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IN THE
SUPREME COURT OF MARYLAND

SEPTEMBER TERM, 2023

NO. 7

ADNAN SYED,

Petitioner/Cross-Respondent

v.

YOUNG LEE, AS VICTIM'S REPRESENTATIVE, ET AL.,

Respondents/Cross-Petitioner

ON WRIT OF CERTIORARI
TO THE APPELLATE COURT OF MARYLAND

PETITIONER'S REPLY BRIEF & CROSS-RESPONDENT'S BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

I. The State's lawfully entered nolle prosequi rendered moot Respondent's appeal alleging procedural violations at the vacatur hearing.

Respondents and Amicus Maryland Crime Victims' Resource Center ("MCVRC") offer a series of arguments for why the State's nol prossing of charges against Mr. Syed did not render Mr. Lee's appeal moot. Some of their arguments overlap with each other and some track the Appellate Court's holding. Ultimately, however, none of the arguments is persuasive.

A. The State

The State advances two theories for why Mr. Lee's appeal was not moot. First, the State argues that the State's Attorney's Office "thwart[ed]" Mr. Lee's appellate rights by entering the nolle prosequi, and therefore the Appellate Court was correct in deeming the nolle prosequi a nullity. Resp. State Br. at 11. For support, the State, like the Appellate Court, relies primarily on *Curley v. State*, 299 Md. 449 (1984). However, the State fails to address Mr. Syed's argument that the Appellate Court misconstrued the holding in *Curley*, which did not nullify a nolle prosequi but merely looked past it for purposes of calculating the time for bringing a defendant to trial. As Mr. Syed pointed out in his principal brief, the remedy for a violation of the 180-day rule under *Curley* is not to dismiss the original charges, which no longer exist by virtue of the nolle prosequi. The remedy instead is to dismiss the new charges the State brought after the nolle prosequi. Therefore, where the issue is whether a nolle prosequi rendered an appeal from an earlier order moot, looking past the nolle prosequi does not suffice to revive the appeal as the nolle prosequi remains in effect.

The State also mischaracterizes *Curley* as a case in which the Court held that "the necessary effect [of a nolle prosequi was] to make it impossible to address the State's violation of an individual's rights." Resp. State Br. at 15. The Court in *Curley* did not employ the "necessary effect" test as a way to protect a defendant's right to a speedy trial. As the Court has repeatedly explained, "the mechanism of the *Hicks* Rule serves as a means of protecting society's interest in the efficient

administration of justice. The actual or apparent benefits [the *Hicks* Rule] confer[s] upon criminal defendants are purely incidental." *Dorsey v. State*, 349 Md. 688, 701 (1998); *see also Curley*, 299 Md. at 460 ("We have pointed out that § 591 and Rule 746 were not intended to be codifications of the constitutional speedy trial right."). Therefore, *Curley* does not provide a useful analogy in a case where, as here, a litigant seeks relief for an alleged violation of their rights.

Yet another reason *Curley* cannot be applied to a nolle prosequi following a vacatur under Criminal Procedure Article § 8-301.1 and Rule 4-333 is that the Court intended the "necessary effect" test to operate as an "exception to the general rule" that "'when a circuit court criminal case is nol prossed, and the state later has the same charges refiled, the 180-day period for trial prescribed by § [6-103] and Rule [4-271] ordinarily begins to run with the arraignment or first appearance of defense counsel under the second prosecution.'" *State v. Price*, 385 Md. 261, 269 (2005) (quoting *Curley*, 299 Md. at 462). The "general rule" in the vacatur context is set forth in Rule 4-333(i):

> Within 30 days after the court enters an order vacating a judgment of conviction or probation before judgment as to any count, the State's Attorney shall either enter a nolle prosequi of the vacated count or take other appropriate action as to that count.

The State posits that a prosecutor "is not prevented from filing a nolle prosequi under the Appellate Court's logic unless an appeal has already been filed" and that "nothing prevents the State from announcing its intention to file a nolle prosequi pending the resolution of the appeal." Resp. State Br. at 20. But the State cannot

comply with Rule 4-333(i) and wait to see whether the victim will appeal since the victim also has 30 days to note an appeal. Md. Rule 8-202(a). And Rule 4-333 requires the State to "enter a nolle prosequi" within 30 days if it does not intend to go forward with a prosecution; simply announcing an intention to nol pros at some point in the future does not satisfy the plain language of the rule. Since nol prossing a case will always have the effect of rendering further proceedings in that case moot, an exception that prohibits a nolle prosequi that might moot an appeal swallows the rule.[1]

In addition to *Curley*, the State relies on *Hook v. State*, 315 Md. 25 (1989), taking out of context this Court's observation that the State's power to enter a nolle prosequi "is not completely without restraint" and "is not absolute." *Hook*, 315 Md. at 35-36 (citing *United States v. Batchelder*, 442 U.S. 114, 124 (1979)).[2] *Hook* does

[1] The State for good reason does not argue that the State's Attorney's Office acted with the purpose of preventing Mr. Lee from appealing. No court has made a first-level finding of fact that the prosecutor acted in bad faith nor does the record support such a finding. *See Greene v. State*, 237 Md. App. 502, 516-17 (2018) (applying deferential clearly erroneous standard of review to finding that State did not act in bad faith).

