IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2014

NO. 90

STATE OF MARYLAND,

Appellant,

v.

PETER WAINE,

Appellee.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

AMICUS CURIAE BRIEF OF FORMER STATE AND FEDERAL PROSECUTORS, FORMER STATE ATTORNEYS GENERAL, FORMER SENIOR JUSTICE DEPARTMENT OFFICIALS, AND A FORMER JUDGE IN SUPPORT OF APPELLEE PETER WAINE

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We are former state and federal prosecutors, former state Attorneys General, former senior Justice Department officials, and a former judge. Our names and the positions that we have held are listed in the Addendum. We share an abiding interest in fundamental fairness in the administration of justice and the integrity of the judicial process. In our opinion, *Unger v. State*, 427 Md. 383 (2012), has proved neither improvident nor unworkable, and it would serve neither justice nor the interests of the Maryland judicial system for it to be overruled. Amici respectfully submit that the views of those who have extensive experience with the administration of justice, and in particular with the prosecution, trial, and sentencing of those accused of crimes, may be helpful in informing the Court's decision whether to overrule *Unger*, a case addressing the integrity of the fact-finding process.

This *amicus curiae* brief is filed with the consent of both parties pursuant to Maryland Rule 8-511.

STATEMENT OF THE CASE, QUESTIONS PRESENTED, STATEMENT OF THE FACTS, AND STANDARDS OF REVIEW

Amici adopt the Statement of the Case, Questions Presented, Statement of the Facts, and the Standards of Review in the brief of the Appellee.

ARGUMENT

INTRODUCTION

Peter Waine was found guilty of two counts of first degree murder after a trial in 1976 in the Circuit Court for Harford County. After closing arguments, but before the jury retired to deliberate, the court in Mr. Waine's trial instructed his jury, consistent with standard Maryland instructions at the time, that the court's instructions were "advisory only." Mr. Waine's attorneys did not object to this instruction. In 2012, in *Unger v. State*, this Court held that inmates like Mr. Waine who had received "advisory only" instructions to which they did not object at trial were no longer deemed to have

waived those objections and could challenge their convictions. 427 Md. at 411. The *Unger* decision affected a limited group of individuals who were convicted well over three decades prior to the decision. Two-hundred forty-six similarly situated individuals then brought challenges to their convictions pursuant to *Unger*. *See* Appendix 1, Affidavit of Becky Kling Feldman. A substantial number of these individuals have had their cases considered and resolved, and a substantial number of them still have cases at various stages in the Maryland court system. *See id.*

As former prosecutors, former senior legal officials, and a former judge, we share an abiding interest in the fair administration of justice, the rule of law, the preservation of the integrity of the judicial process, and the principles embodied in the United States Constitution. If this Court overrules *Unger* only three years after it was decided, the Court's decision will: (1) prevent a limited, identifiable group from seeking redress for serious violations of their constitutional rights; (2) violate the American principle of equal justice under the law by arbitrarily and permanently dividing *Unger*-affected inmates between those whose cases moved promptly through the system and those whose cases did not; and (3) undermine, rather than serve, the foundational principles of *stare decisis* and the related goals of preserving the rule of law and maintaining public respect for the judicial process.

I. OVERRULING *UNGER* WOULD DENY A LIMITED, IDENTIFIABLE GROUP REDRESS FOR SERIOUS CONSTITUTIONAL VIOLATIONS.

A. Maryland's "Advisory Only" Jury Instructions Were an Anomaly.

"Advisory only" jury instructions give juries ultimate responsibility for interpreting the law by labelling the court's legal instructions "advisory only." Such instructions have long been widely recognized as violating a defendant's core constitutional rights. *See, e.g., Sparf v. United States*, 156 U.S. 51, 101 (1895) (holding that jurors cannot be the judges of the law in federal courts because, "[i]f it be the function of the jury to decide the law as well the facts -- if the function of the court be

only advisory as to the law -- why should the court interfere for the protection of the accused against what it deems an error of the jury in matter of law?").

By 1949, only Maryland and Indiana still had constitutional provisions that declared juries the judges of fact and law. *Slansky v. State*, 192 Md. 94, 104 (1949) ("Today there remain only two States, Indiana and Maryland, where the jury have the constitutional right to determine the law in criminal cases"). And while Maryland required its courts to employ "advisory only" instructions for decades after *Slansky*, the Indiana Supreme Court acknowledged in 1899 that "advisory only" instructions could "neutralize the effect" of the court's instructions, and as a result did not require Indiana courts to employ such instructions. *See Bridgewater v. Indiana*, 55 N.E. 737, 739 (Ind. 1899) ("[The court] is not required to neutralize the effect of its instructions by telling the jury that they are at liberty to disregard them, and to decide the law for themselves"). Thus, more than a century ago, Maryland already stood alone in requiring judges to inform jurors that the court's instructions on the law were advisory only. *See Unger*, 427 Md. at 416 (discussing Md. Rule 756(b), in effect at the time of Unger's trial, which required judges to give an "advisory only" instruction).

