained by the clerk's office, and a trial judge's "chambers file." Judge Waldron testified that, among other things, his chambers files typically contained documents such as his trial notes, a copy of the voir dire, and copies of draft versions of the jury instructions, all of which are typically not contained in a court file. He related that it was his practice to retain his chambers files for criminal cases indefinitely. Judge Waldron explained that his chambers file for Mr. Christian's case, along with his chambers files for thousands of other cases, were destroyed by courthouse staff without his authorization shortly after he retired in 2015.

Additionally, Judge Waldron testified that his jury instructions consisted of three parts. The first consisted of non-substantive matters such as the procedure for delivering jury notes to the court, how to complete the verdict sheet, and security arrangements for the jurors if they deliberated into the evening. He testified that "for want of a better term," he "ad-libbed" these instructions, that is, he did not read these instructions from a written text. We will refer to these as the "ad-libbed instructions."

The second part of the instructions pertained to legal principles relevant to all criminal trials, *e.g.*, the presumption of innocence, the concept of reasonable doubt, and various

evidentiary matters. Included in this section was the instruction at issue in this appeal. Judge Waldron referred to this part of his instructions as "boilerplate." For the sake of consistency, we will refer to them as the "boilerplate instructions."[8] The third part of the instructions set out the elements of each offense that was submitted to the jury. We will refer to these as the "elements of the crime instructions."

Neither party asserts that there is anything in the ad-libbed instructions or the elements of the crime instructions that is relevant to the issues before us. Our exclusive focus is on the boilerplate instructions.

In his affidavit, Judge Waldron averred that he had a "recollection" of the jury instructions in Mr. Christian's trial. In his deposition, however, he testified that he had "[a]bsolutely no" independent recollection of those instructions.[9]

In his deposition, Judge Waldron related that after he was appointed to the bench in 1988, he was given a copy of jury instructions used by another judge as a template for the latter's instructions in criminal trials. This template contained two references to the binding

[8] Our use of this term comes with a caveat. The term "boilerplate" suggests unyielding fixity. But, as we will explain, Judge Waldron testified that he modified the language of the boilerplate instructions on several occasions. Moreover, he stated that it was his practice to meet with counsel to discuss the proposed instructions in order to elicit their comments and provide them with an opportunity to object to them.

[9] To the extent there is a discrepancy between the two statements, neither party suggests that it is significant.

nature of the court's instructions, both of which were in the boilerplate instructions. The first was that the jurors were:

> judges of both the law and the facts, but as to the law only as to resolve any disputes as to the law of the crime if there were any such disputes.

This was at the beginning of the boilerplate instructions. The second reference was near the end of that part of the instructions:

> 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.[10]

At some point before Mr. Christian's trial (he was not sure when), Judge Waldron read an unreported opinion of the Appellate Court that caused him to conclude that an instruction that jurors were judges of the law raised "an issue."[11] As a result, he changed

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[10] An instruction that the jurors were "judges of both the law and the facts, but as to the law only as to resolve any disputes as to the law of the crime if there were any such disputes," reflected one of the Court's holdings in *Stevenson v. State*, 289 Md. 167, 180 (1980), *overruled by Unger v. State*, 427 Md. 383, 417 (2012). The second instruction, namely, that jurors were "judges, judges of both the law, and the facts," was not consistent with *Stevenson*. *See Unger*, 427 Md. at 412–16.

[11] Judge Waldron testified that:

> [I]n an unreported opinion from the Court of Special Appeals, somebody had objected to the language of, "You're judges of both the law and the facts but as to the law only as to resolve any disputes as to the law of the crime if there were any such disputes." . . . . [N]obody objected at trial.
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> * * *
>
> I [read] that and, frankly, that's when I said, well, if that's an issue I'll make life real easy and that's when I switched the instruction. So I took that out

the first reference to jury's role as judge of the law, but he did not change the second. The relevant parts of his boilerplate instructions then read as follows (new language in italics):

> *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 in 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. It is your duty to decide the facts and apply the law to those facts.
>
> * * *
>
> 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.

At some point thereafter but prior to Mr. Christian's trial (again, he was not sure when), Judge Waldron recognized the inconsistency between the two paragraphs. At that juncture, he changed the latter paragraph to read as follows:

> You are not partisans. Your sole interest is to ascertain the truth from the evidence in the case.[12]

Judge Waldron also testified in passing that he modified the boilerplate instructions on other occasions to be consistent with the Maryland Criminal Pattern Jury Instructions.

> and put in the mandatory language which is what was in effect at the time of [Mr. Christian's] trial.

[12] In their depositions, both Judge Waldron and Mr. Perrine were very vague as to dates. With that caveat, it appears to us that Mr. Perrine's template was based on the instructions given by Judge Waldron after he amended the first *Unger* instruction in the boilerplate instructions but before he corrected the second.

Additionally, Judge Waldron testified that his fixed and unvarying criminal jury trial practices included the following:

(1) He read the boilerplate instructions and the elements of the crime instructions to the jury verbatim from a prepared written text. Judge Waldron emphasized this point in his deposition:

> [Counsel for the State]: You would review the jury instructions, have them written, and then read them to the jury?
>
> [Judge Waldron]: [T]here are very few absolutes in this life. That is just one of them though. Every single case since I came on the bench, period.

(2) Before instructing the jury, he provided counsel with written copies of the instructions in order to give them an opportunity to suggest changes and to make objections. Additionally, he reviewed the boilerplate instructions and the elements of the crime instructions with counsel before instructing the jury.[13]

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[13] The transcript of Mr. Christian's trial reflects that, immediately before the jury was instructed in Mr. Christian's trial, the following exchanges occurred (emphasis added):

> THE COURT: We did spend some time yesterday afternoon going over the instructions. We have a final draft. *We went through a couple of drafts with a few minor changes here and there*. Has everyone now had a chance to review the final draft of the instructions, and the two-page verdict sheet?
>
> [PROSECUTOR]: Yes, Your Honor.
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> THE COURT: Are they acceptable to the State?
>
> [PROSECUTOR]: Yes, Your Honor. '
>
> THE COURT: Acceptable to the defense?

(3) If, in the process of instructing to the jury, he inadvertently departed from the written text, Judge Waldron made a contemporaneous, hand-written corrective interlineation to the written instructions. All corrections were incorporated into the written instructions given to the jury.

(4) The text of the boilerplate instructions and the elements of the crime instructions as read by him (and if necessary, as corrected by him), were attached to the verdict sheet and given to the foreperson before the jury retired for deliberations.[14]

(5) And finally, after the jury returned its verdict, the verdict sheet, together with the written instructions attached to the verdict sheet, were placed in the court file.

The court file in Mr. Christian's case includes a text of the boilerplate instructions and the elements of the crime instructions. As the post-conviction court

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> [DEFENSE COUNSEL]: Yes, Your Honor.

We do not know what the "minor changes" were, nor do we know whether they were to the boilerplate instructions or the elements of the crime instructions. It is clear from Judge Waldron's testimony that his chambers file might have provided answers to these questions. But the file was destroyed when Judge Waldron retired in 2015.

[14] Judge Waldron testified that providing the jury with a written copy of the jury instructions to juries before they retire to deliberate:

> has been the practice in Harford County since long before I ever showed up. Yes, in every single jury trial both civil and criminal a copy of the instructions goes to the jury. Every single one.

noted in its memorandum opinion, the document in the court file "contains a Circuit Court date stamp which corresponds to the date of the conclusion of the trial and is docketed accordingly."

The instructions in the court file read in relevant part:

> 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 in 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. It is your duty to decide the facts and apply the law to those facts.
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> * * *
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> You are not partisans. Your sole interest is to ascertain the truth from the evidence in the case.

At this point, our focus shifts for a time to Mr. Perrine.

