

21 No. 21-6548

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES CALHOUN-EL,

Petitioner

v.

STATE OF MARYLAND

Respondent.

FILED
DEC 02 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

On Petition for a Writ of Certiorari to the
Maryland Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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Pro se

QUESTION PRESENTED

Whether the lower courts violates the equal protection clause when it denies to a similarly situated individual relief that it had previously given to several other similarly situated individuals, as the Maryland Court of Appeals held in Unger v. State.

PARTIES TO THE PROCEEDING

James Calhoun-El, petitioner on review, was the appellee below.

The State of Maryland, respondent on review, was the appellant below.

RELATED PROCEEDINGS

All proceedings directly related to this petition include:

- James Calhoun-El v. State of Maryland, No.26250C (Judgment denied Md. Cir. Ct. 10/15/2018).
- James Calhoun-El v. State of Maryland, No. 3175 Sept. Term, 2018 (Md. Ct. Spec. App. June 4, 2020); remanded to No. 26250C, unreported, State v. Calhoun-El, No. 177 Sept. Term 2020 (Md. Ct. of App. Aug. 10, 2020) Judgment withdrawn, James Calhoun-El v. State of Maryland, No. 2786 Sept. Term, 2018 (Md. Ct. Spec. App. March 13, 2021) Judgment denied, Calhoun-El v. State of Maryland No. 125 Sept. Term 2021, (Md. Ct. of App. Aug. 2, 2021) Judgment denied. Calhoun-El v. State of Maryland No. 125 Sept. Term 2021, (Md. Ct. of App. Oct. 22, 2021) Judgement denied.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 21

JAMES CALHOUN-EL,
Petitioner

v.

STATE OF MARYLAND
Respondent.

On Petition for a Writ of Certiorari to the
Maryland Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

James Calhoun-El respectfully petitions for a writ of certiorari to review the judgment of the Maryland Court of Appeals in this case.

OPINIONS BELOW

The Maryland Court of Appeals' opinion is not reported. Pet. App. 1a-22a. That court's order denying reconsideration is not reported. Pet. App. 23a-34a. The Maryland Court Special Appeals' opinion is unreported. Pet. App. 120a-155a. The Circuit Court for Montgomery County opinion is not reported. Pet. App. 35a.

(1).

IN THE
SUPREME COURT OF THE UNITED STATES

No. 21

JAMES OATHON-ER
Petitioner
.v.

STATE OF MARYLAND
Respondent

On Petition for Writ of Certiorari
Maryland Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

James Oathon-Er respectfully petitions for a writ
to certiorari of review of the judgment of
Maryland Court of Appeals in this case.

OPINIONS BELOW

The Maryland Court of Appeals' opinion is set
forth at pp. 19-22. This court's order
denying reconsideration is set forth at pp. 19-20.
The Maryland Court of Appeals' opinion is set
forth at pp. 1509-1525. The
District Court for Montgomery County opinion is set
forth at pp. 389-390.

(t)

JURISDICTION

The Maryland Court of Appeals entered judgment on August 2, 2021. Petitioner filed a timely motion for reconsideration, which was denied on October 22, 2021. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment, U.S. Const. amed. VI, provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment, U.S. Const. Section 1. provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws.
JURISDICTION

The Maryland Court of Appeals entered judgment on August 8, 2001, Plaintiff filed a timely motion for reconsideration, which was denied on October 25, 2001. This Court's injunction is unbroken under 28 U.S.C. § 1287(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment, U.S. Const. amend. VI, provides:

...in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

The Fourteenth Amendment, U.S. Const. Section 1 provides:

...in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

The procedural history of this case is both unusual and complex. On November 3, 1981, a jury in the Circuit Court for Montgomery County, Maryland, the Honorable Judge William Cave presiding, found the Petitioner guilty of first-degree murder, felony murder, and a number of lesser offenses. Pet. App. 36a-88a. Petitioner's trial counsel failed to object to the jury instructions even though they were advisory only instructions that violated the new constitutional standard set forth in Stevenson v. State, 289 Md. 167 (1980).

