In The

Supreme Court of Maryland

No. 7

September Term, 2023

SCM-REG-0007-2023

ADNAN SYED,

Petitioner/Cross-Respondent,

vs.

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

Appellee/Cross-Appellant.

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

BRIEF FOR APPELLEE/CROSS-APPELLANT

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STATEMENT OF THE CASE

On September 19, 2022, the Baltimore City Circuit Court purged a murder conviction that had stood for 20-plus years and multiple levels of appellate review, including by this very Court. It barreled through Adnan Syed's vacatur hearing, effectively gagging Young Lee, the victim's brother. The circuit court withheld adequate notice to Mr. Lee and denied his request to attend in person. It let the State keep all evidence in support of vacatur, to the extent there was any evidence, hidden from Mr. Lee and the public. It permitted Mr. Lee to deliver just a brief statement via Zoom, where he could express only confusion and frustration with the process. With little transparency and all parties in lockstep undermining any actual challenge, the court rubberstamped the vacatur. This was an affront to Maryland's victims' rights and our open, adversarial system of justice. It was not what the drafters of Maryland Code, Criminal Procedure ("CP") § 8-301.1 (the "Vacatur Statute") envisioned.

Maryland's Constitution and laws provide crime victims the right to participate in proceedings that affect their direct and substantial interests, such as the September 19 vacatur hearing. These rights are meaningless if victims are denied adequate notice, in-person attendance, and the opportunity to be heard. Here, in the rare circumstance where the prosecutor, defendant, and court are aligned on the result, Mr. Lee's participation was essential to the judicial process. He was the only one positioned to test the evidence and question the arguments. Without him, the court's review of highly disputed claims was hollow and, in the end, merely performative.

The Appellate Court reviewed the record below, identifying grave errors. *Lee v. State*, 257 Md. App. 481 (2023), *reconsideration denied* (May 2, 2023), *cert. granted sub nom. Syed v. Lee*, 483 Md. 589 (2023). It found the State's vacatur motion deficient and even raised doubts about the State's motives. Accordingly, the Appellate Court vacated the ruling and remanded for a redo—with proper safeguards in place. But the Court erred in one way: it stopped short of recognizing Mr. Lee's right to speak, leaving it to the circuit court's discretion. This permits a repeat in which Mr. Lee's voice is again silenced, and a most significant decision relating to a convicted murderer is made without the benefit of any litigant challenging or questioning the State's evidence.

Appellate courts have the power to fashion relief for victims' rights violations. *See Antoine v. State*, 245 Md. App. 521, 542 (2020). For the remedy here to be meaningful, Mr. Lee must not only observe from afar but be empowered to affect the outcome by speaking "before a trial court *formally binds* itself to a particular disposition of a case." *Id.* at 547 (emphasis added). The Appellate Court did not recognize Mr. Lee's full rights. This Court can correct that error by holding that Mr. Lee may speak and substantively contribute.

In short, Mr. Lee seeks enforcement of his right to a fair, unbiased vacatur process as provided by Maryland law. A reasonable interpretation of the Vacatur Statute enables him to speak to the evidence and the purported grounds for vacatur.

QUESTIONS PRESENTED

1. Is a victim's right to speak, as enshrined in Maryland's laws and constitution, incorporated by reference into the Vacatur Statute, CP § 8-

301.1, particularly where no litigant other than the victim has an interest in challenging the evidence in support of vacatur?

2. Is this appeal moot where, despite Mr. Lee's pending motion to stay, the State entered a *nolle prosequi* to evade appellate review and the *nolle pros* was dependent on an invalid vacatur?
3. Was notice to Mr. Lee reasonable when the State informed him of the hearing less than one business day in advance and never said he could attend in person?
4. Did Mr. Lee have a right to in-person attendance at a dispositive hearing where all other litigants were present?

BACKGROUND

Conviction and Vacatur Hearing

On February 25, 2000, Mr. Syed was convicted of murdering his ex-girlfriend, Hae Min Lee. *Syed v. State*, 236 Md. App. 183 (2018). The trial court sentenced him to life in prison with the possibility of parole. *Id*. Mr. Syed filed multiple unsuccessful appeals; most recently, this Court affirmed his conviction in 2019. *State v. Syed*, 463 Md. 60 (2019).

