IN THE
SUPREME COURT OF MARYLAND

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SEPTEMBER TERM, 2023

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NO. 7

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ADNAN SYED,

Petitioner,

v.

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

Respondent.

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ON WRIT OF CERTIORARI TO THE
APPELLATE COURT OF MARYLAND

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# BRIEF OF RESPONDENT, THE STATE OF MARYLAND

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ANTHONY G. BROWN
Attorney General of Maryland

DEREK SIMMONSEN
Assistant Attorney General
Attorney No. 1212130143

Office of the Attorney General
Criminal Appeals Division
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6422
dsimmonsen@oag.state.md.us

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

*Constitutional Provisions*



*Statutes*



*Rules*

## STATEMENT OF THE CASE

Respondent, the State of Maryland, accepts the Statement of the Case in Petitioner Adnan Syed's brief.

## QUESTIONS PRESENTED

1. Did the Appellate Court properly conclude that Lee's appeal as a victim's representative was not moot?

2. Did the Appellate Court properly conclude that the victim's representative had a right to join the parties in attending the vacatur hearing in person but err in concluding that there was no right to be heard?

3. Did the State fail to provide sufficient notice of the vacatur hearing to the victim's representative under the circumstances presented here?

4. If considered, should victims merely need to establish that their rights were violated to demonstrate prejudice necessitating relief rather than show that their attendance at a hearing would have changed the outcome?

## STATEMENT OF FACTS

Except for argumentative characterizations and citations to information outside of the record, the State of Maryland accepts the Statement of Facts in Syed's brief, as supplemented and modified in the following Argument.

## ARGUMENT

In 2000, Syed was convicted in the Circuit Court for Baltimore City of murdering his former girlfriend, Hae Min Lee. *Lee v. State*, 257 Md. App. 481, 490 (2023). On September 14, 2022, the State's Attorney for Baltimore City moved to vacate Syed's convictions under Section 8-301.1 of the Maryland Code's Criminal Procedure Article. *Id.* at 493.[1] Two days later, on Friday, September 16, during a closed hearing in chambers—conducted without notice to, or participation by, the victim's family—the

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[1] That provision permits the State to vacate a probation before judgment or conviction on the ground of (1) newly discovered evidence that could not have been discovered by due diligence and creates a substantial or significant possibility that the result would have been different; or (2) the State's Attorney received new information that calls into question the integrity of the conviction *and* the interest of justice and fairness justify vacating the conviction. Md. Code, Crim. Proc. § 8-301.1(a).

circuit court set an in-person hearing on the motion for the next weekday: Monday, September 19. *Id.* at 496-97. Young Lee, the victim's representative, was notified by email sent around 2 p.m. Eastern Standard Time on Friday that the circuit court had granted him permission to attend the Monday afternoon hearing virtually. *Id.* at 497-98.

Given the short notice, Lee, who lives in California, was unable to attend the hearing in-person and instead made brief comments to the court via Zoom after the court denied his counsel's request for a seven-day postponement. *Id.* at 498-99, 502-04. In denying the postponement, the court indicated that, had it been aware on Friday that Lee wanted to attend in person, the court would have scheduled the hearing at a different time to accommodate him. *Id.* at 501. The court granted the State's motion to vacate Syed's convictions and immediately ordered his release on his own recognizance. *Id.* at 509-10.

On September 28, 2022, Lee noted an appeal and moved to stay the circuit court proceedings pending the resolution of the appeal. *Id.* at 510-11. Prior to the time in which Syed's response to the motion to stay in the Appellate Court was due, the State

entered a nolle prosequi to the charges. *Id.* at 511. Syed subsequently argued that Lee's appeal, regarding whether his rights as a victim's representative were violated, was thereby rendered moot. *Id.* at 518. The Appellate Court disagreed, concluding that, under the unusual circumstances of this case, the matter was not moot, and, on the merits, held that Lee had the right to attend the vacatur hearing in person. *Id.* at 549-50. The intermediate appellate court determined, however, that Lee did not have a right to speak, present evidence, or otherwise participate in the hearing. *Id.* at 547.

The State largely agrees with the Appellate Court's reasoning. This Court likewise should conclude that Lee's appeal was not moot, or, if moot, that it presents a question of public importance concerning the scope of victims' rights that should be addressed.

On the merits, this Court should affirm the Appellate Court's limited holding that, when all participants plan to attend a vacatur hearing in person, a victim's representative should also be permitted to attend in person, if practicable. The State disagrees, however, with the Appellate Court's holding that Lee

did not have a right to speak at the vacatur hearing. Because a vacatur hearing can result in the ultimate alteration of a sentence—vacating the convictions and sentences entirely—Lee had the right to address the circuit court.

Finally, failing to give Lee proper notice of the vacatur hearing, which left him unable to attend in person, violated his rights as a victim's representative. The Maryland Declaration of Rights mandates treating victims with "dignity, respect, and sensitivity during all phases of the criminal justice process." Md. Decl. of Rts. Art. 47(a). The question is not whether Lee's presence would have altered the outcome, but whether he was harmed by the denial of a statutory and constitutional right designed to protect his voice and dignity. The Appellate Court properly concluded that he was harmed and that this harm could be remedied. Accordingly, a new vacatur hearing must occur at which Lee is given a reasonable opportunity to attend in person and address the circuit court prior to its ruling.[2]

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[2] Syed argues that the "specter of reincarceration" has hung over his head during the pendency of this appeal. (Petitioner's Br. at 2). When the State's Attorney's Office for Baltimore City filed

## I.

## THE APPELLATE COURT PROPERLY CONCLUDED THAT LEE'S APPEAL AS THE VICTIM'S REPRESENTATIVE WAS NOT MOOT.

The Appellate Court concluded that Lee's appeal was not moot because the State's filing of a nolle prosequi had the necessary effect of preventing him from challenging the violation of his rights as a victim during the vacatur hearing. Such a ruling is consistent with previous, albeit rare, Maryland decisions that have reached the merits of a dispute despite the filing of a nolle prosequi on the underlying charges.

In the alternative, the nolle prosequi in this case had no effect because of the defective vacatur hearing that proceeded it. Even if the appeal is moot, however, this Court should address the merits, given the important questions raised concerning the scope of victims' rights within the context of a vacatur hearing, the lack

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its motion to vacate Syed's convictions, it indicated that it would agree to have Syed released on his own recognizance pending its decision on whether to re-file charges against him (E. 73-74), which is what occurred. Should this Court reinstate Syed's convictions pending a new vacatur hearing, this Court could order that Syed remain free on his own recognizance until the new hearing.

of case law concerning this new type of hearing, and the likelihood that questions raised by this appeal will reoccur in future cases.

### A. Procedural background.

In October 2021, the State began a review of Syed's convictions, leading the State and Syed to jointly move for touch DNA testing of the victim's clothing in March 2022. *Lee*, 257 Md. App. at 505.[3] Lee, as a victim's representative, received notice from the State of this development. (E. 136).

On September 12, 2022, the State first reached out to Lee by phone regarding its intention to file a motion to vacate Syed's convictions. (E. 124). A prosecutor spoke with Lee the following day, explained the motion "a bit with him," and informed him that a hearing would occur at some point, and Lee expressed his interest in being notified of any hearing. (E. 124, 134). The prosecutor did not ask whether Lee would want to attend in person, nor did Lee mention it. (E. 134).

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[3] This Court in *State v. Syed*, 463 Md. 60 (2019), summarized the previous history of the case.

