

YOUNG LEE, AS VICTIM'S * IN THE
REPRESENTATIVE, * COURT OF SPECIAL APPEALS
Appellant, * OF MARYLAND
v. * September Term 2022
STATE OF MARYLAND * No. 1291
*** Circuit Court Case Nos. 199103042-46**

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**MOTION TO STRIKE EXHIBIT A TO APPELLANT'S RESPONSE AND
REPLY TO RESPONSES BY APPELLANT AND
THE OFFICE OF THE ATTORNEY GENERAL**

MOTION TO STRIKE APPENDIX TO APPELLANT'S RESPONSE

Attached as "Exhibit A" to Appellant's Response to this Court's Order to Show Cause Why Young Lee's Appeal Should Not Be Dismissed as Moot" (hereinafter "Appellant's Response") is an affidavit by retired Circuit Court Judge Wanda Keyes Heard. Judge Heard, who presided over Mr. Syed's trial over two decades ago, was not the judge at the vacatur hearing or when the State entered a nolle prosequi, nor does she claim to have observed either proceeding. Instead, her affidavit is nothing more than a highly inappropriate attempt by a former judicial officer to condemn Mr. Syed.¹ Judge Heard's

¹ Judge Heard's affidavit underscores the wisdom of Maryland Rule 4-406(b), which prohibits the trial judge from presiding over post conviction proceedings unless the petitioner consents. "Predominantly, PCPA proceedings challenge that judge's rulings and decisions. That is the judge, therefore, who is most likely to resist the petitioner's claims of error. That is the judge whom the rule automatically disqualifies." *Hernandez v. State*, 108 Md. App 354, 361 (1996).

affidavit does not and cannot provide any information on the question at issue, whether the appellant's appeal is moot. Therefore, this Court should strike Appellant's Exhibit A.

Rule 8-413 sets forth the contents of the record on appeal, which "shall include (1) a certified copy of the docket entries in the lower court, (2) the transcript required by Rule 8-411, and (3) all original papers filed in the action in the lower court except a supersedeas bond or alternative security and those other items that the parties stipulate may be omitted." Md. Rule 8-413(a). When a party believes that a particular item is not in the record but should be made part of it, the party must follow the procedure for correcting the record outlined in Rule 8-414. Appellant has neither filed a motion to correct the record nor given any reason why Judge Heard's affidavit is properly before this Court. Appellant's failure is especially concerning given that Judge Heard prepared her affidavit on the same date that Appellant filed his response in this Court and "[a]t the request of" Appellant. Affidavit, at 5-6. In effect, Appellant has created evidence after he noted his appeal and now wishes this Court to consider it. The Court should decline to do so. The affidavit must be stricken and given no consideration. *See Shih Ping Li v. Tzu Lee*, 210 Md. App. 73, 95 (2013), *aff'd*, 437 Md. 47 (2014) (explaining that "under a plain language reading, Maryland Rule 8-414 does not provide for evidence created after a record is closed by the trial court to be considered"); *Franklin Credit Management Corp. v. Nefflen*, 208 Md. App. 712, 724, *aff'd*, 436 Md. 300 (2012) ("As this Court has noted, 'an appellate court must confine its review to the evidence actually before the trial court when it reached its decision.'") (quoting *Cochran v. Griffith Energy Service Inc.*, 191 Md. App. 625, 663, *cert. denied*, 415 Md. 115 (2010)); *Colao v. Cnty. Council of Prince George's Cnty.*, 109 Md. App. 431, 469 (1996),

aff'd, 346 Md. 342 (1997) (“Appellants are correct that a party may not supplement the record with documents that are not part of the record.”).

**REPLY TO RESPONSES BY APPELLANT AND
THE OFFICE OF THE ATTORNEY GENERAL**

By order dated October 12, 2022, the Court ordered: (1) the Appellant to explain “[w]hy this appeal should not be dismissed as moot in light of the nolle prosequi filed in the Circuit Court for Baltimore City on October 11, 2022;” and (2) the Office of the Attorney General to respond to Mr. Syed’s motion to disqualify the Office of the Attorney General or strike the State as a party to the appeal. Yet, Appellant and the Attorney General devote the majority of their responses to issues beyond the scope of this Court’s October 12th Order. Personal opinions on the State’s Attorney for Baltimore City or Mr. Syed’s innocence are not properly before this Court.