On September 14, 2022, the State moved to vacate Mr. Syed's conviction, claiming newly discovered exculpatory evidence, a purported Brady violation, and "two alternative suspects." The Appellate Court highlighted several of the deficiencies in the State's motion:

> The State's motion did not identify the two alternate suspects or explain why the State believed those suspects committed the murder without Mr. Syed. The note indicating one of the suspects had motive to kill Hae is not part of the record on appeal, and in the State's October 25, 2022 response, the Office

> of the Attorney General stated that there is other information in the note that was relevant but not cited in the motion to vacate.

Lee, 257 Md. App. at 495 n.8.

On Friday, September 16, the court conducted a clandestine *in-camera* hearing to discuss the motion to vacate; only the parties and judge were present. (E 150:7–10) At 1:59 EDT that afternoon, an Assistant State's Attorney notified Mr. Lee that a vacatur hearing had been scheduled for the next business day—Monday, September 19. (E 179) Mr. Lee wanted to attend in person but could not travel on such short notice.

On the morning of September 19, Mr. Lee moved to postpone the hearing by one week so that he could attend. (E 103–15) The court denied his motion, informing him that if he wanted to address the court, he must do so via Zoom—immediately. (E 137:23–25) With no opportunity to confer with counsel, he made a short, flustered statement. (E 140:23–42:13) The court, without making explanatory findings of fact or conclusions of law, granted the State's motion and ordered that Mr. Syed be released at once. (E 162:21–63:11) The Appellate Court pointed out these procedural irregularities:

> We note that, although CP § 8-301.1(f)(2) requires the court to 'state the reasons for' its ruling, the court did not explain its reasons for finding a Brady violation . . . . Additionally, the court found that the State discovered new evidence that created a substantial likelihood of a different result, but it did not identify what evidence was newly discovered or why it created the possibility of a different result.

Lee, 257 Md. App. at 509 n.15.

Mr. Lee appealed on September 28, and then sought a stay pending the appeal. The circuit court had not ruled on the stay by October 5, so Mr. Lee moved the Appellate Court to stay further proceedings. With both motions pending, on October 11, the State *nolle*

prossed Mr. Syed's vacated charges. (E 65) On October 12, the Appellate Court ordered Mr. Lee to show cause for why his appeal should not be dismissed as moot. It then allowed Mr. Lee's appeal to proceed and issued its opinion on March 28, 2023.

Appellate Court Ruling

First, the Court determined that the State's *nolle pros* was a nullity that did not moot the appeal. *Lee*, 257 Md. App. at 519–27. The *nolle pros* depended on the existence of a valid vacatur, and, as Mr. Lee argued, the vacatur of Syed's conviction was invalid. The Court emphasized the timing of the *nolle pros*—two days before a response to Mr. Lee's motion to stay was due—finding that it "was entered with the purpose or 'necessary effect' of preventing Mr. Lee from obtaining a ruling." *Id.* at 526. The Court underscored that "[t]he nol pros entered under the circumstances of this case violated Mr. Lee's right to be treated with dignity and respect." *Id.* at 527.

Second, the Court held that the State violated Mr. Lee's right to notice. *Id.* at 527–38. Statutorily required notice must be reasonable, so an email one business day prior was insufficient. *Id.* at 537.

Third, it held that the circuit court violated Mr. Lee's right to attend. *Id.* at 541. It found that a remote appearance was inadequate when a victim's representative expresses a desire to appear in person and all other participants could do so. *Id*. The court found that the General Assembly intended to give victims the right to in-person attendance, noting that the Vacatur Statute was enacted before COVID-19 and the widespread use of Zoom proceedings. *Id.* at 538–40. The circuit court denied Mr. Lee's postponement request "despite there being no showing that it was necessary to hold the vacatur hearing that day."

Id. at 541. Requiring him to appear remotely during "what indisputably was (or should have been) an evidentiary hearing" violated his rights. *Id*.

Finally, despite its findings about the hearing's improprieties, the Appellate Court found that a victim has no right to be heard at a vacatur proceeding, "[a]lthough we may think it advisable to allow the victim the right to be heard at a vacatur hearing, particularly where there is no one advocating for the conviction to be upheld, the statute, as written, does not provide that right." *Id.* at 544. It added that "there are valid reasons to allow a victim that right[.]" *Id.* at 547.

