

IN THE
SUPREME COURT OF MARYLAND

SEPTEMBER TERM 2023

No. 7

ADNAN SYED

v.

YOUNG LEE, as Victim's Representative, et al.

ON PETITION AND CROSS-PETITION FOR CERTIORARI
FROM THE MARYLAND APPELLATE COURT

BRIEF OF AMICUS CURIAE
MARYLAND CRIME VICTIMS' RESOURCE CENTER, INC.
FILED PURSUANT TO RULE 8-511(a)(1)(written consent of all parties)

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QUESTIONS ON WHICH THE COURT GRANTED CERTIORARI

1. Does a lawfully entered nolle prosequi render moot an appeal alleging procedural violations at a hearing occurring prior to the nolle prosequi?
2. Does a victim's representative, a non-party to a case, have the right to attend a vacatur hearing in-person or does remote attendance satisfy the right?
3. Was notice to the victim's representative of the vacatur hearing sufficient where the State complied with all statutory and rules-based notice requirements?
4. Must a victim's representative seeking reversal show prejudice on appeal?
5. Is a victim's right to speak incorporated into the Vacatur Statute, Md. Code §8-301.1 of the Criminal Procedure Article, where no party or entity other than the victim has an interest in challenging the evidence alleged to support vacatur?

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case.

STATEMENT OF FACTS

Amicus adopts the statement of facts referenced below, 257 Md. App. 492-511, as supplemented below by citations to the Appellate Court Extract of Record(E.) and this Court's Supplemental Record Extract(E2).

STANDARD OF REVIEW

Questions of law are subject to *de novo* review. *State v. Crawley*, 455 Md. 52,66 (2017).

ARGUMENT

I. The nolle prosequi was null and void.

The defendant's (Syed's) opening brief concedes(p.14) that "Maryland courts have

curtailed the State's otherwise unfettered authority to dismiss criminal charges...when the entry of nolle prosequi was *ultra vires*....” That is the case here.

The Maryland legislature curtailed the State's authority to dismiss pending criminal assault charges unless “the victim and the defendant agree to the dismissal.” Md. Code, Criminal Law(CL) §3-207(a)(1). This same victims' right is repeated in the Victims' Rights Chapter of the Maryland Criminal Procedure Code (CP) §11-201.

First degree murder is the most severe assault charge. *Middleton v. State*, 238 Md. App. 295,309–10(2018) (Second degree murder is a lesser included offense of first degree murder; first degree assault is a lesser included offense of second degree murder). Once an assault charge has been brought, its dismissal is barred by this victims' rights' statutory provision unless the victim consents to the dismissal. In this case, the record shows that the victim's representative (Lee) was both told about and emailed a draft of the State's motion which recounts that the State's Attorney's proposed vacatur motion anticipated a new trial or the filing of a nolle prosequi(E.73). Lee wrote back that same day, September 13th, that “we disagree with your course of action.”(E.114). The State acknowledged in writing the next day that it had received Lee's objection and responded that the State's Attorney's Office “very much understand your family's position”(E.113).

Thereafter, the State had no basis to believe and also did not represent that it had obtained Lee's agreement to the State's later decision to nolle prosequi the indictment.

Consequently, the State's filing of a nolle prosequere in these circumstances violated Maryland statutory law and was null and void as *ultra vires*.

II. A victim has the right in the Circuit Court to be notified, to attend, and to be heard at post-conviction criminal justice proceedings.

A. The victim's representative was entitled to be notified a reasonable time in advance of the Circuit Court's in-camera and open court hearings.

Section 11-503(b) of the Criminal Procedure Article provides that the State's Attorney shall notify the victim or victim's representative of every "subsequent proceeding" in accordance with Md. Code CP §11-104(f). Section 503(a)(7) defines a subsequent proceeding to include "**any**...postsentencing court proceeding."(Emphasis added). Section 11-104(f) provides that "the prosecuting attorney shall send a victim or victim's representative prior notice of each court proceeding in the case...". No exception for in-camera or judicial scheduling and evidence review proceedings appears in the statutes. The Appellate Court below ruled, based on *Brown v. State*, 272 Md. 450,479–80(1974), that "court proceedings" do not include in-camera "conferences between the court and counsel—either before or during a trial—for the purpose of discussing scheduling, other collateral matters of procedure, to hear arguments of law on evidentiary rulings, to confer on proposed instructions to the jury, and the like", 257 Md.App.530–31. That is not what occurred below. The trial court below stated in its oral(E.162) and written opinion(E.172), that the court went beyond those procedural purposes and "conducted an in camera review of the evidence"*(id.)* which was the factual basis for its ruling, and stated that it was relying upon that in-camera factual review. That evidentiary review was not merely cumulative

since no re-review or summary of all the petition's actual exhibits occurred later in open court, as the Appellate Court stated should have occurred.257 Md.App.532.

Although the prosecutor communicated with Lee on September 14th and agreed to keep him informed about "all new developments in the case"(E. 114), Lee was never told that a court hearing, for the purpose of scheduling a subsequent open court hearing and to review the factual evidence, was going to take place on September 16th. The result of this failure to notify Lee about this upcoming scheduling and evidentiary review hearing, which the parties had been collaborating on for nearly a year(E.123), violated Lee's rights since that was the only detailed court review of the evidence that occurred supporting the motion.

