YOUNG LEE, AS VICTIM'S REPRESENTATIVE, Appellant, v. STATE OF MARYLAND, Appellee.	IN THE COURT OF SPECIAL APPEALS OF MARYLAND September Term 2022 No. 1291 Circuit Court Case No. 199103042–46

APPELLANT'S RESPONSE TO THIS COURT'S ORDER TO SHOW CAUSE WHY YOUNG LEE'S APPEAL SHOULD NOT BE DISMISSED AS MOOT

Appellant Young Lee, the victim representative for the family of Hae Min Lee, the crime victim in the above-captioned case, by and through counsel, responds to this Court's Order to Show Cause of October 12, 2022.

INTRODUCTION

This appeal is not moot. Young Lee, as the victim representative of his murdered sister, has suffered an ongoing constitutional and statutory injury for which he seeks a remedy prescribed by Maryland law.

At a press conference on October 11, the Baltimore City State's Attorney boasted that she had mooted the Lee family's rights: "I've utilized my power and discretion to dismiss the case. There is no more appeal, it's moot." But constitutional and statutory rights cannot be mooted by a prosecutor's maneuver to violate those rights and then proclaim that the deed is done and

the harm cannot be remedied.

The Maryland Constitution and victims' rights statutes require that crime victims and their families be treated with dignity, respect, and sensitivity during all phases of the criminal justice process. Families must be provided with an opportunity to appear and comment on the evidence. These rights must be afforded to victims when prosecutors seek to vacate a perpetrator's conviction.

Here, the voices of the Lee family were silenced. Prosecutors went out of their way to evade the Constitution's absolute requirements. They provided the Lee family with barely any notice and no meaningful opportunity to appear and comment on the evidence. When Mr. Lee's counsel later brought this to the Circuit Court's attention, the court astonishingly ruled that the Vacatur Statute requires "notice," but not "*reasonable notice*." The prosecutor also prevented the family from meaningfully participating because she introduced virtually no evidence on why she sought to vacate the charges against Adnan Syed. While the Vacatur Statute places the burden of proof on the State and requires the prosecutor to present particularized reasons for seeking vacatur, the State in this case submitted a vague proffer based upon an incomplete investigation. It introduced only a single exhibit—an affidavit from one of the prosecutors, not a witness with knowledge—without any supporting materials or documentation.

And though the circuit court was required to conduct a public evidentiary hearing and perform a complete legal analysis, the circuit court based its ruling entirely on the state's sparse proffer and a handwritten note that the court viewed in-camera. Hence, neither the court nor the prosecutor satisfied the legal requirements of the vacatur statute. Further, the Lee family was deprived of the opportunity to review and examine the evidence that formed the basis for vacatur and to raise its own questions and challenges. In sum, prosecutors set up a secretive Star Chamber proceeding that shut the Lee family out from any meaningful involvement or engagement with the record.

In fact, procedural irregularities in the vacatur hearing were so pervasive that the original trial judge, the Honorable Wanda K. Heard, has executed a sworn affidavit supporting Mr. Lee's position and urging this Court to take a close look at what occurred here. *See* Affidavit of Judge Wanda K. Heard in Support of Mr. Lee's Response to Order to Show Cause ("Heard Affidavit") (attached as **Exhibit A**).

In sum, the State's Attorney and circuit court committed serious breaches of the Lee family's rights that are not mooted by the State's decision to abandon the charges against Mr. Syed following the vacatur proceeding. In particular, Mr. Lee seeks an evidentiary hearing that fully complies with the Maryland Vacatur Statute and the constitutional and statutory victims' rights that should have been afforded to him as the victim representative. Before

vacatur is deemed effective, Mr. Lee is constitutionally entitled to the legally mandated hearing that the prosecutor denied him. This is a critical form of relief that is not mooted by the posture of this matter.

For the Lee family to meaningfully exercise their rights of participation, in accordance with the Maryland Constitution and supporting statutes, there must be a transparent process in which to participate. A proper evidentiary hearing is required to afford the Lee family an opportunity to exercise their rights under Maryland law.

Even if this Court were to find the appeal moot, it should exercise its broad discretion to consider this appeal under a mootness exception because it is precisely the type of extraordinary circumstance in which appellate courts reach otherwise moot matters. Here, as detailed above, the prosecutor boasted about mooting this matter. Courts should not countenance this type of deliberate mooting, especially where it could not have occurred without the predicate constitutional and statutory violations: the tainted vacatur proceeding was a necessary precursor to dismissal.

Moreover, prosecutors were able to treat the Lee family in this callous and unconstitutional manner in large part because of confusion about whether Maryland's new Vacatur Statute somehow abrogates well-established protections for crime victims. The circuit court read the statute in isolation and held that victims are entitled to nothing more than nominal notice of a vacatur

hearing (mere hours would suffice)—even if such notice is unreasonable and does not allow them to be heard and present their perspectives. This narrow reading threatens to erode long-held legal rights for significant numbers of vulnerable Marylanders. The issue is likely to recur based on the number of anticipated vacatur proceedings, and the issue will evade appellate review based on the short timeline for dismissal of cases.

For all these reasons, discussed more fully below, Appellant respectfully requests that this Court permit the appeal to proceed.

STATEMENT OF FACTS[1]

Syed's Conviction in February 2000

In the Circuit Court for Baltimore City on February 25, 2000, Adnan Syed was convicted of murdering his ex-girlfriend, Hae Min Lee. Years later, after Mr. Syed's petition for post-conviction relief was denied and Mr. Syed appealed, the circuit court conducted further fact-finding on remand and granted Mr. Syed a new trial. *See Syed v. State*, 236 Md. App. 183, 205–09 (2018). In 2019, the Court of Appeals reversed the grant of a new trial and affirmed Mr. Syed's original conviction. *State v. Syed*, 463 Md. 60, 105 (2019).

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[1] Appellant adopts and incorporates the Statement of Facts and Procedural History set forth in the State's Response to Mr. Syed's Motion to Disqualify Attorney General's Office as Counsel for the State or Strike the State as Party to the Appeal ("State's Response"), including the exhibits attached thereto.

In affirming Mr. Syed's conviction, the Court held that there was "substantial" corroborating evidence pointing to Mr. Syed's guilt; moreover, a purported alibi-theory that defense counsel failed to investigate was not substantially likely to have changed that outcome. *Syed*, 463 Md. at 97. The Court went on to highlight the most persuasive evidence, *id.* at 93, and further stressed "the evidentiary value of circumstantial evidence." *Id.* at 95. Not only has the Court of Appeals expressed its confidence in the original trial, but the Honorable Wanda K. Heard, the presiding judge in the original trial, now affirms that Mr. Syed's defense counsel was at the absolute top of her game. Mr. Syed was convicted not because of any deficiency in his lawyer's representation but because the corroborating evidence in favor of Mr. Syed's guilt was overwhelming. *See* "Heard Affidavit", Exhibit A.

The Recently Enacted Vacatur Statute

The Maryland General Assembly recently passed a law, fully enacted in January 2020, which creates a new mechanism to vacate past convictions based on new evidence. Md. Ann. Code, Criminal Procedure ("CP") § 8-301.1 (the "Vacatur Statute"); *see also* Md. Rule 4-333. Importantly, unlike tools previously available that require a defendant to move for relief, the Vacatur Statute permits a state prosecutor to initiate the process. *See* Md. House Bill 874, Bill File ("H.B. 874 Bill File") at 1–5 (2019) (attached as **Exhibit C).**

This creates the unique condition that in almost any case in which a state's attorney moves under the Vacatur Statute, the State and defendant's interests will be initially aligned, and there will be no party to challenge a vacatur grant—that is, other than the victim or victim's representative. Accordingly, the Vacatur Statute includes a key provision that provides victims the guarantee of notification of any vacatur hearing and the right to attend those hearings. CP § 8-301.1(d).

The State's Motion to Vacate Mr. Syed's Conviction

On September 14, 2022, the State moved to vacate Mr. Syed's conviction under the Vacatur Statute, claiming the existence of newly discovered exculpatory evidence, a purported *Brady* violation,[2] and potentially "two alternative suspects." (Motion to Vacate Judgment at 1.) According to the State's motion, the Baltimore City State's Attorney's Office and Syed's defense counsel had conducted "nearly a year-long investigation" into Syed's conviction. (*Id.*) Despite this long investigation, the State never notified the Lee family of its intent to move to vacate the judgment until two days before doing so. Even then, the State did not disclose to the Lee family any details of its investigation, the purported exculpatory evidence, or the identity of the new

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

suspects.

Secretive,* Ex Parte *Proceedings with No Notice to Mr. Lee

On Friday, September 16, 2022, a closed in-Chambers proceeding was conducted before the Honorable Melissa Phinn. The circuit court, State's Attorney's Office, and Mr. Syed's counsel were the only participants. Mr. Lee was not notified of the hearing nor given an opportunity to be present or heard at that proceeding. The record is unclear as to whether the State presented the circuit court with a copy of the note giving rise to the purported *Brady* violation at that time or at some other time.[3] (*See* Sept. 19, 2022, Hearing Transcript ("Tr.") at 31:7–9.) The parties agreed to a hearing on the State's motion on Monday, September 19.

The State's Deficient Notification of Vacatur Hearing

Late that same afternoon, Assistant State's Attorney Becky K. Feldman emailed Mr. Lee, telling him that an "in-person hearing" on the motion to vacate had been scheduled for the next business day—Monday, September 19. (Email from Becky Feldman to Young Lee ("Feldman Email") at 1 (Sept. 16, 2022).) Ms. Feldman told Mr. Lee that if his family wished to "watch" the

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[3] At the subsequent hearing on September 19, Assistant State's Attorney Becky K. Feldman noted "for the record" that she "show[ed] the Court the two documents containing the *Brady* information in camera last week," but did not move to admit those documents into the record. (Tr. at 31:7–9.)

proceedings, they could do so via Zoom, but she did not tell him that he had a right to participate in the hearing or comment on the evidence. (*Id.*) Mr. Lee wanted to attend in person but could not travel from California on such short notice. He retained counsel and moved to postpone the hearing by seven days. (*See* Young Lee's Motion for Postponement & Demand for Rights, *State v. Syed*, Case Nos. 199103042–46 (Md. Cir. Ct. for Balt. City, Sept. 19, 2022).)

The Procedurally Erred Vacatur Hearing on September 19

At the hearing on the vacatur motion on September 19, Judge Phinn heard argument from undersigned counsel. Mr. Lee's Counsel argued that the State's late-Friday afternoon notice for "a family of Korean national immigrants" informing them of "a motion that has been contemplated for one year" was "patently unreasonable" and prevented any "opportunity there to be present." (Tr. 7:12–17.) Counsel also corrected the circuit court's belief that Mr. Lee had agreed to the hearing date and to participate solely by Zoom. (Tr. at 11:14–12:14.) Counsel further argued that the State had stated its position that Mr. Lee did not have a right to participate in this hearing. (Tr. at 7:12–17.) Counsel added that any average person reading Ms. Feldman's email would not have understood that he could make a request to attend the hearing in person and be heard on the record. (Tr. at 8:15–16, 17:21–18:9.)

The circuit court responded that it was Mr. Lee's obligation to understand his rights and inform the prosecutor that he wished to attend the

hearing in person. (Tr. at 12:15–24.) The circuit court also ruled that there was no requirement that the notice to the victim's representative be "reasonable." (Tr. at 13:12–14.) Mr. Lee's counsel argued that the State was violating other victims' rights provisions beyond the Vacatur Statute—ones that required the court to permit Mr. Lee to be heard. (Tr. at 8:8–9:22, 15:19–16:6 (mentioning the Maryland Declaration of Rights article 47 and CP §§ 11-102 and 11-403).) Still, the court was unmoved: "Well, I think he had plenty of time to seek an attorney when he was first told about the motion, you know, regardless of how we're going to proceed." (Tr. at 18:20–22.) The court also stated about "11-403[,] [t]hat has to do with sentencing or disposition hearings. That's not what this is. And you're addressing that as the victim's rights. This is a motion to vacate. So—well, this is what I'm going to say to you, counsel." (Tr. at 16:21–17:1.)

The circuit court denied Mr. Lee's motion to postpone the hearing and instead told counsel that if Mr. Lee wanted an opportunity to address the court, he needed to do so via Zoom—immediately. (Tr. at 18:23–19:2.) Mr. Lee raced home from work and, with no opportunity to confer with counsel, proceeded to make a short, flustered statement remotely. He reaffirmed his strong desire to be there in person; expressed that he was "not an expert in legal matters," and so could not opine adequately, but that the experience of watching Mr. Syed's conviction vacated without his family's involvement felt "unfair"; and that "what we're going through, our family, it's killing us." (Tran. at 21:23–23:13.)