On September 14, the State filed its motion to vacate. *Lee*, 257 Md. App. at 497. On Friday, September 16, the circuit court held an off-the-record discussion in chambers (without notice to, or attendance by, Lee), after which it set a hearing for the following Monday at 2 p.m. *Id.* at 496-97. During that conference, the prosecutor asked the circuit court to arrange for a Zoom link "in case" Lee wanted to observe the hearing. (E. 133). The court indicated that it was "told that [the Lees] lived in California and that they would be present by Zoom." (E. 129).

At 1:59 p.m. Eastern Standard Time on Friday, the prosecutor informed Lee via email of the hearing date and time. (E. 179). The email explained that the hearing would be "in-person" but that the prosecutor had received "permission" for Lee to watch the proceedings virtually. (E. 179). The email was sent around 11 a.m. Pacific Time to Lee, who lived in California. (E. 179).[4]

After receiving no response to the email, the prosecutor texted Lee on Sunday, the day before the hearing, to confirm that

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[4] The record does not indicate when Lee first became aware of the email.

he received the email. *Lee*, 257 Md. App. at 498. At that time, Lee stated that he would attend via the Zoom link that the prosecutor had provided. *Id.*

Lee subsequently obtained counsel and filed a motion to postpone the hearing on the morning of Monday, September 19, 2022, the first business day after Lee received notice of the hearing. *Id.* Lee stated that he wanted to attend the hearing in person and that half-a-business-day's notice was insufficient for him to be able to do so. Lee requested a seven-day postponement to allow him to attend in person. *Id.* at 498-99.

During the hearing, the circuit court asked whether Lee understood that "by him telling us on Friday that he was going to appear via Zoom is why we set this hearing today? Because had we known that on Friday then, of course, we would have scheduled this hearing according to when he was planning to arrive within a reasonable amount of time. So he didn't do that." (E. 130). After being informed by Lee's counsel that Lee had not actually communicated his intent to appear by Zoom on Friday (E. 130), the court indicated that it had been in "close communication" about the case with the prosecutor "since Friday" and that if Lee asked

to attend in person, the court "would have taken the appropriate steps." (E. 131). The prosecutor, meanwhile, confirmed that she (and not Lee) had been the one to request a Zoom link for the hearing. (E. 133).

During the hearing, the circuit court stated that Lee was only entitled to "notice" of the vacatur hearing, not "reasonable notice." (E. 132). After denying his request for a postponement, the circuit court permitted Lee a half-hour's recess to leave work so that he could address the court from a private place. (E. 139). He subsequently gave a brief statement using Zoom. (E. 140-42). Following argument by the parties, the circuit court orally granted the motion to vacate Syed's convictions and immediately ordered Syed's release from custody on his own recognizance. (E. 162-63).

On September 28, 2022, Lee filed a notice of appeal pursuant to Md. Code, Crim. Proc. § 11-103(b). *Lee*, 257 Md. App. at 510. The following day, he filed a motion in the circuit court to stay the proceedings pending his appeal. *Id.* at 510-11. On October 5, 2022, after no ruling on the stay had been issued by the circuit court, Lee filed a motion to stay in the Appellate Court. *Id.* at 511.

Syed filed his notice of intent to respond to the motion the following day. *Id.*

On October 11, the State filed a nolle prosequi as to Syed's charges and it was "entered" by the circuit court. *Id.* On October 12, the Appellate Court requested Lee's response as to why the appeal should not be dismissed in light of that action. *Id.* Following Lee's response, the Appellate Court permitted the appeal to move forward. *Id.* at 11-12.

On March 28, 2023, the Appellate Court issued its opinion in which it concluded that the case was not moot and that the circuit court did not provide Lee with the rights to which he was entitled as a victim's representative. *Id.* at 527, 541. Accordingly, the intermediate appellate court ordered that a new vacatur hearing be held. *Id.* at 549-50.

### B. The Appellate Court properly concluded that the appeal was not moot because the entry of a nolle prosequi had the effect of thwarting Lee's appellate rights.

A nolle prosequi is "an action taken by the State to dismiss pending charges when it determines that it does not intend to prosecute the defendant under a particular indictment." *State v.*

*Huntley*, 411 Md. 288, 291 n.4 (2009) (citation omitted); *see also* Md. Code, Crim. Proc. § 1-101(k) (defining "nolle prosequi" as "a formal entry on the record by the State that declares the State's intention not to prosecute a charge"). Ordinarily, a nolle prosequi would have the effect of discontinuing the underlying criminal case against Syed. *See* Md. Rule 4-247(a) ("The State's Attorney may terminate a prosecution on a charge and dismiss the charge by entering a nolle prosequi on the record in open court.").

A nolle prosequi eliminates the charge, leaving a defendant in the same place as if the charges had never been brought. Following a nolle prosequi, the criminal matter is "terminated," and "the accused may be proceeded against for the same offense only under a new or different charging document or count." *State v. Moulden*, 292 Md. 666, 673 (1982) (citation omitted).

The State has broad discretion to enter a nolle prosequi. *State v. Simms*, 456 Md. 551, 561 (2017). This authority is, however, not boundless. *See Hook v. State*, 315 Md. 25, 35-36 (1989) (explaining that the State's power to enter a nolle prosequi is "not absolute" or "completely without restraint"). A court "may or may not permit the entry of the nolle prosequi in order to

prevent injustice." *Ward v. State*, 290 Md. 76, 83 n. 6 (1981) (citation omitted).

Even when a nolle prosequi remains valid, a reviewing court may take other actions in response to a nolle prosequi. For instance, in *Curley v. State*, 299 Md. 449, 462 (1984), this Court held that if the State's entry of a nolle prosequi has the "purpose or the effect" of circumventing a defendant's right to a trial within 180 days (otherwise known as the *Hicks*[5] rule), that the *Hicks* date for any new charges would be calculated from the original prosecution, not the new filing, even though the original filing was no longer a live case.

This Court has also limited the use of a nolle prosequi in situations that would undermine the right to a fair trial. In *Hook*, the State entered a nolle prosequi to a charge of second-degree murder only after the defendant presented an intoxication defense that could have downgraded a charge of first-degree murder. 315 Md. at 29, 37-38, 41-42. Under the "exceptional circumstances" of the case, this Court concluded it was "simply offensive to

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[5] *State v. Hicks*, 285 Md. 310 (1979).

fundamental fairness, in such circumstances, to deprive the trier of fact, over the defendant's objection, of the third option of convicting the defendant of a lesser included offense." *Id.* at 41, 44. This was 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.[6]

Similarly, in *Simms*, the defendant filed an appeal challenging the sufficiency of the evidence for his convictions. 456 Md. at 569. While the appeal was pending, the State filed a nolle prosequi to the charges and argued that the appeal was moot. *Id.* at 555. Because the nolle prosequi was entered after a final judgment of conviction, this Court declared it a nullity. *Id.* at 575-76. In addition, this Court opined that the State lacked authority "to eliminate the appellate process initiated by Mr. Simms" or to conduct an "end run around the appellate process." *Id.* at 576, 578.

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[6] Syed's citation to *Hooper v. State*, 293 Md. 162 (1982), is unavailing, as that case was decided before *Curley, Hook,* and *Simms*. One member of the Maryland Supreme Court opined during oral argument in *Hooper* that even if a prosecutor's use of a nolle prosequi was "unseemly, there's nothing we can do about it." *Id.* at 165. As *Hook* later demonstrated, this Court does have the authority, in limited circumstances, to address how, and to what effect, the State uses its nolle prosequi authority.

Relying on these precedents, the Appellate Court properly concluded that "the State does not have unlimited authority to nol pros a case." *Lee*, 257 Md. App. at 523. "Rather, the courts will temper the State's authority in exceptional circumstances, such as where it violates fundamental fairness, and in at least some circumstances, it circumvents the right to appeal." *Id.*

The Appellate Court analogized its decision to *Curley* in viewing the State's actions as having had the "purpose or necessary effect" of circumventing the victim representative's ability to challenge the violation of his rights. *Id.* at 526. Although Syed notes that *Curley* involved using a nolle prosequi to avoid a ruling from a circuit court, not an appellate court (Petitioner's Br. at 23), this is a distinction without a difference. In both instances, the necessary effect is to make it impossible to address the State's violation of an individual's rights.