This out-of-state victim's representative, who had been trying to locate and retain local counsel as soon as he was first notified of the State's position on September 13th(E.106,E.131-132) finally located local counsel after five days, on the evening of September 18th(E.131,E.133). The next day, Lee's counsel filed a motion prior to the start of the September 19th hearing, requesting a seven day continuance because that day's hearing date did not take into account the out-of-state crime victim's representative's needs to arrange transportation to travel to Maryland to attend the hearing, and his need to consult with his counsel before such a hearing.(E.131) The court denied the requested continuance on the ground that it was made too late, stating:

"Are you not aware that ...by [Lee] telling us on Friday that he was going to appear via Zoom is why we set this hearing today?" Because had we known that on Friday then, of course, **we would have scheduled this hearing according to when**

he was **planning to arrive within a reasonable amount of time.**”(E.130)(emphasis added).

Accord, Rule 4-406(d)(petitioner, and therefore also victim, has right **“to be present at any hearing”** on UPPA petition.

The Court also stated that the three days between September 13th and September 16th provided Lee “plenty of time to seek an attorney”(E.137), who the Court ruled could have made a motion to continue the hearing on the afternoon of Friday, September 16th, immediately after Lee was emailed about the next business day’s hearing date, but before he had located counsel.(E.137).

Contrary to the court’s statement, the record shows that prior to that September 16th in-camera scheduling and evidence review hearing taking place, Lee knew nothing about that scheduled hearing or about any proposal for an optional Zoom appearance (only applicable to him) on September 19th, and which he could refuse. Nor on September 16th, did Lee communicate to any party or the court his agreement to appear by Zoom on the 19th. That first occurred September 18th, before Lee had managed to obtain counsel.

Notifying Lee about this “judicial action” -- setting a next business date hearing and evaluating the motion’s evidentiary basis – was important and should have occurred because that in-camera hearing “affect[ed] the interests of the victim’s representative [to be present]...including [at that] postsentencing court proceeding”, CP§11-104(f)(3), and contrary to law, the notification only occurred **after the conclusion of that hearing.** That violated Lee’s right to advance notice of the in-camera hearing, even assuming *arguendo* he had no right to attend it, since he lost the opportunity to convey his needs and availability

regarding the 19th to the prosecutor. Two days later, when Lee informed the Assistant State's Attorney that he would appear on the 19th by Zoom, Lee was still not told that the court would have allowed him to appear in-person.(E.137,E.142).

When dealing with a crime victim's representative known to reside out-of-state, known to oppose the prosecutor's position, and only three days into his search for local counsel, providing only one business day advance notice of the next hearing to him was a violation of CP11-104(f)(1) and Article 47 (a) and (b). It denied Lee an opportunity to be present in-person and to meet with his counsel in order to prepare for the hearing and did not treat him with respect, dignity, or sensitivity. The prosecutor also violated her statutory obligation to treat Lee "with dignity, respect, courtesy, and sensitivity".CP§11-1002(b)(1).

B. The rulings in both courts below, that the victim's representative had no right to be heard, are incorrect.

1. Victims are singled out by name as a preferred group with special rights available to no other non-parties in the Maryland Constitution, statutes, and Rules. See Article 47, Md. Decl. of Rts; and CP§11-101 et seq.; Rules 4-342(d) & 4-345(e).

A special position in the legal system is accorded to victims because the injuries to them are indispensable to the existence of violent crime prosecutions. Without an injured victim there is no criminal case. As explained in *Grey v. Allstate Ins. Co.*, 363 Md. 445, 451–55 (2001), until the last few hundred years, crime victims were the "prosecutors" of criminal offenders.

* * * "[t]he basis of primitive and early Western law was personal reparation by the offender or the offender's family to the victim." Stephen Schafer, *The Victim and His Criminal* 8 (1968). Provisions for restitution appear in the earliest recorded codes. In

the Code of Hammurabi, written about 1800 B.C., and in the Book of Exodus, recording events 600 years later, are requirements for restitution for what we now regard as criminal conduct, mixed among the capital and corporal penalties.

Through these various codes, restitution was offered as the more civilized alternative to private retribution. The State, as such, had not yet arrogated to itself the role of punishing conduct that injured only other individuals and not the community as a whole, and the “payback” for such injurious conduct was private retribution, either by the injured person or his or her family or clan—the “blood feud.”

* * *

In time, however, the right of the victim became subservient to, and eventually was replaced by, the right of the Sovereign. * * * Thus, “[a]s the state monopolized the institution of punishment, the rights of the injured were slowly separated from the penal law: compensation, as the obligation to pay damages, became separated from criminal law and became a special field in civil law.” *Id.* This change, notes Schafer, marked the closing phase of the period during which **criminal procedure “was the private or personal concern of the victim or his family and was largely under their control,” in which the wrong done to the victim was not simply an issue but was the only issue.** *Id.* (Footnotes omitted; italics in the original; emphasis added).

2. In recent years, lawmakers have again come to legally recognize “the wrong done to the victim.” The legislature has resurrected many facets of the crime victims’ historic role in prosecuting their offenders, including acknowledging the right of crime victims to “participate as if a party” (Rule 8-111(c)(2)) in judicial proceedings that affect them. This Court has stated:

Article 47 and related legislation have created a class of specific, but narrow, rights for victims with regard to certain aspects of the criminal proceedings against the perpetrators of the crimes committed against victims or their property.