The circuit court ruled that by allowing this short statement, it and the State had complied with all statutory and constitutional obligations to Mr. Lee as the victim representative. (Tr. at 24:6–9.) Mr. Lee's counsel asked to be heard on behalf of Mr. Lee, but the court outright refused this request. (Tr. at 23:23–24:5.) The court then granted the State's motion to vacate and ordered that Mr. Syed be immediately released. (Tr. at 44:12–45:3.)

Mr. Lee's Appeal to this Court

On September 28, 2022, Mr. Lee filed a notice of appeal to the Court of Special Appeals pursuant to CP § 11-103, which provides victims the right to appeal a final order that "denies or fails to consider a right secured to the victim" by Maryland law. Under the Maryland Vacatur Statute and Rule 4-333, the state's attorney must enter a *nolle prosequi* of the vacated charges or take other action within 30 days after of circuit court's order. Because this pressing deadline potentially gave the state's attorney the power to moot Mr. Lee's appeal at any moment, on September 29, Mr. Lee moved for a stay pending the appeal in the Circuit Court for Baltimore City. Given the State's persistent failures to communicate with Mr. Lee as required by Maryland law, Mr. Lee asked the court to rule on the motion by close of business September 29. As of October 7, the court had yet to rule. Accordingly, Mr. Lee moved in this Court to stay further proceedings in the matter pursuant to Maryland Rules 8-422 and 8-425.

The* Nolle Prosequi *and this Court's Order to Show Cause

At 9:04 a.m. on October 11, 2022, the Baltimore City State's Attorney emailed the undersigned: "Please give me a call on my desk phone at [redacted]. I have an update for your clients regarding the Adnan Syed case." *See* email from Baltimore City State's Attorney Marilyn Mosby to Steve Kelly "Mosby Email" (attached as **Exhibit B)**. This was mere minutes before the dismissal became widespread news.[4] The State's Attorney had decided to drop the charges even earlier—on Friday, October 7—but waited until the dismissal had already been entered to notify Mr. Lee. This was an obvious maneuver to keep Mr. Lee from exercising his right to object. On October 12, this Court

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[4] *See* Dylan Segelbaum & Tim Prudente, *Baltimore State's Attorney's Office Abruptly Drops Case Against Adnan Syed of 'Serial,' Citing DNA of Others on Victim's Shoes*, Balt. Sun (Oct. 11, 2022, 9:29 am), https://www.thebaltimorebanner.com/community/criminal-justice/baltimore-states-attorneys-office-drops-case-against-adnan-syed-J57I7FJYUNBUHNE7Q5DSROXOUI; *see also* @alex_mann10, Twitter (Oct. 11, 2022, 9:23 am), https://twitter.com/alex_mann10/status/1579825072378109953 (stating "Baltimore prosecutors drop charges against Adnan Syed").

ordered Mr. Lee to show cause why this appeal should not be dismissed as moot because of the *nolle prosequi*.

STANDARD OF REVIEW

"A question is moot 'if, at the time it is before the court, there is no longer any existing controversy between the parties, so that there is no longer an effective remedy which the court can provide.'" *Bd. of Physician Quality Assurance v. Levitsky*, 353 Md. 188, 200 (1999) (citation omitted). But even if a case is moot, the decision to dismiss a case for mootness is discretionary. Md. Rule 8-602(c) ("The court *may* dismiss an appeal if: . . . the case has become moot." (emphasis added)). Courts may apply mootness exceptions in certain cases.

In particular, this Court may "address the merits of a moot case if [it is] convinced that the case presents unresolved issues in matters of important public concern that, if decided, will establish a rule for future conduct." *Coburn v. Coburn*, 342 Md. 244, 250 (1996). The Court of Appeals has ruled that it will exercise its authority to address the merits of case when "the matter involved is likely to recur frequently, and its recurrence will involve a relationship between government and its citizens, or a duty of government, and upon any recurrence, the same difficulty which prevented the appeal at hand from being heard in time is likely again to prevent a decision[.]" *In re S.F.*, 477 Md. 296, 318–19 (2022) (citation omitted).

ARGUMENT

Mr. Lee's appeal is not moot. The Vacatur Statute and other statutory and constitutional provisions specify precise considerations and procedures with which prosecutors and circuit courts must comply in vacatur proceedings. *See* Md. Const. Decl. of Rts. art. 47(a); CP §§ 8-301.1, 11-102, 11-403. Here, the Baltimore City State's Attorney's Office and circuit court neglected these duties. And the appeal is not moot because Mr. Lee has an ongoing injury—the deprivation of his constitutional and statutory rights as a victim's representative—that can be remedied by an order requiring a new vacatur hearing that complies with law.

Moreover, even if this Court were to find the appeal moot, it should hear Mr. Lee's appeal because it "presents unresolved issues in matters of important public concern that, if decided, will establish a rule for future conduct." *Coburn*, 342 Md. at 250.

I. This Court Should Hear Mr. Lee's Appeal Because the State and Circuit Court Committed Grave Procedural Errors in Vacating Mr. Syed's Sentence, which this Court Has the Capacity to Redress

All that Hae Min Lee's family seeks here is an evidentiary hearing that complies with the Vacatur Statute and Maryland's victims' rights laws. Because this Court has the capacity to provide relief by remanding this case to the circuit court with an order to conduct a new hearing, the appeal is not moot.

See Antoine v. State, 245 Md. App. 521, 547–48 (2020). Mr. Lee has no interest in litigating Mr. Syed's ultimate guilt or innocence as part of this appeal. But Mr. Lee is entitled to an open evidentiary hearing at which the State's Attorney explains to the family and the public the precise legal and evidentiary basis for the vacatur and provides Mr. Lee a meaningful opportunity to be heard and to object. Anything short of that violates Mr. Lee's rights as a crime victim representative.

a. The State and Circuit Court Blatantly Disregarded the Vacatur Statue's Mandatory Procedures

The Baltimore City State's Attorney and circuit court failed to comply with the procedures that the Vacatur Statute demands. The State's motion and the hearing itself were rife with procedural deficiencies. Among other errors, the State's motion to vacate did not meet the Vacatur Statue's requirements that the motion must "state in detail the grounds on which the motion is based" and, "where applicable, describe the newly discovered evidence." CP § 8-301.1(b); (*see* Motion to Vacate Judgment). At the hearing on the motion to vacate, the State offered no evidence supporting the allegations in the motion or its belief that vacatur was in the interest of justice. The State introduced a single exhibit at the hearing: an affidavit signed by Assistant State's Attorney Becky Feldman, which detailed how she came upon the notes that are the basis of the *Brady* claim. (Tr. at 30:24–31:3.) Those notes were never introduced into

evidence at the hearing nor shown to the court at the hearing. Instead, Ms. Feldman stated "for the record" that she "show[ed] the Court the two documents containing the Brady information in camera last week, meaning off the record," through an *ex parte* contact for which Mr. Lee was neither notified nor present. (Tr. at 31:7–17.) In granting the motion, the court relied upon the "in camera review of evidence" without explaining why the evidence could not be placed in the record, why the in-camera review was warranted, or even describing the evidence's contents. (Tr. at 44:7–11); *see* CP § 8-301.1(f)(2) ("The court shall state the reasons for a ruling under this section on the record.").

The significance of the deficiencies here was so apparent that the original trial judge took the extraordinary step of signing an affidavit urging this Court to review the vacatur. Hon. Wanda K. Heard (Ret.) strongly reiterated that the overall evidence remained strong enough to support a conviction. *See* Heard Affidavit, Exhibit A. The State's Attorney's motion presents no evidentiary or legal basis to call any of that original evidence into question.

b. The State and Circuit Court Violated Appellant's Other Constitutional and Statutory Victims' Rights

The procedures adopted at the vacatur hearing violated Mr. Lee's constitutional and statutory rights as the family representative of a victim of a crime. The Maryland Constitution requires State agents to treat crime victims with "dignity, respect and sensitivity during all phases of the criminal

justice process." Md. Const. Decl. of Rts. art. 47(a). The Constitution further provides victims with the "right to be notified of, to attend and to be heard" at criminal justice proceedings. *Id.* art. 47(b). Since the Victims' Rights amendment to the Maryland Constitution was passed in 1997, the General Assembly has expanded and clarified these rights by statute. For example, CP § 11-102 states that a victim or victim's representative "has the right to attend any proceeding in which the right to appear has been granted to a defendant." CP § 11-102(a). In addition, CP § 11-403 requires a court, if practicable, to allow a victim or victim's representative to address the court in any hearing where an "alteration of a sentence" is considered. CP § 11-403(a). If a victim or victim's representative does not appear at such a hearing, the prosecutor must put on the record why proceeding is justified. CP § 11-403(e)(1). If the court is not satisfied with the prosecutor's statement, the hearing may be postponed. CP § 11-403(e)(2).

Here, the circuit court erroneously found that these protections did not apply to vacatur proceedings. The circuit court based its reading on the language of the Vacatur Statute, which states that the State's Attorney is required to notify the victim of the hearing. Ignoring other applicable, post-conviction victims' rights that apply in vacatur proceedings, the court ruled that such notice need not be "reasonable." (*See* Tr. at 13:12–14 (stating that the language "says notice. It doesn't have anything about *reasonable notice*")

(emphasis added).) The court also held that the Vacatur Statute does not grant victims the right to speak and any such right is within the court's discretion. (Tr. at 16:21–17:1 (deciding that CP §11-403, which grants victims the right to be heard, does not apply at vacatur hearings).) Finally, after the court "allowed" Mr. Lee to give his statement via Zoom, the court barred Mr. Lee's lawyer from speaking on Mr. Lee's behalf. (*See* Tr. at 23:23–24:5.) And as is evident from Mr. Lee's statement, he was not able to formulate any substantive points about the vacatur—because neither he nor anyone else understood the substantive basis for the motion. Both the State's Attorney and the circuit court ran afoul of Mr. Lee's rights in critical ways. *See Lopez v. State*, 458 Md. 164, 176 (2018) (noting that Article 47 communicated the "strong public policy that victims should have more rights and should be informed of the proceedings, that they should be treated fairly, and in certain cases, that they should be heard") (quotation omitted); *Antoine*, 245 Md. App. at 546–47 (discussing the importance of appropriately considering the impact of crime upon the victims).

c. This Court Has the Capacity to Redress the Harm Done to Appellant, So the Matter Is Not Moot

Mr. Lee's appeal seeks redress for the State's failure to comply with the law, and this Court has the means to grant redress. In *Antoine v. State*, this Court ruled that the circuit court had violated the victim's rights by imposing

a sentence as agreed through a plea deal without first considering the appellant's victim impact statement. *See* 245 Md. App. at 547. Then-Chief Judge Fader ruled that the proper remedy was vacatur of the defendant's sentence and remand for reconsideration of whether to accept the plea agreement. *Id.* at 556–57. Judge Fader recognized that there can be no meaningful right without a remedy. *See id.* Similarly, here, if this Court were to rule that the circuit court violated Mr. Lee's rights, it could overturn the court's decision to vacate Mr. Syed's sentence and remand the case for an evidentiary hearing that complies with the Vacatur Statute and the constitutional and statutory victims' rights procedures.

Accordingly, this appeal is not moot, and this Court may provide Mr. Lee redress by remanding the case for a proper evidentiary hearing.

II. Even if this Court Decides the Appeal Is Moot, It Should Hear It as a Well-Recognized Exception to Mootness

Even if Mr. Lee's appeal is moot, this Court should exercise its broad discretion to hear it under well-recognized exceptions to the mootness doctrine. This case meets all the essential elements of an established exception: (1) it involves an important matter of significant public interest; (2) the issues

involved are like to recur; and (3) the Vacatur Statute's strict time provisions mean this issue will always evade review.[5]

a. Mr. Lee's Appeal Involves Important Matters of Significant Public Interest

Post-conviction rights for crime victims are often a matter of life and death. Countless Maryland victims depend upon release notifications, for instance, to know whether an offender who poses a threat to them has been set free. Confusion over the intersection between the new Vacatur Statute and existing crime victim protections involves a significant issue of public concern. Appellate guidance is therefore necessary and appropriate.[6]

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[5] This Court should also consider that when such disputes recur, they are likely to involve many of the same parties as here. Although a state's attorney may file for vacatur under the statute, the Attorney General's Office always represents the State on appeal. *See* Md. Const. art. V, § 3. This means both State representatives will again appear before this Court in future appeals. And, as here, the entities might be at odds. (*See* Syed's Response to Attorney General's Motion to Strike at 1.) Such matters are often best brought to an appellate court's attention by the victim. So, although Mr. Lee might not appear before this Court again, other victims will, and Mr. Lee's concerns represent the same tensions that all victims will face with the Vacatur Statute. *See Powell v. Md. Dep't of Health*, 455 Md. 520, 541 (2017) ("Even if it is unlikely that the same party will be subject to the same action, the exception may also apply if the issue is of public importance and affects an identifiable group for whom the complaining party is an appropriate surrogate[.]").

