Circuit Court for Anne Arundel County
Case No. 02-K-91-002144

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 104

September Term, 2021

STATE OF MARYLAND

v.

JAMES D. PROCTOR

Berger,
Shaw,
Sharer, J. Frederick
(Senior Judge, Specially Assigned)

JJ.

Opinion by Shaw, J.

Filed: January 19, 2022

This is an appeal from an order of the Circuit Court for Anne Arundel County granting post-conviction relief to appellee, James Proctor, because the advisory only jury instructions given in his case "resulted in structural error," trial counsel was ineffective in failing to object at trial, and his appellate counsel was ineffective in failing to raise the jury instruction issue on direct appeal. As a result, the post-conviction court awarded him a new trial. The State has appealed and presents the following questions for review:

1. Whether the post-conviction court erred in granting Proctor a new trial?

    a. Where Proctor's trial occurred after *Stevenson v. State*, 289 Md. 167 (1980), and Proctor failed to object at trial to the court's putative "advisory-only" jury instructions on the reasonable doubt standard, does this Court's decision in *Calhoun-El v. State*, 231 Md. App. 285 (2016), dictate that the "advisory-only" instruction issue is waived?

    b. Where Proctor previously litigated other claims regarding the trial court's reasonable-doubt instructions but did not assert a claim that the instructions were impermissible "advisory-only" instructions, is the issue of the putative "advisory-only" jury instructions waived or, in the alternative, foreclosed by the law of the case?

    c. Were the jury instructions on reasonable doubt not impermissible "advisory-only" instructions?

    d. Did the post-conviction court err in granting Proctor relief on the alternative basis of ineffective assistance of counsel (a) because Proctor did not advance an ineffective-assistance claim and the State had no notice of it, (b) because the ineffective-assistance claims are waived or *res judicata*, and/or (c) because the ineffective-assistance claims lack merit?

For the reasons outlined below, we reverse.

BACKGROUND

In September 1981, James Proctor was tried in the Circuit Court for Anne Arundel County on multiple charges, including first degree murder.[1] At the conclusion of the presentation of evidence, the court instructed the jury as follows:

> Under Article 23 of the Maryland Constitutuion [sic], the jury in a criminal case is the final arbiture [sic] of disputes between the State and the Defendant, as to the substantivety [sic] of law of the crimes with which he is charged. That means the actual charges themselves, as well as the evidence which has been presented to you, any comments of mine relative to these matters are advisory only and are not binding on you. Moreover it is only these aspects of the law that counsel may dispute in their argument. Bear in mind that in considering the substantivety [sic] of law involved, you are not privileged to make new laws. You apply the law as you find it to be and not what it should be.
>
> By virtue of the same constitutional provision, all other aspects of the law such as the burden of proof, the requirement of unanimity of your body in making your decision or the validity of the statute or common law involved are of no concern to you. And my instructions relative to these matters are binding on you and you may not disregard them. Your decision as to guilt or innocence of the accused must be unanimous under the standards which will be explained to you later on.
>
> I wish foremost to impress upon you that you should not reach any conclusion or draw any inference from anything I may have said or may say or from the tone of my voice or the manner in which I advise you. The Court or I, have no opinion as to the guilt or innocence of the accused and it is not my function to have such an opinion. This decision is solely yours and may . . . should be made based on the facts arrived from competent testimony which has been presented for your

[1] For the purposes of this appeal, we will not detail the circumstances surrounding Proctor's underlying crimes.

consideration from both the State and the Defense, as applied to the law as you find it to be. . . .

You are advised that the Indictment itself forms no part of the evidence in this case. It's principle [sic] function is to inform the accused of the nature and the date of the crime which he has been charged. . . .

In arriving at your verdict, you are advised that in this State an accused is entitled throughout the entire proceedings to the presumption of innocence. The burden constantly rests on the State to convince you beyond a reasonable doubt to a moral certainty that every fact material to the guilt of the accused, including every circumstance that enters into the greater degree of the crime charged.