The *only* issues immediately before this Court are whether the appeal is moot and, if it is not moot, whether the Attorney General should be permitted to represent the State of Maryland as an appellee. For the reasons discussed below, the appeal is moot and should be dismissed. For the reasons discussed below and in Mr. Syed’s motion, the Office of the Attorney General should be disqualified or, as this Court ordered in *Antoine v. State*, 245 Md. App. 521 (2020), stricken as a party to the appeal.

A. The nolle prosequi entered by the State rendered this appeal moot.

Despite this Court ordering him to do so, Appellant fails to address the legal impact of the factual predicate that prompted this Court’s order: there is no criminal case pending against Mr. Syed below. After the vacatur of Mr. Syed’s convictions, the State was

required to decide within 30 days whether to enter a nolle prosequi of the vacated counts. Md. Rule 4-333(i). The State's Attorney fulfilled her obligations when, on October 11, she nol prossed the charges against Mr. Syed. As this Court implicitly recognized when it directed Appellant to show cause why his appeal should not be dismissed, a holding that Appellant's rights were not honored at the vacatur hearing would not and could not change the fact that there is not currently pending in the circuit court a criminal case against Mr. Syed. Except when it would undermine a defendant's right to a fair trial, the State has virtually unfettered discretion to enter a nolle prosequi prior to final judgment. *See State v. Simms*, 456 Md. 551, 562-63 (2017); *State v. Smith*, 223 Md. App. 16, 28 (2015). Here, the State elected to nol pros the charges against Mr. Syed. That cannot be undone. Appellant makes no argument to the contrary. Assuming Appellant has an "ongoing injury" as he maintains, this appeal became moot on October 11, 2022.

On the first question before this Court, the Attorney General concedes that the appeal is "likely" moot as a result of "the State's Attorney's decision to nol pros the charges against Mr. Syed[.]" State's Response to Motion to Disqualify, at 53. Appellant, on the other hand, alleges, without further explanation or legal support, that he "has an ongoing injury." Appellant also posits that "if this Court were to rule that the circuit court violated Mr. Lee's rights, it could overturn the court's decision to vacate Mr. Syed's sentence and remand the case for an evidentiary hearing that complies with the Vacatur Statute and the constitutional and statutory victims' rights procedures." Appellant's Response, at 14, 19.

Appellant's response mischaracterizes the nature of his alleged injury, misstates the circuit court's "decision," and ignores the action (the nolle prosequi) that prompted this

Court to issue its order on October 12. On the first point, assuming for the sake of argument that Appellant’s rights were not honored in full at the vacatur hearing, the violation is not “ongoing.” Appellant had the right to notice of the hearing and to attend the hearing. He received notice and attended. Assuming he should have received even more notice and should have had the opportunity to attend in person rather than by video, his rights do not continue to be violated. The violation, if it occurred, ended at the conclusion of the hearing. This is not, for example, a case in which a victim was deprived of restitution as a result of a ruling.

With respect to the “court’s decision,” the circuit court did not simply vacate Mr. Syed’s sentence—it vacated his convictions. This point distinguishes *Antoine*, the sole case cited by Appellant in support of his argument that the appeal is not moot. At issue in *Antoine v. State*, 245 Md. App. 521 (2020), was whether the circuit court denied the victim his right to present victim impact evidence at sentencing. This Court held that, in that instance, it had the authority to vacate the defendant’s sentence and to remand for a new sentencing proceeding. Here, by contrast, the circuit court vacated Mr. Syed’s convictions and not, as Appellant states, his sentence. The remedy approved in *Antoine* does not apply here.

B. The Court should not issue an advisory opinion in this case.

Appellant asks that this Court issue an advisory opinion even if this Court determines that the subject of the appeal is moot. This Court should decline Appellant’s request because Appellant seeks *a change in the law* not a clarification. Such a request belongs with the legislature, not an appellate court.

The legislature and rules committee have explicitly defined the proceedings in which a victim impact statement must be heard by the court: sentencing, sentence modification, and review of sentence by a three-judge panel. In contrast, where the court is weighing legal arguments, the law does not provide victims with a right to participate. The statute and rules governing Post Convictions, Petitions for Writ of Actual Innocence, and Vacatur consistently delineate the rights of victims in those proceedings as a right of notification and attendance and not a right of participation. Similarly, victims do not have the right to participate directly in a defendant's direct appeal before this Court.