In his deposition, Mr. Perrine testified that he had been Judge Waldron's court reporter from approximately 2000 until the time of the latter's retirement in 2015. At some point during this period, Mr. Perrine realized that the software program that he was using to prepare transcripts enabled a court reporter to "autopopulate" portions of transcripts, that is, to copy text from the transcript of one trial and to insert it into the transcript of another.[15] Because he believed that Judge Waldron's boilerplate instructions never altered, it occurred to Mr. Perrine that he could save those instructions from one trial and paste that text into transcripts of subsequent trials. He testified that he:

[15] Mr. Perrine testified that the procedure was "akin to cut and paste" features found in word processing programs.

> had a discussion with Judge Waldron, I don't know when in reference to [Mr. Christian's] case, about importing the boilerplate. I asked him if it was necessary since the boilerplate was the same in every trial, and we were doing two or three jury trials a week at that time, whether it was necessary for me to manually transcribe the trial or could I just use the boilerplate. And to my recollection, I'm pretty sure that he gave me permission to do so.
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> * * *
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> I recall him saying words to the effect that he didn't see where there would be a problem with it because the instructions never changed in the boilerplate.

Mr. Perrine testified that this conversation lasted "[p]robably under a minute."[16]

When asked when he began to use the template, Mr. Perrine testified that it was "maybe" in 2010 but that he was "bad with dates" so it could have been earlier.[17] He stated that he stopped using the template when he learned of the *Unger* decision. (Mr. Christian's trial concluded on March 1, 2012; *Unger* was filed on May 24th of that year).

[16] In his memorandum to the post-conviction court, Mr. Christian pointed out that that, at the time of his trial, Md. Rule 16-404(e) provided that all proceedings "shall be recorded in their entirety, unless the court and the parties agree otherwise." From this premise, he stated that "Judge Waldron's permission, even if given, would not be enough to make it permissible for the court reporter to fail to record court proceedings."

[17] Mr. Perrine testified that the transcript of a 2007 criminal trial presided over by Judge Waldron contained an *Unger* instruction that was identical to the one in the transcript of Mr. Christian's trial. Based on this, Mr. Christian asserts that Mr. Perrine was using a template in 2007. He might be correct. But Judge Waldron testified that he modified his boilerplate instructions regarding the binding nature of the court's instructions on two occasions. And he also testified that he could not recall when he made either change. Although identifying when Mr. Perrine first began to use a template might be useful in other contexts, there is no dispute that he used a template for Mr. Christian's trial.

Mr. Perrine testified that he used only one template and that he used it in the transcript for Mr. Christian's trial as well as in transcripts for other jury trials over which Judge Waldron presided. He stated that Judge Waldron presided over "two, sometimes three, jury trials a week" during the time that he used the template. When asked if he "remembered . . . criminal cases, where rather than using the template you actually did transcribe what was said[,]" he responded "yes" without further explanation. He also stated that he could not recall whether he had certified the accuracy of the transcript of Mr. Christian's trial.[18]

Additionally, Mr. Perrine testified that he had been the court reporter for Mr. Christian's initial post-conviction hearing and by that time, he had realized that there were "most likely" discrepancies between the transcript and the boilerplate instructions.[19] However, he did not bring this to the court's or to counsels' attention. He explained that he "didn't see any point [in doing so] because there was no way I could change what had already occurred." He further testified that, after that hearing, he did not "speak with Judge Waldron about the accuracy of the trial transcript[.]"

When asked if he had ever notified either defense counsel or prosecutors in any trial that he was not transcribing the boilerplate instructions, Mr. Perrine replied "No."

[18] The transcript of Mr. Christian's trial was not certified.

[19] In his deposition, Mr. Perrine was asked "At the time of [the first post-conviction hearing], did you realize there was a potential discrepancy between the trial transcript and the instructions as actually given at trial?" He answered "Yes." He was then asked: "Were you aware at that time that[an *Unger*] instruction had not been given?" He responded: "Most likely."

Additionally, he testified that he never modified the template during the time that he used it. When asked if he had spoken to the circuit court administrative reporter regarding his use of templates, Mr. Perrine replied: "I explained that there was a problem and, you know, how I was going to handle things," without further elaboration. He also testified that, after Judge Waldron's retirement, he worked for all of the judges in the Circuit Court for Harford County. When asked if he had spoken to other judges "regarding your use of templates," Mr. Perrine responded that "I think I explained to [the Harford County administrative judge] what had taken place and that was about it."

For his part, Judge Waldron testified that he did not authorize the use of any templates. He testified that, after he learned of the post-conviction court's decision to grant Mr. Christian a new trial, he spoke to Mr. Perrine:

> I confronted him. I said, "You know, on the Christian case I've got a copy of your transcript and I've got the instructions and the transcript's off or, you know, they don't jive," whatever. I said, "Can you explain it?" . . . . And that's when he told me that he — he wouldn't take down what he called the boilerplate. That he had an old template and I guess he would push a button on his machine, I don't know how that works. But the prefatory boilerplate he wasn't taking down. Which was a shock to me. Frankly, it was a shock to me.

Judge Waldron also testified that he did not ask Mr. Perrine whether there were other inaccuracies in the transcript, nor did he make any inquires as to whether "other parts of the transcript were accurate." When asked if Mr. Perrine gave him a copy of the template, Judge Waldron responded "no." He testified that, after he learned that the post-conviction court had granted Mr. Christian a new trial based on "an alleged *Unger* language issue,"

he examined the court file for the 2012 trial and found a copy of the "actual [i]nstructions," by which he meant the boilerplate instructions and the elements of the crime instructions. Based on this document, Judge Waldron then contacted the assistant state's attorney who had handled the post-conviction proceeding and "advised him that the transcript was not accurate and called his attention to the actual written [i]nstructions."[20]

To reiterate, the relevant portion of the transcript of Mr. Christian's trial read as follows (emphasis added):

> 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.

In contrast, the copy of the jury instructions in the court file reads:

> You are not partisans. Your sole interest is to ascertain the truth from the evidence in the case.

[20] At the remand hearing, both the court and the State commented negatively about Judge Waldron's *ex parte* contact with the assistant state's attorney. Mr. Christian contends that Judge Waldron's action was inappropriate but does not assert that he was prejudiced by Judge Waldron's failure go through proper channels.

Proceedings before the post-conviction court

With one exception,[21] the parties presented the same contentions to the post-conviction court at the remand hearing that they do to us. Mr. Christian asserted that he was entitled to a new trial because the court reporter deliberately used a "prefabricated template" for a portion of the trial court's jury instructions "instead of accurately recording [the] trial." According to Mr. Christian, the use of the prefabricated template prejudiced him in at least two ways. First, it resulted in his litigating his case on direct appeal in his post-conviction proceeding "based on a potentially inaccurate record." Second, Mr. Christian contended that "there is significant uncertainty as to what actually happened during the jury instructions." He continued:

> Under these circumstances, it cannot reliably be determined what happened at the trial, and Mr. Christian is entitled to a new trial. Any other result would deprive Mr. Christian of the opportunity for meaningful review and enable conduct that undermines the integrity of the judicial system.
>
> * * *
>
> [Judge Waldron testified that] he never varied from the written instructions. But that sweeping assertion is uncorroborated, either generally or in this particular trial, which is one of potentially thousands Judge Waldron presided over.[22] His chambers file and notes have been destroyed. Even crediting the

[21] Mr. Christian presents an additional contention to this Court. Citing Md. Rule 18-102.11, Mr. Christian asserts that reversal is required because the presiding judge should have recused himself in light of the fact that he had personal knowledge of Judge Waldron's practices in criminal jury trials. As we will explain later, this argument is not preserved for appellate review.

