In The

Supreme Court of Maryland

No. 7

September Term, 2023

SCM-REG-0007-2023

ADNAN SYED,

Petitioner/Cross-Respondent,

vs.

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

Appellee/Cross-Appellant.

On Appeal from the Circuit Court for Baltimore City,
(The Honorable Melissa M. Phinn, Judge)

REPLY BRIEF FOR APPELLEE/CROSS-APPELLANT

DAVID W. SANFORD
ARI B. RUBIN
SANFORD HEISLER SHARP, LLP
700 Pennsylvania Avenue SE, Suite 300
Washington, DC 20003
(202) 499-5232
dsanford@sanfordheisler.com
arubin@sanfordheisler.com

Attorneys for Appellee/Cross-Appellant

CP COUNSEL PRESS (800) 4-APPEAL • (323374)

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ARGUMENT

I. Maryland's Constitution and Laws Provide Victims the Right to Be Heard in Vacatur Statute Proceedings; the Right to Be Heard on the Merits Is the Purpose Behind the Rights of Notice and In-Person Attendance

Mr. Lee argues that the Appellate Court erred in holding that a victim has no right to be heard at a vacatur hearing. The State agrees with this position in full. (Appellee Br. at 22–25; State's Br. at 41–43) Mr. Syed's rebuttal arguments do not weaken Mr. Lee's conclusion.

a. The Right to Be Heard Is a Constitutional Right

A victim's right to be heard is explicit within the Vacatur Statute (Maryland Code, Criminal Procedure ("CP") § 8-301.1) and inherent within the statutory scheme. (Appellee Br. at 22–25) But even before this Court looks to the Vacatur Statute's text and the General Assembly's intent, it will find that the right to be heard is constitutional—established by Article 47(b) of the Maryland Declaration of Rights. Courts may not abrogate this constitutional right under the guise of statutory interpretation.

Article 47(b) specifies that victims shall have the right "to be heard at a criminal justice proceeding, *as these rights are implemented*" (emphasis added). Webster's Dictionary defines the word *implement* as "to give practical effect to and ensure of actual fulfillment by concrete measures." *Implement*, Webster's Online Dictionary (accessed Sept. 27, 2023). The term implies that these rights are to be given "practical effect," not that they must be enacted separately for each type of legal proceeding. One way that they are given such effect is through trial courts' role in conducting hearings and managing the

proceedings. Article 47(b) anticipates a victim's right to be heard "upon request" and "if practicable." Here, the Appellate Court's conclusion—albeit erroneous—that the Vacatur Statute does not incorporate a victim's right to be heard is beside the point because the General Assembly cannot undo a victim's constitutional right, particularly through silence.

b. Proper Statutory Interpretation Supports the Victim's Right to Be Heard Under the Vacatur Statute

Even if the right to be heard were not rooted in the Maryland Constitution, this Court must look to the Vacatur Statute's text, and the proper interpretation yields the same conclusion.

Mr. Syed's arguments that a victim lacks a right to be heard under the Vacatur Statute, (Pet. Resp. Br. at 25–31) are flawed and must be rejected. The right to be heard is expressly incorporated into the Vacatur Statute by Md. Rule 4-333(h)'s cross-reference to CP § 11-403. (Appellee Br. at 22) This cross-reference must be given effect and not deemed meaningless or, worse, to mean the exact opposite of what it says. It makes little sense that the Rules Committee would have included such a reference to indicate that the right to be heard did not apply.[1] (Appellee Br. at 34–35)

Accordingly, Mr. Syed's contention that the victim's right to be heard can be provided only by legislative amendment falls flat. (Pet. Resp. Br. at 29) "Where the legislature has not spoken, judicial interpretation is often required to 'fill in the blanks.'"

