Circuit Court for Montgomery County
Case No. 26250C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3175

September Term, 2018

JAMES A. CALHOUN-EL

v.

STATE OF MARYLAND

Meredith,
Wells,
Wright, Alexander
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: June 4, 2020

James A. Calhoun-El, appellant, is an inmate at Jessup Correctional Institution, having been convicted in the Circuit Court for Montgomery County on November 3, 1981, of two murders. *See Calhoun v. State*, 297 Md. 563 (1983), *cert. denied sub nom. Tichnell v. Maryland*, 466 U.S. 993 (1984).[1]

PROLOGUE

In the decades since his 1981 convictions, Calhoun-El has filed multiple unsuccessful requests for postconviction relief, and made several trips to the appellate courts.

His most recent appearance in this Court resulted in the issuance of a reported opinion in *Calhoun-El v. State*, 231 Md. App. 285 (2016), *cert. denied*, 452 Md. 527 (2017), *cert. denied*, ___ U.S. ___, 138 S.Ct. 457 (2017). In that case, Calhoun-El sought to take advantage of the change in Maryland law flowing from *Unger v. State*, 427 Md. 383 (2012), and its progeny, relative to jury instructions that, at one point in this State's history, had advised jurors that they were judges of the facts **and the law**, based upon a statement to that effect in Article 23 of the Maryland Declaration of Rights.[2]

[1] Subsequent to the time of his conviction in 1981, the appellant adopted the surname of "Calhoun-El." We shall refer to him by that name throughout this opinion.

[2] Article 23 of the Maryland Declaration of Rights provides in paragraph one:

> In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.

In an opinion of the Court of Appeals filed on December 17, 1980—eleven months before Calhoun-El's trial—the Court of Appeals held that Article 23's mandate for juries to serve as judges of the law was not "all-inclusive, but . . . much more limited [in] scope." *Stevenson v. State*, 289 Md. 167, 177 (1980). The *Stevenson* Court concluded that, despite the seemingly broad language in Article 23, that provision of the Maryland constitution does not offend the due process guarantee of the Fourteenth Amendment of the United States Constitution because matters such as "the presumption of innocence and the prohibition on inferring anything from [the defendant's] silence," as well as "the State's burden of proof [to prove guilt] beyond a reasonable doubt . . . are not within the jury's Article 23 law-judging function, but are the subject of binding instructions by the judge." *Id*. at 188.

But Calhoun-El's trial counsel did not argue at his trial in 1981 that his trial judge's jury instructions regarding jurors being "judges of the law" were in conflict with the Court of Appeals's decision in *Stevenson*. And that was not one of the issues reviewed on appeal when his convictions were first affirmed by the Court of Appeals in 1983.

Three decades later, when the Court of Appeals recognized in *Unger* in 2012 that the clarification of Maryland law in *Stevenson* "set forth a new interpretation of Article 23 and established a new state constitutional standard," 427 Md. at 411, the Court of Appeals paved the way for persons who had been convicted prior to *Stevenson* to challenge convictions if the jury had been instructed that the trial judge's instructions on

the law were advisory only. Even though Calhoun-El's trial took place eleven months after *Stevenson* was filed, Calhoun-El sought to take advantage of *Unger's* change in the law by filing a motion to reopen his postconviction proceeding on July 5, 2012. His motion to reopen was denied by the circuit court, and, although we granted his application for leave to appeal in order to review his argument as to whether his instructions were contrary to the law as clarified by *Stevenson*, we ultimately concluded that the failure of his attorney to preserve the issue at trial was, as a matter of law, a waiver of the right to challenge the court's error via postconviction proceedings. *Calhoun-El*, 231 Md. App. at 299 ("we conclude as a threshold matter that appellant's claims were waived" (citing Maryland Code (2001, 2008 Repl. Vol.), Criminal Procedure Article ("CP"), § 7-106(b)(2)). Consequently, we affirmed the denial of that 2012 motion to reopen his postconviction proceedings. We did not decide the merits of Calhoun-El's argument that the instructions given in his case would not pass muster under current standards of review of the advisory-only issue. We noted in footnote 5 that the instructions "were not a model of clarity," although we also observed that the trial judge made an effort to distinguish the portion of the instructions that were "advisory." **We did not address whether the failure of trial counsel to object to the instructions relative to the jurors being "judges of the law" was ineffective assistance of counsel;** that issue was not raised in the 2012 motion to reopen, and was not before us when we issued our opinion in 2016.

Calhoun-El's 2018 Motion to Reopen Postconviction Proceedings

On September 11, 2018, Calhoun-El filed a detailed petition for postconviction relief that led to this appeal.[3] Armed with this Court's 2016 opinion that his trial attorney's failure to object to the advisory language in the jury instructions constituted a waiver of his right to claim directly in postconviction proceedings that the trial court committed a constitutional error, Calhoun-El argued in September 2018—for the first time, he contends—that he is entitled to postconviction relief because it was ineffective assistance of counsel for his trial attorney not to object to the court's "advisory" jury instructions, and ineffective assistance for appellate counsel and postconviction counsel not to adequately raise this issue previously. *Cf. Shortall v. State*, 237 Md. App. 60, 81 (2018) ("If there is a potentially meritorious argument that the instruction is erroneous, and there is no possible strategic benefit to the defendant from having the jury receive the arguably incorrect instruction, defense counsel renders deficient performance by failing to preserve that point for appeal."), *aff'd*, 463 Md. 324 (2019).

Calhoun-El's 2018 motion to reopen was summarily denied by the Circuit Court for Montgomery County on October 15, 2018, without a hearing.

[3] Although the caption Calhoun-El used on his motion, filed self-represented, was "Defendant's Petition for Post-Conviction Relief," the request was, in effect, a motion to reopen his post-conviction proceedings. We shall treat the petition as a motion to reopen.

Calhoun-El's 2018 Application for Leave to Appeal

After the circuit court denied Calhoun-El's 2018 motion to reopen his postconviction proceedings, and its order was docketed on October 15, 2018, Calhoun-El attempted to file an application for leave to appeal ("AFLA") challenging the denial of his motion to reopen his postconviction proceedings. Calhoun-El also filed a request for a waiver of the prepayment of costs for the AFLA that he was attempting to file in the Circuit Court for Montgomery County, arguing poverty based upon his incarceration. On January 4, 2019, the circuit court denied Calhoun-El's request for a waiver of the prepayment of costs associated with filing his AFLA, and did not transmit the AFLA to this Court. This timely appeal from that action of the circuit court followed.

QUESTIONS PRESENTED

Calhoun-El presents the following questions for our review, which we have reordered for our analysis:

1. Did the circuit court abuse its discretion by denying Calhoun-El's Motion to Waive Prepayment of Costs when Calhoun-El established that he is an indigent prisoner and that his claims are not frivolous?

