

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1471

September Term, 2012

NEIL COHEN

v.

STATE OF MARYLAND

Berger,
Nazarian,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: November 23, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2012, Neil Cohen filed a motion, in the Circuit Court for Baltimore County, to reopen his post-conviction proceeding to consider his “*Unger* claim.” In *Unger v. State*, 427 Md. 383 (2012), the Court of Appeals held that the trial court had committed reversible error by instructing the jury that it “is the Judge of the Law as well as the facts,” that the court’s instructions to it were “merely advisory,” and that it was “not in any way bound by” the court’s instructions. *Id.* at 392 (italics omitted). Because the trial court at Cohen’s 1978 trial gave a similar “advisory only” jury instruction,¹ Cohen, relying on *Unger*, sought to reopen his post-conviction proceeding and have his convictions vacated.² After the circuit court denied Cohen’s motion, he filed an application for leave to appeal asserting that the circuit court had abused its discretion in denying his motion. We granted the application for leave to appeal and transferred the case to the regular appeal docket of this Court.

While Cohen’s appeal was pending in this Court, the Court of Appeals granted the State’s petition for a writ of certiorari in *State v. Waine*, 444 Md. 692 (2015), to consider its request that the Court overrule *Unger*. The Court of Appeals subsequently declined to overrule *Unger* and affirmed the Circuit Court for Harford County’s decisions granting

¹The court in Cohen’s case instructed the jury, in pertinent part, as follows:

Under the Maryland Constitution, the Jury is the judge of the law as well as the facts in all criminal cases. Therefore, my instructions as to the law are advisory only, and are not binding upon you.

²A “court may reopen a postconviction proceeding that was previously concluded if the court determines that the action is in the interests of justice.” Md. Code (2001, 2008 Repl. Vol.), § 7-104 of the Criminal Procedure Article.

Waine’s motion to reopen his post-conviction proceeding and awarding Waine, based on *Unger*, a new trial. In so ruling, the Court of Appeals noted that the giving of an “advisory only” jury instruction was “structural error not susceptible to harmless error analysis,” and therefore mandated that the convictions be vacated. *Id.* at 705. It then went on to hold that *Unger* “has retrospective application to specific advisory only instructions,” *id.* at 702, and that “a change in the law intended to apply retroactively meets the ‘interests of justice’ standard for reopening a petition for postconviction relief.” *Id.* at 702-03 (citation omitted).

In light of the *Unger* and *Waine* decisions, we shall reverse the circuit court’s order denying Cohen’s motion to reopen his post-conviction proceeding. We remand with instructions to the circuit court to reopen Cohen’s post-conviction proceeding to consider his *Unger* claim and, thereafter, to vacate Cohen’s convictions and award him a new trial.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY DENYING
MOTION TO REOPEN POST-CONVICTION
PROCEEDING REVERSED. CASE
REMANDED WITH INSTRUCTIONS TO
GRANT MOTION TO REOPEN POST-
CONVICTION PROCEEDING, VACATE
APPELLANT’S CONVICTIONS, AND
AWARD A NEW TRIAL. COSTS TO BE
PAID BY BALTIMORE COUNTY.**