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IN THE
APPELLATE COURT OF MARYLAND

SEPTEMBER TERM, 2022

NO. 1291

YOUNG LEE, AS VICTIM'S REPRESENTATIVE,

Appellant

v.

STATE OF MARYLAND AND ADNAN SYED,

Appellee

APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY
(THE HONORABLE MELISSA M. PHINN PRESIDING)

APPELLEE'S BRIEF AND APPENDIX

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APPELLEE'S BRIEF

STATEMENT OF THE CASE

The State filed the Motion to Vacate Judgment in the Circuit Court for Baltimore City on September 14, 2022. (E. 54). Mr. Syed filed his response the same day. (*Id.*). On September 16, 2022, following a scheduling conference with the parties and the Honorable Melissa Phinn, a hearing was scheduled for September 19, 2022. (E. 123). Through counsel, Appellant filed a Motion for Postponement and Demand for Rights on September 19, 2022. (E. 103-109). A hearing was held on the vacatur motion that same date. (E. 122-168). After

argument from Appellant's counsel and the State on Appellant's Motion for Postponement, the court denied Appellant's Motion. (E. 137). Appellant joined the proceedings via Zoom and made a statement to the court that was broadcast in the courtroom and to the other observers on Zoom. (E. 140-142). The court then heard from the State and Mr. Syed's counsel. (E. 143-162). The court granted the State's Motion to Vacate and vacated Mr. Syed's convictions for first degree murder (case no. 199103042), kidnapping (case no 199103043), robbery (case no 199103045), and false imprisonment (case no. 199103046). (E. 162-163, 172-173). The court further ordered that the State schedule a date for a new trial or enter a nolle prosequi of the vacated counts within 30 days of the court's order. (E. 163, 173).

Appellant noted his appeal on September 28, 2022. (E. 169). The State entered a nolle prosequi to all counts on October 11, 2022. (E. 65). On October 12, 2022, this Court ordered Appellant to show cause why his appeal should not be dismissed as moot in light of the nolle prosequi. Following responses by the Appellant and Appellees, this Court ordered that the appeal would proceed on the following issues:

1. Whether the appeal is moot;
2. Whether this Court should issue an opinion on the merits despite mootness; and
3. Whether the notice provided to Appellant complied with the applicable constitutional provisions, statutes, and rules.

Prior Proceedings

On February 25, 2000, a jury found Mr. Syed guilty of the following

offenses: first-degree murder, kidnapping, robbery, and false imprisonment (J. Wanda K. Heard, presiding). (E. 15). Judge Heard imposed a total sentence of Life plus 30 years. (E. 16).

In an unreported opinion, this Court affirmed his convictions on March 19, 2003. *Syed v. State*, No. 923, Sept. Term 2000.

On May 28, 2010, Mr. Syed filed a petition for post-conviction relief, Petition No. 10432, which he supplemented on June 27, 2010. (E. 76). In that petition, Mr. Syed raised nine allegations of ineffective assistance of trial, sentencing, and appellate counsel. *Id.* The post-conviction court issued an order and memorandum on December 30, 2013, denying all claims. *Id*.

Mr. Syed filed an application for leave to appeal, challenging the post-conviction court's findings on trial counsel's failure to investigate Asia McClain as a potential alibi witness and failure to pursue a plea deal. *Id.* After filing his application, Mr. Syed filed a supplement, requesting that this Court remand the case for the post-conviction court to consider an affidavit from Ms. McClain.[1] *Id.* The Court granted the request on May 18, 2015, and issued a limited remand, which provided Mr. Syed "the opportunity to file such a request to re-open the post-conviction proceedings" in the circuit court. *Id.*

Upon remand, Mr. Syed filed a request for the circuit court to consider an

[1] In that affidavit, Ms. McClain wrote that Assistant State's Attorney Kevin Urick convinced her not to testify at the original post conviction hearing. Ruth Tam, PBS News Hour, *'Serial' witness Asia McClain claims her testimony was suppressed* (Jan. 21, 2015), https://www.pbs.org/newshour/nation/serial-witness-asia-mcclain-claims-testimony-surpressed (last visited 1.7.23).

additional basis for his claim of ineffective assistance of counsel, as well as an alleged *Brady* violation, concerning the cell tower location evidence. *Id.* The post-conviction court granted the request to reopen his post-conviction proceedings to review the alibi and cell tower location issues. *Id.*

On June 30, 2016, the post-conviction court denied relief on the issue of counsel's failure to investigate Ms. McClain as an alibi witness. *Id.* The post-conviction court granted relief on trial counsel's failure to challenge the cell tower location evidence. *Id.* As a result, the post-conviction court vacated the convictions and granted Mr. Syed a new trial. *Id.*

The State filed an Application for Leave to Appeal. *Id.* On March 29, 2018, this Court reversed the post-conviction court's findings on each claim. *Id.* For the second time, Mr. Syed was granted a new trial. The Court held that the failure of trial counsel to call Ms. McClain as an alibi witness warranted a new trial. *Id.* However, the Court reversed the post-conviction court's holding on the cell phone tower evidence on the ground that the claim was waived because it was not raised in the initial post-conviction. *See Syed v. State*, 236 Md. App. 183 (2018).

On March 8, 2019, on Petition for Writ of Certiorari by the State, the Supreme Court of Maryland reversed and held that Ms. McClain's testimony did not warrant a new trial. *State v. Syed*, 463 Md. 60 (2019). The Supreme Court agreed with this Court that the cell phone tower issue was waived. *Id.*

Mr. Syed timely filed a Petition for Writ of Certiorari to the Supreme Court of the United States. The Petition was denied on November 25, 2019. *Syed v.*

Maryland, 140 S. Ct. 562 (2019).

On March 10, 2022, the State and Mr. Syed filed a joint motion for post-conviction DNA testing. (E. 51). The motion was granted on March 14, 2022. *Id*.[2]

QUESTIONS PRESENTED

1. Is this appeal moot where the State entered a nolle prosequi following the granting of the State's vacatur motion and the filing of Appellant's notice of appeal, and should the Court reach the merits of this moot appeal?

2. Did Appellant receive notice of the vacatur hearing where the State notified him of its investigation into Adnan Syed's innocence and its intention to file the motion to vacate and informed him of the date of the hearing as soon as practicable after the court scheduled it?

STATEMENT OF FACTS

Based on Appellant's Statement of Facts, a reader would mistakenly but reasonably conclude that Mr. Syed's innocence is at issue in this appeal. It is not. The only issues before this Court are whether the appeal is moot because Mr. Syed no longer stands charged with any crimes, whether Appellant received notice of the vacatur hearing, and whether the Court should address the issue of notice if the appeal is moot.

Nevertheless, Appellant's attacks on Mr. Syed's innocence merit a response. At trial, the State's case against Mr. Syed was based on two main pieces

[2] The first round of 2022 DNA testing of Hae Min Lee's clothing produced no forensic ties to Mr. Syed. State's Motion to Vacate, Exhibit 1. The second round of testing yielded a mixed profile from which Mr. Syed was excluded. *See* Rachel Duncan and Ashley Hinson, WBALTV News, *Baltimore prosecutors drop charges against Adnan Syed* (Oct. 12, 2022), https://www.wbaltv.com/article/adnan-syed-charges-dropped-baltimore/41585971 (last visited 1.7.23).

of evidence: (1) the inconsistent and evolving testimony of a nineteen-year-old, incentivized, cooperating co-defendant, Jay Wilds, who received a two-year suspended sentence for confessing to assisting in burying the victim's body and hiding and disposing of evidence, (E. 75), and (2) cell phone location evidence based on incoming calls to Mr. Syed's cell phone. (*Id*.). At the time of trial, the prosecution acknowledged that these pieces of evidence, independently, likely would be insufficient to persuade a jury beyond a reasonable doubt: "Jay's testimony by itself, would that have been proof beyond a reasonable doubt? Probably not. Cellphone evidence by itself? Probably not." (E. 88). Because Mr. Wilds was an admitted liar who told multiple versions of the events to the police, the cell phone evidence was critical to the State's case. As this Court noted in granting a new trial, the evidence against Mr. Syed was not overwhelming:

> The State's case was weakest when it came to the time it theorized that Syed killed Hae. As the post-conviction court highlighted in its opinion, Wilds's own testimony conflicted with the State's timeline of the murder. Moreover, there was no video surveillance outside the Best Buy parking lot placing Hae and Syed together at the Best Buy parking lot during the afternoon of the murder; no eyewitness testimony placing Syed and Hae together leaving school or at the Best Buy parking lot; no eyewitness testimony, video surveillance, or confession of the actual murder; no forensic evidence linking Syed to the act of strangling Hae or putting Hae's body in the trunk of her car; and no records from the Best Buy pay phone documenting a phone call to Syed's cell phone. In short, at trial the State adduced no direct evidence of the exact time that Hae was killed, the location where she was killed, the acts of the killer immediately before and after Hae was strangled, and of course, the identity of the person who killed Hae.

Syed, 236 Md. App. at 153.

The calls that were used to place Mr. Syed in Leakin Park at the time when the State alleged that he was burying the victim were not reliable for location. However, this Court did not consider the issue on the merits because it found that the issue, ineffective assistance of trial counsel for failing to cross examine the State's cell phone expert with the fax cover sheet, which indicated that incoming calls were not reliable for location, was waived for not raising it in the initial post-conviction. (E. 76).[3] As part of its investigation, the State consulted with three experts who independently concluded, based on their experience with and knowledge of the technology at issue, that, consistent with the fax cover sheet disclaimer, the incoming calls in this case were, in fact, not reliable for location. (E. 87; State's Motion to Vacate at Exhibit 7). In addition, after consultation with a polygraph expert, the State found that one alternative suspect was improperly cleared as a suspect based on initial results that indicated deception and a different, second test that is not used as a stand-alone test to determine deception. (E. 83).

Most significantly, the State located two documents in its file that it determined to be information that was conveyed to the prosecutor about threats made against the victim by a person other than Mr. Syed. (E. 79-80). The State concluded that this information should have been turned over to Mr. Syed, under

[3] An affidavit from the State's cell phone expert at trial, which was admitted at the post-conviction hearing and was also Exhibit 5 to the vacatur motion, stated that he would not have testified at trial that the location evidence was accurate if Assistant State's Attorney Kevin Urick had told him about or shown him the fax cover sheet disclaimer which accompanied the records. (E. 85; State's Motion to Vacate at Exhibit 5).

Brady v. Maryland, 373 U.S. 83 (1963), but was not. (E. 80). The State provided the court with a sworn affidavit, which was admitted as State's Exhibit 1 during the vacatur hearing, that detailed the manner and timeline during which the documents were discovered. (E. 146-150). That the prosecutor who is responsible for committing these *Brady* violations has since provided the press with an unsworn, self-serving, nonsensical explanation to defend his actions is not before this Court.[4] (Appellant's Brief, at 9-10).