[2] The prosecutorial authority at issue in *Batchelder* was not to enter a nolle prosequi but to charge a defendant under a particular statute where the defendant's conduct also violated a different statute which carried a lesser penalty. The United States Supreme Court declined to limit the government's power under these circumstances, applying the general rule that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *Batchelder*, 442 U.S. at 123-24. *See also Oglesby v. State*, 441 Md. 673, 699 (2015) ("Accordingly, when, as here, the conduct at issue is proscribed by both statutes, the prosecutor may choose whether to pursue a conviction under [either statute] and the appropriate sentence will be a sentence corresponding to the statute under which the defendant is convicted.").

not stand for the proposition that a court may curtail the State's authority whenever it deems the entry of a nolle prosequi to be unfair. Maryland has not adopted a counterpart to Federal Rule of Criminal Procedure 48, which provides that "[t]he government may, *with leave of court*, dismiss an indictment, information, or complaint." Fed. R. Crim. P. 48(a) (emphasis added). Rule 4-247 does not require the State to obtain the court's permission to nol pros a charge. Moreover, the Court in *Hook* merely held that the State can be precluded from dismissing a lesser-included offense at trial under certain circumstances. The Court did not purport to hold that the State may be barred from dismissing *an entire charging document*, which would have the effect of forcing the State to prosecute a person against its wishes.

At the same time, *Hook* concerned a particular type and level of unfairness. At stake was "[t]he right of an accused to a fair trial," which the Court described as "paramount." *Hook*, 315 Md. at 36. Even then, "to declare a denial of fundamental fairness, the reviewing court must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial.'" *Id.* at 36-37 (cleaned up). Nothing in *Hook*, or for that matter any case cited by the State, suggests that the State's broad discretion to enter a nolle prosequi can be limited to protect someone other than the accused, or under circumstances like the ones here where the nolle prosequi did not lead to fundamentally unfair trial proceedings.

The "unique facts and circumstances of this case," *Lee v. State, et al.*, 257

Md. App. 481, 527 (2023), do not call for a different result. When the circuit court announced its ruling at the conclusion of the vacatur hearing on September 19, 2022, it ordered the State, in accordance with Rule 4-333, to "schedule a date for a new trial or enter a nolle pros of the vacated counts within 30 days[.]" (E. 163). Immediately after the hearing, the State's Attorney announced publicly that she would make her decision based upon the results of DNA analysis then being performed. *See* Alex Mann, *State's Attorney Mosby says DNA test results will determine whether she drops Adnan Syed's charges*, Baltimore Sun (Sep. 27, 2022). Mr. Lee did not note an appeal until September 28 and did not file a motion to stay the vacatur order in the circuit court until September 29.[3] (E. 174-77). Even then, the State did not rush into court and dismiss the charges. It waited until October 11 after DNA results came back excluding Mr. Syed as a contributor to DNA on Hae Min Lee's shoes. At that point, only eight days remained for the State to comply with the circuit court's order. There is nothing untoward about the fact that the State exercised its authority to drop the charges against Mr. Syed on Day 22 rather than on Day One (before the notice of appeal was filed) or Day 30 (the last day for compliance).

[3] In his principal brief, Mr. Syed raised a question as to whether a victim's representative can seek a stay in light of Article 47's "express prohibition on a court permitting a victim to 'stay a criminal justice proceeding.'" *Hoile v. State*, 404 Md. 591, 627 (2008). In response, Mr. Lee notes that "nothing would have prevented the State's AG's Office, which was a party to the appeal, from also moving to stay." Resp. Lee Br. at 15 n. 9. Mr. Lee would have a point—if the State had moved for a stay.

The State argues "[i]n the alternative" that Mr. Lee's appeal was not moot because "[t]he vacatur hearing was a necessary precursor to the State's ability to enter a nolle prosequi" and "the vacatur hearing was defective" due to the violation of Mr. Lee's rights. Resp. State Br. at 22. The State cites no authority for this argument, only drawing an analogy to *State v. Simms*, 456 Md. 551 (2017), which, as Mr. Syed explained in his principal brief, is inapposite. In *Simms*, the nolle prosequi was a nullity because the procedural posture of the case – the defendant had been convicted and sentenced – divested the State of the power to enter a nol pros, not because there was some flaw in the pre-nolle prosequi proceedings.

The State's argument is also flawed because it misconstrues the nature of appellate relief. When a party (say, a criminal defendant) argues that procedural error occurred at trial (say, a right to be present) and a reviewing court agrees, the appellate court does not hold that the jury was without authority to render a verdict as a result of the error or that the circuit court was without authority to impose sentence. True, the defective trial was a "but for" cause of verdict and sentencing. But, contrary to the State's logic, the appellate court does not declare the verdict and sentence a nullity; that is, the court does not hold that the jury could not render a verdict or that the trial court could not impose sentence as a result. Instead, the appellate court reverses the defendant's conviction and sentence in order to remedy the trial error. What's more, the conviction and sentence must be before the appellate court in order for it to reverse them, and this is why it is important and not a "red herring" (Resp. State Br. at 21) that Mr. Lee did not appeal from or after the

entering of the nolle prosequi. Assuming the circuit court did not honor Mr. Lee's rights, and assuming a reviewing court can reverse the subsequent entry of nolle prosequi to permit a do-over of the vacatur hearing, the nolle prosequi must be before the reviewing court. Because the nol pros was not before the Appellate Court, it was not subject to reversal, and so it rendered the appeal moot.

B. Mr. Lee

For the most part, Mr. Lee's arguments on mootness echo the State's "alternative" argument. He opens with the following syllogism: "But for the defective vacatur ruling, the State could not have entered a nolle prosequi. The Appellate Court was empowered to reverse the hearing that violated Mr. Lee's rights. Undoing the vacatur nullified the nolle pros." Resp. Lee Br. at 11-12. The argument fails for multiple reasons, not the least of which is that it is circular. In essence, Mr. Lee argues that the reason a court can reverse a vacatur order followed by the entry of nolle prosequi is because it can undo the nolle prosequi by reversing the vacatur order. Furthermore, as discussed above, the notion that procedural defects at the vacatur hearing deprive the State of its authority to enter a nolle prosequi is flawed. Assuming error at the hearing, the vacatur order was at most subject to reversal, so it was voidable, not void *ab initio*. The State therefore had the authority (as well as the obligation under Rule 4-333(i)) to enter the nolle prosequi, which had the incidental effect of mooting the appeal by the victim's representative.

