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IN THE
SUPREME COURT OF MARYLAND

SEPTEMBER TERM, 2023

NO. 7

ADNAN SYED,

Petitioner

v.

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

Respondents

ON WRIT OF CERTIORARI
TO THE APPELLATE COURT OF MARYLAND

PETITIONER'S BRIEF

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INTRODUCTION

For nearly a year, Mr. Syed has lived as a free man in one sense, but not in another. Imprisoned for the murder of Hae Min Lee for 23 years, Mr. Syed never wavered in maintaining his innocence. The State of Maryland at long last admitted in September 2022 that it did not provide him with a fair trial. The following month, the State, having successfully moved to vacate his convictions, nol prossed the charges. During the ensuing months while this appeal has been making its way to this Court, the State has not recharged Mr. Syed, and neither the State's Attorney

for Baltimore City, the Office of the Attorney General, nor Ms. Lee's family has sought his imprisonment. Yet that is the unspoken but necessary result of the relief Mr. Lee seeks in his appeal and which the Appellate Court granted: the reinstatement of Mr. Syed's convictions and life sentence for first degree murder and other offenses. The terrifying specter of reincarceration has hung over Mr. Syed's head every day for the past ten months.

The genesis of this appeal lies in the complaint of the victim's representative, Hae Min Lee's brother Young Lee, that the circuit court did not honor his rights of notice and attendance in connection with the vacatur proceeding. Though Mr. Lee and the Office of the Attorney General have since expressed their disagreement with the outcome of that proceeding, the merits of the vacatur and subsequent dismissal of charges were not before the Appellate Court, and they are not before this Court.

For several reasons, this Court should hold that the intermediate appellate court erred in ordering reinstatement of Mr. Syed's convictions. The nolle prosequi of charges after Mr. Lee noted his appeal to the Appellate Court rendered his appeal moot because it put an end to the criminal case against Mr. Syed. If the appeal is not moot, the Appellate Court erred in holding that the circuit court violated Mr. Lee's right to notice of the vacatur hearing and in holding that Mr. Lee had a right to be physically present at that hearing. Finally, the Appellate Court failed to require Mr. Lee to show a reasonable probability that the results of the vacatur hearing would have been different if Mr. Lee were physically present at the hearing. For each of these reasons, this Court should reverse the decision of the Appellate Court.

STATEMENT OF THE CASE

On September 14, 2022, following a year-long investigation, the State filed the Motion to Vacate Mr. Syed's conviction under Criminal Procedure Article § 8-301.1 in the Circuit Court for Baltimore City. In the motion, the State maintained that it no longer had faith in the integrity of Mr. Syed's convictions for several reasons, among them, misconduct committed by the lead prosecutor during Mr. Syed's trial. (E. 73-93).[1] Mr. Syed filed his response the same day. (E. 94). On September 16, 2022, following a scheduling conference with the parties and the Honorable Melissa Phinn, a hearing was scheduled for the afternoon of September 19, 2022. (E. 123). About 30 minutes before the hearing was scheduled to begin, through counsel, Mr. Lee filed a Motion for Postponement and Demand for Rights. (E. 103-109). After hearing argument from Mr. Lee's counsel and the State on the motion for postponement, the court denied the motion. (E. 137). Mr. Lee joined the proceedings via Zoom and made a statement to the court that was broadcast in the courtroom. (E. 140-142). The court then heard from the State and Mr. Syed's counsel before granting the State's motion to vacate Mr. Syed's convictions for first degree murder (case no. 199103042), kidnapping (case no 199103043), robbery (case no 199103045), and false imprisonment (case no. 199103046). (E. 143-163, 172-173). The court further ordered that the State schedule a date for a new trial or enter a nolle prosequi of the vacated counts within 30 days. (E. 163, 173).

[1] As used herein, "E" refers to the Record Extract filed in the Appellate Court and "E2" to the Supplemental Record Extract filed in this Court.

Mr. Lee noted his appeal on September 28, 2022. (E. 169). After DNA test results excluded Mr. Syed as a contributor to DNA found on Hae Min Lee's shoes, the State entered a nolle prosequi to all counts on October 11, 2022. (E. 65). The next day, the Appellate Court ordered Mr. Lee to show cause why his appeal should not be dismissed as moot in light of the nolle prosequi. Following responses by Mr. Lee, the Office of the Attorney General, and Mr. Syed, the Appellate Court ordered that the appeal would proceed on the following issues:

1. Whether the appeal is moot;
2. Whether th[e] Appellate] Court should issue an opinion on the merits despite mootness; and
3. Whether the notice provided to [Mr. Lee] complied with the applicable constitutional provisions, statutes, and rules.

(E2. 152-153).

On March 28, 2023, the Appellate Court reversed the circuit court and held that the appeal was not moot despite the entry of a nolle prosequi by the State. Slip Op. at 42. Turning to the merits, the court held that notifying Mr. Lee on Friday morning, three days before a Monday afternoon hearing, was insufficient notice for him to attend in person. (E. 54). Though the Court found that Mr. Lee had no right to give a victim impact statement or otherwise participate in the vacatur hearing, the Court nonetheless held that Mr. Lee had the right to appear in person at the hearing and that the circuit court committed reversible error by denying Mr. Lee a continuance so he could attend in person. (E. 58, 65). On May 2, 2023, the Appellate Court denied Mr. Syed's motion for reconsideration in which Mr. Syed argued that

the Appellate Court should have required Mr. Lee to show prejudice prior to reversing. (E2. 154-161).

On June 28, 2023, this Court granted Mr. Syed's Petition for Writ of Certiorari as well as Mr. Lee's Cross-Petition for Writ of Certiorari.

QUESTIONS PRESENTED

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?

STATEMENT OF FACTS

A. Prior proceedings

As detailed in the State's Motion to Vacate, the State's case against Mr. Syed was based on two main pieces of evidence: (1) the inconsistent and evolving testimony of a nineteen-year-old, incentivized, cooperating co-defendant, Jay Wilds, who received a two-year suspended sentence for confessing to assisting in burying the victim's body and hiding and disposing of evidence; and (2) cell phone location evidence based on incoming calls to Mr. Syed's cell phone that allegedly corroborated Mr. Wilds' testimony. (E. 75). At the time of trial, the prosecution acknowledged that these pieces of evidence, independently, would be insufficient to persuade a jury beyond a reasonable doubt: "Jay's testimony by itself, would that

have been proof beyond a reasonable doubt? Probably not. Cellphone evidence by itself? Probably not." (E. 88). Because Mr. Wilds was an admitted liar who told multiple versions of the events to the police, the cell phone evidence was critical to the State's case.

On February 25, 2000, a jury found Mr. Syed guilty of the following offenses: first-degree murder, kidnapping, robbery, and false imprisonment (J. Wanda K. Heard, presiding). (E. 15). Judge Heard imposed a total sentence of life plus 30 years. (E. 16). In an unreported opinion, the Appellate Court affirmed his convictions on March 19, 2003. *Syed v. State*, No. 923, Sept. Term 2000.

On May 28, 2010, Mr. Syed filed a petition for post-conviction relief which he supplemented on June 27, 2010. (E. 76). In that petition, Mr. Syed raised nine allegations of ineffective assistance of trial, sentencing, and appellate counsel. *Id.* The post-conviction court issued an order and memorandum on December 30, 2013, denying all claims.[2] *Id*.

Mr. Syed filed an application for leave to appeal, challenging the post-conviction court's findings on trial counsel's failure to investigate Asia McClain as a potential alibi witness and failure to pursue a plea deal. *Id.* After filing his application, Mr. Syed filed a supplement, requesting that the Appellate Court remand the case for the post-conviction court to consider an affidavit from Ms.

[2] The post-conviction court's order of December 13, 2013, was docketed on January 6, 2014. (E. 26).

McClain.[3] *Id.* The Appellate Court granted the request on May 18, 2015, and issued a limited remand, which provided Mr. Syed "the opportunity to file such a request to re-open the post-conviction proceedings" in the circuit court. *Id.*

On remand, Mr. Syed filed a request for the circuit court to consider an additional basis for his claim of ineffective assistance of counsel, as well as an alleged *Brady* violation, concerning the cell tower location evidence. *Id.* The circuit court granted the request to reopen Mr. Syed's post-conviction proceedings to review the alibi and cell tower location issues. *Id.* On June 30, 2016, the court denied relief on trial counsel's failure to investigate Ms. McClain as an alibi witness. *Id.* However, the court granted relief on counsel's failure to challenge the cell tower location evidence. *Id.* As a result, the post-conviction court vacated Mr. Syed's convictions and granted him a new trial. *Id.*

The State filed an application for leave to appeal. *Id.* On March 29, 2018, the Appellate Court reversed the post-conviction court's findings on each claim. *Id.* For the second time, Mr. Syed was granted a new trial. The court held that the failure of trial counsel to call Ms. McClain as an alibi witness warranted a new trial. *Id.* However, the court reversed the post-conviction court's holding on the cell phone tower evidence on the ground that the claim was waived because it was not raised in the initial post-conviction petition. *See Syed v. State*, 236 Md. App. 183 (2018).

[3] In her affidavit, Ms. McClain wrote that Assistant State's Attorney Kevin Urick convinced her not to testify at the original post-conviction hearing. Ruth Tam, PBS News Hour, https://www.pbs.org/newshour/nation/serial-witness-asia-mcclain-claims-testimony-surpressed. (last visited 7.16.23).

On March 8, 2019, on petition for writ of certiorari by the State, this Court reversed the Appellate Court, holding that although trial counsel was ineffective for failing to investigate Asia McClain as an alibi witness, counsel's deficient performance was not prejudicial. *State v. Syed*, 463 Md. 60 (2019). The Court agreed with the Appellate Court that the cell phone tower issue was waived and so did not address the merits of that issue. *Id.*

Mr. Syed timely filed a petition for writ of certiorari to the Supreme Court of the United States. The petition was denied on November 25, 2019. *Syed v. Maryland*, 140 S. Ct. 562 (2019).

B. The motion to vacate Mr. Syed's convictions

Approximately a year before it filed the motion to vacate, the State's Attorney's Office, in conjunction with defense counsel, began a broad investigation into the integrity of its prosecution of Mr. Syed. (E. 73). Part of that investigation focused on the cell phone evidence the State so heavily relied upon at trial. As noted, this Court did not consider on the merits Mr. Syed's contention on post conviction that trial counsel was ineffective for failing to cross examine the State's cell phone expert with a fax cover sheet, which indicated that incoming calls were not reliable for determining location. (E. 76).[4] As part of the investigation leading to the motion

[4] An affidavit from the State's cell phone expert at trial, which was admitted at the post-conviction hearing and as Exhibit 5 to the vacatur motion, stated that he would not have testified at trial that the location evidence was accurate if Assistant State's Attorney Urick had told him about or shown him the fax cover sheet disclaimer which accompanied the records. (E. 85; E2. 29-30).

to vacate, the State consulted with three experts who independently concluded, based on their experience with and knowledge of the technology, that, consistent with the fax cover sheet disclaimer, the incoming calls in this case did not provide a reliable basis for determining location. (E. 87; E2. 31-34). In addition, after consultation with a polygraph expert, the State found that one alternative suspect was improperly cleared based on initial results that indicated deception and a different, second test that is not used as a stand-alone test to determine deception. (E. 83).