[6] This Court also should not let the absence of case law involving mootness as it relates to victims' rights dissuade its review. Before the Vacatur Statute, the previous methods of challenging convictions where lengthy processes: for example, seeking a writ of *error coram nobis* or review under the Uniform

A moot case may be heard on appellate review "in instances where[ ] the urgency of establishing a rule of future conduct in matters of important public concern is imperative and manifest." *In re S.F.*, 477 Md. 296, 318 (2022) (quoting *J.L. Matthews, Inc. v. Maryland-Nat'l Cap. Park & Plan. Comm'n*, 368 Md. 71, 96 (2002)). Appellate courts have ruled matters to be of important public interest when the rights of vulnerable groups are threatened—including students facing discipline along with criminal enforcement, *In re S.F.*, 477 Md. at 321, child abuse victims seeking shelter outside the family home, *In re O.P.*, 470 Md. 225, 249–50 (2020), and past abuse victims seeking to have evidence of prior abusive conduct heard when courts decide whether to grant protective orders, *Coburn*, 342 Md at 249–50.

The Vacatur Statute's provisions, as interpreted by the circuit court, inherently conflict with the victim's rights provisions of statutory and constitutional law. This appeal is important because absent guidance from this Court, Article 47's protections are likely to be eroded in any application of the Vacatur Statute. *See, e.g.*, *State v. Peterson*, 315 Md. 73, 84–85 (1989) (deciding

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Postconviction Procedure Act. Such methods took months or years, during which, victims' concerns could be raised and heard on appeal. But the Vacatur Statute creates a strict 30-day timeline for a state's attorney to decide whether to drop charges. Md. Rule 433(i). So, although mootness was never an issue before in victims' appeals of vacatur proceedings, now it is inevitable.

to hear an appeal despite mootness where it involved important matters of judicial administration, required statutory interpretation, and the problem was frequently recurring requiring prompt guidance); *Potomac Abatement, Inc. v. Sanchez*, 424 Md. 701, 710 (2012) (holding that "provid[ing] guidance to avoid future inconsistent rulings," overcomes the doctrine of mootness).

Here, based on its misinterpretation of the law, the circuit court granted the State's motion despite grave procedural deficiencies in the motion and at the hearing, and the court failed to make the required findings on the record. Moreover, Mr. Lee received no notice of the *ex parte* in-chambers proceeding held on Friday, October 16; and a one-half-business-day's notice concerning the vacatur hearing was patently unreasonable. The circuit court let Mr. Lee briefly speak via Zoom but offered him only 30 minutes to race home from work to participate. (Tr. at 20:8–20.) Mr. Lee had no time to confer with counsel; he was forced to provide his "statement" before hearing any of the arguments presented by the parties, let alone review the evidence and purported basis for vacatur; and his counsel was barred from speaking further on his behalf. (*See* Tr. at 23:23–24:5.) This is a clear violation of victims' interests. *See Lopez*, 458 Md. at 176; *Antoine*, 245 Md. App. at 547–48.[7]

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[7] *See generally E.H. v. Slayton in & for Cnty. of Coconino*, 249 Ariz. 248, 252 (2020) (agreeing to the extraordinary remedy of overruling precedent in the

This appeal is even more important because Mr. Lee intends to challenge the Vacatur Law as unconstitutional and void for vagueness as applied. Though the vagueness doctrine usually arises in criminal penalty contexts, Courts have considered it in other matters. *See, e.g.*, *Finucan v. Maryland Bd. of Physician Quality Assur.*, 380 Md. 577 (2004) (civil statute); *CodePleasure Zone, Inc. v. Bd. of Appeals for Prince George's Cnty.*, No. 1427 Sept. term 2017, 2019 WL 460474 (Md. App. Feb. 6, 2019) (administrative). Mr. Lee will argue that the Vacatur Statute is unconstitutionally vague because it requires notifying a victim in advance of a hearing on a vacatur motion but does not specify who may call a hearing. *See* CP § 8-301.1(d)(1). So future victims may find that no one calls a hearing at all. *See Finucan*, 380 Md. at 591–92 (the vagueness doctrine requires "fair notice" such that "persons of ordinary intelligence and experience be afforded a reasonable opportunity to know what is prohibited" (internal quotations omitted)). Also, the Vacatur Statute permits a victim to attend the hearing but leaves unclear whether and to what extent the victim must be heard. CP § 8-301.1(d)(2); *see Finucan*, 380 Md. at 592 (a

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face of strong stare decisis to protect victims' interests); *E.H. v. Slayton in & for Cnty. of Coconino*, 251 Ariz. 289, 291 (Ct. App. 2021) (agreeing to hear Victims' Rights appeal on special action jurisdiction because "petition raises legal questions of first impression and statewide importance" (quoting *Hiskett v. Lambert in & for Cnty. of Mohave*, 247 Ariz. 432, 435 (Ct. App. 2019))).

law must have "legally fixed standards . . . to avoid resolving matters in an arbitrary or discriminatory manner" (quotations omitted)). The inherent conflicts between the Vacatur Statute and other victims' rights provisions mean circuit courts will be left to improvise solutions with no statutory guidance. Such circumstances clearly require this Court's intervention. *See, e.g.*, *In re Leroy T.*, 285 Md. 508, 512 (1979).

When this Court closely examines the Vacatur Statute's legislative history, it will find clear evidence of the General Assembly's intent to grant victims broad protections. During debate in the Assembly, the bill elicited support but also strong pushback from community leaders over whether victims' rights were protected. Among its critics was the State's Attorney of Caroline County who, notably, was a member of the State Board of Victim Services. *See* H.B. 874 Bill File at 11, Exhibit C; Caroline Cnty. State's Att'y Biography, Maryland Manual Online (last viewed Oct. 24, 2022), https://msa.maryland.gov/msa/mdmanual/36loc/caro/stattorneys/html/msa17677.html. Perhaps of most significance, the Maryland Judiciary and then-Chief Judge of the Court of Appeals, Ellen Barbera, opposed the bill, in large part because of the statutory concerns that Mr. Lee now asks this Court to review—vagueness as to who may request a hearing on a vacatur motion and whether

a judge must grant a victim the right to be heard.[8] *See* H.B. 874 Bill File at 13, Exhibit C.

Finally, this is undeniably a matter of significant popular interest. The case has been the subject of a massively popular podcast and HBO series. *See* Michael Levenson, *Judge Vacates Murder Conviction of Adnan Syed of 'Serial',* N.Y. Times (updated Oct. 11, 2022), https://www.nytimes.com/2022/09/19/us/adnan-syed-murder-conviction-overturned.html?smid=url-share. A Google news search for Mr. Syed's sentencing vacatur turns up over 22,000 results (on the date this response was filed). This was also not the first application of the Vacatur Statute to draw attention. *See* Darcy Costello, *Baltimore Man's Conviction in 1991 Murder Overturned After 30 Years in Prison*, *Balt. Sun* (Dec. 21, 2021), https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-paul-madison-conviction-overturned-20211221-perf3vgjefhb5hml7ptzsh3soq-story.html (discussing vacatur of Paul Madison's conviction).

The popular interest in this matter has led to many individuals questioning the facts and legal rulings in Mr. Syed's case, often without

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[8]An early markup of the bill between the House and Senate sponsors also included proposed changes by then Baltimore County State's Attorney Scott Shellenberger that would have given the victim or victim's representative "the right to be heard at the hearing," H.B. 874 Bill File at 32, Exhibit C, the file contains no explanation for why that language was eliminated.

knowledge as to what occurred. Some have even questioned the soundness of the Maryland judicial system. *See* Deirdre Enright, *Adnan Syed's Case Gives Maryland a Black Eye and a Teachable Moment*, Wash. Post (Oct. 13, 2022, 12:19 pm), https://www.washingtonpost.com/opinions/2022/10/13/adnan-syed-maryland-baltimore-prosecutors-reform. But as the judge who presided over Mr. Syed's jury trial said, "[a] reading of the trial transcript will show that the jury verdict was supported by substantial direct and circumstantial evidence." *See* Heard Affidavit ¶ 11, Exhibit A. This appeal will provide this Court the final word about whether the State followed proper procedures in Mr. Syed's conviction vacatur.

The State and circuit court violated Mr. Lee's rights, in no small part, based on the Vacatur Statute's vaguely constructed provisions, which conflict with countless other victims' rights afforded under Maryland law. Because this Court can clarify a matter that has already attracted so much media interest, it should be considered an exception to the mootness doctrine.

b. Victims' Rights Violations Are Likely to Recur in Future Vacatur Proceedings

It is not just an abstract possibility nor will it be a rare phenomenon that future motions under the Vacatur Statute will rob victims of their rights. Failure to consider Mr. Lee's appeal will leave courts without needed guidance.

Vacatur motions will be frequent. Although Mr. Lee is not privy to the exact number of motions already filed—let alone, in the works—there are likely thousands. The Vacatur Statute's bill files discuss the number of potentially reviewable criminal convictions. The Senate Judicial Proceedings Committee Floor Report mentions misconduct by Baltimore's Gun Trace Task Force as a basis for passing the law and notes that there were an estimated 1,300 cases affected by those activities. *See* H.B. 874 Bill File at 6, Exhibit C. The House Judicial Committee's hearing summary explained that changing standards for marijuana convictions was another rationale and says that already, using alternative, slower methods to vacate convictions, the Baltimore City State's Attorney had already filed to vacate 5,000 convictions. (*Id.* at 8.)

With each vacatur motion, the potential for victims' rights violations is compounded. As discussed above, the Vacatur Statute's Victims' Rights provisions are hopelessly vague and, in many ways, they conflict with other statutory and constitutional requirements. The record demonstrates that Judge Phinn wrestled with these issues herself in determining a proper resolution. As to the provision permitting a victim to appear, *see* CP § 8-301.1(d)(2), she asked "[w]hat is attendance, what is presence?" (Tr. at 10:1.) She expressed uncertainty about how to apply the requirements, noting that "nothing . . . indicates that the victim's family would have a right to be heard," and yet stating, "of course, if Mr. Lee was present today . . . I would allow him

to speak." (Tr. at 10:18–22.) Later, she added that the statute "says notice. It doesn't have anything about *reasonable* notice." (Tr. at 13:12–14 (emphasis added).) The circuit court decided to allow Mr. Lee to speak via Zoom—having rushed home from work and without conferring with counsel—but there is no telling how future courts might rule. Some courts might leave victims completely out of the loop, especially if the State's Attorney's office does not request a hearing.

With the inevitable wave of future cases and clear confusion about the statute, "the need for clarity . . . is a matter of great public concern and is something which can frequently recur." *Robinson v. Lee*, 317 Md. 371, 376 (1989) (holding that such matters "requires [the Court's] attention"); *see State v. Ficker*, 266 Md. 500, 507 (1972) ("[A]n appeal, even though moot, will not be dismissed where the urgency of establishing a rule of future conduct in matters of important public concern is both imperative and manifest.")

c. These Issues Are Likely to Evade Court Review

It is not just possible that victims' appeals of future vacatur motions would again become moot; it is a virtual certainty. The Vacatur Statute requires state's attorneys to decide whether to *nolle prosequi* in only 30 days, Rule 4-333(i), which means that—if this appeal is deemed moot—the State has carte blanche to moot the victim's complaints after the circuit court rules. This unmitigated power is antithetical to the interests of justice and this Court's

appellate powers and, on its own, should deter this Court dismissing the appeal as moot. *See, e.g.*, *In re O.P.*, 470 Md. 225, 250 (2020) (holding that because certain administrative proceedings "are inevitably on a fast track, an appeal from a denial of shelter care will almost always be moot by the time the appellate court would render its decision on a disputed question of law").