Appellant's recounting of the events surrounding the filing and granting of the State's motion to vacate is equally problematic. As the State presented in its sworn affidavit at the vacatur hearing, the State's review of the case began in October of 2021. (E. 147). Based on that review, the State and Mr. Syed jointly moved for DNA testing of the victim's clothing on March 10, 2022. (E. 144). Before that petition was filed, the State contacted Appellant to advise him in advance of the filing and to answer any questions he might have. (E. 136). Thus, the State first notified Appellant in the spring of 2022 that it was reviewing the case and believed DNA testing was warranted in light of the evidence, a full six months before the vacatur motion was filed.

[4] It bears mentioning that even in his protestations, Urick did not assert that he turned over the document. Instead, he offered an after-the-fact explanation that the "he" in the note who made the threat against the victim was Mr. Syed. This explanation strains credulity, both logically and linguistically. If it were true, the rules required the State to turn it over as a statement by the defendant if the State intended to use it. Md. Rule 4-263(d)(1). The statement would have been admissible against Mr. Syed as a statement against interest. Yet, the prosecution inexplicably failed to make use of Mr. Syed's alleged guilty statement to an innocent bystander who, unlike Mr. Wilds, was not involved in the crime.

On September 12, two days before it moved to vacate Mr. Syed's conviction and before the State's statutory notice obligations were triggered by a scheduled hearing, the State called Appellant to inform him of its intention to file the motion. (E. 124). The State then spoke with Appellant by telephone on September 13 and explained what was happening in the case, discussed with him the new information it had developed, and reviewed the motion. (*Id.*). During that conversation, the State's representative also advised Appellant that there would be a hearing on the motion, provided Appellant with her email, cell phone and office numbers, and told Appellant to contact her at any time. (E. 134, 136). The State then emailed a copy of the motion to Appellant. (*Id.*). In that email, the State referenced the information discussed in the phone call about the alternative suspects, offered to share the status of the investigation as it moved forward, and invited Appellant "to reach out" with questions "at any time." (E. 180). Appellant replied to the State's email that same day, expressing his disagreement with the decision to seek vacatur but also stating that he understood the State's position and its obligation to "do due diligence and cover all possibilities." (E. 179-180). The State responded promptly by acknowledging Appellant's position and apologizing for the pain that the case was causing Appellant. (E. 179).

Almost immediately following a scheduling conference on September 16 (which Appellant mischaracterizes as a "[s]ecretive, ex parte proceeding"), (Appellant's Brief, at 7)), the State emailed Appellant to notify him of the date and time of the vacatur hearing. During that scheduling conference, the court

conducted an in-camera review of the *Brady* material the State admitted not having turned over to the defense at trial. (E. 150, 172). The State notified Appellant of the vacatur hearing as soon as was practicable and informed him that, while the hearing would be in-person, it wanted to ensure that he was able to observe the proceedings and so was providing him a Zoom link so that he and his family would have the option of attending remotely. (E. 123, 179). Appellant did not respond to that email. (E. 123).

On September 18, having not heard back from Appellant, the State reached out to him again by text message to confirm that he received the State's previous email and was aware of the hearing. (E. 123, 181). Appellant responded this time, acknowledging receipt of the State's email informing him of the hearing and stating that he would "be joining" via the provided Zoom link. (E. 182). Despite being informed as of September 13 that a hearing would be scheduled and that the hearing would be in-person, at no point did Appellant mention to the State that he wished to attend in-person. (E. 125, 134). On this point, the court at the vacatur hearing noted that, had Appellant communicated to the State that he wished to attend in-person before the afternoon of the hearing, as opposed to advising the State that he would attend by Zoom, the hearing would have been rescheduled to accommodate Appellant's wishes. (E. 130, 131). The court also found that Appellant had sufficient time to consult with an attorney from the time that the State began communicating with him about the motion. (E. 137).

On October 11, after the DNA results excluded Mr. Syed as a contributor

but yielded a mixed profile, the State entered a nolle prosequi to the charges.[5] (E. 65). Again, without statutory obligation, the State reached out to Appellant to advise him of the nolle prosequi. (Appellant's Brief, at 11).

INTRODUCTION TO ARGUMENTS

In its Order, this Court directed the parties to brief the issue of whether "the notice Mr. Lee received in advance of the circuit court's vacatur hearing complied with the applicable constitutional provisions, statutes, and rules[.]" (Order, November 4, 2022). But Appellant's chief complaint in his brief does not concern notice. He asserts that, "[i]f the State's allegations at the vacatur hearing had truly been new and persuasive, Mr. Lee would not have objected to vacatur." (Appellant's Brief, at 22). In other words, Appellant finds fault with the *outcome* of the vacatur hearing, and that is what he seeks to change.

The procedural vehicle through which Appellant seeks to undo the results of the vacatur hearing – a remand for a new hearing at which he would be "permitted to present evidence, call witnesses, and challenge the state's evidence and witnesses" (Appellant's Brief, at 24) – is unprecedented. Only a party may exercise the rights he now demands. At least six times in his brief, Appellant declares himself a "party" to the case. *Id.* at 12, 15, 17, 24, 30, 33. He is not.

While Maryland law recognizes, as it should, that victims are entitled to be treated "with dignity, respect, and sensitivity," Md. Decl. of Rts. Art. 47(a),

[5] *See* Alex Mann, *State's Attorney Mosby says DNA test results will determine whether she drops Adnan Syed's charges*, Baltimore Sun (Sep. 27, 2022).

Maryland law does not recognize victims as "parties." The very provision giving Appellant the right to appeal says this explicitly: "***Although not a party to a criminal or juvenile proceeding***, a victim of a crime for which the defendant or child respondent is charged may file an application for leave to appeal to the Court of Special Appeals from an interlocutory order or appeal to the Court of Special Appeals from a final order that denies or fails to consider a right secured to the victim[.]" Md. Code, Crim. Proc. Art. § 11-103(b) (emphasis in original); *see also Griffin v. Lindsey*, 444 Md. 278, 281 (2015) ("In Maryland, a victim is not a party to a criminal prosecution."). Victims do not prosecute charges, they do not decide which witnesses to call, and they do not cross-examine those witnesses. Giving Appellant what he wants will not just result in the re-imprisonment of Mr. Syed for a crime he did not commit, it will wreak havoc on our criminal justice system.

Even if Appellant has standing to challenge the merits of the vacatur, which he does not, he waived that argument when he informed the court below, "I'm not prepared, nor do I want to address the merits of the motion, Your Honor. I'm here strictly as a matter of victim's rights. Strictly on the issue of the right of this family to meaningfully participate." (E. 128). Md. Rule 8-131(a); *Sifrit v. State*, 383 Md. 116 (2004) (If the argument at trial has a different basis than the argument on appeal, the issue is not preserved for appellate review); *Graham v. State*, 325 Md. 398 (1992) (An appellate court will not decide an issue not raised and decided at trial).

Before he can press the merits of his position, Appellant must first

overcome another obstacle: Mr. Syed is not a defendant in a criminal case. When the State nol prossed the charges, there ceased to exist a case against Mr. Syed. Appellant devotes significant time to addressing whether double jeopardy presents a bar to a reversal of the vacatur order. (Appellant's Brief, at 26-29). This is a red herring. The appeal is not moot because of principles of double jeopardy; it is moot because there is no underlying case left in which to order a remand and because the nolle prosequi occurred after Appellant noted his appeal and thus is not part of the judgment under review.

The Court should dismiss the appeal as moot and decline to address the merits. If the Court does not dismiss the appeal, it should deny Appellant's request that he be given party status, hold that Appellant received notice of his right to attend the vacatur hearing, and affirm the order vacating Mr. Syed's convictions.

ARGUMENT

I. Because the underlying case was ended by the entry of a nolle prosequi subsequent to the filing of the notice of appeal, this Court should dismiss the appeal as moot and decline to reach the merits.

This appeal is moot as there is no effective relief the Court can provide Appellant following the State's dismissal of the charges against Mr. Syed. According to Appellant, "[t]he only limitation on this Court's grant of relief is that it must not violate the protection against double jeopardy." (Appellant's Brief, at 26). Appellant is incorrect. While double jeopardy may be the only limitation mentioned in Criminal Procedure Article § 11-103, there are other limitations on

this Court's authority. "A case is considered moot when 'past facts and occurrences have produced a situation in which, without any future action, any judgment or decree the court might enter would be without effect.'" *La Valle v. La Valle*, 432 Md. 343, 351 (2013) (quoting *Hayman v. St. Martin's Evangelical Lutheran Church*, 227 Md. 338, 343 (1962)); *see also Suter v. Stuckey*, 402 Md. 211, 219 (2007) (holding that appeal was moot where "[e]ven were we to agree with respondent, there is no possible relief that could be granted"). To be clear, a case may become moot as a result of the lawful dismissal of charges. *See Hooper v. State*, 293 Md. 162, 169 (1982) (recognizing that "if the State decided not to wait until the trial on the informations, but were to abandon the prosecution on the indictments before that time, the case would become moot because of the abandonment or nol pros"); *Mitchell v. State*, 369 P.3d 299, 307 (Idaho 2016) (holding that appeal in which victim alleged violation of his rights was moot where "[t]he underlying criminal charges against [the criminal defendant] have been dropped" and so "[a] judicial determination on this issue would therefore have no practical effect on the outcome: there are no further proceedings for which [the victim] could request or receive notice.").

That this appeal is moot flows independently from two sources. *First*, as of October 11, 2022, Mr. Syed is not a defendant in a criminal case. Appellant seeks reinstatement of convictions in a case in which there are no existing charges. *Second*, Appellant has no right to mount an appellate challenge to the State's decision to enter a nolle prosequi. Section 11-103 of the Criminal Procedure

Article provides victims only the right to appeal from a court order. Since the dismissal of charges did not involve a court order, Appellant could not appeal from it, and this Court should not indirectly grant relief to which Appellant would not be entitled directly.

A. The lawful dismissal of Mr. Syed's charges ended the criminal case against him.

In its Response to Mr. Syed's Motion to Disqualify, the Attorney General acknowledged that "the State's Attorney's decision to nol pros the charges against Mr. Syed. . ." mooted the appeal. (State's Response to Motion to Disqualify, at 53). Nothing has changed since the Attorney General took that position other than the passage of time. The State's Attorney indicated after the vacatur hearing that it would dismiss the charges if DNA evidence excluded Mr. Syed. *See* Mann, *State's Attorney Mosby says DNA test results will determine whether she drops Adnan Syed's charges*. The State's Attorney kept her word, and Mr. Syed remains today a free man with no pending charges. The appeal was moot then, just as it is moot now.

It is uncontroverted that the State acted lawfully in entering the nolle prosequi. "[E]ntering a nolle prosequi is a part of the 'broad discretion vested in the State's Attorney.'" *State v. Simms*, 456 Md. 551, 561 (2017) (quoting *Food Fair Stores, Inc. v. Joy*, 283 Md. 205, 214 (1978)); *accord State v. Smith*, 223 Md. App. 16, 28 (2015). So long as the State acts prior to final judgment, the only limitation on its authority to enter a nolle prosequi is that the dismissal not impair

the defendant's right to a fair and speedy trial. *Simms*, 456 Md. at 562-63, 576; *see also* Md. Rule 4-247(a) ("The State's Attorney may terminate a prosecution on a charge and dismiss the charge by entering a nolle prosequi on the record in open court."). Also relevant to this case is Rule 4-333, which implements the vacatur statute, § 8-301.1 of the Criminal Procedure Article. Under Rule 4-333, the State, within 30 days after a court grants a motion to vacate a conviction, "*shall* either enter a nolle prosequi of the vacated count or take other appropriate action as to that count." Md. Rule 4-333(i) (emphasis added).

