

STATE OF MARYLAND \* IN THE  
v. \* COURT OF SPECIAL APPEALS  
ADNAN SYED, \* OF MARYLAND  
Appellee \* September Term 2022  
\* No. 1291  
\* Circuit Court Case Nos. 199103042-46  
\* \* \* \* \*

**RESPONSE TO ATTORNEY GENERAL’S MOTION TO STRIKE AND  
MOTION TO DISQUALIFY OFFICE OF THE ATTORNEY GENERAL AS  
COUNSEL FOR THE STATE OF MARYLAND OR STRIKE THE STATE AS A  
PARTY TO THE APPEAL**

In its Motion to Strike, the Attorney General argues that Mr. Syed is not a party to the appeal. In support, the Attorney General asserts that Mr. Syed, like the defendants in *State v. Rice, et al.*, 447 Md. 594 (2016), “would not gain or lose as a direct result of the outcome[.]” Motion to Strike, at 7. This is plainly wrong.

In fact, it is the Office of the Attorney General that should not be a party to this appeal. Through its conduct following the hearing on the State’s motion to vacate Mr. Syed’s convictions, the Attorney General has shown that it has a conflict of interest and cannot fairly represent the interests of the State. At the very least, its pronouncements disqualify it from acting as an appellee.

**A. Response to Motion to Strike**

Contrary to the Attorney General’s position, at issue in this appeal is not solely a question of notice to the victim’s family. Neither the Attorney General nor, more importantly, the victim, has disavowed that they are asking this Court to reverse the order

vacating Mr. Syed's convictions. After all, assuming a violation of the victim's rights (something Mr. Syed does not concede), that is the likely remedy the appellant would ask for—a reversal of the order vacating the convictions and a remand for a new hearing on the State's motion to vacate.

If the only relief the appellant is entitled to is an advisory declaration by this Court that his rights were violated, then to be sure Mr. Syed would have no interest in the appeal. But, then, there would also be no reason to stay the proceedings in the circuit court pending the appeal. The Attorney General joins the appellant's request for a stay, arguing that “[i]f a temporary stay is not entered pending the resolution of the State's motion to strike and Mr. Lee's motion to stay, actions could be taken in the circuit court that would arguably moot the appeal[.]” Motion to Strike, at 9.

The Attorney General cannot have it both ways. Either the direct result of this appeal may be a reversal of the order vacating Mr. Syed's conviction – something in which he surely has an interest – or there is no reason to stay the circuit court proceedings as this Court's mandate will not reverse the vacatur. Whether a stay is appropriate is a different matter, addressed in Mr. Syed's separately filed response to the motion to stay. For present purposes, however, the Attorney General cannot logically maintain that Mr. Syed has no direct interest in the appeal and, at the same time, argue that the appeal may become moot as a result of interim events in the circuit court.

To be sure, in numerous prior appeals by victims, the defendant (as well as the State) has been a party. *See, e.g., Antoine v. State*, 245 Md. App. 521 (2020) (appeal by victim from ruling denying opportunity to present victim impact evidence at sentencing); *Griffin*

*v. Lindley*, 444 Md. 278 (2015) (application for leave to appeal by victim from order denying request for restitution); *Lamb v. Kontgias*, 169 Md. App. 466, *cert. denied*, 395 Md. 57 (2006) (appeal by victim from denial of right to notice of hearing on defendant’s motion to reconsider sentence); *Lopez-Sanchez v. State*, 388 Md. 214 (2005) (application for leave to appeal by victim from denial of motion to reconsider restitution order).

*Rice*, the sole authority on which the Attorney General relies, is not on point. At issue in *Rice* was the denial of the State’s motion to compel immunized testimony by a witness at the trial of various criminal defendants. Before reaching the merits, the Court of Appeals first clarified that the defendants themselves were not parties to the appeal. A party, the Court explained, is one whose interest in the case is “so closely and directly connected with the subject matter that the [party] will either gain or lose by the direct legal operation and effect of the decree.” *Id.* at 615 (quoting *Lickle v. Boone*, 187 Md. 579, 584 (1947)).

The criminal defendants in *Rice* stood at most to have been indirectly impacted by a decision on appeal. By contrast, Mr. Syed will be directly impacted. Should this Court reverse the order vacating his convictions, his status will shift from one who presently stands charged with murder to one who has been convicted of it. Like the defendants in *Antoine*, *Griffin*, *Lamb*, and *Lopez-Sanchez*, Mr. Syed very much has an interest in whether this Court changes the *status quo*.