Despite the fact that its position had become an aberration, Maryland continued to operate as if an "advisory only" instruction passed constitutional muster. While it is now generally acknowledged that instructing jurors that constitutional requirements such as proof beyond a reasonable doubt are advisory violates the Constitution, Maryland did not adopt that position as a matter of law until it decided *Stevenson v. State*, 289 Md. 167 at 183 (1980).

B. This Court Correctly Held that "Advisory Only" Instructions Undermine Fundamental Constitutional Protections.

In 1980, this Court held that "advisory only" jury instructions, if applied to instructions on fundamental constitutional safeguards, are unconstitutional. *Stevenson*, 289 Md. at 183. The Court held that only disputes on the law of the crime and the legal effect of the evidence were subject to debate by the jury, while core constitutional

protections, including the burden of proof and the requirement of unanimity, are "beyond the jury's pale." *Id.* at 180. As a result, the "judge's comments on those matters are binding" upon the jury. *Id.*

A few months later, this Court similarly held that, where there is no dispute as to the law of the crime, "advisory only" jury instructions violate due process. *See Montgomery v. State*, 292 Md. 84, 91 (1981) ("Instructions on these matters . . . are not advisory. . . . They are binding. They are the guidelines of due process to which every jury is required to adhere"). According to this Court, "advisory only" instructions impermissibly "muddle[] the judge/jury dichotomy" by allocating judgment regarding the application of "bedrock characteristics . . . indispensable to the integrity of every criminal trial," such as the presumption of innocence, the burden of proof, and the right against self-incrimination, to the jury. *Id.*

C. *Unger* Corrected Decades of Unconstitutional Jurisprudence by Applying *Stevenson* and *Montgomery* to Pre-*Stevenson* Defendants.

In 2012, this Court allowed individuals unconstitutionally convicted under "advisory only" instructions prior to *Stevenson* to pursue relief, even if their lawyers did not object to the instructions at trial. *See Unger*, 427 Md. at 393 (holding that relief was appropriate for "advisory only" instructions to which no objection was raised at trial because, "under the trial judge's instructions, the jury could place the burden of proof upon the defendant, could utilize a different standard than reasonable doubt such as preponderance of the evidence, and could adopt a presumption of guilt"). Consistent with *Stevenson* and *Montgomery*, the Court emphasized the importance of protecting bedrock constitutional rights for all defendants. *Id*. at 388. Because "advisory only" jury instructions "affect the integrity of the fact finding process," this Court reiterated that these instructions are "clearly in error . . . as applied to matters implicating federal constitutional rights" regardless of whether the "advisory only" instructions were issued before *Stevenson*. *Id.* at 416-17. Thus, as this Court recognized, the error corrected in

Unger is not an error that affects a conviction at the margins; it affects the foundation of our system of justice.

The *Unger* decision correctly recognized that the holdings of *Stevenson* and *Montgomery* represented a new rule of law, and, accordingly, the failure to object to "advisory only" instructions prior to those decisions did not bar relief for the resulting constitutional violation. This Court extensively detailed the history of advisory instructions in Maryland and found that no case prior to *Stevenson* and *Montgomery* had held that the jury's purview as judges of the law was limited to disputes regarding the law of the crime. *Id.*, at 411, 412-16. This Court further held that, because this new standard "affect[ed] the integrity of the fact-finding process," and as a result was fully retroactive, "defense counsel's failure to object to the advisory nature of the instructions . . . did not constitute waiver." *Id.* at 416.

D. Overruling *Unger* Would Target a Limited, Identifiable Group of Individuals and Prevent Consideration of Well-Founded Constitutional Claims.

The cornerstone of *Unger* is the recognition that the constitutional violations resulting from "advisory only" jury instructions profoundly undermined the legitimacy of trials in which such instructions were given, and that *Stevenson*, as the first Maryland case to recognize this fact, represented a new rule of law. *See Unger*, 427 Md. at 411. Accordingly, this Court correctly reasoned that the constitutional injury required the granting of new trials to individuals whose juries received "advisory only" instructions pre-*Stevenson*. *Id.* at 417. As will be discussed below, more than 100 individuals have received additional consideration and resolution since *Unger*, and more than 100 more are in the process of receiving additional consideration on the path to resolution. *See* Appendix 1, Affidavit of Becky Kling Feldman. Overruling *Unger* now would abruptly prevent a limited, identifiable group of individuals – all convicted on fundamentally unconstitutional instructions; all having served at least thirty-five years in prison following those unconstitutional convictions – from seeking orderly consideration and redress for constitutional violations.

As this Court recognized in *Stevenson*, *Montgomery* and *Unger*, by allowing juries to determine the law, "advisory only" instructions undermine bedrock constitutional protections including the presumption of innocence, the burden of proof, and the right against self-incrimination. *See Montgomery*, 292 Md. at 91. Venerable legal precedents have emphasized the fundamental nature of these core constitutional principles.

In 1895, the United States Supreme Court explained that it is "unquestioned in the textbooks" and is "the undoubted law, axiomatic and elementary" that "there is a presumption of innocence in favor of the accused." *Coffin v. United States*, 156 U.S. 432, 453-54 (1895). This presumption of innocence "lies at the foundation of the administration of our criminal law." *Id.* at 453.