In this case, the circuit court granted the State's motion to vacate on September 19, 2022. At that time, Mr. Syed no longer stood convicted of an offense, so the State had the authority to enter a nolle prosequi, and it was required under Rule 4-333 to decide whether to exercise that authority within 30 days. The circuit court echoed the requirements of the rule in its September 19 order granting the vacatur and "[o]rder[ing] that the State schedule a date for new trial or enter nolle prosequi of the vacated counts within 30 days of the date of this Order." (E. 173). Approximately three weeks after the vacatur hearing, the State elected to enter a nolle prosequi, thereby putting an end to its prosecution of Mr. Syed.[6]

[6] Neither the circuit court nor this Court had ruled on Appellant's motion to stay the vacatur order when the State dismissed Mr. Syed's charges, so there is no need for this Court to determine whether the State would have had authority to enter a nolle prosequi had a stay been issued. Nevertheless, it bears noting that Article 47 of the Maryland Declaration of Rights provides that "[n]othing in this Article … authorizes a victim of crime to take any action to stay a criminal justice proceeding." Md. Decl. of Rts. Art. 47(c). *See Hoile v. State*, 404 Md. 591, 627

Appellant attempts to sidestep the State's lawful authority and obligation to nol pros the charges when he argues that the "entry of nolle prosequi does not moot the right to a compliant hearing because the State had no authority to nolle pros but for the deficient vacatur hearing." (Appellant's Brief, at 12). This case is unlike *Simms*, *supra*, cited by Appellant in his brief. During the pendency of Simms' direct appeal from his conviction and sentence, the State nol prossed the charges against him. On petition to the Supreme Court of Maryland, the State argued that it had the authority to enter a post-judgment nolle prosequi, and that the effect of its action was to render the appeal by Simms moot. *Simms*, 456 Md. at 557. The Court rejected the State's argument, holding that the State does not have the authority to enter a nolle prosequi after a defendant has been convicted and sentenced, and so "the nol pros entered in the trial court as to the charge underlying the conviction and sentence was simply a nullity, 'improper' and therefore 'ineffective.'" *Id*. at 576 (citing *Friend v. State*, 175 Md. 352, 356 (1938)). The Court reasoned that the State sought to dismiss the charges at a time when the charges were "no longer pending" as "[f]inal judgment terminate[d] the case in the trial court." *Id.* at 578.

Here, assuming for the sake of argument that the State should not have exercised its authority to dismiss the charges because of what Appellant alleges was a "deficient vacatur hearing," it does not follow that the State lacked the

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(2008) (discussing "Article 47's express prohibition on a court permitting a victim to 'stay a criminal justice proceeding.").

authority to enter a nolle prosequi. To the contrary, unlike in *Simms*, the entry of nolle prosequi was not "'void *ab initio* for lack of jurisdiction to enter it.'" *Cottman v. State*, 395 Md. 729, 742 (2006). Because it acted after the court vacated Mr. Syed's convictions, the State had the authority to dismiss the charges regardless of whether it derived that authority from a vacatur hearing that, according to Appellant, did not comply with his right to notice. Put another way, the act of entering the nolle prosequi was lawful and put an end to the then-extant prosecution of Mr. Syed. *See Hooper*, 293 Md. at 1701 ("The nol pros of a charging document or of a count is 'a final disposition' of the charging document or count; 'there can be no further prosecution under the nol prossed charging document or count; the matter is 'terminated' at that time; and the accused may be proceeded against for the same offense only under a new or different charging document or count.") (cleaned up). Appellant cites no support for the proposition that this Court can undo a lawfully entered nolle prosequi and override the State's decision not to charge Mr. Syed. *Cf. id.* at 171 (holding that State was not permitted to "withdraw a nolle prosequi or have a nol prossed indictment reinstated" as this "would be flatly inconsistent with the nature of a nolle prosequi under Maryland law").

Appellant's reliance on *Antoine v.* State, 245 Md. App. 521 (2020), is similarly misplaced. At issue in *Antoine* was whether the circuit court denied the victim his right to present victim impact evidence at sentencing when the court bound itself to a negotiated plea agreement without hearing from the victim.

Holding that the circuit court violated the victim's right, this Court turned to the question of what it could do to remedy the violation. The victim requested that this Court vacate both the acceptance of the defendant's plea and the sentence to which the court bound itself when it approved the plea agreement. *Id.* at 548. Finding the requested relief overbroad, the Court instead chose to vacate only the circuit court's approval of the plea agreement – in essence, to remand for resentencing – so that the victim could present victim impact evidence before the court determined whether the negotiated sentence was appropriate. *Id.* at 555-57.

Antoine stands for the proposition that an appellate court may order a new sentencing proceeding to remedy a violation of a victim's right to present victim impact evidence prior to sentencing. Nothing in *Antoine* authorizes the remedy Appellant seeks in this case: reversal of an order granting the State's motion to vacate a conviction based on new information calling the integrity of the conviction into question. More importantly, nothing in *Antoine* supports the proposition that an appellate court can provide that remedy after the State has acted lawfully to dismiss the underlying criminal case through entry of a nolle prosequi.

In order to grant Appellant the relief he requests, this Court would need to: (1) direct the State to reinstate the charges against Mr. Syed; (2) reverse the circuit court's order vacating Mr. Syed's convictions; and (3) direct the circuit court to reinstate Mr. Syed's convictions pending a new vacatur hearing. Even if the Court can and should take the latter two actions, it still may not take the first. The State

had the sole discretion to decide whether to enter the nolle prosequi. Because it acted lawfully, its decision may not be disturbed. Since reversal of the vacatur order alone would not provide Appellant the relief he seeks, his appeal is moot.[7]

B. Appellant may not seek appellate review of the entry of nolle prosequi.

Additionally, this appeal is moot because Appellant may not challenge the entry of a nolle prosequi on appeal. Under § 11-103 of the Criminal Procedure Article, a victim, "[a]lthough not a party to a criminal or juvenile proceeding, … may file an … appeal to the Court of Special Appeals *from a final order* that denies or fails to consider a right secured to the victim[.]" Md. Code, Crim. Proc. Art. § 11-103(b) (emphasis added). The only appealable "order" was the vacatur order entered on September 19. Therefore, that is the only order before this Court. The entry of nolle prosequi was not done by order of the circuit court but by action of the State, so it is not before this Court and not subject to appellate review.[8]

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[7] Appellant adds that he suffers "collateral consequences" from the order of vacatur in that it deprived him and his family of "closure." (Appellant's Brief, at 29 n. 11). The need for closure following the murder of a loved one is undeniable. However, reversal by this Court and reinstatement of Mr. Syed's convictions cannot provide that closure. Putting Mr. Syed back in prison will not lay to rest the questions about the integrity of his convictions.

[8] To be sure, if Appellant had the right to appeal from the dismissal of the charges, he did not do so, and so the result would be the same: the entry of the nolle prosequi is not before this Court. *Compare Cnty. Comm'rs of Carroll Cnty. v. Carroll Craft Retail, Inc.*, 384 Md. 23, 45-46 (2004) (dismissing writ of certiorari as improvidently granted where petitioner failed to note appeal from subsequent order of circuit court striking notice of appeal) *with In re Emileigh F.*, 355 Md. 198, 201-02 (1999) (granting relief on appeal from order of circuit court terminating its jurisdiction during pendency of earlier appeal).

Because Appellant had no right to appeal from the October 11 dismissal of charges, he may not ask this Court to reverse the nolle prosequi. *See Mateen v. Saar*, 376 Md. 385, 406 (2003) (holding that Court would not correct an illegal sentence as State had "no right to challenge [it] on appeal" and "[w]e cannot do indirectly what the State could not ask for directly"). The dismissal of Mr. Syed's charges is not subject to appellate review. For this reason as well, the appeal is moot.

C. No exception to the mootness doctrine applies.

Ordinarily, dismissal is appropriate when an appeal has become moot. *See Mercy Hosp., Inc. v. Jackson*, 306 Md. 556, 562 (1986) ("[G]enerally when a case becomes moot, we order that the appeal or the case be dismissed without expressing our views on the merits of the controversy."); *State v. Ficker*, 266 Md. 500, 506-07 (1972) ("Appellate courts do not sit to give opinions on abstract propositions or moot questions, and appeals which present nothing else for decision are dismissed as a matter of course.").

Nevertheless, "in rare instances which demonstrate the most compelling of circumstances," this Court will address the merits in a case that is moot. *Mercy Hosp., Inc.*, 306 Md. at 562 (quoting *Reyes v. Prince George's Cnty.*, 281 Md. 279, 297 (1977)). The "'rare instances' when the Court will express its views in moot controversies" include cases in which "'the public interest clearly will be hurt if the question is not immediately decided, [] the matter involved is likely to recur frequently, and … upon any recurrence, the same difficulty which prevented

the appeal at hand from being heard in time is likely again to prevent a decision[.]'" *Id.* at 562-63 (quoting *Lloyd v. Supervisors of Elections*, 206 Md. 36, 43 (1954)). There are two exceptions to the mootness doctrine:

> First, this Court may address the merits of a moot case if the controversy is "'capable of repetition but evading review.'" *Id.* at 277, 146 A.3d 1223 (quoting *Sanchez v. Potomac Abatement, Inc.*, 198 Md. App. 436, 443, 18 A.3d 100 (2011)). "This exception applies when '(1) the challenged action was too short in its duration to be fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Powell*, 455 Md. at 541, 168 A.3d 857 (quoting *State v. Parker*, 334 Md. 576, 585–86, 640 A.2d 1104 (1994)).
>
> Second, courts may review an otherwise moot controversy "if the issue is of public importance and affects an identifiable group for whom the complaining party is an appropriate surrogate." *Id.*

State v. Crawford, 239 Md. App. 84, 113 (2018).

Appellant argues that both exceptions apply. (Appellant's Brief, at 30). He starts from the uncontroversial premise that "[p]ost conviction rights for crime victims are a serious matter," but then pivots to the conclusion that "[t]his appeal is important because, without appellate guidance, such protections could be eroded in any future application of the Vacatur Statute, effectively reversing this Court's precedent in *Antoine*." (Appellant's Brief, at 31). Appellant is correct that victims' rights are a matter of public concern. But it does not follow that victims are at risk of losing their rights if this Court does not opine on the merits in this case.

As discussed in Argument II in this brief, the vacatur statute and rule unambiguously confer upon victims the right to notice of and the right to attend

hearings on motions to vacate. This is not a case in which the parties or court took the position that Appellant was not entitled to these rights. Appellant received notice and exercised his right to attend. Not only was Appellant not entitled to the additional rights he now seeks ("to present evidence, call witnesses, and challenge the state's evidence and witnesses"), when he had the chance, his attorney expressly disclaimed any intention of challenging the merits of the vacatur motion. (E. 128: "I'm not prepared to address *nor do I want to address the meris of the motion*, Your Honor. I'm here strictly as a matter of victim's rights.") (emphasis added).