**B. Motion to Disqualify Office of the Attorney General or, in the Alternative, Strike the State as a Party**

The Office of the State's Attorney admitted to an egregious *Brady* violation – the failure to disclose exculpatory evidence about alternative suspects to the defense prior to trial – in support of its motion to vacate. In granting the motion, the circuit court acknowledged the violation and found, based on this and other flaws with Mr. Syed's trial, that the interest of justice and fairness justified vacating his convictions. Md. Code, Crim. Proc. § 8-301.1(a).

Shortly thereafter, the Attorney General began publicly criticizing the State's Attorney's Office's motivation for moving to vacate the conviction, defended the Office of the Attorney General regarding the *Brady* violation, alleged that a *Brady* violation did not occur at all, and defended the underlying convictions. The Attorney General now seeks to represent not the State of Maryland but itself before this Court. Under the unusual circumstances presented by this case, the Office of the Attorney General should be disqualified and directed to appoint independent counsel for the State.

Following the hearing on the State's vacatur motion, the State's Attorney accepted that her office was to blame for the *Brady* violation but also accused the Office of the Attorney General of willfully perpetuating the *Brady* violation. During a press conference, she asserted that evidence pointing to alternative suspects had not been turned over to defense counsel "by the original prosecutor or the attorney general's office where the original case file still sits." 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). According to State’s Attorney Mosby, “Attorney General Brian Frosh needs to speak to his office’s willful decision to sit on exculpatory evidence for the last seven years” as “[h]is inability to uphold this fundamental obligation denied Mr. Syed his right to a fair trial and now forces a family to relive an unimaginable nightmare because of his unconscionable misdeeds.” *Id.*

The Attorney General publicly responded by defending his office in the press. “Hours after Syed’s release, ... the Attorney General’s Office denied that there had been a *Brady* violation, which occurs when prosecutors fail to turn over exculpatory evidence to the defense. The office said in a statement that Syed’s file had been made available to defense attorneys.” Madeleine O’Neill, *Baltimore State’s Attorney’s Office clashes with AG over release of key document in Syed case*, The Daily Record (September 30, 2022). According to the same article, Attorney General Frosh announced three days after the court granted the motion to vacate that “he stands behind Syed’s conviction despite city prosecutors’ motion to vacate” and that “[t]here’s nothing in the motion that’s changed our view about the overwhelming evidence that showed that Adnan Syed murdered Hae Min Lee[.]” *Id.*

The Baltimore Sun reported similarly that, shortly after Judge Phinn’s ruling and in response to remarks by the State’s Attorney for Baltimore City, the Office of the Attorney General issued a statement alleging “serious problems with the motion to vacate,” among them that the State’s Attorney did not consult with his office. Sanderlin and Mann, *War of words: Maryland AG Brian Frosh, Marilyn Mosby spar over evidence that led to Adnan Syed’s release*. See also Omari Daniels and Emily Davies, *Judge frees Syed in 1999*

*murder; new trial possible*, Washington Post (September 20, 2022) (“Maryland Attorney General Brian E. Frosh (D) - whose office has previously defended the handling of Syed’s case in court proceedings - blasted the Baltimore prosecutor for acting without consulting his office, and he called the allegations that prosecutors did not hand over evidence to Syed’s defense as they should have ‘incorrect.’”).

The Attorney General then publicly speculated that the State’s Attorney’s motivations were self-serving. In a televised interview, Attorney General Frosh suggested that she “filed the motion to free Syed to distract from her upcoming federal perjury and mortgage fraud trial.” Sanderlin and Mann, *War of words: Maryland AG Brian Frosh, Marilyn Mosby spar over evidence that led to Adnan Syed’s release*.

At the same time, members of the Office of the Attorney General publicly expressed that it intended to represent the State in this appeal by arguing against the State’s position in the circuit court. An article in the Baltimore Sun revealed that “[t]he attorney general’s office is expected to file a brief arguing that [Judge] Phinn erred when she overturned Syed’s conviction, according to people familiar with the attorney general’s plans but who were not authorized to speak publicly.” Lee O. Sanderlin, *Family of Hae Min Lee to appeal Baltimore judge’s decision to free Adnan Syed*, Baltimore Sun (September 29, 2022). See also Rachel Sharp, *Hae Min Lee’s family file motion to appeal Serial subject Adnan Syed’s release*, Independent Online (U.K.) (September 30, 2022) (“The family’s appeal comes as sources told the local outlet that the Maryland Attorney General’s Office is also planning to file a brief arguing the judge erred in vacating Mr. Syed’s conviction. The AG’s office

repeatedly insisted that Mr. Syed was guilty of murdering Lee during his appeals and has been accused of hiding evidence pointing to other potential suspects from his legal team.”).