[22] As we have related, the State has asserted that the *Unger* instruction problem "may affect hundreds" of criminal cases which Judge Waldron presided over. *See* Petition for

> Judge's good faith, Judge Waldron would not claim to have never made a mistake. . . . [T]he whole point of having a verbatim transcript is to avoid having to rely on such memories, which are notoriously fallible and should be treated with skepticism.

In response, the State asserted that, in reality, no *Unger* instruction had been given to the jury and the *Unger* language was included in the transcript as a result of Mr. Perrine's improper use of a template. The State also pointed out that, in the 2017 post-conviction hearing, defense counsel testified that she had no recollection of the court's giving an *Unger* instruction to the jury.

The State asserted that the "sole focus of this remand is to determine what the jury instructions were," and that "the determination of that issue 'would resolve the merits of the State's appeal by eliminating the sole ground for Christian's postconviction relief.'" (quoting *Christian III*, 463 Md. at 649.) The State contended that Judge Waldron's testimony established that no *Unger* instruction had been given to the jury and that Mr. Perrine conceded that the transcript was inaccurate. According to the State, this evidence was dispositive.

However, the State presented no evidence to corroborate Judge Waldron's testimony as to two critical aspects of the State's case: first, that he read the boilerplate instructions and the elements of the crime instructions verbatim from prepared texts to juries in every

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Writ of Certiorari at 3 n.2. In his deposition, Judge Waldron testified that he had presided over "hundreds, if not thousands, of jury trials" without further explanation.

criminal case over which he presided; and second, that in every such case the version of the jury instructions in the court file matched exactly what he told the jury.

To this Court, the State asserts that Mr. Perrine's testimony corroborated Judge Waldron's. The relevant portion consisted of the following:

> [Mr. Christian's counsel]: Do you independently recall whether those words [i.e., the *Unger* instruction] were spoken at the trial?
>
> [Mr. Perrine]: No, I don't. But I do know from the instructions that were in Judge Waldron's chamber's file that my transcript was inaccurate.[23]
>
> [Mr. Christian's counsel]: Did you make your best effort to accurately transcribe the jury instructions as Judge Waldron gave them at trial?
>
> * * *
>
> [Mr. Perrine]: Well, the boilerplate instructions in the beginning were not recorded verbatim.
>
> [Mr. Christian's counsel]: When you say they're "not recorded verbatim," were you transcribing those instructions at the time they were given?
>
> * * *
>
> [Mr. Perrine]: Not the boilerplate part.
>
> [Mr. Christian's counsel]: So the part of the instructions you're referring to as boilerplate wasn't recorded at the time of trial, correct?
>
> [Mr. Perrine]: Correct.

On March 31, 2021, the post-conviction court issued a memorandum opinion and order. After summarizing the procedural history of the case, relevant case law, and the evidence presented by both parties, the court stated:

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[23] As we will explain in footnote 34, *infra*, the probative value of Mr. Perrine's testimony as to what the jury was actually told is minimal.

> While the State could have arguably produced more evidence in support of its position, the Defendant, with the exception of his trial counsel's testimony at the original post-conviction proceeding that she had no recollection of the actual jury instructions given or a reason for not objecting, offered nothing at the remand hearing to support his position that incorrect instructions were given to the jury. No testimony or affidavit of parties, court personnel or jurors were offered, nor was any proffer of the impossibility of obtaining such evidence put forth.

The court noted that both Judge Waldron and Mr. Perrine testified in their depositions that the trial transcript was incorrect, and that it was:

> significant that [defense counsel] failed to object to the instructions[.] [Mr.] Christian's attorneys were given notice of the language to be used and had ample opportunities to object. They were experienced trial attorneys and the lack of an objection supports the conclusion that the proper instruction was, in fact, given.

Next, the court took judicial notice of Judge Waldron's practices regarding jury instructions:

> Courts may take judicial notice of the operation and practices of the courts in this State. In the present case, the pool of people which would comprise the "everybody" in "everybody around here knows that" are the other Circuit Court judges, and possibly some court staff, who had worked in the courthouse and with Judge Waldron over those years. Would that the State or Christian had put forth additional evidence to support or rebut such a contention.
>
> However, absent such evidence, this Court takes judicial notice of the fact that Judge Waldron's practice, as it pertained to the placement of jury instructions into the court file, is as described in his affidavit and deposition.[24]

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[24] As we have related, Mr. Perrine testified that before using the template, he discussed the matter with Judge Waldron. The latter testified that no such discussion occurred. The

The post-conviction court then stated:

> Judge Waldron is nothing if not a creature of habit. This Court tried cases in front of Judge Waldron as an attorney and observed this practice. In addition, this Court sat with Judge Waldron during my orientation and was specifically instructed by him to continue this practice which Judge Waldron claimed had served him well throughout his career on the bench.

Finally, the post-conviction court noted that other aspects "of this complex case . . . cause concern." These included the "'anti-CSI' voir dire question, [the] missing evidence instruction and the cumulative ineffectiveness of counsel during the original post-conviction proceeding," the fact that the error in the trial transcript was "not addressed until late in the post-conviction appeals process by the State, who only learned of this error from a private conversation with the presiding Judge in the trial," Mr. Perrine's awareness "of his error [who nonetheless] chose not to reveal the shortcomings until directly asked," and the destruction of the chambers file for Mr. Christian's trial.

The post-conviction court stated that "[t]hese are not small mistakes and do not rest easy with this Court. However, these are not matters within the purview of the remand by the Court of Appeals and do not affect the credibility of the witnesses as to the issue before the court."

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post-conviction court credited Judge Waldron's version of events. In its memorandum opinion, the court stated:

> Judge Waldron was not aware that the court reporter was using a template, he never had the opportunity to have the practice stopped or, at a minimum, to correct the language the court reporter was inserting in the template.

Ultimately, the court found that "the transcript from the trial did not match the instructions given to the jury by Judge Waldron." Commenting that the trial transcript "should mirror the instructions in the court file," the court ordered the following modification to the transcript (deleted language stricken, new wording in italics):

> You are not partisans. ~~Since this is a criminal case, you are judges, judges of both the law and the facts~~. *The instructions that I give you about the law are binding on you. In other words, you must apply the law as I explain it to you in 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. It is your duty to decide the facts and apply the law to those facts*. Your sole interest is to ascertain the truth from the evidence in the case.

Based on the amended transcript, the court denied Mr. Christian's petition for post-conviction relief. Mr. Christian did not file a motion for reconsideration; instead, he filed an application for leave to appeal, which was granted and docketed as the present appeal.

After briefing and oral argument, this Court gave permission for the parties to file supplemental briefs to address two additional matters:

> (1) Whether the changes to the trial transcript ordered by the post-conviction court were consistent with the evidence presented to the court at the evidentiary hearing; and
>
> (2) If the answer to the previous question is no, what is the appropriate appellate remedy?

The parties filed supplemental briefs addressing these questions. We will discuss their responses in our analysis.

The parties' appellate contentions

Mr. Christian's primary appellate contention emanates from the premise that "the importance of the judicial process not only being fair, but appearing to be fair." (quoting *Jefferson-El v. State*, 330 Md. 99, 107 (1993)). He contends that what happened both in his 2012 trial and the 2019 post-conviction court hearing failed to meet these standards for the following reasons: (1) the evidence against him in his trial was weak and his convictions were "based entirely on circumstantial evidence;" (2) at this point, "no one can say with reasonable certainty how the jury was instructed;" (3) Mr. Perrine has testified that the critical part of the trial transcript "was fabricated;" and (4) Judge Waldron initiated an improper *ex parte* contact with a member of the State's Attorney's Office regarding the accuracy of the trial transcript." "None of this," Mr. Christian asserts, "can lead to confidence in the outcome of this proceeding. Under these circumstances, it is simply impossible for this Court to assure itself that [he] received a fair trial." For much the same reasons, he asserts that he has been deprived of his right to a "meaningful appellate review," both in his direct appeal and in his post-conviction action.