Most significantly, the State located two documents in its file which it determined to be information that was conveyed to the prosecutor about threats made against the victim by a person other than Mr. Syed. (E. 79-80). The State concluded that this information should have been turned over to Mr. Syed, under *Brady v. Maryland*, 373 U.S. 83 (1963), but was not. (E. 80). In support of the motion to vacate, the State provided the circuit court with a sworn affidavit, which was admitted as State's Exhibit 1 during the vacatur hearing, and which detailed the manner and timeline during which the documents were discovered. (E. 146-150; E2. 149-151).[5]

[5] The prosecutor who is responsible for committing these *Brady* violations has since provided the press with an unsworn, self-serving, nonsensical explanation to defend his actions. *See* Tim Prudente & Dylen Segelbaum, *A Decades-Old Note Helped Adnan Syed Get Out of Prison, The Author Says It Was Misinterpreted*, Baltimore Banner (Nov. 1, 2022). Though the issue is not before this Court, it bears mentioning that even in his protestations, Mr. Urick did not assert that he turned over the document. Instead, he offered an after-the-fact explanation that the "he" in the note who made the threat against Ms. Lee was Mr. Syed. This explanation strains

As the State presented in its sworn affidavit at the vacatur hearing, the State's review of the case began in October of 2021. (E. 147; E2. 149). Based on that review, the State and Mr. Syed jointly moved for DNA testing of the victim's clothing on March 10, 2022. (E. 144). Before that petition was filed, the State contacted Mr. Lee to advise him in advance of the filing and to answer any questions he might have. (E. 136). Thus, the State first notified Mr. Lee in the spring of 2022, a full six months before the vacatur motion was filed, that it was reviewing the case and believed DNA testing was warranted.

The circuit court granted the motion for DNA testing on March 14, 2022. (E. 51). The first round of DNA testing of Hae Min Lee's clothing produced no forensic ties to Mr. Syed. (E. 74). The second round of DNA testing yielded a mixed profile from which Mr. Syed was excluded. *See* Rachel Duncan and Ashley Hinson, *Baltimore prosecutors drop charges against Adnan Syed*, WBALTV News (Oct. 12, 2022), https://www.wbaltv.com/article/adnan-syed-charges-dropped-baltimore/41585971 (last visited 7.16.23).

On September 12, 2022, two days before it moved to vacate Mr. Syed's convictions and before the State's statutory notice obligations were triggered by a scheduled hearing, the State called Mr. Lee to inform him of its intention to file the

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credulity, both logically and linguistically. If it were true, the rules required the State to turn it over as a statement by the defendant if the State intended to use it. Md. Rule 4-263(d)(1). The statement would have been admissible against Mr. Syed as a statement by a party opponent. Yet, the prosecution inexplicably failed to make use of Mr. Syed's alleged inculpatory statement to an innocent bystander who, unlike Mr. Wilds, was not involved in the crime.

motion. (E. 124). The State then spoke with Mr. Lee by telephone on September 13 and explained what was happening in the case, discussed with him the new information it had developed, and reviewed the motion. *Id.* During that conversation, the State's representative also advised Mr. Lee that there would be a hearing on the motion, provided Mr. Lee with her email address and cell phone and office numbers, and told Mr. Lee to contact her at any time. (E. 134, 136). The State then emailed a copy of the motion to Mr. Lee. *Id.* In that email, the State referenced the information discussed in the phone call about the alternative suspects, offered to share the status of the investigation as it moved forward, and invited Mr. Lee "to reach out" with questions "at any time." (E. 180). Mr. Lee replied to the State's email that same day, expressing his disagreement with the decision to seek vacatur but also stating that he understood the State's position and its obligation to "do due diligence and cover all possibilities." (E. 179-180). The State responded promptly by acknowledging Mr. Lee's position and apologizing for the pain that the case was causing Mr. Lee. (E. 179).

Almost immediately following a scheduling conference, at 10:59 a.m. PST[6] on September 16, the State emailed Mr. Lee to notify him of the date and time of the vacatur hearing. (E. 179). During that scheduling conference, the court conducted an in-camera review of the *Brady* material the State admitted not having turned over to the defense at trial. (E. 150, 172). The State notified Mr. Lee of the

[6] Mr. Lee resides in California. Thus, it was 10:59 a.m. Pacific Standard Time (PST) (1:59 p.m. Eastern Standard Time (EST) in Maryland), when he was notified.

vacatur hearing as soon as was practicable and informed him that, while the hearing would be in-person, it wanted to ensure that he was able to observe the proceedings and so was providing him a Zoom link so that he and his family would have the option of attending remotely. (E. 123, 179). Despite having previously sent a same-day response to the State's email just three days earlier, Mr. Lee did not respond to the Friday morning email notice from the State, which was part of the same email thread dating back to September 13. *Id*.

On September 18, having not heard back from Mr. Lee, the State reached out to him again by text message to confirm that he received the State's previous email and was aware of the hearing. (E. 123, 181). Mr. Lee responded this time, 24 hours before the scheduled hearing, and acknowledged receipt of the State's email informing him of the hearing and stated that he would "be joining" via the provided Zoom link. (E. 182). Despite being informed as of September 13 that a hearing would be scheduled and that the hearing would be in person, at no point did Mr. Lee mention to the State that he wished to attend in person. (E. 125, 134). According to Mr. Lee's counsel, Mr. Lee retained counsel approximately an hour and a half later at 6 p.m. EST. (E. 131). Despite Mr. Lee's representation to the State that he would attend via Zoom, presumably of which his counsel was aware, and despite having the State's representative's contact information, Mr. Lee's counsel failed to communicate to the State or the Court that Mr. Lee had changed his mind and wished to attend in person until 30 minutes before the hearing was scheduled to begin on Monday afternoon.

On this point, the court at the vacatur hearing noted that, had Mr. Lee communicated to the State that he wished to attend in person before the afternoon of the hearing, as opposed to advising the State that he would attend by Zoom, the hearing would have been rescheduled to accommodate Mr. Lee's wishes. (E. 130, 131). The court also found that Mr. Lee had sufficient time to consult with an attorney from the time that the State began communicating with him about the motion. (E. 137).

On October 11, after the DNA results excluded Mr. Syed as a contributor but yielded a mixed profile, the State entered a nolle prosequi to the charges.[7] (E. 65). As Mr. Lee acknowledged in his Appellant's Brief in the Appellate Court, the State reached out to Mr. Lee to advise him of the nolle prosequi. (Appellant's Brief, at 11).

ARGUMENT

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

The State's entry of nolle prosequi rendered moot Mr. Lee's appeal from the State's motion to vacate Mr. Syed's convictions. This is so for two reasons. *First*, the remedy Mr. Lee sought in the Appellate Court – reinstatement of Mr. Syed's convictions and a rehearing on the motion to vacate – was no longer possible after October 11, 2022, the date on which the State nol prossed the charges and ended the

[7] *See also* Alex Mann, *State's Attorney Mosby says DNA test results will determine whether she drops Adnan Syed's charges*, Baltimore Sun (Sep. 27, 2022).

case against Mr. Syed. *Second*, even assuming Mr. Lee could seek reinstatement of Mr. Syed's convictions notwithstanding the State's dismissal of the underlying charges, the nol pros was not properly before the Appellate Court as it took place after Mr. Lee noted his appeal, and he could not (or did not, if he could) appeal from it.

The Appellate Court's conclusion that the nolle prosequi did not render the appeal moot marks an unprecedented and unwarranted intrusion into the authority of the State to control which cases it prosecutes. Prior to the Appellate Court's decision in this case, Maryland courts have curtailed the State's otherwise unfettered authority to dismiss criminal charges in just two circumstances—when the entry of nolle prosequi was *ultra vires* or the nol pros violated the defendant's constitutional right to a fair trial. This case involves neither circumstance. The Appellate Court erred in manufacturing out of whole cloth a new limitation on the State's authority.

A. The lawful dismissal of Mr. Syed's charges ended the case against him.

"A case is considered moot when 'past facts and occurrences have produced a situation in which, without any future action, any judgment or decree the court might enter would be without effect.'" *La Valle v. La Valle*, 432 Md. 343, 351 (2013) (quoting *Hayman v. St. Martin's Evangelical Lutheran Church*, 227 Md. 338, 343 (1962)); *see also Suter v. Stuckey*, 402 Md. 211, 219 (2007) (holding that appeal was moot where "[e]ven were we to agree with respondent, there is no possible relief that could be granted").

Issues arising out of a criminal case may become moot as a result of the lawful dismissal of charges by the State. *See Hooper v. State*, 293 Md. 162, 169 (1982) (recognizing that "if the State decided not to wait until the trial on the informations, but were to abandon the prosecution on the indictments before that time, the case would become moot because of the abandonment or nol pros"). That the victim's representative initiated this appeal makes no difference. *See, e.g., S.K. v. State*, 881 So. 2d 1209, 1212 n. 6 (Fla. Dist. Ct. App. 2004) (holding that when prosecution entered nolle prosequi, appeal by victim's parents became moot because "there is no case or controversy remaining to remand to the trial court"); *Mitchell v. State*, 369 P.3d 299, 307 (Idaho 2016) (holding that appeal in which victim alleged violation of his rights was moot where "[t]he underlying criminal charges against [the defendant] have been dropped" and "[a] judicial determination on this issue would therefore have no practical effect on the outcome: there are no further proceedings for which [the victim] could request or receive notice").

"[E]ntering a nolle prosequi is a part of the 'broad discretion vested in the State's Attorney.'" *State v. Simms*, 456 Md. 551, 561 (2017) (quoting *Food Fair Stores, Inc. v. Joy*, 283 Md. 205, 214 (1978)); *accord Ward v. State*, 290 Md. 76, 83 (1981) ("The entry of a nolle prosequi is generally within the sole discretion of the prosecuting attorney, free from judicial control and not dependent upon the defendant's consent."). The State acts within its authority so long as it enters the nolle prosequi in open court and prior to final judgment. Md. Rule 4-247(a) ("The State's Attorney may terminate a prosecution on a charge and dismiss the charge by

entering a nolle prosequi on the record in open court."); *see also Simms*, 456 Md. at 576 (holding that authority to dismiss charges extends only until final judgment); *Williams v. State*, 140 Md. App. 463, 473-74, *cert. denied*, 367 Md. 90 (2001) ("The State has an absolute right, without court approval, to enter a nolle prosequi to charges, provided it does so in open court."); *Gray v. State*, 38 Md. App. 343, 357 (1977) ("Provided it was done in open court, as in this case it was, the State had an absolute right, without court approval, to enter a nolle prosequi to the other charges.").

In *Hook v. State*, 315 Md. 25 (1989), this Court recognized the sole instance when the State, acting in open court and prior to final judgment, may be prevented from dismissing charges: when doing so would violate the right of the defendant to a fair trial. At Hook's capital trial on charges including first degree murder, the State nol prossed second degree murder at the close of its case-in-chief and over defense objection. On appeal, Hook argued that the dismissal of the second degree murder charge rendered his trial fundamentally unfair as it placed the jury in the untenable position of having to convict him of first degree murder or nothing at all. After reviewing relevant case law from the United States Supreme Court, this Court voiced its agreement, declaring that "the exceptional circumstances of this case present a rare occasion calling for a tempering of the broad authority vested in a State's Attorney to terminate a prosecution by a nolle prosequi." *Id.* at 41. Earlier in its opinion, the Court laid the groundwork for its conclusion, stating that "[t]he right of an accused to a fair trial, although not a perfect trial, is paramount." *Id.* at 36.

According to the Court, "[w]hen the defendant is plainly guilty of some offense, and the evidence is legally sufficient for the trier of fact to convict him of either the greater offense or a lesser included offense, it is fundamentally unfair under Maryland common law for the State, over the defendant's objection to nol pros the lesser included offense." *Id.* at 43-44.