In 1966, in *Miranda v. Arizona*, the Court emphasized that the right against self-incrimination is an "essential mainstay of our adversary system" that was "fixed in our Constitution only after centuries of persecution and struggle" and was "designed to approach immortality as nearly as human institutions can approach it.'" 384 U.S. 436, 442, 460 (1966) (quoting *Cohens v. Virginia*, 19 U.S. 264, 387, 5 L.Ed. 257 (1821)). The Court explained that "the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord the dignity and integrity of its citizens." *Id.* at 460.

In 1970, the Supreme Court reiterated and reinforced the Constitution's commitment to ensuring that the burden of proof beyond a reasonable doubt is borne by the state. *In re Winship*, 397 U.S. 358 (1970). As the Court held, "[d]ue process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt," and, in service of that goal, "the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude." *Id.* at 364 (*quoting Speiser v. Randal*, 357 U.S. 513, 525-26 (1958)) (internal quotation marks omitted).

In 1980, in *Stevenson*, this Court held that juries must not be told that instructions as to the above constitutional requirements are "advisory only." *Stevenson v.*

State, 289 Md. at 183. In 1981, in *Montgomery*, this Court found that the Circuit Court for Prince George's County had erroneously told a jury that "standard instructions invoked to preserve the integrity of the judicial system and to assure the defendant a fair and impartial trial" were advisory, in sharp conflict with the fundamental constitutional requirements described above. *See* 291 Md. at 86-87, 91. Nonetheless, prior to *Stevenson* and *Montgomery*, Maryland juries were routinely instructed that they could disregard judicial instructions on constitutional requirements such as the presumption of innocence, the right against self-incrimination, and the government's burden of proof, despite the "bedrock" nature of these constitutional protections.

Surveying this history, *Unger* reached the important, common-sense conclusion that *Stevenson* and *Mongtomery* announced a new rule of law in Maryland, and that individuals convicted under the unconstitutional "advisory only" instruction should receive an opportunity for orderly process and appropriate relief from that violation.

As former prosecutors, former senior legal officials, and a former judge, we emphasize that the opportunity for orderly process and appropriate relief is individualized and does not lead to an automatic result. Some petitioners affected by *Unger* have received new trials and been convicted; some have had their status resolved by negotiation; some are awaiting new trials; some are awaiting consideration of their petitions. In all instances, however, in light of *Unger*'s straightforward recognition that *Stevenson* and *Montgomery* entitle individuals who suffered constitutional violations inherent in "advisory only" instructions to a remedy, the individuals have received, or are slated to receive, individualized consideration in an orderly judicial process. *Unger* thus provided an appropriate and necessary opportunity to redress a pervasive constitutional violation that fundamentally marred the convictions of a limited group of identifiable individuals.

II. OVERRULING *UNGER* WOULD CREATE PRONOUNCED UNFAIRNESS IN THE ADMINISTRATION OF JUSTICE.

Carved in stone on the front of the United States Supreme Court building are the words, "Equal Justice Under Law." These words likewise appear behind the statue of Thurgood Marshall on Lawyers Mall at the State House in Annapolis. Equal justice under the law "is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists." Justice Lewis F. Powell, Jr., Address at the ABA Legal Services Program, ABA Annual Meeting (Aug. 10, 1976). It means that all citizens, including criminal defendants, are subject to the same laws and legal principles, and are not subject to arbitrary outcomes.

With *Unger*, this Court carefully opened the courthouse doors to a small group of defendants who were convicted following jury instructions that no one argues were constitutional. These defendants, all of whom had been in prison at least 32 years at the time *Unger* was decided, promptly pursued orderly legal consideration of their claims.

Were this Court to overrule *Unger* only three years after it was decided, it would create an unwarranted and unjust bifurcation of the individuals affected by *Unger* into two groups. A total of 246 individuals have sought relief in light of *Unger*. *See* Appendix 1, Affidavit of Becky Kling Feldman. One sub-group, consisting of 105 individuals, have obtained some form of relief based on their challenges to the "advisory only" instructions given at their trials:

- 12 were released following grants of new trials in which they pled guilty, were sentenced to the time they had already served with some period of probation, and released;
- 2 were granted new trials, were retried, convicted, and resentenced;
- 4 were granted new trials, pled guilty, and were sentenced to an additional period of incarceration;
- 7 were granted new trials that have yet to occur;
- 2 were granted new trials but died before the new trial could take place;
- 3 were re-sentenced and released to federal or other state detainers as a result of negotiations with the State's Attorney's office; and

- 75 were released as a result of settlement negotiations with various State's Attorney's offices.

Id. Another sub-group, consisting of 139 individuals, is in the process of having their claims heard but have not yet received a definitive resolution:

- 21 were denied relief and have pending Applications for Leave to Appeal ("AFLA") before the Court of Special Appeals;
- 9 were granted new trials, but the State filed AFLAs which are pending before the Court of Special Appeals;
- 6 have had their AFLA's granted and have been granted relief by the Court of Special Appeals, but the State has filed Writs of Certiorari to this Court in all six cases, one of which is the present case; and
- 103 cases are pending at various stages litigation or negotiation.