Mr. Christian also contends that the post-conviction court misinterpreted the Supreme Court's mandate. In his view, the Supreme Court of Maryland could not "have intended to mandate a process [in which] no consideration could be given to whether Mr. Christian was entitled to a remedy," especially in light of the fact that the irregularities in the transcript were the result of "deliberate actions of court personnel."

Pointing out that "it was the State—and not Mr. Christian—that moved to correct the record," Mr. Christian contends that it was the State that bore the burden of production and persuasion at the post-conviction hearing. He asserts that the State failed to meet these burdens and that the post-conviction court erred by relying on judicial notice and its own knowledge of Judge Waldron's trial practices as bases for its decision.

Additionally, Mr. Christian asserts that a new trial is "necessary to uphold the integrity of the criminal justice system" and to deter future misconduct by court reporters:

> What happened at Mr. Christian's trial was, in many ways, worse than if no court reporter had been present at all. . . . Had the court reporter been absent or had the parties been told that the court reporter was not making a verbatim transcript, Mr. Christian and his appellate counsel would have been on notice that the record would be incomplete and could have taken appropriate steps.
>
> * * *
>
> Moreover, this case revealed a longstanding pattern of misconduct on the part of a court reporter[.]
>
> * * *
>
> Under these extraordinary circumstances, basic notions of fairness have been thwarted and the reliability of the record in this case has been damaged to such a degree that a new trial is needed to vindicate the credibility of the judicial system.

Next, Mr. Christian contends that Md. Rule 8-414 does not authorize a post-conviction court to change the record of a criminal trial.

Finally, he points out that in *Christian III*, the Supreme Court vacated the judgment of this Court in *Christian II.* Mr. Christian asserts that he is therefore permitted to relitigate the issues of whether the post-conviction court was correct when it granted him a new trial

based on the court's conclusions that the trial counsel's failure to object to an improper *voir dire* question and her failure to request a missing evidence instruction.[25]

In response, the State presents the following:

Although it initially asserts that the post-conviction court did not err in taking judicial notice of Judge Waldron's conduct of criminal jury trials, the State eventually concedes that the court erred when it took judicial notice of Judge Waldron's practices and work habits. This notwithstanding, the State contends that the post-conviction court's "recitation of the evidence that [it] *actually considered* . . . amply supported his conclusion that the trial transcripts was in error." (Emphasis in original). This leads to the conclusion, says the State, that the post-conviction court's "comment about judicial notice" was "in the context of a factor that did not matter to [its] decision," and that the court was "either right for the wrong reason, or any error was harmless."

Second, the State takes issue with Mr. Christian's contention that the post-conviction court erred when it relied upon its personal knowledge of Judge Waldron's practices in

[25] Mr. Christian makes an additional argument. He asserts that he has the right under Md. Rule 4-402(c) to amend his post-conviction petition at any time and application of this principle means that the post-conviction court had the authority to address his contention that the problems in the transcript denied him his right to meaningful appellate review. Certainly, Md. Rule 4-402(c) states that "[a]mendment of the petition shall be freely allowed in order to do substantial justice," but Mr. Christian did not ask to amend his petition when his case was pending in the post-conviction court. We do not read the rule to permit a post-conviction petition to be amended after the post-conviction court has decided the petitioner's case on its merits. However, as we will explain in the main text, Mr. Christian's meaningful appellate review contention is properly before us.

jury trials to buttress its conclusion that no *Unger* instruction had been given to the jury. The State correctly points out that this contention was not presented to the post-conviction court and that we therefore should not consider it. It also argues that "the putative error here is only that [the post-conviction court] impermissibly considered those observations" and that the court's action in doing so was "not an abdication of impartiality," but rather harmless error.

Third, the State contends that the post-conviction court correctly interpreted the scope of the Supreme Court's mandate. Focusing on the Court's rejection of Mr. Christian's contention that the State's motion to correct the record was barred by the doctrine of *laches*, the State contends that the Supreme Court "put an end to the finger-wagging at the State."

Finally, the State addresses Mr. Christian's argument that he has been denied "meaningful appellate review" because of the purportedly false language in the transcript. Looking past the modifier "meaningful," the State points out that Mr. Christian pursued both a direct appeal and a post-conviction proceeding. It characterizes Mr. Christian as seeking "an outrageous windfall . . . based on the court reporter's erroneous entry in the transcript of his trial, notwithstanding that the jury . . . would not ever have known of the error."

THE STANDARD OF REVIEW

In appeals from judgments in post-conviction cases, "an appellate court reviews for clear error the trial court's findings of fact, and reviews without deference the trial court's

conclusions of law[.]" *Ramirez v.* State, 464 Md. 532, 560 (2019) (citing *Newton v. State*, 456 Md. 341, 351–52 (2017)).

Mr. Christian asserts, and the State agrees, that the post-conviction court erred when it took judicial notice of Judge Waldron's practices in criminal jury trials. Whether the post-conviction court correctly interpreted Md. Rule 5-201 is a legal question and this Court is not bound by the State's concession. *See, e.g., Coley v. State*, 215 Md. App. 570, 572 n.2 (2013). The State argues that the court's invocation of judicial notice and its reliance on its own experiences with Judge Waldron were harmless errors. For the State to prevail on its harmless error contentions, it is required to demonstrate by a preponderance of the evidence that the court's errors did not affect the outcome of the post-conviction proceeding.

The parties also agree that the post-conviction court erred when it ordered changes to the trial transcript that were not supported by the evidence presented at the remand hearing. However, they disagree as to the implications of the error. Mr. Christian contends that, at a minimum, the case must be remanded to the post-conviction court for a new hearing. The State suggests that Md. Rule 8-604(d)(1) authorizes us to direct the post-conviction court to correct the record without a hearing so that we can address the merits of the parties' contentions based upon a corrected record. The proper interpretation of Rule 8-604 is a question of law.

In order to prevail on his contention that the irregularities in the transcription of his trial deprived him of his right to "meaningful appellate review." Mr. Christian "has to show that the omission [was] not inconsequential, but [was] 'in some manner' relevant to the

appeal." *Wilson v. State*, 334 Md. 469, 477 (1994) (quoting *Smith v. State*, 291 Md. 125, 136 (1981)). Mr. Christian has met this threshold because giving an *Unger* instruction is a structural error. *See State v. Adams-Bey*, 449 Md. 690, 694 (2016); *State v. Waine*, 444 Md. 692, 705 (2015).

The post-conviction court correctly identified the State as the moving party because the State filed the motion to correct the record.[26] The post-conviction court also correctly identified the burden of persuasion as being by a preponderance of the evidence. *See State v. Thaniel*, 238 Md. App. 343, 361 (2018).

Finally. "[t]here is a presumption of regularity which normally attaches to trial court proceedings, although its applicability may sometimes depend upon the nature of the issue before the reviewing court." *Harris v. State*, 406 Md. 115, 122 (2008) (quoting *Beales v. State*, 329 Md. 263, 274 (1993)). This presumption extends to trial transcripts. *See, e.g.*,

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[26] In its brief and at oral argument, the State asserted that "it was Christian's—and not the State's—obligation to produce a corrected record[.]" But implicit in this contention is the assumption that the record needs correcting in the first place. It is the State, and not Mr. Christian, who asserts that the 2012 transcript is inaccurate. And it is the State's burden to prove it. *See Harris v. State*, 406 Md. 115, 122 (2008):

> There is a presumption of regularity which normally attaches to trial court proceedings, although its applicability may sometimes depend upon the nature of the issue before the reviewing court. *See, e.g., United States v. Morgan*, 346 U.S. 502, 512 (1954) ("It is presumed the [trial court] proceedings were correct and the burden rests on the [challenger] to show otherwise")[.]