Reasonable doubt as the name applys [sic] is a doubt based on reason. A doubt for which you can give a reason . . . . It is such as would cause a reasonable person, after careful and impartial consideration of all the evidence to be so undecide [sic] that he or she cannot say that he or she has a abiding conviction of the defendants [sic] guilt. Put another way, it is such a doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions of his own life. However, it is not a fancilful [sic] doubt nor a whimsical doubt or a doubt based on pure conjecture. It is a doubt which as it implies is based on reason. On the other hand, proof beyond all doubt has never been required. To prove guilt beyond a reasonable doubt, it is not necessary that every conceivable miraculous incident consistent with innocence be negated. Nor is the State required to establish guilt to a mathematical or a scientific certainty, for this would prevent any conviction based upon circumstantial evidence. To a moral certainty means, certainty based upon convincing grounds of probability. . . .

No greater degree of certainty is required when the evidence is circumstantial than it is direct. In either case, you must be convinced beyond a reasonable doubt of the guilt of the Defendant and if you are not so convinced, you must find the Defendant not guilty.

> Now, in this case, we have eleven counts in the indictment that has been placed against the Defendant, James Proctor. . . . You may find the Defendant guilty or not guilty as to any one or more of the counts but your verdict must be reached on the basis of the evidence as it separately relates to each individual count. . . .
>
> If you are not convinced of the guilt of the Defendant beyond a reasonable doubt, you should find him not guilty. However, if you are convinced of his guilt beyond a reasonable doubt, you should find him guilty. . . .

Following deliberations, appellee was convicted of first-degree murder and various sexual offenses and theft crimes. He was sentenced to life imprisonment and two concurrent fifteen-year terms. Appellee appealed to this Court, and his conviction was affirmed with the exception of his theft charges. *See James D. Proctor v. State*, No. 397, Sept. Term 1982 (filed Jan. 19, 1983). Thereafter, he filed and later withdrew without prejudice, his first post-conviction petition. In July 1991, appellee filed a second petition for post-conviction relief which he amended in August 1992 and was denied in October 1992. This Court denied his leave to appeal. *See James D. Proctor, Sr. v. State*, No. 124, Sept. Term 1992 (filed Apr. 29, 1993). Appellee then sought habeas corpus relief in the federal district court in 1995 and was granted relief, but the case was later reversed on appeal. *See Proctor v. Sacchet,* 217 F.3d 840 (4th Cir. 2000) (unreported).

In October 2005, Proctor filed his first motion, pro se, to reopen the post-conviction proceedings. The motion was denied in March 2006, and this Court denied his leave to appeal. *See James David Proctor, Sr. v. State*, No. 390, Sept. Term 2006 (filed June 22, 2006). In November 2007, he filed a second motion to reopen post-conviction proceedings which was supplemented by counsel in February 2008. The motion was denied in May

2008. Leave to appeal was also denied. *See James David Proctor v. State*, No. 808, Sept. Term 2008 (filed Nov. 20, 2008).

In April 2016, Appellee filed a third motion, with counsel, to reopen post-conviction proceedings, which was supplemented and amended. The third motion is the basis for this appeal, where Appellee argued, *inter alia*, that the jury instructions were "advisory only" and as a result he was entitled to relief based upon *Unger v. State*, 427 Md. 383 (2012), *State v. Waine*, 444 Md. 692 (2015), and *Adams-Bey v. State*, 449 Md. 690 (2016). On March 24, 2017, the circuit court reopened post-conviction proceedings and later conducted a hearing on the merits. On November 25, 2020, the court granted a new trial as post-conviction relief. The court's opinion was filed on December 9, 2020 and stated:

> Because Petitioner's trial took place post-*Stevenson* and pre-*Montgomery*, this case does not fall within the purview of the retroactive application of *Unger v. State*, and falls squarely under *Calhoun-El*. Accordingly, as a threshold matter, this Court finds that Petitioner has waived his allegations of error as to the "advisory only" instruction, and post-conviction relief cannot be granted on that basis.
>
> This Court does find, however, that the reasonable doubt instruction that was also advisory in nature resulted in structural error such that it falls under the Court of Appeals decision in *Adams-Bey*. This Court further finds that both trial counsel and the appellate counsel were ineffective in failing to object to the instruction at trial and failing to raise the issue on direct appeal, respectively. As such, this Court finds that the Petitioner is entitled to a new trial.