Id. Additionally, two individuals who brought claims under *Unger* died before those claims could be litigated. *Id.*

There is absolutely no basis for distinguishing between the sub-group of 105 individuals who have obtained relief under *Unger* and the 139 who have not. If this Court overrules *Unger*, however, the 139 individuals who have yet to reach resolution of their claims would be permanently barred from following the same orderly process that brought 105 of their fellow citizens relief. The State cannot claim that these 139 individuals would be barred relief for any legitimate reason, such as that the jury instructions in their trials were not equally violative of their constitutional rights as those employed in the trials of the 105 individuals who obtained relief based on *Unger*. Nor can it argue that the crimes committed by the disfavored group members were somehow different from those committed by the 105 individuals who have obtained relief. And finally, it cannot claim that subsequent evidence showed that giving the 139 individuals the opportunity to pursue resolution was a bad idea, as compared to the 105 individuals. In fact, evidence indicates that the 87 individuals who have obtained release (the 12 sentenced to time served and the 75 released after negotiations with the State) have rejoined society without incident, belying any claim that subsequent events require a change of course. *See* Appendix 2, Affidavit of Elizabeth Smith.

The disfavored 139 individuals who have yet to obtain relief would be permanently barred from pursuing relief for purely arbitrary reasons – for example, because it took time to identify which inmates had eligible *Unger* claims; because it took time to find lawyers for all of the inmates affected by *Unger*, despite diligent and wide-ranging efforts by Maryland's Office of Public Defender; or because the judge presiding over their motion to reopen did not schedule a hearing for an extended period – in one case eighteen months. *See* Appendix 1, Affidavit of Becky Kling Feldman.

Rather than differences, the *Unger* petitioners share one common trait: They were convicted before this Court decided *Stevenson*. At each of those trials, the judge offered materially identical unconstitutional "advisory only" instructions. That is the only fact that matters, and it is shared in common by the 105 who have obtained relief and the 139 who have not.

Overruling *Unger* would create two permanently divided classes, their facts identical but their legal results diametrically opposed, for no reason other than bad timing and a preference for an older rule. Such a decision would amount to inconsistent application of the law, and would remove the only means of obtaining orderly process and relief for a group of people who no one denies were convicted following jury instructions that violated the Constitution. That is not equal justice under the law; it is the creation of a small, permanent, disfavored group for no sound reason that distinguishes those individuals from others who had been similarly situated. This Court should not impose such unfairness.

III. OVERRULING *UNGER* WOULD UNDERMINE THE FOUNDATIONAL PRINCIPLES OF *STARE DECISIS*.

A. *Stare Decisis* Is Fundamental to Preserving Faith in the Judiciary.

Our system of justice depends on prosecutors, defendants, and the public fully trusting that the courts to consistently interpret the law. As this Court has previously articulated, the doctrine of *stare decisis* "'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and

contributes to the actual and perceived integrity of the judicial process.'" *DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 63 (2010) (quoting *Livesay v. Balt. Cnty.*, 384 Md. 1, 14 (2004)).

These foundational principles of *stare decisis* limit disorder, confusion and chaos in the legal system, but they also ensure public trust in the judicial process. As Justice Powell explained, "Elimination of constitutional *stare decisis* would represent an explicit endorsement of the idea that the Constitution is nothing more than what five justices say it is. This would undermine the rule of law. . . . [R]estraint in decisionmaking and respect for decisions once made are the keys to preservation of an independent judiciary and public respect for the judiciary's role as a guardian of rights." Justice Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 Wash. & Lee L. Rev. 281, 289-90 (1990).

Notwithstanding these principles, *stare decisis* should not be used to protect absurd or unjust decisions at all costs: "The doctrine of the law then is this: that precedents and rules be followed, unless flatly absurd or unjust." William Blackstone, Commentaries on the Laws of England 36 (Chase 3d ed. 1910).

B. Applying the Principles of *Stare Decisis*, This Court Should Uphold *Unger*.

In *Livesay v. Baltimore County*, the Court explained that courts should follow precedent and court-established rules unless (1) "that rule has become so unsound that it is no longer suitable" or (2) the precedent has been superseded by significant changes in the law or the facts. 384 Md. at 15. Neither reason justifies overruling *Unger*. Far from being unsound, *Unger* correctly held that *Stevenson* was a new rule under Maryland law. And far from being superseded by subsequent facts, *Unger* has, if anything, been solidified by subsequent facts, with 105 defendants obtaining relief based on its ruling and another 139 in the process of doing so. *See* Appendix 1, Affidavit of Becky Kling Feldman. Basic principles of *stare decisis* counsel strongly against the disruptive abandonment of this precedent.

1. *Unger* Was Correctly Decided, and Is Not Absurd, Unjust, or Unsound.