That this was the necessary effect of the nolle prosequi in the present case is not an abstract hypothetical. The Appellate Court summarized the timeline:

> The timing of the entry of the nol pros is important. It was entered soon after the filing of the motion to stay in this Court, on the morning of the third business day

> after Mr. Lee filed the motion. At that point, there were only two days before the response to the motion to stay was due, after which this Court potentially could have granted the motion to stay. The nol pros was filed with eight days still remaining before the 30-day time period provided by Rule 4-333(i) required the State to "either enter a *nolle prosequi* of the vacated count or take other appropriate action as to that count."

*Lee*, 257 Md. App. at 526. "Allowing a nol pros in this circumstance gives the State a mechanism to insulate a defective proceeding from appellate review, and it prevents victims from receiving the rights to which they are entitled." *Id.*

As the Appellate Court recognized, whether the prosecutor intentionally tried to thwart Lee's rights is immaterial, so long as the necessary effect of the nolle prosequi was to do so. As in *Simms* and *Hook*, the nolle prosequi was a nullity here because it acted to thwart the appellate process by foreclosing review of the circuit court proceedings at which Lee's rights were violated and which gave rise to Lee's claim.

Unlike *Hook* and *Simms*, where the reviewing courts essentially nullified the ability of the State to ever file a nolle prosequi under the circumstances in those cases, the Appellate Court's decision here does not prevent the State from filing a nolle

prosequi to the charges against Syed in the future. Rather, the Court's holding voided that action pending the completion of a proper vacatur hearing.

The Appellate Court recognized that in Maryland, unlike in some other states, trial courts are "not stripped of their jurisdiction to take post-judgment action simply because an appeal is pending from that judgment." *Cottman v. State*, 395 Md. 729, 740 (2006). Even so, a circuit court cannot exercise its discretion in a manner that "affects either the subject matter of the appeal or the appellate proceeding itself—that, in effect, precludes or hampers the appellate court from acting on the matter before it." *Id.* (citation omitted). In *Cottman*, 395 Md. at 743, this Court concluded that a circuit court's granting of a new trial eliminated the judgment of conviction and rendered an appeal of that conviction moot. This was because, in essence, the appellant received the relief that he was seeking. By contrast, the filing of the nolle prosequi in the circuit court while Lee's motions to stay were still pending thwarted Lee's ability to vindicate his rights.

*Antoine v. State*, 245 Md. App. 521 (2020), although dealing with victims' rights in a different setting, is instructive. Antoine

was the victim of an assault by Dorian Bostic. *Id.* at 530. During a hearing that the prosecutor advised Antoine not to attend, the circuit court became involved in negotiating a plea agreement and bound itself to a disposition of probation before judgment without first hearing from Antoine. *Id.* Antoine asked the court to reconsider its decision and hear from him before reaching a final determination, but the court determined that it lacked authority to reopen the case. *Id.*

The Appellate Court reversed, holding that when "a victim has invoked sufficiently [the] right to present victim impact evidence before sentencing, a court errs as a matter of law if it approves a plea agreement that binds the court to a particular sentence without first giving the victim a reasonable opportunity to present appropriate victim impact evidence." *Id.* at 531. The intermediate appellate court concluded that when such an error occurs, the Criminal Procedure Article "authorizes a remedy that is both effective and respectful of the constitutional rights of defendants." *Id.* (citing Crim. Proc. § 11-103(e)(2)). The remedy is "to vacate the sentence and the trial court's final approval of the plea agreement, and require the court to receive and consider

victim impact evidence before deciding whether to give final approval of the plea agreement." *Id.*

*Antoine* involved a different set of facts, as Syed argues (Petitioner's Br. at 21), but it stands for the general principle that a reviewing court may reverse a circuit court's decision when a victim's rights were violated. A reviewing court may also order a new proceeding, so long as doing so does not offend double jeopardy. The Appellate Court noted, and Syed did not contest, that a new vacatur hearing would not offend double jeopardy principles in this case. *Lee*, 257 Md. App. at 548-49.

In *Antoine*, the intermediate appellate court observed that the court, stand-in prosecutor, and even defense counsel "were all aware that Mr. Antoine wanted to be heard." 245 Md. App. at 545. This was true for Syed's hearing, as well. Prior to it occurring, all parties were aware of Lee's desire to be heard in person. Just as Antoine did not appear "only because the assigned prosecutor had told him that the trial would not go forward that day," *id.* at 545, Lee "consented" to a Zoom hearing because that was the only option presented to him.

The Appellate Court's decision is not in tension with Md. Rule 4-333(i), which requires the State, within 30 days of a conviction being vacated, to either file a nolle prosequi or take "other appropriate action" as to a vacated count. Syed raises the concern that the State may be prevented 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." (Petitioner's Br. at 24). But the State is not prevented from filing a nolle prosequi under the Appellate Court's logic *unless* an appeal has already been filed. Even then, nothing prevents the State from announcing its intention to file a nolle prosequi pending the resolution of the appeal.

Contrary to Syed's assertions, the Appellate Court's decision was not an "unprecedented and unwarranted intrusion into the authority of the State to control which cases it prosecutes." (Petitioner's Br. at 14). Even within this case, following a new vacatur hearing, the Appellate Court's decision does not prevent the State from filing a nolle prosequi immediately after the conclusion of the vacatur hearing.

Victim appeals, like the one here, are likely to be rare. Simply *disagreeing* with the result of a vacatur hearing does not give a victim standing to appeal. An appeal would proceed only in the unusual instances in which a victim raises a claim that their limited rights have been denied. Even in such circumstances, the State could concede error and permit a new hearing for the victim to receive the rights to which they are entitled, foreclosing the need for an appeal.[7]

Syed's claim that Lee cannot "seek appellate review of the entry of nolle prosequi" is a red herring. (Petitioner's Br. at 25-28). Lee is not appealing the nolle prosequi; he is appealing the denial of his rights at the vacatur hearing. It was Syed who injected the nolle prosequi into the case by raising mootness against Lee's claim and the Appellate Court directly asked the parties to address that question. The issue of the nolle prosequi was therefore "raised

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[7] For instance, in the present case, if the circuit court had simply granted a one-week extension, giving Lee an opportunity to fly across the country on very short notice and attend the hearing, and then there had been a vacatur followed by a nolle prosequi, the State would not argue that the victim's disappointment vindicated a right to appeal.

in or decided by" the Appellate Court, Md. Rule 8-131(a), thus preserving the mootness question for review.

In the alternative, the law is clear that the State does not have the authority to enter a nolle prosequi after entry of a final judgment, meaning conviction and sentence. *Simms*, 456 Md. at 575. As noted, in *Simms*, this Court criticized the use of a nolle prosequi to circumvent the right to appeal. *Id.*

This case presents an analogous circumstance. The vacatur hearing was a necessary precursor to the State's ability to enter a nolle prosequi pursuant to Md. Rule 4-333(i). Because the vacatur hearing was defective (as described in Parts II and III), the State was without power to enter a nolle prosequi in Syed's case because the convictions remained in place absent a valid hearing. Thus, the nolle prosequi was a legal nullity, and the appeal is not moot.

### C. If moot, this Court should address the questions presented because the scope of a victim's rights under Maryland law presents an issue of public importance that may reoccur.