The State filed an application for leave to appeal, which we granted.

STANDARD OF REVIEW

As an appellate court, we review the post-conviction court's factual findings with deference unless they are clearly erroneous. *See Newton v. State*, 455 Md. 341, 351 (2017) (citation omitted). The lower court's legal conclusions, however, are reviewed without any such deference. *See id.* at 351-52 (citation omitted). A post-conviction court's order granting a new trial is reviewed for an abuse of discretion. *State v. Adams-Bey*, 449 Md. 690, 702 (2016) (citation omitted). "We do not reverse a trial court's discretionary determination unless it is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Faulkner v. State*, 468 Md. 418, 460 (2020) (citation omitted). When the lower court does not adhere to the correct legal standards, it has abused its discretion. *See id.* at 460-61 (citations omitted). Under the Criminal Procedure Article of the Maryland Code, § 7-109, if an aggrieved party's application for leave to appeal within the post-conviction context is granted, "the Court of Special Appeals may . . . affirm, reverse, or modify the order appealed from" or "remand the case for further proceedings."

DISCUSSION

I. Advisory-only jury instructions

"Advisory only instructions have a tortured history in [the State of Maryland]." *State v. Adams-Bey*, 449 Md. at 694. The origin, Article 23 of the Maryland Declaration of Rights, provides, "[i]n 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 1980, the Court of Appeals, in *Stevenson v. State*, 289 Md. 167 (1980) addressed whether Article 23 violated the due process clause of the United States Constitution. Determining that it was not violative, the Court held that juries have a limited role. *Id.* at 176, 178. They may decide the law related to non-constitutional disputes as to "'the law of the crime,' . . . or 'the definition of the crime,' as well as 'the legal effect of the evidence before (the jury).'" *Id.* at 178 (citations omitted). "[A]ll other aspects of law (e. g., the burden of proof, the requirement of unanimity, the validity of a statute) are beyond the jury's pale, and that the judge's comments on these matters are binding upon that body." *Id.* at 180.

A year later, in *Montgomery v. State*, 292 Md. 84 (1981), the Court of Appeals clarified that jury instructions were advisory only when "the jury is the final arbiter of the law of the crime." *Id.* at 89. The trial court had instructed the jury that "anything that I will now tell you about the law will be . . . advisory. And because it is advisory . . . you may pay absolutely no attention to what I tell you about the law . . . ." *Id.* at 86. The advisory instructions specifically included instructions on reasonable doubt. *Id.* at 86-87. The Court held that because the issue of reasonable doubt is "indispensable to the integrity of every criminal trial" the trial judge erred when he told the jury that his instructions regarding reasonable doubt were not binding and were advisory. *Id.* at 91.

In 2008, the Court of Appeals in *State v. Adams*, 406 Md. 240, 261, 265-66 (2008), held that the failure at the appellee's 1979 trial, (pre-*Stevenson*), to object to advisory-only jury instructions and his subsequent failure to raise the issue on direct appeal precluded post-conviction relief. Subsequently in *Unger v. State*, 427 Md. 383 (2012), the Court of

Appeals held that "the *Stevenson* and *Montgomery* opinions set forth a new interpretation of Article 23 and established a new state constitutional standard." *Id.* at 411. The Court held that a "failure to object to advisory only jury instructions in criminal trials prior to *Stevenson* will not constitute a waiver." *Id.* at 391.