* * *

These rights, however, are limited in application and context. In the present case, for example, Palmer is not a party to the litigation. §11–103(b); Maryland Rule 8–111(c). There are only two parties, the State of Maryland and Hoile. *See Lopez–Sanchez*, 388 Md. at 226,879 A.2d at 702 (“**The victim is not a party to the proceeding ... although vested with statutory and constitutional rights....**”);**A non-party's right to participate in**

the litigation is limited to “decisions affecting the party's direct and substantial interests.” *Lopez–Sanchez*, 388 Md.at 227,879 A.2d at 702.

Hoile v. State, 404 Md. 591,605–07(2008)(emphasis added).

The *Hoile* case involved a probation violation and resentencing. The defendant filed an appeal along with a motion to exclude the victim’s participation, “individually or through counsel, as a party to the proceedings” in the appellate court. *Id.*601.

After the intermediate appellate court dismissed the case, this Court granted both the defendant’s petition for certiorari and the State’s cross-petition. After the defendant moved to strike the appearance of counsel for the victim, this Court denied the motion, stating that “the denial of the motion deserves an explanation because of **the relative ‘sea change’ in our jurisprudence it represents regarding the status of the victim’s participation** in a criminal appeal.”(*Id.*602, emphasis added). “Under the circumstances of this case, we must agree that [the victim] has the right to brief and argue in this appeal.”(*Id.*). The circumstance that led to that ruling was that the victim’s legal right to be notified in advance about post-conviction hearings in the case was not honored, and that **affected the victim’s “direct and substantial interests.”**(Emphasis added.) *Hoile* applies here. It did not turn on whether the crime victim could show factual “prejudice” or was termed “a party”. The controlling consideration is not what term is used to describe the crime victim, but whether in that judicial proceeding the crime victim’s

“direct and substantial interests” are affected. *State v. Norton*, 443 Md.

517,549fn.29(2015)(the use of particular terms or "magic words" is not decisive).

The rules of court, which have the force of law, mandate the same result. Rule 18-102.6(a)(ABA Rule 2.6) provides:

A judge shall accord to **every person who has a legal interest in a proceeding, or that person’s attorney, the right to be heard** according to law.(Emphasis added.)

Like *Hoile*, this Rule accords the right to be heard to “every person who has a legal interest” in the judicial proceeding, regardless of whether they are a “party”. By contrast, this Rule’s “(b)” provision explicitly only applies to “parties.” Similarly, Rule 1-326(a) provides that “An attorney may enter an appearance on behalf of a victim or a victim’s representative under Title 4, Title 8 and Title 11 of these Rules for the purpose of **representing the rights of the victim or victim’s representative.**”(Emphasis added.) Under the (b) and (c) provisions of Rule 1-326, the parties and the clerk must serve on the victim’s counsel copies of all pleadings or papers and notify counsel of all hearings that **“relate to: (1) the right of the victim or victim’s representative’s to be informed** regarding the criminal or juvenile delinquency case, **(2) the right of the victim’s representative to be present and heard at any hearing,** or **(3) restitution.**(Emphasis added.)

Rule 8-111(c)(2)&(3) provides that the victim or victim’s representative **although not a party, may file an application for leave to appeal from an interlocutory or final**

order and “participate in the same manner as a party regarding the rights of the victim or victim’s representative.”(Emphasis added.); Accord,CP§11-103(b).

III. Whenever a post-conviction motion is filed, crime victims who have a “direct and substantial interest” in the finality of their offender’s conviction, have a legal interest in those proceedings.

This Court has recognized “the important concept of finality” of convictions to victims in closed criminal cases. *Colvin v. State*, 450 Md. 718,728(2016)(Rule 4-345 “creates a limited exception to the general rule of finality and sanctions a method of opening a judgment otherwise final and beyond the reach of the court”); *State v. Wilkins*, 393 Md. 269,284(2006)(the refusal to reopen a life sentence “heeds our extensive precedent on this matter, the important concepts of finality and judicial economy.”);Rule 4-407(d)(“Finality”).

The U.S. Supreme Court explained in *Calderon v. Thompson*, 523 U.S. 538,555-556(1998):

“Finality is essential to both the retributive and the deterrent functions of criminal law. ‘Neither innocence nor just punishment can be vindicated until the final judgment is known.’ *McCleskey [v. Zant]*, *supra*, [499 U.S. 467] at 491.

“* * * Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. See generally *Payne v. Tennessee*, 501 U.S. 808,115 L.Ed.2d 720,111 S.Ct. 2597(1991). To unsettle these expectations is to inflict a profound injury to the ‘powerful and legitimate interest in punishing the guilty,’ *Herrera v. Collins*, 506 U.S. 390,421,122 L.Ed 2d 203, 113 S.Ct. 853(1993)(O’CONNOR, J.,concurring), an interest shared by the State and the victims of crime alike.(Emphasis added).”

A “profound injury” to the murdered crime victim and the crime victim’s representative occurred in this case(E.141-142). This vacatur motion tore the scab off the

Lee family's injury. It caused Lee to relive "the nightmare over and over again" which was "killing" the murdered victim's family. (*Id.*) In addition, Lee had to emotionally prepare to see both the defendant and successor court which after the significant lapse in time has no firsthand knowledge about the circumstances of the crime, the prior records and documents in the case which filled 17 boxes (E. 147), or the offender's demeanor at trial.

