

YOUNG LEE, AS VICTIM'S
REPRESENTATIVE,

Appellant

v.

STATE OF MARYLAND AND
ADNAN SYED,

Appellees

IN THE

APPELLATE COURT OF

OF MARYLAND

No. 1291

September Term, 2022

Cir. Ct. Nos. 199103042-46

MOTION FOR RECONSIDERATION

Appellee, Adnan Syed, by counsel, Erica J. Suter, Director, UB Innocence Project Clinic and Brian L. Zavin, Chief Attorney, Office of the Public Defender, Appellate Division, files this Motion for Reconsideration of the Court's opinion pursuant to Rule 8-605 for the following reasons:

The Court reinstated Mr. Syed's convictions and remanded for the circuit court to conduct a new vacatur hearing based on an error that Appellant did not allege: a violation of the right to notice of a hearing he could attend in person but in which he would not be allowed to participate. Notably absent from the Court's opinion is any discussion of how Appellant satisfied his burden of demonstrating that the purported error was not harmless. *See Crane v. Dunn*, 382 Md. 83, 91 (2004) ("It is the policy of this Court not to reverse for harmless error and the burden is on the appellant in all cases to show prejudice as well as error.").

Even in cases involving a violation of a criminal defendant's constitutional right to be present, Maryland courts have held that automatic reversal is not the norm. In *State v.*

Hart, 449 Md. 246, 262 (2016), the Supreme Court of Maryland explicitly held that “[w]hen a violation of a criminal defendant’s right to be present is at issue, we apply the harmless error analysis.” “Prejudice will not be conclusively presumed,” the Court explained, so the standard for harmless error set forth in *Dorsey v. State*, 276 Md. 638 (1976), applied: “If the record demonstrates beyond a reasonable doubt that the denial of the right could not have prejudiced the defendant, the error will not result in a reversal of his conviction.” *Id.* at 262-63 (quoting *Noble v. State*, 293 Md. 549, 568–69 (1982)). *Cf. Reeves v. State*, 192 Md. App. 277, 300 (2010) (“Finally, even if we were to hold that the trial court’s failure to conduct a more extensive investigation into the voluntariness of appellant’s absence and its decision to allow the verdict to be rendered in his absence were abuses of discretion, any error was harmless. An error is harmless if we are convinced beyond a reasonable doubt that the error in no way influenced the verdict.”).

Similarly, other courts that have considered cases in which defendants were required to appear remotely rather than in person have reviewed for harmless error. *See, e.g., Hager v. United States*, 79 A.3d 296 (D.C. 2013) (violation of defendant’s right to be physically present during voir dire not harmless where record did not show that “defendant was able to meaningfully participate”); *Gibson v. Commonwealth*, 2021 WL 3828558, *4 (Ky. Aug. 26, 2021) (error in conducting sentencing by video conference harmless where, *inter alia*, “hearing allowed all participants to see and hear one another”); *People v. Anderson*, ___ N.W.2d ___, 2022 WL 981299, *7 (Mich. Ct. App. March 31, 2022) (error in conducting sentencing hearing by video conference harmless where “[t]here is no evidence, inference, nor indication that defendant’s treatment likely would have been different had he been

face-to-face with the sentencing judge”); *State v. Taylor*, 198 N.E.3d 956, 966-67 (Ohio Ct. App. 2022) (violation of defendant’s right to be physically present at sentencing harmless where his “interests were represented by defense counsel who was physically present in the courtroom; no objection was raised as to his physical absence; appellant was able to see and hear the courtroom and to be seen and heard by the courtroom; although he chose not to, appellant was permitted the opportunity to make a statement; and appellant advances no argument on appeal that his physical absence prevented a fair hearing”); *State v. Byers*, 875 S.E.2d 306, 318-19 (W.Va. 2022) (State failed to demonstrate beyond a reasonable doubt that requiring defendant to appear remotely for sentencing was harmless where court was “left to simply speculate as to the sentence Mr. Byers might have received had he been physically present”).