Moreover, as discussed above, the Court's holding in *Antoine* that a court may order a resentencing in the event of a violation of a victim's right to present victim impact evidence does not apply in this case. Appellant identifies no reason to believe that *Antoine* is at risk of being "effectively revers[ed]." Certainly, nothing in this case, which does not involve a procedural challenge to a sentencing hearing, raises such a concern.

Appellant argues in the alternative that the issue in this case is capable of repetition but will evade review. Appellant alludes to a "looming wave" of vacatur cases in which victims' rights are at risk of being violated. (Appellant's Brief, at 32). Yet, Appellant points to no other case like his even though hundreds of vacatur motions have been litigated just in Baltimore City during the three years since the General Assembly enacted the vacatur statute. *See* Report of the Commission to Restore Trust in Policing (Dec. 2, 2020), at 98 ("As of October 28,

2020, the Office of the State's Attorney has filed motions to undo/set aside criminal convictions in approximately 759 cases.").[9] Despite the number of motions which have been heard, Mr. Syed is aware of only one other appeal, *Walker v. State*, No. 2418, September Term 2019 (filed Feb. 9, 2021), a case which involved an appeal by *the defendant*.[10] Tellingly, Appellant also ignores the fact that, like *Walker*, many vacatur cases involve victimless crimes.[11]

Nor is Appellant correct that violations of victims' rights are likely to escape review if the Court dismisses his appeal. First, assuming a stay of a vacatur order may be appropriate and that a victim would be entitled to seek a stay notwithstanding the language in Article 47(c), obtaining a stay is a mechanism by which a victim can seek appellate review without the case becoming moot. Second, our circuit and district courts take pains to ensure that victims' rights are complied with. If a court denies a motion to vacate on the ground of non-compliance, either the State or the defendant can appeal, and the victim may

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[9] http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnRstrTrustPol/Commission-to-Restore-Trust-in-Policing-Final-Report.pdf (last visited 1.8.23).

[10] In accordance with Rule 1-104, Mr. Syed does not cite *Walker* as precedent or persuasive authority, and he attaches a copy of the opinion in the appendix to his brief.

[11] This is not to say that the *cases* are victimless. The vacatur statute was enacted, in part, to enable prosecutors to provide relief for the scores of individuals who were the victims of police misconduct. *See* Lea Skene, *How two new Maryland laws paved the way for Adnan Syed's long-awaited release from prison*, Baltimore Sun (Sep. 25, 2022) (noting that "[l]awmakers passed the legislation largely in response to the Baltimore Police Department's Gun Trace Task Force corruption scandal, which left thousands of potentially faulty convictions in its wake.").

participate in that appeal with respect to the question of whether their rights were violated. *See* Md. Code, Crim. Proc. Art. § 8-301.1(h) ("An appeal may be taken by either party from an order entered under this section."); Md. Rule 8-111(c) ("Although not a party to a criminal or juvenile proceeding, a victim of a crime or a delinquent act or a victim's representative may … participate in the same manner as a party regarding the rights of the victim or victim's representative.").

For all of the above reasons, the exceptions to the mootness doctrine are not met in this case. Therefore, dismissal is appropriate "as a matter of course." *Ficker*, 266 Md. at 506–07.

II. Appellant received advance notice of the vacatur hearing, attended the hearing, and was permitted to participate as a non-party.

If this Court reaches the merits of the notice issue, then the Court should affirm the decision below for three reasons: (1) the State's victim notification complied with the applicable constitutional provisions, statutes, and rules; (2) the victim's representative has the right to be notified and attend, but does not have a right to participate in collateral review proceedings involving legal arguments such as post-conviction proceedings, petitions for writ of actual innocence, and vacatur under Criminal Procedure Article § 8-301.1; and (3) the victim's representative did attend and participate in the vacatur proceeding via Zoom.

A. Standard of review

Appellant's argument that he was not given sufficient notice and that he had a right to participate involves a question of statutory and rule construction,

which the Court reviews de novo. *Xu v. Mayor of Baltimore*, 254 Md. App. 205, 211, *cert. denied sub nom. Mayor & City Cncl. of Baltimore v. Xu*, 479 Md. 467 (2022).

B. The State notified Appellant of the vacatur hearing.

The State notified the victim's representative of the vacatur hearing as soon as was practicable as required by the relevant statute and rule.[12] The statute and rule require that the State notify the **defendant** at the time of filing, but neither contains a parallel requirement that the State notify the victim's representative at the time of filing. Md. Code, Crim. Proc. Art. § 8-301.1(c)(1); Rule 4-333(e). Appellant's criticism of the State for not notifying him **before** moving to vacate is both inaccurate and without support in the law. (Appellant's Brief, at 16).

Despite his complaint to the contrary, *see, e.g.*, (Appellant's Brief, at 7), Appellant was first advised that the State was taking another look at this case in March of 2022 when the State contacted Appellant about the joint motion for DNA testing. (E. 136). This filing was also covered nationally in the press. *See*

[12] There is no evidence in the record that the victim's representative submitted a notification request form. Criminal Procedure Article § 11-102 provides that a "victim's representative who has filed a notification request form under § 11-104 of this subtitle has the right to attend any proceeding in which the right to appear has been granted to a defendant." The procedures for filing the notification form, also referred to as the Crime Victim Notification Form (CVNF), are detailed in § 11-104. The State's duty to notify the victim or victim's representative of each court's proceeding is triggered by the CVNF. Md. Code, Crim. Proc. Art. § 11-104(f)(1)(ii). Neither counsel for the victim's representative, the Office of the State's Attorney for Baltimore City, nor the Office of the Attorney General have referenced or moved into the record any evidence that a CVNF was completed and on file in this case. Regardless, the failure to fill out the form is not dispositive of the issue. *See Antoine*, 245 Md. App. at 545.

Neil Vigdor, *New DNA Testing in the 'Serial' Case*, New York Times (March 10, 2022); Rebekah Riess, Amanda Watts and Elizabeth Joseph, *Adnan Syed, subject of 'Serial' podcast, and prosecutors are requesting additional DNA testing in the case*, CNN (March 11, 2022).[13]

Although it was not required to do so, the State thereafter called Appellant on September 12 to notify him of its intent to file the vacatur motion. (E. 124). The State spoke with Appellant about its intention to file the motion the following day, September 13. (*Id.*). During that conversation, the State advised Appellant that there would be a hearing on the motion. (E. 134, 136). That same day, the State emailed a "draft of the motion" to Appellant and invited him "to reach out" with questions "at any time." (E. 136, 180). At no point in the back-and-forth discussion that followed did Appellant indicate that he intended to attend the hearing, in-person or otherwise.

Following the scheduling hearing on September 16, the State promptly emailed Appellant to notify him of the date and time of the vacatur hearing. The State let him know that the hearing would be in-person and provided him with a Zoom link so that he and his family would have the option of attending remotely if they chose. (E. 123, 179). Appellant did not respond to the State's email. (E. 123). On September 18, having not heard back from Appellant, the State reached out to him again by text message to confirm that he received the State's email and was

[13] https://www.cnn.com/2022/03/11/us/adnan-syed-baltimore-city-prosecutors-additional-forensic-testing/index.html (last visited 1.7.23).

aware of the hearing. (E. 123, 181). Appellant responded this time, acknowledging receipt of the email and stating, for the first time, that he would be attending the hearing and that he would do so by "joining" via the provided Zoom link. (E. 182).

Appellant thus received the notice to which he was entitled by statute and rule. Criminal Procedure Article § 8-301.1(d)(1) references §§ 11-104 and 11-503 and requires the State to notify the victim or victim's representative before a hearing. Section 11-104(f)(1) requires prior notice of each court proceeding. Section 11-503(a)(7) likewise requires notice of postsentencing court proceedings. Rule 4-333(g)(2), meanwhile, requires the State to provide the victim or victim's representative with written notice of the vacatur hearing that "contain[s] a brief description of the proceeding and inform[s] the victim or victim's representative of the date, time, and location of the hearing and the right to attend the hearing." The State complied with these requirements by calling, emailing, and texting Appellant to notify him of the hearing, the date, time, and location, and facilitating his attendance by providing a Zoom link.

C. Appellant had a right to attend, but not participate in, the vacatur hearing.

The vacatur statute is unambiguous and establishes a victim's or victim's representative's rights to be notified of and to attend the hearing. Neither it nor any other statute provides a victim or victim's representative with the right to participate in collateral review proceedings involving legal arguments, as was the case here.

"To ascertain the intent of the General Assembly, we begin with the normal, plain meaning of the language of the statute." *Lockshin v. Semsker*, 412 Md. 257, 275 (2009) (cleaned up). The vacatur statute first provides the right to be notified before a hearing and references §§ 11-104 and 11-503. Md. Code, Crim. Proc. Art. § 8-301.1(d)(1). It then provides "the right to attend a hearing on a motion filed under this section, as provided under § 11-102 of this article." The vacatur statute does not provide the victim or victim's representative with the right to make a victim impact statement or to participate in any other way. Section 11-104(f)(1) spells out the obligation of the State to give the victim prior notice of each court proceeding in the case, of the terms of any plea agreement, and of the right of the victim to submit a victim statement to the court **under § 11-402**. Section 11-402, as its title suggests, deals only with the "[i]nclusion of victim impact statement[s] in presentence investigation[s]." Section 11-503, entitled "Notice of subsequent proceedings," does no more than define what constitutes a subsequent proceeding, which includes "any other postsentencing court proceeding." Md. Code, Crim. Proc. Art. § 11-503(a)(7).

Appellant alleges that the circuit court violated § 11-403. (Appellant's Brief, at 11, 13-14, 19-20). However, that statute, entitled "Right of victim or victim's representative to address court during sentencing or disposition hearing," has no applicability to a vacatur hearing. It applies only to a "sentencing or disposition hearing," which the statute defines as "a hearing at which the imposition of a sentence, disposition *in a juvenile court proceeding*, or alteration

of a sentence or disposition *in a juvenile court proceeding* is considered."[14] Md. Code, Crim. Proc. Art. § 11-403(a) (emphasis added). Unlike at a sentencing or disposition hearing under § 11-403, a victim or victim's representative does not have a right to provide a victim impact statement at a vacatur or other collateral proceeding[15] that does not involve a discretionary decision that impacts a defendant's sentence or restitution.

If the Legislature had intended to afford a victim or victim's representative the right to provide a victim impact statement at a vacatur hearing, it would have done so as it did for sentencing and sentencing-related proceedings. "The principles of applying a plain meaning approach include consideration of the doctrine of '*expression unius est exclusio alterius'* (the expression of one thing is the exclusion of another)." *Hudson v. Housing Authority of Baltimore City*, 402 Md. 18, 30 (2007) (cleaned up). *See also Maryland-Nat'l Cap. Park & Plan. Comm'n v. Anderson*, 164 Md. App. 540, 577 (2005), *aff'd*, 395 Md. 172 (2006) (holding that inclusion of language providing for right in one provision but not in related provision "underscores that the absence of comparable language … was by design").