Except for the limited circumstance addressed in *Hook*, neither a court nor a defendant may stop the State's Attorney from entering a nolle prosequi. *See, e.g., Barrett v. State*, 155 Md. 636, 142 A. 96, 97 (1928) (rebuffing defendant who, desirous of proving his innocence at trial, attempted to prevent State from entering nolle prosequi). This is by design, not accident. Unlike a stet, a nolle prosequi is not initiated by motion and does not require court approval. *See* Md. Rule 4-248(a) ("On motion of the State's Attorney, the court may indefinitely postpone trial of a charge by marking the charge 'stet' on the docket."); *Att'y Grievance Comm'n of Maryland v. Usiak*, 418 Md. 667, 674 n. 6 (2011) ("Unlike a motion to stet a case, no motion requiring approval by the court of the State's decision to nol pros a matter is required."). Further, over 30 years ago, the Court removed language from Rule 4-247 which required the prosecutor to make "[a] statement of the reasons for entering a nolle prosequi … part of the record." 117th Rules Order (Nov. 1, 1991) (Maryland Register, Aug. 23, 1991, at 1908, and Maryland Register, Nov. 29, 1991, at 2622). The change came about at the request of the then-Deputy State's Attorney for Baltimore City, who pointed out that "[e]ntering a Nol Pros is within the sole province of the State's Attorney, who may Nol Pros for any reason, good or bad.

His Nol Pros is not reversible by the court and unlike a Stet, does not need the court's concurrence." Minutes from Rules Committee Meeting of May 17/18, 1991, at Appendix 3.

Also relevant to this case is Rule 4-333, which implements the vacatur statute, § 8-301.1 of the Criminal Procedure Article. Under Rule 4-333, the State, within 30 days after a court grants a motion to vacate a conviction, "*shall* either enter a nolle prosequi of the vacated count or take other appropriate action as to that count." Md. Rule 4-333(i) (emphasis added). Thus, when the State successfully obtains vacatur of a defendant's convictions, it has not merely the option, but the obligation, to enter a nolle prosequi if it does not intend to re-prosecute under the same charging document.

In this case, the circuit court granted the State's motion to vacate on September 19, 2022. At that time, Mr. Syed no longer stood convicted of an offense, so the State had the authority to enter a nolle prosequi, and it was required under Rule 4-333 to decide whether to exercise that authority within 30 days. The circuit court echoed the requirements of the rule in its order granting vacatur, directing that "the State schedule a date for new trial or enter nolle prosequi of the vacated counts within 30 days of the date of this Order." (E. 116-117). Approximately three weeks after the vacatur hearing, the State enter a nolle prosequi on the record in open court, thereby putting an end to its prosecution of Mr. Syed in Baltimore City Circuit Court Case Nos. 199103042, *et seq.*

The State acted lawfully in entering the nolle prosequi. This case is unlike

Simms, *supra*. During the pendency of Simms' direct appeal from his conviction and sentence, the State nol prossed the charge against him. On petition to this Court, the State argued that it had the authority to enter a post-judgment nolle prosequi, and that the effect of its action was to render Simms' appeal moot. *Simms*, 456 Md. at 557. The Court rejected the State's argument, holding that the State does not have the authority to enter a nolle prosequi after a defendant has been convicted and sentenced, and so "the nol pros entered in the trial court as to the charge underlying the conviction and sentence was simply a nullity, 'improper' and therefore 'ineffective.'" *Id*. at 576 (citing *Friend v. State*, 175 Md. 352, 356 (1938)). The Court reasoned that the State sought to dismiss the charge at a time when it was "no longer pending" as "[f]inal judgment terminate[d] the case in the trial court." *Id.* at 578.

Here, assuming for the sake of argument that Mr. Lee had a valid grievance about notice and attendance at the vacatur hearing, it does not follow that the vacatur order was somehow illegal just as it does not follow that a verdict is a nullity when error occurs at trial. The issuance of a lawful vacatur order left the case in prejudgment status, thereby permitting (and, under Rule 4-333, requiring) the State to exercise its discretion to nol pros the charges. The entry of nolle prosequi was not "'void *ab initio* for lack of jurisdiction to enter it.'" *Cottman v. State*, 395 Md. 729, 742 (2006). Because it acted in open court and after the circuit court vacated Mr. Syed's convictions, the State had the authority to dismiss the charges regardless of whether it derived that authority from a vacatur hearing at which Mr. Lee was not

present in person. Put another way, the act of entering the nolle prosequi was lawful and put an end to the then-extant prosecution of Mr. Syed. With no criminal case left in which to reinstate Mr. Syed's convictions, Mr. Lee's appeal became moot as the Appellate Court could not grant him relief.

The *Hook* exception to the State's authority to nol pros does not apply to this case.[8] As Judge Berger explained in his dissenting opinion, "the fundamental fairness principle discussed in *Hook* focused upon the fair procedure owed to a criminal defendant whose liberty interest was at stake." Dissent Slip Op. at 4. "Victims' rights," he continued, are important, but they "are not the same rights as those granted to criminal defendants[.]" *Id.* In fact, this Court has recognized on many occasions that the rights of the accused occupy a unique space in our justice system. *See, e.g., Collins v. State*, 452 Md. 614, 623 (2017) ("The broad discretion that we accord judges in the conduct of voir dire 'and the rigidity of the limited voir dire process are tempered by the importance and preeminence of the right to a fair and impartial jury and the need to ensure that one is empaneled.'") (quoting *Dingle v. State*, 361 Md. 1, 14 (2000)); *State v. Johnson*, 440 Md. 228, 247 (2014)

[8] Even if the *Hook* exception applied, that would not end the analysis, as the nolle prosequi still would have had to have been before the Appellate Court for that court to reverse it. When the State improperly dismisses a charge under *Hook*, the nol pros is not automatically void, but merely voidable on a direct appeal after timely objection by the defendant. *See Kinder v. State*, 81 Md. App. 200, 208 (1989) (explaining that "the *Hook* Court did not flat out prohibit the State from nol prossing lesser included offenses but directed the trial courts to forbid such action only upon the defendant's objection"). As discussed *infra*, the nolle prosequi was not before the intermediate appellate court because it took place after Mr. Lee noted his appeal.

("Accordingly, we hold that a victim's right to assert a privilege in his or her mental health records may yield to the criminal defendant's constitutional rights at trial."); *Foster v. State*, 297 Md. 191, 210 (1983) ("Regardless of whether the proffered testimony is inadmissible because of Maryland's hearsay rule, under the facts of this case, its exclusion deprived the accused of a fair trial in violation of the Due Process Clause of the Fourteenth Amendment.").

Antoine v. State, 245 Md. App. 521 (2020), which the Appellate Court also discusses in its opinion, does not support a different conclusion. At issue in *Antoine* was whether the circuit court denied the victim his right to present victim impact evidence at sentencing when the court bound itself to a negotiated plea agreement without hearing from the victim. Holding that the circuit court violated the victim's right, the Appellate Court vacated the circuit court's approval of the plea agreement so that the victim could present victim impact evidence before the court determined whether the negotiated sentence was appropriate. *Id.* at 555-57.

Antoine stands for the proposition that an appellate court may order what is in effect a new sentencing proceeding to remedy a violation of a victim's right to present victim impact evidence. Nothing in *Antoine* authorizes reversal of an order granting the State's motion to vacate a conviction. More importantly, nothing in *Antoine* supports the proposition that an appellate court can undo a lawfully entered nolle prosequi and override the State's decision not to prosecute a defendant under a particular charging document.

For different reasons, the Appellate Court's reliance on *Curley v. State*, 299

Md. 449 (1984), is misplaced. *Curley* did not involve an appeal by a victim or victim's representative. Instead, at issue in *Curley* was how to calculate the 180-day period for trial under the predecessors to Rule 4-271 and Criminal Procedure Article § 6-103 when the State nol prosses charges against a defendant and then re-charges the defendant with the same offenses. While the ordinary rule is that the 180-day period begins anew with the new charging document, the Court held that a different rule applies if the nol pros had the "purpose" or "necessary effect" of circumventing the requirements of the 180-day rule. *Id.* at 462. According to the Court, in that limited circumstance, "the 180-day period will commence to run with the arraignment or first appearance of counsel under the first prosecution." *Id.* Subsequent opinions have clarified that the *Curley* exception applies when a nolle prosequi has the necessary effect or purpose of circumventing Rule 4-271 and Criminal Procedure Article § 6-103 by "evading" a ruling dismissing a case for violation of the 180-day requirement. *See State v. Huntley*, 411 Md. 288, 293 n. 9 (2009).

The Appellate Court's co-optation of the *Curley* exception reflects a misunderstanding of how the exception operates. The Appellate Court recognized that the entry of nolle prosequi will render an appeal moot unless the nol pros can be declared "void, and therefore … a nullity." Slip Op. at 34. But when a court applies the *Curley* exception, it does not nullify a nolle prosequi. Rather, the court conducts its assessment of the State's time to try the defendant without reference to the nol pros. If the court grants relief to the defendant, it does so by dismissing the

new charges, not the original charges which the Court does not need to dismiss since, by virtue of the nol pros, they no longer exist.[9]

Application of the *Curley* exception is also unwarranted on this record. According to the Appellate Court, the State's entry of nolle prosequi was improper because, under the "unique circumstances of this case," "the nol pros was entered with the purpose or 'necessary effect' of preventing Mr. Lee from obtaining a ruling on appeal regarding whether his rights as a victim's representative were violated." Slip Op. at 34, 41-42. The *Curley* exception, however, looks to whether the State's action had the effect or purpose of averting a ruling by the circuit court. *Huntley*, 411 Md. at 293 n. 9. Here, the State nol prossed the charges *at the direction* of the circuit court under Rule 4-333(i). In any event, there is no support in the record for the notion that the State intended to circumvent Mr. Lee's right to obtain appellate relief, as the Attorney General acknowledged at oral argument before the Appellate Court. The State was public and transparent that it would dismiss the charges if DNA testing was exculpatory. *See* Alex Mann, *State's Attorney Mosby says DNA test results will determine whether she drops Adnan Syed's charges*, Baltimore Sun (Sep. 27, 2022).

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[9] The analysis in the speedy trial context operates similarly, *i.e.* the reviewing court does not reverse the entry of nolle prosequi but may disregard it for purposes of determining whether the defendant's speedy trial right was violated. *See State v. Bailey*, 319 Md. 392, 412 (1990) (explaining that "discretion of the prosecutor to enter a nol pros remained unfettered, *but* he ran the risk that its entry might result in denial of a speedy trial") (emphasis in original); *Clark v. State*, 97 Md. App. 381, 393-94 (1993) ("If the prior termination of charges is done in good faith, we start the speedy trial clock at the second indictment.") (footnote omitted).

Moreover, it is commonplace for the State to dismiss a charge after it has successfully sought vacatur to correct an injustice. Rule 4-333(i) instructs the State to make that call within 30 days of the vacatur order. But a victim or victim's representative also has 30 days from the entry of the vacatur order to note an appeal. *See* Md. Rule 8-202(a). The result is that nol prossing the charge following vacatur of a defendant's conviction will frequently have the effect of mooting an appeal by the victim or victim's representative. Far from being the exception to a general rule that *Curley* intended, the Appellate Court's holding prevents the State, contrary to Rule 4-333(i), from ever dismissing charges until the time for noting an appeal has passed or, if the victim or victim's representative takes an appeal, the appeal is concluded. In the meantime, the defendant must live with charges hanging over their head, under a cloud of suspicion and in constant fear of re-prosecution.[10]

By contrast, this Court's opinion in *Hooper*, *supra*, is instructive. In that case, the State noted an appeal after the circuit court dismissed indictments against two

[10] Contrary to the Majority's opinion, Slip Op. at 41-42, the fact that Mr. Lee's motion to stay the order granting vacatur was pending at the time of the nol pros is a red herring. As the Majority acknowledged, whether a victim's representative can seek a stay in order to prevent the State from dismissing charges is an open question. *See* Slip Op. at 42 n. 29 ("We recognize that Article 47(c) of the Maryland Declaration of Rights states: 'Nothing in this Article . . . authorizes a victim of crime to take any action to stay a criminal justice proceeding.'"); *Hoile v. State*, 404 Md. 591, 627 (2008) (discussing "Article 47's express prohibition on a court permitting a victim to 'stay a criminal justice proceeding."). However, even if the circuit court or Appellate Court could have granted a stay at Mr. Lee's request, neither court had done so before the State entered a nolle prosequi. This is not a case in which the State acted in defiance of a stay ordered by a court. The mere pendency of a request for a stay did not deprive the State of its authority to nol pros the charges.

co-defendants. While the appeal was pending, the State filed informations charging the defendants with the same offenses. During oral argument in this Court, the Attorney General moved to dismiss the appeal "'on the ground of mootness.'" *Hooper*, 293 Md. at 164-65. When the State later sought to reinstate the appeal, this Court demurred. Denying the State's motion to withdraw the dismissal of the appeal, the Court held that the Attorney General's actions during oral argument were tantamount to the entry of a nolle prosequi. *Id.* at 169. Once the State elected to end its prosecution of the defendants on the indictments, the Court continued, the appeal became moot. *Id.* at 169-70. According to the Court, "[t]o permit the State to withdraw a nolle prosequi, or have a nol prossed indictment reinstated, would be flatly inconsistent with the nature of a nolle prosequi under Maryland law." *Id.* at 171.