2. Did the circuit court abuse its discretion by denying Calhoun-El's timely filed Application for Leave to Appeal and by not forwarding it to this Court?

For reasons we will explain herein, we will vacate the judgment of the circuit court and remand the case with instructions to enter an order waiving the prepayment of costs associated with filing Calhoun-El's AFLA, and, thereafter, to transmit Calhoun-El's AFLA to this Court. At this point, we are not ruling upon the merits of the issues in

Calhoun-El's AFLA; at this point, we decide merely that the AFLA should be filed, with prepayment of filing fees waived, and the AFLA should be transmitted to this Court for further consideration.

FACTUAL AND PROCEDURAL BACKGROUND

On November 3, 1981, a jury sitting in the Circuit Court for Montgomery County found Calhoun-El guilty of first-degree premeditated murder of a Montgomery County police officer, first-degree felony murder of a civilian, attempted murder of a second civilian, two counts of use of a handgun in the commission of a felony or crime of violence, robbery with a deadly weapon, and storehouse breaking. Calhoun-El was sentenced to death for the murder of the police officer, a term of life imprisonment for the murder of a civilian, 30 years of imprisonment for the attempted murder of a second civilian, 15 years of imprisonment for each of the handgun violations, and 20 years of imprisonment for robbery with a deadly weapon, all sentences to be served consecutive to each other. He was also sentenced to a concurrent term of 10 years of imprisonment for storehouse breaking. Calhoun-El noted a direct appeal.

Because the death penalty was imposed in Calhoun-El's case, his direct appeal was considered by the Court of Appeals. The Court of Appeals affirmed Calhoun-El's convictions and death sentence in *Calhoun v. State*, 297 Md. 563 (1983).

On January 7, 1985, Calhoun-El filed his first petition for postconviction relief to challenge the validity of his convictions. *See* Dkt. No. 364. He asserted numerous claims of error regarding the assistance of trial counsel, the jury selection process, several

of the trial court's instructions to the jury, the prosecutor's closing argument, and his sentencing proceeding. Pertinent to the instant appeal, Calhoun-El claimed that he was entitled to a new trial because the trial court erred when it instructed the jury that some of its instructions were advisory, which, according to Calhoun-El, made the instructions "potentially misleading" and gave the jury "wider latitude than should have been permitted." The postconviction court quoted the following excerpt as the challenged portion of the jury instructions:

> As to the instructions as I now get into the offenses themselves, and your function, as I said, you become the sole judges of the law and the facts. My instructions become advisory and you are not bound to follow them. Indeed, if you disagree, you may disregard entirely what I say. This doesn't mean that you ought to arbitrarily interpret the law so as to make it conform to the law that you would like to have or that you ignore clearly the existing law. Rather, you could resolve conflicting interpretations of the law and decide what law should be applied to the facts as you ladies and gentlemen determine them.

On August 2, 1985, the postconviction court rejected the claim that there was any error in the instruction regarding the portion of the court's instructions that were advisory only, stating:

> The instruction given in the context of the trial judge's entire instruction was fair and accurate. It was not misleading nor, taken as a whole, did it give the jury impermissible latitude. The makeweight nature of this particular claim justifies little further discussion except to comment upon waiver. . . . The matter is deemed waived by the failure to raise the matter at trial. Waiver is likewise present by virtue of the failure to raise the issue on [the previous direct] appeal.

Calhoun-El also claimed at that time that he was entitled to postconviction relief because he was denied effective assistance of trial counsel when his attorney failed to

object to a number of things, including the above quoted "advisory" jury instructions. With respect to all of those claims of ineffective assistance for failing to object at trial, the postconviction court stated: "It is not ineffective assistance of counsel to fail to object to that for which no valid objection lies."

In the ruling issued on August 2, 1985, the postconviction court rejected all arguments except Calhoun-El's claim that he was not advised of his right to allocution prior to his sentencing. On that basis only, the postconviction court granted Calhoun-El postconviction relief and awarded him a new sentencing proceeding.

But the Court of Appeals granted leave for both the State and Calhoun-El to appeal the judgment of the postconviction court to the Court of Appeals. *Calhoun v. State*, 306 Md. 692, 698 (1986). The Court of Appeals reversed that portion of the postconviction court's decision that had granted relief to Calhoun-El, and affirmed the portions of the postconviction court's ruling that had denied relief. Pertinent to the instant appeal, Calhoun-El did not argue to the Court of Appeals that his trial counsel had been ineffective for failing to object to the advisory verbiage in the instructions, even though Calhoun-El did argue in that appeal that he had been denied effective assistance of counsel in other respects. *Id*. at 728-29. He asked the Court of Appeals to review his ineffective assistance of counsel claim on the following grounds, which were summarized by the Court of Appeals as follows:

(H) INEFFECTIVE ASSISTANCE OF COUNSEL

> Calhoun contends that trial and appellate counsel were ineffective. As to trial counsel he makes five claims: (1) failure to investigate and

> present mitigating evidence; (2) failure to object to improper evidence; (3) failure to object to improper argument; (4) failure to inform Calhoun of his right of allocution; and (5) failure to object to instructions at sentencing. As to appellate counsel he claims error in failing to argue: (1) the issue of the selection of a prosecution-prone jury; (2) the failure of the trial court to excuse Calhoun from participating in suggestive in-court identification procedures; (3) the issue of failure to disclose grand jury testimony; (4) the issue of proper jury instructions; and (5) the question of improper closing argument at trial and sentencing.

Id. at 728-29. Although some jury instructions were reviewed by the Court of Appeals in its 1986 opinion, because we discern no comment in the Court of Appeals's opinion with respect to Article 23 or the extent to which the jurors were judges of the law as well as the facts, we infer that Calhoun-El did not assert as one of the grounds for his ineffective assistance of counsel claim in the Court of Appeals his trial counsel's failure to object to the trial court's explanation of which instructions on the law were advisory only. And, indeed, the State asserts in its brief in the present appeal that, "[o]n appeal [from the postconviction court's ruling], Calhoun-El did not challenge the post-conviction court's findings regarding the complained about [advisory] instruction itself or that Calhoun[-El]'s counsel was not [sic] ineffective for failing to object to the instruction. *See id.* [306 Md.] at 698-753."

The Court of Appeals remanded the case to the circuit court for entry of an order denying all postconviction relief to Calhoun-El. *Id.* at 753. Accordingly, the circuit court entered an order on September 17, 1986, denying Calhoun-El's 1985 petition for postconviction relief. *See* Dkt. No. 392.