It bears noting that Appellant is not a criminal defendant, and so Appellant must show, and this Court must find, that “the error was likely to have affected the verdict below[.]” *Flores v. Bell*, 398 Md. 27, 33 (2007). “The focus of our inquiry is on the probability, not the possibility, of prejudice.” *Id.* See also *I. W. Berman Properties v. Porter Bros.*, 276 Md. 1, 11–12 (1975) (“An error which does not affect the outcome of the case is ‘harmless error.’”). To establish reversible error, Appellant therefore must show, and this Court must find, that the result of the vacatur hearing would have been different had he been permitted to observe the hearing silently in person rather than, as happened, participate over Zoom.

Because Appellant’s asserted right of participation was the crux of his argument before the Court, Mr. Syed did not argue previously that Appellant failed to meet his burden

of demonstrating that the outcome would have been different. If, as Appellant contended in his brief and at oral argument, he was entitled to act as a party by presenting and refuting evidence, then Mr. Syed would have been hard-pressed to argue that the denial of *that right* was harmless. However, this Court's holding is far more limited. The right to be physically present, with no corresponding right to participate, is susceptible to harmless error analysis under the circumstances present here: a motion to vacate filed by the State, joined by the defense, and granted by the court.

Nothing in the record gives even the slightest indication that the circuit court would have reached a different result if Appellant had been afforded the rights to which the Court holds he was entitled. Indeed, as the Court observes, the circuit court allowed Appellant the opportunity to speak, although neither the vacatur statute nor rule authorizes it. If the circuit court was not persuaded to deny the State's vacatur motion under these circumstances, it beggars belief to suggest that it would have denied the motion had Appellant been physically present in the courtroom and addressed the court as he did remotely at the vacatur hearing. It is equally inconceivable that the Court would have reached a different conclusion had Appellant remained silent.

As it stands, the Court's opinion permits two inferences, neither of which is justified. The first is that errors affecting the rights of victims' representatives can never be harmless even where, as here, the right in question is provided for by statute. By contrast, and as noted above, courts in Maryland and elsewhere have held that the violation of a similar constitutional right of a criminal defendant may be found harmless.

In the alternative, the Court may be announcing a new rule of law that *anytime* a court requires a party or, as here, a non-party, to appear remotely, the error is *per se* reversible. The number of cases impacted by such a rule in just the past few years when our courts operated remotely is likely quite high. But even post-pandemic, the impact will be staggering. Just last week, the Supreme Court approved rules allowing trial courts to require remote participation in certain proceedings over the objection of the parties. Supreme Court of Maryland, 214th Rules Order, at 396-400 (April 21, 2023).¹ Tellingly, even when the consent of the parties is required to allow for remote participation, the new rules make no provision for objections by non-parties, including victims and victims' representatives. Under this Court's opinion, compliance with the rule will lead invariably to reversible error.

Assuming the Court has not singled out victims' representatives for special treatment not available even to criminal defendants, and assuming the Court does not wish to open the floodgates to claims of reversible error, it should reconsider its decision to reverse in this case. Through video and the presence of his attorney in the courtroom, Appellant was able to convey the gravity of the proceedings for his family. Before this Court should be willing to take the drastic and unprecedented step of reinstating the criminal convictions of an individual whom the State has declined to prosecute, it at a minimum should require Appellant, like all other litigants, to demonstrate that any errors committed by the trial court were not harmless.

¹ <https://www.mdcourts.gov/sites/default/files/rules/order/ro214.pdf> (last checked April 25, 2023).

WHEREFORE, Appellee respectfully requests that this Court reconsider its opinion and, unless Appellant is able to demonstrate prejudice in accordance with established precedent, affirm the judgment below.

Respectfully submitted,

/s/ *Erica Suter*

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**CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112**

1. This motion contains 1,505 words.
2. This motion complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Erica Suter

Erica J. Suter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of April, 2023, a copy of the foregoing in the captioned case was delivered via the MDEC system to:

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