Unger was properly decided. This Court correctly concluded that, although the *Stevenson* opinion included statements that it was applying the law as it existed, the core holding in *Stevenson* and *Montgomery* – that Article 23 would be in conflict with the federal Constitution if not properly limited to disputes regarding the law of the crime – "set forth a new interpretation of Article 23 and established a new state constitutional standard." *See Unger*, 427 Md. at 388, 411.

As a preliminary matter, the State argues that, because this Court used the phrase "law of the crime" in cases decided before 1980, *Stevenson* could not have been a new interpretation of Article 23. The State's discussion of pre-*Stevenson* cases, however, omits the fact that not one of the cases mentioned, nor any other case prior to *Stevenson*, held that Article 23 and related "advisory only" instructions could, if not properly limited, conflict with fundamental federal constitutional protections. *See, e.g., Dillon v. State*, 277 Md. 571, 580-81 (1976) (mentioning one time that "any instruction 'as to the law of the crime' is advisory only" but also repeatedly reinforcing the advisory nature of all of the court's instructions on the law and highlighting precedent which counseled "that a trial judge, in instructing in a criminal case, 'should be careful to couch the instruction in an advisory form, so that the jury are left free to find their verdict in accordance with their own judgment of the law as well as the facts. When such an instruction is given, it goes to the jury simply as a means of enlightenment, and not, as in civil cases, as a binding rule for their government."); *Blackwell v. State*, 278 Md. 466, 479 (1976) (quoting a Court of Special Appeals decision for the proposition that Article 23 allows the "jury to resolve conflicting interpretations of the law and to decide whether the law should be applied in dubious factual situation" and that it "does not confer upon them . . . untrammeled discretion to enact new law or to repeal or ignore clearly existing law as whim" but articulating no federal constitutional protections as the reason for this delineation); *Hamilton v. State*, 265 Md. 256, 257 (1972) (adopting the Court of Special Appeals analysis and explaining that the Court was not going to address the appellant's

claim regarding his Article 23 "advisory only" instructions because "these issues do not trouble us"). Therefore, although this Court had previously opined that Article 23 was intended to allow juries to judge the law of the crime, no pre-*Stevenson* decisions by this Court had held that Article 23 would be in conflict with the federal Constitution if not so limited. In fact, prior to *Montgomery*, this Court had never found that an "advisory only" jury instruction violated the Constitution.

Consequently, in *Unger*, this Court appropriately concluded that *Stevenson* and *Montgomery* actually provided a new interpretation of Article 23 and a new constitutional standard that "affect[ed] the integrity of the fact-finding process." 427 Md. at 411, 416. Following *Stevenson*, defendants across the state began objecting to "advisory only" instructions, and the state's pattern jury instructions were permanently revised to include an express statement that instructions on the law are binding on the jury. The new-rule effect of *Stevenson* on Maryland's criminal justice system is evidenced by the changes that were made to Maryland Rules regarding criminal jury instructions in the years that followed. Prior to *Stevenson*, Maryland Rule 756, which was in effect at the time of Mr. Unger's trial, instructed courts that "The court shall in every case in which instructions are given to the jury, instruct the jury that they are the judges of the law, and that the court's instructions are advisory only." *Unger*, 427 Md. at 415-16. The current equivalent of that instruction, Maryland Rule 4-325, does not even contain the word "advisory," and requires the judge to "instruct the jury as to the applicable law and the extent to which the instructions are binding." Furthermore, current Maryland Pattern Jury Instruction 2:00(A) encourages the judge to tell jurors that "The instructions that I give about the law are binding upon you. In other words, you must apply the law as I explain it in arriving at your verdict." These later instructions clearly reflect the rule-changing impact that *Stevenson* and *Montgomery* had on Maryland law: Prior to *Stevenson*, juries were judges of the law and instructions were advisory; after *Stevenson*, juries are told that instructions about the law are binding.

In short, this Court's decision in *Unger* was correct: *Stevenson* was a new interpretation of Article 23. As a result, this Court was also correct to rule that failure to

object to the errors that *Stevenson* identified for the first time, errors inherent in an "advisory only" instruction, did not waive the right to challenge conviction based on those errors.

Even if the correctness of *Unger* were less clear, however, and even if reasonable people might disagree on the issue as a question of first impression, the *Unger* decision should not be abruptly jettisoned now. At the very least, *Unger* is far from being "flatly absurd or unjust," and, absent such characteristics, the principles of *stare decisis* counsel this Court to follow *Unger* in order to ensure predictable and consistent development of legal principles and to preserve public faith in the judiciary. Nothing in *Unger* is so manifestly erroneous and untenable that it meets the very high burden for overruling a governing precedent.

2. The Facts Since *Unger* Weigh Heavily Against Overruling *Unger*.

Principles of *stare decisis* also counsel that an opinion should not be overruled unless there are superseding changes in fact or law that demand departure from precedent. There has been no such change in the three years since this Court decided *Unger*. In fact, the only relevant change in circumstances is that, unlike in 2012 when *Unger* was decided, there now are two identifiable groups of people with nearly identical legal claims but potentially drastically different outcomes (if *Unger* is overruled) that have nothing to do with the merits of the claims.