This concern -- that the passage of time until there is finality injures crime victims -- is legally recognized in CP§11-1002(b)(13) (crime victims "should be entitled to a speedy disposition of the case to minimize the length of time the person must endure the responsibility and stress in connection with the case.") Accord, *United States v. MacDonald*, 435 U.S. 850, 853-54 (1978) ("The rule of finality has particular force in criminal prosecutions because 'encouragement of delay is fatal to the vindication of the criminal law.' *Cobbledick v. United States*, 309 U.S. [323 (1940)] at 325. See also *DiBella v. United States*, 369 U.S. [121 (1962)], at 126."); *Abney v. United States*, 431 U.S. 651, 661 (1977) ('wholly unrelated to the propriety of any subsequent conviction', individuals should not be forced to endure the personal strain, public embarrassment, and expense of a criminal trial more than once..."); accord, *Warren v. State*, 226 Md.App. 596, 608 (2016). As stated by Justice Cardozo, and quoted in *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (emphasis

added). Accord, *Morris v. Slappy*, 461 U.S. 1,14(1983)(“[I]n the administration of criminal justice, courts may not ignore the concerns of victims” but must hear them); *State v. Korsen*, 141 Idaho 445,450(2005)(abatement of the conviction would deny victim of fairness, respect and dignity guaranteed by these laws by preventing the finality and closure).

This injury to victims from reopening closed cases, combined with Article 47(a) of the Maryland Declaration of Rights requiring that crime victims be treated with dignity, respect, and sensitivity, led Maryland lawmakers to mandate a comprehensive baseline of victims’ legal rights that apply at all post-conviction hearings, and must be harmonized to avoid being evaded, which principle the Appellate Court recognized, but failed to correctly apply, 257 Md.App. at 535. Here, Syed and the prosecution considered but chose not to file other varieties of post-conviction motions(E.145). But their choice is not dispositive because CP§§11-403(a) and 11-503(a)(7) give victims the right to notice of “any ... postsentencing court proceeding” and to be heard at any hearing at which “alteration of a sentence...is considered.” To emphasize the victim’s role, the mandatory victim notice is repeated in CP§3-123(b)(c)&(l); CP§7-105;CP§8-106(a);Rule 4-345(e)(2);CP §8-110(a)(5);CP§8-301(d)(1),and CP §8-301.1(d)(1).

The victim’s general right to be heard at any hearing where finality is at issue because “alteration of a sentence ...is considered,” even if ultimately the sentence is not altered, is granted by CP§11-403(a)(1). Accord, CP§11-1002(b)(11)(ii). If “alteration” of a prior sentence was not intended to cover all post-conviction challenges to the finality

of the original sentence, then there would have been no reason for both CP§11-403 and CP§11-1002(b)(11)(ii) to use the word “alteration” rather than “imposition” and for CP§11-403 to be cited in other postconviction statutes. Those statutes, emphasizing the importance of victims being heard when the finality of a sentence is being considered, include the cross-reference to the vacatur Rule as well as CP§8-106(a), Rule 4-345(e)(2), and CP§8-110(a)(5). Accord, Md. Code, Correctional Services(CS)§§7-305(9)&(10) & 7-801(g); CS§7-309(h); CS§7-805(d).

The vacatur legal provisions at issue here highlight the victim’s legal interest in those vacatur motions by providing that victims have a right to notice of any such hearings and a right to attend them (CP §8-301.1(d) & Rule 4-333(g)(2)). Rule 4-333(h)(1) states that the absence of the victim and the efforts to contact an absent victim must be explained on the record. That is consonant with Rule 18-102.6(a), *supra*.

The Rule 4-333(h) “Conduct of Hearing” provision cites the statute providing the victim a right to speak at such hearings, immediately after its “Disposition” subsection, as follows: “Cross References – For the right of a victim or victim’s representative to address the court during a sentencing or disposition hearing, see Code, Criminal Procedure Article, § 11-403.” This official cross-reference confirms that any action taken by the vacatur court constitutes an altered disposition or sentence, just as in other postconviction proceedings, for the purposes of CP §11-403. The alternative, that crime victims must be notified and attend vacatur hearings, or else have their absence explained, but stand mute as silent witnesses to these hearings is illogical and violates

Article 47(a) of the Maryland Declaration of Rights requiring that crime victims be treated “with dignity, respect, and sensitivity during all phases of the criminal justice process.” Accord, *Kenna v. U.S. Dist. Ct. for C.D.Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006)(“The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process.”)

Consequently, caselaw, i.e., *Hoile supra*, the Maryland Rules including Rule 18-102.6 & Rule 4-333(h), and Maryland statutory law, specifically CP §11-403, when considered together must be harmonized and they supply the legal authority, guaranteed by Article 47(a)&(b) of the Maryland Declaration of Rights, that crime victims must be heard at any criminal justice proceeding when the alteration of a sentence, challenging its finality -- as to which crime victims have a direct and substantial legal interest -- is being considered. Below, Lee’s legal right to be heard was rejected by the trial court(E.135) who also refused to let Lee’s counsel make his full argument(E.143).¹ Lee’s right to be heard was also rejected by the Appellate Court, 257 Md. App. at 547.

In addition, the Appellate Court espoused a novel rationale for limiting the issues as to which crime victims can be heard. The Appellate Court stated that whenever a post-

¹ Similarly, in *Fowler v. State*, No. SCM-PET-0064-2023 (petition for certiorari pending), when the crime victim’s representative sought to raise the trial court’s lack of jurisdiction to grant or even hear a petition for post-conviction relief after the petition was withdrawn with prejudice, the trial court and then the Appellate Court of Maryland declined to consider the crime victim’s representative’s attempt to raise the courts’ lack of subject

conviction hearing is based “on legal grounds” the crime victim has no right to be heard. That assertion followed the Appellate Court’s concession that the post-conviction petition in the instant case, “the vacatur of a defendant’s conviction [,] **is the ultimate alteration of sentence, in the sense that it sets it aside.**” 257 Md.App.at 545(emphasis added).