On November 10, 1981, Judge Cave sentenced Petitioner to death on the charge of first-degree murder, and to life plus 80 years for the other offenses. The Maryland Court of Appeals affirmed the convictions and sentence on direct appeal. See Calhoun v. State, 297 Md. 563 (1983). Petitioner did not raise a challenge, on direct appeal, to the advisory only jury instructions.

On January 7, 1985, Petitioner filed his first motion for post-conviction relief. Petitioner raised a number of issues in that petition, including that Judge Cave had improperly told the jury that his instructions as to the offenses were advisory and could be disregarded. After a hearing, the Circuit Court for Montgomery County, Maryland rejected this challenge to the advisory instructions at Petitioner's trial, saying that Petitioner's trial counsel had waived the issue by failing to object.

On May 8, 1989, Petitioner filed a

STATEMENT OF THE CASE

Supplemental Petition for Post Conviction Relief. On June 2, 1989 the State conceded that Petitioner was entitled to a new sentencing hearing. Following a sentencing hearing, a jury determined that the evidence against Petitioner was insufficient to prove beyond a reasonable doubt that petitioner was a principal in the first-degree murder of which petitioner was convicted, and on June 19, 1990, Petitioner's death sentence was vacated and he was sentenced to life imprisonment on the first-degree murder charge.

Petitioner raised the advisory instruction issue again in a January 17, 2001, petition for post-conviction relief. That petition was denied without a hearing on February 5, 2001.

On April 1, 2003, Petitioner filed a Motion for a New Trial, arguing that the advisory instructions at petitioner trial entitled petitioner to a new trial based on the Fourth Circuit decision in Jenkins v. Hutchinson, 221 F.3d 679 (4th Cir. 2000)(holding that jury instructions indicating that the reasonable doubt standard was advisory only violated the defendant's constitutional rights). That claim was denied without a hearing on April 4, 2003. On May 12, 2003, Petitioner filed a Motion to Reopen for Post Conviction Relief alleging both ineffective assistance of counsel for failure to object to the advisory instructions at trial and requesting a new trial based on the advisory instructions. The motion was denied without a hearing on May 20, 2003.

which following Petitioner's next raised the advisory instructions issue in a Motion for New Trial filed on October 10, 2003, that was denied without a hearing on June 29, 2004. Petitioner again raised the advisory instructions issue again in 2007 in response to the Maryland Court of Appeals' opinion in *State v. Adams*, 171 Md. App. 562, 668 (2005). That request was denied without a hearing on April 4, 2008. Petitioner again raised the advisory instructions in a Motion to Reopen for Post Conviction Relief on December 18, 2009. That request was also denied without a hearing on January 10, 2010. Petitioner filed a Motion to Reopen again on July 12, 2012, following the Maryland Court of Appeals' decision in *Unger v. State*, 427 Md. 383 (2012). The circuit court denied Petitioner motion without a hearing on December 3, 2012. On December 10, 2015, the Maryland Court of Special Appeals granted Petitioner's Application for Leave to Appeal. On December 21, 2016, the Maryland Court of Special Appeals denied Petitioner's appeal on the grounds that his trial occurred after *Stevenson* (even though it occurred before *Montgomery v. State*, 429 Md. 84 (1981)) and, therefore, Petitioner's counsel had waived petitioner's objection regarding the advisory jury instructions the trial court delivered to the jury. The Maryland Court of Special Appeals also declined to excuse the waiver pursuant to Maryland Rule 8-131(a).

Petitioner argued that Stevenson and Montgomery jointly set forth a new constitutional standard. Petitioner argued that based on Unger, Petitioner did not waive his objection to the advisory jury instructions at issue because Petitioner's trial happened after Stevenson, but before Montgomery. The Maryland Court of Special Appeals rejected this argument and held that Stevenson alone set the new constitutional standard, and that only Defendants whose trials occurred before Stevenson where the Defendants failed to object to advisory instructions were not barred by the doctrine of waiver from asserting that argument on appeal. *Calhoun-El v. State*, 231 Md. App. 285, 302-303 (Ct. Spec. App. 2016).