Underlying the public feud between the Attorney General and State’s Attorney is the fact that a *Brady* violation could potentially be imputed to both offices. The State’s Attorney’s Office originally prosecuted Mr. Syed, and the failure to disclose exculpatory evidence is first and foremost the fault of the trial prosecutor. But it is also true that the evidence was discovered among material in the possession of the Office of the Attorney General, which took custody of the trial and investigatory files in the course of defending Mr. Syed’s convictions before this Court and the Court of Appeals and overseeing previous DNA testing which did not connect Mr. Syed to the crimes.

The Office of the Attorney General has demonstrated an interest in this case separate and apart from the subject matter of the appeal. Attorney General Frosh has been outspoken in his efforts to absolve his office of responsibility, as well as in his public criticism of the Office of the State’s Attorney. In addition, the Office of the Attorney General has prejudged this case and announced in advance that it will be siding with the appellant. The Office of the Attorney General thus has a conflict of interest that demands that it be disqualified from representing the State. *See Sinclair v. State*, 278 Md. 243, 259, 363 A.2d 468, 478 (1976) (“[Section] 1.2(a) of The A.B.A. Project on Standards For Criminal Justice, Standards Relating To The Prosecution Function (Approved Draft, 1971) cogently declares that ‘A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties.’”); *In re J. S.*, 446 A.2d 772 (VT. 1981) holding that disqualification of prosecutor was proper where prosecutor made public statements

“indicating the state’s attorney’s personal belief in the guilt of the juvenile of an admittedly heinous crime, and stating his belief that only an out-of-state facility was the proper place of custody for J.S.”); Alex B. Long, *Of Prosecutors and Prejudice (or "Do Prosecutors Have an Ethical Obligation Not to Say Racist Stuff on Social Media?")*, 55 U.C. Davis L. Rev. 1717, 1737 (2022) (“A lawyer’s strongly-held views, biases, or personal animosity may also result in a disqualifying conflict of interest.”).

Whatever animus exists between the Attorney General and the State’s Attorney for Baltimore City, it should not be permitted to impact the current proceedings. Notwithstanding its claim to be the one and only true appellee in this case, the Attorney General is seeking to make this a one-party appeal. The Office of the Attorney General has made clear its intention to side with the appellant. By excluding Mr. Syed, no party will be left defending the order to vacate his conviction.

To be sure, Mr. Syed’s interests need not be aligned with the State’s. It may be that an independent, objective advocate for the State on appeal will take a position with which one or even both of the other parties does not agree. The Office of the Attorney General has shown that it is not able to function in that role and so should be disqualified.

In the alternative, the Court should strike the State as a party to the appeal.

In *Antoine v. State*, 245 Md. App. 521 (2020), an appeal by the victim from a ruling denying him the ability to present victim impact evidence before sentencing, the State filed a brief as an appellee in support of the appellant-victim. *Id.* at 538 n. 4. In an opinion by then-Chief Judge Fader, this Court held that the State could only participate as an *amicus curiae*. The Court explained that “parties ‘cannot properly cast themselves as appellees if



they are supporting the position of [the] appellant.” *Id.* (quoting *Matta v. Bd. of Educ.*, 78 Md. App. 264, 267 n.1 (1989)). Instead, “[o]ne who seeks to attack, modify, reverse, or amend a judgment ... is required to appeal or cross appeal from that judgment.” *Id.* (quoting *Paolino v. McCormick & Co.*, 314 Md. 575, 579 (1989)). The Court also noted the unfairness that would arise by “permitting an appellee to advocate for reversal when, as here, there is another appellee who seeks affirmance[.]” *Id.* Specifically, “[u]nless the schedule and parties are re-aligned in advance of briefing—which the State did not request here—the true appellee would be placed at a disadvantage.” *Id.*

Here, as in *Antoine*, the State, as represented by the Office of the Attorney General, has made clear that it will be proceeding as an appellee in name only. Underlying this appeal is the State’s motion to vacate Mr. Syed’s convictions. If the State is now seeking to undo the order granting its motion, it is not acting as an appellee but, rather, as an appellant. This it cannot do. Assuming it otherwise satisfies the requirements of an *amicus curiae*, perhaps the Office of the Attorney General may participate in that manner. However, the Court should not allow the Attorney General to act as an appellant in appellee clothing.

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 2,494 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 11, 2022, I emailed a copy of the foregoing Response to Attorney General’s Motion to Strike and Motion to Disqualify Office of the Attorney General as Counsel for the State of Maryland or Strike the State as a Party to the Appeal to Steven J. Kelly at skelly@sanfordheisler.com, Assistant State’s Attorney Becky K. Feldman at bfeldman@statorney.org, and Assistant Attorney General Carrie Williams at cwilliams@oag.state.md.us.

\_\_\_\_\_/s/\_\_\_\_\_  
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