State v. Waine, 444 Md. 692 (2015), decided in 2015, affirmed *Unger* and held that the giving of an advisory instruction was structural error. *Id.* at 705. As a result, the Court of Appeals vacated Waine's conviction, *id.*, notwithstanding the fact that Waine had not objected during trial to the invalid instructions. *Id.* at 697. Shortly thereafter, in *Calhoun-El v. State*, 231 Md. App. 285 (2016), this Court affirmed the denial of a motion to reopen post-conviction relief, stating that appellant waived his right to contest the jury instructions as being advisory-only because he did not object at trial or raise the issue on direct appeal. *Id.* at 290, 299, 303. We held *Stevenson*, decided in 1980, was the turning point in Maryland jurisprudence and because "appellant's trial took place after *Stevenson*. . . . general waiver principles apply." *Id.* at 300-301.

In 2016, the Court of Appeals in *Adams-Bey* held that the circuit court abused its discretion when it denied the defendant's motion to reopen his post-conviction petition. *Id.* at 703. Appellee there argued the jury instructions given at his 1978 trial, (pre-*Stevenson*), were unconstitutional because, *inter alia*, the jury was not informed that the burden of proof and the presumption of innocence instructions were binding, with the trial judge concluding "[g]entlemen, that concludes the *advisory instructions.*" *Id.* at 696-98 (emphasis in original). The Court of Appeals clarified "[l]est 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." *Id.* at 705. The Court of Appeals emphasized "that the constitutional infirmity at issue here is of the sort that 'will always invalidate the conviction.'" *Id.* at 708 (citation omitted).

A. Waiver – Failure to Object at Trial

The State argues that appellee's claims for post-conviction relief are waived because he did not object at trial to the reasonable doubt jury instructions, citing *Calhoun-El.* Appellee argues that the language used by the court violated *Stevenson* and failed to properly address the principle of reasonable doubt, as well as the State's burden of proof. Thus, there was no waiver. Appellee distinguishes his case from *Calhoun-El* by arguing that in *Calhoun-El*, the trial court did make an appropriate dichotomy between advisory and binding instructions. In appellee's case, the trial judge did not make clear that the instructions on reasonable doubt and the state's burden of proof were binding. In addition, appellee did not have the benefit of the Court of Appeals ruling in *Montgomery*.

In both *Calhoun-El* and the instant case, "[t]he wrinkle . . . is the timing of appellant's trial." *Calhoun-El*, 231 Md. App. at 300. In *Calhoun-El*, the defendant's trial occurred in November 1981. *Id.* at 287. Appellee's trial was held in September 1981; both were in between *Stevenson* and *Montgomery*. Like Calhoun-El, appellee argues that this Court should consider the law to have been finalized in *Montgomery*, not *Stevenson*. *Id.* at 300. But as we said before and reiterate now, "the Court's interpretation of Article 23 originated in the *Stevenson* opinion. . . . *Montgomery* merely 'reaffirmed' the '*Stevenson* interpretation of Article 23,' . . . and 'reinforced' the '*Stevenson* interpretation

of Article 23.'" *Calhoun-El*, 231 Md. App. at 300-301 (citations omitted). Because *Stevenson* had been decided at the time of appellant's trial, "there existed a reasonable basis for appellant to object at trial to the alleged advisory nature of the instructions." *Id.* at 303. As a result, his claim was waived.