There is no statutory language, legislative history, or controlling case law supporting the novel position that victims can never address “legal” defects occurring in a post-conviction proceeding. It is refuted by the statutes as well as the proceedings below. For example, CP§11-103(b) lists numerous legal grounds that permit a crime victim to appeal. If crime victims are not permitted to raise these legal grounds, then a victim will be unable to preserve for appeal any of the violations of their victim’s legal rights that the legislature has specifically determined may be appealed under CP§11-103(b).

Moreover, the crime victim’s representative in this case would have had no ability to raise in the trial court and then in the Appellate Court the failure to have provided him reasonable notice of the vacatur hearing. Furthermore, the prosecution moved for a nolle prosequere. As explained *supra*, that action is directly contrary to Lee’s right to decline

matter jurisdiction. In that case and the instant case, the refusal to address this dispositive legal issue denied the victim’s representatives due process of law, in violation of Article 24 of the Maryland Declaration of Rights, and their right to be treated with dignity, respect and sensitivity under Article 47(a) of the Maryland Declaration of Rights.

allowing that unilateral procedural action by the prosecutor, pursuant to CL §3-207(a)(1), but the trial court refused to hear Lee's counsel.

Consequently, the Appellate Court's novel and unsupported rationale for the decision below, separating out "discretionary trial court action" about which a victim has a right to be heard, from legally mandated actions of the trial court about which a victim has no right to be heard, has no support and is untenable. It is also incompatible with other crime victims' legal rights including their right, pursuant to Rule 1-326, to be supplied with legal pleadings and court orders that relate to the victim's legal rights. In every case, the statute must be given a reasonable interpretation, not one that is "absurd, illogical, or incompatible with common sense." *Johnson v. State*, 467 Md. 362,375(2020); *Gardner v. State*, 420 Md.1,8-9(2011); *Merchant v. State*, 448 Md. 75,95(2016).

The court below also stated that allowing the victim to be heard at post-sentencing proceedings on legal issues "would result in a huge shift in practice".(*Id.* 546) That shift in practice occurred years ago when victims were granted the right, irrespective of the parties' wishes, to be represented by their own counsel; to be heard at bail hearings to "request reasonable protections for safety", CP§5-222 & CP§11-203; to be represented and heard at sentencing hearings of all types; to make their own restitution requests and to offer evidence in support of those requests, CP§11-603(b)(1) & CP §11-615(a); and to independently appeal various kinds of violations of their rights, CP§11-103(b). Victims have the right to be heard: at Rule 4-345(e) resentencing hearings that occur as late as 5

years after an original sentencing; and can make “any statement” factual or legal, at a post-conviction hearing under CP§8-110(d)(6) that is held twenty years or more after the original sentencing; and whenever a new sentence is requested, offer evidence of restitution, be cross-examined, and argue that they have met their burden of proof to support a restitution order. CP§11-601 et seq. The ruling below would impliedly overrule, by making unappealable and unenforceable, many other crime victims’ mandatory legal rights as well. See, CL§3-207 & CP§11-201, CP§11-102, CP§11-103, CP§11-104, CP§§11-111, 112 & 113, CP§11-202 & 203, and Courts Art.§3-8A-01, et seq. Repeals by implication are not favored. *Kirkwood v. Provident Sav. Bank*, 205 Md. 48,55(1954)

This novel holding limiting a victim’s ability to raise procedural legal defects at post-conviction hearings is also at odds with *Lopez v. State*, 458 Md. 164,204 (2018). There, this Court ruled that a victim’s live testimony, unlike a victim’s written impact submission, is not limited in scope. This Court stated that the limitations applying to victims’ written impact statements by CP§11-402(e) “does not, however, apply to victim ... live testimony” that is provided under CP§11-403. As demonstrated by this case, such a limitation fosters the legal errors that occurred below.

IV. Numerous legal errors which occurred in the Circuit Court.

First, no participant at the Circuit Court corrected the prosecutor that she had no authority to nolle prosequere the case, see Argument I. *supra*.

Second, neither party at the Circuit Court informed the Court that an alleged *Brady* violation, based on an unattributed handwritten page(E.147), does not fall within the scope of a vacatur motion based on “newly discovered evidence that ... the State’s Attorney received ... after the entry of a ... judgment of conviction...”, CP§8-301.1(a)(1)(ii). In addition to the parties, the trial court’s decision relied upon that *Brady* violation as the first reason for its ruling(E.116, E.163). Although the alleged *Brady* material was provided to Syed(E.144), a defense motion under the Maryland Uniform Post-Conviction Procedure Act(UPPA) alleging a *Brady* violation has never been filed. Since the trial court’s ruling, that handwritten page has been identified as the notes of a particular prosecutor who was not called as a witness at the vacatur hearing. That former prosecutor has stated(see Petitioner’s Opening Br.9, fn.5) about these notes reflecting his impressions of the witnesses, that the notes have been completely misconstrued and reveal nothing material that was previously unknown. In any event, his notes appear to be his attorney work product, not quotes from witnesses which the witnesses ever reviewed or endorsed as accurate, and which for that reason would fall outside the scope of any *Brady* obligations. See, www.thebaltimorebanner.com/community/criminal-justice/adnan-syed-note-kevin-urick-handwriting-document-serial-podcast-release-2I3GK2ZD6ZBRHPJW7KJLWZGCIQ/, which displays both the original alleged *Brady* handwritten note and a typed transcription. To the extent that the vacatur