C. Amicus MCVRC

MCVRC offers a very different argument for why Mr. Lee's appeal was not

moot. MCVRC's argument proceeds according to the following logic:

> 1. Criminal Law Article § 3-207 authorizes a court, on motion of the State, to dismiss a charge of assault only if the victim and defendant agree to the dismissal.
> 2. "First degree murder is the most severe assault charge."
> 3. Criminal Law Article § 3-207 authorizes a court to grant the State's motion to dismiss a first degree murder charge where the State has obtained the agreement of the victim and defendant.
> 4. Mr. Lee did not agree to the dismissal of charges against Mr. Syed.
> 5. The State did not have the authority to nol pros the charges.

(MCVRC Br. at 2-3).

MCVRC's argument is flawed. Setting aside the fact that the nolle prosequi in this case was not limited to first degree murder, and assuming for the sake of argument that § 3-207 applies in a murder prosecution, MCVRC confuses a nolle prosequi with a motion to dismiss under § 3-207. To be sure, the effect – dismissal of a charge – is similar, but that is where the similarities end. A nolle prosequi under Rule 4-247 does not require a motion by the State. *See* Md. Rule 4-247(a) ("The State's Attorney may terminate a prosecution on a charge and dismiss the charge by entering a nolle prosequi on the record in open court."). Nor does it require the agreement of the defendant or the approval of the court. *See id.* (allowing State to enter nol pros even when neither defendant nor defense counsel is present or had prior notice).

In contrast to a nolle prosequi, a dismissal under § 3-207 necessarily occurs as a result of a compromise reached by the parties and the victim. This is not apparent merely from a straightforward reading of § 3-207. Other statutes also treat a dismissal under § 3-207 as qualitatively different from a nolle prosequi. For

example, Criminal Procedure Article § 10-105 permits a defendant to petition for expungement if, among other things:

> (1) the person is acquitted;
> (2) the charge is otherwise dismissed;
> (3) a probation before judgment is entered, unless the person is charged with a violation of § 21-902 of the Transportation Article or Title 2, Subtitle 5 or § 3-211 of the Criminal Law Article;
> *(4) a nolle prosequi or nolle prosequi with the requirement of drug or alcohol treatment is entered;*
> (5) the court indefinitely postpones trial of a criminal charge by marking the criminal charge "stet" or stet with the requirement of drug or alcohol abuse treatment on the docket;
> *(6) the case is compromised under § 3-207 of the Criminal Law Article;*

Md. Code, Crim. Proc. Art. § 10-105(a).

Perhaps the clearest distinction between a nolle prosequi and a dismissal under § 3-207 was set forth by the United States District Court for the District of Maryland in *Franklin v. Office of Baltimore City State's Attorney*, 2015 WL 799416 (filed Feb. 24, 2015). Granting the State's motion to dismiss a complaint that it violated the plaintiff's civil rights by nol prossing an assault charge, the court wrote:

> In this case, the attorneys' decision to nolle prosequi the charges against Clagett was "at the core of [their] responsibilities" because it related to "whether to proceed with a prosecution." *See Springmen*, 122 F.3d at 212-13. However, the Plaintiff attempts to remove the absolute immunity by arguing that the Maryland Victim's Rights Act implied a mandatory duty to seek the Plaintiff's consent before dismissing the case; therefore, he argues, their actions were "ministerial." *See* ECF No. 13 at 5–10.
>
> The Victim's Rights Act states that "[a] victim of assault has the rights provided under § 3–207 of the Criminal Law Article." Md. Code Ann. Crim. Proc. § 11–201. Section 3–207 addresses the "dismissal of [an] assault charge." It states that "[o]n a pretrial motion of the State, a court may dismiss a charge of assault if: 1) the victim

> and the defendant agree to the dismissal; and 2) the court considers the dismissal proper." Md. Code Ann. Crim. Law § 3–207(a) (emphasis added).
>
> The statute addresses dismissals that require court approval and mandates the considerations the court should make. Here, the attorneys did not enter a dismissal that required court approval—the charge was nolle prossed. In Maryland, "the broad discretionary right of a prosecutor to enter a nolle prosequi, and thereafter institute new charges based on the same facts is well established law." *Mora v. State*, 123 Md. App. 699, 720 A.2d 934, 944 (Md. Ct. Spec. App. 1998). "The entry of a nolle prosequi is generally within the sole discretion of the prosecuting attorney, free from judicial control ...." *Ward v. State*, 290 Md. 76, 427 A.2d 1008, 1012 (Md. 1981) (emphasis added). Based on the plain wording of the statute, § 3-207 did not apply to Clagett's case-the attorneys did not dismiss the charges on a pre-trial motion requiring court approval or the determination of with or without prejudice. Thus, the Plaintiff's consent was not required.

Id. at *4.

As with the complaint in *Franklin*, MCVRC's reliance on § 3-207 is without merit.

II. Zoom attendance satisfies a victim's representative's right to attend a vacatur hearing.

Mr. Lee's criticism of Zoom attendance is based on his unsupported assertion that he had the right to participate to the same extent as a party in the vacatur proceeding. His complaint about the notice he received in this case relies on his assertion that his right of attendance may only be satisfied by in-person attendance. By its own logic, if Mr. Lee did not have the right to participate as a party, his argument on attendance fails. Relatedly, if his argument on attendance fails, his argument on notice fails.