As noted, 246 individuals who were convicted prior to *Stevenson* in cases involving unconstitutional "advisory only" instructions relied on *Unger* to pursue orderly consideration of those violations. One-hundred-and-five have had their challenges resolved, while the other 139 remain in the process (and two died while their challenges were pending). Reversing course now – halfway through the process – would create permanent and unjustifiable disparity between those who already have received relief and those who are still awaiting a judicial decision or negotiated agreement. This disparity between those who have obtained resolution and those who have not is the most salient

development since *Unger*, and it counsels strongly against abandoning the governing precedent.

Additionally, as former prosecutors, former senior legal officials, and a former judge, we must point out that subsequent facts prove that the relief required by *Unger* is workable. Indeed, two inmates granted relief under *Unger* have been retried and convicted. Merle Unger, the petitioner in the *Unger* case, was retried and convicted in 2013. *State v. Unger*, No. 20K76002072 (Talbot Cnty. Cir. Ct. filed July 21, 1976). And in 2014, James Bonnett was retried and convicted. *State v. Bonnett*, No. CT12464 (Prince George Cnty. Cir. Ct. filed Nov. 20, 1972). The rules of the Maryland criminal justice system allow the retrial of cases that are decades old. For example, Maryland Rule 5-804 allows for admission of former trial testimony where witnesses are unavailable or cannot remember. Md. Rule 5-804. Thus, where the facts and justice warrant, inmates granted *Unger* relief can be retried, curing constitutional violations and promoting the integrity of the criminal justice system.

Furthermore, as the data discussed earlier in this brief demonstrate, the State has adopted various approaches to resolving *Unger* disputes short of retrying cases, such as negotiating agreements with *Unger* petitioners that avoided the need for a full-scale retrial. Such resolutions vindicate the petitioners' constitutional rights while also preserving the State's flexibility to allocate its resources.

3. The Foundational Principles of *Stare Decisis* Counsel Upholding *Unger*.

The purpose of *stare decisis* is to promote evenhandedness, predictability and consistency while encouraging reliance on judicial decisions and contributing to the perceived integrity of the judicial process. *DRD Pool Serv.*, 416 Md. at 63. These core principles would be flouted by overruling *Unger*.

First, overruling *Unger* would undeniably be a dramatic change in course. Such a decision – which would be a fundamental change in law that would directly affect ongoing cases before the courts of this state, the conduct of the State's Attorneys Offices,

and the lives of at least 139 inmates and their family members – could not possibly be described as an evenhanded, predictable, or consistent evolution in the law. Rather, this abrupt change in course would disrupt the pending and ongoing work of courts, prosecutors, and defense counsel, and have a permanent and unjust impact on the 139 inmates seeking consideration of their claims.

Second, overruling *Unger* would seriously risk undermining the public's faith in the judicial process. *See McGraw v. Merryman*, 133 Md. 247, 261 (1918) (explaining that reversing a decision in violation of *stare decisis* "would have a tendency to cause decisions of courts to be regarded as unstable and vacillating–depending upon the individual views of the judges who happened to constitute the court when such questions arose"). *Unger* is the law of the land, and there is no sound basis for overruling it.

If *stare decisis* – a tool deployed to "promote[] the evenhanded, predictable, and consistent development of legal principles," to "foster[] reliance on judicial decisions," and to "contribute[] to the actual and perceived integrity of the judicial process" (*see DRD Pool Serv.*, 416 Md. at 63) – means anything, it should mean that these 139 elderly inmates, who have relied on and continue to rely on *Unger* in seeking relief and resolution, should be treated the same as the 105 similarly situated inmates and former inmates fortunate enough to have received an opportunity for relief before today. *Stare decisis* should preserve and perpetuate just precedent that defendants, prosecutors, defense attorneys and lower courts have relied upon and continue to rely upon. Today, *stare decisis* requires that all of the small number of individuals affected by *Unger* have the same right to seek relief for the unquestionably unconstitutional jury instructions given at their pre-*Stevenson* trials.

CONCLUSION

The State makes the untenable argument that this Court would more consistently apply the law by abandoning established precedent than by preserving it. Overruling *Unger* would unsettle properly decided precedent, disrupt ongoing litigation,

and strip 139 victims of constitutional violations of the opportunity to have their claims resolved in an orderly fashion. This foreseeable and avoidable harm is fundamentally at odds with the principles underlying *stare decisis* and equal justice. Overruling *Unger* would be unjust and would severely harm the fairness of the criminal justice system in Maryland.

Respectfully submitted,

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Dated: April 10, 2015

* Motions by Maryland Attorney Donald P. Salzman for the special admission of out-of-state attorneys Clifford M. Sloan, Breanna L. Peterson and Paul M. McLaughlin have been filed herewith.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of April, 2015, two copies of the foregoing *amicus curiae* brief were served on the following via Federal Express:

Cathleen Brockmeyer
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ADDENDUM

ADDENDUM
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APPENDIX 1

STATE V. PETER WAINE, NO. 90 (SEPT. TERM 2014)
AFFIDAVIT OF BECKY KLING FELDMAN

I, Becky Kling Feldman, do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the following are true.