motion rests on DNA evidence, that too is not a proper subject of a vacatur motion. DNA evidence had to be brought to the court's attention pursuant to a defense motion under CP §8-201 and UPPA, as the parties are aware(E2 p.3). The vacatur motion also relies on a polygraph test which is not admissible as evidence, new investigation that is not exculpatory and could have been done decades ago, and a repetitive analysis of cell phone data and its likely implications which was ruled by this Court not to be a ground for a new trial, becoming the law of the case. Because: (1) the vacatur ruling is a legal ruling and no witness credibility issues were before the trial court; (2) this Court has all the supporting trial court exhibits in front of it, i.e. E.& E2; and (3) the motion attempts to overcome this Court's last ruling which rejected the same cell phone arguments, this Court could, after its own legal review of the sufficiency of all the materials in the record, determine that as a matter of law, see Rule 4-333(f), the motion should be dismissed rather than remanded for another determination. Both parties are aware(E2,p.149) that Syed has other sentence reduction remedies available, not tethered to contradicting this Court's prior determination about his conviction.

Third, the Circuit Court violated its Constitutional obligations under Article 47(a) of the Maryland Declaration of Rights to treat the victim with dignity, respect, and sensitivity when it denied Lee's request for a 7 day continuance to consult with counsel and prepare his comments for the court. Lee was previously denied the required advance notice of the court's September 16th scheduling and

evidentiary review conference and therefore was unfairly surprised and prejudiced by what was decided there. Based on the schedule adopted in that conference, the court denied Lee's motion filed the next business day for a 7 day continuance.

The court's ruling did not properly consider either that Lee had not been able to secure counsel within the three days after he was notified on September 13th of the prosecutor's change in position regarding this twenty-year old matter that the parties had spent nearly a year preparing, or that Lee's counsel would have needed to move for the 7 day continuance on the same afternoon that the court's hearing schedule was promulgated, September 16th. No other attorney is treated this way. The Circuit Court's ruling in this regard also erroneously relied on Lee's acquiescence to entering a remote appearance, at a time before Lee had secured counsel and when Lee was not told that he had the option of attending the hearing in-person, which he later told the court he had wished to do (E.140,E.142). The trial court did not consider that the omission in the advice provided to the then-uncounseled victim's representative by the prosecutor, whose interest she knew was adverse to Lee's, materially misled Lee. Therefore, his consent to his remote participation upon which the Court relied was neither knowing nor voluntary and consequently invalid, which is now settled law under Rule 21-301(c)(2). The Circuit Court also violated its statutory obligation under CP§11-103(e) to ensure that Lee's rights under CP§11-102(a) were honored to attend in-person the open court hearing at which Syed was present. Instead, the court denied the

continuance even though no special need for urgency was presented, thereby failing to treat Lee with dignity, respect, and sensitivity, as required by Article 47 of the Maryland Declaration of Rights.

Fourth, the parties and the trial court failed to address or satisfy the vacatur requirements in Rule 4-333(d)(7)(B)&(C). These provisions require the movant to address why, not just state, that the newly discovered evidence proffered to the trial court “could not have been discovered earlier”, especially given the many earlier attorney reviews of the prosecution’s original files(E.149), and why that evidence could not have been proffered in time to move for a new trial under Rule 4-331. Compare, Rule 4-407(a).

Fifth, the trial court did not allow Lee’s counsel to speak and make a record of his objections concerning the concerns listed here, other than his request for a continuance(E143). See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)(a “fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”). Accord, Rule 18-102.6.

Sixth, the trial court in its opinion states that the court was relying upon its prior in-camera examination of material which was not re-presented or summarized by the court in open court. Since the supporting evidence was not specifically identified and summarized by the court at the hearing when Lee was

present (remotely), that nullified Lee’s right to be present at the vacatur hearing.

The Circuit Court also stated that it relied on an affidavit of counsel which was limited to the inapplicable *Brady* allegations(E.146). The court never discussed the names of the investigators who located the allegedly newly discovered *non-Brady* information, and it did not discuss the dates, times, and manner in which investigators discovered the new information. To the extent that DNA was relied upon, no witnesses other than the parties’ counsel were called to testify and no lab tests, lab analyses, or even the alleged *Brady* document, were offered in evidence. *Juliano v. State*, 166 Md.App. 531, 543–44(2006)(“...the prosecutor's representations during the sentencing phase of appellant's trial do not constitute “competent evidence”... citing *Winborn v. State*, 625 So.2d 977,977(Fla.Dist.Ct.App.1993) (prosecutor's statement was not “competent evidence” sufficient to establish the victim's loss. Witnesses “did not testify nor did they submit receipts, inventories, or the like...”). See Rule 4-333(g)(2)(“The State’s Attorney has the burden of proving grounds for vacating the judgment of conviction...”); Rule 5-602, “Lack of Personal Knowledge”.