A. Mr. Lee

Mr. Lee's position that his attendance right may only be satisfied by in-person attendance is premised on a right not afforded to him by statute or rule: the right to participate as a party or party-equivalent in a criminal proceeding. Resp. Lee Br. at 31-33. Because Mr. Lee wishes to change the law, a goal better suited for the Maryland General Assembly, Mr. Lee cites two federal cases that are entirely distinguishable. Resp. Lee Br. at 31. *Kenna* provides that victims should be permitted to provide victim impact at sentencing. *Kenna v. U.S. Dist. Ct. for C.D. Cal.*, 435 F.3d 1011 (9th Cir. 2006). *Moussaoui* holds that "victims [may not] intervene in the criminal process for the purpose of obtaining discovery from the Government to be used in civil litigation" for reasons of "efficiency, competency, fairness, and slippery slope concerns." *United States v. Moussaoui*, 483 F.3d 220, 237 (4th Cir. 2007).

Mr. Lee argues that in-person testimony is preferable when the factfinder must assess the credibility of witnesses. Resp. Lee Br. at 32 n. 16., n. 17. This point, though true, does not help Mr. Lee's position because his credibility was not at issue in this case. He was neither a fact witness nor a party, and the law does not provide for victim impact at a vacatur hearing. The Appellate Court correctly concluded that a victim's representative has no right of participation given the critical differences between a vacatur hearing and a hearing at which a court exercises discretionary sentencing authority. *Lee*, 257 Md. App. at 544-45.

B. The State

The State begins its discussion of attendance by noting that the passage of the vacatur statute predates the COVID-19 pandemic and that therefore the Legislature "understood that the default would be in-person attendance." Resp. State. Br. at 33-34. As addressed in Mr. Syed's principal brief, that the use of remote technology was not as widespread in 2019 as it was in 2022 does not advance the State's argument. The legislative history is silent on remote versus in-person attendance. Thus there is no basis to infer the Legislature's intent on the subject. However, where the courts and Rules Committee have since weighed in on the subject, remote attendance is widely used and encouraged. Pet. Br. at 29-30. As the circuit court noted, even where victim impact is permitted, it is frequently provided via Zoom. (E.138).

In its discussion of Rule 21-301— which permits the court to require remote attendance of both parties and nonparties in certain proceedings and does not give non-parties, including victims or their representatives, standing to object in matters which may be handled in person, remotely, or hybrid— the State grafts into the rule a term that the rule neither defines nor even references, "stakeholder." Resp. State Br. at 36. The State likewise fails to define this term or cite any rule, statute, or case that supports the notion that this Court or the Rules Committee intended to carve out special standing for "stakeholders." If the State wishes for the rule to provide standing for victims, their representatives, or some broader category of "stakeholders," that proposal should be made to the Rules Committee.

The State cites *State v. Casey*, 44 P.3d 756 (Utah 2002), for guidance on how the circuit court should have proceeded at the vacatur hearing. Resp. State. Br. at 38-39. *Casey* involved a guilty plea and sentencing in which a victim was not permitted to address the court, but where the plea court informally reopened the proceedings when it became aware that the victim wished to address the court. 44 P.3d at 757. *Casey* is unavailing. At issue in that case was a victim's right to address the court at sentencing, a right not at issue in this case and a right that Maryland indisputably recognizes.

Attempting to highlight the shortcomings of Zoom attendance, the State selectively quotes from *People v. Anderson*, 989 N.W. 2d 832 (Mich. Ct. App. 2022), a case in which the court held that a defendant's appearing remotely at his own sentencing hearing while other participants appeared in person was not reversible error. Resp. State Br. at 39. Echoing the opinion of the Appellate Court, the State makes much of the fact that the parties and court were in person, but Mr. Lee was not. Resp. State Br. at 35, 38, 39. *Lee*, 257 Md. App. at 541. This position ignores the fact that Mr. Lee conveyed an intent to attend via Zoom to the State and did not convey a desire to attend in person until minutes before the scheduled hearing was to begin. (E. 138). But setting that fact aside, this position also ignores the distinctions between the roles of parties and that of the victim's representative in the vacatur context. Mr. Lee's right as victim's representative was to attend as opposed to participate in the hearing. As Judge Berger explained in his dissent, "there are distinct differences between remote participation and in-person

participation that are not implicated when an individual has the right to observe, but not participate." 257 Md. App. At 559 (Berger, J. dissenting). There is nothing inherently undignified about a hybrid or remote proceeding. The vacatur court addressed Mr. Lee with sensitivity and respect and permitted him to speak without limit in time or substance. (E. 142). The court acknowledged Mr. Lee's emotion, expressed that it was important to hear from a victim's representative, and thanked him for appearing and speaking. *Id.* Mr. Lee was able to observe the proceedings and the vacatur court could observe him.

The State concludes its discussion by asserting that the circuit court's declining Mr. Lee's request for a continuance after it determined that Mr. Lee's rights to notice and attendance were satisfied would lead to courts "barring all victims from attending in person" and excluding the family members of victims and defendants, the press, and the public from the courtroom. *Id*. at 40. The State fails to offer any roadmap as to how an already common practice in Maryland courts, hybrid proceedings, would lead to an unprecedented, closed courtroom scenario. The circuit court was correct in holding that Zoom attendance satisfied Mr. Lee's right of attendance.

III. Notice to a victim's representative is sufficient where the State complied with all statutory and rules-based notice requirements.

A. Mr. Lee

In its opinion, the Appellate Court rejected Mr. Lee's argument that he had a right to notice of the filing of the motion to vacate. *Lee*, 257 Md. App. at 530. Mr.

Lee opens his discussion on notice by complaining that the State was "woefully deficient in notifying [him] before moving to vacate." Resp. Lee Br. at 29. If Mr. Lee disagrees with the Appellate Court's holding, then he should have cross petitioned on the issue, but he did not. Likewise, he complains that he was not notified of the chambers conference that took place three days before the vacatur hearing, Resp. Lee Br. at 30, but he failed to cross petition on this issue.

