

ADNAN SYED,

Petitioner

v.

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

Respondents

IN THE

SUPREME COURT

OF MARYLAND

September Term, 2023

No. 7

**MOTION TO STRIKE ARGUMENT II(D) OF THE BRIEF OF
RESPONDENT STATE OF MARYLAND**

Petitioner, Adnan Syed, by counsel, Erica J. Suter, moves that this Court strike Argument II(D) of the Respondent's Brief filed by the State of Maryland, for the following reasons:

1. In its opinion, the Appellate Court set forth at least seven separate holdings: (1) Respondent Young Lee's appeal from the order granting the State's motion to vacate was not rendered moot by the entry of nolle prosequi, *Lee v. State, et al.*, 257 Md. App. 481, 526-27 (2023); (2) Mr. Lee did not have the right to advance notice of the filing of the motion to vacate, *id.* at 530; (3) Mr. Lee did not have the rights to notice of and to attend an off-the-record, in chambers conference, *id.* at 531-32; (4) Mr. Lee did not receive sufficient notice of the vacatur hearing to allow him to attend in person, *id.* at 537-38; (5) Mr. Lee had the right to attend the vacatur hearing in person because he requested to do so on the morning of the hearing, the parties were present in person, and there were no "compelling reasons that require[d] [him] to appear remotely," *id.* at 540-41; (6) Mr. Lee did not have

the right to be heard at the vacatur hearing, *id.* at 547; and (7) reversal of the order of vacatur and reinstatement of Mr. Syed’s convictions was the proper remedy for the violation of Mr. Lee’s rights to notice and to attend in person, *id.* at 547-49.

2. On May 24, 2023, Mr. Syed filed a Petition for Writ of Certiorari challenging holdings (1), (4), (5), and (7) in the Appellate Court’s opinion. Specifically, he argued that Mr. Lee’s appeal from the vacatur order was moot, remote attendance satisfied Mr. Lee’s right to attend the vacatur hearing, Mr. Lee received sufficient notice to allow him to attend remotely, and, assuming error by the circuit court, any error was harmless.

3. On the morning of June 8, 2023, Mr. Lee filed a “Cross-Petition for Writ of Certiorari” in which he disagreed with Mr. Syed on the merits of the questions presented in Mr. Syed’s petition but agreed “that this case involves important legal issues warranting review,” and asked this Court to consider an additional issue: “whether a victim has a right to be heard at a vacatur proceeding.” (Cross-Petition at 1 n. 1, 16). According to Mr. Lee, the Appellate Court “erred in one regard: it stopped short of granting Mr. Lee the right to speak and challenge the evidence.” *Id.* at 3.

4. That afternoon, the State, through the Office of the Attorney General, filed an “Answer to Petition and Cross-Petition for a Writ of Certiorari,” which states, in full:

While Respondent, the State of Maryland, maintains that the Appellate Court of Maryland’s decision below is correct across the board, the State also recognizes that the certiorari petition and cross-

petition both raise novel questions of broad public importance, thus satisfying the test for issuing the writ of certiorari. Md. Code Ann., Cts. & Jud. Proc. § 12-203 (LexisNexis 2020) (conditioning the issuance of the certiorari writ on the Court's determination that review "is desirable and in the public interest"). The State therefore agrees that Court should issue the writ of certiorari to address the questions raised in the petition and cross-petition.

5. Despite taking the position in its Answer that the Appellate Court's opinion was "correct across the board," the State argues in its Respondent's Brief that the Appellate Court "ERRED IN CONCLUDING THAT THE VICTIM'S REPRESENTATIVE HAD NO RIGHT TO BE HEARD." (Brief of Respondent State of Maryland at 28). Although the State does not clarify what a victim's representative might say that would be relevant to the issues before the vacatur court, its position is distinct from Mr. Lee's. The State argues for a right to be heard that is different from, and far more limited than, Mr. Lee's requested right of participation. The State, the Attorney General explains, "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." *Id.* at 41 n. 9. Rather, the State's position is premised on Crim. Proc. § 11-403, which provides for a victim's right to address the court during a sentencing or juvenile disposition hearing, but does not contemplate the party status which Mr. Lee seeks.