[1] Mr. Syed turns again to Md. Rule 1-201 to dismiss the import of the cross-reference. (Pet. Resp. Br. at 28) But appellate courts have discussed the impact of that rule of construction and found its effect to be limited. *See, e.g.*, *Bijou v. Young–Battle*, 185 Md. App. 268, 288 (2009) (courts "read the Rules in light of the Committee notes"); *Aguilera v. State*, 193 Md. App. 426, 442 (2010). (*See* Appellee Br. at 23)

Coleman v. Anne Arundel Cnty. Police Dep't, 369 Md. 108, 123 (2002) (quoting JOSEPH F. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK § 400, at 150 (2d ed.1993)). Even assuming that the Statute is ambiguous, "it is [the court's] duty to announce a rule that [it is] convinced is best supported by sound jurisprudential policy germane to the pursuit of legislative intent." *In re Tyrell A.*, 442 Md. 354, 375 (2015) (quoting *Haas v. Lockheed Martin Corp.*, 396 Md. 469, 493 (2007)).

Mr. Syed asks this Court to read into the Vacatur Statute an explicit prohibition on the right to speak. No such bar exists. The canons of construction on which Mr. Syed relies (Pet. Resp. Br. at 26)—all of which presume unambiguous drafting—do not apply. The Vacatur Statute either expressly provides for the right to be heard or, at minimum, is ambiguous on the issue.

Where, as here, a victim's right is clearly established by the Constitution, it is the end of the inquiry. A court must not erode entrenched constitutional rights based on its own predilections, nor upon speculation as to what the General Assembly must really have meant. *See Cincinnati, N.O. & T.P.R. Co. v. Commonwealth*, 115 U.S. 321, 334 (1885) (when a party possesses a constitutional right, "the statute is properly to be construed so as to recognize and respect it, and not to deny it"); *see, e.g., State v. Roscoe*, 185 Ariz. 68, 73 (1996) ("[E]ven assuming, *arguendo*, . . . that the framers of the Victims' Bill of Rights intended to deny peace officers some coverage under the Bill, we may not diminish clearly-expressed constitutional rights to correspond to our (or to the legislature's) perception of the people's intent."). This is consistent with the well-established doctrine of constitutional avoidance. *See, e.g., VNA Hospice of Md. v. Dep't. of Health & Mental Hyg*iene, 406 Md.

584, 610 (2008) ("[I]f reasonably possible, a statute should not be construed to raise substantial constitutional issues").

c. Hearings Under the Vacatur Statute Are Similar to Sentencings

Mr. Syed also adopts the Appellate Court's erroneous reasoning that CP § 11-403 does not apply to Vacatur Statute hearings because they do not require a court to make a discretionary ruling. *See Lee*, 257 Md. App. 481, 545–46 (2023). (Pet. Resp. Br. at 28) Mr. Lee has already demonstrated why this distinction is beside the point: the reason that the right to be heard is important to Vacatur Statute proceedings is because no other type of post-conviction relief or dispositive proceeding eliminates the parties' adversarial posture.[2] (Appellee Br. at 36 & n.18) The victim is the only litigant positioned to provide countervailing perspective for the court's consideration. But the assertion that Vacatur Statute proceedings are not discretionary is also misconstrued.

A Vacatur Statute motion may be granted only if, among other requirements, the circuit court determines vacatur to be in "the interest of justice and fairness." CP § 8-301.1(a)(2). As the State notes, in other contexts, the term, "in the interest of justice," is often reviewed at the appellate level under an abuse of discretion standard. *Williams v. State*, 462 Md. 335, 344 (2019). (State's Br. at 43). The Appellate Court has recognized the discretionary nature of a Vacatur Statute proceeding. *See Walker v. State*, No. 2418, Sept. Term, 2019, 2021 WL 465455, at *2 (App. Ct. Feb. 9, 2021) (ruling that under CP § 8-

[2] The Appellate Court has accepted that Vacatur Statute hearings are like sentencings in other ways. *See Lee*, 257 Md. App. at 545 ("It certainly can be argued that the vacatur of a defendant's conviction is the ultimate alteration of a sentence, in the sense that it sets it aside.").