The Court of Appeals decision in *Adams-Bey* is not dispositive. We note that Adams-Bey's trial preceded *Stevenson* and did not involve a waived claim. *Adams-Bey*, 449 Md. at 696, 703. There, the Court held that an instruction constitutes structural error where a court advises a jury that it is the judge of the law of the crime but does not inform the jury that it is bound by the presumption of innocence and the beyond a reasonable doubt standard. *Id.* at 705. In *Adams-Bey*, the trial judge instructed: "[i]n arriving at your verdict, *you're advised* that in this State an accused is entitled throughout the entire proceedings to the presumption of innocence." *Id.* at 697 (emphasis in original). In the case at bar, the jury was instructed: "*you are advised* that in this State an accused is entitled throughout the entire proceedings to the presumption of innocence." (emphasis added). But there are key differences as well. In *Adams-Bey*, the judge stated: "*You're further advised* that the burden is on the State to prove beyond a reasonable doubt not only that the offense was committed but also it was the defendant who is the person who committed these offenses." 449 Md. at 697 (emphasis in original). In appellee's trial, the judge instructed: "[A]ll other aspects of the law *such as the burden of proof . . . are of no concern to you. And my instructions relative to these matters are binding on you and you may not disregard them.*" (emphasis added). The judges in *Adams-Bey* and appellee's case also ended the jury instructions differently. In the former the judge concluded: "Gentlemen,

that concludes the *advisory instructions.*" *Adams-Bey*, 449 Md. at 698 (emphasis in original). In the present case, the judge did not make such a conclusory statement.

B. Waiver – Previous Litigation

The Uniform Post-Conviction Procedure Act provides that, except where there are "special circumstances," "an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation . . . on direct appeal . . . or . . . in any other proceeding that the petitioner began." Md. Code, Crim. Proc., § 7-106(b). A petitioner waives his claim if it "had not been raised at trial or in a previously-filed appeal, application for leave to appeal, or post-conviction petition." *State v. Smith*, 443 Md. 572, 601 (2015) (citations omitted). "When a petitioner could have made an allegation of error at [such] a proceeding . . . but did not make an allegation of error, there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation." Md. Code, Crim. Proc., § 7-106(b)(2). Furthermore, the law of the case doctrine bars re-litigation not only of claims that were decided in prior appeals, but also any claims "that could have been raised and decided." *Holloway v. State*, 232 Md. App. 272, 282 (2017).

Appellee litigated a claim regarding the reasonable-doubt instructions in his direct appeal, but he did not argue that they were advisory-only. He asserted that the trial court erred and improperly shifted the burden of proof on him while instructing the jury about reasonable doubt. Appellee had not objected at trial and he requested plain error review. We held that the judge's statement was a mere "slip of the tongue." Appellee did not raise a claim regarding advisory-only instructions in his prior post-conviction proceedings or

applications for leave to appeal. In his first motion to reopen post-conviction proceedings, he alleged error regarding the reasonable doubt jury instruction because the court equivocated between "reasonable doubt," "to a moral certainty," and "convincing grounds of probability"; by using inappropriate phrases such as "would cause you to hesitate in the graver matters of life"; by allowing the State to make inappropriate comments during closing arguments; and by allowing the State to clarify reasonable doubt using prohibited language, and that the upshot was the "reasonable doubt instruction unconstitutionally reduced the state's burden of proof" thus violating *In re Winship*, 397 U.S. 358 (1970). He also accused his trial, appellate, and post-conviction counsel of being ineffective. His application for leave to appeal from the denial of this motion added nothing substantively different.

Similarly, in his second motion to reopen post-conviction proceedings, he challenged the jury instructions on reasonable doubt because the "jury was instructed that they could find Petitioner guilty based on 'moral certainty' defined as 'convincing ground[s] of probability'" which effectively lowered the State's burden of proof. The supplement to the second motion elaborated on Proctor's claims, but in no way alleged that any jury instructions were invalid because they were advisory-only, and neither did his application for leave to appeal.

Nevertheless, appellee argues his claim is not waived. When appellee proceeded with his appeal in 1982, and any filings thereafter, *Stevenson* and *Montgomery* had been decided. Thus, he could have challenged the jury instructions as being advisory-only. As

a result, he has waived his claim under the Post-Conviction Act and under the law of the case doctrine.