6. For two related reasons, this Court should not consider the State's argument that the Appellate Court erred and should strike that portion of the State's brief. *First*, the State, like Mr. Lee, could have filed a cross-petition (conditional or unconditional) but did not do so. Instead, the State informed this Court that it was

not challenging any of the Appellate Court's holdings. See Md. Rule 8-131(b)(1) ("Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Appellate Court or by a circuit court acting in an appellate capacity, the Supreme Court 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 Supreme Court."); *Edwards Sys. Tech. v. Corbin*, 379 Md. 278, 287 n. 5 (2004) ("As this issue was not presented in the certiorari petition, a cross-petition, or added by order of this Court, it is not properly before us, and we intimate no opinion on the issue."); *Walston v. Sun Cab Co.*, 267 Md. 559, 564 (1973) ("We have concluded that the appellants' motion to strike should be granted, so that we will not consider the questions decided adversely to Sun Cab by the Court of Special Appeals, they not being the subject of any cross-petition for certiorari filed by Sun Cab.").

7. *Second*, the State accepted the Appellate Court's holdings as "correct across the board." See *Parker v. State*, 402 Md. 372, 405 (2007) ("Moreover, as previously pointed out, the State in its answer to the certiorari petition took the position that the Court of Special Appeals' judgment was correct. The State, therefore, *consented* to the judgment of the Court of Special Appeals which overturned the Circuit Court's judgments and remanded the case for anew [*sic*] suppression hearing. It is a firmly established principle of Maryland law, however, that a party may not obtain appellate review of a judgment to which the party consented.") (emphasis in original). Cf. *Allen v. Zurich Ins. Co.*, 667 F.2d 1162,

1166 (4th Cir. 1982) (“In certain circumstances a party may properly be precluded as a matter of law from adopting a legal position in conflict with one earlier taken in the same or related litigation. ‘Judicial estoppel’ is invoked in these circumstances to prevent the party from ‘playing fast and loose’ with the courts, and to protect the essential integrity of the judicial process.”).

8. While the State’s response to Mr. Syed’s petition for writ of certiorari is entitled “Answer to Petition *and Cross-Petition for a Writ of Certiorari*,” the State did not seek permission in that pleading to brief and argue the question of whether a victim’s representative has some undefined but limited right to address a court in a vacatur proceeding under Crim. Proc. § 11-403, and this Court did not give such permission in its order granting Mr. Syed’s petition and Mr. Lee’s cross-petition. The State accurately refers to itself only as a “Respondent” in its brief and not as a “Cross-Petitioner.” But a respondent may not complain of error in the judgment below, particularly where, as here, the respondent previously consented to that judgment in its answer to the petition for writ of certiorari.

9. This Court having not granted certiorari to consider the State’s claim of error, that portion of the State’s brief in which the State argues that the Appellate Court erred should be stricken, and the State should not be permitted to take that position at oral argument.

WHEREFORE, Petitioner respectfully requests that this Court issue the attached order granting the foregoing motion.

Respectfully submitted,

/s/ *Erica J. Suter*

Erica J. Suter, AIS # 0712110231
Director, Innocence Project Clinic
University of Baltimore School of Law
& Office of the Public Defender
1401 N. Charles Street
Baltimore, MD 21201
410-837-5388 (phone)
410-837-4776 (fax)
esuter@ubalt.edu

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of September, 2023, a copy of the foregoing in the captioned case was delivered via the MDEC system to:

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

Derek Simmons
Assistant Attorney General
Office of the Attorney General
Criminal Appeals Division
200 Saint Paul Place, 17th Floor
Baltimore, MD 21202

/s/ *Erica J. Suter*

Erica J. Suter