On August 9, 2018, Petitioner filed the pro se pleading that is the subject of this appeal. Although captioned as a Petitioner for Post-Conviction Relief, the pleading set out the prior post-conviction petitions Petitioner filed and alleged that his trial counsel and direct appeal counsel provided ineffective assistance of counsel, respectively, for failing to object to the trial court's unconstitutional advisory only instructions and for failing to raise that issue on appeal. Pet. App. 89a-119a. In its conclusion, the pleading clearly stated that the "[c]ourt should reopen the previously concluded post conviction proceeding since the 'Interests of Justice' warrants a reopening in this case." On October 15, 2018, the circuit court denied the motion to reopen without a hearing in a

On ~~the~~ ~~no~~ brief order, Pet. App. 35a, the trial court denied Petitioner's motion for postconviction relief. On September 11, 2018, Petitioner filed a detailed petition for postconviction relief that led to this appeal. Armed with this Court's 2016 opinion that his trial attorney's failure to object to the trial court's "advisory" language in the jury instructions to him constituted a waiver of his right to claim directly in postconviction proceedings that the trial court committed a constitutional error, Petitioner argued for the first time that Petitioner 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 Petitioner 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 jury received the arguably incorrect instruction, defense counsel renders deficient performance by failing to preserve that point for appeal."), aff'd, 463 Md. 324 (2019). Petitioner's 2018 motion to reopen was denied summarily by the Circuit Court for Montgomery County on October 15, 2018, without a hearing. 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 postconviction motions, all without merit with one exception.** There are at least 2 federal cases that were filed, as well. Pet. App. 120a-155a.

Pet. App. 120a-155a.

On June 4, 2020, the Maryland Court of Special Appeals judges Meredith, Wells, and Wright granted Petitioner application for leave to appeal, ruling that Petitioner was entitle to waiver of cost, but also stated that the trial and appellant counsel were ineffective for not objecting to the 'advisory' jury instruction and that counsel were ineffective for not raising it on appeal. Pet. App. 120a-155a. Calhoun-El v. State, No. 3175, Sept. Term 2018 (June 4, 2020).

After the first panel granted the application for leave to appeal the second panel of judges Nazarian, Leahy, and Zarnoch, in Calhoun-El v. State, No. 3175, Sept. Term 2018 (March 31, 2021) ruled that trial counsel was not required to object to the instructions, and any challenge by appellate counsel to the instructions on appeal would have been without merit. Pet. App. 156a-157a.

Petitioner filed for a Writ of Certiorari in the Maryland Court of Appeals. On August 2, 2021, Petitioner Writ of Certiorari to the Maryland Court of Appeals was denied as there has been no showing that review by certiorari is desirable

and in the public interest, by Senior Judge Robert N. McDonald. Pet. App. 1a.-22a.

On September 3, 2021, Petitioner filed a Motion for Reconsideration. On October 22, 2021, Chief Judge Joseph M. Getty, denied the Motion for Reconsideration. Pet. App. 23a.-34a.

**REASONS FOR GRANTING THE
WRIT**

1. The Court of Appeals of Maryland has held that the Maryland State Court had decided an

important question of federal law that has not been, but should be, settled by this Court. The Maryland Court commit an error so important that it must be corrected immediately.

In Petitioner most recent appeal before the Maryland Court of Special Appeals in December 2016, Petitioner argued that the Court's decisions in *Stevenson v. State*, 289 Md. 167 (1980) and *Montgomery v. State*, 29 Md. 84 (1981) combined to set a new constitutional standard prohibiting advisory only jury instructions. Therefore, Petitioner argued, because his trial occurred before *Montgomery*, Petitioner counsel had not waived his objection to the advisory only instructions given at trial. However, in denying that appeal, the Maryland Court of Special Appeals held that *Stevenson* alone set the new constitutional standard. See *Calhoun-El v. State*, 231 Md. App. 285, 299-302 (2016). As a result, the Maryland Court of Special Appeals ruled that because Petitioner's trial occurred after *Stevenson*, Petitioner trial counsel and appellate counsel had waived his right to challenge the advisory only instructions as unconstitutional. Id. The necessary conclusion from the Maryland Court of Special Appeals' decision that *Stevenson*

also was sufficient to establish the clear constitutional standard is that Petitioner's trial lawyers had an obligation to object to jury instructions that allowed the jury to disregard the court's instructions on basic constitutional rights and to treat them as under Strickland v. Washington, 466 U.S. 668 (1984). This is exactly what Petitioner argued in his pro se motion to reopen post-conviction petition: Pet. App. 90a.-
121a.