(Bracketed language in *Harris*).

Lawson v. State, 187 Md. App. 101, 108–09 (2009) (collecting cases holding that when there is a conflict between commitment records and docket entries and a transcript, "the transcript prevails" unless there is proof to the contrary.) The presumption of regularity is rebuttable. *Harris*, 406 Md. at 122.

ANALYSIS

We will reverse the judgment of the post-conviction court.

First, we agree with the parties that the post-conviction court erred when it took judicial notice of Judge Waldron's practices in criminal jury trials. The State's argument that this error is harmless is not convincing. Second, Mr. Christian's contention that the post-conviction erred by relying on its personal knowledge is not preserved for appellate review. Third, we agree with the parties that there is no evidentiary basis for the transcript changes ordered by the post-conviction court. Finally, we conclude that the post-conviction court erred when it declined to address whether the problems with the transcript warranted a new trial. For these reasons, reversal is required.

Mr. Christian asserts that, at a minimum, he has the right to another evidentiary hearing before a different judge. However, he also argues that both the post-conviction proceeding and his criminal trial were so permeated with irregularities that the proper remedy is a new trial. As we have explained, the State's current position is that a limited remand to the post-conviction court is necessary to correct the record but that it is for this Court to decide the merits of the parties' contentions. As we will explain, we conclude that a new trial is the appropriate remedy.

1. The post-conviction court's authority to correct the transcript of Mr. Christian's 2012 trial

In *Christian III*, the Supreme Court remanded this case to the post-conviction court for it to consider:

> relevant information, whether documentary or testimonial, that will facilitate the postconviction court's fact findings and ultimate determination of what the trial judge did, or did not, include in his instructions to the jury at Christian's trial.

463 Md. at 655.

Mr. Christian's first appellate contention is that notwithstanding the Supreme Court's clear direction, the post-conviction court was without authority to correct the record of Mr. Christian's trial. He asserts this is so because:

> for purposes of Rule 8-414,[27] "the record" refers to the record generated in the proceeding under review, which must "accurately disclose[] what

[27] Rule 8-414 states in pertinent part:

> (a) Authority of Appellate Court. On motion or on its own initiative, the appellate court may order that a material error or omission in the record be corrected. . . .
>
> (2) Correction or Modification of the Record. If the parties disagree about whether the record accurately discloses what occurred in the lower court, the motion shall specify what the difference is. If the appellate court does not resolve the dispute over what occurred in the lower court, the appellate court may direct the lower court to determine whether the record differs from what actually occurred and, if appropriate, conform the record accordingly. . . .
>
> * * *
>
> (c) Order to Correct Record. The order of the appellate court to correct the record constitutes the correction[.]

> occurred in the lower court." Rule 8-413(a).[28] The State's motion challenged what occurred in an entirely distinct proceeding—Mr. Christian's trial—not his post-conviction proceeding, which was what was under review at the time of the State's motion. *See* Md. Code Ann., Crim. Proc. § 7-102(a) ("…a convicted person may begin a proceeding under this title in the circuit court for the county in which the conviction took place at any time …"); [Crim. Proc.] § 7-102(b) ("A person may begin a proceeding under this title if … the alleged error has not been previously and finally litigated or waived in the proceeding resulting in the conviction.").

We do not agree. There are two relevant rules, each of which provides a distinct mechanism to correct errors in records. The first is Md. Rule 8-414, which authorizes an appellate court to resolve a dispute as to a record or to direct the trial

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> (d) Effect on Oral Argument. Oral argument generally will not be postponed because of an error or omission in the record. If a permitted correction or addition cannot be made to the record in time for the scheduled oral argument, the appellate court may (1) postpone the argument or (2) direct the argument to proceed as if the correction or addition had been made and permit it to be filed after argument.

[28] Md. Rule 8-413 states in pertinent part:

> (a) Contents of Record. The record on appeal shall include:
>
> (1) a certified copy of the docket entries in the lower court,
>
> (2) the transcript required by Rule 8-411, and
>
> (3) . . . . The lower court, by order, shall resolve any dispute whether the record accurately discloses what occurred in the lower court, and shall cause the record to conform to its decision. The lower court shall also correct or modify the record if directed by an appellate court pursuant to Rule 8-414 (b)(2).

court to do so. However, the appellate court retains jurisdiction over the appeal. *See* Md. Rule 8-414(d).[29]

The second is Rule 8-604, which sets out an appellate court's authority to "dispose of an appeal." Among other means of disposition, the court may "remand the action to a lower court in accordance with section (d) of this Rule." Md. Rule 8-604(a)(5). Subsection (d) states (emphasis added):

> If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. *The order of remand and the opinion upon which the order is based are conclusive as to the points decided*. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

In the present case, the Supreme Court made it explicitly clear that it was remanding the case to the post-conviction court pursuant to Md. Rule 8-604. *See Christian III*, 463 Md. at 655 ("Pursuant to Maryland Rule 8-604(d)(1), we remand this case for further fact finding.") The Supreme Court's judgment remanding this

[29] Rule 8-414(d) states:

> (d) Effect on Oral Argument. Oral argument generally will not be postponed because of an error or omission in the record. If a permitted correction or addition cannot be made to the record in time for the scheduled oral argument, the appellate court may (1) postpone the argument or (2) direct the argument to proceed as if the correction or addition had been made and permit it to be filed after argument.

case to the post-conviction court is conclusive as to the latter tribunal's authority to correct the record of Mr. Christian's trial. And, of course, the Supreme Court's judgment is equally binding on this Court.

2. The scope of the Supreme Court's mandate in Christian III

In its memorandum opinion, the post-conviction court proceeded under the premise that the holding and judgment of *Christian III* required it "to determine, if possible, what instruction was given to the jury at Christian's original trial," and to grant appropriate relief based on the corrected record. Neither party disputes this. However, Mr. Christian argues that the court's authority was broader in two distinct ways. First, he argues that he has the right to relitigate the issues resolved against him by this Court in *Christian II.* Second, he contends that the post-conviction court failed to consider his contention that the totality of the circumstances surrounding his original conviction and the irregularities in the way that his trial was transcribed have resulted in his inability to obtain "meaningful appellate review" both in his direct appeal and in this post-conviction proceeding. The post-conviction court agreed with neither of the propositions. We will address them separately.

A

Mr. Christian points out that in *Christian III*, the Supreme Court:

> vacated the judgment of the [Appellate Court of Maryland], including its conclusions concerning the other grounds upon which the [post-conviction court] originally granted [him] a new trial—the missing evidence instruction and anti-CSI voir dire question.

Mr. Christian asserts that the Court's judgment permits him to relitigate these issues and that the post-conviction court erred in refusing to address them. The flaw in Mr. Christian's argument is that the *Christian II* panel's holdings as to missing evidence instruction and anti-CSI voir dire issues were not affected by the Supreme Court's judgment.

In *MAS Associates v. Korotki*, the Supreme Court explained (emphasis added):

> Under Maryland Rule 8-131(b)(1),[30] where an issue is not raised by a party in a petition for a writ of certiorari or a cross-petition, the issue is not properly before this Court. Stated otherwise, under our certiorari process, this Court will only consider matters on appeal raised in a petition for writ of certiorari that we have granted.
>
> Nonetheless, under Maryland Rule 8-131(b), "in our order granting certiorari, or in a later order having the effect of amending the order granting certiorari, we may either limit the issues or add issues which the parties have not presented in certiorari petitions or cross-petitions." The use of the term "ordinarily" in Maryland Rule 8-131(b)(1) implies that this Court possesses the discretion to consider issues that were not necessarily raised in the petition or order for a Writ of Certiorari. *Importantly, when we exercise our discretion under Maryland Rule 8-131(b)(1) to consider an issue not presented in a petition for a writ of certiorari or cross-petition, we generally state as much*.