Here, as in *Hooper*, the State had the sole discretion to decide whether to enter the nolle prosequi. Because it acted within the scope of its authority and did not violate Mr. Syed's constitutional right to a fair trial, its decision may not be disturbed even with the consent of the State (by way of the Office of the Attorney General). The Appellate Court erred in holding that Mr. Lee's appeal was not moot.

B. Respondent may not seek appellate review of the entry of nolle prosequi.

Mr. Lee's appeal was also moot because the nolle prosequi was not before the Appellate Court. Assuming for the sake of argument that the State should not have nol prossed the charges against Mr. Syed, at most this made the nolle prosequi

subject to reversal. It did not make it void or a nullity from the start as in *Simms*, *supra*, because, again, the State entered the nol pros in open court and prior to final judgment. Since Mr. Lee filed his appeal before the State entered the nolle prosequi, the propriety of the State's election to dismiss the charges was not before the Appellate Court.

There is some authority for the proposition that the entry of nolle prosequi constitutes an appealable judgment. In *Barrett*, *supra*, 142 A. 96, the State, citing an inability to sustain its burden of proof, dismissed the lone charge against the defendant over objection during jury selection. *Id.* at 97. Barrett appealed, and the State moved to dismiss. This Court sided with Barrett on the question of appealability, reasoning that "[t]here was a final disposition of the case when the court ordered the entry of the nolle prosequi at the instance of the state's attorney." *Id.* However, the Court ultimately affirmed on the ground that Barrett did not have the right to stop the State's Attorney from entering a nolle prosequi. *Id.*

Despite *Barrett*, there is some question as to whether a trial court *orders* anything when the State nol prosses a charge. As noted, a nol pros, unlike a stet, is not initiated by motion, so, arguably, a court does not need to issue a ruling when the State dismisses charges. If that is so, the only appealable "order" in this case was the vacatur order the circuit court issued on September 19. As a victim's representative may appeal only from "a final order," Md. Code, Crim. Proc. Art. § 11-103(b), Mr. Lee would not have been permitted to seek review of the nol pros.

In any event, the dispositive fact is that the nolle prosequi took place after

Mr. Lee noted his appeal. *Cottman*, *supra*, 395 Md. 729, is instructive. In *Cottman*, the circuit court granted the defendant's motion for new trial while his direct appeal was pending, and he moved to dismiss his appeal as moot. The Appellate Court denied his motion, and this Court reversed. The Court rejected the State's challenge to the circuit court's order granting Cottman a new trial. According to the Court, the State's argument failed for several reasons, including, as relevant here, that the circuit court acted after the case went up on appeal. The Court reasoned that an "appellate court has no power to vacate an order where there is no appeal of that order," and so "the issues as to the propriety of granting a new trial and its effect on the appellate proceedings are not properly before this Court." *Id.* at 740 n. 10. This was so, the Court explained, even if the circuit court acted improperly, as a trial court retains fundamental jurisdiction to issue rulings in a case during the pendency of an appeal. *Id.* at 742. *Compare Cnty. Comm'rs of Carroll Cnty. v. Carroll Craft Retail, Inc.*, 384 Md. 23, 45-46 (2004) (dismissing writ of certiorari as improvidently granted where petitioner failed to note appeal from subsequent order of circuit court striking notice of appeal) *with In re Emileigh F.*, 355 Md. 198, 201-02 (1999) (granting relief on appeal from order of circuit court terminating its jurisdiction during pendency of earlier appeal).

In this case, the State dismissed the charges prior to final judgment but after Mr. Lee appealed. Therefore, the entry of the nolle prosequi was not before the Appellate Court, and so the Appellate Court erred in reversing it even assuming there were valid grounds for challenging it. As Mr. Lee could not seek reversal of

the nolle prosequi, his appeal from the earlier vacatur order was moot, and the Appellate Court should have dismissed it.

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

In holding that Mr. Lee had no right to participate at the vacatur hearing but that he had a right to attend the hearing in person, the Appellate Court got it half right. The Appellate Court correctly concluded that a victim's representative has no right of participation given the critical differences between a vacatur hearing and a hearing at which a court exercises discretionary sentencing authority. Slip Op. at 65. Nonetheless, the Appellate Court erred when it held that Mr. Lee had a right to attend the vacatur hearing in person. According to the Appellate Court, the circuit court violated Mr. Lee's rights where Mr. Lee, through counsel, conveyed a desire to attend the hearing in person, the parties in the case appeared in person, and there were no compelling reasons to require Mr. Lee to attend the proceedings remotely. Slip Op. at 58. Further, the violation warranted the reinstatement of Mr. Syed's convictions so that the circuit court could conduct a second vacatur proceeding notwithstanding that Mr. Lee attended the hearing via Zoom and the circuit court permitted him to address the court, without limit in time or substance. Slip Op. at 65-68.

The Appellate Court's reasoning is wrong for several reasons. *First,* the Appellate Court relies on the flawed premise that "attendance" in Criminal Procedure Article § 8-301.1(d)(2) means in-person attendance. The Court

acknowledges that there is no mention of in-person attendance in either the plain language of the statute or its legislative history. Slip Op. at 56. Instead, the Court cites the timing of the enactment of the vacatur statute – in 2019 before the widespread adoption of video conferencing technology by the Judiciary – as the sole support for its conclusion. Slip Op. at 56.

That the vacatur statute's enactment preceded the Covid-19 pandemic and the widespread use of Zoom and other technology to facilitate remote attendance is hardly telling. The use of technology to facilitate alternatives to physical presence in the courtroom is not new to Maryland's courts. *See, e.g., Maryland v. Craig*, 497 U.S. 836, 851-60 (1990) (allowing child witness to testify by one-way closed circuit television). More to the point, our courts did not shut down during the pandemic. As the circuit court and the Dissent acknowledged, E. 138; Dissent Slip Op. at 13, remote or partially remote hearings were commonplace during the pandemic and remained so at the time of the vacatur hearing, notwithstanding the lack of any enabling legislation. In April of 2022, after commissioning a task force to study the efficacy of virtual court proceedings, the Maryland Judiciary announced that courts would be encouraged to use remote access technology beyond the pandemic.[11]

More recently, this Court adopted rules permitting courts to require remote participation in certain criminal proceedings even over the objection of the parties. 214th Rules Order, at 396-400 (April 21, 2023). The Appellate Court's

[11] *See* Kate Mettler, *Senior Judge urges Md. Courts to keep virtual access beyond pandemic*, Washington Post (April 7, 2022).

anachronistic interpretation of § 8-301.1 threatens to render the statute obsolete or, at the very least, in conflict with the new rules. "The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature." *Lockshin v. Semsker*, 412 Md. 257, 274 (2010). Courts regularly apply existing laws to new and unprecedented circumstances to effectuate legislative intent, though the use of Zoom by courts to hear victim impact was hardly new or unprecedented in September 2022. Even constitutional provisions such as the Fourth Amendment must be construed in light of modern technology.

Second, the right of a victim or victim's representative to attend a proceeding is not absolute. The Legislature has explicitly recognized exceptions to a victim's right of attendance where a defendant's liberty interest and their ability to defend against the government's encroachment on their liberty interest are at issue. For example, a trial court may exclude a victim or victim's representative from the courtroom until after they testify and may continue to exclude them if they may be recalled and their presence may influence their future testimony in a manner that would affect a defendant's right to a fair trial. Md. Code, Crim. Proc. Art. § 11-302(c), (d).

In fact, Article 47 of the Declaration of Rights and its implementing statutes couch the rights of victims and their representatives in terms of what is "practicable." Under Article 47, "a victim of crime shall have the right … upon request and if practicable, to be notified of, to attend, and to be heard at a criminal justice proceeding, as these rights are implemented[.]" Similarly, Criminal

Procedure Article § 11-104(f)(1)(i) provides that the State shall send a victim's representative prior notice of each court proceeding "if … prior notice is practicable."

This Court has defined "practicable" as follows:

> The words "whenever practicable" or "as practicable," according to our cases, "are of a relative and dependent character, to be controlled more or less by the circumstances of the case, and by no means furnish a definite and fixed rule." *Lankford v. Somerset County,* 73 Md. 105, 113–114 (1890). *See Selinger v. Governor of Maryland,* 266 Md. 431, 435*cert. denied,* 409 U.S. 1111 (1972); *Robey v. Broersma,* 181 Md. 325, 341 (1943). *See also, e.g., Young v. Travelers Ins. Co.,* 119 F.2d 877, 880 (5th Cir.1941) (they "are not words of precise and definite import. They are roomy words. They provide for more or less free play. They are in their nature ambulatory and subject ... to the impact of particular facts on particular cases"); *Petition of Gally,* 329 Mass. 143, 148–149 (1952); *Transamerica Ins. Co. v. Parrott,* 531 S.W.2d 306, 312–313 (Tenn.App.1975). They obviously are not words which would be employed if Rule 4–346(c) were manifestly intended to confer a specific right upon the defendant to have a particular judge hear his case.

State v. Peterson, 315 Md. 73, 87 (1987). Under this definition, practicability requires that trial courts retain a measure of discretion in how they apply the law.

Here, the circuit court took into account various factors, including that Mr. Lee lived in California, had counsel present at the hearing, indicated prior to the vacatur hearing that he would attend by Zoom, did not request to attend in person until just prior to the hearing, and was able, through the use of reliable and universally available technology, to be present. Mr. Lee's request to continue the hearing to allow him to appear in person came 24 hours after he confirmed that he would attend via Zoom, three days after he was notified of the hearing date, six days

after he was notified of the filing of the motion to vacate and that a hearing would be scheduled, and about 30 minutes before the hearing was scheduled to begin. The circuit court properly took these facts into consideration in denying the continuance request. (E. 131, 137-38). The court's determination that in-person attendance was not practicable is entitled to deference.

Third, as Judge Berger noted in his dissent, the Majority's reasoning ignores the distinction between Mr. Lee's role as observer and a party's role as participant. The Appellate Court viewed as relevant that the parties were present in the courtroom. But this conflates the role of a victim's representative at a vacatur proceeding and that of the parties. Like the Majority, Judge Berger concluded that § 8-301.1 provides a victim's representative the right to attend but not participate at a vacatur hearing. Unlike the Majority, however, he did not posit some undefined but overarching "value" in having the representative attend in-person, Slip Op. at 56. Judge Berger correctly determined that because the representative may not participate as a party, neither his interests nor the factfinding process were compromised by his attendance via Zoom. Dissent Slip Op. at 10.