The Court vacated the order vacating Mr. Syed's conviction and remanded it for "a new, legally compliant, transparent hearing, . . . where Mr. Lee is given notice of the hearing that is sufficient to allow him to attend in person, evidence supporting the motion to vacate is presented, and the court states its reasons in support of its decision." *Id.* at 550.

STANDARD OF REVIEW

This case involves the interpretation of previously unexamined provisions of Maryland's Vacatur Statute and other laws to determine the scope of victims' rights at vacatur proceedings. Courts conduct legal determinations, including interpretation of constitutional and statutory provisions, under a *de novo* standard. *Beall v. Holloway-Johnson*, 446 Md. 48, 76 (2016); *Nesbit v. GEICO*, 382 Md. 65, 72 (2004); *Walter v. Gunter*, 367 Md. 386, 392 (2002).

ARGUMENT

Our justice system relies on the adversarial process. Here, Mr. Lee learned of Mr. Syed's vacatur proceeding at the last possible minute and received no opportunity to attend,

review the evidence, or opine on the State's arguments. Because the prosecutor effectively acted on Mr. Syed's behalf, neither party had an interest in challenging the motion, and the circuit court provided no effective oversight. The outcome was based on speculation, conjecture, and innuendo. In such a case, the only safeguard is to allow a victim the right to speak where no one else will.

I. The State and Circuit Court Violated Mr. Lee's Rights, Resulting in a Predetermined Hearing with No Apparent Evidentiary Review

A. The Circuit Court Violated Mr. Lee's Participation Rights

The circuit court granted the State nearly free rein over the vacatur process. Now, Mr. Syed contends that Mr. Lee had full opportunity to vocalize his concerns and participate in the process. (Appellant's Br. at 10–12, 28, 31, 36) But this revisionist history ignores key facts: Mr. Lee was prevented from meaningfully participating and never saw the evidence. He could vocalize bewilderment but nothing more.

The State first advised Mr. Lee of its motion on Monday, September 12. *Lee*, 257 Md. App. at 497.[1] Mr. Lee made clear that he wanted the prosecutor to notify him if there was a hearing, but the prosecutor did not do so until 1:59 pm EDT on Friday, September 16 (E 179)—less than one business day in advance. *Id.* at 497–98.

With no legal training, (E 132:20–24) Mr. Lee rushed to find counsel, doing so only at 6:00 pm on Sunday, September 18—the day before the hearing. (E 131:3–5, 137:10–15) Working through the night, counsel moved to postpone so Mr. Lee could travel cross-

[1] In March 2022, the State told Mr. Lee that it would be conducting DNA tests. (E 136) But considering the repeated reaffirmation of Mr. Syed's conviction, it is unreasonable to expect that Mr. Lee would have expected a different outcome or retained counsel then.

country to attend. *Id.* at 498–502. The circuit court heard briefly from counsel at the hearing but struggled with the law, asking "[w]hat is attendance, what is presence?" (E 129:1) It denied the motion, offering Mr. Lee a bare concession of an unprepared statement by Zoom.

Given only 30 minutes to race home from work and without counsel's guidance, Mr. Lee spoke haltingly about his sister's murder. He could not address the vacatur's merits because the prosecutor had not yet presented them. *Id.* at 502–04. He could not speak to the evidence because neither he nor the public saw any—all evidence in support of the motion appeared just once, at the secret *in-camera* proceeding. *Id.* at 496–97.[2] He was unaware that this meeting had even occurred until the prosecutor obliquely mentioned it—after Mr. Lee made his remote statement and was barred from further contribution. (E 150:7–10) The irony is not lost that while Mr. Syed was alleging a *Brady* violation, he and the State were closeting evidence to insulate the vacatur from challenge.

B. The Circuit Court Conducted No Meaningful Evidentiary Review

Mr. Syed's underlying guilt or innocence is not before this Court. But the substance of the vacatur proceedings is relevant, as it shows that the outcome—had the court conducted a fair review with Mr. Lee questioning the evidence—was far from certain. To grant vacatur, a court must hold a hearing and record its reasons for ruling. CP § 8-301.1(e), (f). In its ruling, the court must state how any newly discovered evidence calls the integrity

[2] Although Mr. Syed provided numerous circuit court exhibits for the Joint Supplemental Record Extract, none but Exhibit No. 1 (the prosecutor's affidavit) appeared in court or were attached to the State's motion. If not for Mr. Lee's appeal, the evidence would still be hidden.

of the conviction into question and how the "interest of justice and fairness justifies" vacatur by clear and convincing proof.[3] CP § 8-301.1(a), (g). The circuit court conducted an insufficient review and made no such findings.