In any event, Mr. Lee received advance notice of the filing of the motion to vacate, and he had no right to notice of, or to attend, the chambers conference. The State did not file the motion out of the blue. Mr. Lee was already aware from communications in the spring of 2022 that the State was reviewing the case. (E. 136). The State then notified Mr. Lee of its intention to file the motion two days in advance and sent him a copy of the motion a day in advance. (E. 124, 134, 179-80). As in the Appellate Court, Mr. Lee cites no authority for the proposition that he was entitled to anything further with respect to the filing of the motion. Furthermore, his rights of notice and attendance were triggered by the scheduling of the hearing.[4]

As to the vacatur hearing, Mr. Lee argues that the notice he received was not sufficient because he wished to attend in person and "meaningfully participate."

[4] Criminal Procedure Article § 8-301.1(d)(1) references §§ 11-104 and 11-503 and requires the State to notify the victim's representative before a hearing. Section 11-104(f)(1) requires prior notice of each proceeding. Section 11-503(a)(7) likewise requires notice of post-sentencing proceedings. Rule 4-333(g)(2), meanwhile, requires the State to provide the victim's representative with written notice of the vacatur hearing that "contain[s] a brief description of the proceeding and inform[s] the victim or victim's representative of the date, time, and location of the hearing and the right to attend the hearing."

Resp. Lee Br. at 31. For the reasons discussed in Argument II, Mr. Lee's right to attend the hearing did not include a right to attend in person. And even the State agrees that Mr. Lee did not have the participatory rights of a party. Resp. State Br. at 41 n. 9.

In making his arguments, Mr. Lee also misstates the record and law on several critical points.[5] First, Mr. Lee mischaracterizes the circuit court's reasoning in denying his motion to continue as follows: "The circuit court held that notice was adequate because the State followed the bare letter of the law, which does not expressly specify that notice must be reasonable." Resp. Lee. Br at 29, 30. Although the judge asked Mr. Lee's counsel about where the term "reasonable" appeared in the statute, she did not find that notice did not need to be reasonable. (E. 136). The circuit court was explicit that it denied the continuance because Mr. Lee had ample time to obtain counsel when the State first advised him that the motion would be filed. (E. 137). The court also explained that it was denying the continuance because Mr. Lee advised the State that he would join by Zoom, that Zoom is a common and appropriate method by which victims and their representatives attend many proceedings, and that it was appropriate in Mr. Lee's circumstances. (E. 138).

Second, Mr. Lee incorrectly states that the "vacatur [was] in the works for nearly a year," implying that the vacatur was a fait accompli. Resp. Lee Br. at 29.

[5] Mr. Lee asserts that the exhibits to the vacatur motion were not attached to the motion and would remain "hidden" but for his appeal. Resp. Lee Br. at 8 n.2. Mr. Lee is mistaken. The exhibits were attached to the motion that was filed with the court and are part of the record.

Contrary to Mr. Lee's description, the record indicates that the case was under review and investigated for nearly a year. (E. 73). Along those same lines, Mr. Lee criticizes the State for moving forward with the vacatur before the investigation was complete, but he is conflating two different decision points in the case. Resp. Lee Br. at 30. At the conclusion of the investigation, the State moved for vacatur because it was convinced that Mr. Syed's conviction lacked integrity and that it was in the interest of justice to move to vacate the conviction. (E. 73-93). The State based its decision on whether to retry Mr. Syed or dismiss the charges on the outstanding DNA results. Pet. Br. at 13 n.7.

Third, Mr. Lee states that when the State contacted Mr. Lee before filing, it did not disclose relevant details and did not tell him there would be a hearing, but the record contradicts him. *Id*. As noted above, the State reached out to Mr. Lee on the September 12 to inform him that the motion would be filed (E. 124); the State then spoke with him on the 13th, reviewed the motion, told him there would be a hearing, offered to answer any questions, and emailed him a copy. (E. 124, E. 134).

Fourth, Mr. Lee alleges that "Mr. [Syed] had independent authority to move to vacate with the same evidence at any time." Resp. Lee Br. at 30. However, Criminal Procedure Article § 8-301.1 permits only the State to move to vacate a conviction.

Perhaps most significantly, in criticizing the circuit court's exercise of discretion in denying a continuance, Mr. Lee fails to account for the multiple interests before the court. Mr. Lee asserts that vacatur was neither "ripe nor urgent"

and therefore could have been postponed without prejudice to anyone. Resp. Lee Br. at 30. But Mr. Syed had a liberty interest where the State and defense agreed that he had been wrongfully deprived of his liberty for twenty-three and a half years. Subjecting Mr. Syed to the horrors of prison for even an additional day weighed heavily against delaying the vacatur hearing, particularly where, as here, Mr. Lee's right was limited to the right to attendance.

B. The State

Like Mr. Lee, the State acknowledges that its attack on notice depends on this Court finding that Mr. Lee had the right to appear in person and speak at the vacatur hearing. Resp. State Br. at 44. Although the State notes that it disagrees with Mr. Lee that he had the right to call witnesses and present evidence, *id*. at 41 n.9, the State argues that Mr. Lee was uniquely situated to argue to the court regarding "shortcomings in the State's presentation." *Id*. at 43. The State also criticizes the notice provided by the State below because it gave "the false impression . . . that if Lee had family still the Baltimore area, they also could not attend in person." *Id*. at 50. The State's argument is entirely speculative and not based on the law. There has been no complaint that Mr. Lee had family residing in the area who wanted to attend the hearing but did not because they believed they could only attend over Zoom.