V. The numerous legal errors which occurred in the trial court warrant that a new trial judge be assigned on remand.

The above-described errors occurred before a judge whom the record states was very familiar with vacatur motions filed by the prosecution(E.143). Given the court’s familiarity, this results in the appearance, whether true or not, that the court’s ruling was not based on the evidence before the court and that it did not result in the impartial and

fair administration of justice. This perception was supported by the trial court's unnecessary rush to judgment and thereafter its immediate release of Syed in this extraordinarily high profile murder case that has repeatedly been reviewed in detail, including here, and been upheld. Therefore, reassignment on remand is appropriate to restore the public's faith in the integrity of this criminal justice process. As stated in *United States v. Torkington*, 874 F.2d 1441,1447(11th Cir. 1989):

We do not question the district judge's actual ability, integrity, and impartiality. Rather, we respond to the appearance of a lack of neutrality and act to preserve in the public mind the image of absolute impartiality and fairness of the judiciary. We do not order this case reassigned lightly. However, we must preserve not only the reality but also the appearance of the proper functioning of the judiciary as a neutral, impartial administrator of justice. Consequently, we remand this case with the direction that it be reassigned to a different judge.

Accord, Rule 4-406(b)(routine appearance of justice judicial reassignments); *United States v. Spears*, 827 F.2d 705,709(11th Cir.1987)(where a judge's actions may give the appearance of a lack of impartiality, the interests of justice may make it appropriate to reassign the case on remand); *United States v. Nickle*, 816 F.3d 1230,1239(9th Cir. 2016)(“to preserve the appearance of justice,’ we remand to a different judge”); *Diggs v. State*, 409 Md. 260,294-295(2009)(case remanded for new trial before a different judge); *Archer v. State*, 383 Md. 329,360 (2004)(appellate courts have supervisory authority to preserve judicial integrity including during a sentencing hearing); *Jackson v. State*, 364 Md. 192(2001)(same); *State v. Payton*, 461 Md. 540,564 (2018)(same); *Mitchell v. State*, 320 Md. 756,769(1990)(appellate courts can act to promote the appearance of justice).

VI. Responses to the questions on which certiorari was granted.

Re: question (1), a lawfully entered nolle prosequi was not entered in this case so it does not render this appeal moot.

Re: question (2), pursuant to newly promulgated Rule 21-301(c), respondents who wish to participate remotely in court hearings must consent knowingly and voluntarily, which did not occur below. The new Rule resolves this question going forward.

Re: question (3), notice to Lee was insufficient because he was not notified in advance of the September 16th in-camera scheduling and evidence review hearing. Even if he could not attend, he could have taken steps to ensure that his availability and readiness at the time set for the open court hearing were made known to the court and taken into account. Instead, the lack of notice about and opportunity to raise his needs at the September 16th scheduling hearing resulted in Lee getting unreasonably short notice about the subsequent next business day's open court hearing which the court declined to postpone.

Re: question (4), victims need not show factual prejudice on appeal. They are prejudiced as a matter of constitutional and statutory law. Article 47(a) of the Maryland Declaration of Rights guarantees that victims will be treated with dignity, respect, and sensitivity when their statutory rights are violated. That constitutional guarantee is implemented by CP §11-103(e) which requires courts to ensure that victims' rights are honored in every case, other than when double jeopardy prevents a remedy. The parties to a criminal case have no such constitutional and statutory rights, and no statutes or case

law in Maryland applies harmless error standards to victims. If they did, courts could rule in every case that they already took the victim's views into consideration, and for that reason every violation of a victim's right would be excused as harmless, rather than being able to be corrected on appeal.

Re: question (5), victims have a legal interest in and right to speak at all hearings that attack the finality of their offender's sentence, including vacatur hearings, for the reasons explained *supra*. One consequence of victims not being allowed to speak in vacatur hearings, where the parties are typically collaborating, is that such a non-adversarial presentation is likely to result in judicial rulings rife with avoidable errors, as occurred here, which unnecessarily impugn the appearance of justice and conflict with Rule 18-102.6.

CONCLUSION

This Court should remand the case with directions that it be dismissed, or in the alternative, that it be reassigned to a new judge with the direction that the victim's representative has a right to be heard by the court on any issue.

Respectfully submitted,

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**CERTIFICATION OF WORD COUNT AND COMPLIANCE
WITH THE MARYLAND RULES**

1. This brief contains 6500 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font; spacing, and type size requirements stated in Rule 8-112.

/s/ Victor Stone
Victor Stone, Esq.

INTEREST OF THE AMICUS

Maryland Crime Victims Resource Center, Inc. (MCVRC) has represented hundreds of crime victims in Maryland and federal courts serving as a legal voice for victims.

MCVRC continues the mission of the Stephanie Roper Committee (Committee) established after Stephanie Roper's murder four decades ago.

PERTINENT AUTHORITIES

Annotated Code of Maryland

Md. CRIMINAL LAW Code Ann. § 3-207. Dismissal of assault charge

Dismissal

(a) On a pretrial motion of the State, a court may dismiss a charge of assault if:

- (1) the victim and the defendant agree to the dismissal; and**
- (2) the court considers the dismissal proper.**

Payment of costs

(b) The defendant shall pay the costs that would have been incurred if the defendant had been found guilty.

Md. CRIMINAL PROCEDURE Code Ann. § 11-102(a).

If practicable, a victim or victim's representative who has filed a notification request form under § 11-104 of this subtitle has the right to attend any proceeding in which the right to appear has been granted to a defendant.

Md. CRIMINAL PROCEDURE Code Ann. § 11-403.

(a) In this section, "sentencing or disposition hearing" means a hearing at which the imposition of a sentence, disposition in a juvenile court proceeding, or alteration of a sentence or disposition in a juvenile court proceeding is considered.