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[14] Despite Appellant's assertion that a vacatur is a "disposition" under § 11-403, (Appellant's Brief, at 20), a "sentencing" in juvenile proceedings is referred to as a "disposition hearing." *See* Md. Code, Cts. & Jud. Proc. Art. § 3-8A-01(p).

[15] Examples of other collateral proceedings at which a victim or victim's representative has a right to notice and to attend include proceedings governed by the Uniform Post Conviction Procedure Act and the Petition for Writ of Actual Innocence Statute. *See* Md. Code, Crim. Proc. Art. §§ 7-105, 8-301(d)(1), 8-301.1(d)(1).

Another sign of legislative intent is where amendments are proposed but not adopted. *Hudson*, 402 Md. at 32. Appellant's Response to this Court's Order to Show Cause Why Young Lee's Appeal Should Not Be Dismissed as Moot contains the House Bill File of the vacatur statute as Exhibit C. Page 74 of that exhibit contains a markup of the bill by Baltimore County State's Attorney Scott Shellenberger, emailed from Senate Sponsor Chris West to House Sponsor Erek Barron. Handwritten into the provision describing a victim's or victim's representative's right to attend the hearing is a proposal to also provide a "right to be heard at the hearing." However, this verbiage was not adopted. This indicates that the General Assembly chose not to include this provision in the law.

D. Even assuming Appellant had a right to participate, he did so.

Ultimately, the victim's representative attended the hearing on the State's motion to vacate via Zoom and addressed the court. The court below found, correctly, that attendance at hearings via Zoom is commonplace since the COVID pandemic and that appearing via Zoom was, in fact, attendance. (E. 129, 138). Appellant provides no relevant authority to the contrary.

Moreover, Appellant addressed the court during the proceedings, and his remarks were broadcast over the speakers in the courtroom.[16] (E. 140-142). The

[16] Although Appellant asserts that he made his statement "with no opportunity to confer with counsel" (Appellant's Brief, at 9), Appellant's counsel failed to make this request of the court before his client addressed the court. Regardless, Appellant's counsel presumably conferred with his client when he called him during the hearing and had the opportunity to do so further during the interceding

court did not limit the length or substance of Appellant's remarks, acknowledged how difficult the day must be for him, and noted the importance of hearing from victims. (E. 142). The transcript of the hearing thus reflects that the court did not rule on the State's motion until after it had been assured that Appellant had received notice of the hearing and had the opportunity to address the court.

Appellant nevertheless argues before this Court, for the first time, that the court below should have "permitted [him] to present evidence, call witnesses, and challenge the state's evidence and witnesses." (Appellant's Brief, at 24). But even the right to provide a victim impact statement does not go that far. Nothing in Criminal Procedure Article §§ 11-402 or 11-403 provides a victim with standing to act as a party in a vacatur proceeding. Under the auspices of victim notification, Appellant seeks new rights that are well beyond the thoughtful and deliberate protection of victims' rights currently enshrined in Maryland law. For that, Appellant must seek his remedy in the legislature, not before this Court.

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51 minutes that the court stood in recess while it waited for Appellant to join the Zoom. (E. 139-140).

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court affirm the judgment of the court below.

Respectfully submitted,

Natasha M. Dartigue
Public Defender

Erica J. Suter
Director, Innocence Project Clinic

Counsel for Appellee

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 9,075 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 stated in Rule 8-112.

/s/ Erica Suter

Erica J. Suter

PERTINENT AUTHORITY

Md. Decl. of Rts. Art. 47

(a) A victim of crime shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process.

(b) In a case originating by indictment or information filed in a circuit court, a victim of crime shall have the right to be informed of the rights established in this Article and, upon request and if practicable, to be notified of, to attend, and to be heard at a criminal justice proceeding, as these rights are implemented and the terms "crime", "criminal justice proceeding", and "victim" are specified by law.

(c) Nothing in this Article permits any civil cause of action for monetary damages for violation of any of its provisions or authorizes a victim of crime to take any action to stay a criminal justice proceeding.

Md. Code, Crim. Proc. Art. § 7-105

Notice of hearing

(a) Before a hearing is held on a petition filed under this title, the victim or victim's representative shall be notified of the hearing as provided under § 11-104 or § 11-503 of this article.

Attendance at hearing

(b) A victim or victim's representative is entitled to attend any hearing under this title as provided under § 11-102 of this article.

Md. Code, Crim. Proc. Art. § 8-301

Claims of newly discovered evidence

(a) A person charged by indictment or criminal information with a crime triable in circuit court and convicted of that crime may, at any time, file a petition for writ of actual innocence in the circuit court

for the county in which the conviction was imposed if the person claims that there is newly discovered evidence that:

(1)(i) if the conviction resulted from a trial, creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined; or

(ii) if the conviction resulted from a guilty plea, an Alford plea, or a plea of nolo contendere, establishes by clear and convincing evidence the petitioner's actual innocence of the offense or offenses that are the subject of the petitioner's motion; and

(2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331.

Petition requirements

(b) A petition filed under this section shall:

(1) be in writing;

(2) state in detail the grounds on which the petition is based;

(3) describe the newly discovered evidence;

(4) contain or be accompanied by a request for hearing if a hearing is sought; and

(5) distinguish the newly discovered evidence claimed in the petition from any claims made in prior petitions.

Notice of filing petition

(c)(1) A petitioner shall notify the State in writing of the filing of a petition under this section.

(2) The State may file a response to the petition within 90 days after receipt of the notice required under this subsection or within the period of time that the court orders.

Notice to victim or victim's representative

(d)(1) Before a hearing is held on a petition filed under this section, the victim or victim's representative shall be notified of the hearing as provided under § 11-104 or § 11-503 of this article.

(2) A victim or victim's representative has the right to attend a hearing on a petition filed under this section as provided under § 11-102 of this article.

Hearing

(e)(1) Except as provided in paragraph (2) of this subsection, the

court shall hold a hearing on a petition filed under this section if the petition satisfies the requirements of subsection (b) of this section and a hearing was requested.

(2) The court may dismiss a petition without a hearing if the court finds that the petition fails to assert grounds on which relief may be granted.

Power of court to set aside verdict, resentence, grant a new trial, or correct sentence

(f)(1) If the conviction resulted from a trial, in ruling on a petition filed under this section, the court may set aside the verdict, resentence, grant a new trial, or correct the sentence, as the court considers appropriate.

(2)(i) If the conviction resulted from a guilty plea, an Alford plea, or a plea of nolo contendere, when assessing the impact of the newly discovered evidence on the strength of the State's case against the petitioner at the time of the plea, the court may consider admissible evidence submitted by either party, in addition to the evidence presented as part of the factual support of the plea, that was contained in law enforcement files in existence at the time the plea was entered.

(ii) If the court determines that, when considered with admissible evidence, in addition to the evidence presented as part of the factual support of the plea, that was contained in law enforcement files in existence at the time the plea was entered, the newly discovered evidence establishes by clear and convincing evidence the petitioner's actual innocence of the offense or offenses that are the subject of the petitioner's motion, the court may:

1. allow the petitioner to withdraw the guilty plea, Alford plea, or plea of nolo contendere; and

2. set aside the conviction, resentence, schedule the matter for trial, or correct the sentence, as the court considers appropriate.

(iii) When determining the appropriate remedy, the court may allow both parties to present any admissible evidence that came into existence after the plea was entered and is relevant to the petitioner's claim of actual innocence.

(3) The court shall state the reasons for its ruling on the record.

Burden of proof

(g) A petitioner in a proceeding under this section has the burden of proof.

Appeal of conviction

(h) If the petitioner was convicted as a result of a guilty plea, an Alford plea, or a plea of nolo contendere, an appeal may be taken either by the State or the petitioner from an order entered under this section.

State's Attorney certification that conviction was in error

(i) On written request by the petitioner, the State's Attorney may certify that a conviction was in error, if:

(1) the court grants a petition for relief under this section;

(2) in ruling on a petition under this section, the court:

(i) sets aside the verdict or conviction; or

(ii) schedules the matter for trial or grants a new trial; and

(3) the State's Attorney declines to prosecute the petitioner because the State's Attorney determines that the petitioner is innocent.

Md. Code, Crim. Proc. Art. § 8-301.1

Grounds for motion to vacate

(a) On a motion of the State, at any time after the entry of a probation before judgment or judgment of conviction in a criminal case, the court with jurisdiction over the case may vacate the probation before judgment or conviction on the ground that:

(1)(i) there is newly discovered evidence that:

1. could not have been discovered by due diligence in time to move for a new trial under Maryland Rule 4-331(c); and

2. creates a substantial or significant probability that the result would have been different; or

(ii) the State's Attorney received new information after the entry of a probation before judgment or judgment of conviction that calls into question the integrity of the probation before judgment

or conviction; and

(2) the interest of justice and fairness justifies vacating the probation before judgment or conviction.

Form and contents of motion

(b) A motion filed under this section shall:

(1) be in writing;

(2) state in detail the grounds on which the motion is based;

(3) where applicable, describe the newly discovered evidence; and

(4) contain or be accompanied by a request for a hearing.

Notify defendant

(c)(1) The State shall notify the defendant in writing of the filing of a motion under this section.

(2) The defendant may file a response to the motion within 30 days after receipt of the notice required under this subsection or within the period of time that the court orders.

Notify victim or victim's representative

(d)(1) Before a hearing on a motion filed under this section, the victim or victim's representative shall be notified, as provided under § 11-104 or § 11-503 of this article.

(2) A victim or victim's representative has the right to attend a hearing on a motion filed under this section, as provided under § 11-102 of this article.

Hearing on motion or dismissal of motion

(e)(1) Except as provided in paragraph (2) of this subsection, the court shall hold a hearing on a motion filed under this section if the motion satisfies the requirements of subsection (b) of this section.

(2) The court may dismiss a motion without a hearing if the court finds that the motion fails to assert grounds on which relief may be granted.

Ruling on motion

(f)(1) In ruling on a motion filed under this section, the court, as the court considers appropriate, may:

(i) vacate the conviction or probation before judgment and discharge the defendant; or

(ii) deny the motion.

(2) The court shall state the reasons for a ruling under this section on the record.

Burden of proof

(g) The State in a proceeding under this section has the burden of proof.

Appeal

(h) An appeal may be taken by either party from an order entered under this section.

Md. Code, Crim. Proc. Art. § 11-102

Victim or victim's representative who has filed notification request form

(a) If practicable, a victim or victim's representative who has filed a notification request form under § 11-104 of this subtitle has the right to attend any proceeding in which the right to appear has been granted to a defendant.

Protection of employment for persons with right to attend proceedings

(b) As provided in § 9-205 of the Courts Article, a person may not be deprived of employment solely because of job time lost because the person attended a proceeding that the person has a right to attend under this section.

Md. Code, Crim. Proc. Art. § 11-103

Crime defined

(a)(1) In this section, "crime" means:

(i) a crime;

(ii) a delinquent act that would be a crime if committed

by an adult; or

(iii) except as provided in paragraph (2) of this subsection, a crime or delinquent act involving, causing, or resulting in death or serious bodily injury.

(2) "Crime" does not include an offense under the Maryland Vehicle Law1 or under Title 8, Subtitle 7 of the Natural Resources Article unless the offense is punishable by imprisonment.