The State claims that the circuit court's mistaken belief that Mr. Lee expressed his intent to attend via Zoom before the scheduling conference contributed to the court's denial of Mr. Lee's motion to continue. Resp. State Br. at 51. This complaint belies the record. Mr. Lee's counsel informed the court, and the

State agreed, that Mr. Lee indicated that he would attend via Zoom on Sunday, September 18th. (E. 130-138). The State further engages in speculation when it posits that Mr. Lee's receipt of the email notifying him of the hearing was delayed because he did not check his email. Resp. State Br. at 52. The record does not support the State's conjecture. Mr. Lee's counsel did not complain at the vacatur hearing or in his brief that Mr. Lee's receipt of the email was delayed because he did not check his email. Moreover, in his response to the State's text asking him if he received the email informing him of the hearing and facilitating his attendance via Zoom, Mr. Lee did not indicate that he just received the email or that the text was the first that he heard of it. Rather, he confirmed receipt and indicated that he would attend via Zoom. (E. 182).

Finally, the State alleges that Mr. Lee faced "a Hobson's choice" and "acquiesced in attending by Zoom because he was presented with no other option" given the notice he received. (E. 53). Given that Mr. Lee communicated to the State that he would attend via Zoom, the court reasonably concluded that Mr. Lee had agreed to appear by Zoom until the afternoon of the hearing when Mr. Lee's counsel entered his appearance and filed a motion to continue at 1:30 p.m., 30 minutes before the hearing was scheduled to begin. Whether to grant Mr. Lee's continuance request at that late hour so that Mr. Lee could appear in person or to move forward with the hearing with Mr. Lee attending by Zoom was in the discretion of the court, which, as noted, had to balance not only Mr. Lee's wishes but also the interests of Mr. Syed. In addition, Mr. Lee and the State wed their claims on notice and

attendance to the new right that he seeks, a right that Maryland does not provide, the right for a victim to "meaningfully participate" in a vacatur proceeding. Accepting instead that his rights were more limited, the court's decision was not an abuse of discretion.

The notice that Mr. Lee received complied with the statutory and rules requirements, and the circuit court was correct in so ruling.

IV. Respondent had the burden of proving that any violation of his rights affected the outcome of the vacatur hearing.

In his principal brief, Mr. Syed argued that Mr. Lee had not demonstrated that any violation of his rights *as recognized by the Appellate Court* affected the outcome of the vacatur hearing. Mr. Lee and the State do not respond to this argument. Instead, they assume that Mr. Lee had broader rights than recognized by the Appellate Court – a right to present and challenge evidence, according to Mr. Lee, and an amorphous right "to be heard," according to the State – and contend that a violation of these rights was not harmless. Resp. Lee Br. at 39-40; Resp. State Br. at 56. Assuming, as the Appellate Court held, that the vacatur court violated only Mr. Lee's right to attend the hearing in person and right to notice sufficient to allow him to attend in person, the issue before this Court is whether the results of the hearing would have been different had he appeared and observed the proceedings in person rather than by Zoom.

Still, one of the points Mr. Lee and the State make applies generally to any argument that a violation of a victim's rights was harmless. Mr. Lee and the State

suggest that traditional harmless error analysis under which the reviewing court assesses the impact of the error on the outcome of the proceedings does not apply to violations of a victim's rights. According to the State, that analysis only pertains to parties, and "[a] victim is not a party to the case and does not have the same ability to control the outcome of a proceeding as a party would." Resp. State Br. at 57. It follows, the State contends, that "harm and prejudice must be measured not against whether a victim's presence might influence judicial proceedings but based on the deprivation of a victim's rights."[6] *Id.* Mr. Lee argues similarly that "harmless error analysis is not appropriate with respect to denial of a victim's constitutional and statutory rights to participate in proceedings" because, according to Mr. Lee, "[p]articipatory rights provided under Maryland law are an end onto themselves" and "[t]he right is not to a substantive outcome but to be treated with dignity and respect." Resp. Lee Br. at 37.

Tellingly, neither Mr. Lee nor the State cite any authority for the position that the rights of a victim or victim's representative are more protected than the rights of a party, including the accused whose liberty is at stake. Dignity underlies the constitutional protections afforded to criminal defendants. *See, e.g., Miranda v.*

[6] Given that the State also argues that Mr. Lee had a right to address the court, Resp. State Br. at 41-43, its attempt to distinguish victims' representatives as lacking "the same ability to control the outcome of a proceeding as a party" is curious. If a victim's representative can influence the ruling of the vacatur court, then the victim's representative has the ability to control the outcome, and so traditional harmless error analysis would apply under the State's logic. How any error was not harmless here in light of the fact that Mr. Lee was allowed to address the court is a question the State does not answer.

Arizona, 384 U.S. 436, 460 (1966) ("All these policies point to one overriding thought: the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens."); *Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) ("As Chief Justice Warren explained in his opinion in *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958): 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.'"); *Tweedy v. State*, 380 Md. 475, 497 (2004) ("'Respect for the dignity of the individual is at the base of the right of a man to be present when society authoritatively proceeds to decide and announce whether it will deprive him of life or how and to what extent it will deprive him of liberty. It shows a lack of fundamental respect for the dignity of a man to sentence him *in absentia*.'"). Yet, violations of a defendant's rights, including the right to be present and participatory rights like the right to present a defense and confront the State's evidence, are subject to traditional harmless error analysis. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (right to confrontation); *State v. Hart*, 449 Md. 246, 262 (2016) (right to be present); *Evans v. State*, 333 Md. 660, 683 (1994) (Fifth Amendment violation); *Sutton v. State*, 128 Md. App. 308, 319 (1999) (Fourth Amendment violation).