475 Md. 325, 365 (2021) (cleaned up).

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[30] Md. Rule 8-131(b)(1) states:

> Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Appellate Court or by a circuit court acting in an appellate capacity, the Supreme Court ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Supreme Court.

In *Christian II,* this Court addressed three assertions of error presented by the State. The first was the *Unger* instruction issue. This is clearly properly before us and the State does not suggest otherwise.

The second issue was whether defense counsel "rendered deficient assistance by failing to object to [an] anti-CSI *voir dire* question." 2018 WL 5306987 at *5. This issue was raised in Mr. Christian's direct appeal. The *Christian I* panel addressed the issue even though it was not preserved for appellate review and concluded that the error was harmless because the trial court asked follow-up questions that the panel deemed to be curative. *Christian I*, slip op. at 30. The *Christian II* panel concluded that "[b]ecause 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." 2018 WL 5306987 at *6.

The third issue presented to the *Christian II* Court pertained to the post-conviction court's finding that trial counsel had been deficient for failing to request a missing evidence instruction. The panel held that Mr. Christian did not demonstrate that he had been prejudiced by the trial counsel's failure to request the instruction. *Id.* at *9.

In its petition for certiorari, the State raised two issues. Neither pertained to defense counsel's failure to request a missing evidence instruction or to the anti-CSI voir dire question. Mr. Christian did not file a cross-petition for certiorari. The Supreme Court's order granting the State's petition was silent as to the latter two matters. The Court did not address either issue in its opinion. The Court's reasoning in *MAS Associates* points clearly

to the conclusion that the judgment of the Supreme Court in *Christian III* did not disturb the *Christian II* panel's holdings as to the *voir dire* and missing evidence instruction issues.

In *Garner v. Archers Glen Partners, Inc*., the Court explained "[t]he law of the case doctrine is one of appellate procedure. Once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case." 405 Md. 43, 55–56 (2008) (cleaned up). Because the *voir dire* and missing evidence instruction issues were neither raised to nor addressed in any fashion by the Supreme Court in *Christian III*, the judgment of the Supreme Court did not have the effect of vacating the *Christian II* panel's holdings as to these issues. The law of the case doctrine dictates that the disposition of those issues in *Christian II* was binding on the parties and the post-conviction court.

B

Mr. Christian's second contention is that the post-conviction court misinterpreted the scope of the Supreme Court's judgment. In *Christian III*, the Supreme Court explained that its remand to the post-conviction court for an evidentiary hearing:

> will facilitate the postconviction court's fact findings and ultimate determination of what the trial judge did, or did not, include in his instructions to the jury at [Mr.] Christian's trial.
>
> Pursuant to Maryland Rule 8-604(d)(1), we remand this case for further fact finding. Of course, any decision rendered on remand is subject to appeal. See Md. Code (1973, 2013 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article.

463 Md. at 655.

The post-conviction court interpreted this to mean that it "was to consider one issue only . . . what instruction was given to the jury at Christian's original trial." Mr. Christian argues that the Supreme Court of Maryland could not "have intended to mandate a process [in which] no consideration could be given to whether Mr. Christian was entitled to a remedy," especially in light of the fact that the irregularities in the transcript were the result of "deliberate actions of court personnel." The State asserts that the post-conviction court's interpretation of *Christian III* is correct.

We begin our analysis by noting that instructions by an appellate court to a trial court for proceedings on remand are court orders. And court orders:

> are construed in the same manner as other written documents and contracts and if the language of the order is clear and unambiguous, the court will give effect to its plain, ordinary, and usual meaning, taking into account the context in which it is used.

Tallant v. State, 254 Md. App. 665, 678 (2022) (quoting *Taylor v. Mandel*, 402 Md. 109, 125 (2007)) (cleaned up).

We now turn to the State's contentions. First, the State asserts that the Supreme Court's rejection of Mr. Christian's *laches* contention "put an end to the finger-wagging at the State" for the five-year delay between his trial and the filing of the motion to correct the record. We agree. But the State doesn't explain what this has to do with the scope of the post-conviction court's remedial authority on remand.

Second, the State argues that the Supreme Court "directed the [post-conviction court] 'to render findings of fact and conclusions of law[.]'" (quoting *Christian III*, 463 Md. at

655). But the State's quotation is selective—in its judgment, the Court directed the post-conviction court to "to render findings of fact and conclusions of law consistent with this opinion." *Id.* And in its opinion, the Supreme Court explained that a remand for an evidentiary hearing:

> will facilitate the postconviction court's fact findings and ultimate determination of what the trial judge did, or did not, include in his instructions to the jury at [Mr.] Christian's trial.
>
> Pursuant to Maryland Rule 8-604(d)(1), we remand this case for further fact finding. Of course, any decision rendered on remand is subject to appeal.

There is nothing in the *Christian III* opinion that restricts the remedies available to the post-conviction court once that court decided "what the trial judge did, or did not, include in his instructions to the jury[.]" The post-conviction court's conclusion to the contrary read language into the Supreme Court's opinion that is not there.

Although the post-conviction court expressed reservations about aspects of this case that were unrelated to the *Unger* instruction issue,[31] the court ultimately agreed with the

[31] Specifically, the post-conviction court stated that other aspects "of this complex case . . . cause concern." The court identified the following: "the anti-CSI' voir dire question, [the] missing evidence instruction and the cumulative ineffectiveness of counsel during the original post-conviction proceeding," the fact that the alleged error in the trial transcript was "not addressed until late in the post-conviction appeals process by the State, who only learned of this error from a private conversation with the presiding Judge in the trial," Mr. Perrine's awareness "of his error [who nonetheless] chose not to reveal the shortcomings until directly asked," and, finally, the destruction of Judge Waldron's chambers file.

State that those concerns were "not matters within the purview of the remand by the [Supreme Court] and do not affect the credibility of the witnesses as to the issue before the court." For the reasons that we have explained, we do not agree with the post-conviction court's reading of the Supreme Court's opinion.

We hold that the Supreme Court's opinion and judgment does not preclude the post-conviction court from granting relief as long as that relief is consistent with the court's "determination of what the trial judge did, or did not, include in his instructions to the jury at [Mr.] Christian's trial." This includes considering Mr. Christian's contention that, even if no *Unger* instruction had been given, Mr. Perrine's conscious decision to substitute his "template" in lieu of actually transcribing a portion of the jury instructions without notice to the court, to counsel, or to the defendant is a sufficient reason to order a new trial.[32]

Several of the post-conviction court's concerns were addressed by this Court in *Christian II* or by the Supreme Court in *Christian III.* But neither appellate court has addressed the implications of Mr. Perrine's conduct.

[32] The State presents two additional contentions. Neither is persuasive.

First, the State maintains that Mr. Christian's contention that "he has been 'denied "meaningful appellate review"' is wrong. Looking past the modifier "meaningful," the State argues:

> had a full opportunity to pursue a direct appeal, and a full opportunity to pursue post-conviction remedies. He has been denied nothing, vis-à-vis appellate review, other than the disappointment that comes sometimes when a person does not get what the person wants.

The State misses the point—Mr. Christian does not assert that he was barred from filing a direct appeal and then a post-conviction proceeding. He maintains that the absence

3. Judicial notice and the court's personal knowledge

In his brief, Mr. Christian asserts that the post-conviction court erred because it:

> reached its opinion not by crediting any evidence that was introduced in the case by either party, but instead by resorting to the use of "judicial notice," . . . to invoke the Circuit Court's own personal knowledge of the trial judge's habits[.]