Even if this Court concludes that the appeal is moot, the decision whether to dismiss an appeal for mootness is

discretionary. Md. Rule 8-602(c) ("The court may dismiss an appeal if: . . . (8) the case has become moot"). In limited circumstances, this Court may address the merits of an otherwise moot case if the Court is "convinced that the case presents unresolved issues in matters of important public concern that, if decided, will establish a rule for future conduct." *Coburn v. Coburn*, 342 Md. 244, 250 (1996); *see also J.L. Matthews, Inc. v. Maryland-Nat'l Cap. Park & Plan. Comm'n*, 368 Md. 71, 96 (2002) (explaining that the Court has the "constitutional authority" to express its views "on the merits of a moot case" where "the urgency of establishing a rule of future conduct in maters of important public concern is imperative and manifest") (citation omitted).

This is particularly true where "the matter involved is likely to recur frequently" and "the same difficulty which prevented the appeal at hand from being heard in time is likely again to prevent a decision." *Coburn*, 342 Md. at 250 (citation omitted). In *Coburn*, this Court addressed a moot issue involving an expired protective order issued under Maryland's domestic-violence statute because protective orders occur frequently but often "escape judicial review" due to the orders' "limited duration." *Id.* In addition, the

mooted controversy involved "construction of a statute routinely applied by courts of this state," and the Court's interpretation would "assist judges in determining whether victims of abuse are in need of protection." *Id.*

Although Syed cites *Suter v. Stuckey*, 402 Md. 211, 219 (2007), for the proposition that an appeal is moot where there was "no possible relief that could be granted," this Court in *Suter* went on to address the merits of the claim (involving a protective order) because it was "one of those rare cases that presents an unresolved issue of important public concern." *Id.* at 220. Assuming Lee's case is moot because of the nolle prosequi, it similarly raises an "unresolved issue of important public concern" that should be addressed.

It is true, as Syed notes, that victims' rights are not the same as those of criminal defendants. (Petitioner's Br. at 20) (citing *Lee*, 257 Md. App. at 554 (Berger, J., dissenting)). But victims' rights in Maryland have both a constitutional and statutory dimension. *See* Md. Const., Decl. of Rts, art. 47(a); Crim. Proc. § 11-1002(b)(1). Were this appeal to be dismissed, the question of the scope of those rights, particularly in the context of a vacatur hearing, would go

unanswered. Moreover, there would be uncertainty as to the correctness of the Appellate Court's reasoning. Dismissing this appeal as moot would leave circuit courts to wonder whether the Appellate Court was correct on the merits (if not on mootness). Instead of providing guidance, dismissing the appeal would answer such questions with silence.

Courts from outside Maryland have opined on the scope of a victim's rights even in situations in which the courts otherwise concluded the cases were moot. In *Mitchell v. State*, 369 P.3d 299, 307 (Idaho 2016), the Supreme Court of Idaho held that a victim's claim was moot but proceeded, in a footnote, to address the merits.[8] The Idaho Court concluded that "it is clear in this case that the prosecutor failed to fulfill his duty to inform [the victim] of his rights[.]" *Id.* at 307 n.2. The mandatory victims' rights provisions required the prosecutor, at the initiation of criminal proceedings, to notify victims of their rights, which "was not done in this case." *Id.* Had notice been given to the victim, "he might have understood

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[8] Notably, in Idaho, unlike Marland, victims are not authorized to obtain appellate relief "from any criminal judgment." Idaho Const. art. I, §22.

what his rights were from the start and could have requested notice of future proceedings." *Id.; see also S.K. v. State,* 881 So.2d 1209, 1212 n. 6 (Fla. Dist. Ct. App. 2004) (addressing the issue raised by the victim's family "on the merits because this proceeding involves important legal issues which would escape appellate review if the case were deemed to be moot").

As in *Coburn*, if the controversy is moot, this Court should nevertheless reach the merits because the case concerns unresolved issues in matters of important public concern that can establish a rule of future conduct and provide guidance to circuit courts. The Appellate Court's decision addressed previously unresolved issues about victims' rights to notice of, and attendance at, vacatur hearings under Crim. Proc. § 8-301.1(d). No court had spoken to the nature and quality of those rights and to dismiss the appeal as moot, without opining on the Appellate Court's reasoning, would return the law to an unsettled state. Conversely, reaching the merits would set down a rule for future conduct by the State's Attorneys and the circuit courts.

In addition, the requirement in Md. Rule 4-333(i) that the State's Attorney act within 30 days of the vacatur order to either

enter a nolle prosequi of the vacated criminal charge or take other appropriate action means that dismissing this case based on the nolle prosequi would also prevent any future case from being heard, as well, because the same time constraints exist in all cases under the vacatur law. More broadly, victims' rights to notice and a right to be heard have applicability beyond the setting of a vacatur hearing. Whether victims have such rights, and whether they have an ability to vindicate those rights, are questions of future applicability beyond the specific facts of this case. For these reasons, the State urges this Court, if it concludes that the appeal is moot, to nonetheless exercise its discretion and issue an opinion on the merits.

II.

THE APPELLATE COURT PROPERLY CONCLUDED THAT THE VICTIM'S REPRESENTATIVE HAD A RIGHT TO JOIN THE PARTIES IN ATTENDING THE VACATUR HEARING IN PERSON BUT ERRED IN CONCLUDING THAT THE VICTIM'S REPRESENTATIVE HAD NO RIGHT TO BE HEARD.

The Appellate Court concluded that Lee had a right to attend the vacatur hearing in person, if he so wished, but determined that he did not have a right to address the court. The State agrees with the intermediate appellate court as to the first conclusion but disagrees on the second. Under existing victims' rights statutes, Lee had a right not only to attend the hearing in person but to address the court.

### A. Crime victims possess "broad rights" under Maryland law.

The Maryland Declaration of Rights mandates that crime victims be treated with "dignity, respect, and sensitivity during all phases of the criminal justice process." Md. Decl. of Rts. Art. 47(a). "In a case originating by indictment or information filed in a circuit court, 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 those terms are defined in law. Md. Decl. of Rts. Art. 47(b).

These provisions reflect Maryland's "clear public policy" to "provide broad rights to crime victims." *Antoine,* 245 Md. App. at 539 (quoting *Lopez v. State*, 458 Md. 164, 175 (2018)). Maryland first enacted a victim impact evidence statute in 1982 and gradually expanded the rights of crime victims over the following years, resulting in the ratification of Article 47 of the Declaration of Rights in 1994. *Id.* at 539-40 (citations omitted). As the intermediate appellate court recognized, though, these "hard-won rights" were "largely illusory" because victims were not afforded the right to appeal "if those basic rights were denied." *Id.* at 540 (cleaned up). In multiple cases, appellate courts declined to vacate judgments of conviction or reopen cases where victims had complained that their rights had been violated. *Id.* at 541. (citations omitted).

In 2013, the General Assembly remedied this by permitting victims to file a direct appeal where their rights have been violated. *Id.* at 541-52. Crim. Proc. § 11-103(b) provides:

> (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 [Appellate Court] from an interlocutory order or appeal to the [Appellate Court] from a final order that denies or fails to consider a right secured to the victim[.]

The law also empowers a circuit court to remedy the violation of a victim's rights:

> (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.

Crim. Proc. § 11-103(e)(1)-(3). These provisions generally provide Lee with his right to challenge the vacatur decision.

### B. Victims are expressly entitled to notice of a vacatur hearing and have the right to attend.

Against this broader backdrop of victims' rights, the vacatur statute provides a victim or victim's representative various rights in connection with a vacatur hearing:

> (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.

Md. Code, Crim. Proc. § 8-301.1(d).