The State's vacatur motion asserted newly discovered evidence and an alleged *Brady* violation. (E 79–80) But the evidence was neither new—it was all in the original file—nor convincing.[4] The State asserted six categories of evidence but omitted the underlying documents, offering only its own conclusions about what it showed. (E 79–84) The motion loosely described Ms. Lee's car being found near a home where one purported suspect lived but did not identify the evidence relating to this suspect, did not discuss why this person was a suspect, and did not demonstrate how the evidence could have changed the outcome. (E 81–82) The rest of the argument about other suspects relied on claims of past misconduct without any explanation of why such acts were material or how such character evidence was even admissible. (E 82–84)

The motion failed to properly "state in detail the grounds on which the motion is based" or "describe the newly discovered evidence." CP §8-301.1(b)(2)–(3). The timing was also odd: the investigation was ongoing and so-far inconclusive, yet the State filed

[3] The Vacatur Statute specifies that the moving party bears the burden of proof. Here, Mr. Syed's motion was based on a purported *Brady* violation; the burden of proof is "substantial possibility," *Adams v. State*, 165 Md. App. 352, 434–35 (2005), which in Maryland "must be proven by clear and convincing evidence." *E.g.*, *Suessmann v. Lamone*, 383 Md. 697, 720 (2004).

[4] The suspects' identities, now publicly surmised, were dismissed as suspects in the original trial, and the State has not furthered the case against them. *See* Andrew Hammel, *The Wrongful Exoneration of Adnan Syed Part II: The Legal and Media Circus: Part II*, Quillette (May 22, 2023), https://quillette.com/2023/05/22/the-wrongful-exoneration-of-adnan-syed-ii/.

anyway—shortly before the Baltimore City State's Attorney was to leave office—rather than awaiting pending DNA results. *Lee*, 257 Md. App. at 493 & n.6. Accordingly, the circuit court should have denied the motion.

At the hearing, the State submitted just one exhibit—a prosecutor's affidavit describing how she came upon the notes underlying the *Brady* claim. (E 149:24–50:6) The record suggests that the court reviewed two more exhibits *in camera*—the actual notes. (E 150:7–10) Reliance on the notes is suspect. The prosecutor, Becky Feldman, never spoke with their author—the prosecutor from the original trial—even though she admitted that the handwriting was hard to read. (E 147:20–24, 148:19–20) Ms. Feldman selectively quoted a description of a threat against Ms. Lee but omitted inculpatory statements consistent with the evidence against Mr. Syed. *See, e.g.*, *Syed*, 236 Md. App. at 204. (E 148:7–9) In fact, the notes' author states that the reference was to Mr. Syed, not another suspect.[5] Finally, a significant portion of the State's argument was based on alleged misconduct by the investigating detective, (E 155:7–57:5, 90–91) but the State presented no proof of misconduct—only aspersions drawn from unsworn allegations in a federal lawsuit. The Appellate Court recognized the many holes in the State's legal reasoning. *Id.*

[5] Tim Prudente & Dan Segelbaum, *A Decades-Old Note Helped Adnan Syed Get Out of Prison. The Author Says It Was Misinterpreted*, Balt. Banner, https://www.thebaltimorebanner.com/community/criminal-justice/adnan-syed-note-kevin-urick-handwriting-document-serial-podcast-release-2I3GK2ZD6ZBRHPJW7KJLWZGCIQ. Mr. Syed now calls the former prosecutor "self-serving." (Appellant Br. at 9 n.5) But the prosecutor's explanation would have emerged at trial. Mr. Syed fails to show how the note, if disclosed, created a substantial possibility that he would have been acquitted. *See Adams*, 165 Md. App. at 434–35.

at 495 n.8. In so evidently failing to substantiate its allegations, the State demonstrated that it was set on a specific outcome despite its lack of necessary proof.