301.1, "the decision to grant or deny a motion to vacate *lies within the discretion* of the circuit court") (emphasis added); *see also id.* at *4 (determining adequacy of vacatur motion by looking to "the totality of the circumstances bearing on the integrity of the conviction and the interests of justice and fairness").[3]

Similarly, for a *forum non-conveniens* transfer, permitted when it "serves the interests of justice," Md. Rule 2-327(c), a trial court must weigh multiple factors, including convenience to the witnesses, "systemic integrity and fairness," and private concerns. *Bittner v. Huth*, 162 Md. App. 745, 758 (2005) (quoting *Odenton Dev. Co. v. Lamy*, 320 Md. 33, 40 (1990)). Likewise, a court may reopen a postconviction proceeding under the Uniform Postconviction Procedure Act ("UPPA") if it finds that doing so is in the "interests of justice," CP § 7-104; "the phrase 'in the interests of justice' has been interpreted to include a wide array of possibilities," which in turn "requires the court to exercise discretion." *Gray v. State*, 388 Md. 366, 382 & n.7 (2005).[4]

Such broad balancing acts are discretionary rulings, similar to sentencings. A victim's input may be just as relevant to a court's determination of where the interests of justice and fairness lie in vacating a conviction as such input is to the appropriate sentence to impose following a conviction. This is particularly so where the victim is the only one

[3] *Walker* is discussed only for its persuasive value as the only appellate case (in addition to this one) to address an application of the Vacatur Statute. *See* Md. Rule 1-104(a)(2)(B).

[4] It bears noting that Mr. Syed himself previously argued "that the interests of justice standard has been interpreted to give a post-conviction court *broad discretion* in determining whether it is in the interests of justice to reopen a post-conviction proceeding" filed under UPPA. *Syed v. State*, 236 Md. App. 183, 217 (2018), *rev'd*, 463 Md. 60 (2019) (emphasis added).

willing to raise questions about the purported grounds for vacatur.

II. The Harmless Error Doctrine Does Not Insulate the Blatant Victims' Rights Violations Perpetrated Against Mr. Lee

Mr. Syed asks this Court to overlook of all the violations that occurred below based on an incorrect interpretation and application of harmless error review.

In arguing that the Appellate Court erred by failing to perform harmless error review, Mr. Syed continues to mischaracterize or misunderstand the proper test for harmless error in victims' rights appeals. Victims' rights are free-standing procedural rights, and the remedy is to redo the hearing with the proper procedures in place. Remedying these violations have value to victims independent of whether the outcome of the proceeding would have changed had the violation not occurred. Victims' rights violations are not subject to traditional harmless error analysis that focuses on prejudice to the defendant because there is no need to show that honoring the victims' rights would have affected the final result. Instead, the question in victims' rights appeals is whether the victim was prejudiced by having a constitutionally or statutorily provided right unjustly withheld for which this Court can fashion a remedy. *See, e.g.*, *Antoine v. State*, 245 Md. App. 521, 547–49, 556–57 (2020).[5] (*See* Appellee Br. at 37–38; State's Resp. Br. at 5, 57–58)

[5] In discussing *Antoine v. State*, Mr. Syed concedes that in sentencing hearings, "a court's discretion is so broad and may so readily be swayed one way or another that to totally exclude the participation of a party or the victim will rarely be harmless." (Pet. Resp. Br. at 24) The same logic applies here, *see supra* Part I.c., which in turn undermines Mr. Syed's harmless error argument. This Court cannot simply assume that Mr. Lee's full participation would have had no impact on the vacatur proceeding. After all, the parties went to great lengths to exclude him and to deny him knowledge of what was occurring.

The Oregon case *State v. Ball*, 362 Or. 807 (2018), is instructive. There, a victim exercised her constitutionally provided right to present a victim impact statement at the defendant's sentencing. *Id.* at 810. The trial court interrupted her multiple times to direct her to avoid certain topics and then, without offering a reason, terminated the statement before she had finished. *Id.* at 810–13. The Oregon Supreme Court applied a harmless error analysis that considered not the effect on the sentencing decision but the impact on the victim's rights. In particular, the interruptions were harmless because they did not interfere with what the victim intended to say. *Id.* at 819–20. But the high court reached a different outcome for the premature termination, noting that the victim had an established right to speak, the trial court did not offer a rationale for circumventing it, and those two things alone "established a violation and prejudice." *Id.* at 823. Critically, the high court's inquiry looked to the victim's injury, and asked only three questions: "whether appellant's right to be heard was violated, whether she was prejudiced as a result, and whether she [wa]s entitled to the relief that she requested." *Id.* at 819.