Relatedly, Crim. Proc. § 11-104(f)(1) provides that 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 [concerning presentence investigations] if: (i) prior notice is practicable; and (ii) the victim or the victim's representative has filed a notification request form . . . ." If prior notice is not practicable or the victim or victim's representative

does not attend a hearing, the prosecutor shall inform the victim of the terms of "any plea agreement, judicial action, and proceeding that affects the interests of the victim or the 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[.]" Crim. Proc. § 11-104(f)(3).

In addition, 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 the victim or victim's representative submits a notification request form. Crim. Proc. § 11-503(b). A subsequent hearing includes a "hearing on a request to have a sentence modified or vacated under the Maryland Rules" or "any other postsentencing court proceeding." Crim. Proc. § 11-503(a)(2), (7). A victim or victim's representative "who has filed a notification request form" has "the right to attend any proceeding in which the right to appear has been granted to a defendant." Crim. Proc. § 11-102(a).

Md. Rule 4-333 further provides:

> (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.

Md. Rule 4-333(g)(2). A committee note to the rule states that, because a motion under Crim. Proc. § 8-301.1 "may be filed years after the judgment of conviction," it may be difficult to locate defendants, victims, and victims' representatives. Committee Note, Md. Rule 4-333(g). "Reasonable efforts, beyond merely relying on the last known address in a court record, should be made by the State to locate defendants, victims, and victims' representatives and provide the required notices." *Id.*

### C. Remote attendance, when Lee wished to attend in person and all other parties did so, did not comply with the statute.

Syed acknowledges that Lee had a right to attend the vacatur hearing. He contends, however, that attendance by Zoom satisfied Lee's rights. (Petitioner's Br. at 28-33). Given that the General Assembly enacted the vacatur statute in 2019 against the

backdrop of open, in-court hearings, it is presumed that legislators understood that the default would be in-person attendance. Although remote hearings occurred frequently during the COVID-19 pandemic, remote hearings are the exception, not the rule, for judicial proceedings.

This is not to say that a remote hearing could never satisfy a victim's rights. A victim or victim's representative could certainly consent to appearance remotely. In other cases, it might be required by a future public health emergency or because it is simply not feasible for the victim to travel to court within a reasonable amount of time. The Appellate Court observed that there "certainly might be situations where a person would prefer to attend [remotely], due to travel distance, personal health, or other reasons, and utilizing technology to accommodate that preference, in appropriate circumstances, is valuable." *Lee*, 257 Md. App. at 540.

The fact that remote hearings may sometimes be appropriate "does not, however, take away from the value in attending a proceeding in person, when desired, *particularly when all other individuals involved in the proceeding appear in person*."

*Id.* at 539 (emphasis added). Crim. Proc. § 11-102(a) provides that a victim has the right to attend any proceeding "in which the right to appear has been granted to a defendant." Syed attended in person while Lee did not.

Syed points to the adoption this summer of Md. Rule 21-301, which contains a list of matters that are "presumptively appropriate for remote electronic participation," including bail reviews, parking citations, and non-evidentiary motions hearings. Md. Rule 21-301(a). Upon objection by a party, the court shall make findings that remote participation is "not likely to cause substantial prejudice to a party and adversely affect the fairness of the proceeding" and "no party lacks the ability to participate by remote electronic participation." Md. Rule 21-301(b).

The Rules Committee endorsed "two caveats" to the rule: (1) remote proceedings are generally not recommended where the finder of fact needs to assess credibility but may be appropriate by consent or if a case needs to be heard on an expedited basis and remote hearings make it possible for people to attend who would have trouble attending in person; and (2) judges should consider a host of factors in using remote hearings, including the preference

of the parties, the availability of participants who will be affected by the decision, and whether remote participation will cause substantial prejudice to a party or affect the fairness of a proceeding. Committee Note, Md. Rule 21-301.

In short, the new rule is not meant to make electronic proceedings the default nor to force parties to unwillingly appear remotely when they would prefer to be in person. Similarly, the new rule is not meant to force stakeholders, unwillingly, to appear remotely when other parties to the same case are not doing so. Rather, the rules provide commonsense ways for courts to conduct electronic hearings for the convenience of the parties and to allow courts to expeditiously consider routine matters. This was not, however, a situation where the victim's representative suggested a remote hearing or where a remote hearing was held because an in-person hearing was not practicable.

Syed correctly observes that a victim's right to attend a proceeding is not absolute, citing Md. Code, Crim. Proc. § 11-302 (Petitioner's Br. at 30). But that provision is a narrow one. The statute provides that "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." Crim. Proc. § 11-302(c)(2). It is only where the victim may be recalled and their presence at the trial or hearing may influence their future testimony in a way that would affect a defendant's right to a fair trial that the victim is barred from the courtroom. Crim. Proc. § 11-302(d). Here, by contrast, there is no question that Lee had a right to attend the hearing.

This was not a situation in which Lee appeared remotely due to a public health emergency. Nor did he appear remotely because it was the only feasible means of enabling his participation. Nor was Lee demanding in-person attendance where the parties agreed to appear remotely. In addition, Lee was not requesting a lengthy postponement of the hearing but a delay of seven days. The circuit court indicated that it would have been inclined to grant Lee additional time to travel for the hearing had it been aware of his interest on Friday but declined to accommodate him on the following Monday.

Syed wrongly asserts that the Appellate Court's holding was a "*per se* rule that no court may require remote participation by a victim's representative." (Petitioner's Br. at 33). The Appellate

Court's actual holding was narrow, not sweeping. The Court held that a victim must be allowed to attend a vacatur hearing in person (1) where a victim or victim's representative conveys a desire to attend in person; (2) all other individuals involved are permitted to attend in person; and (3) there are no compelling reasons that require the victim to appear remotely. *Lee*, 257 Md. App. at 541. This is a reasonable approach that is not difficult for circuit courts to apply.

*State v. Casey* provides a useful contrast. In *Casey*, a victim of sexual abuse and his mother informed the prosecutor that they wished to be heard before a change of plea hearing. 44 P.3d 756, 757 (Utah 2002). The prosecutor did not, however, inform the court of this request and the court, unaware of the request, accepted the defendant's guilty plea to a reduced charge. *Id.* at 758. The Utah Court concluded that the victim was deprived of his right to speak at the plea hearing but that the violation was cured when the court, at the defendant's sentencing hearing, informally re-opened the plea hearing and "permitted [the victim] and his mother to take the stand and testify regarding the appropriateness of defendant's plea bargain" as well as "permitted extensive argument by [the

victim's] counsel." *Id.* at 765. Taking these steps, "remedied" the denial of the victim's right to be heard. *Id.*

Notably, the remedy in *Casey* was not a rushed Zoom hearing convened on short notice immediately after the victim raised a non-frivolous complaint about lack of notice. When the circuit court here became aware of the lack of notice and Lee's desire to attend and be heard in-person, it should have granted his request for a short postponement to reschedule the hearing.

"Remote proceedings, despite the greatly improved and available technologies, simply do not compare to face-to-face interaction." *People v. Anderson*, 989 N.W. 2d 832, 843 (Mich. Ct. App. 2022). When all of the other parties appear in person, and there is not a compelling reason for victims to be remote, requiring victims to appear by Zoom signals to them their lack of importance and deprives them of dignity. This is directly contrary to the past few decades of Maryland law, which have seen a broadening and expansion of victims' rights.