The circuit court ruled that the State had met its burden for vacatur but did so without analysis, merely quoting the legal standard. (E 162:21–63:11) It did not expound on its reasoning as required, CP § 8-301(f)(2), nor mention a single argument or piece of evidence. It found a *Brady* violation, *Lee*, 257 Md. App. at 509–10 & n.15, but did not explain its reasons for this finding. *See Att'y Grievance Comm'n of Md. v. Cassilly*, 476 Md. 309, 389 (2021). In fact, the court seemingly knew how it would rule before the hearing began: it pre-arranged a press conference on the courthouse steps at which Mr. Syed would appear in his street attire and then be free to go. *Lee*, 257 Md. App. at 510, 542 n.33. The Appellate Court held that the hearing was so flawed that the only solution was to remand the case for a brand-new proceeding. *Id*. at 493 n.6, 495 n.8, 549–50.

If the State's assertions had truly been new and persuasive, Mr. Lee would not have objected to vacatur. But many of the same arguments were weighed in prior appeals, and this Court ruled that they "could not have [] substantially undermined" the original conviction. *See Syed*, 463 Md. at 93–97. Mr. Lee seeks a redo of the vacatur hearing at which such errors are not repeated.

II. This Appeal Is Not Moot

Mr. Syed acknowledges the rights afforded to victims and the importance of those rights. (Appellant's Br. at 42) But he then asserts that this Court is powerless to enforce them because this case is moot. (*Id.* at 13–28) This is incorrect. But for the defective vacatur ruling, the State could not have entered a *nolle prosequi*. The Appellate Court was

empowered to reverse the hearing that violated Mr. Lee's rights. Undoing the vacatur nullified the *nolle pros*.

A. *Antoine v. State* Presents the Proper Analysis for Mootness

The Appellate Court in *Antoine* reviewed the 2013 amendments to CP § 11-103 and recognized that victims could henceforth appeal a violation of their rights and appellate courts could fashion relief. *See Lee*, 257 Md. App. at 533–35. The objective was to place the victim "in the position he occupied before the violations occurred." *Antoine*, 245 Md. App at 550. The victim in *Antoine* claimed that the sentencing court violated his rights by not considering his impact statement or letting him timely address the court. *Id.* at 546. The lower court there—echoing the erroneous assertion Mr. Syed makes here—held that even if it had violated the victim's rights, it lacked "'the legal ability to change the sentence' because it had already bound itself to a plea agreement." *Id.* at 548. The Appellate Court disagreed. It found that it could rely on the powers afforded by CP § 11-103(e)(2)–(e)(3) that "authorize a court, upon finding that a victim's rights have been violated, to grant relief necessary to rectify the violation." *Id.* at 549. Mr. Syed has conceded that the only restrictions on the ability to fashion relief (timeliness and double jeopardy) do not apply. *See Lee*, 257 Md. App. at 548. This Court may fashion relief.[6]

B. The State's Entry of *Nolle Prosequi* Did Not Moot this Case

Instead of contesting appellate courts' full power to fashion relief, Mr. Syed argues

[6] Mr. Syed dismisses *Antoine* on the grounds that its rule applies only to sentencing hearings. But *Antoine* expressly recognized that future courts might grant different remedies for violations occurring at other stages "in the life of a case." 245 Md. App. at 556 n.13.

this Court may not reverse a prosecutor's entry of *nolle prosequi*. To be crystal clear, this is not what Mr. Lee ever sought. Whether a *nolle pros* may ever be reversed is simply not before this Court. Rather, reversing the vacatur and remanding this case for a new hearing nullifies the entry of *nolle prosequi* as though it had never occurred.

As stated in *Ward v. State*, a *nolle pros* does not create a *per se* barrier to appellate intervention or even to a prosecutor bringing dismissed claims under the original charging document. 290 Md. 76, 83 n.6, 84 n.7 (1981). Case law shows that when a trial court's ruling is reversed, any subsequent acts predicated on the reversed ruling are a legal nullity. As in *State v. Simms*, 456 Md. 551 (2017), once Mr. Lee appealed, the Appellate Court gained jurisdiction to review the challenged decision and remedy his injuries. *Id.* at 576. In *Simms*, as here, the State *nolle prossed* "to erase a conviction and sentence, and in doing so attempted an end run around the appellate process." *Id.* This Court "reject[ed] the State's suggestion that its power to nol pros may divest a criminal defendant of his or her right to appeal a final judgment." *Id.* at 577. Instead, the Appellate Court's reversal of the conviction rendered the *nolle pros* "simply a nullity, 'improper' and therefore 'ineffective.'" *Id.* at 576; *see also State v. Thomas*, 465 Md. 288, 299–300 (2019) (ruling that a circuit court's exercise of jurisdiction that "frustrates the appellate process" is subject to reversal, and an action that putatively mooted the appeal was "no longer in effect").