The State concedes that the post-conviction court erred when it took judicial notice of Judge Waldron's practices in criminal jury trials. Nonetheless, the State asserts that the court's ruling "was either right for the wrong reason, or any error was harmless."[33] This is so, says the State, in light of "the evidence cited by the post-conviction court [which

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of an accurate trial transcript impaired his efforts to obtain judicial relief in each of those proceedings.

Second, the State contends that Mr. Christian "seeks an outrageous windfall" by asking for a new trial "based on the disappearance of the judge's [chambers] file, some years after the trial, and based on the court reporter's erroneous entry in the transcript of his trial, notwithstanding that the jury that convicted him would not ever have known about the error." The State's views to the contrary notwithstanding, we can detect no impropriety in Mr. Christian's request for a new trial. And, for the reasons that we will explain, we disagree with the State's characterization of Mr. Perrine's conduct as merely an "erroneous entry."

[33] The State cites *Yaffe v. Scarlett Place Residential Condo.*, 205 Md. App. 429, 440 (2012) for the proposition that "an appellate court can affirm . . . when the trial court's decision was right for the wrong reasons." In support of this proposition, the *Yaffe* Court cited *Robeson v. State*, 285 Md. 498, 502 (1979) (citations omitted). In *Robeson*, the Supreme Court equated the concept of "right for the wrong reasons" with the harmless error doctrine. *Id.* at 503. We will do the same in this opinion.

consisted of] Judge Waldron's certainty, the depositions of the judge and of Perrine, and the instructions in the court file corroborating both."[34]

We agree that the post-conviction court erred when it took judicial notice of some of Judge Waldron's trial practices. However, as we will explain, the State's harmless error contention is not convincing. We will discuss these issues in order.

Trial courts may take judicial notice of facts that are:

> not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Md. Rule 5-201.

As this Court has explained: "What unites these various classes of information is not so much their nature as public or widely-known, but more their nature as *undisputed*—as one commentator has described it, falling into either the 'everybody around here knows that' category, or the 'look it up' category." *Abrishamian v. Washington Medical Group*,

[34] Mr. Perrine testified that he had no independent recollection of the jury instructions given at Mr. Christian's trial. He did testify his boilerplate instruction was inaccurate based on "the instructions that were in Judge Waldron's chamber's [sic] file." But the only evidence that the boilerplate instructions in the court file accurately mirrored what actually happened at trial was Judge Waldron's testimony. In effect, Mr. Perrine testified that no *Unger* instruction had been given because Judge Waldon said that none had been given. To the extent that there is probative value to this part of Mr. Perrine's testimony, it is dependent upon Judge Waldron's testimony. Mr. Perrine's testimony has very little, if any, independent probative value.

216 Md. App. 386, 413, (2014) (emphasis in original) (citing Lynn McLain, MARYLAND EVIDENCE, STATE & FEDERAL § 201:4(b)-(c), at 221, 237 (3rd ed. 2013)).

"The doctrine of judicial notice substitutes for formal proof of a fact when formal proof is clearly unnecessary to enhance the accuracy of the fact-finding process." *Lerner v. Lerner Corp*., 132 Md. App. 32, 40 (2000). And, as we explained in *Lerner*, "courts, trial and appellate, [may] take notice of their own respective records in the present litigation, both as to the matters occurring in the immediate trial, and in previous trials or hearings." *Id.* at 40–41 (quoting MCCORMICK ON EVIDENCE § 330, at 766 (2d ed. 1972)). However, taking judicial notice that documents are in a court file "does not mean accepting what they say as true, only that they exist as public records." *Abrishamian*, 216 Md. App. at 416. With this as background, we return to the post-conviction court proceeding.

Our first step is to clarify what the post-conviction court judicially noticed.

First, the court took judicial notice of the fact that a copy of the boilerplate and elements of the crime instructions had been entered into the court file of Mr. Christian's criminal case. This was entirely proper, and Mr. Christian does not suggest otherwise.

Second, the court stated that (emphasis added):

> What appears to be more at issue is the ability of this Court to take judicial notice of Judge Waldron's practice, for over 30 years on the bench, of placing an exact copy of the instructions he gave to the jury in the court file. Courts may take judicial notice of the operation and practices of the courts in this State. In the present case, the pool of people which would comprise the "everybody" in "everybody around here knows that" are the other Circuit Court judges, and possibly some court staff, who had worked in the courthouse and with Judge Waldron over those years. Would that the State or Christian had put forth additional evidence to support or rebut such a

> contention. *However, absent such evidence*, *this Court takes judicial notice of the fact that Judge Waldron's practice, as it pertained to the placement of jury instructions into the court file, is as described in his affidavit and deposition*.

Mr. Christian asserts that the post-conviction court erred because "'judicial notice,' [is] traditionally limited to matters of indisputable truth," and Judge Waldron's jury trial practices do not fall into that category. The State concedes that the post-conviction court erred when it concluded that the knowledge of "other Circuit Court judges, and possibly some court staff, who had worked in the courthouse and with Judge Waldron," satisfied Md. Rule 5-201's requirement that the judicially noticed facts are "generally known within the territorial jurisdiction of the trial court[.]" Both parties are correct.

However, the State asserts that the error was harmless because (emphasis in original):

> [The post-conviction court's] recitation of the evidence that he *actually considered* in support of his finding of fact amply supported his conclusion that the trial transcript was in error. Perrine had confirmed that he was reusing old "boilerplate" and that the transcript in this case was in error, Judge Waldron was certain he had stopped using the problematic language years earlier, and the written jury instructions in the file indicated that he remembered correctly, consistent with his own description of his habit. Such was the evidence cited by [the post-conviction court]: Judge Waldron's certainty, the depositions of the judge and of Perrine, and the instructions in the court file corroborating both.

The State's harmless error argument does not reflect the actual reasoning of the post-conviction court. If that court had been persuaded that the evidence presented to it was sufficient to rebut the presumption that the trial transcript was correct, then surely the court would have said so. But the court did not. Instead, and after twice commenting on the

absence of evidence corroborating or challenging Judge Waldron's testimony as to his procedures for instructing juries, the post-conviction court proceeded to take judicial notice of those practices. In effect, the State is asking us to hold that the evidence it presented to the post-conviction court had more probative weight than the post-conviction court concluded that it had. But assessing the probative value of evidence is the role of the trial court, and not the appellate court.

Third, the post-conviction court buttressed its conclusion by referring to its own personal experiences with Judge Waldron:

> Judge Waldron is nothing if not a creature of habit. This Court tried cases in front of Judge Waldron as an attorney and observed this practice. In addition, this Court sat with Judge Waldron during my orientation and was specifically instructed by him to continue this practice which Judge Waldron claimed had served him well throughout his career on the bench.

Mr. Christian argues:

> [The post-conviction court's] reliance on its own observations as the source of that judicial notice is a separate, independent error. . . . . The [post-conviction court] here explicitly relied on [its] personal experience trying cases in front of Judge Waldron and later receiving instruction from Judge Waldron during his judicial orientation to resolve the dispositive issue of whether the written instructions in the court file accurately reflected the oral instructions given at trial. Rule 18-102.11.[35]

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[35] Md. Rule 18-102.11 states in pertinent part:

> (a) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including the following circumstances:

In response, the State presents two contentions. First, and pointing to Md. Rule 8-131(a),[36] the State asserts that the contention is not preserved for appellate review because his counsel did not object. We agree. As a general rule, and even in cases in which a party asserts that a judgment must be reversed because the trial court violated the Code of Judicial Conduct, "the onus is on defense counsel to object in order to preserve an issue for review." *State v. Payton*, 461 Md. 540, 554–55 (2018) (quoting *Diggs v. State*, 409 Md. 260, 294 (2009)). However, appellate courts will look past a failure to preserve in cases in which the trial court's behavior is "egregious and repeated." *Id.* The post-conviction court's conduct in the present case was neither egregious nor repeated.