Fourth, the Appellate Court's conclusion that there were no "compelling reasons to require Mr. Lee to participate remotely" applies an inapplicable legal standard and ignores critical facts. The circuit court did not require Mr. Lee to attend remotely. The court denied Mr. Lee's last-minute request for a continuance after it found that Mr. Lee had sufficient time to consult with an attorney when he was informed that the vacatur motion would be filed, that he previously conveyed a

desire to attend the hearing remotely, that he failed to convey his change of mind until 30 minutes before the hearing began, and that his rights could be honored through Zoom attendance. There is no support in the law that the court must find a "compelling reason" to permit a victim or victim's representative to testify remotely. In fact, new Rule 21-301 permits the court to require remote attendance of both parties and nonparties in certain proceedings and does not give non-parties, including victims or their representatives, standing to object in matters which may be handled in person, remotely, or hybrid.

In finding that there was no showing that it was necessary to proceed with the scheduled hearing that day and the related conclusion that there was no compelling reason to require the victim to appear remotely, the Appellate Court also failed to weigh Mr. Syed's liberty interests in the extraordinary circumstance where the State and defense agreed that he had been wrongfully incarcerated for over 23 years. Prison is a dangerous environment that poses myriad risks to its residents. Where the State and defense agree that an individual has been wrongfully deprived of his liberty for more than two decades, urgency is appropriate and is, at a minimum, an appropriate factor to consider in the balancing of interests.

Victims' representatives are entitled to dignity and respect, and remote attendance can be consistent with those rights. The Appellate Court's *per se* rule that no court may require remote participation by a victim's representative will have disastrous consequences for the orderly administration of justice in Maryland's courts.

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

Contrary to previous characterizations of the State's interactions with Mr. Lee leading up to the vacatur hearing, the State's representative was accessible, communicative, and as transparent as an ongoing investigation would permit. The State's representative provided more notice to Mr. Lee than was required under the victim's right statute. Though it had no statutory obligation to do so, the State's representative notified Mr. Lee before filing the Joint Motion for DNA Testing in March 2022. (E. 136). Mr. Lee did not respond to the State's outreach. *Id.* Though it had no statutory obligation to do so, before filing the Motion to Vacate, the State's representative called Mr. Lee, informed him that the motion would be filed, discussed some details of the motion, informed him that a hearing would be scheduled, and emailed him a copy of the motion. *Id.* The State's representative also provided her office and cell phone number and email address and asked Mr. Lee to contact her with any questions. *Id.* She followed up her phone conversation with an email to Mr. Lee in which she reiterated that she was accessible to him and willing to answer any questions. *Id.* The State's representative notified Mr. Lee, who resides in California, via email immediately after the hearing was scheduled. (E. 123). When she did not hear back from him, she followed up with a text, and Mr. Lee responded to that text and confirmed that he would attend via Zoom. (E 125, 182). After the vacatur hearing, again, without statutory obligation, the State reached out to Mr. Lee, this time through his attorney, to notify him of the dismissal of charges.

Though Mr. Lee, quite understandably, may have been surprised by the State's admission of wrongdoing at trial and though he may disagree with the outcome of the vacatur proceeding, he received the notice and information to which the law entitled him and more.

The Appellate Court's holding that Mr. Lee did not receive sufficient notice is predicated on its determination that he had a right to attend the hearing in person and therefore that there was not a reasonable amount of time for Mr. Lee to arrange to travel from California to Maryland. Slip Op. at 53-54. In his dissent, Judge Berger concluded that the notice provided to Mr. Lee was sufficient based on a fact-specific analysis that considered the limited guidance provided by the applicable statute and rules, the scope of the representative's rights, and the actions taken by the State to facilitate his attendance. Dissent Slip Op. at 13. The Appellate Court's holding to the contrary depends on ignoring the specific rights afforded to victims in a proceeding unrelated to sentencing and providing the victim's representative with greater rights than have been provided by the General Assembly and this Court.

The Appellate Court concluded that notice to a victim's representative was not sufficient despite the State's compliance with all statutory and rules-based notice requirements. Mr. Lee received the notice to which he was entitled. Criminal Procedure Article § 8-301.1(d)(1) references §§ 11-104 and 11-503 and requires the State to notify the victim's representative before a hearing. Section 11-104(f)(1) requires prior notice of each proceeding. Section 11-503(a)(7) likewise requires notice of postsentencing proceedings. Rule 4-333(g)(2), meanwhile, requires the

State to provide the victim's representative with written notice of the vacatur hearing that "contain[s] a brief description of the proceeding and inform[s] the victim or victim's representative of the date, time, and location of the hearing and the right to attend the hearing." The State complied with these requirements by emailing and texting Mr. Lee to notify him of the date, time, and location of the hearing and facilitating his attendance by providing a Zoom option. (E. 123).

Whether notice is reasonable cannot be determined in the abstract. Although no Maryland case addresses what constitutes reasonable notice to a victim, the caselaw on parties' right to notice, which entails notice *and the right to be heard*, involves consideration of multiple factors including what type of action is being brought. *See, e.g., Miserandino v. Resort Properties, Inc.*, 345 Md. 43, 53 (1997) ("Among the multiple factors to be considered in determining what process is due in a given situation is the nature of the action being brought."). As Judge Berger noted, the purpose of notice in a given proceeding is a factor to be considered in the proper analysis of whether notice was reasonable in a particular case. For example, if one has a right to be informed that an event was occurring, but no right to attend the event, contemporaneous notice may be reasonable. On the other hand, if a person has a right of notice and participation, then they are entitled to notice sufficient to allow them to prepare to participate. Finally, if a person has a right of notice and attendance, but not participation, then they are entitled to the amount of notice which allows them to attend.

As discussed above in Argument II, the Appellate Court unanimously and

correctly determined that Maryland law provides a victim's representative with the right to attend but not to participate in a vacatur hearing. It follows that notice of a vacatur hearing for a victim's representative who requested that they be notified is reasonable if it permits them to attend the hearing. Mr. Lee did attend; indeed, he was allowed to address the court before the court made its ruling. In his cross-petition, Mr. Lee argues that he also should have been allowed to challenge the State's vacatur petition, but that is not a right he possessed. The notice he received enabled him to do that which he was entitled and more, and so it was reasonable.

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

> "In the interest of the orderly administration of justice, and to avoid useless expense to the state and to litigants in its courts, it has long been the settled policy of this court not to reverse for harmless error. And as a corollary of that policy it has held that in all cases the burden is upon the appellant to show injury as well as error."

McKay v. Paulson, 211 Md. 90, 101-02 (1956) (quoting *Johnson & Higgins v. Simpson*, 163 Md. 574, 588 (1933)).

Despite its near-universal applicability, there is no mention in the Appellate Court's opinion of the requirement that an appellant prove that the error complained of affected the results of the proceedings below. This is so despite the fact that Mr. Lee never claimed a right to be present physically but not speak and so never argued how a violation of that right resulted in prejudice. To no avail, Mr. Syed brought the omission to the Appellate Court in a motion for reconsideration. (E2. 154-161). This Court should take the opportunity to do what the Appellate Court did not. If the

Court does not dismiss the appeal as moot and holds that the circuit court violated a right of the victim's representative to be physically present at the vacatur hearing, it should require him to demonstrate prejudice.

A. The harmless error doctrine applies to all litigants, including victims and their representatives.

"It is the policy of this Court not to reverse for harmless error and the burden is on the appellant in all cases to show prejudice as well as error." *Crane v. Dunn*, 382 Md. 83, 91 (2004). *See also Harris v. David S. Harris, P.A.*, 310 Md. 310, 319 (1987) ("[W]e start with the premise that the appellate courts of this State will not reverse a lower court judgment for harmless error: the complaining party must show *prejudice* as well as *error*.") (emphasis in original). So firmly established is this principle that the Maryland Rules provide that this Court "may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition." Md. Rule 8-131(b)(1).

To be sure, there are "limited circumstances" in which Maryland courts apply a presumption of prejudice upon finding error on appellate review. *Barksdale v. Wilkowsky*, 419 Md. 649, 660 (2011); *see also State v. Jordan*, 480 Md. 490, 508 (2022) (noting that "this Court has found structural errors in a limited number of situations" in criminal cases).[12] Notably, a violation of a criminal defendant's

[12] As set forth in *Jordan*, the circumstances in which the Court has deemed an error in a criminal case structural "include[e] 'giving [an] advisory only jury instruction[,]' giving a flawed reasonable doubt jury instruction; violating a defendant's right to a public trial; and failing to swear-in a jury." 480 Md. at 508 (internal citations omitted).

constitutional right to be present is not one of these rare instances. In *State v. Hart*, 449 Md. 246, 262 (2016), this Court held that "[w]hen a violation of a criminal defendant's right to be present is at issue, we apply the harmless error analysis." "'Prejudice will not be conclusively presumed,'" the Court explained, so the test for harmless error set forth in *Dorsey v. State*, 276 Md. 638 (1976), applies in an appeal by a defendant: "'If the record demonstrates beyond a reasonable doubt that the denial of the right could not have prejudiced the defendant, the error will not result in a reversal of his conviction.'" *Id.* at 262-63 (quoting *Noble v. State*, 293 Md. 549, 568–69 (1982)). *Cf. Reeves v. State*, 192 Md. App. 277, 300 (2010) ("Finally, even if we were to hold that the trial court's failure to conduct a more extensive investigation into the voluntariness of appellant's absence and its decision to allow the verdict to be rendered in his absence were abuses of discretion, any error was harmless.").

More to the point, other courts to consider the issue have reviewed for harmless error cases in which criminal defendants were required to appear remotely rather than in person. *See, e.g., Hager v. United States*, 79 A.3d 296, 303 (D.C. 2013) (violation of defendant's right to be physically present during voir dire not harmless where record did not show that "defendant was able to meaningfully participate"); *Gibson v. Commonwealth*, 2021 WL 3828558, *4 (Ky. Aug. 26, 2021) (error in conducting sentencing by video conference harmless where, *inter alia*, "hearing allowed all participants to see and hear one another"); *Commonwealth v. Curran*, 178 N.E.3d 399, 404-05 (Mass. 2021) (defendant not entitled to reversal

following bench trial conducted by video where "he erroneously assumes that a criminal defendant's appearance at trial via Zoom is necessarily inconsistent with the right to be present … and does not argue that he was actually prejudiced by his appearance in this manner at his trial"); *People v. Anderson*, 989 N.W.2d 832, 843 (Mich. Ct. App. 2022) (error in conducting sentencing hearing by video conference harmless where "[t]here is no evidence, inference, nor indication that defendant's treatment likely would have been different had he been face-to-face with the sentencing judge"); *State v. Tonnessen*, 2022 WL 893780, *3 (Minn. Ct. App. March 28, 2022) (any error in conducting sentencing remotely was harmless where "any additional impact of an in-person showing of remorse would not have affected the district court's sentencing decision"); *State v. Taylor*, 198 N.E.3d 956, 966-67 (Ohio Ct. App. 2022) (violation of defendant's right to be physically present at sentencing was harmless where his "interests were represented by defense counsel who was physically present in the courtroom; no objection was raised as to his physical absence; appellant was able to see and hear the courtroom and to be seen and heard by the courtroom; although he chose not to, appellant was permitted the opportunity to make a statement; and appellant advances no argument on appeal that his physical absence prevented a fair hearing"); *State v. Kiner*, 2023 WL 3946837, *12 (Wash. Ct. App. June 12, 2023) (any error in conducting jury selection by video conference was harmless where "Kiner makes no argument and points to no evidence in the record that these alleged limitations impacted the selection of the actual jury members who rendered the verdict against him"); *State v. Byers*, 875

S.E.2d 306, 318-19 (W.Va. 2022) (State failed to demonstrate beyond a reasonable doubt that requiring defendant to appear remotely for sentencing was harmless where court was "left to simply speculate as to the sentence Mr. Byers might have received had he been physically present").