1. I am the Division Chief of the Collateral Review Division of Maryland's Office of Public Defender (OPD). Among my responsibilities is managing the post-*Unger* litigation for the OPD. I also track the status of all post-*Unger* cases throughout the State, whether the petitioner is/was represented by OPD or private counsel.

2. Following the 2012 *Unger* decision, the OPD took primary responsibility for identifying inmates who had *Unger* claims. The process of identification was done by obtaining records from the Maryland Department of Public Safety & Correctional Services (DPSCS) and sending questionnaires to those inmates who were listed as having been convicted before 1981.

3. In this process, it became evident that the DPSCS records were not completely accurate and did not identify the full potential pool of *Unger*-eligible inmates, including those who are serving sentences outside of Maryland. In addition, not all inmates were capable of effectively communicating with OPD due to infirmities, including mental disabilities and other cognitive problems. This slowed down the process of identifying and effectively communicating with *Unger*-eligible inmates, and providing counsel to them.

4. In 2012, OPD organized an *Unger* litigation team to provide representation to all *Unger*-eligible inmates still incarcerated, which included a large team of attorneys from the Appellate and Collateral Review Divisions, as well as law students, and social workers. OPD also developed a relationship with professors and students from the University of Maryland School of Law to help provide representation.

5. OPD obtained the records in the cases of *Unger* claimants, including court files, transcripts, and other trial records. In addition, OPD worked to obtain DOC records, parole records, and other institutional records for mitigation purposes.

6. OPD's capacity to provide lawyers for all potential *Unger* petitioners, however, was limited by its responsibilities to its many other clients, budget cuts, and the significant amount of time and resources it takes to effectively represent an *Unger* petitioner. This meant that it was essential that *pro bono* lawyers be recruited to meet the critical shortfall in legal services. From 2012 to the present, thirty-one private attorneys have accepted *Unger* cases on a *pro bono* basis.

7. The process of identifying *Unger*-eligible inmates and placing OPD attorneys

with them or finding pro bono lawyers for them has been ongoing. Accordingly, *Unger* claimants have obtained lawyers at different times throughout the last three years, the latest being in March, 2015.

8. Approximately 142 *Unger*-eligible petitioners were convicted in Baltimore City. In 2013, OPD and the Baltimore City State's Attorney's Office established a negotiation process for *Unger* claims. The defense attorney provides the State with transcripts, court documents, institutional progress documentation, parole documents, release plans, and victim contact information. The State's Attorney's Office reviews the records and decides whether to offer a settlement in the matter resulting in the ultimate release of the inmate, or decline settlement and go forward with a post conviction hearing. The wait period for the State's Attorney's Office to make a decision has been as long as two years in some cases, and approximately one year in most other cases.

9. If an *Unger*-eligible inmate decides to forego the negotiation process and file a motion to reopen a post-conviction proceeding, the State has made it clear it will oppose that motion and seek leave to appeal if the inmate prevails. Therefore, some *Unger* claimants who were convicted in Baltimore City have been waiting for almost three years, first to obtain an attorney, and then to have their claims reviewed for possible settlement.

10. In most jurisdictions, circuit courts have granted hearings on *Unger*-based motions to reopen post-conviction proceedings and decided those motions in timely fashion. In a few other jurisdictions, however, there have been extraordinary time lags between the filing of *Unger*-based motions to reopen and hearings on them. In Baltimore County, for example, motions were filed in multiple cases in August, 2013. A consolidated hearing was not held on those motions until January 21, 2015. Decisions are still pending.

11. Based on our extensive efforts to identify all *Unger*-eligible inmates, I believe the total number of inmates who had *Unger* claims when *Unger* was decided is 246. What follows is an accounting of the cases of these 246. (It is of course possible that there are a few other *Unger*-eligible inmates who have not yet been identified.)

A. 87 inmates have been released.

- 75 of those inmates have been re-sentenced and released as a result of settlement agreements with the various State's Attorneys' offices.
- 12 of those inmates were granted new trials on post-conviction based on the *Unger* decision, subsequently pled guilty, and have been released with some period of probation.

B. 3 inmates were re-sentenced and released to federal or other state detainers as a result of settlement agreements with the State's Attorneys' offices.

C. 4 inmates were granted new trial on post conviction and subsequently pled guilty to an additional period of incarceration. They have not yet been released.

D. 7 inmates were granted new trial on post-conviction and are pending re-trials.

E. Applications for Leave to Appeal are currently pending in 30 cases in the Court of Special Appeals

- 21 of those cases were denied *Unger* relief on post-conviction.
- 9 of those cases were granted new trials on post-conviction based on *Unger*.

F. The Court of Special Appeals granted Applications for Leave to Appeal in 6 cases; the Court upheld the post-conviction court's new trial decision in 2 of the cases, and reversed the post-conviction court's denial of relief in 4 of those cases. The Office of the Attorney General filed Writs of Certiorari to the Court of Appeals in all 5 cases. To date, the Court of Appeals granted the Writ of Certiorari in 1 case – Peter Waine. The other 5 Writs of Certiorari remain pending with the Court of Appeals.