To say that a violation of a victim's rights can be harmless is not to devalue

victims' rights. Nor is it too great a burden for a victim to have to establish prejudicial error. In many cases, the issue will never arise as the prejudice will be obvious. *Antoine v. State*, 245 Md. App. 521 (2020), is a perfect example. In *Antoine*, the circuit court violated the victim's right to present impact evidence by binding itself to a plea agreement calling for probation before judgment for an assault without hearing from the victim of the assault. It was unnecessary in that case to address whether the error was harmless. In the context of sentencing, a court's discretion is so broad and may so readily be swayed one way or another that to totally exclude the participation of a party or the victim will rarely be harmless. *See Carter v. State*, 461 Md. 295, 364 (2018) ("So long as the sentence is within the constraints set by the Eighth Amendment, the Circuit Court on remand has its usual broad discretion in selecting an appropriate sentence, taking into account the circumstances of the offenses, their impact on victims, [the defendant's] culpability, his status as a juvenile offender, the State's sentencing guidelines, and other factors typically considered by a sentencing court.").

A vacatur hearing is different from sentencing. To grant a motion to vacate a conviction, a court must find that there is newly discovered evidence that creates a substantial or significant probability that the result would have been different or that there is new information that calls into question the integrity of the conviction, and that the interest of justice and fairness justifies vacating the conviction. Md. Code, Crim. Proc. Art. § 8-301.1(a). Mr. Lee cannot demonstrate that his physical presence in the courtroom would have led to the circuit court reaching a different

conclusion on whether to grant the State's motion to vacate.[7]

Under these circumstances, reversing the vacatur order and remanding for a new hearing does not honor Mr. Lee's rights. It elevates form over substance and, at least temporarily, undoes the State's attempt to correct the injustice suffered by Mr. Syed for 23 years. Assuming a violation of Mr. Lee's rights, reversal is not appropriate in this case.

CROSS-RESPONDENT'S BRIEF

ARGUMENT

The Legislature has provided victims' representatives the right to attend but not participate in vacatur hearings.

Mr. Lee and the State acknowledge that neither Criminal Procedure Article § 8-301.1 nor Rule 4-333 expressly grant a victim's representative the right to participate in a vacatur hearing. Resp. Lee Br. at 23; Resp. State Br. at 42. Instead, Mr. Lee argues, this Court should read a broad participatory right into the law because either: § 8-301.1 "bakes in a role for victims" (despite having been, in Mr. Lee's words, "drafted … under the presumption of victimless crimes); or the right is "incorporated" into Rule 4-333 (via a cross-reference which is not part of the rule); or the right is "inherent in the statutory scheme" (which only provides victims

[7] This is not a case in which the newly discovered evidence or new information undermined the victim's credibility. The Court does not need to resolve whether in-person attendance by the victim could impact the result in such a case.

the right to speak at sentencings and juvenile dispositions). Resp. Lee Br. at 19-25. The State echoes some of Mr. Lee's arguments but asks the Court to interpret the law as providing victims an undefined but more limited participatory right "to address" a vacatur court. Resp. State Br. at 41-43. The Court should reject Respondents' arguments, which amount to requests to change the law.

Respondents' arguments run afoul of basic principles of statutory construction as set forth by this Court:

> To ascertain the intent of the General Assembly, our analysis begins with the normal, plain meaning of the language of the statute. *Id.* at 275, 987 A.2d 18. In doing so, we read the plain meaning of the language of the statute "as a whole, so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory." *Koste v. Town of Oxford*, 431 Md. 14, 25-26, 63 A.3d 582 (2013) (internal quotations omitted). Additionally, "[w]e neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute, and we do not construe a statute 'with forced or subtle interpretations' that limit or extend its application." *Lockshin*, 412 Md. at 275, 987 A.2d 18 (citations omitted). "If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to legislative intent ends ordinarily and we apply the statute as written, without resorting to other rules of construction." *Id.*

Wheeling v. Selene Fin. LP, 473 Md. 356, 376-77 (2021). Neither Criminal Procedure Article § 8-301.1 nor Rule 4-333 is ambiguous about the rights afforded to victims and their representatives in connection with vacatur proceedings. Under § 8-301.1, a victim or victim's representative has a right to "be notified" of a vacatur hearing "under § 11-104 or § 11-503 of this article" and "to attend" the hearing "under § 11-102 of this article." Md. Code, Crim. Proc. Art. § 8-301.1(d). Similarly, Rule 4-333 directs the State to "send written notice of the hearing to each victim or

victim's representative, in accordance with Code, Criminal Procedure Article, § 11-104 or § 11-503" and "to inform the victim or victim's representative of the date, time, and location of the hearing and the right to attend the hearing." Md. Rule 4-333(g)(2).

The plain language of the statute and rule provide victims and their representatives only the right to attend vacatur hearings and not the right to be heard at the hearings. The latter right need not accompany the former. Notifying a victim or their representative of a particular proceeding allows them to stay informed of developments in the case, whether the proceeding is pretrial like a suppression hearing or post-trial like an appeal or post-conviction hearing. Moreover, as the Appellate Court noted in its opinion, the Legislature has provided victims and their representatives a right to be heard in statutes pertaining to certain other types of proceedings. For example, a victim or victim's representative has the right under Criminal Procedure Article § 11-402 to prepare and submit a victim impact statement in connection with a sentencing proceeding, and the court "if practicable" must allow the victim or victim's representative to address the court at the sentencing hearing. *See* Md. Code Crim. Proc. Art. § 11-403.