121a. Petition is denied to the extent
Petitioner claims that the court's instructions
was (were) not clear, binding, & advisory.
Petitioner's trial counsel failed to object to
binding instructions that were binding & advisory
but failing to distinguish between what is binding
and what is merely advisory.

121a. Petitioner's trial counsel's failure to object to the court's instructions fell below any standard of reasonableness and severely prejudiced him. After telling the jury that his instructions related to "constitutional rights" were binding, the circuit court failed to identify which instructions applied to constitutional rights (and were binding) and which concerned non-constitutional rights (and were merely advisory, only, and ones, jurors could disregard). Then, over the course of nine pages of transcript, the circuit court mixed instructions addressing several core constitutional principles (only once expressly, describing a right as "constitutional") with non-constitutional instructions, creating a confusing, muddled whole. Pet. App. 158a-196a. In addition, after telling the jury that, at this point, his instructions had "become advisory," the circuit court discussed the State's burden of proving its case "beyond a reasonable doubt" at least seven times throughout the balance of the court's instructions. Pet. App. 158a-196a.

WHETHER THE LOWER COURTS VIOLATES THE EQUAL PROTECTION CLAUSE WHEN IT DENIES TO A SIMILARLY SITUATED INDIVIDUAL RELIEF THAT IT HAD PREVIOUSLY GIVEN TO SEVERAL OTHER SIMILARLY SITUATED INDIVIDUALS, AS THE MARYLAND COURT OF APPEALS HELD IN UNGER v. STATE?

As of March 2020, 199 people who had been convicted under the 'advisory' jury instruction were given new trials.²

On July 12, 2012, following the Maryland Court of Appeals decision in Unger v. State, 427 Md. 383 (2012) (the Maryland Court of Appeals held that the combined effect of the Court's decisions in Stevenson v. State, 289 Md. 167 (1980) and Montgomery v. State, 292 Md. 84 (1981) created a new interpretation of Maryland Constitution Article 23 that applied retroactively because it formed a new constitutional standard. Therefore, a criminal defendant who had failed to object to advisory only instructions on core constitutional principles at trials held before Montgomery would not have waived their right to raise the issue on appeal. Under this new constitutional standard, jury instructions that gave the jury the discretion to disregard the trial court's instructions on constitutional principles constituted reversible error.

Judge Cave of the Circuit Court for Montgomery

²<https://wtop.com/maryland/2020/05/growing-old-in-prison-how-maryland-is-working-to-ease-the-path-to-release-for-a-low-risk-high-cost-population/>

County offered his version of the traditional "advisory" instructions that had been used in Maryland for decades before Petitioner's trials, and which the Maryland Court of Appeals deemed to be **UNCONSTITUTIONAL** in *Stevenson*.

Now, as I come to the instructions, as I said, you are bound to all 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 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 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.

In Petitioner's trial court told the jury that its **instructions on reasonable doubt and the burden of proof were advisory and could be disregarded.** Stevenson states that "it is incumbent upon a trial judge to clearly delineate for the jury the stark dichotomy between binding constitutional issues and advisory only law of the offense issues." 289 Md. at 180. The trial judge in Petitioner's case failed to do so, and the instructions at Petitioner's trial constitute reversible error under Stevenson.

Petitioner's trial took place between this Court

decisions in Stevenson and Montgomery; and, the jury instructions in Petitioner's case suffered from the same flaws identified as reversible error in

Stevenson and Montgomery.