The Appellate Court's opinion permits two inferences, neither of which can be justified. The first is that errors affecting the rights of victims' representatives can never be harmless. By contrast, and as noted above, courts in Maryland and elsewhere have held that the violation of a similar constitutional right of a criminal defendant may be found to be harmless.

In the alternative, the Appellate Court's opinion may be read as announcing a new rule of law that anytime a court requires a party or even, as here, a non-party, to appear remotely, the error is *per se* reversible. The number of cases impacted by such a rule in just the past few years when our courts often operated remotely is high. But even post-pandemic, the impact will be staggering. As noted, this Court recently approved rules allowing trial courts to require remote participation in certain proceedings over the objection of the parties.[13] 214th Rules Order, at 396-400 (April 21, 2023). Under the Appellate Court's opinion, compliance with the new rules will lead invariably to reversible error.

[13] Tellingly, even when the consent of the parties is required to allow for remote participation, the new rules make no provision for objections by non-parties, including victims and victims' representatives.

B. Unlike a criminal defendant, a victim's representative bears the burden of proving that any error was likely to have affected the circuit court's ruling.

Accepting that a victim's representative's claim of error is subject to harmless error review, the next question is how to conduct that review. The *Dorsey* harmless error standard does not apply here. In requiring the State to prove that errors at a criminal trial were harmless beyond a reasonable doubt, the Court in *Dorsey* sought consistency with the State's constitutionally-mandated burden of proof.[14] *See Dorsey*, 276 Md. at 658. Mr. Lee is entitled to be treated with dignity, respect, and sensitivity, but he is not a criminal defendant facing loss of liberty at the hands of the government. Indeed, he is "not a party." Md. Code, Crim. Proc. Art. § 11-103(b); Md. Rule 8-111(c). Nevertheless, he is entitled to seek redress for a violation of his rights. Therefore, like other litigants, he must bear the burden of proving that any "error was likely to have affected the verdict below[.]" *Flores v. Bell*, 398 Md. 27, 33 (2007). That standard asks "whether a complainant has shown

[14] Mr. Syed assumes, for purposes of this discussion, that the *Dorsey* standard applies to a claim by a criminal defendant that they were denied the right to be present at a hearing under Criminal Procedure Article § 8-301.1. Rule 4-333 contemplates that defendants as well as victims and their representatives often will not be present. A Committee Note to the Rule points out that "[b]ecause a motion under Code, Criminal Procedure Article, § 8-301.1 may be filed years after the judgment of conviction or probation before judgment was entered, locating defendants, victims, and victim's representatives may be difficult." In addition, the rule allows a court to rule on a vacatur motion in the absence of a defendant but provides that "[i]f the motion is denied and the defendant did not receive actual notice of the proceedings, the court's denial shall be without prejudice to refile the motion when the defendant has been located and can receive actual notice." Md. Rule 4-333(h)(3).

that prejudice was probable rather than simply showing that prejudice was possible." *Shealer v. Straka*, 459 Md. 68, 80 (2018). *See also Flores*, 398 Md. at 33 ("The focus of our inquiry is on the probability, not the possibility, of prejudice.").

If a criminal defendant is not entitled to automatic reversal of a conviction for violation of the right to be present at trial, a victim's representative is not entitled to automatic reversal for violation of the right to be physically present at a vacatur hearing. This Court conducts harmless error review in both instances. However, it does not do so in the same manner. Unlike a criminal defendant, Mr. Lee bears the burden of proving that any violation of his right was likely to have contributed to the ruling of the circuit court granting the State's motion to vacate. In particular, he must show a reasonable probability that the result would have been different under the circumstances present here: a motion to vacate filed by the State, joined by the defense, and granted by the court. As discussed, below, he cannot meet this burden.

C. Any violation of a right to physical presence was harmless in this case.

Assuming for the sake of argument that Mr. Lee's right to be present at the vacatur hearing was not satisfied by his attendance via Zoom, he cannot demonstrate that the circuit court's ruling likely would have been different had he been present in person. Nothing in the record gives any indication that the circuit court would have reached a different result if Mr. Lee had been afforded the opportunity to be physically present in the courtroom.

In fact, Mr. Lee was afforded *more* than he was entitled to by law. As both

the majority and dissent in the Appellate Court recognized, Criminal Procedure Article § 8-301.1 gives victims' representatives a right to attend vacatur hearings. Unlike certain other proceedings like sentencings, victims' representatives do not also enjoy a right to participate (let alone the right to participate as a party that Mr. Lee seeks in his cross-petition). Slip Op. at 54-65; Dissent Slip Op. at 10, 13. The circuit court liberally allowed Mr. Lee to address the court even though this is something neither the vacatur statute nor rule authorizes. If the circuit court was not persuaded to deny the State's vacatur motion under these circumstances, it beggars belief to suggest that it would have denied the motion had Mr. Lee been physically present in the courtroom.

As it stands, Mr. Lee, through video and the presence of his attorney in the courtroom, was able to convey the gravity of the proceedings for his family. Under these circumstances, any violation of a right to be physically, rather than electronically, present, did not affect the outcome. The State moved to vacate Mr. Syed's convictions because it learned of new information that caused it to lose faith in the integrity of the convictions. The circuit court found these concerns meritorious. The State later dismissed the charges following the results of DNA testing that were consistent with Mr. Syed's innocence. Absent a demonstration of even a remote possibility that the circuit court would have denied the State's motion to vacate, the Appellate Court erred by undoing the nolle prosequi and reinstating Mr. Syed's convictions.

CONCLUSION

Petitioner respectfully requests that this Court reverse the judgment of the Appellate Court. For the reasons set forth in Argument I, the Court should hold that the appeal by the victim's representative became moot when the State entered a nolle prosequi and that the Appellate Court erred by failing to dismiss it. If this Court does not determine that the appeal was moot, it should hold, for the reasons set forth in Arguments II and III, that there was no violation of Mr. Lee's rights to attendance and notice. Finally, for the reasons set forth in Argument IV, the Court should hold that Mr. Lee cannot satisfy his burden of proving that the results of the vacatur hearing would have been different but for the alleged errors.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112

1. This brief contains 12,807 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

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

/s/ Erica Suter

_____
Erica J. Suter

PERTINENT AUTHORITY

Md. Const., Decl. of Rts. Art. 47

(a) A victim of crime shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process.

(b) In a case originating by indictment or information filed in a circuit court, a victim of crime shall have the right to be informed of the rights established in this Article and, upon request and if practicable, to be notified of, to attend, and to be heard at a criminal justice proceeding, as these rights are implemented and the terms "crime", "criminal justice proceeding", and "victim" are specified by law.

(c) Nothing in this Article permits any civil cause of action for monetary damages for violation of any of its provisions or authorizes a victim of crime to take any action to stay a criminal justice proceeding.

Md. Code, Crim. Proc. Art. § 8-301.1

Grounds for motion to vacate

(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 on the ground that:

(1)(i) there is newly discovered evidence that:

1. could not have been discovered by due diligence in time to move for a new trial under Maryland Rule 4-331(c); and

2. creates a substantial or significant probability that the result would have been different; or

(ii) the State's Attorney received 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; and

(2) the interest of justice and fairness justifies vacating the probation before judgment or conviction.

Form and contents of motion

(b) A motion filed under this section shall:

(1) be in writing;

(2) state in detail the grounds on which the motion is based;

(3) where applicable, describe the newly discovered evidence; and

(4) contain or be accompanied by a request for a hearing.

Notify defendant

(c)(1) The State shall notify the defendant in writing of the 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.

Notify victim or victim's representative

(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.

Hearing on motion or dismissal of motion

(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.

(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.

Ruling on motion

(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.

Burden of proof

(g) The State in a proceeding under this section has the burden of proof.

Appeal

(h) An appeal may be taken by either party from an order entered under this section.

Md. Code, Crim. Proc. Art. § 11-103

Crime defined

(a)(1) In this section, "crime" means:

(i) a crime;

(ii) a delinquent act that would be a crime if committed by an adult; or

(iii) except as provided in paragraph (2) of this subsection, a crime or delinquent act involving, causing, or resulting in death or serious bodily injury.

(2) "Crime" does not include an offense under the Maryland Vehicle Law1 or under Title 8, Subtitle 7 of the Natural Resources Article unless the offense is punishable by imprisonment.

Appeals

(b) Although not a party to a criminal or juvenile proceeding, a victim of a crime for which the defendant or child respondent is charged may file an application for leave to appeal to the Court of Special Appeals from an interlocutory order or appeal to the Court of Special Appeals from a final order that denies or fails to consider a right secured to the victim by subsection (e)(4) of this section, § 4-202 of this article, § 11-102 or § 11-104 of this subtitle, § 11-302, § 11-402, § 11-403, or § 11-603 of this title, § 3-8A-06, § 3-8A-13, or § 3-8A-19 of the Courts Article, or § 6-112 of the Correctional Services Article.

Stay of other proceedings in criminal or juvenile case

(c) The filing of an application for leave to appeal under this section

does not stay other proceedings in a criminal or juvenile case unless all parties consent.

Representation of victim who has died or is disabled

(d)(1) For purposes of this section, a victim's representative, including the victim's spouse or surviving spouse, parent or legal guardian, child, or sibling, may represent a victim of a crime who dies or is disabled.

(2) If there is a dispute over who shall be the victim's representative, the court shall designate the victim's representative.

Rights of victim

(e)(1) In any court proceeding involving a crime against a victim, the court shall ensure that the victim is in fact afforded the rights provided to victims by law.

(2) If a court finds that a victim's right was not considered or was denied, the court may grant the victim relief provided the remedy does not violate the constitutional right of a defendant or child respondent to be free from double jeopardy.

(3) A court may not provide a remedy that modifies a sentence of incarceration of a defendant or a commitment of a child respondent unless the victim requests relief from a violation of the victim's right within 30 days of the alleged violation.

(4)(i) A victim who alleges that the victim's right to restitution under § 11-603 of this title was not considered or was improperly denied may file a motion requesting relief within 30 days of the denial or alleged failure to consider.

(ii) If the court finds that the victim's right to restitution under § 11-603 of this title was not considered or was improperly denied, the court may enter a judgment of restitution.

Md. Code, Crim. Proc. Art. § 11-104

Definitions

(a)(1) In this section the following words have the meanings indicated.

(2) "DNA" has the meaning stated in § 2-501 of the Public Safety Article.

(3) "Statewide DNA database system" has the meaning stated in § 2-501 of the Public Safety Article.

(4) "Victim" means a person who suffers actual or threatened physical, emotional, or financial harm as a direct result of a crime or delinquent act.

(5) "Victim's representative" includes a family member or guardian of a victim who is:

(i) a minor;

(ii) deceased; or

(iii) disabled.

Pamphlet given to victim or victim's representative on first contact

(b) On first contact with a victim or victim's representative, a law enforcement officer, District Court commissioner, or juvenile intake officer shall give the victim or the victim's representative the pamphlet described in § 11-914(9)(i) of this title.

Notice to victim or victim's representative

(c) Unless to do so would impede or compromise an ongoing investigation or the victim's representative is a suspect or a person of interest in the criminal investigation of the crime involving the victim, on written request of a victim of a crime of violence as defined in § 14-101 of the Criminal Law Article or the victim's representative, the investigating law enforcement agency shall give the victim or the victim's representative timely notice as to:

(1) whether an evidentiary DNA profile was obtained from evidence in the case;

(2) when any evidentiary DNA profile developed in the case was entered into the DNA database system; and

(3) when any confirmed match of the DNA profile, official DNA case report, or DNA hit report is received.