Calhoun-El's Numerous Efforts to Obtain Postconviction Relief

On May 8, 1989, Calhoun-El filed another petition for postconviction relief, to which the State did not object, with respect to his death sentence. *See* Dkt. No. 402. As a result, the circuit court vacated Calhoun-El's death sentence. On June 19, 1990, Calhoun-El was re-sentenced to a term of life imprisonment for his conviction of first-degree premeditated murder of a Montgomery County police officer. That sentence was ordered to run consecutive to any and all sentences then being served. *See* Dkt. No. 518.

Between 1995 and 2009, Calhoun-El filed numerous motions in the circuit court seeking postconviction relief, without success.

***Unger* opinion filed May 24, 2012**

On May 24, 2012, the Court of Appeals announced, in *Unger v. State*, 427 Md. 383, 417 (2012), that a trial judge's instructions "telling the jury that all of the court's instructions on legal matters were 'merely advisory,' were clearly in error." In light of the Court of Appeals's opinion in *Unger*, Calhoun-El filed a motion to reopen his post-conviction proceeding on July 5, 2012, alleging that the jury instructions given at his trial improperly told the jury that part of the instructions were "advisory." *See* Dkt. No. 666. After the circuit court denied Calhoun-El's motion without a hearing, he filed an application for leave to appeal. *See* Dkt. Nos. 670, 676. This Court granted his application for leave to appeal on December 10, 2015, and scheduled the appeal for oral argument in 2016.

In the meantime, the Court of Appeals decided a series of post-*Unger* cases challenging convictions in cases in which the trial judge's instructions told jurors, consistent with Article 23, that they were the judges of the law as well as the facts, and the court's instructions on the law were merely advisory. As Chief Judge Barbera observed in *State v. Adams-Bey*, 449 Md. 690, 694 (2016), such "advisory only" instructions were customarily given in all cases in Maryland until 1980, when *Stevenson* was decided on December 17, 1980. Prior to *Stevenson*, she noted, based upon Article 23 and an implementing Maryland Rule, "we required judges under then-Maryland Rule 756b '[i]n every case in which instructions are given to the jury [to] instruct the jury that they are the judges of the law and that the court's instructions are advisory only.'" *Id.* But, in *Unger*, the Court had "held that a defendant could challenge his pre-*Stevenson* conviction through a postconviction proceeding notwithstanding that the defendant did not object to advisory only jury instructions at trial." *Id.* at 695. Further, Chief Judge Barbera explained, after *Unger*, the Court in *State v. Waine*, 444 Md. 692, 702-03 (2015), had reaffirmed *Unger* and held "that the constitutional standard set forth in *Stevenson*—that the jury is the judge of the law of the crime and the judge's remaining instructions on the law are binding—was a change in the law that must be applied retroactively; we further held [in *Waine*], pertinent to the case now before us, that a motion to reopen based on *Unger* satisfied the 'interests of justice' standard under the UPPA. [*Waine*, 444 Md. at 702-03.]" *Id.* at 696. And the Court had held in *Waine* that an instruction that did not meet the standard set forth in *Stevenson* constituted a structural

error. *Id.* at 696 (citing *Waine*, 444 Md. at 705). The *Adams-Bey* Court followed up this summary by stating, at *id*.:

> From this, we can discern that a petitioner whose conviction resulted from a trial in which the jury was given advisory only instructions is entitled to have his postconviction proceedings reopened because such clearly erroneous instructions implicate the petitioner's federal constitutional right to due process. To deny reopening a postconviction proceeding to a petitioner whose conviction rests upon an error of constitutional dimension not subject to a harmless error analysis would necessarily be an abuse of discretion as "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Gray* [*v. State*], 388 Md. [366,] at 383, 879 A.2d 1064 [(2005)] (internal quotation marks omitted).

The *Adams-Bey* Court ruled that this Court had correctly held that the circuit court had erred in refusing to reopen Adams-Bey's postconviction proceedings to consider his "advisory instruction" claims. Chief Judge Barbera explained:

> We conclude that the jurors at Respondent's trial received what were unquestionably advisory only instructions and, as a consequence of that structural error, Respondent is entitled to a new trial. The new constitutional standard announced in *Stevenson* is that the jury is the judge of the law of the crime and the judge's remaining instructions on the law are binding. 289 Md. at 180, 423 A.2d 558. **Because bedrock constitutional principles such as the presumption of innocence and the standard of proof "are not 'the law of the crime,'" the jury must be told that**. *Montgomery*, 292 Md. [84,] at 91, 437 A.2d 654 [(1981)]. Consequently, the latter portion of the *Stevenson* rule—that the jury is bound by the court's instructions on the law other than the substantive law of the crime—is necessary to render constitutional an advisory only instruction. **Lest there be any doubt, a jury instruction advising the jury that it is the judge of the law is an advisory only instruction. Such an instruction constitutes structural error if the court does not also inform the jury that it is bound by the presumption of innocence and the beyond a reasonable doubt standard**. *See Robertson v. State*, 295 Md. 688, 689, 457 A.2d 826 (1983) (per curiam) (concluding that the defendant "was entitled to an instruction that the court's comments on the burden of proof were not merely advisory but were binding upon the jury" and that

> the "[f]ailure to give the requested instruction constituted reversible error"); *Montgomery*, 292 Md. at 91, 437 A.2d 654 (concluding that the trial judge erred in advising the jury that all of his instructions were advisory because "certain bedrock characteristics" such as the presumption of innocence and standard of proof "are not 'the law of the crime'" and "are not advisory").
>
> Because the court's instructions to the jury at Respondent's trial did not follow the standard set forth by *Stevenson* and *Montgomery*, those instructions were structurally erroneous.

449 Md. at 705-06 (emphasis added).

***Calhoun-El v. State*, 231 Md. App. 285 (2016)**

When this Court granted Calhoun-El's AFLA in 2015, we directed the parties to brief three issues, and Calhoun-El described the three questions presented in his brief as follows:

> 1. In light of *Unger v. State*, 427 Md. 383, 48 A.3d 242 (2012), did the trial court at Calhoun-El's 1981 trial commit reversible error by instructing the jury that (1) as to the offenses with which Calhoun–El was charged, the jury was "the sole judges of the law and facts," (2) the court's instructions as to the offenses were "advisory," and (3) the jury was "not bound to follow" the instructions?
>
> 2. If the trial court committed reversible error, then in light of *Unger*, did defense counsel's failure to object to the instructions constitute a waiver?
>
> 3. If defense counsel's failure to object to the instructions did not constitute a waiver, then in light of *State v. Waine*, 444 Md. 692, 122 A.3d 294 (2015), did the circuit court abuse its discretion in denying Calhoun-El's motion to reopen his post-conviction proceeding and err in failing to vacate his convictions and award him a new trial?