The vacatur of criminal sentences could also open another avenue to evade appellate review in future cases: double jeopardy protections. Double jeopardy will attach if a state's attorney enters a *nolle prosequi* without the defendant's consent or when the dismissal or other equivalent order is based on the evidence used to convict. *See State v. Simms*, 456 Md. 551, 560 (2017) (discussing *nolle prosequi* without consent); *In re Kevin E.*, 402 Md. 624, 633 (2008) (discussing other dismissal orders that cause double jeopardy to attach). In such instances, even if there is strong evidence of a defendant's underlying guilt, there could never be a new criminal trial on the original offense. So, the victim's grievances may never be heard and there would be no redress through the criminal justice system. The Vacatur Statute may forever escape appellate review if this Court decides there is no exception to the mootness doctrine.

The issues involved in Mr. Lee's appeal affect not just his family. The Vacatur Statute's vagaries leave it dangerously prone to abuse, with the potential to harm many Marylanders' rights. For all the reasons discussed above, hearing this appeal will resolve the ambiguous portions of the Vacatur

Statute and address its underlying constitutionality. *See Arrington v. Dep't of Human Resources*, 402 Md. 79, 91–92 (2007); *Albert S. v. Dep't of Health and Mental Hygiene*, 166 Md. App. 726, 748 (2006); *Coburn*, 342 Md. at 250; *Peterson*, 315 Md. at 84–85.[9]

CONCLUSION

Mr. Lee's appeal is not moot because the State and the circuit court committed significant procedural errors in applying the Vacatur Statute that can only be remedied through an evidentiary hearing that complies with that statute and Maryland victims' rights laws. This appeal also presents significant unresolved issues surrounding how Maryland's constitutional and statutory protections for victims relate to Maryland's new Vacatur Statute.

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[9] No other procedural issues should preclude hearing this appeal. There are no disputes of fact between the parties as it relates to the vacatur hearing (only the legal meaning of those facts), the record is clearly articulated, and Mr. Lee made his complaints known to the circuit court. *See* Md. Rule 8-131; *see also Wilkerson v. State*, 420 Md. 573, 597 (2011) (as an example of a factual record that was not prepared for appellate review). Mr. Lee's counsel appeared at the vacatur hearing and made the need to stay the proceeding clear to the circuit court. (Tr. at 5:8–20:20.) Mr. Lee expressed his concerns about not being able to appear in person when he spoke to the circuit court by Zoom. (Tr. at 22:11–23:9.) Such testimony and the judge's response to it is clear in the trial transcript. (Tr. at 21:11–24:8.) The parties agree on these facts, so this Court need only resolve the underlying questions of law. With no procedural issues in the way, this Court should not wait for the same Vacatur Statute challenge to arise in another dispute. *See, e.g.*, *Ray-Simmons v. State*, 446 Md. 429, 442 (2016) (ruling petitioners preserved appellate review).

Even if this Court finds that the underlying case is moot, this Court should exercise its discretion to consider this appeal because these issues are likely to recur and will continue to evade appellate review. For all these reasons, Appellant Young Lee respectfully requests that this Court permit this appeal to proceed.

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH MD. RULES 8-112

This brief complies with the font, line spacing, and margin requirements of Md. Rules 8-112 and contains 7,350 words, excluding the parts exempted from the word count by Md. Rules 8-503.

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CERTIFICATE OF SERVICE

I certify that on this day, October 27, 2022, a copy of the foregoing Motion to Stay the Circuit Court Proceedings Pending Resolution of the Appeal was served on counsel of record via the Court's electronic filing system.

____

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EXHIBIT A

YOUNG LEE, AS VICTIM'S REPRESENTATIVE Appellant, v. STATE OF MARYLAND, Appellee.	IN THE COURT OF SPECIAL APPEALS OF MARYLAND September Term 2022 No. 1291 Circuit Court Case Nos. 199103042–46

AFFIDAVIT OF JUDGE WANDA KEYES HEARD (RET.) IN SUPPORT OF YOUNG LEE'S RESPONSE TO SHOW CAUSE WHY THIS APPEAL SHOULD NOT BE DISMISSED AS MOOT

I, Wanda Keyes Heard, pursuant to Maryland Rule 1-304, hereby declare as follows:

1. My name is Wanda Keyes Heard, I am over 18 years of age, and I am competent to testify.

2. I served as an Associate Judge and the Chief Judge on the Baltimore City Circuit Court, Eighth Judicial Circuit from February 3, 1999, to December 31, 2019. I fully retired from the bench on December 31, 2019 and do not practice law.

3. I was the presiding judge in the six-week jury trial of Adnan Syed in January and February 2000 where the Defense Attorney was Christina Gutierrez (deceased), the Assistant State's Attorneys were K.C. Murphy and Kevin Urick.

4. On February 25, 2000, the jury found Mr. Syed guilty of first-degree murder, kidnapping, robbery, and false imprisonment of Hae Min Lee.

5. I sentenced Mr. Syed to life in prison plus 30 years.

6. I recall the trial proceedings in detail as I have over 100 pages of typewritten notes I took during the trial.

7. From television and news reports, I am generally familiar with the proceedings in which Judge Melissa Phinn vacated Mr. Syed's conviction and State's Attorney Marilyn Mosby then decided to dismiss the charges against Mr. Syed.

8. I understand that the procedure by which the Motion to Vacate reached the Court is under review by this Court. I further understand that this Court is reviewing whether the procedure violated Young Lee's constitutional and statutory rights as a victim representative under Maryland law.

9. My understanding from news reports and broadcast interviews of State's Attorney Mosby, that this Motion was filed as the State is claiming that touch DNA testing of Ms. Lee's shoes "eliminated" Mr. Syed as a suspect. Ms. Mosby

publicly stated she intends to investigate other suspects and whether to declare Mr. Syed's actual innocence.

10. As the trial judge in this matter, I would direct the Court to the transcript of the trial as I recall no evidence or testimony that Mr. Syed handled the shoes of Hae Min Lee. The absence of touch DNA on her shoes would seem to be an unusual basis to eliminate Mr. Syed as Ms. Lee's killer in the face of other overwhelming and riveting testimony of the eyewitness of Jay Wilds, who testified that he assisted Mr. Syed in the burial of her body.

11. A reading of the trial transcript will show that the jury verdict was supported by substantial direct and circumstantial evidence. However, transcripts do not always reflect the tone, manner and delivery of witness testimony. I heard the evidence and all testimony. The verdict and the swift manner of the verdict being reached made it clear to the court that the jury weighed the credibility of the witnesses who testified and were subject to vigorous cross examination. The jury appeared to have considered all of the evidence, the witnesses testimony, followed the law in instructions given by the Court, applied the law to the facts and reached their verdict.

12. Among the most powerful evidence presented at the trial, was the testimony of Jay Wilds concerning the burial of Ms. Lee's body after the murder. Further, he testified regarding the staged alibi orchestrated by Mr. Syed which became moot once Mr. Wilds became the State's star witness and

his testimony was corroborated by other witnesses, physical and documentary evidence.

13. Additional evidence received by the jury included testimonial and documentary evidence demonstrating Mr. Syed's motive for killing Ms. Lee.

14. Mr. Syed's trial attorney, Christina Gutierrez is now deceased and cannot speak for herself. However, it should be stated that during the trial I observed her to be a strong and effective advocate.

15. During the trial, Ms. Gutierrez was particularly effective during the lengthy cross-examination of Mr. Wilds which was consistent with what I knew to be her forte. Ten years prior to my ascending to the bench and while I was a prosecutor, Ms. Gutierrez was known to me as an aggressive litigator. At that time and during the trial, her legal talent and skill was outstanding. In fact, I found her performance to be at its best and consistent with other trials. She was at the top of her game during her defense of Mr. Syed.

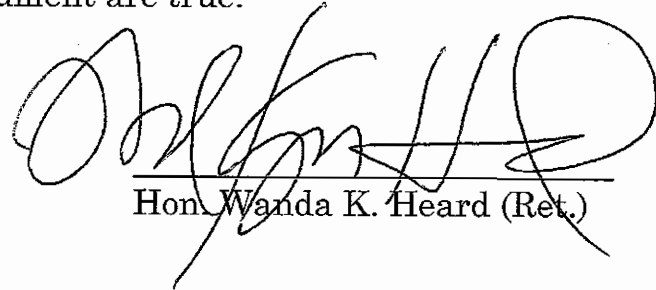
16. Ms. Gutierrez had an aggressive strategy, which she executed in a highly effective manner. In particular, she took full advantage of the fact that she knew what the State's witnesses were going to say because she had a trial transcript of each of the State's witnesses from the first trial. (The first trial before Judge Quarles resulted in a mistrial following the State's case.)

17. At the request of the family of the victim and in the interest of justice, I provide these observations and information as the viewpoint of the trial judge

may be helpful to this Court in reviewing this matter and may provide much needed insight.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of this document are true.

DATE: 10/27/2022



Hon. Wanda K. Heard (Ret.)

EXHIBIT B

From: Marilyn Mosby <MMosby@stattorney.org>
Sent: Tuesday, October 11, 2022 9:04 AM
To: Steve Kelly <skelly@sanfordheisler.com>
Subject: Updates for your client

———EXTERNAL EMAIL———

Mr. Kelly,

Please give me a call on my desk phone at [redacted]. I have an update for your clients regarding the Adnan Syed case.

Thanks,
Marilyn J. Mosby

EXHIBIT C

SENATE JUDICIAL PROCEEDINGS COMMITTEE
BOBBY A. ZIRKIN, CHAIR · COMMITTEE REPORT SYSTEM
DEPARTMENT OF LEGISLATIVE SERVICES · 2019 MARYLAND GENERAL ASSEMBLY

FLOOR REPORT

House Bill 874

Criminal Procedure - Postconviction Review - State's Motion to Vacate

SPONSORS: (Delegate Barron, et al.)

COMMITTEE RECOMMENDATION: **Favorable with Amendments (2)**

SHORT SUMMARY:

As amended, this bill authorizes a court with jurisdiction over the case, on motion of the State, to vacate a probation before judgment or conviction when (1) there is newly discovered evidence that could not have been discovered by due diligence in time to move for a new trial and creates a substantial or significant probability that the result would have been different or (2) the State receives new information after the entry of a probation before judgment or judgment of conviction that calls into question the integrity of the probation before judgment or conviction. The interest of justice and fairness must also justify vacating the probation before judgment or conviction.

COMMITTEE AMENDMENTS: **There are two (2) committee amendments.**

AMENDMENT NO. 1: Is technical.

AMENDMENT NO. 2: Alters the criteria for granting a motion and requires a hearing on a motion as specified.

SUMMARY OF BILL:

The bill establishes requirements for filed motions, requires notification of the defendant and the victim or the victim's representative, and authorizes a defendant to file a response to the motion.

The State may make a motion at any time after the entry of the probation before judgment or conviction in the case. The court must hold a hearing on a motion if the bill meets the specified requirements for a motion and a hearing was requested. The State has the burden of proof in a proceeding on the motion. The court may dismiss a motion without a hearing if the court finds that the motion fails to assert grounds on which relief may be granted. In ruling on a motion, the court, as it considers appropriate, may vacate the conviction or

probation before judgment and discharge the defendant or deny the motion. Either party may take an appeal from an order entered on the motion.

CURRENT LAW:

A person convicted of a crime has a number of alternatives for seeking review of a conviction. The options include (1) an appeal; (2) review at the trial court level (motion for new trial and a petition for writ of actual innocence); (3) petition under the Uniform Postconviction Procedure Act; and (4) coram nobis. In general, a defendant is not limited to any particular option for judicial review and may pursue multiple avenues for review in connection with a single conviction. However, the pursuit of these options must be initiated by the defendant, not the State. Some of these options are discussed below.

Motion for a New Trial

In general, a defendant has 10 days after the verdict to file a motion for a new trial, and the trial court has discretionary authority to grant a new trial if the court finds that a new trial is in the interest of justice. There are several grounds on which a defendant may base a motion for a new trial. However, there are specific grounds that allow the defendant more time to file the motion, including (1) an unjust or improper verdict; (2) fraud, mistake, or irregularity; (3) newly discovered evidence; or (4) an act of prostitution as a victim of human trafficking.

A defendant has 90 days after sentencing to file a motion for a new trial based on either an unjust or improper verdict, such as a verdict contrary to evidence, or fraud, mistake, or irregularity. Allegations that constitute fraud, mistake, or irregularity include misconduct of a juror, bias and disqualification of jurors, misconduct or error of the judge, and prosecutorial misconduct.