Appeals

(b) Although not a party to a criminal or juvenile proceeding, a victim of a crime for which the defendant or child respondent is charged may file an application for leave to appeal to the Court of Special Appeals from an interlocutory order or appeal to the Court of Special Appeals from a final order that denies or fails to consider a right secured to the victim by subsection (e)(4) of this section, § 4-202 of this article, § 11-102 or § 11-104 of this subtitle, § 11-302, § 11-402, § 11-403, or § 11-603 of this title, § 3-8A-06, § 3-8A-13, or § 3-8A-19 of the Courts Article, or § 6-112 of the Correctional Services Article.

Stay of other proceedings in criminal or juvenile case

(c) The filing of an application for leave to appeal under this section does not stay other proceedings in a criminal or juvenile case unless all parties consent.

Representation of victim who has died or is disabled

(d)(1) For purposes of this section, a victim's representative, including the victim's spouse or surviving spouse, parent or legal guardian, child, or sibling, may represent a victim of a crime who dies or is disabled.

(2) If there is a dispute over who shall be the victim's representative, the court shall designate the victim's representative.

Rights of victim

(e)(1) In any court proceeding involving a crime against a victim, the court shall ensure that the victim is in fact afforded the rights provided to victims by law.

(2) If a court finds that a victim's right was not considered or was denied, the court may grant the victim relief provided the

remedy does not violate the constitutional right of a defendant or child respondent to be free from double jeopardy.

(3) A court may not provide a remedy that modifies a sentence of incarceration of a defendant or a commitment of a child respondent unless the victim requests relief from a violation of the victim's right within 30 days of the alleged violation.

(4)(i) A victim who alleges that the victim's right to restitution under § 11-603 of this title was not considered or was improperly denied may file a motion requesting relief within 30 days of the denial or alleged failure to consider.

(ii) If the court finds that the victim's right to restitution under § 11-603 of this title was not considered or was improperly denied, the court may enter a judgment of restitution.

Md. Code, Crim. Proc. Art. § 11-104

Definitions

(a)(1) In this section the following words have the meanings indicated.

(2) "DNA" has the meaning stated in § 2-501 of the Public Safety Article.

(3) "Statewide DNA database system" has the meaning stated in § 2-501 of the Public Safety Article.

(4) "Victim" means a person who suffers actual or threatened physical, emotional, or financial harm as a direct result of a crime or delinquent act.

(5) "Victim's representative" includes a family member or guardian of a victim who is:

(i) a minor;

(ii) deceased; or

(iii) disabled.

Pamphlet given to victim or victim's representative on first contact

(b) On first contact with a victim or victim's representative, a law enforcement officer, District Court commissioner, or juvenile intake officer shall give the victim or the victim's representative the pamphlet described in § 11-914(9)(i) of this title.

Notice to victim or victim's representative

(c) Unless to do so would impede or compromise an ongoing investigation or the victim's representative is a suspect or a person of interest in the criminal investigation of the crime involving the victim, on written request of a victim of a crime of violence as defined in § 14-101 of the Criminal Law Article or the victim's representative, the investigating law enforcement agency shall give the victim or the victim's representative timely notice as to:

(1) whether an evidentiary DNA profile was obtained from evidence in the case;

(2) when any evidentiary DNA profile developed in the case was entered into the DNA database system; and

(3) when any confirmed match of the DNA profile, official DNA case report, or DNA hit report is received.

Pamphlet mailed or delivered to victim or victim's representative by prosecuting attorney

(d)(1) Within 10 days after the filing or the unsealing of an indictment or information in circuit court, whichever is later, the prosecuting attorney shall:

(i) mail or deliver to the victim or victim's representative the pamphlet described in § 11-914(9)(ii) of this title and the notification request form described in § 11-914(10) of this title; and

(ii) certify to the clerk of the court that the prosecuting attorney has complied with this paragraph or is unable to identify the victim or victim's representative.

(2) If the prosecuting attorney files a petition alleging that a child is delinquent for committing an act that could only be tried in the circuit court if committed by an adult, the prosecuting attorney shall:

(i) inform the victim or victim's representative of the right to request restitution under § 11-606 of this title;

(ii) mail or deliver to the victim or victim's representative the notification request form described in § 11-914(10) of this title; and

(iii) certify to the clerk of the juvenile court that the prosecuting attorney has complied with this paragraph or is unable to identify the victim or victim's representative.

(3) For cases described under this subsection, the prosecuting attorney may provide a State's witness in the case with the guidelines for victims, victims' representatives, and witnesses

available under §§ 11-1001 through 11-1004 of this title.

Notification request form

(e)(1) A victim or victim's representative may:

(i) file a completed notification request form with the prosecuting attorney; or

(ii) follow the MDEC system protocol to request notice.

(2)(i) If the jurisdiction has not implemented the MDEC system, the prosecuting attorney shall send a copy of the completed notification request form to the clerk of the circuit court or juvenile court.

(ii) If the jurisdiction has implemented the MDEC system and the victim or victim's representative has filed a completed notification request form, the prosecuting attorney shall electronically file the form with the clerk of the circuit court or juvenile court in the MDEC system.

(3) By filing a completed notification request form or completing the MDEC system protocol, a victim or victim's representative complies with Article 47 of the Maryland Declaration of Rights and each provision of the Code that requires a victim or victim's representative to request notice.

(4) To keep the address and electronic mail address of a victim or victim's representative confidential, the victim or victim's representative shall:

(i) designate in the notification request form a person who has agreed to receive notice for the victim or victim's representative; or

(ii) request as part of the MDEC system protocol, without filing a motion to seal, that the address and electronic mail address remain confidential and available, as necessary to only:

1. the court;

2. the prosecuting attorney;

3. the Department of Public Safety and Correctional Services;

4. the Department of Juvenile Services;

5. the attorney of the victim or victim's representative;

6. the State's Victim Information and Notification Everyday vendor; and

7. a commitment unit that a court orders to retain custody of an individual.

Notice of court proceedings, plea agreements, and submission of victim impact statement

(f)(1) Unless provided by the MDEC system, the prosecuting attorney shall send a victim or victim's representative prior notice of each court proceeding in the case, of the terms of any plea agreement, and of the right of the victim or victim's representative to submit a victim impact statement to the court under § 11-402 of this title if:

(i) prior notice is practicable; and

(ii) the victim or victim's representative has filed a notification request form or followed the MDEC system protocol under subsection (e) of this section.

(2)(i) If the case is in a jurisdiction in which the office of the clerk of the circuit court or juvenile court has an automated filing system, the prosecuting attorney may ask the clerk to send the notice required by paragraph (1) of this subsection.

(ii) If the case is in a jurisdiction that has implemented the MDEC system, the victim may follow the MDEC system protocol to receive notice by electronic mail, to notify the prosecuting attorney, and to request additional notice available through the State's Victim Information and Notification Everyday vendor.

(3) As soon after a proceeding as practicable, the prosecuting attorney shall tell the victim or victim's representative of the terms of any plea agreement, judicial action, and proceeding that affects the interests of the victim or victim's representative, including a bail hearing, change in the defendant's pretrial release order, dismissal, nolle prosequi, stetting of charges, trial, disposition, and postsentencing court proceeding if:

(i) the victim or victim's representative has filed a notification request form or followed the MDEC system protocol under subsection (e) of this section and prior notice to the victim or victim's representative is not practicable; or

(ii) the victim or victim's representative is not present at the proceeding.

(4) Whether or not the victim or victim's representative has filed a notification request form or followed the MDEC system protocol under subsection (e) of this section, the prosecuting attorney may give the victim or victim's representative information about the status of the case if the victim or victim's representative asks for the information.

Clerk of court to include copy of form with orders and appeals

(g) If a victim or victim's representative has filed a notification request form or followed the MDEC system protocol under subsection (e) of this section, the clerk of the circuit court or juvenile court:

(1) shall include a copy of the form with any commitment order or probation order that is passed or electronically transmit the form or the registration information for the victim or the victim's representative through the MDEC system; and

(2) if an appeal is filed, shall send a copy of the form or electronically transmit the form or the registration information for the victim or the victim's representative through the MDEC system to the Attorney General and the court to which the case has been appealed.

Notification request forms to unit in which defendant or child respondent committed

(h) This section does not prohibit a victim or victim's representative from filing a notification request form with a unit to which a defendant or child respondent has been committed.

Discontinuance of further notices

(i)(1) After filing a notification request form under subsection (e) of this section, a victim or victim's representative may discontinue further notices by filing a written request with:

(i) the prosecuting attorney, if the case is still in a circuit court or juvenile court; or

(ii) the unit to which the defendant or child respondent has been committed, if a commitment order has been issued in the case.

(2) After following the MDEC system protocol for electronic notices, a victim or victim's representative may discontinue further notices by following the MDEC system protocol to terminate notice.

Md. Code, Crim. Proc. Art. § 11-402

Actions causing physical, psychological, economic injury, or death to victim

(a) A presentence investigation that the Division of Parole and Probation completes under § 6-112 of the Correctional Services Article or a predisposition investigation that the Department of Juvenile Services completes shall include a victim impact statement if:

(1) the defendant or child respondent caused physical, psychological, or economic injury to the victim in committing a felony or delinquent act that would be a felony if committed by an adult; or

(2) the defendant caused serious physical injury or death to the victim in committing a misdemeanor.

Preparation of victim impact statement separate from presentence or predisposition investigation

(b) If the court does not order a presentence investigation or predisposition investigation, the prosecuting attorney or the victim may prepare a victim impact statement to be submitted to the court and the defendant or child respondent in accordance with the Maryland Rules.

Submission of victim impact statement to court in transfer hearing

(c)(1) The prosecuting attorney shall notify a victim who has filed a notification request form under § 11-104 of this title of the victim's right to submit a victim impact statement to the court in a transfer hearing under § 4-202 of this article or a waiver hearing under § 3-8A-06 of the Courts Article.

(2) This subsection does not preclude a victim who has not filed a notification request form under § 11-104 of this title from submitting a victim impact statement to the court.

(3) The court may consider a victim impact statement in determining whether to transfer jurisdiction under § 4-202 of this article or waive jurisdiction under § 3-8A-06 of the Courts Article.

Court consideration of victim impact statement

(d) The court shall consider the victim impact statement in determining the appropriate sentence or disposition and in entering a judgment of restitution for the victim under § 11-603 of this title.

Contents of victim impact statement

(e) A victim impact statement for a crime or delinquent act shall:

(1) identify the victim;

(2) itemize any economic loss suffered by the victim;

(3) identify any physical injury suffered by the victim and describe the seriousness and any permanent effects of the injury;

(4) describe any change in the victim's personal welfare or familial relationships;

(5) identify any request for psychological services initiated by the victim or the victim's family;

(6) identify any request by the victim to prohibit the defendant or child respondent from having contact with the victim as a condition of probation, parole, mandatory supervision, work release, or any other judicial or administrative release of the defendant or child respondent, including a request for electronic monitoring or electronic monitoring with victim stay-away alert technology; and

(7) contain any other information related to the impact on the victim or the victim's family that the court requires.