It is generally correct that the State has the prerogative to *nolle pros* once a circuit court vacates a conviction. (Appellant Br. 19–20) But that assumes that the vacatur was sound. As the Appellate Court recognized here, there are numerous instances in which courts may proceed on appeal even in the face of a *nolle pros*. *See Lee*, 257 Md. App. at

520–23. For instance, as in *Simms*, an appellate court may do so when a party appeals and the State then drops charges to evade appellate review. 456 Md. at 576–78.[7] Similarly, courts may treat a *nolle pros* as a nullity when the prosecutor enters it to circumvent the *Hicks* rule. *Curley v. State*, 299 Md. 449, 462 (1984). Or where it is fundamentally unfair, as in prosecutors *nolle prossing* a lesser-included offense to force a conviction on a greater offense. *See Hook v. State*, 315 Md. 25, 37, 43–44 (1989).[8] These cases are not exhaustive. *See Lee*, 257 Md. App. at 523. Together, they stand for the proposition that the State's authority over charging decisions does not divest appellate courts of the power to intervene when litigants' direct and substantial rights, including the right to appeal, are violated. *See id.* If Mr. Syed were correct that the *nolle pros* mooted this appeal, a prosecutor could circumvent review of any vacatur motion and shield even the most egregious abuses, simply by entering a *nolle pros*.

Here, the Baltimore City State's Attorney entered its *nolle prosequi* "with the purpose or 'necessary effect' of preventing Mr. Lee from obtaining a ruling on appeal regarding whether his rights as a victim's representative were violated." *Id.* at 526 (quoting *Curley*, 299 Md. at 462). The timing of the entire vacatur motion was suspect. *See supra* Part I.B. Then, the State *nolle prossed* while Mr. Lee's appeal was pending, two days before

[7] The *Simms* ruling is not limited to criminal defendants. The Appellate Court found that the State could not interfere with a right it did not control—*i.e.*, rights "not controlled by the prosecuting attorneys." *Simms*, 456 Md. at 577. Here, the State did not control Mr. Lee's right to appeal.

[8] The *Hook* ruling should extend to Mr. Lee. His situation implicated the same "fundamental fairness" principles involved in appeals by criminal defendants because Mr. Lee stood in the lone adversarial role. 315 Md. at 44.

the response to his motion to stay was due.[9] *Lee*, 257 Md. App. at 526. (E 65) This all raised questions about the prosecutor's motivations. The Appellate Court did not overturn the State's entry of *nolle prosequi*; instead, it reversed the vacatur, restoring the disposition *ex ante* with Mr. Syed's conviction in place. As in *Simms*, this case was not moot because the *nolle pros* simply no longer had any effect—the conviction was reinstated, and "the State did not and does not have the authority to alter a final judgment." 456 Md. at 576.

Mr. Syed rejects the Appellate Court's ruling, citing *Cottman v. State*, 395 Md. 729 (2006). (Appellant's Br. at 18, 27–28) *Cottman* is inapposite. It deals not with a *nolle prosequi* but a circuit court's jurisdiction after a defendant appeals. There, the circuit court, with rightful authority, granted a defendant a new trial after he appealed but before the Appellate Court ruled. *Id.* at 734. This Court deemed the appeal moot because the circuit court acted to further the defendant's rights, not to divest him of them. *Id.* at 741, 743, 749–50. In other words, his injuries were resolved; his rights were protected. Here, Mr. Lee's injuries were still very much ongoing; nothing would rectify them short of a renewed vacatur hearing with his rights in place. *Cottman* fully recognizes that when, as here, an action taken pending appeal does not moot the appeal, this Court retains the power not only to hear the appeal but to reverse that action. *Id.* at 742.