A defendant has one year after sentencing or the date on which the court received a mandate (i.e., ruling) from the Court of Appeals or the Court of Special Appeals, whichever is later, to file a motion for a new trial based on newly discovered evidence. This motion must allege that newly discovered evidence exists that could not have been discovered by due diligence within 10 days after the original verdict. However, a defendant may file a motion for a new trial based on newly discovered evidence at any time, if the newly discovered evidence is based on DNA identification testing or other generally accepted scientific techniques, the results of which, if proven, would show the defendant is actually innocent of the crime.

Uniform Postconviction Procedure Act

Any person convicted of a crime in the District Court or a circuit court has a right to institute a proceeding for postconviction relief in a circuit court to set aside or correct a

verdict. This right extends to a sentence of parole or probation, as well as confinement. Relief under the Uniform Postconviction Procedure Act is available to a person confined under sentence of imprisonment or on parole or probation.

A postconviction proceeding is not an inquiry into guilt or innocence; the trial and appellate review are where that issue is determined. Postconviction proceedings focus on whether the sentence or judgment imposed is in violation of the U.S. Constitution or the constitution or laws of the State. In theory, the scope of this inquiry is quite broad. The postconviction court may not, however, grant relief based on an allegation of a particular error if the petitioner has finally litigated or waived the error. As a practical matter, this requirement bars the petitioner from obtaining relief for most trial errors.

Unless extraordinary cause is shown, a petition for postconviction relief must be filed within 10 years of the sentence. The petition must be filed in the circuit court for the county where the conviction took place. A person may only file one petition arising out of each trial or sentence. A defendant is entitled to a hearing on the merits, the assignment of counsel, and a right of appeal. In the interests of justice, a court may reopen a postconviction proceeding that was previously decided.

Writ of Error Coram Nobis

Another way to challenge the legality of a conviction is to file a petition for a writ of error coram nobis. The writ is only available to a person who (1) challenges a conviction based on constitutional, jurisdictional, or fundamental grounds, whether factual or legal; (2) rebuts the presumption of regularity that attaches to the criminal case; (3) faces significant collateral consequences from the conviction; (4) asserts an alleged error that has not been waived or finally litigated in a prior proceeding; and (5) is not entitled to another statutory or common law remedy. The purpose of the writ of error coram nobis is to request that a court reopen or reconsider a matter that the court has already decided, based on an error of fact or law that was not raised as an issue at trial. For example, one ground for a writ of error coram nobis is that the defendant entered into an involuntary guilty plea.

The writ is used "to bring before the court facts which were not brought into issue at the trial of the case, and which were material to the validity and regularity of the proceedings, and which if known by the court, would have prevented the judgment." Skok v. State, 361 Md. 52, 68 (2000) (quoting Madison v. State, 205 Md. 425, 432 (1954)).

Coram nobis may be used by a defendant who is not in custody (i.e., not incarcerated, or on parole or probation) and faces collateral consequences as a result of a conviction.

Writ of Actual Innocence

A person charged by indictment or criminal information with a crime triable in circuit court

and convicted of that crime may, at any time, file a writ of actual innocence in the circuit court for the county in which the conviction was imposed. If the conviction resulted from a trial, the person must claim that there is newly discovered evidence that (1) creates a substantial or significant possibility that the result may have been different and (2) could not have been discovered in time to move for a new trial. If the conviction resulted from a guilty plea, an Alford plea, or a plea of nolo contendere, the person must claim that there is newly discovered evidence that (1) establishes by clear and convincing evidence the petitioner's actual innocence and (2) could not have been discovered in time to move for a new trial.

The State must be notified of the petition and may file a response. A victim or the victim's representative must be notified, as well, and has the right to attend the hearing on the petition. If the court finds that the petition fails to assert grounds on which relief may be granted, the court may dismiss the petition without a hearing.

In the case of a petition where the conviction resulted from a trial, the court may (1) set aside the verdict; (2) resentence; (3) grant a new trial; or (4) correct the sentence, as the court considers appropriate.

If the conviction resulted from a guilty plea, an Alford plea, or a plea of nolo contendere, when assessing the impact of the newly discovered evidence on the strength of the State's case against the petitioner at the time of the plea, the court may consider admissible evidence submitted by either party, in addition to the evidence presented as part of the factual support of the plea, that was contained in law enforcement files in existence at the time the plea was entered.

If the court determines that the evidence establishes the petitioner's actual innocence by clear and convincing evidence, the court may allow the petitioner to withdraw the guilty plea, Alford plea, or plea of nolo contendere and (1) set aside the conviction; (2) resentence; (3) schedule the matter for trial; or (4) correct the sentence, as the court considers appropriate. When determining the appropriate remedy, the court may allow both parties to present any admissible evidence that came into existence after the plea was entered and is relevant to the petitioner's claim of actual innocence. The State or the petitioner may appeal an order entered by the court on a petition filed for a conviction that

BACKGROUND:

The Baltimore City Gun Trace Task Force was created in 2007 as an elite unit within the Baltimore City Police Department intended to pursue violent criminals and persons illegally possessing and using guns. In 2017, eight of the nine members of the task force were charged with crimes including racketeering, robbery, extortion, overtime pay fraud, and filing false paperwork. The officers allegedly pocketed hundreds of thousands of

dollars discovered while searching the homes and cars of criminals and some innocent civilians. All eight members who were indicted either pled guilty or were convicted of several federal charges.

According to news reports, an estimated 1,300 cases may have been affected by the task force's activities. The Office of the State's Attorney for Baltimore City is reviewing past cases where task force officers were material witnesses to determine if convictions need to be vacated. The officers involved may have committed crimes as far back as 2008.

FISCAL IMPACT:

State Effect: The bill can be handled with existing budgeted resources.

Local Effect: The bill can be handled with existing budgeted resources.

Small Business Effect: None.

ADDITIONAL INFORMATION:

Prior Introductions: None.

Cross File: SB 676 (Senator West) - Judicial Proceedings.

COUNSEL: Jamie Lancaster (x5372)

House Bill 874

Criminal Procedure - Postconviction Review - State's Motion to Vacate

SPONSORS:
(Delegate Barron, et al.)

COMMITTEE RECOMMENDATION: FAVORABLE WITH AMENDMENT

COMMITTEE AMENDMENT: alters the grounds for the filing of a motion to vacate under the bill.

BILL SUMMARY:

As amended, this bill authorizes a court with jurisdiction over the case, on motion of the State, to vacate a probation before judgment or conviction when (1) there is newly discovered evidence that meets specified criteria; or (2) the State presents information that justifies vacating the probation before judgment or conviction in the interest of justice and fairness or calls into question the integrity of the conviction or probation before judgment.

The bill establishes requirements for filed motions, requires notification of the defendant and the victim or the victim's representative, and authorizes a defendant to file a response to the motion.

The State may make a motion at any time after the entry of the probation before judgment or conviction in the case. The court must hold a hearing on a motion if the bill meets the specified requirements for a motion and a hearing was requested. The State has the burden of proof in a proceeding on the motion. The court may dismiss a motion without a hearing if the court finds that the motion fails to assert grounds on which

relief may be granted. In ruling on a motion, the court, as it considers appropriate, may vacate the conviction or probation before judgment and discharge the defendant or deny the motion. Either party may take an appeal from an order entered on the motion.

CURRENT LAW:

While there are several acts that were once but are no longer crimes, the most likely former crime to which the bill applies is the use or possession of less than 10 grams of marijuana. Pursuant to Chapter 158 of 2014, possession of less than 10 grams of marijuana is a civil offense punishable by a fine of up to $100 for a first offense and $250 for a second offense. The maximum fine for a third or subsequent offense is $500. For a third or subsequent offense, or if the individual is younger than age 21, the court must (1) summon the individual for trial upon issuance of a citation; (2) order the individual to attend a drug education program approved by the Maryland Department of Health; and (3) refer him or her to an assessment for a substance abuse disorder. After the assessment, the court must refer the individual to substance abuse treatment, if necessary.

Otherwise, use or possession of marijuana is a misdemeanor, punishable by imprisonment for up to six months and/or a $1,000 maximum fine.

Chapter 4 of 2016 repealed the criminal prohibition on the use or possession of marijuana paraphernalia and eliminated the associated penalties. The law also established that the use or possession of marijuana involving smoking marijuana in a public place is a civil offense, punishable by a fine of up to $500. Penalties under § 5-619 of the Criminal Law Article for paraphernalia offenses other than use or possession still apply to acts involving marijuana.

BACKGROUND:

In January 2019, Baltimore City State's Attorney Marilyn Mosby

announced that her office would cease prosecutions for possession of marijuana. She also filed motions to vacate convictions in approximately 5,000 marijuana possession cases. She cited the social and economic collateral consequences of these convictions and the disproportionate enforcement of marijuana possession laws on minorities as reasons behind her decision. According to news reports, the office used petitions for writs of error coram nobis to pursue the vacating of these convictions.

Under the English common law, a writ of error coram nobis was a remedy allowing a court to correct an error in fact. The writ was used "to bring before the court facts which were not brought into issue at the trial of the case, and which were material to the validity and regularity of the proceedings, and which if known by the court, would have prevented the judgment." Skok v. State, 361 Md. 52, 68 (2000) (quoting Madison v. State, 205 Md. 425, 432 (1954)). In Skok v. State, the Court of Appeals extended the writ of error coram nobis to apply to errors in law. See Skok at 78.

A petition for a writ of error coram nobis "provides a remedy for a person who is not incarcerated and not on parole or probation, who is faced with a significant collateral consequence of his or her conviction, and who can legitimately challenge the conviction on constitutional grounds." Parker v. State, 160 Md. 672, 677 (2005) (citing Skok v. Stae, 361 Md. 52, 78 (2000)). The petitioner bears the burden of proof "to show that the grounds for challenging the criminal conviction are of a constitutional, jurisdictional, or fundamental character; that the petitioner is suffering or facing significant collateral consequences from the conviction; and that there is no other statutory or common law remedy available." See Parker at 678 (citing Skok at 78-80).

FISCAL IMPACT:

State Effect: Minimal increase in general fund expenditures to handle increased court workloads. Revenues are not affected.

Local Effect: Minimal increase in local expenditures to handle increased court workloads. Revenues are not affected.

Small Business Effect: None.

ADDITIONAL INFORMATION:
Prior Introductions: None.

Cross File: SB 676 (Senator West) - Judicial Proceedings.

Judiciary
2/26/2019

HB0874 - Delegate Barron

Criminal Procedure - Postconviction Review - State's Motion to Vacate

TOTALS: Panels: 2 FAV: 19 FWA: 0 UNF: 2 INFO: 0 Oral: 20 Written: 2

2/26/2019 1:00 PM

Type	Position	Testify	Name	Organization	Address	Phone	Email
Panel - Bill Sponsor	FAV	Oral	Delegate Barron				
	FAV	Oral	MARILYN MOSBY	BALTIMORE CITY STATE'SVATTORNEY			
	FAV	Oral	TONY GIOIA	BALTIMORE CITY STATE'S ATTORNEY'S OFFICE			
	FAV	Oral	JUDGE (RET.) ALEX WILLIAMS	GTTF COMMISSION TO RESTORE PUBLIC TRUST			
	FAV	Oral	AISHA BRAVEBOY	PRINCE GEORGE'S COUNTY STATE'S ATTORNEY			
	FAV	Oral	DAVID LABAHN	CEO, ASSOCIATION OF PROSECUTING ATTORNEYS			
Panel - Public	FAV	Oral	PAUL DEWOLFE	MD Public Defender			

Judiciary

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Type	Position	Testify	Name	Organization	Address	Phone	Email
Panel - Public	FAV	Oral	sean malone	commission to restore trust in policing			
	FAV	Oral	michele nethercott	UB innocence project			
	FAV	Oral	toni holness	ACLU			
	FAV	Oral	Dayvon love	leaders of a beautiful struggle			
	FAV	Oral	nicole hansen	out 4 justice			
Individual	FAV	Oral	doug colbert	university of maryland school of law			
Individual	FAV	Oral	Alan Drew	Maryland Criminal Defense Attorneys Association			
Individual	FAV	Both	Douglas Colbert	university of maryland law school			
Individual	UNF	Oral	joe riley	md state's attys	denton		
Individual	FAV	Oral	Ivan potts	Out for Justice			
Individual	FAV	Oral	nicole hanson	out for justice			
Individual	UNF	Oral	andrew rappaport	msaa	3300north ridge road		
Individual	FAV	Oral	Doug Colbert				

Judiciary
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HB0874 - Delegate Barron

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2/26/2019 1:00 PM

Type	Position	Testify	Name	Organization	Address	Phone	Email
Individual	FAV	Written	Toni Holness	ACLU			

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Mary Ellen Barbera
Chief Judge

580 Taylor Avenue
Annapolis, MD 21401

MEMORANDUM

TO:	House Judiciary Committee
FROM:	Legislative Committee Suzanne D. Pelz, Esq. 410-260-1523
RE:	House Bill 874 Criminal Procedure – Postconviction Review – State's Motion to Vacate
DATE:	February 20, 2019 (2/26)
POSITION:	Oppose

The Maryland Judiciary opposes House Bill 874. This bill would allow a court, with jurisdiction over the case and subject to motion by the state, to vacate either a probation before judgment or conviction for the reasons enumerated in the proposed bill. The legislation also calls for victim notification, notification of the defendant, allows for a response to the motion by the defendant, and a request for a hearing if sought by the state.