C. Merits

Assuming, *arguendo*, that appellee's claim is not waived, this Court will address the merits. The trial court instructed the jury as follows:

> Under Article 23 of the Maryland Constitutuion [sic], the jury in a criminal case is the final arbiture [sic] of disputes between the State and the Defendant, as to the substantivety [sic] of law of the crimes with which he is charged. *That means the actual charges themselves, as well as the evidence which has been presented to you, any comments of mine relative to these matters are advisory only and are not binding on you.* Moreover it is only these aspects of the law that counsel may dispute in their argument. Bear in mind that in considering the substantivety [sic] of law involved, you are not privileged to make new laws. You apply the law as you find it to be and not what it should be.
>
> *By virtue of the same constitutional provision, all other aspects of the law such as the burden of proof, the requirement of unanimity of your body in making your decision or the validity of the statute or common law involved are of no concern to you. And my instructions relative to these matters are binding on you and you may not disregard them.* Your decision as to guilt or innocence of the accused must be unanimous under the standards which will be explained to you later on.

(emphasis added).

The post-conviction court held that

> [w]hile there is no question that the trial court initially told the jury that his instructions regarding "all other aspects of the law such as the burden of proof, the requirement of unanimity of your body in making your decision or the validity of the statue [sic] or common law" were binding upon them and may not be disregarded, the trial court implicitly undid that instruction by "advising" the jury "that in this State the accused is entitled

> throughout the entire proceedings to the presumption of innocence." It should also be noted that in his instructions the trial court made the additional statements which clearly implied that his instructions as to the burden of proof and presumption of innocence were advisory only. . . . Such instructions clearly amount to advisory only instructions that "include expressly or by implication the presumption of innocence standard and the standard of proof" and amount to structural error.

In so doing, the court pointed to a single instance where the trial court used "should" rather than "must":

> If you are not convinced of the guilt of the Defendant beyond a reasonable doubt, you *should* find him not guilty. However, if you are convinced of his guilt beyond a reasonable doubt, you *should* find him guilty.

(emphasis added). The post-conviction court then pointed out two instances where the trial court qualified an instruction with the phrase "you are advised that":

> *You are advised that* the Indictment itself forms no part of the evidence in this case. It's principle [sic] function is to inform the accused of the nature and the date of the crime which he has been charged. . . .
>
> In arriving at your verdict, *you are advised that* in this State an accused is entitled throughout the entire proceedings to the presumption of innocence. The burden constantly rests on the State to convince you beyond a reasonable doubt to a moral certainty that every fact material to the guilt of the accused, including every circumstance that enters into the greater degree of the crime charged.

(emphasis added).

We observe that the trial judge specified that the instructions on reasonable doubt "are binding on you and you may not disregard them." Unlike *Adams-Bey*, where the trial

court instructed the jurors that it was "purposely us[ing] the term 'advise' since in a criminal case, under Maryland law, you are the judges of both the law and the facts," *id.* at 697, here the judge told the jurors that the instruction on the reasonable-doubt standard was binding: "if you find that the State has failed to prove beyond a reasonable doubt the Defendant killed the deceased, the Defendant *must* be found not guilty." (emphasis added).

We hold that while the judge's use of the word "advise" may have been inartful, in light of caselaw, it merely "told" the jury that these were its instructions. Likewise, the use of the term "should" did not create an implication that the jury could disregard the instruction that they were told was binding. The court clearly delineated the jury's responsibility by stating:

> By virtue of the same constitutional provision, all other aspects of the law such as the burden of proof, the requirement of unanimity of your body in making your decision or the validity of the statute or common law involved *are of no concern to you*. And my instructions relative to these matters *are binding on you and you may not disregard them*.

(emphasis added).

II. Ineffective assistance of counsel

A. Notice of claim

The State argues it had no notice of appellee's *Strickland* claim and that the post-conviction court inappropriately ruled on this claim *sua sponte*. Appellee argues that at the March 24, 2017 hearing on the motion to reopen postconviction proceedings, his attorney alleged that his trial counsel's representation was deficient and that he was

prejudiced, as a result. The State responds that no argument was made at the hearings nor was any evidence adduced.