Without reaching the merits of whether the trial court's instruction regarding the jurors being judges of the law was sufficiently compliant with *Unger* and cases decided by the Court of Appeals since *Unger*, this Court affirmed the judgment of the circuit

court—denying Calhoun's 2012 petition for postconviction relief—in a reported opinion filed on August 25, 2016, because we concluded that the failure of Calhoun-El's trial counsel to object to the advisory instructions during the trial constituted a waiver of the right to challenge the court's instructions by way of postconviction proceedings. *Calhoun-El v. State*, 231 Md. App. 285, 299-300 (2016), *cert denied*, 452 Md. 527 (2017), *cert denied*, 138 S. Ct. 457 (2017). In our 2016 opinion, after recounting the history of advisory jury instructions in Maryland, 231 Md. App. at 291-96, and summarizing the instructions at issue in Calhoun-El's case, *id*. at 297-98, we stated:

> Appellant concedes that his attorney did not object to these instructions. Appellant contends that the court erred in its instructions to the jury. **We need not address whether the circuit court's jury instructions were improper** in light of *Stevenson*, *Montgomery*, *Adams*, *Unger*, and *Waine*, **because, as we explain below, we conclude as a threshold matter that appellant's claims were waived**.

231 Md. App. at 299 (emphasis added).

We then explained why the claim that the instructions were flawed was deemed waived, and why we declined to exercise our discretion to excuse the waiver:

> Pursuant to the Maryland Uniform Postconviction Procedure Act, **"an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation . . . at trial."** Md. Code (2008 Repl. Vol.) § 7–106(b)(1)(i) of the Criminal Procedure Article ("CP"). Where a petitioner could have objected, but failed to do so, "there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation." CP § 7–106(b)(2). The waiver provision requiring an affirmative waiver from the defendant, however, applies only to fundamental rights. *Adams*, 406 Md. [240] at 262–63, 958 A.2d 295 [(2008)]. "An erroneous jury instruction, even on reasonable doubt, is not such a fundamental right requiring an affirmative 'knowing and intelligent' waiver." *Id.* at 263, 958 A.2d 295.

> Thus, **the mere failure to object to a jury instruction constitutes a waiver**. *Id.* at 263–66, 958 A.2d 295.
>
> Here, Calhoun-El concedes that he did not object at trial to the trial court's instructions. He argues, however, that pursuant to *Unger*, [427 Md. 383 (2012),] his claim is not waived.
>
> * * *
>
> Here, Calhoun-El's trial took place after *Stevenson* [289 Md. 167 (1980), *overruled by Unger v. State*, 427 Md. 383 (2012)]. Accordingly, general waiver principles apply. *See State v. Bowman*, 450 Md. 40, 41, 144 A.3d 1252 (2016), (remanding case to the circuit court to determine whether "Respondent waived any claim under *Unger* . . ., given that Respondent's trial occurred after this Court issued its opinion in *Stevenson*"). And **because there is no dispute that Calhoun-El's attorney did not object to the trial court's jury instructions, his claim of error in this regard has been waived**.
>
> * * *
>
> We decline to exercise our discretion to excuse Calhoun-El's waiver for several reasons. First, ***Stevenson* had been decided at the time of Calhoun-El's trial, and therefore, there existed a reasonable basis for Calhoun-El to object at trial to the alleged advisory nature of the instructions**. Second, exercising our discretion to excuse the waiver, and potentially reverse a conviction more than 35 years after a crime, would present the potential for unfair prejudice to the State. *See Cave v. Elliott*, 190 Md. App. 65, 84, 988 A.2d 1 (2010) (in deciding whether to exercise discretion pursuant to Rule 8–131(a), court looks to "whether the exercise of its discretion will work unfair prejudice to either of the parties") (quoting *Jones v. State*, 379 Md. 704, 714, 843 A.2d 778 (2004)). Third, the extensive litigation that already has occurred regarding "advisory" jury instructions weighs against exercising our discretion to review this unpreserved issue.

Id. at 300-03 (emphasis added).

Although we did not reach the merits of the argument that the jury instructions were fatally flawed, we observed in a footnote in that case:

> We do note, however, that although the instructions given here were not a model of clarity, the court clearly informed the jury that it would provide two sets of instructions, the first set being binding instructions on constitutional principles. When it finished instructing the jury on those principles, and it came to the section regarding the specific offenses, the court reiterated that the instructions that had just been given were binding constitutional instructions. It then explained that the next instructions, which were "advisory," related to the "offenses themselves."

231 Md. App. at 299 n.5. We did not express an opinion that the instructions adequately communicated to the jury that the it was not the judge of the law with respect to the "bedrock due process instructions on the presumption of innocence and the State's burden of proving the defendant's guilt beyond a reasonable doubt." *Waine*, 444 Md. at 704. Nor did we consider whether there was ineffective assistance of counsel relative to the advisory language in the instructions.

Calhoun-El's 2018 Petition for Postconviction Relief

On August 13, 2018, Calhoun-El filed another motion to reopen his post-conviction proceeding, which he captioned as "Defendant's Petition for Post-Conviction Relief." *See* Dkt. No. 746. (The circuit court's denial of Calhoun-El's 2018 petition, as amended, is the subject of the AFLA Calhoun-El was unable to successfully file because the circuit denied his request for waiver of prepaid fees on the grounds that the AFLA was "frivolous.") On September 11, 2018, he filed an amended version of his August 13 motion, which he captioned as "Defendant's Supplemental Petition for Post-Conviction Relief." *See* Dkt. No. 748. In his amended motion to reopen, he claimed that he was denied effective assistance of trial counsel because of counsel's failure to object to the advisory jury instructions, and was denied effective assistance of appellate counsel

because of counsel's failure to pursue an argument for relief on the basis that the instructions did not properly advise the jury which specific instructions were binding versus advisory only. The motion to reopen also raised the question of "whether the petitioner was denied effective assistance of counsel during his postconviction proceedings where counsel failed to properly argue that trial counsel was ineffective for failing to object to the trial court['s] 'advisory only jury instructions?'" (Capitalization altered.)

Calhoun-El's amended motion to reopen asserted that his allegations of ineffective assistance of counsel "have neither been waived nor abandoned by expressed waiver or by acquiescence, nor previously litigated . . . ." And the motion "prays for an opportunity" "to rebut the presumption of waiver of claims and/or make a showing of 'special circumstances' in order to overcome the presumption of waiver of a claim or claims."

By order dated October 9, 2018, which was entered on the docket on October 15, 2018, the circuit court summarily denied, without a hearing, Calhoun-El's amended petition to reopen his postconviction proceedings to consider his ineffective assistance of counsel claim. *See* Dkt. No. 750.