This bill requires finding the victim before a hearing, but if no one requests a hearing the victim has no way of receiving notice to exercise the victim's rights. In addition, the bill indicates that in addition to a right to notice, a victim has a right to attend a hearing but it is not clear under this legislation if the victim has a right to be heard at the hearing.

The Judiciary also believes this bill is unnecessary as numerous postconviction laws, including Criminal Procedure § 8-301, address this issue. In addition, the Judiciary is concerned that § 8-303(a)(5) of the bill is vague in requiring courts to determine whether "the interest of justice and fairness justifies vacating the probation before judgment or conviction." Further, the bill is inconsistent as it authorizes a court to dismiss a motion without a hearing but also provides that a court shall state the reasons for a ruling on the record. It is unclear if this means the court would have to then hold a hearing to state the reasons for dismissing the motion without a hearing on the record.

cc. Hon. Erek Barron
Judicial Council
Legislative Committee
Kelley O'Connor

Maryland Commission to Restore Trust in Policing

House Bill 874: Criminal Procedure-Postconviction Review – State's Motion to Vacate

The Maryland Commission to Restore Trust in Policing Support for a Favorable Report

The Maryland Commission to Restore Trust in Policing has voted unanimously to support and request a favorable report on House Bill 874, entitled Criminal Procedure-Postconviction Review-State's Motion to Vacate. We firmly believe this critical legislation is an essential first step to address the wrongful convictions attained as a result of the criminal actions of the Gun Trace Task Force (GTTF).

Senate Bill 1099 (Chapter 753) of 2018 established the Commission to Restore Trust in Policing which under the leadership of the Honorable Alexander Williams, is tasked with reviewing the operation of the Baltimore Police Department's GTTF and make recommendations to enact policies and best practices to restore trust in the Baltimore Police Department. Effective policing relies on public trust and established practices to avoid police misconduct and ensure accountability for wrongdoers.

The commission during its public meetings has heard significant amounts of testimony regarding the devastating impact of the rouge GTTF. Several witnesses have expressed extreme concern about the damage done to Baltimore City by GTTF and emphasized the importance of the work of the commission in restoring Baltimore citizens' faith and trust in government. The actions of these officers resulted in bogus charges and convictions of many Baltimore citizens. The commission strongly believes HB 874 is a tool the State's Attorney of Baltimore needs to mitigate the significant harm done by this rogue band of criminal officers.

HB 874 enables a court on a motion of the State's Attorney to vacate a conviction or entry of probation of judgment under circumstances which serve the interest of justice and fairness. In particular, the commission believes the General Assembly should enable a court, when petitioned by the State's Attorney, to vacate the entry of a probation of judgment or conviction when newly discovered evidence which was not available at the time for a motion for a new trial under Maryland Rule 4-331 (c) and that evidence creates a substantial possibility that the probation before judgment or conviction would not have occurred.

Additionally, HB 874 infuses the criminal justice system with a broad but reasonable standard to enable the reversal of unjust convictions when the interest of justice and fairness justifies in the eyes of the court dictates. In Baltimore, citizens were prosecuted and convicted based on tainted and often false evidence and testimony manufactured by members of the GTTF. According to testimony by the Baltimore State's Attorney's office, current court rules hinder their efforts to reverse the wrongful convictions which have left many citizens convicted, imprisoned and burdened with a felony conviction. The commission feels strongly that HB 874 provides an intelligent approach to addressing the unjust outcomes and harms caused by the unlawful actions of the GTTF by providing a new course to reverse wrongful convictions.

We respectfully request a favorable report of HB 874.

ERЕK L. BARRON
Legislative District 24
Prince George's County

Health and Government
Operations Committee

Subcommittees
Government Operations
and Estates and Trusts

Public Health and Minority
Health Disparities

The Maryland House of Delegates
6 Bladen Street, Room 216
Annapolis, Maryland 21401
301-858-3692 · 410-841-3692
800-492-7122 *Ext.* 3692
Fax 301-858-3442 · 410-841-3442
Erek.Barron@house.state.md.us

THE MARYLAND HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401

February 26, 2019

Delegate Luke Clippinger
Chairman, House Judiciary
Vanessa Atterbeary
Vice Chair, House Judiciary
House Office Building
Annapolis, MD 21401

Re: Request for a favorable report on House Bill 874

Dear Chair Clippinger, Vice Chair Atterbeary and Members of the Judiciary Committee:

Sometimes, long before the defendant, it is the prosecutor who may learn of credible and material information of a wrongful conviction or sentence or some other reason to make a reexamination of a case after it has become final. In Maryland, there is no clear tool for the prosecutor when this happens.

House Bill 874 provides a mechanism for a prosecutor to do what he or she is legally, ethically, and by well-tread standards, bound to do. As an attorney and officer of the court, the prosecutor is unique and by codifying this responsibility, the proposed provisions would not only protect individual rights but also serve to enhance public confidence in our justice system.

The U.S. Supreme Court, in *Berger v. United States*, 295 U.S. 78, 88 (1935), stated that prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

The Maryland Lawyer's Rules of Professional Conduct has particular rules for prosecutors – the Comments to Rule 3.8, Special Responsibilities of a Prosecutor, state: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."

The National District Attorneys Association, National Prosecution Standards 8-1.8 states, "When the prosecutor is satisfied that a convicted person is actually innocent, the prosecutor should notify the appropriate court…and seek the release of the

defendant if incarcerated. If the prosecutor becomes aware of material and credible evidence which leads him or her to reasonably believe a defendant may be innocent of a crime for which the defendant has been convicted, the prosecutor should disclose, within a reasonable period of time, as circumstances dictate, such evidence to the appropriate court." These standards also say that the "primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth" and that this responsibility includes "that the innocent are protected from unwarranted harm."

This standard is also embedded within the American Bar Association's Criminal Justice Standards for the Prosecution Function, Standard 3-8.3, which says that "[i]f a prosecutor learns of credible and material information creating a reasonable likelihood that a defendant was wrongfully convicted or sentenced or is actually innocent, the prosecutor should...develop policies and procedures to address such information, and take actions that are consistent with applicable law, rules, and the duty to pursue justice."

The American Bar Association Model Rules of Professional Responsibility, Rule 3.8(g) and (h) outlines "Special Responsibilities of a Prosecutor" requiring, among other things, that if he or she knows of clear and convincing evidence establishing a wrongful conviction, the prosecutor shall seek to remedy the conviction.

Thus, a prosecutor has clearly established obligations under case law, ethical rules, and standards established by national prosecutor organizations. House Bill 874 provides a clear mechanism for him or her to fulfill these responsibilities. Under the bill, it's still up to a judge to make the ultimate decision.

This is simply one tool to empower a prosecutor, at his or her discretion, to do justice and I urge your favorable vote.

Respectfully,

Erek L. Barron

Delegate Erek L. Barron

Ariz. R. Crim. P. 24.2

Copy Citation

Current through changes received by the publisher as of October 15, 2018, except for the re-promulgation of the rules of Family law procedure, which will be available when effective on January 1, 2019.

Rule 24.2. Motion to **vacate** judgment

(a) **Grounds.** -- The court must vacate a judgment if it finds that:
(1) the court did not have jurisdiction;
(2) newly discovered material facts exist satisfying the standards in Rule 32.1(e); or
(3) the conviction was obtained in violation of the United States or Arizona constitutions.
(b) **Time for filing.** -- A party must file a motion under this rule no later than 60 days after the entry of judgment and sentence, or, if a notice of appeal has already been filed under Rule 31, no later than 15 days after the appellate clerk distributes a notice under Rule 31.9(e) that the record on appeal has been filed.
(c) **Motion filed after notice of appeal.** -- If a party files a motion to vacate judgment after a notice of appeal is filed, the superior court clerk must immediately send copies of the motion to the Attorney General and to the clerk of the appellate court in which the appeal was filed.
(d) **Appeal from a decision on the motion.** -- In noncapital cases, the party appealing a final decision on the motion must file a notice of appeal with the trial court clerk no later than 20 days after entry of the decision for a superior court case, or no later than 14 days after entry of the decision for a limited jurisdiction court case. In a capital case, if the court denies the motion, it must order the clerk to file a notice of appeal from that denial.
(e) **State's motion to vacate judgment.** -- Notwithstanding (b), the State may move the court to vacate the judgment at any time after the entry of judgment and sentence if:
(1) clear and convincing evidence exists establishing that the defendant was convicted of an offense that the defendant did not commit; or
(2) the conviction was based on an erroneous application of the law.

Attachment A

STATE OF CALIFORNIA
AUTHENTICATED
ELECTRONIC LEGAL MATERIAL

Assembly Bill No. 1793

CHAPTER 993

An act to add Section 11361.9 to the Health and Safety Code, relating to cannabis.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1793, Bonta. Cannabis convictions: resentencing.

Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), enacted by the voters at the November 8, 2016, statewide general election, regulates the cultivation, distribution, and use of cannabis for nonmedical purposes by individuals 21 years of age and older. Under AUMA, a person 21 years of age or older may, among other things, possess, process, transport, purchase, obtain, or give away, as specified, up to 28.5 grams of cannabis and up to 8 grams of concentrated cannabis. Existing law authorizes a person to petition for the recall or dismissal of a sentence, dismissal and sealing of a conviction, or redesignation of a conviction of an offense for which a lesser offense or no offense would be imposed under AUMA.

This bill would require the Department of Justice, before July 1, 2019, to review the records in the state summary criminal history information database and to identify past convictions that are potentially eligible for recall or dismissal of sentence, dismissal and sealing, or redesignation pursuant to AUMA. The bill would require the department to notify the prosecution of all cases in their jurisdiction that are eligible for recall or dismissal of a sentence, dismissal and sealing, or redesignation. The bill would require the prosecution to, on or before July 1, 2020, review all cases and determine whether to challenge the resentencing, dismissal and sealing, or redesignation. The bill would authorize the prosecution to challenge the resentencing, dismissal and sealing, or redesignation if the person does not meet the eligibility requirements or presents an unreasonable risk to public safety. The bill would require the prosecution to notify the public defender and the court when they are challenging a particular resentencing, dismissal and sealing, or redesignation, and would require the prosecution to notify the court if they are not challenging a particular resentencing, dismissal and sealing, or redesignation. By imposing additional duties on local entities, this bill would create a state-mandated local program. The bill would require the court to automatically reduce or dismiss the conviction pursuant to AUMA if there is no challenge by July 1, 2020. The bill would require the department to modify the state summary criminal history information database in conformance with the recall or dismissal of sentence, dismissal

Attachment B

and sealing, or redesignation within 30 days and to post specified information on its Internet Web site.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

The people of the State of California do enact as follows:

SECTION 1. Section 11361.9 is added to the Health and Safety Code, to read:

11361.9. (a) On or before July 1, 2019, the Department of Justice shall review the records in the state summary criminal history information database and shall identify past convictions that are potentially eligible for recall or dismissal of sentence, dismissal and sealing, or redesignation pursuant to Section 11361.8. The department shall notify the prosecution of all cases in their jurisdiction that are eligible for recall or dismissal of sentence, dismissal and sealing, or redesignation.

(b) The prosecution shall have until July 1, 2020, to review all cases and determine whether to challenge the recall or dismissal of sentence, dismissal and sealing, or redesignation.

(c) (1) The prosecution may challenge the resentencing of a person pursuant to this section when the person does not meet the criteria established in Section 11361.8 or presents an unreasonable risk to public safety.

(2) The prosecution may challenge the dismissal and sealing or redesignation of a person pursuant to this section who has completed his or her sentence for a conviction when the person does not meet the criteria established in Section 11361.8.

(3) On or before July 1, 2020, the prosecution shall inform the court and the public defender's office in their county when they are challenging a particular recall or dismissal of sentence, dismissal and sealing, or redesignation. The prosecution shall inform the court when they are not challenging a particular recall or dismissal of sentence, dismissal and sealing, or redesignation.

