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RECENT DEVELOPMENT

STATE V. WAINE: A COURT MAY REOPEN A CLOSED POST CONVICTION PROCEEDING TO ADDRESS A CHALLENGE TO AN ADVISORY ONLY JURY INSTRUCTION.

By: Ashley N. Nelson-Raut

The Court of Appeals of Maryland held that advisory only jury instructions are not harmless error and the *Unger v. State* precedent should be applied retroactively. *State v. Waine*, 444 Md. 692, 122 A.3d 294 (2015). In addition, the court held that a defendant's motion to reopen his or her post-conviction case after the *Unger* decision met the "interests of justice" standard required for reconsideration of the constitutionality of the defendant's conviction. *Id.* at 695, 122 A.3d at 294.

In 1976, Peter Sutro Waine ("Waine") was tried before a jury in the Circuit Court for Harford County for first-degree murder and larceny. The presiding judge gave jury instructions stating, "you are judges, judges of the facts and the law," and instructed that anything he stated regarding the law was advisory only. Defense counsel did not object to the advisory only jury instructions. The jury found Waine guilty of first-degree murder and larceny. Subsequently, the judge sentenced Waine to two consecutive life sentences in prison for first-degree murder, and an additional fourteen years in prison for larceny. In 1977, Waine, acting pro se, appealed to the Court of Special Appeals of Maryland, which affirmed the trial court's decision.

In 1997, Waine sought post-conviction relief based upon ineffective assistance of counsel and claimed that the presiding judge erred in giving advisory only jury instructions. *Waine*, 444 Md. at 698, 122 A.3d at 297. The post-conviction court denied Waine's appeal. *Id.* In 2007, Waine filed a motion to reopen his petition for post conviction relief. *Id.* Waine's claim was dormant until 2012, when the Circuit Court for Harford County reopened his motion based on the *Unger* decision. *Id.* at 698-99, 122 A.3d at 297-98. After a hearing, Waine was granted post-conviction relief. *Id.* The court of special appeals denied the State's application for leave to appeal, so the State petitioned for a writ of certiorari, which was granted. *Id.*

The Court of Appeals of Maryland first considered whether the *Unger* holding, that advisory only jury instructions are not harmless error, should be overruled because the holding did not conform to stare decisis. *Waine*, 444 Md. at 699, 122 A.3d at 298. The court recognized two exceptions for when a court may depart from stare decisis. *Id.* at 700, 122 A.3d at 298. First, a court may depart from stare decisis when an extensive amount of time has passed, rendering the prior decision archaic and inapplicable. *Waine*, 444 Md. at 699, 122 A.3d at 298 (citing *Coleman v. Soccer Ass'n of Columbia*, 432 Md. 679, 689, 69 A.3d 1149 (2013)). Second, a court may depart from stare decisis if the holding is clearly wrong. *Waine*, 444 Md. at 701, 122 A.3d at 299, (citing *DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 64, 5 A.3d 45 (2010)).

The court held that the *Unger* court rightfully deviated from stare decisis because the precedent was clearly wrong and archaic. *Waine*, 444 Md. at 700-01, 122 A.3d at 299. Thus, the court reasoned that the *Unger* court was justified in overruling precedent that stated a defendant's failure to object to advisory only jury instructions constituted a waiver of the defendant's right. *Id.* Furthermore, the court noted that the *Unger* court properly overruled *State v. Adams*. *Id.* Thus, the court held that precedent set forth in *Stevenson v. State* and *Montgomery v. State* established a new constitutional standard in Maryland for non-advisory jury instructions. This standard cannot be waived by the defense's failure to object to advisory only jury instructions during trial. *Id.* (citing *Stevenson v. State*, 289 Md. 167, 423 A.2d 558 (1980), *Montgomery v. State*, 292 Md. 84, 437 A.2d 654 (1981), and *State v. Adams*, 406 Md. 240, 958 A.2d 295 (2008)).

Next, the court addressed whether the circuit court retained discretion to deny a defendant's motion to reopen a post conviction proceeding after *Unger*. *Waine*, 444 Md. at 702, 112 A.3d at 299. The court reasoned that a change in a law that intended to apply retroactively must meet the "interests of justice" standard in order to justify the court's decision to reopen a petition for post conviction relief. *Id.* at 702-03, 122 A.3d at 300. (citing *Gray v. State*, 388 Md. 366, 382-83, 879 A.2d 1064, 1073 (2005)). In applying this standard to *Waine*, the court held that given the nature and time of Waine's trial and the developing case law, the court had reasonable discretion to reopen Waine's post-conviction proceeding. *Id.* In addition, the court noted that failure to object to advisory only jury instructions would likely be considered a waiver, thus providing additional reason to reopen a post conviction. *Id.* The court further noted that deference must be given to case precedent that ensures the appropriate fundamental due process protection. *Id.* at 702, 122 A.3d at 300.

Finally, the court considered what test to apply when considering a challenge to an advisory only jury instruction. *Waine*, 444 Md. at 703, 122 A.3d at 300. The court rejected the State's proposal to apply a reasonable likelihood test in determining whether jurors understood the jury instruction. *Id.* at 703, 122 A.3d at 301. The court articulated that a reasonable likelihood test is applicable when jury instructions are ambiguous. *Id.* The court further reasoned that advisory only jury instructions are not ambiguous, but are erroneous because they give the jury permission to disregard the judge's instructions. *Id.* Thus, advisory only jury instructions enable the jury to disregard due process instructions regarding the defendant's innocence and the State's burden of proof. *Id.* Therefore, the court held that a judge giving advisory only jury instructions was not an error in which a harmless error analysis could be applied. *Id.*

In *Waine*, the Court of Appeals of Maryland's decision to uphold *Unger* was justified because *Unger* created new case precedent, that advisory only jury instructions create a non-harmless error to the defendant. This decision provides a bright-line rule for judges, creating a ban of advisory only jury instructions. Thus, it is crucial for judges to make clear to the jury that his or her instructions are not advisory, and must be followed in order to ensure that

cases will not be re-tried because of an error, and to ensure a fair trial for the defendant.

Practitioners must scrutinize jury instructions to ensure that they are reasonable and that they ensure the defendant's rights. The court's decision to allow defendants to bring forth claims retroactively will further overwhelm the court systems in Maryland, take additional time to re-try the cases, and will require additional funding for attorneys' fees and court costs. Judges and practitioners are not the only persons affected by this decision. The defendants that have fallen victim to advisory only jury instructions, whether or not they had counsel who objected to the instructions, received an unfair trial and deserve a new trial. All members of the justice system should use the *Waine* precedent to strategically fight for these defendants to ensure that they obtain the justice to which they are entitled.