Pamphlet mailed or delivered to victim or victim's representative by prosecuting attorney

(d)(1) Within 10 days after the filing or the unsealing of an indictment or information in circuit court, whichever is later, the prosecuting attorney shall:

(i) mail or deliver to the victim or victim's representative the pamphlet described in § 11-914(9)(ii) of this title and the notification request form described in § 11-914(10) of this title; and

(ii) certify to the clerk of the court that the prosecuting

attorney has complied with this paragraph or is unable to identify the victim or victim's representative.

(2) If the prosecuting attorney files a petition alleging that a child is delinquent for committing an act that could only be tried in the circuit court if committed by an adult, the prosecuting attorney shall:

(i) inform the victim or victim's representative of the right to request restitution under § 11-606 of this title;

(ii) mail or deliver to the victim or victim's representative the notification request form described in § 11-914(10) of this title; and

(iii) certify to the clerk of the juvenile court that the prosecuting attorney has complied with this paragraph or is unable to identify the victim or victim's representative.

(3) For cases described under this subsection, the prosecuting attorney may provide a State's witness in the case with the guidelines for victims, victims' representatives, and witnesses available under §§ 11-1001 through 11-1004 of this title.

Notification request form

(e)(1) A victim or victim's representative may:

(i) file a completed notification request form with the prosecuting attorney; or

(ii) follow the MDEC system protocol to request notice.

(2)(i) If the jurisdiction has not implemented the MDEC system, the prosecuting attorney shall send a copy of the completed notification request form to the clerk of the circuit court or juvenile court.

(ii) If the jurisdiction has implemented the MDEC system and the victim or victim's representative has filed a completed notification request form, the prosecuting attorney shall electronically file the form with the clerk of the circuit court or juvenile court in the MDEC system.

(3) By filing a completed notification request form or completing the MDEC system protocol, a victim or victim's representative complies with Article 47 of the Maryland Declaration of Rights and each provision of the Code that requires a victim or victim's representative to request notice.

(4) To keep the address and electronic mail address of a victim or victim's representative confidential, the victim or victim's representative shall:

(i) designate in the notification request form a person

who has agreed to receive notice for the victim or victim's representative; or

(ii) request as part of the MDEC system protocol, without filing a motion to seal, that the address and electronic mail address remain confidential and available, as necessary to only:

1. the court;

2. the prosecuting attorney;

3. the Department of Public Safety and Correctional Services;

4. the Department of Juvenile Services;

5. the attorney of the victim or victim's representative;

6. the State's Victim Information and Notification Everyday vendor; and

7. a commitment unit that a court orders to retain custody of an individual.

Notice of court proceedings, plea agreements, and submission of victim impact statement

(f)(1) Unless provided by the MDEC system, the prosecuting attorney shall send a victim or victim's representative prior notice of each court proceeding in the case, of the terms of any plea agreement, and of the right of the victim or victim's representative to submit a victim impact statement to the court under § 11-402 of this title if:

(i) prior notice is practicable; and

(ii) the victim or victim's representative has filed a notification request form or followed the MDEC system protocol under subsection (e) of this section.

(2)(i) If the case is in a jurisdiction in which the office of the clerk of the circuit court or juvenile court has an automated filing system, the prosecuting attorney may ask the clerk to send the notice required by paragraph (1) of this subsection.

(ii) If the case is in a jurisdiction that has implemented the MDEC system, the victim may follow the MDEC system protocol to receive notice by electronic mail, to notify the prosecuting attorney, and to request additional notice available through the State's Victim Information and Notification Everyday vendor.

(3) As soon after a proceeding as practicable, the prosecuting attorney shall tell the victim or victim's representative of the terms of any plea agreement, judicial action, and proceeding that affects the interests of the victim or victim's representative, including a bail hearing, change in the defendant's pretrial release order, dismissal,

nolle prosequi, stetting of charges, trial, disposition, and postsentencing court proceeding if:

(i) the victim or victim's representative has filed a notification request form or followed the MDEC system protocol under subsection (e) of this section and prior notice to the victim or victim's representative is not practicable; or

(ii) the victim or victim's representative is not present at the proceeding.

(4) Whether or not the victim or victim's representative has filed a notification request form or followed the MDEC system protocol under subsection (e) of this section, the prosecuting attorney may give the victim or victim's representative information about the status of the case if the victim or victim's representative asks for the information.

Clerk of court to include copy of form with orders and appeals

(g) If a victim or victim's representative has filed a notification request form or followed the MDEC system protocol under subsection (e) of this section, the clerk of the circuit court or juvenile court:

(1) shall include a copy of the form with any commitment order or probation order that is passed or electronically transmit the form or the registration information for the victim or the victim's representative through the MDEC system; and

(2) if an appeal is filed, shall send a copy of the form or electronically transmit the form or the registration information for the victim or the victim's representative through the MDEC system to the Attorney General and the court to which the case has been appealed.

Notification request forms to unit in which defendant or child respondent committed

(h) This section does not prohibit a victim or victim's representative from filing a notification request form with a unit to which a defendant or child respondent has been committed.

Discontinuance of further notices

(i)(1) After filing a notification request form under subsection (e) of this section, a victim or victim's representative may discontinue further notices by filing a written request with:

(i) the prosecuting attorney, if the case is still in a circuit court or juvenile court; or

(ii) the unit to which the defendant or child respondent has been committed, if a commitment order has been issued in the case.

(2) After following the MDEC system protocol for electronic notices, a victim or victim's representative may discontinue further notices by following the MDEC system protocol to terminate notice.

Md. Code, Crim. Proc. Art. § 11-302

Definitions

(a)(1) In this section the following words have the meanings indicated.

(2) "Representative" means a person who is designated by:

(i) the next of kin or guardian of a victim who is deceased or disabled; or

(ii) the court in a dispute over who will be the representative.

(3) "Victim" means a person who is the victim of a crime or delinquent act.

Application of section to criminal trials or juvenile delinquency hearings

(b) This section applies to:

(1) a criminal trial; and

(2) a juvenile delinquency adjudicatory hearing that is held in open court or that a victim or representative may attend under § 3-8A-13 of the Courts Article.

Right of victim or representative to be present at criminal trials or juvenile delinquency hearings

(c) Except as provided in subsections (d) and (e) of this section:

(1) a representative has the right to be present at the trial of the defendant or juvenile delinquency adjudicatory hearing of the child respondent; and

(2) after initially testifying, a victim has the right to be present at the trial of the defendant or juvenile delinquency adjudicatory hearing of the child respondent.

Sequestration of representative or victim from part of trial or hearing

(d) The court may sequester a representative or, after a victim has initially testified, the victim from any part of the trial or juvenile delinquency adjudicatory hearing on request of the defendant, child respondent, or the State only after the court determines, with specific findings of fact on the record, that:

(1) there is reason to believe that the victim will be recalled or the representative will be called to testify at the trial or juvenile delinquency adjudicatory hearing; and

(2) the presence of the victim or representative would influence the victim's or representative's future testimony in a manner that would materially affect a defendant's right to a fair trial or a child respondent's right to a fair hearing.

Removal of victim or representative from trial or hearing

(e) The court may remove a victim or representative from the trial or juvenile delinquency adjudicatory hearing for the same causes and in the same manner as the law provides for the exclusion or removal of a defendant or a child respondent.

Protection of employment for persons with right to attend proceedings

(f) As provided in § 9-205 of the Courts Article, a person may not be deprived of employment solely because of job time lost because the person attended a proceeding that the person has a right to attend under this section.

Construction with § 3-8A-13 of the Courts Article or § 11-102 of this title

(g) This section does not limit a victim's or representative's right to attend a trial or juvenile delinquency adjudicatory hearing as provided in § 3-8A-13 of the Courts Article or § 11-102 of this title.

Md. Code, Crim. Proc. Art. § 11-503

Subsequent proceeding defined

(a) In this section, "subsequent proceeding" includes:

(1) a sentence review under § 8-102 of this article;

(2) a hearing on a request to have a sentence modified or vacated under the Maryland Rules;

(3) in a juvenile delinquency proceeding, a review of a commitment order or other disposition under the Maryland Rules;

(4) an appeal to the Court of Special Appeals;

(5) an appeal to the Court of Appeals;

(6) a hearing on an adjustment of special conditions of lifetime sexual offender supervision under § 11-723 of this title or a hearing on a violation of special conditions of lifetime sexual offender supervision or a petition for discharge from special conditions of lifetime sexual offender supervision under § 11-724 of this title; and

(7) any other postsentencing court proceeding.

Written notification requests by victim or victim's representative

(b) Following conviction or adjudication and sentencing or disposition of a defendant or child respondent, the State's Attorney shall notify the victim or victim's representative of a subsequent proceeding in accordance with § 11-104(f) of this title if:

(1) before the State's Attorney distributes notification request forms under § 11-104(d) of this title, the victim or victim's representative submitted to the State's Attorney a written request to be notified of subsequent proceedings; or

(2) after the State's Attorney distributes notification request forms under § 11-104(d) of this title, the victim or victim's representative submits a notification request form in accordance with § 11-104(e) of this title.

Notice of appeals or subsequent proceedings pertinent to appeal

(c)(1) The State's Attorney's office shall:

(i) notify the victim or victim's representative of all appeals to the Court of Special Appeals and the Court of Appeals; and

(ii) send an information copy of the notification to the Office of the Attorney General.

(2) After the initial notification to the victim or victim's representative or receipt of a notification request form, as defined in

§ 11-104 of this title, the Office of the Attorney General shall:

(i) notify the victim or victim's representative of each subsequent date pertinent to the appeal, including dates of hearings, postponements, and decisions of the appellate courts; and

(ii) send an information copy of the notification to the State's Attorney's office.

Contents of notice

(d) A notice sent under this section shall include the date, the time, the location, and a brief description of the subsequent proceeding.

Md. Rule 4-247

(a) Disposition by Nolle Prosequi. The State's Attorney may terminate a prosecution on a charge and dismiss the charge by entering a nolle prosequi on the record in open court. The defendant need not be present in court when the nolle prosequi is entered, but if neither the defendant nor the defendant's attorney is present, the clerk shall send notice to the defendant, if the defendant's whereabouts are known, and to the defendant's attorney of record. Notice shall not be sent if either the defendant or the defendant's attorney was present in court when the nolle prosequi was entered. If notice is required, the clerk may send one notice that lists all of the charges that were dismissed.

(b) Effect of Nolle Prosequi. When a nolle prosequi has been entered on a charge, any conditions of pretrial release on that charge are terminated, and any bail bond posted for the defendant on that charge shall be released. The clerk shall take the action necessary to recall or revoke any outstanding warrant or detainer that could lead to the arrest or detention of the defendant because of that charge.

Md. Rule 4-248

(a) Disposition by Stet. On motion of the State's Attorney, the court may indefinitely postpone trial of a charge by marking the charge "stet" on the docket. The defendant need not be present when a charge is stetted but if neither the defendant nor the defendant's attorney is present, the clerk shall send notice of the stet to the defendant, if the defendant's whereabouts are known, and to the defendant's attorney

of record. Notice shall not be sent if either the defendant or the defendant's attorney was present in court when the charge was stetted. If notice is required, the clerk may send one notice that lists all of the charges that were stetted. A charge may not be stetted over the objection of the defendant. A stetted charge may be rescheduled for trial at the request of either party within one year and thereafter only by order of court for good cause shown.

(b) Effect of Stet. When a charge is stetted, the court shall order the clerk to take the action necessary to recall or revoke any outstanding warrant or detainer that could lead to the arrest or detention of the defendant because of the charge, unless the court orders that any warrant or detainer shall remain outstanding.

Md. Rule 4-333

(a) Scope. This Rule applies to a motion by a State's Attorney pursuant to Code, Criminal Procedure Article, § 8-301.1 to vacate a judgment of conviction or the entry of a probation before judgment entered in a case prosecuted by that office.