Mr. Lee makes much of the fact that Rule 4-333 contains a cross-reference to § 11-403, which, he asserts, "makes the cited statute part of the law." Resp. Lee Br. at 22. Like Mr. Lee, the State acknowledges that Criminal Procedure Article § 8-301.1 only expressly affords a victim's representative a right of attendance but argues that the Court should read a participatory right into the law through the cross-

reference to § 11-403 in Rule 4-333. Resp. State Br. at 41-43. According to the State, "Section 11-403 is cross-referenced in Md. Rule 4-333(h)(3) governing the disposition of a motion to vacate. If a victim has the right to address the court before the mere alteration of a sentence, surely a victim has the same right to address the court when a sentence may be vacated entirely." Resp. State Br. at 41.

Contrary to Respondents' contentions, Rule 1-201 ("Rules of Construction") states plainly that "[h]eadings, subheadings, *cross references*, committee notes, source references, and annotations are not part of these rules." Md. Rule 1-201(e). Furthermore, by its own terms, the right to address a court under § 11-403 applies only to a "sentencing or disposition hearing," which the statute defines as "a hearing at which the imposition of a sentence, disposition in a juvenile court proceeding, or alteration of a sentence or disposition in a juvenile court proceeding is considered." Md. Code, Crim. Proc. Art. § 11-403(a). The limitation makes sense because a victim impact statement contemplated by the statute is relevant only to a court's exercise of discretion in imposing a sentence or juvenile disposition. But, in any event, a vacatur proceeding is neither a sentencing hearing, a juvenile disposition, nor a hearing on a motion for modification of a sentence or juvenile disposition. Had the General Assembly intended to provide victims' representatives the right to participate at a vacatur hearing, it knew how to do so.

At bottom, Mr. Lee is asking this Court to change § 8-301.1 to fit his vision of how our criminal justice system should operate, a vision that is at odds with our current system. Amicus MCVRC is correct in its observation that "until the last few

hundred years, crime victims were the 'prosecutors' of criminal offenders." MCVRC Brief at 6. Crime victims are still entitled to seek redress on their own in civil court, but society – the Framers, the General Assembly, and the electorate – has assigned exclusively the role of prosecutor to the State. This is reflected in the information provided to an individual applying to a commissioner for a statement of charges: "You are applying for a charging document which may lead to the arrest and detention of the person you are charging. If the commissioner issues a charging document, neither you nor the commissioner may withdraw the charges later. The charge may only be disposed of by trial or by action of the State's Attorney." Application for Statement of Charges, available at https://www.mdcourts.gov/sites/default/files/import/district/commissioners/forms/dccr001.pdf (last visited 9/6/23).

To be sure, the people of Maryland and the General Assembly have provided rights to crime victims through legislation and an amendment to the state constitution. *See generally Lopez v. State*, 458 Md. 164, 177 (2018). While these provisions are important, their reach should not be overstated. *See id.* at 178 ("However, the legislature and this Court have also made clear that victims' rights are not without limitation."). The fact that the Legislature has afforded some rights to crime victims does not support an argument that this Court should provide the rights that Mr. Lee now seeks. Instead, it suggests, at most, that the appropriate audience for Mr. Lee's request to expand victims' rights is the Legislature and not this Court.

At the same time, Respondents' arguments are premised on a misconception of the State's role. The State (the movant in the circuit court) now laments that "the victim was the only one taking an adversarial position to the granting of the motion." Resp. State Br. at 43. Mr. Lee, meanwhile, argues that "the prosecutor effectively acted on Mr. Syed's behalf" rather than "on the public's behalf." Resp. Lee Br. at 7, 18, 27-28. Respondents define the State's function too narrowly. When the State determines that a person was prosecuted unfairly and, as here, wrongfully, that does not mean the State has abandoned its adversarial role and become an arm of the defense. *See Walker v. State*, 373 Md. 360, 395 (2003) ("The special duty of the prosecutor to seek justice is said to exist because the State's Attorney has broad discretion in determining whether to initiate criminal proceedings. … The prosecutor's duty is not merely to convict, but to seek justice."); Md. Rule 19-303.8(f), (g) (setting forth prosecutor's duty after conviction to disclose "evidence creating a reasonable likelihood that a convicted defendant did not commit an offense" and to "seek to remedy the conviction"). When a prosecutor seeks to undo a conviction in order to achieve justice, the prosecutor is not abandoning their role, they are fulfilling it.

Writing for a unanimous court in *Price v. State*, 378 Md. 378, 387 (2003), Judge Raker explained that "if the words of a statute clearly and unambiguously delineate the legislative intent, ours is an ephemeral enterprise. We need investigate no further but simply apply the statute as it reads." Section 8-301.1 and Rule 4-333 plainly and unambiguously provide victims and their representatives the right to

attend the vacatur hearing. Mr. Lee and the State ask the Court to read into the law a new right for victims and their representatives, and then to find that the circuit court violated this new right. The Court should decline to do so and should hold that the statute means what it says.

CONCLUSION

For the foregoing reasons, and those stated in Petitioner's Brief, Petitioner Adnan Syed respectfully requests that this Court hold that the State's entry of nolle prosequi rendered moot the appeal by the victim's representative from the order vacating Mr. Syed's convictions. In the alternative, Mr. Syed requests that the Court hold that there was no violation of Mr. Lee's rights to attendance and notice or that any violation did not result in prejudice sufficient to justify reinstating Mr. Syed's convictions.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112

1. This brief contains 8,921 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Erica J. Suter

_____

Erica J. Suter

ADNAN SYED, Petitioner/Cross-Respondent v. YOUNG LEE, AS VICTIM'S REPRESENTATIVE, ET AL., Respondents/Cross-Petitioner	IN THE SUPREME COURT OF MARYLAND September Term, 2023 No. 7

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of September, 2023, a copy of the Petitioner's Reply Brief and Cross-Respondent's Brief in the captioned case was delivered via the MDEC system, and paper copies were sent by first-class mail or courier, to:

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