In order for a defendant to prove his counsel provided ineffective assistance, he must prove two things: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In our review of the record, we found that appellee's counsel did make a *pro forma* statement regarding *Strickland* and alleging ineffective assistance:

> I would only supplement that in the sense that perhaps there's a potential down the road for – as it relates to waiver and as it relates to ineffective assistance of counsel under the *Strickland* standard, I would only add for purposes of today's proceedings that the trial counsel's representation of my client fell below the objective standard of what would be effective assistance of counsel and that my client was, in fact, prejudiced as a result of that ineffective assistance of counsel and the constitutionally defective jury instructions that were provided by the court.

Here, appellee provided no notice, apart from the *pro forma* statement noted *supra*, at either of his post-conviction hearings or in his pleadings in his third motion to reopen that would have alerted the State he would be asserting these claims. Nor did appellee provide any evidence at the hearings or in his pleadings from which the post-conviction court could assess whether his claims were valid. For example, there was no testimony at either of his hearings from any of his counsel with respect to trial strategy at the time his

trial occurred, etc. Hence, the post-conviction court should have declined to rule on this claim *sua sponte*.

B. Waiver

Appellee raised no claims of ineffective assistance of counsel in his direct appeal. In his original post-conviction petition, he raised seventeen allegations but none related to jury instructions and his subsequent application for leave to appeal. Appellee raised various allegations of ineffective assistance against trial counsel, but all of these were rejected and the allegations were on entirely different bases than failing to object to advisory-only jury instructions. In his first motion to reopen the post-conviction petition and the subsequent application for leave to appeal (and the amendment thereto), he again claimed ineffective assistance of counsel by his post-conviction and trial counsel, but not on the basis he now claims. Similarly, his second motion to reopen, supplement thereto, and subsequent application for leave to appeal alleged ineffective assistance on the part of his trial, appellate, and post-conviction counsel, but not on this basis.

Appellee argues there is no waiver because, §7-106(b) requires intelligent and knowing waiver "with respect to errors which deprived a petitioner of fundamental constitutional rights." *McElroy v. State*, 329 Md. 136, 140 (1993). He asserts that this was the first allegation of ineffective assistance of counsel to be raised post-*Unger* and post-*Adams-Bey*. "Prior to these cases, it cannot be said that the failure to include allegations of ineffective assistance of counsel as to advisory-only instructions on the presumption of innocence and the standard of proof was made 'intelligently and knowingly.'"

The State analogizes this case to *State v. Syed*, 463 Md. 60, where the defendant also raised ineffective assistance claims in his post-conviction petition, then moved to reopen, and sought to advance a new claim of ineffective assistance. *Id.* at 68-70, 103-04. The Court of Appeals there ruled that, unlike when a defendant seeks to litigate an ineffective assistance of counsel claim in a motion to reopen and has not previously litigated any ineffective assistance of counsel, Syed had waived the new ground for ineffective assistance. *Id.* at 103.

The State further argues that if the basis of the post-conviction court's decision was the trial court's use of the phrase "convincing ground of probability" as rejected in *Himple v. State*, 101 Md. App. 579, 582-83 (1994), Proctor's waiver of that ground of ineffective assistance of counsel was *res judicata*. Proctor alleged ineffective assistance for failing to object to the instruction on that basis in his first and second motions to reopen. The court, with respect to his second motion to reopen, rejected that claim due to waiver because Proctor had not argued it in the original petition. We hold his claim is barred by waiver and/or *res judicata*.

In addition, this Court does not consider the law on advisory-only instructions to have been clarified only after *Unger* and *Adams-Bey*. With *Stevenson* and *Montgomery*, there was more than enough caselaw for Proctor to argue that his counsel were ineffective for not objecting to the jury instruction because it was advisory-only. Because Proctor did not use this opportunity, as noted *infra*, in his direct appeal, original post-conviction, or either of the first or second motions to reopen, he has now waived it.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED; COSTS TO BE PAID BY APPELLEE.