Deceased or disabled victims

(f) If the victim is deceased, under a mental, physical, or legal disability, or otherwise unable to provide the information required under this section, the information may be obtained from the victim's representative.

Md. Code, Crim. Proc. Art. § 11-403

Sentencing or disposition hearing defined

(a) In this section, "sentencing or disposition hearing" means a hearing at which the imposition of a sentence, disposition in a juvenile court proceeding, or alteration of a sentence or disposition in a juvenile court proceeding is considered.

Court allowance of victim or victim's representative to address court

(b) In the sentencing or disposition hearing the court, if practicable, shall allow the victim or the victim's representative to address the court under oath before the imposition of sentence or other disposition:

(1) at the request of the prosecuting attorney;

(2) at the request of the victim or the victim's representative; or

(3) if the victim has filed a notification request form under § 11-104 of this title.

Cross examination of victim or victim's representative

(c)(1) If the victim or the victim's representative is allowed to address the court, the defendant or child respondent may cross-examine the victim or the victim's representative.

(2) The cross-examination is limited to the factual statements made to the court.

Right of victim or victim's representative not to address the court

(d)(1) A victim or the victim's representative has the right not to address the court at the sentencing or disposition hearing.

(2) A person may not attempt to coerce a victim or the victim's representative to address the court at the sentencing or disposition hearing.

Failure of victim or victim's representative to appear at hearing or disposition in court

(e)(1) If the victim or the victim's representative fails to appear at a hearing on a motion for a revision, modification, or reduction of a sentence or disposition in circuit court or juvenile court, the prosecuting attorney shall state on the record that proceeding without the appearance of the victim or the victim's representative is justified because:

(i) the victim or victim's representative was contacted by the prosecuting attorney and waived the right to attend the hearing;

(ii) efforts were made to contact the victim or the

victim's representative and, to the best knowledge and belief of the prosecuting attorney, the victim or victim's representative cannot be located; or

(iii) the victim or victim's representative has not filed a notification request form under § 11-104 of this title.

(2) If the court is not satisfied by the statement that proceeding without the appearance of the victim or the victim's representative is justified, or, if no statement is made, the court may postpone the hearing.

Appeals

(f) A victim or victim's representative who has been denied a right provided under this section may file an application for leave to appeal in the manner provided under § 11-103 of this title.

Md. Code, Crim. Proc. Art. § 11-503

Subsequent proceeding defined

(a) In this section, "subsequent proceeding" includes:

(1) a sentence review under § 8-102 of this article;

(2) a hearing on a request to have a sentence modified or vacated under the Maryland Rules;

(3) in a juvenile delinquency proceeding, a review of a commitment order or other disposition under the Maryland Rules;

(4) an appeal to the Court of Special Appeals;

(5) an appeal to the Court of Appeals;

(6) a hearing on an adjustment of special conditions of lifetime sexual offender supervision under § 11-723 of this title or a hearing on a violation of special conditions of lifetime sexual offender supervision or a petition for discharge from special conditions of lifetime sexual offender supervision under § 11-724 of this title; and

(7) any other postsentencing court proceeding.

Written notification requests by victim or victim's representative

(b) Following conviction or adjudication and sentencing or disposition of a defendant or child respondent, the State's Attorney shall notify the victim or victim's representative of a subsequent

proceeding in accordance with § 11-104(f) of this title if:

(1) before the State's Attorney distributes notification request forms under § 11-104(d) of this title, the victim or victim's representative submitted to the State's Attorney a written request to be notified of subsequent proceedings; or

(2) after the State's Attorney distributes notification request forms under § 11-104(d) of this title, the victim or victim's representative submits a notification request form in accordance with § 11-104(e) of this title.

Notice of appeals or subsequent proceedings pertinent to appeal

(c)(1) The State's Attorney's office shall:

(i) notify the victim or victim's representative of all appeals to the Court of Special Appeals and the Court of Appeals; and

(ii) send an information copy of the notification to the Office of the Attorney General.

(2) After the initial notification to the victim or victim's representative or receipt of a notification request form, as defined in § 11-104 of this title, the Office of the Attorney General shall:

(i) notify the victim or victim's representative of each subsequent date pertinent to the appeal, including dates of hearings, postponements, and decisions of the appellate courts; and

(ii) send an information copy of the notification to the State's Attorney's office.

Contents of notice

(d) A notice sent under this section shall include the date, the time, the location, and a brief description of the subsequent proceeding.

Md. Code, Cts. & Jud. Proc. Art. § 3-8A-01

In general

(a) In this subtitle the following words have the meanings indicated, unless the context of their use indicates otherwise.

*** * ***

Disposition hearing

(p) "Disposition hearing" means a hearing under this subtitle to determine:

(1) Whether a child needs or requires guidance, treatment, or rehabilitation; and, if so

(2) The nature of the guidance, treatment, or rehabilitation.

* * *

Md. Rule 4-333

(a) Scope. This Rule applies to a motion by a State's Attorney pursuant to Code, Criminal Procedure Article, § 8-301.1 to vacate a judgment of conviction or the entry of a probation before judgment entered in a case prosecuted by that office.

(b) Filing. The motion shall be filed in the criminal action in which the judgment of conviction or probation before judgment was entered. If the action is then pending in the Court of Appeals or Court of Special Appeals, that Court may stay the appeal and remand the case to the trial court for it to consider the State's Attorney's motion.

(c) Timing. The motion may be filed at any time after entry of the judgment of conviction or probation before judgment.

(d) Content. The motion shall be in writing, signed by the State's Attorney, and state:

(1) the file number of the action;

(2) the current address of the defendant or, if the State's Attorney after due diligence is unable to ascertain the defendant's current address, a statement to that effect and a statement of the defendant's last known address;

(3) each offense included in the judgment of conviction or probation before judgment that the State's Attorney seeks to have vacated;

(4) whether any sentence or probation before judgment includes an order of restitution to a victim and, if so, the name of the victim, the amount of restitution ordered, and the amount that remains unpaid;

(5) if the judgment of conviction or probation before

judgment was appealed or was the subject of a motion or petition for post judgment relief, (A) the court in which the appeal or motion or petition was filed, (B) the case number assigned to the proceeding, if known, (C) a concise description of the issues raised in the proceeding, (D) the result, and (E) the date of disposition;

(6) a particularized statement of the grounds upon which the motion is based;

(7) if the request for relief is based on newly discovered evidence, (A) how and when the evidence was discovered, (B) why it could not have been discovered earlier, (C) if the issue of whether the evidence could have been discovered in time to move for a new trial pursuant to Rule 4-331 was raised or decided in any earlier appeal or post-judgment proceeding, the court and case number of the proceeding and the decision on that issue, and (D) that the newly discovered evidence creates a substantial or significant probability that the result would have been different with respect to the conviction or probation before judgment, or part thereof, that the State's Attorney seeks to vacate, and the basis for that statement;

(8) if the basis for the motion is new information received by the State's Attorney after the entry of the judgment of conviction or probation before judgment, a summary of that information and how it calls into question the integrity of the judgment of conviction or probation before judgment, or part thereof, that the State's Attorney seeks to vacate;

(9) that, based upon the newly discovered evidence or new information received by the State's Attorney, the interest of justice and fairness justifies vacating the judgment of conviction or probation before judgment or part thereof that the State's Attorney seeks to vacate and the basis for that statement; and

(10) that a hearing is requested.

(e) Notice to Defendant. Upon the filing of the motion, the State's Attorney shall send a copy of it to the defendant, together with a notice informing the defendant of the right: (1) to file a response within 30 days after the notice was sent; (2) to seek the assistance of an attorney regarding the proceeding; and (3) if a hearing is set, to attend the hearing.

(f) Initial Review of Motion. Before a hearing is set, the court shall make an initial review of the motion. If the court finds that the motion does not comply with section (d) of this Rule or that, as a matter of law, it fails to assert grounds on which relief may be granted, the court may dismiss the motion, without prejudice,

without holding a hearing. Otherwise, the court shall direct that a hearing on the motion be held.

(g) Notice of Hearing.

(1) *To Defendant.* The clerk shall send written notice of the date, time, and location of the hearing to the defendant.

(2) *To Victim or Victim's Representative.* Pursuant to Code, Criminal Procedure Article, § 8-301.1(d), the State's Attorney shall send written notice of the hearing to each victim or victim's representative, in accordance with Code, Criminal Procedure Article, § 11-104 or § 11-503. The notice shall contain a brief description of the proceeding and inform the victim or victim's representative of the date, time, and location of the hearing and the right to attend the hearing.

(h) Conduct of Hearing.

(1) *Absence of Defendant, Victim, or Victim's Representative.* If the defendant or a victim or victim's representative entitled to notice under section (g) of this Rule is not present at the hearing, the State's Attorney shall state on the record the efforts made to contact that person and provide notice of the hearing.

(2) *Burden of Proof.* The State's Attorney has the burden of proving grounds for vacating the judgment of conviction or probation before judgment.

(3) *Disposition.* If the court finds that the State's Attorney has proved grounds for vacating the judgment of conviction or probation before judgment and that the interest of justice and fairness justifies vacating the judgment of conviction or probation before judgment, the court shall vacate the judgment of conviction or probation before judgment. Otherwise, the court shall deny the motion and advise the parties of their right to appeal. If the motion is denied and the defendant did not receive actual notice of the proceedings, the court's denial shall be without prejudice to refile the motion when the defendant has been located and can receive actual notice. The court shall state its reasons for the ruling on the record.

(i) Post-Disposition Action by State's Attorney. Within 30 days after the court enters an order vacating a judgment of conviction or probation before judgment as to any count, the State's Attorney shall either enter a nolle prosequi of the vacated count or take other appropriate action as to that count.

Md. Rule 8-111

(a) Formal Designation.

(1) *No Prior Appellate Decision.* When no prior appellate decision has been rendered, the party first appealing the decision of the trial court shall be designated the appellant and the adverse party shall be designated the appellee. Unless the Court orders otherwise, the opposing parties to a subsequently filed appeal shall be designated the cross-appellant and cross-appellee.

(2) *Prior Appellate Decision.* In an appeal to the Court of Appeals from a decision by the Court of Special Appeals or by a circuit court exercising appellate jurisdiction, the party seeking review of the most recent decision shall be designated the petitioner and the adverse party shall be designated the respondent. Except as otherwise specifically provided or necessarily implied, the term "appellant" as used in the rules in this Title shall include a petitioner and the term "appellee" shall include a respondent.

(b) Alternative References. In the interest of clarity, the parties are encouraged to use the designations used in the trial court, the actual names of the parties, or descriptive terms such as "employer," "insured," "seller," "husband," and "wife" in papers filed with the Court and in oral argument.

(c) Victims and Victims' Representatives. Although not a party to a criminal or juvenile proceeding, a victim of a crime or a delinquent act or a victim's representative may: (1) file an application for leave to appeal to the Court of Special Appeals from an interlocutory or a final order under Code, Criminal Procedure Article, § 11-103 and Rule 8-204; or (2) participate in the same manner as a party regarding the rights of the victim or victim's representative.

Md. Rule 8-131

(a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(b) In Court of Appeals--Additional Limitations.