The analysis was similar in the rare example of a Maryland case that considered a victim's appeal for harmless error. In *Borkowski v. State*, an unreported case, the victim appealed the court's failure to ensure that she received a generic victim's information pamphlet and notice of a hearing at which a *nolle prosequi* was entered. No. 2700, Sept. Term, 2018, 2019 WL 5581520, at *3 (App. Ct. Oct. 29, 2019). The Appellate Court held that even if she should have received a pamphlet, the error was harmless because she had no right to notice of the *nolle pros* proceeding or to do anything to bar the State from entering the *nolle prosequi*. *Id.* at *7. In other words, the Court's consideration was not

whether the outcome of the underlying proceeding would have been different, but whether the victim had a right that was prejudiced. *See also Doe v. United States*, 950 F. Supp. 2d 1262, 1268 (S.D. Fla. 2013) (denying Government's futility argument, which asserted that providing victims their conferral rights would not have changed the underlying non-prosecution agreement, because the only proper inquiry was whether the "victims' CVRA injury . . . can be redressed").

CP § 11-103 vests courts with "express authority to 'grant the victim relief'" when her rights are violated. *Antoine*, 245 Md. App. at 554 (quoting CP § 11-103(e)(2)). If this mandate is to have teeth, appellate review in victims' rights appeals must focus on prejudice to the victim. Courts must ensure that victims' rights are honored and provide appropriately tailored remedies, including for the right to be heard under Article 47(b) and CP § 11-403(d)(1). The primary purpose of these rights is not to enable victims to sway the outcome. It is to provide victims with "dignity, respect, and sensitivity." *See* Md. Const. Decl. of Rts. art 47(a); CP § 11-1002(b)(1). To the extent that the victim may inform the court of information withheld by the parties and shift the ultimate disposition of the hearing, that is incidental and to society's benefit.

Remedying the violations to Mr. Lee's rights by remanding for a new vacatur proceeding, as the Appellate Court ordered, is in line with the relief ordered in *Antoine*. It is also similar to cases in other jurisdictions with strong appellate rights for victims. In the Oregon case, *State v. Barrett*, for instance, the victim appealed the defendant's sentencing on the grounds that she had not been notified or allowed to attend. 350 Or. 390, 396 (2011). The Oregon high court ruled that the court had violated the victim's rights and remanded

the case to the trial court to resentence the defendant with the victim present. *Id.* at 407 (adding that the outcome of the remanded hearing might be the same). This is essentially what Mr. Lee seeks here.

III. The Court Should Remand the Matter to a New Judge

It is axiomatic that both actual fairness and the appearance of fairness are important to the judicial process. *See Boyd v. State*, 321 Md. 69, 85–86 (1990); *Smith v. State*, 64 Md. App. 625, 635 (1985). Judges must abide by the Maryland Code of Judicial Conduct as to situations in which disqualification is necessary, including when "the judge's impartiality might reasonably be questioned." Md. Rule Judges 18-102.11(a). The obligation to recuse applies even if a motion to disqualify is not filed. *See* Md. Rule Judges 18-102.11, Comment 2. And the failure to move for recusal below does not preclude this Court from considering recusal on appeal. *See Scott v. State*, 110 Md. App. 464, 486 (1996).

If a reasonable person could question the trial judge's impartiality, then Mr. Lee "has been deprived of due process and the judge has abused his or her discretion." *Archer v. State*, 383 Md. 329, 356–57 (2004). Judges in such circumstances should recuse. *See, e.g.*, *Scott v. State*, 110 Md. App. at 488–89 (ruling that because trial judge "acted as the prosecutor, . . . adopt[ing] an unjudicial attitude toward appellant," he "should have recused himself, and his failure to do so [wa]s reversible error"); *see also State v. Payton*, 461 Md. 540, 561 (2018) (ordering a new trial based on judge's demonstrated partiality).