(b) Filing. The motion shall be filed in the criminal action in which the judgment of conviction or probation before judgment was entered. If the action is then pending in the Court of Appeals or Court of Special Appeals, that Court may stay the appeal and remand the case to the trial court for it to consider the State's Attorney's motion.

(c) Timing. The motion may be filed at any time after entry of the judgment of conviction or probation before judgment.

(d) Content. The motion shall be in writing, signed by the State's Attorney, and state:

(1) the file number of the action;

(2) the current address of the defendant or, if the State's Attorney after due diligence is unable to ascertain the defendant's current address, a statement to that effect and a statement of the defendant's last known address;

(3) each offense included in the judgment of conviction or probation before judgment that the State's Attorney seeks to have vacated;

(4) whether any sentence or probation before judgment includes an order of restitution to a victim and, if so, the name of the

victim, the amount of restitution ordered, and the amount that remains unpaid;

(5) if the judgment of conviction or probation before judgment was appealed or was the subject of a motion or petition for post judgment relief, (A) the court in which the appeal or motion or petition was filed, (B) the case number assigned to the proceeding, if known, (C) a concise description of the issues raised in the proceeding, (D) the result, and (E) the date of disposition;

(6) a particularized statement of the grounds upon which the motion is based;

(7) if the request for relief is based on newly discovered evidence, (A) how and when the evidence was discovered, (B) why it could not have been discovered earlier, (C) if the issue of whether the evidence could have been discovered in time to move for a new trial pursuant to Rule 4-331 was raised or decided in any earlier appeal or post-judgment proceeding, the court and case number of the proceeding and the decision on that issue, and (D) that the newly discovered evidence creates a substantial or significant probability that the result would have been different with respect to the conviction or probation before judgment, or part thereof, that the State's Attorney seeks to vacate, and the basis for that statement;

(8) if the basis for the motion is new information received by the State's Attorney after the entry of the judgment of conviction or probation before judgment, a summary of that information and how it calls into question the integrity of the judgment of conviction or probation before judgment, or part thereof, that the State's Attorney seeks to vacate;

(9) that, based upon the newly discovered evidence or new information received by the State's Attorney, the interest of justice and fairness justifies vacating the judgment of conviction or probation before judgment or part thereof that the State's Attorney seeks to vacate and the basis for that statement; and

(10) that a hearing is requested.

(e) Notice to Defendant. Upon the filing of the motion, the State's Attorney shall send a copy of it to the defendant, together with a notice informing the defendant of the right: (1) to file a response within 30 days after the notice was sent; (2) to seek the assistance of an attorney regarding the proceeding; and (3) if a hearing is set, to attend the hearing.

(f) Initial Review of Motion. Before a hearing is set, the court shall make an initial review of the motion. If the court finds that the motion

does not comply with section (d) of this Rule or that, as a matter of law, it fails to assert grounds on which relief may be granted, the court may dismiss the motion, without prejudice, without holding a hearing. Otherwise, the court shall direct that a hearing on the motion be held.

(g) Notice of Hearing.

(1) *To Defendant.* The clerk shall send written notice of the date, time, and location of the hearing to the defendant.

(2) *To Victim or Victim's Representative.* Pursuant to Code, Criminal Procedure Article, § 8-301.1(d), the State's Attorney shall send written notice of the hearing to each victim or victim's representative, in accordance with Code, Criminal Procedure Article, § 11-104 or § 11-503. The notice shall contain a brief description of the proceeding and inform the victim or victim's representative of the date, time, and location of the hearing and the right to attend the hearing.

(h) Conduct of Hearing.

(1) *Absence of Defendant, Victim, or Victim's Representative.* If the defendant or a victim or victim's representative entitled to notice under section (g) of this Rule is not present at the hearing, the State's Attorney shall state on the record the efforts made to contact that person and provide notice of the hearing.

(2) *Burden of Proof.* The State's Attorney has the burden of proving grounds for vacating the judgment of conviction or probation before judgment.

(3) *Disposition.* If the court finds that the State's Attorney has proved grounds for vacating the judgment of conviction or probation before judgment and that the interest of justice and fairness justifies vacating the judgment of conviction or probation before judgment, the court shall vacate the judgment of conviction or probation before judgment. Otherwise, the court shall deny the motion and advise the parties of their right to appeal. If the motion is denied and the defendant did not receive actual notice of the proceedings, the court's denial shall be without prejudice to refile the motion when the defendant has been located and can receive actual notice. The court shall state its reasons for the ruling on the record.

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

Md. Rule 8-111

(a) Formal Designation.

(1) *No Prior Appellate Decision.* When no prior appellate decision has been rendered, the party first appealing the decision of the trial court shall be designated the appellant and the adverse party shall be designated the appellee. Unless the Court orders otherwise, the opposing parties to a subsequently filed appeal shall be designated the cross-appellant and cross-appellee.

(2) *Prior Appellate Decision.* In an appeal to the Court of Appeals from a decision by the Court of Special Appeals or by a circuit court exercising appellate jurisdiction, the party seeking review of the most recent decision shall be designated the petitioner and the adverse party shall be designated the respondent. Except as otherwise specifically provided or necessarily implied, the term "appellant" as used in the rules in this Title shall include a petitioner and the term "appellee" shall include a respondent.

(b) Alternative References. In the interest of clarity, the parties are encouraged to use the designations used in the trial court, the actual names of the parties, or descriptive terms such as "employer," "insured," "seller," "husband," and "wife" in papers filed with the Court and in oral argument.

(c) Victims and Victims' Representatives. Although not a party to a criminal or juvenile proceeding, a victim of a crime or a delinquent act or a victim's representative may: (1) file an application for leave to appeal to the Court of Special Appeals from an interlocutory or a final order under Code, Criminal Procedure Article, § 11-103 and Rule 8-204; or (2) participate in the same manner as a party regarding the rights of the victim or victim's representative.

Md. Rule 8-131

(a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(b) In Court of Appeals--Additional Limitations.

(1) *Prior Appellate Decision.* Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.

(2) *No Prior Appellate Decision.* Except as otherwise provided in Rule 8-304(c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals will consider those issues that would have been cognizable by the Court of Special Appeals.

(c) Action Tried Without a Jury. When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

(d) Interlocutory Order. On an appeal from a final judgment, an interlocutory order previously entered in the action is open to review by the Court unless an appeal has previously been taken from that order and decided on the merits by the Court.

(e) Order Denying Motion to Dismiss. An order denying a motion to dismiss for failure to state a claim upon which relief can be granted is reviewable only on appeal from the judgment.

Md. Rule 8-202

(a) Generally. Except as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken. In this Rule, "judgment" includes a verdict or decision of a circuit court to which

issues have been sent from an Orphans' Court.

(b) Criminal Action--Motion for New Trial. In a criminal action, when a timely motion for a new trial is filed pursuant to Rule 4-331 (a), the notice of appeal shall be filed within 30 days after the later of (1) entry of the judgment or (2) entry of a notice withdrawing the motion or an order denying the motion.

(c) Civil Action--Post-Judgment Motions. In a civil action, when a timely motion is filed pursuant to Rule 2-532, 2-533, 2-534, or 11-218, the notice of appeal shall be filed within 30 days after entry of (1) a notice withdrawing the motion or (2) an order denying a motion pursuant to Rule 2-533 or disposing of a motion pursuant to Rule 2-532, 2-534, or 11-218. A notice of appeal filed before the withdrawal or disposition of any of these motions does not deprive the trial court of jurisdiction to dispose of the motion. If a notice of appeal is filed and thereafter a party files a timely motion pursuant to Rule 2-532, 2-533, 2-534, or 11-218, the notice of appeal shall be treated as filed on the same day as, but after, the entry of a notice withdrawing the motion or an order disposing of it.

(d) When Notice for in Banc Review Filed. A party who files a timely notice for in banc review pursuant to Rule 2-551 or 4-352 may file a notice of appeal provided that (1) the notice of appeal is filed within 30 days after entry of the judgment or order from which the appeal is taken and (2) the notice for in banc review has been withdrawn before the notice of appeal is filed and prior to any hearing before or decision by the in banc court. A notice of appeal by any other party shall be filed within 30 days after entry of a notice withdrawing the request for in banc review or an order disposing of it. Any earlier notice of appeal by that other party does not deprive the in banc court of jurisdiction to conduct the in banc review.

(e) Appeals by Other Party--Within Ten Days. If one party files a timely notice of appeal, any other party may file a notice of appeal within ten days after the date on which the first notice of appeal was filed or within any longer time otherwise allowed by this Rule.

(f) Date of Entry. "Entry" as used in this Rule occurs on the day when the clerk of the lower court enters a record on the docket of the electronic case management system used by that court.

Md. Rule 21-301

(a) Proceedings Presumptively Appropriate for Remote Electronic Participation. Subject to the conditions in this Title, any other reasonable conditions the court may impose in a particular proceeding, and resolution of any objection made pursuant to section (b) of this Rule, the court, on motion or on its own initiative, may permit or require one, some, or all participants to participate by means of remote electronic participation in all or any part of the following types of criminal and delinquency proceedings:

(1) appearances pursuant to bench warrants;

(2) bail reviews;

(3) expungement hearings;

(4) hearings concerning non-incarcerable traffic citations for which the law permits, but does not require, that the defendant appear;

(5) hearings concerning parking citations;

(6) initial appearances for detained defendants;

(7) juvenile detention hearings where the respondent already is detained;

(8) motions hearings not involving the presentation of evidence;

(9) proceedings in which remote electronic participation is authorized by specific law;

(10) proceedings involving Rule 4-271 (a)(1) or the application of *State v. Hicks*, 285 Md. 310 (1979) or its progeny, other than a motion to dismiss that involves the presentation of evidence; and

(11) with the knowing and voluntary consent of the defendant pursuant to subsection (c)(2) of this Rule:

(A) discharge-of-counsel hearings;

(B) plea agreements not likely to result in incarceration or where the defendant already is incarcerated;

(C) sentencings; and

(D) three-judge panel sentencing reviews.

(b) Objection by a Party. Upon objection by a party in writing or on the record, the court, before requiring remote electronic participation in any proceeding, shall make findings in writing or on the record that (1) remote electronic participation is not likely to cause substantial prejudice to a party or adversely affect the fairness of the proceeding and (2) no party lacks the ability to participate by remote electronic participation in the proceeding.

(c) Other Criminal and Delinquency Proceedings by Consent.

(1) *Generally.* Subject to the conditions in this Title and any other reasonable conditions the court may impose in a particular case, one, some, or all participants may participate by remote electronic participation in all or any part of any other proceeding in which the presiding judicial officer and all parties consent to remote electronic participation.

(2) *Consent by Defendant or Respondent.* The court may not accept the consent of a defendant or respondent to waive an in-person proceeding pursuant to subsections (a)(11) or (c)(1) of this Rule unless, after an examination of the defendant or respondent in person or by remote electronic participation on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant or respondent, or any combination thereof, the court determines and announces on the record that the consent is made knowingly and voluntarily. The consent of a defendant or respondent pursuant to this subsection is effective only for the specified proceeding and not for any subsequent proceedings.

(d) Conditions of Remote Electronic Participation by Witness. Unless otherwise ordered by the court, conditions of remote electronic participation in criminal and delinquency proceedings shall include ensuring that a witness:

(1) is alone in a secure room when testifying, and, upon request, shares the surroundings to demonstrate compliance;

(2) is not being coached in any way;

(3) is not referring to any documents, notes, or other materials while testifying, unless permitted by the court;

(4) is not exchanging text messages, e-mail, or in any way communicating with any third parties while testifying;

(5) is not recording the proceeding; and

(6) is not using any electronic devices other than a device necessary to facilitate the remote electronic participation.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of August, 2023, a copy of the Petitioner's Brief and Joint Supplemental Record Extract in the captioned case was delivered via the MDEC system, and paper copies were sent by first-class mail or courier, to:

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