Calhoun-El's 2018 Application for Leave to Appeal and Attendant Request for Waiver of Prepaid Costs

On November 14, 2018, Calhoun-El, while self-represented, filed an application for leave to appeal the circuit court's ruling that had been entered on October 15, 2018. *See* Dkt. No. 751. The application was over 20 pages long, and clearly sought to raise the

issue of whether Calhoun-El had been denied effective assistance of counsel when his trial counsel failed to preserve for appeal an objection to the trial court's explanation of which instructions were binding and which were merely advisory, noting that the Court of Appeals had held in *State v. Adams-Bey*, 449 Md. 690, 705 (2016), that the jury "*must be told* that" the presumption of innocence and the burden of proof beyond a reasonable doubt are not advisory. (Citing *Montgomery*, 292 Md. at 91; emphasis in *Adams-Bey*.)

Among the arguments Calhoun-El included in his November 2018 AFLA were the following:

> Appellant was denied effective assistance of counsel at trial and on appeal, in violation of his rights guaranteed by the Fifth, Sixth, Fourteenth Amendment, and the Maryland Declaration of Rights. Counsel failed to object to and/or present as grounds for appeal the trial court's improper "advisory" jury instruction to the jury.
>
> The COA has held that anytime advisory only jury instructions are given, a structural error is created. And, as a consequence of that structural error, a new trial is warranted. See State v. Adams-Bey, 449 Md. 690, 705 (2016).
>
> In the instant case as already presented to this Court, the trial judge instructed the jury that all of the instructions as to the law of the crime are advisory and could be disregard[ed]:
>
> > Now, as I come to the instructions, as I said, you are bound to all the constitutional instructions that I have given, to Mr. Calhoun in this case. As to the instructions as I now get to the offenses themselves, and your function, as I said, you become the sole judges of [t]he law and the facts. My instructions become advisory and you are not bound to follow them. Indeed, if you disagree, you may disregard entirely what I say. This doesn't mean that you ought to arbitrarily interpret the law so as to make it conform to the law that you would like to have or that you ignore clearly existing law. Rather, you could resolve conflicting interpretations of the

law and decide what law should be applied to the facts as you, ladies and gentlemen determine.

In Adams-Bey, the COA considered the case in which the circuit court denied Adams-Bey's Motion to Reopen a Closed Post Conviction proceedings based on advisory only jury instruction. In ruling that the circuit court had abused its discretion in denying the reopen motion. Id. 449 Md. at 703. The COA held that the reasonable doubt standard is a bedrock constitutional principle and "are not the law of the crime," as such, "the jury must be told that." Adams-Bey, Jr., 449 Md. at 705 (citation omitted).

The COA explained that "a jury instruction advising the jury that it is the judge of the law is an advisory only instruction." In accord, "[s]uch [an] instruction constitutes structural error if the court does not also inform the jury that it is bound by . . . the beyond a reasonable doubt standard." Adams-Bey, 449 Md. at 705 (Citations omitted).

The instructions at Appellant's trial on the Law of the Offense violated the Maryland Constitution as interpreted in Montgomery and subsequent cases.

Montgomery held that where there is no dispute as to the Law of the Crime, it is reversible error to tell the jury that Court's instructions are advisory. 292 Md. at 89-90. There was no disputes as to the law in the Appellant's case, yet Judge Cave told the Appellant's jury that it could disregard all of his instructions on the specific offenses. This additional error separately entitles Appellant to a new trial.

* * *

Defense counsel's failure to object did constitute ineffective assistance of counsel because the trial took place prior to the Court of Appeals' decision in Montgomery.

The trial counsel should have known that in 1980, with Stevenson, the Court of Appeals began to reshape Maryland law regarding the proper interpretation of Article 23.

A confusion was created with the Court's instruction because the Court repeated the words beyond a reasonable doubt 12 times attached with [h]is explanation of the law of the crimes. He mentioned the reasonable

doubt requirement seven more times in the portion of the instructions he told the jury they could disregard . . . . [Quoting seven instructions regarding the offenses charged.]

* * *

Appellant's trial counsel should have been aware of Article 23's limited scope and "should have objected to the advisory nature of the instruction." Unger, 427 Md. at 408. Approximately one (1) year before Appellant's trial the COA decided Stevenson v. State, 289 Md. 167 (1980), which construed Art. 23 as limited [sic] the jury's role of deciding the law of non-constitutional "disputes as to the substantive 'law of the crime.'["] Unger, 427 Md. at 387-88 citing Stevenson, 289 Md. at 180). In 1981, the COA decided Montgomery v. State, 292 Md. 84 (1981), which concluded that the trial judge erred in advising . . . the jury that all of his instructions were advisory because "certain bedrock characteristics" such as the presumption of innocence and standard of proof "are not 'the law of the crime'" and "are not advisory". Montgomery, 292 Md. at 91.

In Adams-Bey, the COA held that an advisory only jury instruction is a "constitutional infirmity" which "is of the sort that 'will always invalidate the conviction.'" Adams-Bey, Jr., 449 Md. at 708 (quoting Sullivan, 508 U.S. at 279. Which requires a new trial. Id. 449 Md. at 708.

* * *

. . . Appellant prays for an opportunity ["to rebut the presumption of waiver of claims and/or make a showing of 'special circumstances' in order to overcome the presumption of waiver of a claim or claims."] See Curtis v. State, 284 Md. 132, [150-51,] 395 A.2d 464 (1978), cited in Holmes v. State, 401 Md. 429, [441,] 932 A.2d 698 (2007) (Observing that []the presumption of waiver had been overcome when Appellant showed that he ["]was not aware that his counsel might have been ineffective["]).

* * *

A motion to reopen in these circumstances is precisely what the legislature had in mind when it created the reopening provision found in Criminal Procedure Article §7-104. As enacted, Criminal Procedure Article §7-104 reads: "The court may reopen a postconviction proceeding that was previously concluded if the court determines that the action is in the interests of justice."

At the same time Calhoun-El filed the November 2018 AFLA, he also filed with the circuit court a "Request for Waiver of Prepaid Costs (Md. Rule 1-325)," *i.e*, Form CC-DC-089 (Rev. 08/2015). On that form, Calhoun-El affirmed, under the penalties of perjury, that he was an "indigent prisoner" and unable to prepay the required costs for the AFLA that he sought to file. *See* Dkt. No. 752. The circuit court docketed his AFLA and request for waiver of prepaid costs on November 14, 2018.

On November 20, 2018, the circuit court entered an order denying Calhoun-El's request for a waiver of prepaid costs because the AFLA that he sought to file "DOES appear, on its face, to be frivolous." *See* Dkt. No. 755. The order warned that, if the unwaived costs were not paid within 10 days, the pleading or paper would be considered withdrawn.

On November 21, 2018, the circuit court also apparently concluded, incorrectly, that Calhoun-El's AFLA was untimely filed, and entered a show cause order, directing Calhoun-El to show why his AFLA should not be stricken as untimely. *See* Dkt. No. 756. Calhoun-El answered the circuit court's show cause order, pointing out that his AFLA was timely filed because the 30-day deadline to file an AFLA began to run on October 15, 2018, the date the circuit court entered on the docket a judgment summarily denying his motion to reopen his postconviction proceeding, and his AFLA was filed on November 14 (the 30th day after October 15). *See* Dkt. No. 757.