Here, the circumstances are sufficient to raise the appearance of partiality. The court should have dismissed the State's motion as substantively deficient and premature, *see* CP § 8-301.1(e)(2), but did neither. The court raced to hold an *in camera* proceeding with

unnecessary speed and without notice to Mr. Lee. This secret proceeding was the only time that any evidence was presented in support of vacatur.[6] (Appellee Br. at 8) The circuit court then scheduled an official hearing for just one business day later. At the hearing, the Court was aware of and disregarded the State's failure to timely inform Mr. Lee of the proceeding or to offer an opportunity for in-person attendance. Conversely, although Mr. Syed's counsel offered that Mr. Syed would have been willing to appear remotely, the court granted him in-person rights anyway. (E 96) The circuit court allowed Mr. Lee only a perfunctory opportunity to speak. And then it revealed its intention to bypass rigorous review and have Mr. Syed walk free that very same day by orchestrating a press conference at which he would be released wearing his own street clothing. (Appellee Br. at 11; E 164:5–11)

Considering the full record below, this Court should remand the case for a legally compliant hearing with orders to appoint a new judge. Such a disposition is in line with

[6] The Appellate Court held that it was not a violation of Mr. Lee's right to notice and appearance not to learn of the *in camera* proceeding, *Lee*, 257 Md. App. at 531–32, but this is unsupported. *Brown v. State*, 272 Md. 450 (1974), on which the Appellate Court relied, *Lee*, 257 Md. App. at 530–31, asserts limited participation rights at *ex parte* conferences that involve "collateral matters of procedure" or "arguments of law on evidentiary rulings," *Brown*, 272 Md. at 479–80. The events at the September 16 *in camera* hearing were far more involved. Likewise, the Appellate Court's reliance on *State v. Damato-Kushel*, 327 Conn. 173, 173 (2017), is misplaced because the proceeding there involved plea negotiations; not a post-sentencing procedure with evidentiary review. *Id.* at 185; *see Lee*, 257 Md. App. at 531. Moreover, the victims' right law at issue in *Damato-Kushel* did not define the term "court proceeding," 327 Conn. at 186, whereas Maryland law does, *see* CP § 11-503(a)(7) (a "subsequent proceeding" includes "any other postsentencing court proceeding").

similar rulings in the past. *See, e.g.*, *Diggs v. State*, 409 Md. 260, 294–95 (2009); *Mainor v. State*, 475 Md. 487, 518–19 (2021); *Jackson v. State*, 364 Md. 192, 208–09 (2001).

CONCLUSION

Hae Min Lee's murder has been at issue in Maryland's courts for nearly a generation. A vacatur hearing that proceeds in accordance with the law is all that the Lee family asks for. This Court should remand this matter for a new vacatur hearing before a different judge where Mr. Lee's rights of notice, appearance, and to be heard are fully honored.[7]

Respectfully submitted,

/S/DAVID W. SANFORD
ARI B. RUBIN
SANFORD HEISLER SHARP, LLP
700 Pennsylvania Avenue SE, Suite 300
Washington, DC 20003
(202) 499-5232
dsanford@sanfordheisler.com
arubin@sanfordheisler.com

Attorneys for Appellee/Cross-Appellant

[7] Mr. Lee agrees with the State that if this Court rules in his favor, it should order that Mr. Syed remain free on his own recognizance until a new hearing is conducted. (State's Resp. Br. at 5 n.2)

CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3,284 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 state in Rule 8-112. This brief was printed using a 13-point Times New Roman font.

Respectfully submitted,

/S/DAVID W. SANFORD
ARI B. RUBIN
SANFORD HEISLER SHARP, LLP
700 Pennsylvania Avenue SE, Suite 300
Washington, DC 20003
(202) 499-5232
dsanford@sanfordheisler.com
arubin@sanfordheisler.com

Attorneys for Appellee/Cross-Appellant

CERTIFICATE OF SERVICE

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I, Elissa Diaz, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by SANFORD HEISLER SHARP, LLP, counsel for Appellee to print this document. I am an employee of Counsel Press.

On the **29th Day of September 2023**, the within **Reply Brief for Appellee/Cross-Appellant** have been filed and served electronically via the Court's MDEC system. Additionally, I will serve paper copies upon:

Party: Adnan Syed – Appellant
Erica J. Suter,
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
Office of the Public Defender
Appellate Division
6 St. Paul Street, Suite 1400
Baltimore, MD 21202

Party: State of Maryland - Appellee
Daniel J. Jawor
Derek Simmonsen
Office of the Attorney General
Criminal Appeals Division
200 Saint Paul Place, 17th Floor
Baltimore, MD 21202

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September 29, 2023

/s/ Elissa Diaz
Elissa Diaz
Counsel Press