Mr. Syed's reliance on *Hooper v. State*, 293 Md. 162 (1982), is also unavailing. (Appellant's Br. at 24–25) There, the State effectively *nolle prossed* charges by

[9] Mr. Syed argues that victims cannot stay criminal proceedings. (Appellant Br. at 24 n.10) But the Appellate Court found that issue an open question. *Lee*, 257 Md. App. at 527 n.29. Regardless, nothing would have prevented the State's AG's Office, which was a party to the appeal, from also moving to stay.

withdrawing an appeal of a dismissed indictment but later sought to reinstate the appeal over defendants' objection. *Id.* at 167. This Court ruled that the State could not do so because the effective *nolle pros* mooted the case, leaving no charges to prosecute. *Id.* at 167–68. Unlike here, there was no precursor to a *nolle pros* (here, the vacatur ruling) being challenged on appeal. Nor did the State enter the *nolle prosequi* to circumvent any party's rights. To the contrary, *nolle pros* benefitted defendant—the party whose rights were at issue—and the State could not renege on its own action to that party's prejudice. *Hooper* reaffirms the typical rule that the State cannot *on its own volition* "withdraw a nolle prosequi, or have a nol prossed indictment reinstated." *Id.* at 171.

Citing *Barrett v. State*, 155 Md. 636 (1928), Mr. Syed also suggests that Lee failed to appeal the *nolle pros* itself. (Appellant's Br. at 26) This contradicts Mr. Syed's contention that a *nolle pros* is inviolable. Regardless, as explained, the *nolle pros* itself is not where Mr. Lee's challenge lies. The issue before this Court is whether it may look back to the conduct of the vacatur hearing, where the vacatur order was a predicate for the entry of a *nolle prosequi*. A *nolle pros* might ordinarily moot a case; "[t]his, however, is not an ordinary case." *Lee*, 256 Md. App. at 525.

This Court must not succumb to fearmongering. Mr. Syed insists that the Appellate Court's ruling will bar prosecutors from ever *nolle prossing* charges if a victim appeals. The hyperbole ignores the unique characteristics of the Vacatur Statue. *See infra* Part III.A. Regardless, the Appellate Court's ruling merely stands for the proposition that if a victim does appeal, the State should wait for courts to rule on a pending motion to stay. This Court

is empowered to grant Mr. Lee relief. Accordingly, the appeal is not moot.[10]

III. The Vacatur Statute Envisions Crime Victims Playing a Key Role in the Proceedings

The circuit court disregarded Mr. Lee's rights in a sweeping fashion. The rights to reasonable notice, in-person attendance, and speaking to the evidence are recognized in the Vacatur Statute and essential to its effective implementation.

A. The Vacatur Statute is Unique by Eliminating the Adversarial Process from a Criminal Proceeding

The Vacatur Statute is unique among post-conviction relief statutes in that it aligns the parties' interests: both the prosecutor and defendant seek vacatur. No other law in Maryland authorizes the only two parties to a case to decide on an outcome and proceed to a dispositive ruling without any dissenting voice.

Prior to the Vacatur Statute, there were four main instruments for defendants to vacate a conviction: (1) a direct appeal; (2) a motion for a new trial and a petition for writ of actual innocence, CP § 8-301; (3) a petition under the Uniform Postconviction Procedure Act ("UPPA"), CP §§ 7-101–301; and (4) a writ of error *coram nobis*. *See Griffin v. Baltimore Police Dep't*, 804 F.3d 692, 698 (4th Cir. 2015) (adding executive pardons and post-pardon compensation). All these mechanisms have one element in common—the defendant is the party seeking relief.

The Vacatur Statute is unique. It sets the defendant aside and empowers the prosecutor to move for vacatur. CP § 8-301.1(a). Indeed, the prosecutor bears all the

[10] This appeal should be heard even if the dispute is deemed moot. *See Lee*, 257 Md. App. at 555–56 (Berger, J., dissenting).

requisite responsibilities including submitting the motion, notifying the defendant and victim, and carrying the burden of proof. CP § 8-301.1(a), (c), (d), (g). The law ascribes no responsibility to the defendant other than that both parties may appeal. CP § 8-301.1(h). Md. Rule 4-333(i) thrusts the State even further into the controlling role, requiring that within 30 days of vacatur, the prosecutor "either enter a *nolle prosequi* of the vacated count or take other appropriate action as to that count."