The notice rights of victims in post conviction posture are clear and well-established. To the extent that Mr. Lee wishes to expand those rights, the proper forum to address that issue is the legislature, not this Court.² Couching his dissatisfaction with the law regarding victims' right to weigh in on purely legal arguments as a circumstance capable of repetition does not make it so.

C. The Office of the Attorney General should be disqualified or stricken as a party to the appeal.

For the reasons addressed in his motion, Mr. Syed urges this Court to disqualify the Office of the Attorney General as counsel for the State of Maryland. The language and tone

²In addition to the notice requirement, Appellant's pleading also seeks to litigate the merits of the vacatur proceedings below and to raise a constitutional challenge to the vacatur statute. "Mr. Lee seeks an evidentiary hearing that fully complies with the Maryland Vacatur Statute **and** the constitutional and statutory victims' rights that should have been afforded to him as the victim representative." (Appellant's response at 3) (emphasis supplied). "This appeal is even more important because Mr. Lee intends to challenge the Vacatur Law as unconstitutional and void for vagueness as applied." (*Id* at 23). These challenges are not preserved and are beyond the scope of Appellant's appeal.

of the Attorney General’s response confirms that it cannot act as an objective advocate for the State and that it intends instead to continue its blistering attack of the State’s Attorney for Baltimore City and to defend its own conduct relating to the *Brady* violation. On multiple occasions, the Attorney General, despite professing that it is “is not interested in using this appeal to litigate culpability for an alleged *Brady* violation,” does just that. *See, e.g.*, State’s Response, at 6 n. 5 (“To be clear, the Attorney General vehemently denies Ms. Mosby’s unfounded accusation that anyone in the Office hatched an intentional plot to ‘sit on’ exculpatory evidence for seven years.”); *id.* at 17-18 n. 17 (“As for the State’s Attorney’s Office’s identification of another allegedly undisclosed document ‘in which a different person relayed information that can be viewed as a motive for that same suspect to harm the victim[,]’ the Attorney General’s Office cannot find any document that fits that description.”); *id.* at 39 (“Ms. Mosby’s baseless allegations of intentional misconduct are not at issue in this appeal.”); *id.* at 41 n. 37 (“The Office of the Attorney General unequivocally rejects Ms. Mosby’s baseless allegations that it intentionally violated its obligations under *Brady*.”).³

If there is lingering doubt about the true role the Attorney General is playing in this matter, it is quashed by the fact that the Appellant filed his response after the Attorney

³ The Attorney General also maintains that its “position ... is the result of considered legal analysis and in furtherance of the Attorney General’s duty to advocate for the State.” State’s Response, at 7. One wonders what “legal analysis” went into the Attorney General’s televised remark that the State’s Attorney “filed the motion to free Syed to distract from her upcoming federal perjury and mortgage fraud trial.” Lee O. Sanderlin and Alex Mann, *War of words: Maryland AG Brian Frosh, Marilyn Mosby spar over evidence that led to Adnan Syed’s release*, Baltimore Sun (September 21, 2022).

General (acting as Appellee) and adopts much of the Attorney General's response. Appellant's Response, at 5 n. 1. Appellant and the Attorney General are acting as a team in their effort to undo the circuit court's judgment. The Court must not countenance this attempt to circumvent the rules. It was the State of Maryland that filed the motion to vacate Mr. Syed's convictions, and it was the State of Maryland that later entered a nolle prosequi. The Attorney General may disagree with that decision, and he may even file a short concession of error, but he may not act as a co-Appellant.

Respectfully submitted,

_____/s/_____
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Certification of Word Count and Compliance with MD Rule 8-112

This pleading complies with the font, line spacing, and margin requirements of Maryland Rule 8-112 and contains 2,173 words, excluding the parts exempted from the word count by Rule 8-503.

_____/s/_____
Erica J. Suter

Certificate of Service

I hereby certify that on October 29, 2022, I electronically filed the foregoing “Motion to Strike Exhibit A to Appellant’s Response and Responses to Appellant and the Office of the Attorney General” using the MDEC System, which sent electronic notification of filing to all persons entitled to service, including Steven J. Kelly and Assistant Attorney General Carrie Williams.

_____/s/_____
Erica J. Suter