(4) The public defender's office, upon receiving notice from the prosecution pursuant to paragraph (3), shall make a reasonable effort to notify the person whose resentencing or dismissal is being challenged.

(d) If the prosecution does not challenge the recall or dismissal of sentence, dismissal and sealing, or redesignation by July 1, 2020, the court shall reduce or dismiss the conviction pursuant to Section 11361.8.

(e) The court shall notify the department of the recall or dismissal of sentence, dismissal and sealing, or redesignation and the department shall modify the state summary criminal history information database accordingly.

(f) The department shall post general information on its Internet Web site about the recall or dismissal of sentences, dismissal and sealing, or redesignation authorized in this section.

(g) It is the intent of the Legislature that persons who are currently serving a sentence or who proactively petition for a recall or dismissal of sentence, dismissal and sealing, or redesignation pursuant to Section 11361.8 be prioritized for review.

SEC. 2. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

O

NY Criminal Procedure Law

S 440.10 **Motion to vacate judgment.**

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

(a) The court did not have jurisdiction of the action or of the person of the defendant; or

(b) The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or

(c) Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false; or

(d) Material evidence adduced by the people at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution of this state or of the United States; or

(e) During the proceedings resulting in the judgment, the defendant, by reason of mental disease or defect, was incapable of understanding or participating in such proceedings; or

(f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or

(g) New evidence has been discovered since the entry of a judgment

Attachment C

based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence; or

(g-1) Forensic DNA testing of evidence performed since the entry of a judgment, (1) in the case of a defendant convicted after a guilty plea, the court has determined that the defendant has demonstrated a substantial probability that the defendant was actually innocent of the offense of which he or she was convicted, or (2) in the case of a defendant convicted after a trial, the court has determined that there exists a reasonable probability that the verdict would have been more favorable to the defendant.

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States; or

(i) The judgment is a conviction where the arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense, provided that the defendant was not alleged to be loitering for the purpose of patronizing a person for prostitution or promoting prostitution) or 230.00 (prostitution) or 230.03 (prostitution in a school zone) of the penal law, and the defendant's participation in the offense was a result of having been a victim of sex trafficking under

section 230.34 of the penal law, labor trafficking under section 135.35 of the penal law, aggravated labor trafficking under section 135.37 of the penal law, compelling prostitution under section 230.33 of the penal law, or trafficking in persons under the Trafficking Victims Protection Act (United States Code, title 22, chapter 78); provided that

(i) a motion under this paragraph shall be made with due diligence, after the defendant has ceased to be a victim of such trafficking or compelling prostitution crime or has sought services for victims of such trafficking or compelling prostitution crime, subject to reasonable concerns for the safety of the defendant, family members of the defendant, or other victims of such trafficking or compelling prostitution crime that may be jeopardized by the bringing of such motion, or for other reasons consistent with the purpose of this paragraph; and

(ii) official documentation of the defendant's status as a victim of trafficking, compelling prostitution or trafficking in persons at the time of the offense from a federal, state or local government agency shall create a presumption that the defendant's participation in the offense was a result of having been a victim of sex trafficking, compelling prostitution or trafficking in persons, but shall not be required for granting a motion under this paragraph.

2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:

(a) The ground or issue raised upon the motion was previously

determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; or

(b) The judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal. This paragraph shall not apply to a motion under paragraph (i) of subdivision one of this section; or

(c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him; or

(d) The ground or issue raised relates solely to the validity of the sentence and not to the validity of the conviction.

3. Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the

ground or issue in question was not subsequently determined upon appeal. This paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right, or to a motion under paragraph (i) of subdivision one of this section; or

(b) The ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue; or

(c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

Although the court may deny the motion under any of the circumstances specified in this subdivision, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment.

4. If the court grants the motion, it must, except as provided in subdivision five or six of this section, vacate the judgment, and must dismiss the accusatory instrument, or order a new trial, or take such other action as is appropriate in the circumstances.

5. Upon granting the motion upon the ground, as prescribed in paragraph (g) of subdivision one, that newly discovered evidence creates

a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant in that the conviction would have been for a lesser offense than the one contained in the verdict, the court may either:

(a) Vacate the judgment and order a new trial; or

(b) With the consent of the people, modify the judgment by reducing it to one of conviction for such lesser offense. In such case, the court must re-sentence the defendant accordingly.

6. If the court grants a motion under paragraph (i) of subdivision one of this section, it must vacate the judgment and dismiss the accusatory instrument, and may take such additional action as is appropriate in the circumstances.

7. Upon a new trial resulting from an order vacating a judgment pursuant to this section, the indictment is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except (a) those upon or of which the defendant was acquitted or deemed to have been acquitted, and (b) those dismissed by the order vacating the judgment, and (c) those previously dismissed by an appellate court upon an appeal from the judgment, or by any court upon a previous post-judgment motion.

8. Upon an order which vacates a judgment based upon a plea of guilty to an accusatory instrument or a part thereof, but which does not

dismiss the entire accusatory instrument, the criminal action is, in the absence of an express direction to the contrary, restored to its prepleading status and the accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time of the entry of the plea, except those subsequently dismissed under circumstances specified in paragraphs (b) and (c) of subdivision six. Where the plea of guilty was entered and accepted, pursuant to subdivision three of section 220.30, upon the condition that it constituted a complete disposition not only of the accusatory instrument underlying the judgment vacated but also of one or more other accusatory instruments against the defendant then pending in the same court, the order of vacation completely restores such other accusatory instruments; and such is the case even though such order dismisses the main accusatory instrument underlying the judgment.

Barron, Erek Delegate (Laptop)

From: Barron, Erek Delegate (Laptop)
Sent: Monday, February 25, 2019 5:53 PM
To: West, Chris Senator
Subject: RE: SB 676

Hey, just confirming that I do not have a big problem with the proposed changes and agree that (1) the conviction no longer a crime provision, (2) the possession of marijuana provision, (3) drug paraphernalia provision, and (4) the newly discovered evidence provision in the original bill are all included in the "interest of justice and fairness" provision. Judges should give strong deference to a prosecutor's decision and judgement to move pursuant to this new mechanism.

From: Barron, Erek Delegate
Sent: Monday, February 25, 2019 12:59 PM
To: Barron, Erek Delegate (Laptop) <Delegate.E.Barron@house.state.md.us>
Subject: FW: SB 676

From: West, Chris Senator
Sent: Monday, February 25, 2019 10:45 AM
To: Barron, Erek Delegate <Erek.Barron@house.state.md.us>
Subject: FW: SB 676

Erek, I just took a look at Scott's proposed changes. They actually seem to broaden the bill and would enable the State to move to vacate on any ground at all if the State feels that the interest of justice and fairness justifies vacating the probation before judgment or the conviction. Let's talk about this when we meet.

From: Scott Shellenberger [mailto:sshellenberger@baltimorecountymd.gov]
Sent: Monday, February 25, 2019 8:36 AM
To: West, Chris Senator <Chris.West@senate.state.md.us>
Cc: Lazerow, Marc <MLazerow@senate.state.md.us>; MSchatzow@stattorney.org
Subject: SB 676

I think SB 676 needs to have some amendments as parts of it are unnecessary and other parts are too broad. Attached is our marked up version of how we would like the bill to look. We believe by making it more general you capture what you were aiming for.

Attachment D

Changes I would like.

1. Remove (A) (1)(2)(3) in each of these listed there already exists an ability to expunge under well-established conditions. Reopening and having the ability to expunge will be redundant and create confusion.
2. Remove (4) is already covered by rules moving for new trials again with well-established rules and conditions.
3. Have section (A) now read like this which I believe captures your original intent:

(A) ON A MOTION OF THE STATE, AT ANY TIME AFTER THE ENTRY OF A PROBATION BEFORE JUDGMENT OR JUDGMENT OF CONVICTION IN A CRIMINAL CASE, THE COURT WITH JURISDICTION OVER THE CASE MAY VACATE THE PROBATION BEFORE JUDGMENT OR CONVICTION:

If in the judgement of the state THE INTEREST OF JUSTICE AND FAIRNESS JUSTIFIES VACATING THE PROBATION BEFORE JUDGMENT OR CONVICTION

CONNECT WITH BALTIMORE COUNTY

www.baltimorecountymd.gov

HB 874 2/26

SENATE BILL 676

2/27

E2 9lr2515
CF 9lr1669

By: Senator West
Introduced and read first time: February 4, 2019
Assigned to: Judicial Proceedings

A BILL ENTITLED

1 AN ACT concerning

2 **Criminal Procedure – Postconviction Review – State's Motion to Vacate**

3 FOR the purpose of authorizing a court to vacate a certain probation before judgment or
4 judgment of conviction under certain circumstances; establishing the requirements
5 for a certain motion; requiring the State to notify a certain defendant of the filing of
6 a certain motion in a certain manner; authorizing the defendant to file a response to
7 a certain motion within a certain time period; requiring that a certain victim or
8 victim's representative be notified of a certain hearing; providing that a victim or
9 victim's representative has the right to attend a certain hearing; requiring the court
10 to hold a hearing on a certain motion under certain circumstances; authorizing the
11 court to dismiss a certain motion without a hearing under certain circumstances;
12 authorizing the court to take certain actions in ruling on a certain motion; requiring
13 the court to state the reasons for a certain ruling in a certain manner; establishing
14 that the State has the burden of proof in a certain proceeding; authorizing certain
15 parties to take an appeal from a certain order; and generally relating to
16 postconviction review.

17 BY adding to
18 Article – Criminal Procedure
19 Section 8–303
20 Annotated Code of Maryland
21 (2018 Replacement Volume)

22 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
23 That the Laws of Maryland read as follows:

24 **Article – Criminal Procedure**

25 **8–303.**

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter deleted from existing law.

1 (A) ON A MOTION OF THE STATE, AT ANY TIME AFTER THE ENTRY OF A
2 PROBATION BEFORE JUDGMENT OR JUDGMENT OF CONVICTION IN A CRIMINAL
3 CASE, THE COURT WITH JURISDICTION OVER THE CASE MAY VACATE THE
4 PROBATION BEFORE JUDGMENT OR CONVICTION ~~ON THE GROUND THAT:~~

5 (1) THE DEFENDANT RECEIVED A PROBATION BEFORE JUDGMENT
6 FOR OR WAS CONVICTED OF A CRIME AND THE ACT ON WHICH THE PROBATION
7 BEFORE JUDGMENT OR CONVICTION WAS BASED IS NO LONGER A CRIME;

8 (2) THE DEFENDANT RECEIVED A PROBATION BEFORE JUDGMENT
9 FOR OR WAS CONVICTED OF POSSESSION OF MARIJUANA UNDER § 5-601 OF THE
10 CRIMINAL LAW ARTICLE;

11 (3) THE DEFENDANT RECEIVED A PROBATION BEFORE JUDGMENT
12 FOR OR WAS CONVICTED OF AN OFFENSE RELATING TO DRUG PARAPHERNALIA FOR
13 MARIJUANA UNDER § 5-619 OF THE CRIMINAL LAW ARTICLE;

14 (4) THERE IS NEWLY DISCOVERED EVIDENCE THAT:

15 (I) COULD NOT HAVE BEEN DISCOVERED BY DUE DILIGENCE IN
16 TIME TO MOVE FOR A NEW TRIAL UNDER MARYLAND RULE 4-331(C); AND

17 (II) CREATES A SUBSTANTIAL OR SIGNIFICANT POSSIBILITY
18 THAT THE RESULT WOULD HAVE BEEN DIFFERENT, AS THAT STANDARD HAS BEEN
19 JUDICIALLY DETERMINED; OR

20 (5) THE INTEREST OF JUSTICE AND FAIRNESS JUSTIFIES VACATING
21 THE PROBATION BEFORE JUDGMENT OR CONVICTION.

22 (B) A MOTION FILED UNDER THIS SECTION SHALL:

23 (1) BE IN WRITING;

24 (2) STATE IN DETAIL THE GROUNDS ON WHICH THE MOTION IS BASED;

25 (3) WHERE APPLICABLE, DESCRIBE ~~THE~~ ANY NEWLY DISCOVERED
26 EVIDENCE; AND

27 (4) CONTAIN OR BE ACCOMPANIED BY A REQUEST FOR A HEARING IF
28 A HEARING IS SOUGHT.

29 (C) (1) THE STATE SHALL NOTIFY THE DEFENDANT IN WRITING OF THE
30 FILING OF A MOTION UNDER THIS SECTION.