On December 20, 2018, the circuit court entered a different show cause order. *See* Dkt. No. 759. The December 20 show cause order directed Calhoun-El to show cause

why he "failed to deposit with the Clerk of the lower court the filing fee required by Rule 8-201(b)," without any mention of his previously filed Form CC-DC-089. Calhoun-El answered the circuit court's December 20 show cause order, asserting that, having been an inmate at Jessup Correctional Institution for the past 40 years, he was indigent and unable to pay the required filing fees for his AFLA. *See* Dkt. No. 761. He therefore asked the circuit court to reconsider its November 20 decision denying his request for a fee waiver.

On January 4, 2019, the circuit court entered an order, in which a circuit court judge crossed-out the body of Calhoun-El's proposed language discharging the December 20 show cause order, and wrote "DENIED." *See* Dkt. No. 764.

Calhoun-El's 2019 Notice of Appeal and Attendant Request for Waiver of Costs

On January 24, 2019, Calhoun-El, self-represented, noted a direct appeal of the circuit court's order that was entered on January 4, 2019. *See* Dkt. No. 765.

The circuit court's appeals clerk, in a letter to Calhoun-El dated January 25, 2019, asked Calhoun-El to remit payment for the filing fee of $121.00 for his January 24 notice of appeal. In the letter, the appeals clerk advised that, if he was indigent, he needed to complete and return immediately the "Request for Waiver of Prepaid Appellate Costs for BOTH the Court of Special Appeals and the Circuit Court for Montgomery County."

On February 7, 2019, as instructed, Calhoun-El filed in the circuit court a "Request for Waiver of Prepaid Costs for Assembling the Record for an Appeal," *i.e.*, form no. CC-DC-091 (Rev. 08/2015). *See* Dkt. No. 768. On that form, he affirmed,

under the penalties of perjury, that he was an indigent prisoner without work release or an institutional job.

On February 11, 2019, the circuit court entered an order denying Calhoun-El's request for a fee waiver for his notice of appeal filed on January 24, 2019. *See* Dkt. No. 769. In the order, the circuit court stated:

> Other findings: appeal is frivolous, as it is an appeal from a denial of a motion for reconsideration. Defendant has filed at least 20 post-conviction motions, all without merit with one exception. There are at least 2 federal cases that were filed, as well.

Despite the court's denial of the request to waive the prepaid fees for the appeal noted on January 24, 2019, the circuit court clerk transmitted the record to this Court on March 25, 2019, and did not enter an order striking Calhoun-El's 2019 notice of appeal.

Calhoun-El's appeal was docketed in this Court as No. 3175, September Term, 2018. Private pro-bono counsel entered their appearance as counsel for Calhoun-El on May 3, 2019, and they paid the required filing fees for the instant appeal. And this Court held oral argument on the issue of whether Calhoun-El should have been allowed by the circuit court to file, without prepayment of costs, his AFLA challenging the denial of his 2018 motion to reopen his postconviction proceedings.

DISCUSSION

Filing Fees

The subject of our review in the instant appeal is the judgment of the circuit court that was entered on January 4, 2019, denying Calhoun-El's request for a waiver of the prepayment of costs for the 2018 AFLA that he sought to file in the circuit court for

transmittal to this Court. As background regarding filing fees, we note that Maryland law requires that, except for an appeal from the State Workers' Compensation Commission or an appeal by an individual claiming benefits from a decision of the Board of Appeals of the Maryland Department of Labor, no case may be docketed unless the plaintiff or appellant pays the required filing fee. Maryland Code (1974, 2013 Repl. Vol., 2019 Supp.), Courts and Judicial Proceedings Article ("CJP"), § 7-201(a). Pursuant to CJP § 7-201(b), however, indigent plaintiffs or appellants are granted a statutory right to obtain a waiver of the prepayment of filing fees upon filing a petition explaining an inability to pay due to indigency. CJP § 7-201(b) states:

Waiver of fees

(b) The circuit court shall pass an order waiving the payment in advance if:

> (1) Upon petition for waiver, it is satisfied that the petitioner is unable by reason of his poverty to make the payment; and
>
> (2) The petitioner's attorney, if any, certifies that the suit, appeal, or writ is meritorious.

The waiver of filing fees is also addressed in Maryland Rules 1-325 ("Waiver of Costs Due to Indigence -- Generally") and 1-325.1 ("Waiver of Prepaid Appellate Costs in Civil Actions"). For purposes of the instant appeal, we note the pertinent sections of Rules 1-325 and 1-325.1 provide:

RULE 1-325. WAIVER OF COSTS DUE TO INDIGENCE - - GENERALLY

(a) Scope. This Rule applies only to (1) original civil actions in a circuit court or the District Court and (2) **requests for relief that are civil in nature filed in a criminal action.**

Committee note: Original civil actions in a circuit court include actions governed by the Rules in Title 7, Chapter 200, 300, and 400. Requests for relief that are civil in nature filed in a criminal action include petitions for expungement and requests to shield all or part of a record.

(b) Definition. In this Rule, "prepaid costs" means costs that, unless prepayment is waived pursuant to this Rule, must be paid prior to the clerk's docketing or accepting for docketing a pleading or paper or taking other requested action.

* * *

(e) Waiver of Prepaid Costs by Court.

(1) *Request for Waiver.* An individual unable by reason of poverty to pay a prepaid cost and not subject to a waiver under section (d) of this Rule may file a request for an order waiving the prepayment of the prepaid cost. The request shall be accompanied by (A) the pleading or paper sought to be filed; (B) an affidavit substantially in the form approved by the State Court Administrator, posted on the Judiciary website, and available in the Clerks' offices; and (C) if the individual is represented by an attorney, the attorney's certification that, to the best of the attorney's knowledge, information, and belief, there is good ground to support the claim, application, or request for process and it is not interposed for any improper purpose or delay.

Cross reference: See Rule 1-311 (b) and Rule 3.1 of the Maryland Lawyers' Rules of Professional Conduct.

(2) *Review by Court; Factors to be Considered.* The court shall review the papers presented and may require the individual to supplement or explain any of the matters set forth in the papers. In determining whether to grant a prepayment waiver, the court shall consider:

(A) whether the individual has a family household income that qualifies under the client income guidelines for the Maryland Legal Services Corporation for the current year, which shall be posted on the Judiciary website; and

(B) any other factor that may be relevant to the individual's ability to pay the prepaid cost.