Syed suggests that endorsing the Appellate Court's approach "will have disastrous consequences for the orderly administration of justice in Maryland's Courts." (Petitioner's Br.

at 33). That suggestion does not withstand scrutiny. In this case, by every indication, the circuit court could have adhered to the Appellate Court's approach and protected Lee's rights by granting a seven-day postponement. The "disastrous consequences" would actually inure to victims were this Court to hold, as Syed contends, that attendance over Zoom satisfies a victim's right to be present and/or heard at a vacatur proceeding. Under such an interpretation of the law, nothing would stop a court from barring *all* victims from attending hearings in person. For that matter, members of victims' and defendants' families, members of the press, and other interested spectators could all be required to watch legal proceedings remotely while the parties and court personnel attend in person. Remote hearings are designed to *increase* access to the courts, promote efficiency, and preserve public safety, not act as tools to bar interested individuals from attending court proceedings in person or insulate the judicial system from scrutiny.

### D. Lee had a right not only to attend the vacatur hearing, but to address the court.

Contrary to the Appellate Court's conclusion, Lee had a right to be heard at the vacatur hearing. When a court hearing is convened that might alter a criminal sentence, Crim. Proc. § 11-403(b) authorizes a victim or the victim's representative, where practicable, to address a court before the alteration. Section 11-403 is cross-referenced in Md. Rule 4-333(h)(3) governing the disposition of a motion to vacate. If a victim has the right to address the court before the mere alteration of a sentence, surely a victim has the same right to address the court when a sentence may be vacated entirely.[9]

In concluding that a victim does not have a right to address the court during a vacatur hearing, the Appellate Court relied on legislative history, specifically concerns that were raised to lawmakers about the lack of an explicit right to be heard in the statute. *Lee*, 257 Md. App. at 543-44. The Appellate Court noted that despite "this voiced concern," the legislature "did not include

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[9] The State does not agree with Lee that he was entitled to any additional rights of participation, such as the right to present evidence or call witnesses.

a right for a victim to give a statement at a hearing on a motion to vacate a conviction." *Id.* at 544. But when "engaging in statutory interpretation, legislative inaction is seldom a reliable guide in discerning legislative intent." *Smith v. Westminster Mgmt., LLC*, 257 Md. App. 336, 372, *cert granted*, 483 Md. 571 (2023). "Legislative rejection is not an infallible indicator of legislative intent." *Id.* (quoting *City of Baltimore Dev. Corp. v. Carmel Realty Assocs.*, 395 Md. 299, 329 (2006)). This is because the General Assembly may decide not to enact an amendment "for a myriad of other reasons." *Id.* There are any number of reasons for why the General Assembly may not have included language concerning a victim's right to be heard in the statute, including that lawmakers already believed the right was sufficiently spelled out elsewhere.

Syed argues that a vacatur hearing, unlike a sentencing decision, does not involve an exercise of the court's discretion but rather pure legal arguments. (Petitioner's Br. at 28). But in addition to considering whether there is newly discovered evidence or new information that calls into question the integrity of a conviction, a circuit court must decide whether vacating the convictions is justified in "the interest of justice and fairness."

Crim. Proc. 8-301.1(a)(2). In the context of whether to order a new trial "in the interest of justice" under Md. Rule 4-331(a), a reviewing court generally applies an abuse of discretion standard. *Williams v. State*, 462 Md. 335, 344 (2019).

Even if the arguments are purely legal, however, this suggests that a victim's input is not necessary or helpful to a circuit court in a vacatur hearing. But this case demonstrates the opposite. Here, where the victim was the only one taking an adversarial position to the granting of the motion, the victim's input could alert the circuit court to shortcomings in the State's presentation or lead the court to ask questions that it might not otherwise have posed. Permitting a victim to speak, under these circumstances, is consistent with the numerous other procedural requirements that must be met in order for the State to vacate a defendant's convictions under Crim. Proc. § 8-301.1.

## III.

## THE STATE FAILED TO PROVIDE SUFFICIENT NOTICE OF THE VACATUR HEARING TO THE VICTIM'S REPRESENTATIVE UNDER THE CIRCUMSTANCES PRESENTED HERE.

There is no dispute that Lee was entitled to notice of the vacatur hearing. An email sent one business day before the hearing, which informed Lee that he had received "permission" to attend the hearing virtually, did not alert him to his right to attend the hearing in person, nor did it give him adequate time in which to travel for the hearing or to prepare a statement. Under the circumstances, the Appellate Court properly determined that the circuit court erred in concluding that the State had provided sufficient notice.

### A. The statute requires "reasonable" notice of the vacatur hearing.

The question of whether the State's notice to Lee of his rights as a victim's representative was sufficient is a question of law, which this Court reviews de novo. *See Wheeling v. Selene Fin. LP*, 473 Md. 356, 373 (2021). The focus is not on the prosecutor per se, but rather on "whether the circuit court erred in determining that

the notice requirement had been satisfied before proceeding with the hearing." *Lee*, 257 Md. App. at 533; *see also Antoine*, 245 Md. App. at 533 (explaining that Crim. Proc. § 11-103e "makes courts responsible for ensuring that victims' rights are honored, and authorizes them to fashion appropriate remedies if not").

Determining whether notice was reasonable under the circumstances here involves statutory interpretation. "The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature." *State v. Bey*, 452 Md. 255, 265 (2017) (citation omitted). A reviewing court will "begin with the normal, plain meaning of the statute." *Id.* "If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose," a court's inquiry ends, and the court will "apply the statute as written without resort to other rules of construction." *Id.* Courts do not "read statutory language in a vacuum" nor does a court confine its interpretation to the "isolated section alone." *Id.* at 266. "In every case, the statute must be given a reasonable interpretation, not one that is absurd, illogical or incompatible with common sense." *Id.*

As an initial matter, Crim. Proc. § 8-301.1 provides that a victim shall be "notified" but does not specify that such notice be "reasonable," as the circuit court observed. Words in a statute must, however, be given their "natural and ordinary meaning, by considering the express and implied purpose of the statute, and by employing basic principles of common sense[.]" *75-80 Properties L.L.C. v. Rale, Inc.*, 470 Md. 598, 645 (2020) (citation omitted). For instance, in *In re Katherine C.*, 390 Md. 554, 579-80 (2006), this Court concluded that notice of a hearing was defective where it failed to properly alert a party that child support would be addressed at the hearing, even though a motion seeking child support had been filed. "Parties are entitled to adequate notice of the subject matter of a hearing, so that they may prepare to address the issues." *Id.*

In other contexts, this Court has opined that "whether a method of giving notice is reasonable in a given case depends on the specific circumstances of that case." *Golden Sands Club Condo., Inc. v. Waller*, 313 Md. 484, 496 (1988). The notice "must be of such nature as reasonably to convey the required information

. . . and it must afford a reasonable time for those interested to make their appearance[.]" *Id.* (citation omitted).

The Appellate Court properly concluded that notice under the vacatur statute must also be reasonable, citing Crim. Proc. § 8-301.1(d) and Md. Rule 4-333 in the context of the "constitutional and statutory mandate that crime victims 'be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process[.]'" *Lee*, 257 Md. App. at 537 (citing Md. Const., Decl. of Rts, art. 47(a)). The intermediate appellate court also observed "the legislative intent that a victim has the right to notice and attend the vacatur hearing." *Id.*

Were the statute construed otherwise, "notice to a victim in California that there would be a hearing in Baltimore a minute later" would comply, as it technically would provide notice. Syed's counsel conceded in the Appellate Court that such notice "would not be sufficient to comply with the statutory objectives." *Id.* In that vein, the Appellate Court properly concluded that "an email one business day before the hearing on Monday, September 19, 2022, was not sufficient to reasonably allow Mr. Lee, who lived in California, to attend the proceedings, as was his right." *Id.*

### B. The circuit court failed to ensure that Lee had received reasonable notice of the vacatur hearing.

Several factual conditions demonstrate how the circuit court erred in concluding that notice was sufficient in these circumstances. First, Lee had unequivocally expressed interest to the prosecutor in any hearing that might occur. (E. 134) ("He said, absolutely, you know, let me know if there's a hearing."). There was no indication in the record, though, that Lee was informed how *soon* that hearing might occur (in this case, within days of the State filing its motion). Syed observes that Lee was told a few days earlier "that a hearing would be scheduled." (Petitioner's Br. at 12). But being informed generally that a hearing "would be" scheduled and being informed of the date, time, and location are two very different things.