In *State v. Waine*, 444 Md. 692 (2015) (the instructions given by the trial courts in *Unger* and *Waine* were similar to Judge Cave's instructions in this case.) In *Unger*, the trial court told the jury at the start of the trial that it was "the [j]udge of the [l]aw as well as the facts. Therefore, anything which I may say about the law, including any instructions which I may give you, is merely advisory and you are not in any way bound by it. You may feel free to reject my advice on the law and to arrive at your own independent conclusion." *Unger*, 427 Md. at 392 (Emphasis omitted).

In Thirty-one years later, in *Unger v. State*, the Maryland Court of Appeals reversed course and held that Stevenson and Montgomery substantially changed the state constitutional standard embodied in Maryland Constitution Article 23 and held that the failure to object to advisory only jury instructions prior to Stevenson would not constitute waiver.

In the instructions in *Waine*, the trial court told the jury that it was "the judge of both the law and the facts and anything I say to you about the law is advisory only. It is intended to help you, but you are at liberty to reject the Court's advice on the law and to arrive at your own independent conclusion on it." *Waine*, 444 Md. 697.

Advisory instructions empower jurors to disregard the "bedrock characteristics which distinguish Maryland system from most others

throughout the world and which are indispensable to the integrity of every criminal trial" because they "preserve the integrity of the judicial system and....assure the defendant a fair and impartial trial." Montgomery, 292 Md. at 91. Thus, when a trial court fails to inform the jury that instructions on these bedrock issues are binding, the trial process is compromised because "under the trial judge's instructions, the jury could place the burden of proof upon the defendant, [and] could utilize a different standard than reasonable doubt." Unger, 427 Md. at 393.

Maryland Court of Appeals in Waine recognized the prejudicial nature of advisory jury instructions. In Waine, Maryland Court of Appeals elaborated on the danger posed by advisory instruction: "advisory only jury instructions...are clear, but erroneous, as they give the jury permission to disregard any or all of the court's instructions, including those 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. Finding that advisory instructions permitted the jury to apply an unconstitutional standard of proof and thus vitiated the jury's findings. The Maryland Court of Appeals held that advisory instructions were "structural error not susceptible to harmless error analysis." Id. at 705.

In rejecting the State's "reasonable likelihood"

argument in Waine, the Maryland Court of Appeals made clear that advisory instructions are not subject to the type of case-by-case analysis embodied by the reasonable likelihood standard. Under Waine, Judge Cave's confusing instructions prior to telling the jury that the requirement of reasonable doubt and the burden of proof could be disregarded are irrelevant. The Maryland courts held in Waine that to engage in such case-by-case analysis in the structural error like the advisory instructions given to Petitioner's jury is to "engage in pure speculation" as to "what a reasonable jury would have done. And when [a court] does that, the wrong entity judge[s] the defendant guilty." *Id.* at 704 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993)).

In light of Waine, any argument that other aspects of the instructions given at Petitioner's trial somehow erase the harm done by the advisory instruction his jury unquestionably received must fail. Given the seriousness of the constitutional rights that the advisory instructions delivered by Judge Cave minimized, there is a reasonable probability that but for those instructions, the jury's verdict may have been affected. These instructions, like the instructions in Waine, constituted a structural error that certainly prejudiced Petitioner's defense.

In *State v. Adams-Bey*, 449 Md. 690, 705 (2016), Maryland considered the case in which the circuit court denied Adams-Bey's, Motion to

Appellate to Reopen a "closed" Post-Conviction proceedings based on an advisory jury instruction. In ruling that the circuit court had abused its discretion in denying the reopening motion, *Id.* at 703.

The Maryland Court of Appeals held that the "beyond reasonable doubt" standard is a bedrock constitutional principle and "are not the law of the state unscrupulously crime," as such, "the jury must be told that." *Adams-Bey, Jr.*, 499 Md. at 705 (citation omitted).

The Maryland Court of Appeals explained that "a jury instruction advising the jury that it is bound by the judge's law is an advisory only instruction." In accord, "[s]uch 'beyond reasonable doubt'" constitutes structural error and trial counsel should have objected if the court does not also inform the jury that it is bound by "the 'beyond reasonable doubt' standard." *Adams-Bey*, 449 Md. at 705 (citation omitted).