(3) *Order; Payment of Unwaived Prepaid Costs.* **If the court finds that the party is unable by reason of poverty to pay the prepaid cost and that the pleading or paper sought to be filed does not appear, on its face, to be frivolous, it shall enter an order waiving prepayment of the prepaid cost. In its order, the court shall state the basis for granting or denying the request for waiver.** If the court denies, in whole or in part, a request for the waiver of its prepaid costs, it shall permit the party, within 10 days, to pay the unwaived prepaid cost. If, within that time, the party pays the full amount of the unwaived prepaid costs, the pleading or paper shall be deemed to have been filed on the date the request for waiver was filed. If the unwaived prepaid costs are not paid in full within the time allowed, the pleading or paper shall be deemed to have been withdrawn.

(Emphasis added.)

RULE 1-325.1. WAIVER OF PREPAID APPELLATE COSTS IN CIVIL ACTIONS

(a) Scope. This Rule applies (1) to an appeal from an order or judgment of the District Court or an orphans' court to a circuit court in a civil action, and (2) **to an appeal as defined in subsection (b)(1) of this Rule seeking review in the Court of Special Appeals or the Court of Appeals of an order or judgment of a lower court in a civil action.**

(b) Definitions. In this Rule, the following definitions apply:

(1) *Appeal.* **"Appeal" means an appeal, an application for leave to appeal to the Court of Special Appeals**, and a petition for certiorari or other extraordinary relief filed in the Court of Appeals.

* * *

(3) *Prepaid Costs.* "Prepaid costs" means . . . the filing fee charged by the clerk of the appellate court.

> **Cross reference:** See the schedule of appellate court fees following Code, Courts Article, § 7-102 and the schedule of circuit court fees following Code, Courts Article, § 7-202.
>
> **(c) Waiver.**
>
> (1) *Generally.* **Waiver of prepaid costs under this Rule shall be governed generally by section (d) or (e) of Rule 1-325, as applicable . . . .**[4]

(Emphasis added.)

With these legal principles in mind, we turn to the question presented in the instant appeal.

> **"Did the circuit court abuse its discretion by denying Calhoun-El's Motion to Waive Prepayment of Costs when Calhoun-El established that he is an indigent prisoner and that his claims are not frivolous?"**

Calhoun-El contends preliminarily that the circuit court erred in applying Rule 1-325, including the "frivolousness" standard under Rule 1-325(e)(3), because, he posits, "Rule 1-325 by its express terms, does not apply to applications for leave to appeal in a criminal case." He asserts that the scope of Rule 1-325, as applied to a criminal case, is narrow. In support of his claim, he cites the note of the Standing Committee on Rules of Practice and Procedure that appears below Rule 1-325(a). The note states: "Requests for relief that are civil in nature filed in a criminal action include petitions for expungement and requests to shield all or part of a record." Because an "application for leave to

[4] Rule 1-325(d) provides for the clerk of court to waive payment of prepaid costs in cases in which the party is represented by certain pro bono programs or legal organizations such as the Legal Aid Bureau, Inc. or the Office of the Public Defender.

appeal" is not one of the examples listed in the Rules Committee's note, Calhoun-El asserts that Rule 1-325 does not govern his 2018 AFLA, in which he sought appellate review of the denial of his motion to reopen his post-conviction proceeding pursuant to Maryland Code (2001, 2018 Repl. Vol., 2019 Supp.), Criminal Procedure Article ("CP"), § 7-104.

In the alternative, Calhoun-El asserts that, even if Rule 1-325 does apply, the circuit court erred in denying his request for a fee waiver because he established that he is indigent, and his 2018 AFLA was not "frivolous" on its face. In support of his assertion, he argues that it is not a "frivolous position to suggest that the necessary implication of this Court's 2016 ruling in Calhoun-El's case[, *i.e.*, 231 Md. App. 285,] is that his trial lawyers provided ineffective assistance of counsel by failing to object to the jury instructions in his case."

The State disagrees with both of Calhoun-El's contentions; it argues that Rule 1-325 plainly applies to Calhoun-El's AFLA, and that the circuit court properly exercised its discretion in finding that his AFLA was frivolous. The State contends that Calhoun-El's AFLA is frivolous because the merits of the claims raised therein were fully resolved by the postconviction court in 1985. The State argues that, pursuant to the law of the case doctrine as described in *Holloway v. State*, 232 Md. App. 272, 279 (2017), the postconviction court's 1985 ruling remains binding on Calhoun-El. The State also argues that Calhoun-El's claim of ineffective assistance of counsel is waived because, when he sought appellate review of the post-conviction court's 1985 judgment, he failed to assert

as grounds any reason relating to the trial court's "advisory-only" jury instructions. The State also notes that, as of 2018, Calhoun-El had already made "almost two dozen challenges to the constitutionality of the trial court's instructions and none of them were successful."

A.

As a preliminary matter, we respond to the State's reference to "almost two dozen" prior challenges regarding the trial court's instructions. As far as we can see, Calhoun-El has raised only one previous challenge to the advisory nature of his trial court's instructions since the Court of Appeals issued its landmark opinion in *Unger* in 2012. That one prior post-*Unger* challenge by Calhoun-El resulted in the reported opinion in 2016 in which we held that Calhoun-El's trial counsel had waived the right to challenge the advisory nature of the jury instructions because trial counsel failed to raise an objection at trial, even though he was on actual or constructive notice of the issue because the Court of Appeals had issued its ruling in *Stevenson* eleven months before Calhoun-El's trial. Calhoun-El's petition to reopen postconviction proceedings in 2018 appears to be the first time since *Unger* that he has asserted that his trial attorney was ineffective for failing to preserve an objection to the court's instructions regarding the advisory nature.

But we agree with the State, and disagree with Calhoun-El, with respect to whether Rule 1-325 applies to his request for a waiver of the prepayment of fees for the filing of his 2018 AFLA. In Maryland, a postconviction proceeding "does not constitute

a part of the original criminal cause, but is an independent and collateral **civil inquiry** into the validity of the conviction and sentence[.]" *Maryland State Bar Ass'n v. Kerr*, 272 Md. 687, 689-90 (1974) (emphasis added). As the Court of Appeals has explained: "A post-conviction proceeding, often called a 'collateral proceeding,' . . . is a collateral attack designed to address alleged constitutional, jurisdictional, or other fundamental violations that occurred at trial." *Mosley v. State*, 378 Md. 548, 559-60 (2003) (citing *Perry v. State*, 357 Md. 37, 72 (1999); *Davis v. State*, 285 Md. 19, 22 (1979)). In *Grandison v. State*, 425 Md. 34, 56 (2012), the Court of Appeals quoted from the United States Supreme Court's holding in *Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987), which reinforced the view that, in Maryland's State courts, a postconviction proceeding is, indeed, a civil action:

> Postconviction relief is even further removed from the criminal trial than is discretionary direct review. **It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature.** It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction.