(2) THE DEFENDANT MAY FILE A RESPONSE TO THE MOTION WITHIN 30 DAYS AFTER RECEIPT OF THE NOTICE REQUIRED UNDER THIS SUBSECTION OR WITHIN THE PERIOD OF TIME THAT THE COURT ORDERS.

(D) (1) BEFORE A HEARING ON A MOTION FILED UNDER THIS SECTION, THE VICTIM OR VICTIM'S REPRESENTATIVE SHALL BE NOTIFIED, AS PROVIDED UNDER § 11–104 OR § 11–503 OF THIS ARTICLE.

(2) A VICTIM OR VICTIM'S REPRESENTATIVE HAS THE RIGHT TO ATTEND A HEARING ON A MOTION FILED UNDER THIS SECTION, AS PROVIDED UNDER § 11–102 OF THIS ARTICLE, AND HAS THE RIGHT TO BE HEARD AT THE HEARING

(E) (1) EXCEPT AS PROVIDED IN PARAGRAPH (2) OF THIS SUBSECTION, THE COURT SHALL HOLD A HEARING ON A MOTION FILED UNDER THIS SECTION IF THE MOTION SATISFIES THE REQUIREMENTS OF SUBSECTION (B) OF THIS SECTION AND A HEARING WAS REQUESTED.

(2) THE COURT MAY DISMISS A MOTION WITHOUT A HEARING IF THE COURT FINDS THAT THE MOTION FAILS TO ASSERT GROUNDS ON WHICH RELIEF MAY BE GRANTED.

(F) (1) IN RULING ON A MOTION FILED UNDER THIS SECTION, THE COURT, AS THE COURT CONSIDERS APPROPRIATE, MAY:

(I) VACATE THE CONVICTION OR PROBATION BEFORE JUDGMENT AND DISCHARGE THE DEFENDANT; OR

(II) DENY THE MOTION.

(2) THE COURT SHALL STATE THE REASONS FOR A RULING UNDER THIS SECTION ON THE RECORD.

(G) THE STATE IN A PROCEEDING UNDER THIS SECTION HAS THE BURDEN OF PROOF.

(H) AN APPEAL MAY BE TAKEN BY EITHER PARTY FROM AN ORDER ENTERED UNDER THIS SECTION.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2019.

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SCHOOL OF LAW

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February 25, 2019

The Honorable Luke Clippinger
Chair, House Judiciary Committee
6 Bladen Street
Annapolis, Maryland 21401

Re: HB 874

Dear Chairman Clippinger and House Judiciary Members,

I write in strong support of HB 874 in my individual capacity as a full-time law professor at Maryland Francis King Carey School of Law, where I currently teach Legal Profession and professional ethics, constitutional criminal procedure, and criminal justice courses.

Proposed HB 874 provides statutory authority for Maryland prosecutors to take remedial action and vacate a defendant's prior conviction or probation of judgment (PBJ) sentence in any of the following situations. First, the crime itself may no longer exist. Second, the previous conviction or PBJ involved possession of marijuana or of marijuana paraphernalia. Third, newly-discovered evidence raises a "substantial or significant possibility" of a different outcome had the evidence been introduced at trial. See, section 8-303 (A)(4)(II). Lastly, the interests of justice and fairness require a court vacating the prior conviction or PBJ. I find each of these grounds to justify and explain why a prosecutor would properly initiate a motion to vacate.

Essentially, HB 874 incorporates into law a prosecuting attorney's ethical obligation to do justice and to exercise discretion in a manner consistent with assuming the role of a "minister of justice." Maryland Rule 19-303.8, comment 1; American Bar Association Rule 3.8. In clear terms, a prosecutor's duty as an advocate extends beyond convicting the guilty; it also includes taking "special precautions to prevent and to rectify conviction of innocent persons." Id. at cmt. 1. A prosecutor also must be permitted to exercise its charging responsibilities in a manner that takes into account the office's limited resources in fighting serious and violent crime. While some may disagree with a prosecutor's choices, HB 874 recognizes prosecutorial power and discretion to select which crimes merit prosecution and where resources can be used more wisely and prudently by refraining to prosecute marijuana possession cases.

HB 874 provides the requisite due process that allows a judge to review the grounds raised and the newly-discovered evidence presented, while giving notice to the defendant and crime victim to attend and presumably the opportunity to respond and be heard. For all of these reasons, I urge your approval and passage of HB 874.

Sincerely,

Doug Colbert

Professor Doug Colbert

LEGISLATIVE BLACK CAUCUS OF MARYLAND, INC.

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February 25, 2019

Delegate Luke Clippinger
Chairman
Judiciary Committee
Room 101
House Office Building
Annapolis, MD 21401

Re: HB0874 - Criminal Procedure – Post-Conviction Review - State's Motion to Vacate

Dear Chairman Clippinger and Committee Members:

I am writing in support of HB0874, *Post-Conviction Review – State's Motion to Vacate*, sponsored by Delegate Erek L. Barron, and co-sponsored by Delegate Charles Sydnor and others, and scheduled to be heard before your committee on February 26, 2019 at 1:00 pm.

This bill will provide a mechanism for prosecutors throughout Maryland to file motions to The Court to vacate unjust and wrongful convictions. As you know, probations before judgment and other criminal convictions can have severe consequences beyond time spent on probation or incarcerated. Indeed, a criminal record can make one ineligible for employment, and potentially impact an individual's access to private and public housing, student loans, military service and legal status to remain in the United States.

For those who have been convicted of offenses which are no longer a crime and in such other instances where "fairness and justice" dictate, prosecutors have an affirmative responsibility to seek justice by righting the wrongs of the past, present and future. And, as we as a society seek to find new ways to encourage hope, and to provide access and opportunity for those who most need it, passage of this bill is a necessary step towards that end.

For these reasons, HB0874 has the full support of the Legislative Black Caucus of Maryland, Inc. Please do not hesitate to contact me if I can answer any questions.

Sincerely,

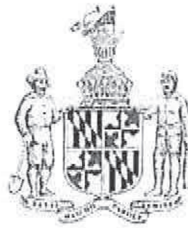
Darryl Barnes Chair, Legislative Black Caucus of Maryland	Edith Patterson 1st Vice Chair, Legislative Black Caucus of Maryland

Erek L. Barron
Legislative District 24
Prince George's County

Health and Government
Operations Committee

Subcommittees
Government Operations
and Estates and Trusts

Public Health and Minority
Health Disparities



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THE MARYLAND HOUSE OF DELEGATES
Annapolis, Maryland 21401

February 26, 2019

Delegate Luke Clippinger
Chairman, House Judiciary
Vanessa Atterbeary
Vice Chair, House Judiciary
House Office Building
Annapolis, MD 21401

Re: Request for a favorable report on House Bill 874

Dear Chair Clippinger, Vice Chair Atterbeary and Members of the Judiciary Committee:

Sometimes, long before the defendant, it is the prosecutor who may learn of credible and material information of a wrongful conviction or sentence or some other reason to make a reexamination of a case after it has become final. In Maryland, there is no clear tool for the prosecutor when this happens.

House Bill 874 provides a mechanism for a prosecutor to do what he or she is legally, ethically, and by well-tread standards, bound to do. As an attorney and officer of the court, the prosecutor is unique and by codifying this responsibility, the proposed provisions would not only protect individual rights but also serve to enhance public confidence in our justice system.

The U.S. Supreme Court, in *Berger v. United States*, 295 U.S. 78, 88 (1935), stated that prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

The Maryland Lawyer's Rules of Professional Conduct has particular rules for prosecutors – the Comments to Rule 3.8, Special Responsibilities of a Prosecutor, state: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."

The National District Attorneys Association, National Prosecution Standards 8-1.8 states, "When the prosecutor is satisfied that a convicted person is actually innocent, the prosecutor should notify the appropriate court…and seek the release of the

defendant if incarcerated. If the prosecutor becomes aware of material and credible evidence which leads him or her to reasonably believe a defendant may be innocent of a crime for which the defendant has been convicted, the prosecutor should disclose, within a reasonable period of time, as circumstances dictate, such evidence to the appropriate court." These standards also say that the "primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth" and that this responsibility includes "that the innocent are protected from unwarranted harm."

This standard is also embedded within the American Bar Association's Criminal Justice Standards for the Prosecution Function, Standard 3-8.3, which says that "[i]f a prosecutor learns of credible and material information creating a reasonable likelihood that a defendant was wrongfully convicted or sentenced or is actually innocent, the prosecutor should...develop policies and procedures to address such information, and take actions that are consistent with applicable law, rules, and the duty to pursue justice."

The American Bar Association Model Rules of Professional Responsibility, Rule 3.8(g) and (h) outlines "Special Responsibilities of a Prosecutor" requiring, among other things, that if he or she knows of clear and convincing evidence establishing a wrongful conviction, the prosecutor shall seek to remedy the conviction.

Thus, a prosecutor has clearly established obligations under case law, ethical rules, and standards established by national prosecutor organizations. House Bill 874 provides a clear mechanism for him or her to fulfill these responsibilities. Under the bill, it's still up to a judge to make the ultimate decision.

This is simply one tool to empower a prosecutor, at his or her discretion, to do justice and I urge your favorable vote.

Respectfully,

Erek L. Barron

Delegate Erek L. Barron

TONI HOLNESS
PUBLIC POLICY DIRECTOR

Testimony for the House Judiciary Committee
February 26, 2019

HB 874 Criminal Procedure - Postconviction Review - State's Motion to Vacate

FAVORABLE

The ACLU of Maryland urges a favorable report on HB 874, which would allow courts to vacate a probation before judgment or conviction in certain circumstances.

A criminal record severely undermines an individual's employability in the job market, which bars reentry into society and thereby predisposes that individual to further criminal justice entanglement. The collateral consequences reach far beyond employment—a criminal record may compromise one's eligibility for tuition assistance and stable housing. Moreover, these collateral consequences are particularly stark for communities of color.

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ANDREW FREEMAN
GENERAL COUNSEL

Criminal records for non-violent offenses excludes individuals from employment, educational opportunities, public benefits, and stable housing

The existence of a criminal record can and does create a barrier to employment for many Marylanders. Under current regulations, a misdemeanor conviction in Maryland may result in the denial, suspension, or revocation of myriad business licenses, including: a barber license,[1] a cosmetology license,[2] an electrician license,[3] professional engineer license,[4] a landscape architect license,[5] an interior designer certificate,[6] and countless others.

Misdemeanor convictions also serve to exclude persons from educational opportunities. A recent study found that a majority (66%) of colleges collect criminal justice information as part of the admissions process.[7] A misdemeanor conviction also hinders an individual's access to stable housing and a range of public benefits. A misdemeanor conviction record may bar individuals from residing at certain homes,[8] and exclude individuals from low-income utility payment plans[9] as well as food stamps.[10]

HB 874 will allow for individuals with certain convictions to access a broader range of services and opportunities, including but not limited to, employment, schooling, public benefits, and housing, and thereby contribute productively to the state's economy. By

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[1] Md. Business Occupations and Professions, Code Ann. § 4-314
[2] Md. Business Occupations and Professions, Code Ann. § 5-314
[3] Md. Business Occupations and Professions, Code Ann. § 6-316.
[4] Md. Business Occupations and Professions, Code Ann. § 14-317.
[5] Md. Business Occupations and Professions, Code Ann. § 9-310.
[6] Md. Business Occupations and Professions, Code Ann. § 8-310.
[7] Center for Community Alternatives—Innovative Solutions for Justice, *The Use of Criminal Records in College Admissions, Reconsidered* (available at http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf).
[8] *See for example,* COMAR 35.04.01.04.
[9] COMAR 20.31.01.08.
[10] Md. Human Services Code Ann. § 5-601.

increasing access to this broad range of services, HB 874 can be expected to generate greater socioeconomic stability and productivity in Maryland's communities.

Misdemeanor convictions disparately disadvantage individuals, families, and communities of color

A startling one in three Black men born today can expect to go to prison in their lifetime, compared with one in six Latino men, and one in seventeen White men.[11] In addition to facing higher imprisonment rates, persons of color, once arrested, are more likely to be convicted, and once convicted, are more likely to face longer sentences than their White counterparts.[12] With higher conviction rates, persons of color necessarily bear the brunt of collateral consequences stemming from misdemeanor convictions.

For the foregoing reasons, the ACLU of Maryland urges a favorable report on HB 874.

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND

[11] Saki Knafo, 1 In 3 Black Males Will Go To Prison In Their Lifetime, Report Warns (HUFFINGTON POST, Oct. 4, 2013).
[12] *Id.*

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