However, "[w]hen the trial court exhibits a clear failure to consider the proper legal standard to assist in reaching a decision such an action constitutes an abuse of discretion." *State v. Adams-Bey*, 449 Md. 690, 702-703 (2016), *see also Kusi v. State*, 438 Md. 362, 385 (2014) ("When the trial court exhibits a clear failure to consider the proper legal standard in reaching a decision, such an action constitutes an abuse of discretion." (citation omitted)).

In Petitioner's case, the circuit court abused its discretion because the jury, in this case, was not permitted to choose whether or not to apply critical

constitutional principles in weighing the evidence in his case and deciding whether the State met its burden of proof. The Maryland Court of Appeals has held that this specific constitutional error is a structural one. In response to that fundamental error, Petitioner's lawyers provided ineffective assistance of counsel that prejudiced him.

In Adams-Bey, this Court stated:

We hold that the Court of Special Appeals concluded correctly that the circuit court abused its discretion in denying Respondent's motion to reopen.

* * *

The basis for Respondent's motion was his Unger claim, and the briefs in support of each party were largely devoted to the question of whether the instructions given at Respondent's trial were sufficiently "advisory" to satisfy the **"interests of justice"** standard for reopening his postconviction proceeding.

449 Md. 690, 703-704 (finding that lack of hearing or written opinion by circuit court did not preclude appellate review of lower court's decision for abuse of discretion). Adams-Bey controls here. A circuit court is required to grant a motion to reopen and consider a defendant's Unger claim when a defendant raises a credible claim that instructions given at trial were "sufficiently advisory" to satisfy the **"interests of justice"** standard. As demonstrated below, Petitioner met that requirement and the circuit court abused its discretion in failing to reopen his previously

decided post-conviction petition. That instruction constitutes reversible error under Stevenson, Montgomery, Unger, State v. Waine, 444 Md. 692 (2015), and State v. Adams-Bey, 449 Md. 690 (2016).

In Adams-Bey, the Court explained the magnitude of the risk posed by advisory only instruction:

We emphasize that the constitutional infirmity at issue here is of the sort that "will always invalidate the conviction." [Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)]. In the face of an instruction that "create[d] the risk that the jury will convict the defendant even if the State has not met its required burden of proof," Arizona v. Fulminante, 499 U.S. 279, 291, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (White, J. dissenting), Respondent's conviction is essentially a nullity, see Sullivan, 508 U.S. at 280, 113 S.Ct. 2078 (concluding that "there has been no jury verdict within the meaning of the Sixth Amendment" when the jurors did not receive a proper reasonable doubt instruction). Consequently, there would be no purpose to remand to the circuit court to reconsider Respondent's motion in light of Waine, as suggested by the State. The error in the trial court's instructions was apparent within the four corners of the transcript and there is no further fact finding that needs to be conducted to decide the merits of Respondent's Unger claim. The Court of Appeals did not err in recognizing the structural error and ordering the circuit court to grant the appropriate relief. Having confirmed that the trial court gave an advisory instruction, Respondent is necessarily entitled to a new trial, and it would be an abuse of discretion to deny Respondent relief in light of Waine. See Rose v. Clark, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (noting that, when a defendant is deprived of those constitutional protections that constitute

21.

structural error, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair" (citation omitted)).

Adams-Bey, 449 Md. at 708.

CONCLUSION

The court below commit an error so important that it must be corrected. The court below decision create an intolerable conflict with the lower courts and should be sent back to the lower court to determine whether the 'advisory' jury instructions was unconstitutional.

Respectfully submitted,


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Wiederholt kommt hierin ein hoher Einfluss der rechtlichen und sozialen Erfahrungen der sozialen Gruppen in der Stadt und Landwirtschaft auf die politische Praxis (z.B. Landwirtschaftliche Partei, Landwirtschaftliche Volksbewegung) und die Wirtschaftspolitik des Landes (z.B. Landwirtschaftliche Partei, Landwirtschaftliche Volksbewegung).

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THE FIGHT FOR FREEDOM

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this writ of certiorari was mailed on this 2nd day of December 2021 to the following:

Brian E. Frosh
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

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JAMES CALHOUN-EL