Second, none of the prosecutor's communications with Lee informed him that he could attend the hearing in person or inquired as to his availability in setting a date. Although Syed notes that 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"

(Petitioner's Br. at 10), that communication did not (1) indicate that the State would necessarily be filing a vacatur motion or (2) that Lee would have the right to attend a vacatur hearing if one would occur.

Syed also observes that the prosecutor "spoke with Mr. Lee by telephone on September 13 and explained what was happening in the case," including advising Lee "that there would be a hearing on the motion." (Petitioner's Br. at 11). But, importantly, the prosecutor never stated that she informed Lee that he could attend the hearing in person. Md. Rule 4-333(g)(2) requires that the State provide a victim's representative with written notice of a vacatur hearing that contains a "brief description" of the proceeding and informs the victim's representative of the "date, time, and *location of the hearing and the right to attend the hearing*" (emphasis added). The State's notice of the hearing did not include the location (besides describing it as "in person") and did not state that Lee had a right to attend in person if he wished. (E. 179). Rather, Lee was informed that the prosecutor had obtained "permission" for him to watch virtually and sent him a link.

Syed argues that "at no point did Mr. Lee mention to the State that he wished to attend in person." (Petitioner's Br. at 12). This wrongly placed the burden on *Lee* to have affirmatively demanded a right as opposed to placing the burden on the State to provide the required information to Lee necessary to ensure he had notice of the hearing.

The Friday email in which the prosecutor ostensibly provided notice of the hearing specifically told Lee that the hearing would occur in person on the following Monday but that the prosecutor had received "permission" for Lee to watch virtually. The prosecutor also stated, "Please let me know if anybody from your family will be joining the link, so I will make sure the court lets you into the virtual courtroom." This gave the false impression that (1) Lee was only permitted to watch the hearing virtually, not attend in person, and (2) that if Lee had family still in the Baltimore area, they also could not attend in person. *See Doe 1 v. United States*, 359 F. Supp. 3d 1201, 1219 (S.D. Fla. 2019) ("When the Government gives information to victims, it cannot be misleading."). Although the email conveyed information to Lee, it did not give him the full picture concerning his rights.

Third, the circuit court was under a mistaken impression concerning Lee's wish to attend the hearing in person. The court asked during the hearing whether Lee understood that "by him telling us on Friday that he was going to appear via Zoom is why we set this hearing today? Because had we known that on Friday then, of course, we would have scheduled this hearing according to when he was planning to arrive within a reasonable amount of time." (E. 130). Although there is no record of the chambers discussion between the prosecutor, the court, and Syed's counsel on Friday, the court's comment suggests that it was under the impression that Lee was *already aware* of the upcoming hearing and preferred to attend by Zoom. Thus, his ability to travel to Baltimore was not something that the court needed to consider. The only way in which the court could have found that the notice was sufficient under these circumstances was if the court *already believed* that Lee knew of the hearing and had already expressed an intent to attend virtually, something he did not do until *after* the hearing date, time, and location had been set.

Fourth, by the time that Lee was sent an email about the Monday hearing, it was already late morning (Pacific Time) on the

Friday before. Although the email notice was sent at 1:59 p.m. Eastern (the equivalent of 10:59 a.m. Pacific), it is not clear when Lee first opened the email.[10] *See Lawrence v. A-1 Cleaning & Septic Sys.*, LLC, No. 4:19-CV-03526, 2020 WL 2042323, at *5 (S.D. Tex. Apr. 28, 2020) ("The reality of modern-day life is that some people never open their first-class mail and others routinely ignore their emails. Most folks, however, check their text messages regularly (or constantly).").

Although the prosecutor previously called Lee, she did not do so on Friday and waited until Sunday to text him to see if he received the email. Email can certainly serve as reasonable notice of a hearing, particularly where victims have previously received notice in that matter and the notice is sent well in advance of any hearing. But given the short time frame involved, an email sent in the middle of a workday, informing the victim's representative of a hearing on the afternoon of the next workday, was simply not

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[10] Whether Lee responded promptly to earlier emails is irrelevant. It is simply not reasonable to presume that someone will read, respond, and act with regards to a personal email in the middle of a workday, particularly where the end of a 5 p.m. workday in California is 8 p.m. on the East Coast.

reasonable, regardless of whether the victim lived across the country.

Lee was left with less than one business day to take off from work and schedule a flight, hotel, and other travel accommodations. Syed wrongly asserts that the "circuit court did not require Mr. Lee to attend remotely." (Petitioner's Br. at 32). By the time Lee indicated on Sunday that he would appear by Zoom, he had no other choice but to accept the virtual option. It is therefore not accurate to state, as Syed does, that Lee "had changed his mind" about appearing remotely. (Petitioner's Br. at 12). It was a Hobson's choice between that or nothing. Lee acquiesced in attending by Zoom because he was presented with no other option.

Fifth, as the court's comments made clear, the hearing did not have to happen on that Monday afternoon. There was not a statutory deadline at play and the circuit court already expressed its willingness to move the hearing date had it known *on Friday* of Lee's desire to attend in person. As Syed acknowledges, "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." (Petitioner's Br. at 13, citing E. 130-31).

But it was not Lee's burden to assume he had the right to attend a hearing; it was the State's responsibility to inform him of that right. By leaving it to Lee to raise the question of whether he could attend in person (when such an option was never presented to him), the State failed in its duty and the court wrongly concluded that the notice was reasonable. Syed succinctly sums up the type of notice to which Lee should have been entitled:

> [I]f a person has a right of notice and participation, then they are entitled to notice sufficient to allow them to prepare. 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.

(Petitioner's Br. at 36). Whether Lee had the right merely to attend, or to attend and speak (as the State contends), he did not receive notice within sufficient time to "attend" or "prepare." Even under the standard proposed by Syed, the circuit court wrongly concluded that Lee's rights were honored when they were not.

As part of the State's interest in "procuring justice," prosecutors "have an obligation to ensure that the constitutional rights of crime victims are honored and protected." *Casey*, 44 P.3d at 764. The notice was not sufficient in this case to allow Lee to exercise his rights and the circuit court erred by concluding otherwise.

## IV.

## VICTIMS NEED ONLY ESTABLISH THAT THEIR RIGHTS WERE VIOLATED TO DEMONSTRATE PREJUDICE NECESSITATING RELIEF RATHER THAN SHOW THAT THEIR ATTENDANCE AT A HEARING WOULD HAVE CHANGED THE OUTCOME.

Syed urges this Court to apply a harmless error standard that would allow relief only if the proceeding would have been different had Lee attended and participated in person (Petitioner's Br. at 37).[11] His argument manifests a misunderstanding of the role of the victim in a criminal case and is without merit.

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[11] Following the Appellate Court's decision, Syed filed a motion for reconsideration in which he argued that the Court did not address whether the error complained of "affected the results of the proceedings below." (Petitioner's Br. at 37). The Appellate Court denied the motion because it was based on an argument that

The Maryland Declaration of Rights mandates treating victims with "dignity, respect, and sensitivity during all phases of the criminal justice process." Md. Decl. of Rts. Art. 47(a) (emphasis added). "All phases," of course, includes trial, sentencing, and—in this case—the vacatur of the convictions. Consistent with the Maryland Declaration of Rights and with the statutory protections afforded to victims, Lee had a right to reasonable notice of the vacatur hearing, the opportunity to attend in person, and to be heard. These provisions give voice to victims and elevate their dignity, ensuring that they are not forgotten byproducts of the criminal justice system.