(1) *Prior Appellate Decision.* Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals 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 Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.

(2) *No Prior Appellate Decision.* Except as otherwise provided in Rule 8-304(c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals will consider those issues that would have been cognizable by the Court of Special Appeals.

(c) Action Tried Without a Jury. When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

(d) Interlocutory Order. On an appeal from a final judgment, an interlocutory order previously entered in the action is open to review by the Court unless an appeal has previously been taken from that order and decided on the merits by the Court.

(e) Order Denying Motion to Dismiss. An order denying a motion to dismiss for failure to state a claim upon which relief can be granted is reviewable only on appeal from the judgment.

APPENDIX

Circuit Court for Baltimore City
Case No. 116127003

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2418

September Term, 2019

ANTHONY WALKER

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Wright, Alexander
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: February 9, 2021

In 2016, Anthony Walker was arrested by members of the Baltimore City Police Department and charged with an array of drug distribution crimes and conspiracy. Rather than proceeding to trial, Mr. Walker pleaded guilty to one count of possession with intent to distribute.

Three years later, the State revealed that the detective who submitted and recovered the drugs underlying Mr. Walker's charges had been involved in an incident that called into question the integrity of Mr. Walker's conviction, and in response filed a motion to vacate it. After a hearing, the Circuit Court for Baltimore City found that the actions of the submitting officer didn't affect the integrity of the conviction and denied the State's motion. Mr. Walker argues on appeal that the court abused its discretion in denying the motion, the State agrees, and we vacate the judgment and remand for further proceedings.

I. BACKGROUND

On April 1, 2016, after the Baltimore City Police Department executed a search and seizure warrant, Mr. Walker was arrested and charged by indictment with intent to distribute cocaine (Count 1), possession with intent to distribute heroin (Count 3), possession of cocaine (Count 5), possession of heroin (Count 7), possession of drug paraphernalia (Count 9), second-degree assault (Count 11), and conspiracy to commit the offenses charged in Counts 1, 3, 5, 7, and 9. He opted to plead guilty to one count of possession with intent to distribute heroin, and on September 22, 2016 was sentenced to ten years, all but time served suspended, and three years of supervised probation.

On October 25, 2019, three years after Mr. Walker was sentenced, the State filed a

motion under Maryland Code, § 8-301.1 of the Criminal Procedure Article ("CP"),[1] and asked the court to vacate the conviction. In support of the motion, the State contended that it had acquired new information about Detective Robert Hankard, the submitting officer in Mr. Walker's case, that called into question the integrity of Mr. Walker's conviction. According to the State's motion, Detective Hankard took part in an incident, on March 26, 2014, in which a sergeant had "deliberately [run] over an arrestee" and Detective Hankard had provided a BB gun that they had planted at the scene to make the Sergeant's conduct seem justified. The State said that it learned of this incident on September 10, 2019.

The circuit court held a hearing on the State's motion on January 8, 2020. After the Assistant State's Attorney described the situation, the court denied the State's motion after

[1] 8-301.1 defines the circumstances under which the State can ask a court to vacate a conviction:

> (a) On a motion of the State, at any time after the entry of a probation before judgment or judgment of conviction in a criminal case, the court with jurisdiction over the case may vacate the probation before judgment or conviction on the ground that:
>
> (1)(i) there is newly discovered evidence that:
>
> 1. could not have been discovered by due diligence in time to move for a new trial under Maryland Rule 4-331(c); and
>
> 2. creates a substantial or significant probability that the result would have been different; or
>
> (ii) the State's Attorney received new information after the entry of a probation before judgment or judgment of conviction that calls into question the integrity of the probation before judgment or conviction; and
>
> (2) the interest of justice and fairness justifies vacating the probation before judgment or conviction.

concluding, based on *Wheeler v. State*, 459 Md. 555 (2018), that "Hankard being the submitting officer in no way impacted integrity of the case. Additionally, he was not a necessary witness." We supply additional facts as necessary below.

II. DISCUSSION

Mr. Walker raises two issues in his brief,[2] but we need only address the first:[3] did the circuit court err in denying the State's motion on the ground that Detective Hankard was not a "necessary witness" in Mr. Walker's case? The State agrees with Mr. Walker that it did, and we agree as well.

Section 8-301.1 of the Criminal Procedure Article took effect on October 1, 2019, as a response to revelations of misconduct by the same unit of the Baltimore Police Department, the "Gun Trace Task Force," that arrested and searched Mr. Walker. Indeed, misconduct committed by the Gun Trace Task Force has called into question the validity of an estimated 1,300 cases, of which Mr. Walker's case is one. Fiscal and Policy Note,

[2] Mr. Walker's brief identified two Questions Presented:

> 1. Did the circuit court err in denying the State's motion to vacate Appellant's conviction on the ground that the information calling into question the integrity of the conviction only concerned "the submitting officer" and not a "necessary" witness?
>
> 2. Did the court err in denying the State's motion to vacate without permitting Appellant to address the court?

[3] The hearing transcript reveals, as we'll detail, that the court ruled immediately after the State's presentation, without turning to Mr. Walker and offering him an opportunity to speak. He did not ask the court for an opportunity to be heard before it ruled but, to be fair, the court moved immediately into its ruling and Mr. Walker, who appeared on his own behalf, didn't appear to realize what had happened until after the court revised its ruling.

H.B. 874 (2019). The statute was brand new at the time of the State's motion and there is no appellate case law interpreting and applying it. But as the opening line of the statute itself indicates—"the court with jurisdiction over the case *may* vacate the . . . conviction," CP § 8-301.1(a) —the decision to grant or deny a motion to vacate lies within the discretion of the circuit court. Our role is to review that decision for abuse of discretion, which occurs "'when it is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Wheeler*, 459 Md. at 561 (*quoting Alexis v. State*, 437 Md. 457, 478 (2014).

Section 8-301.1(a) identifies two bases on which a circuit court can vacate a conviction. The one at issue here appears in subsection (a)(1)(ii), which provides that the court may vacate the conviction on the ground that there is newly discovered evidence that "the State's Attorney received new information after the . . . judgment of conviction that calls into question the integrity of the . . . conviction." From there, the court then must find that "the interest of justice and fairness justify vacating the . . . conviction." CP § 8-301.1(a)(2). The statute authorizes the State, not the defendant, to bring this motion, and the State did so in this case within a month of the statute's effective date.

At the motions hearing, the State presented newly discovered, and undisputed, information about Detective Hankard's involvement in an incident that took place on March 26, 2014, two years before Mr. Walker's arrest. According to the State's motion, Detective Hankard provided Detective Keith Gladstone with a BB gun to plant at the scene of a crime. Detective Hankard's actions led to federal charges against him and others of

conspiracy to deprive an individual of their civil rights by intentionally presenting false evidence, a violation of 18 U.S.C. § 241. The State asserted that it learned of Detective Hankard's misconduct on September 10, 2019, when Detective Gladstone and another officer involved in the cover-up entered guilty pleas in federal court.[4]

After hearing the State's presentation, the circuit court stated that "Suiter being the submitting officer in no way impacted the integrity of the case. Additionally, he was not a necessary witness. See Wheeler v. State, 459 Md. 555, 2019. The motion is denied with prejudice. Thank you." The prosecutor advised the court that Officer Suiter had not been involved in the case, but Officer Hankard was. The court then looked again, and after a short colloquy restated its ruling, *verbatim* except for the name of the officer: "Yes. All right. Hankard being the submitting officer in no way impacted [the] integrity of the case. Additionally, he was not a necessary witness. See Wheeler v. State, 459 Md. 555, 2019. The motion is denied with prejudice. Thank you." At that point, Mr. Walker spoke up and asked the court if the conviction had been vacated. The prosecutor advised him that it hadn't, and after Mr. Walker responded that he thought he had been summoned for it to be vacated, the court advised him that relief wasn't guaranteed:

> No. I review the cases. The State has filed a motion for vacation. It's not guaranteed. I review the cases based on the evidence they present, and then I make a decision whether they're granted or denied. They're not automatically granted.

[4] The federal charges against Officer Hankard encompassed one other incident in which he, Sergeant Gladstone, and a third officer planted drugs on a suspect and lied about it in court papers. *See* Justin Fenton, "Baltimore Police officer charged in BB gun planting incident as Gun Trace Task Force fallout continues," *Baltimore Sun* (Jan. 15, 2020).

The court was right that the mere filing of a § 8-301.1 motion is not a guarantee that the conviction will be vacated. The language of the statute is permissive—the court *may* vacate the conviction—even if it makes the necessary findings. In this case, though, the court based its ruling solely on its conception of Detective Hankard's role as the submitting officer. Because the police report didn't say anything about Detective Hankard recovering the drugs underlying Mr. Walker's case, the court assumed that he would not have been a necessary witness, and from there that his misconduct in "no way impacted [the] integrity of the case."

In a case like this, where an officer involved in handling evidence has been charged with and pleaded guilty to criminal misconduct in his handling of evidence in other cases, we cannot see how the new evidence wouldn't affect the integrity of this conviction. It may be that in a normal case, where the State otherwise would be able to demonstrate "that the evidence was substantially in the same condition as when recovered and presented sufficient evidence to demonstrate the absence of tampering," *Wheeler*, 459 Md. at 561, Detective Hankard wouldn't have been a necessary witness. But here, where Mr. Walker was searched and arrested by the Gun Trace Task Force, and where Detective Hankard, among others, has pled guilty to planting evidence on defendants, it is difficult to imagine how Mr. Walker would *not* have sought to call the Detective had he known, and equally difficult to imagine how the absence of that testimony and cross-examination would *not* have affected the integrity of this conviction. Put another way, it's not purely a question of whether the State could have proven the elements of its case without this witness (although

the State, to its credit, acknowledges that "it is unclear whether the state could have proven the chain of custody without Detective Hankard's testimony," and that the record before the circuit court at the time wouldn't establish the chain definitively).

We agree with the State that the court should have considered not only whether Detective Hankard, on this record, was an essential witness, but also (whether or not he was essential) the totality of the circumstances bearing on the integrity of the conviction and the interests of justice and fairness. In cases like this, the State—the prosecuting authority that pursued and obtained the conviction in the first place—is asserting that the conviction has been tainted to the extent that it is inconsistent with the interests of justice and fairness to leave it intact. The State isn't saying that Mr. Walker is innocent of the crimes, but instead that it no longer can defend the integrity of the body of evidence underlying that conviction. To be sure, the court is not obliged to agree with the State's assessment. But where the State's motion is grounded in adjudicated police misconduct on the part of officers involved in securing the conviction at issue, the court abuses its discretion when it reduces the § 8-301.1 analysis to a determination of whether the officer was a necessary witness. We vacate the decision to deny the State's motion to vacate Mr. Walker's conviction and remand for further proceedings consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

YOUNG LEE, AS VICTIM'S REPRESENTATIVE, Appellant v. STATE OF MARYLAND AND ADNAN SYED, Appellee	IN THE APPELLATE COURT OF MARYLAND September Term, 2022 No. 1291

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January, 2023, a copy of the Appellee's Brief and Appendix in the captioned case was delivered via the MDEC system, and paper copies were sent by first-class mail or courier, to:

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