(b) In the sentencing or disposition hearing the court, if practicable, shall allow the victim or the victim's representative to address the court under oath before the imposition of sentence or other disposition:

- (1) at the request of the prosecuting attorney;
- (2) at the request of the victim or the victim's representative; or
- (3) if the victim has filed a notification request form under § 11-104 of this title.

(c) (1) If the victim or the victim's representative is allowed to address the court, the defendant or child respondent may cross-examine the victim or the victim's representative.

(2) The cross-examination is limited to the factual statements made to the court.

(d) (1) A victim or the victim's representative has the right not to address the court at the sentencing or disposition hearing.

(2) A person may not attempt to coerce a victim or the victim's representative to address the court at the sentencing or disposition hearing.

(e) (1) If the victim or the victim's representative fails to appear at a hearing on a motion for a revision, modification, or reduction of a sentence or disposition in circuit court or juvenile court, the prosecuting attorney shall state on the record that proceeding without the appearance of the victim or the victim's representative is justified because:

(i) the victim or victim's representative was contacted by the prosecuting attorney and waived the right to attend the hearing;

(ii) efforts were made to contact the victim or the victim's representative and, to the best knowledge and belief of the prosecuting attorney, the victim or victim's representative cannot be located; or

(iii) the victim or victim's representative has not filed a notification request form under § 11-104 of this title.

(2) If the court is not satisfied by the statement that proceeding without the appearance of the victim or the victim's representative is justified, or, if no statement is made, the court may postpone the hearing.

(f) A victim or victim's representative who has been denied a right provided under this section may file an application for leave to appeal in the manner provided under § 11-103 of this title.

Md. CRIMINAL PROCEDURE Code Ann. § 11-1002(b)(1) & (13).

A victim of a crime, victim's representative, or witness:

(1) should be treated with dignity, respect, courtesy, and sensitivity;

* * * *

(13) should be entitled to a speedy disposition of the case to minimize the length of time the person must endure responsibility and stress in connection with the case;

Maryland Rules

RULE 1-326. PROCEEDINGS REGARDING VICTIMS AND VICTIMS' REPRESENTATIVES

(a) Entry of Appearance. An attorney may enter an appearance on behalf of a victim or a victim's representative in a proceeding under Title 4, Title 8, or Title 11 of these Rules for the purpose of representing the rights of the victim or victim's representative.

(b) Service of Pleadings and Papers. A party shall serve, pursuant to Rule 1-321 on the attorney for a victim or a victim's representative, copies of all pleadings or papers that relate to: (1) the right of the victim or victim's representative to be informed regarding the criminal or juvenile delinquency case, (2) the right of the victim or victim's representative

to be present and heard at any hearing, or (3) restitution. Any additional pleadings and papers shall be served only if the court directs.

(c) Duties of Clerk. The clerk shall (1) send to the attorney for a victim or victim's representative a copy of any court order relating to the rights of the victim referred to in section (b) of this Rule and (2) notify the attorney for a victim or a victim's representative of any hearing that may affect the rights of the victim or victim's representative.

(d) Access to Case Records. An attorney who has entered an appearance in an action for a victim or victim's representative shall have access to all case records in the action that are not sealed, shielded under the Rules in Title 16, Chapter 900 of these Rules, or subject to a protective order.

RULE 4-406. HEARING

(a) When Required. A hearing shall be held promptly on a petition under the Uniform Post Conviction Procedure Act unless the parties stipulate that the facts stated in the petition are true and that the facts and applicable law justify the granting of relief. If a defendant requests that the court reopen a post conviction proceeding that was previously concluded, the court shall determine whether a hearing will be held, but it may not reopen the proceeding or grant the relief requested without a hearing unless the parties stipulate that the facts stated in the petition are true and that the facts and applicable law justify the granting of relief.

(b) Judge. The hearing shall not be held by the judge who presided at trial except with the consent of the petitioner.

(c) Evidence. Evidence may be presented by affidavit, deposition, oral testimony, or in any other form as the court finds convenient and just. In the interest of justice, the court may decline to require strict application of the rules in Title 5, except those relating to the competency of witnesses.

Cross reference: For procedures concerning DNA testing and preservation of DNA evidence in post conviction cases, see Code, Criminal Procedure Article, § 8-201.

(d) Presence of Petitioner. The petitioner has the right to be present at any hearing on the petition.

RULE 4-407. STATEMENT AND ORDER OF COURT

(a) Statement. The judge shall prepare and file or dictate into the record a statement setting forth separately each ground upon which the petition is based, the federal and state rights involved, the court's ruling with respect to each ground, and the reasons for the action taken thereon. If dictated into the record, the statement shall be promptly transcribed.

(b) Order of Court. The statement shall include or be accompanied by an order either granting or denying relief. If the order is in favor of the petitioner, the court may provide

for arraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper.

(c) Copy to the Parties. A copy of the statement and the order shall be filed promptly with the clerk and sent to the petitioner, petitioner's counsel, and the State's Attorney.

(d) Finality. The statement and order constitute a final judgment when entered by the clerk.

RULE 18-102.6. ENSURING THE RIGHT TO BE HEARD (ABA RULE 2.6)

(a) A judge shall accord to every person who has a legal interest in a proceeding, or that person's attorney, the right to be heard according to law.

(b) A judge may encourage parties to a proceeding and their attorneys to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

COMMENT

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August, 2023, electronic copies of the foregoing Brief of Amicus Curiae Maryland Crime Victims' Resource Center, Inc., were filed and served via the MDEC system and also sent separately by electronic means to the below counsel with their prior consent in lieu of two paper copies:

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