The circuit court deprived Lee of these rights. These constitutional and statutory violations contradicted the very purpose for which they were enacted, leaving Lee as an afterthought and without the dignity he deserved. These were substantial harms that were not otherwise remedied. The only option is a new vacatur hearing.

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was not previously raised. The State acknowledges that under the Maryland Rules, this Court may consider harmless error despite the issue not being raised previously. *See* Md. Rule 8-131(b).

It is true that the burden is generally on civil litigants to "show prejudice as well as error." *Crane v. Dunn*, 382 Md. 83, 91 (2004). In most cases, "[p]rejudice will be found if a showing is made that the error was likely to have affected the verdict below." *Id.* But this standard presumes that the person alleging error is a party to the proceedings. In *Crane*, for instance, this Court held that it was prejudicial error to exclude evidence in a civil proceeding, but that the exclusion "did not affect the outcome of the trial." 332 Md. at 101-102.

A victim is not a party to the case and does not have the same ability to control the outcome of a proceeding as a party would. Victims' rights are limited to those provided by statute. *See* Argument II, *supra*. Therefore, harm and prejudice must be measured not against whether a victim's presence might influence judicial proceedings but based on the deprivation of a victim's rights.

When the State's Attorney's Office did not provide an opportunity for Lee to attend the hearing at which it moved to vacate the convictions of the man convicted of killing his sister, and when the motions court refused to accommodate Lee's request

to delay the hearing a single week, Lee was denied the rights the legislature had given him. The harm was not that Lee could not control the outcome of the case, but, rather, that the Declaration of Rights and the Criminal Procedure Article afford dignity and access to the victims of crime, and here, the court's conduct took it away.

Syed's cited authority illustrates the point. In *Hager v. United States*, 79 A.3d 296, 300-01 (D.C. 2013) (Petitioner's Br. at 39), the District of Columbia Court of Appeals considered a case in which a defendant was denied an opportunity to participate in voir dire, which was conducted at the bench. The appellate court addressed harmlessness by focusing on the deprivation of the right —the degree to which the defendant was prevented from participating—rather than how the outcome might have been different. *Id.* at 303-04. The government argued that the defendant's headset gave him access to the bench proceedings, but the appellate court held that headsets, of unknown functionality,

were not comparable to being at the bench where voir dire was actually taking place. *Id.* at 304.[12]

Syed's remaining authority is distinguishable. *Gibson v. Commonwealth*, 2021 WL 3828558, at *4 (Ky. August 26, 2021) (unreported), involved a sentencing hearing during the height of the COVID-19 pandemic in which *all* parties participated remotely. Unlike here, where Lee was treated differently, the defendant "was not at a greater disadvantage than anyone else involved in the hearing." *Id.*

In several other cases, unlike Lee, the defendants never raised an objection to appearing remotely. *See Commonwealth v. Curran*, 178 N.E. 3d 399, 402 (Mass. 2021); *People v. Anderson*, 989 N.W. 2d 832, 839 (Mich. Ct. App. 2022); *State v. Tonnessen*, 2022 WL 893780, at *1 (Minn. Ct. App. March 28, 2022); *State v. Taylor*, 198 N.E. 3d 956, 966-67 (Ohio Ct. App. 2022).

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[12] "Despite the fact that the trial court knew there was a problem with the headsets, the court did not regularly, or even irregularly, check on whether they were working. Therefore, we can give little weight to the argument that the headsets offset Davis's inability to observe voir dire, because we cannot be sure of the degree to which he could actually hear the jurors' responses." *Hager*, 79 A.3d at 304.

Finally, two of the cases turned on public health considerations (or the lack thereof). In *State v. Kiner*, 2023 WL 3946837, at *11-12 (Wash Ct. App. June 12, 2023) (unpublished), the court held that conducting voir dire remotely due to COVID-19 risks, while the defendant was present in the courtroom, was necessary due to the public health emergency and that any error was harmless in that the defendant was able to select a jury. By contrast, in *State v. Byers*, 875 S.E. 2d 306, 318 (W.Va. 2022), the circuit court required a defendant and his counsel to appear remotely by video conference for sentencing (from separate locations) while the judge, prosecuting attorney, and a probation officer were physically present in the courtroom. The West Virginia court could not conclude that such an error had no impact on the sentencing decision. *Id.* at 318-19. As in *Byers* and unlike *Kiner*, there were no public health concerns necessitating Lee's remote appearance.

Syed argues that there are two inferences to be drawn from the Appellate Court's opinion: either that errors affecting victims can never be harmless or that requiring a party or non-party to appear remotely is per se reversible error. (Petitioner's Br. at 41).

The Appellate Court, of course, did not suggest either of these inferences; it declined to consider harmlessness because it had not been raised prior to the issuance of the court's decision.

Even so, neither of these inferences can be fairly drawn from the court's decision. First, there certainly may be situations in which an error affecting a victim's rights is harmless. For instance, a victim who is not informed about a hearing but learns of it anyway and appears ready in person with a prepared statement might technically have had their rights to notice violated, but the lack of notice in such an instance would be harmless. The same is not true here.

As to Syed's second inference, the take-away is not that requiring remote participation is per se reversible error. The Appellate Court acknowledged the many instances in which remote participation may be appropriate and may (such as in a public health emergency) be required to ensure the continued administration of justice while preserving public health and safety. Instead, if a victim's representative has not received sufficient notice of a vacatur hearing and has indicated a desire to attend such a hearing in person, a circuit court should take

reasonable steps to permit the victim's representative to exercise those rights. Under the circumstances of this case, that was not done. Because Lee was unable to fully exercise his rights as a victim's representative under Maryland law, a new vacatur hearing is required.

## CONCLUSION

The State respectfully asks the Court to affirm the judgment of the Appellate Court of Maryland.

Dated: August 28, 2023

Respectfully submitted,

ANTHONY G. BROWN
Attorney General of Maryland

DEREK SIMMONSEN
Assistant Attorney General
Attorney No. 1212130143

Counsel for Respondent

CERTIFICATION OF WORD COUNT AND
COMPLIANCE WITH THE MARYLAND RULES

This filing was printed in 13-point Century Schoolbook font; complies with the font, line spacing, and margin requirements of Maryland Rule 8-112; and contains 12,086 words, excluding the parts exempted from the word count by Maryland Rule 8-503.

*/s/ Derek Simmonsen*
DEREK SIMMONSEN
Assistant Attorney General
Attorney No. 1212130143

Counsel for Respondent

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| ADNAN SYED, | IN THE |
| Petitioner, | SUPREME COURT |
| v. | OF MARYLAND |
| STATE OF MARYLAND, | September Term, 2023 |
| Respondent. | No. 7 |

**CERTIFICATE OF SERVICE**

In accordance with Md. Rule 20-201(g), I certify that on this day, August 28, 2023, I electronically filed the foregoing "Brief of Respondent, the State of Maryland" using the MDEC System, which sent electronic notification of filing to all persons entitled to service, including:

Erica J. Suter
Director, Innocence Project Clinic
University of Baltimore School of Law
& Office of the Public Defender
1401 N. Charles Street
Baltimore, MD 21201

Brian L. Zavin
Chief Attorney, Appellate Division
Office of the Public Defender
6 St. Paul Street, Suite 1400
Baltimore, MD 21202

David W. Sanford
Ari B. Rubin
Sanford Heisler Sharp
111 S. Calvert St., Suite 1950
Baltimore, Maryland 21202

*/s/ Derek Simmonsen*

DEREK SIMMONSEN
Assistant Attorney General
Attorney No. 1212130143

Counsel for Respondent