(Emphasis added.)

Here, Calhoun-El's 2018 AFLA sought appellate review of the circuit court's 2018 denial of his petition to reopen his postconviction proceeding pursuant to CP § 7-104. A motion to reopen a postconviction proceeding is a civil action because it is "an independent and collateral civil inquiry" into the validity of his convictions and sentence. *Maryland State Bar Ass'n*, 272 Md. at 689-90. Therefore, his AFLA falls within the scope of Rule 1-325.1(a), which states: "This Rule applies . . . to an appeal as defined in

subsection (b)(1) of this Rule [which, for purposes of the Rule, defines an "Appeal" to include "an application for leave to appeal to the Court of Special Appeals"] seeking review in the Court of Special Appeals . . . of an order or judgment of a lower court in a civil action." And, the procedure for obtaining a waiver of the prepayment of filing fees pursuant to Rule 1-325(e) applies by virtue of Rule 1-325.1(c)(1), which states: "Waiver of prepaid costs under [Rule 1-325.1] shall be governed generally by section . . . (e) of Rule-135, as applicable."

B.

Having determined that Rule 1-325(e) applies to Calhoun-El's request for a waiver of the prepayment of filing fees for his 2018 AFLA, we also conclude that the circuit court erred when it denied Calhoun-El's request for a fee waiver under Rule 1-325(e).

A circuit court's decision to grant or deny a request for a waiver of fees and costs under Rule 1-325 is reviewed for abuse of discretion. *Torbit v. State*, 102 Md. App. 530, 536 (1994) (citing *Wigginton v. Wigginton*, 16 Md. App. 329 (1972)). The Court of Appeals has explained that, under an abuse of discretion standard, a circuit court judge must "use his or her discretion soundly and the record must reflect the exercise of that discretion. Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner[.]" *Jenkins v. State*, 375 Md. 284, 295-96 (2003) (quoting *Campbell v. State*, 373 Md. 637, 665-66 (2003)). In addition, an abuse of discretion has been said to occur "when the ruling is 'clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result.'" *North v. North*, 102 Md. App. 1, 13 (1994)

(citations omitted). But "a ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling." *Id.* at 14. As Judge Alan Wilner explained in *North*:

> The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. **That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective.** That, we think, is included within the notion of "untenable grounds," "violative of fact and logic," and "against the logic and effect of facts and inferences before the court."

102 Md. App. at 14 (emphasis added).

In this case, it appears to us that the circuit court concluded that there was nothing to differentiate Calhoun-El's 2018 AFLA from the large number of petitions and motions for postconviction relief previously filed in his case. In the order entered on February 11, 2019, the circuit court stated:

> Other findings: appeal is frivolous, as it is an appeal from a denial of a motion for reconsideration. **Defendant has filed at least 20 post-conviction motions, all without merit with one exception**. There are at least 2 federal cases that were filed, as well.

(Emphasis added.)

It is true that Calhoun-El has been a frequent filer of requests for the courts to re-examine his 1981 conviction. And, due to the complexity of the *Unger* issue and the changes in the law during the past decade, we can understand why the distinguishing aspect of this umpteenth petition for postconviction relief may not have been immediately apparent. But, in light of the sea change in Maryland law recognized in *Unger, Waine*,

and *Adams-Bey*, combined with the fact that this Court ruled in Calhoun-El's own case in 2016 that he was precluded from obtaining relief in that proceeding *because his trial attorney had failed to preserve an objection* to the advisory nature of the trial judge's jury instructions despite being on notice of the "advisory-only" issue by virtue of the ruling in *Stevenson*—*see Calhoun-El*, 231 Md. App. at 299-300—Calhoun-El's 2018 petition cannot be fairly characterized as "frivolous," regardless of whether he will be able to ultimately succeed on the merits. A review of the assertions made in Calhoun-El's 2018 AFLA (portions of which were quoted at length above) does not support a summary conclusion that the arguments are frivolous or "patently meritless," *Torbit*, 102 Md. App. at 537.

We therefore conclude that denying Calhoun-El's request for a fee waiver on the basis that his AFLA was frivolous was an abuse of discretion. *Cf. Adams-Bey*, 449 Md. at 703-04 (holding that circuit court abused its discretion by denying a motion to reopen where the parties disputed "whether the instructions given at Respondent's trial were sufficiently 'advisory' to run afoul of due process").

As noted above, the ultimate merits of Calhoun-El's claim of ineffective assistance of counsel are not before us in *this* appeal; we are called upon only to consider whether all of the arguments he sought to raise in his 2018 AFLA are so devoid of possible merit that they were rightly dismissed out of hand as frivolous.

We do not decide at this juncture whether—if the AFLA is granted and Calhoun-El's arguments are considered on appeal—the appellate courts could conclude that the

trial court's instructions adequately explained to Calhoun-El's jury which specific instructions on the law were *not* merely advisory, and adequately explained the constitutional limits to the court's instruction to the jurors that they were "the sole judges of the law and the facts." But the merits of the potential arguments likely to be raised by the State are not so pellucidly clear that a court could conclude from the face of the AFLA that Calhoun-El's arguments have *no* chance of success and need not be even considered.

In *Adams-Bey*, 449 Md. at 706, the Court of Appeals found the trial court's instructions in that case and its predecessors were constitutionally deficient because the courts' "admonishment that the jury was the judge of the law" had "fail[ed] to instruct that the jury was bound by the courts' instructions on the law other than the substantive law of the crime." The Court emphasized in *Adams-Bey* "that the constitutional infirmity at issue here is of the sort that 'will always invalidate the conviction.' *Sullivan*[*v. Louisiana*,] 508 U.S. [275,] at 279, 113 S.Ct. 2078 [(1993)]." *Id.* at 708. That arguable infirmity appears to be at the heart of the argument Calhoun-El raises in his 2018 AFLA, in which he contends that his trial counsel was ineffective for failing to make an objection that could have entitled him to the sort of relief granted in *Adams-Bey* and numerous other cases since *Unger* was decided in 2012.

Accordingly, we conclude that the circuit court erred in rejecting Calhoun-El's 2018 AFLA and the accompanying request for waiver of prepaid costs. On remand, the circuit court shall grant Calhoun-El's request for waiver of prepaid costs, and shall

transmit his 2018 AFLA to this Court for further consideration pursuant to Maryland Rule 8-204.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED. CASE REMANDED FOR ENTRY OF AN ORDER WAIVING PREPAYMENT OF COSTS FOR THE APPLICATION FOR LEAVE TO APPEAL, AND UPON ENTRY OF SAID ORDER, THE CIRCUIT COURT SHALL TRANSMIT THE APPLICATION FOR LEAVE TO APPEAL TO THIS COURT. COSTS TO BE PAID BY MONTGOMERY COUNTY.