G. 2 inmates were granted new trials on post conviction, but died before the re-trial. Two (2) additional inmates died before their *Unger* cases could be litigated.

H. 2 inmates were granted new trials and were subsequently reconvicted and resentenced to life sentences (Merle Unger & James Bonnett)

I. 103 additional cases of incarcerated *Unger*-eligible inmates are still pending litigation or negotiation.

Becky Kling Feldman

Becky Kling Feldman

April 8, 2015

Date

APPENDIX 2

STATE V. PETER WAINE, NO. 90 (SEPT. TERM, 2014)

AFFIDAVIT OF ELIZABETH SMITH

I, Elizabeth Smith, MSW, LGSW, and a Fellow of the Law & Social Work Services Program of the University of Maryland-Carey School of Law, solemnly affirm under the penalties of perjury that the assertions set forth below are true to the best of my knowledge, information, and belief.

1. I graduated from the University of Maryland School of Social Work in May 2013, with an MSW degree and passed my licensure exam in April 2013 and now have the title LGSW. In 2013, I was hired as a Forensic Social Work Fellow by the Law & Social Work Services Program of the University of Maryland-Carey School of Law ("UM Social Work Program"). The Open Society Foundation initially funded, and continues to fund, my position.

2. In my position, my main job is to help prisoners whose rights are affected by *Unger* and those who have been released, now 87 people, under *Unger*. I work with, among others, Rebecca Bowman Rivas, MSW, LCSW-C, Director of the UM Social Work Program, UM social work students, social workers with the State Office of Public Defender and their social work students, and our *Unger* Project Advisory Committee, which Mr. Walter Lomax chairs. (He is Director of Maryland Restorative Justice Initiative, Inc.) I began working with *Unger*-eligible prisoners in January, 2013 as a graduate student. I will be continuing as the Forensic Social Work Fellow for the duration of this Project, which currently has no scheduled end date. The UM Social Work Program maintains offices and sees clients within the Law School.

3. I have worked with the UMB and OPD social work teams to develop and implement a comprehensive *Unger* implementation plan to provide services to both the prisoners who are entitled to relief under *Unger* and to those who have been released. The overall goal of the plan is to help those released make the transition from prison to free society as smoothly as possible. The services we provide are transition services.

a) *Pre-release Planning for Unger-affected prisoners:* We have developed a release plan for every prisoner released as a result of *Unger*, and continue to do this for every prisoner eligible for *Unger* relief. We develop these release plans in collaboration with the client, family, Division of Correction (DOC) social workers or case managers, the DOC medical department, and others. This pre-release planning includes a housing plan and a post-release medical plan, and applications, when appropriate, for Social Security and medical benefits prior to release when possible. This pre-release planning is particularly important for clients with medical or age-related issues. The average age of the 87 Unger prisoners released to date is sixty-four, and the majority have medical problems, many ranging from significant to acute.

b) *Providing Post-release Services and Support:* I help to provide, and coordinate the provision of, post-release services to those who have been released as a result of

Unger. The released prisoners have varying degrees of transition needs when they are released. Some, especially those who have supportive families, need little help. Others need more. We are able to meet most of the clients' needs through our case management network and with family support (both emotionally and financially). In the relatively small number of cases in which the client has no supportive family (and is indigent), we have helped place the clients in transitional housing. The extent of post-release services depends on the capacities and needs of the client. Among the range of reentry services we provide, or help the clients to obtain, are help in obtaining: identification cards (when the prison did not provide them), social security cards, and birth certificates; basic benefits like SSI, Temporary Disability Assistance, Supplemental Nutrition Assistance, Medical Assistance and/or Medicare, and MTA Mobility Assistance; medical care and prescriptions; housing; and job training and potential employment. We also work in collaboration with Walter Lomax and Maryland Restorative Justice Initiative, Inc., who provide those who have been released with a monthly series of informational/educational programs, for example, talks about Healthy Relationships and a session about personal finances sponsored by M&T Bank. These events give both the released prisoners and family members the opportunities to address common issues, problems, and concerns.

4. We work closely with the other reentry service providers. For example, some of the released men now are receiving services from and/or working with Living Classrooms, Jericho House, Hope Community Center, Baltimore Area Community Health Services (BACHS), and One Stop Reentry.

5. To date, the eighty-six men and one woman released as a result of *Unger* have been successful, many extraordinarily successful. A number are employed, some full-time, some part-time. Some have gotten married. Most have been reunited with their families. Some have participated in community programs aimed at preventing juvenile crime. Many are active in their churches, mosques or temples (a few as ordained clergy). *None has been convicted of a new crime or found to have violated a condition of probation.*

6. Our team also provides pre-court briefings for the families of the men to be released, which serve as information and preparation sessions. Each family is also given a resource binder which contains information about a large variety of resources. These binders have specific resources for veterans and those with chronic medical issues, among others. We strive to provide a geo-specific resource guide to assist men and their families throughout Maryland.

Elizabeth Smith

Date: April 8, 2015.