The State's second argument is premised on the notion that the harmless error doctrine applies to Md. Rule 18-102.11(a). The State has waived this contention because it cites neither authority nor reasoning to support it. *See, e. g., Tallant v. State*, 254 Md. App. 665, 689 (2022); *Rollins v. Cap. Plaza Assocs., L.P.*, 181 Md. App. 188, 202 (2008).

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(1) The judge has a personal bias or prejudice concerning a party or a party's attorney, or personal knowledge of facts that are in dispute in the proceeding.

* * *

[36] Md. Rule 8-131(a) states in pertinent part: "Ordinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"

4. The changes to the trial transcript

In its memorandum opinion, the post-conviction court struck the following sentence from the trial transcript: "Since this is a criminal case, you are judges, judges of both the law and the facts." The court ordered that the following was to be added in its place:

> The instructions that I give you about the law are binding on you. In other words, you must apply the law as I explain it to you in 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. It is your duty to decide the facts and apply the law to those facts.[37]

After oral argument, and at the invitation of this Court, the parties filed supplemental briefs to address two issues:

> 1. Whether the changes to the trial transcript ordered by the post-conviction court were consistent with the evidence presented to the court at the evidentiary hearing?
>
> 2. If the answer to the previous question is no, what is the appropriate appellate remedy?

The parties agree that there was no evidence to support the additions to the transcript ordered by the post-conviction court. They are correct—the evidence and contentions

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[37] In context, the court-ordered changes read as follows (new language in italics):

> You are not partisans. ~~Since this is a criminal case, you are judges, judges of both the law and the facts~~. *The instructions that I give you about the law are binding on you. In other words, you must apply the law as I explain it to you in 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. It is your duty to decide the facts and apply the law to those facts*. Your sole interest is to ascertain the truth from the evidence in the case.

presented to the post-conviction court pertained to whether the *Unger* instruction should be deleted. There was no evidence that supported the post-conviction court's finding that different language should be inserted in its place.

Mr. Christian argues that the post-conviction court's revision was just the latest "in the seeming endless parade of errors" associated with his conviction. He contends that, at a minimum, the case should be remanded to the post-conviction court for a new hearing presided over by a different judge. However, he also asserts that the court's error is one more reason why his post-conviction petition be granted. He asks for a new trial.

The State requests us to remand this case without affirmance or reversal to the post-conviction court pursuant to Md. Rule 8-604(d)(1)[38] with directions to the court for it to delete the language in question. According to the State:

> This Court's Order, providing for the circuit court to reconcile the amended transcript with the written jury instructions, would not require new legal

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[38] Md. Rule 8-604(d) states in pertinent part:

(d) Remand.

(1) Generally. If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

* * *

> argument before the circuit court, and the proceedings before that court may be limited by the scope of this Court's order.

The State asserts that such a procedure will result in a corrected record to enable us "to consider the legal issues raised at oral argument and in the parties' briefs."

It is clear that the post-conviction court erred when it ordered that additional language was to be added to the trial transcript. However, we believe that there is little to be gained by a limited remand. Instead, we will direct the post-conviction court to strike the four sentences in question as part of our disposition of this appeal on its merits. We turn to that issue.

5. The appropriate appellate remedy

Mr. Christian asserts that the judgment of the post-conviction court is irredeemably flawed. He argues that he is entitled to a new trial or, at a minimum, a *de novo* post-conviction hearing presided over by a different judge. The State concedes that the post-conviction court erred. It argues that the court's missteps should be treated as harmless errors. As we have explained, we do not agree. This leaves us with the State's remaining contention, which is that granting Mr. Christian a new trial because of what the State describes as Mr. Perrine's "erroneous entry" would be an "outrageous windfall." We do not agree with the State's characterization of Mr. Perrine's actions. Moreover, we believe that granting Mr. Christian a new trial is the appropriate remedy under the circumstances of this case. We will explain why we have reached these conclusions.

First, the State's characterization of Mr. Perrine's conduct as an "erroneous entry" distorts and trivializes what occurred at Mr. Christian's trial. At that time, Md. Rule 16-404(e) stated in pertinent part:

> Each court reporter assigned to record a proceeding shall record verbatim by shorthand, stenotype, mechanical, or electronic audio recording methods, electronic word or text processing methods, or any combination of these methods. . . . All proceedings held in open court, including opening statements, closing arguments, and hearings on motions, shall be recorded in their entirety, unless the court and the parties agree otherwise.[39]

The undisputed evidence before the post-conviction court was that Mr. Perrine deliberately failed to transcribe a portion of Mr. Christian's trial and instead substituted part of a transcript from a previous trial. It also is undisputed that he did so without notice to Mr. Christian or to counsel.[40] Moreover, Mr. Perrine did not disclose the possible inaccuracy in the trial transcript at Mr. Christian's first postconviction hearing, even though

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[39] In 2016, Rule 16-404 was amended. The current equivalent of former Rule 16-404 is Rule 16-503, which states in relevant part:

> (a) Proceedings to be Recorded.
> (1) Proceedings in the Presence of Judge. All trials, hearings, testimony, and other judicial proceedings before a circuit court judge . . . shall be recorded verbatim in their entirety by a person authorized by the court to do so, except that, unless otherwise ordered by the court, the person responsible for recording need not report or separately record an audio or audio-video recording offered as evidence at a hearing or trial.

[40] What was disputed was whether Judge Waldron was aware of, and thus implicitly approved, Mr. Perrine's use of the template. As we explained in footnote 23, *supra*, the post-conviction court found that that Judge Waldron "was not aware that the court reporter was using a template[.]"

by that time he knew that there was "a potential discrepancy" between the instructions given by Judge Waldron and the trial transcript and believed that it was "most likely" that no *Unger* instruction had been given.

All of this notwithstanding, it is the State's position that Mr. Christian or his lawyers somehow should have been on notice that the transcript was inaccurate. But the law does not require litigants to proceed on the assumption that the court reporter is failing to perform their duties. *See King v. State Roads Commission*, 284 Md. 368, 375 n.3 (1979) ("It is, of course, a party's responsibility to insure that a proper record is made. Nonetheless, we do not think that each party should be forced to constantly keep an eye on the court reporter to make sure every word is being recorded[.]")

We recognize a larger context. What happened in Mr. Christian's trial offends the principles of transparency, due process, and fairness that are integral to the Judiciary's mission. To accept the State's invitation to shrug off the improprieties that occurred in that case would, in our view, undermine the moral authority of the judicial process and erode the public confidence on which courts depend. We must decline the invitation.

We also acknowledge that responsibility for the problems with the trial transcript lies with the Judiciary. A court reporter's obligation is to accurately transcribe to the best of their abilities what is said in a court proceeding. This is a foundational principle of our justice system. Every litigant and the public expect and deserve no less.

For these reasons, we conclude that a new trial for Mr. Christian is the appropriate remedy in this very difficult and troubling case. We reverse the judgment of the Circuit

Court for Harford County and remand this case with instructions for the court to grant Mr. Christian's request for a new trial. Additionally, the court is to strike from the trial transcript the changes ordered by the post-conviction court.[41]

THE JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY IS REVERSED AND THIS CASE IS REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY HARFORD COUNTY.

[41] The post-conviction court ordered that page 16 of the transcript of Mr. Christian's trial for February 29, 2021, be modified to read as follows (new language in italics, deleted language stricken):

> You are not partisans. ~~Since this is a criminal case, you are judges, judges of both the law and the facts~~. *The instructions that I give you about the law are binding on you. In other words, you must apply the law as I explain it to you in 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. It is your duty to decide the facts and apply the law to those facts*. Your sole interest is to ascertain the truth from the evidence in the case.

Because the judgment of the post-conviction court has been reversed, the transcript should be modified to read as follows:

> 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.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0013s21cn.pdf