The General Assembly was familiar with these distinctions; the existing avenues for defendant-driven, post-conviction relief were memorialized in the House Floor Report. (Apx 1–5) Indeed, the legislature's intent was to provide prosecutors a tool they could use to correct an injustice when they learned about new information "*long before* the defendant." (Apx 15)

It is this arrangement between parties, with the prosecutor acting on the defendant's behalf, that results in neither party having an interest in challenging the evidence or arguments. This alignment is why the victim's and court's involvement are essential—to ensure that a duly convicted defendant is not freed without proof.[11]

[11] The absence of adversarial parties is further highlighted by comparing the Vacatur Statute to the law enabling petitions for writ of actual innocence, CP § 8-301—an earlier law that the Vacatur Statute most closely resembles. The two are structured almost identically, except for which party moves for relief. *Compare id.*, *with* CP § 8-301.1. For writs of actual innocence, a court may consider evidence from either party. CP § 8-301(f)(2). But the Vacatur Statue, in a corresponding provision, omits this clarification. *Compare* CP § 8-301(f), *with* CP § 8-301.1(f). The most logical explanation is that the drafters simply cut the parts related to an adversarial party. But it is unreasonable to thus assume that the General Assembly intended to bar all evidentiary review. The victim remains the only litigant interested in and positioned for a challenge to the State's claims.

B. The Assembly Drafted the Vacatur Statute Under the Presumption of Victimless Crimes

In passing the Vacatur Statute, the Assembly explained why it was necessary to take the extraordinary step of allowing a prosecutor to move to vacate convictions it had obtained. The House Judicial Committee had a narrow target—changing standards for prosecution of marijuana crimes. (Apx 7) The Committee Report noted that Maryland had eliminated or significantly reduced criminal prohibitions on possession or use of marijuana and that the Baltimore City State's Attorney accordingly wanted to vacate 5,000 prior marijuana convictions. (Apx 7-8) The full Floor Report cited another use for the Vacatur Law: to remedy erroneous convictions based on fraudulent evidence derived from the Baltimore City Gun Trace Task Force. (Apx 4–5) *See also Walker v. State*, No. 2418, Sept. Term, 2019, 2021 WL 465455, at *2 (Md. App. Feb. 9, 2021).

In other words, the record shows that the Assembly was focused on specific types of crimes—namely, ones where the underlying acts were no longer prohibited or where there had been recognized wholesale fraud by authorities. In such circumstances, the crime was victimless; there was undisputed evidence that the original basis for prosecution was tarnished, if not baseless.

The envisioned uses are wholly at odds with the State's motion here. Hae Min Lee's murder was in no conceivable way victimless. The Lee family has grieved her loss for 20-plus years. Murder remains as much a crime today as in 1999. And there has been no wholesale fraud by authorities. To the extent doubts exist about the original prosecution, appellate courts have rejected the same claims repeatedly. *See Lee*, 257 Md. App. at 493

n.6, 495 n.8, 549–50. So, it was unprecedented for the State to turn to the Vacatur Statute here, where the basis for relief was highly disputed and there were individuals adversely affected by the motion.

C. When Victims' Interests Are Affected, the Vacatur Statute Expects Victims to Play a Meaningful Role

1. Maryland's Laws and Constitution Empower Victims

The Maryland Declaration of Rights requires state agents to treat crime victims with "dignity, respect and sensitivity during all phases of the criminal justice process." Md. Const. Decl. of Rts. art. 47(a); *see also* CP § 11-1002(b)(1). This broad grant engendered a suite of victims' rights. Under CP § 11-402(a), presentence investigation reports in sentencing proceedings must include a victim impact statement for crimes involving serious injury or death. Under CP § 11-102(a), a victim's representative may "attend any proceeding in which the right to appear has been granted to a defendant." And CP § 11-403(a) requires courts to allow a victim's representative to "address the court under oath" where an "alteration of a sentence" is considered. *Id.* If the representative does not appear, the prosecutor must state why it is fair to proceed, and if the court is dissatisfied with this explanation, it may postpone the hearing. CP § 11-403(e)(1)–(2).[12]

[12] Maryland affords victims other rights that further their direct and substantial interests. For instance, victims may seek permission to present evidence to a grand jury where the prosecutor refuses to do so. *See Brack v. Wells*, 184 Md. 86, 91 (1944). Additionally, Maryland's restitution statute permits victims to request and conduct restitution hearings notwithstanding the state's position and may call expert witnesses at such hearings. *See* CP § 11-603(b)(1); *In re Cody H.*, 452 Md. 169, 186 (2017). Crime victims may introduce evidence, including expert testimony, when seeking to permit a child-victim to testify via CCTV. *See* CP § 11-303; *Craig v. State*, 322 Md. 418, 432–34

In 2013, the Assembly passed amendments to CP § 11-103, greatly expanding victims' rights to appeal, as recognized by *Antoine v. State* in 2020. The amendments expanded victims' standing to challenge violations of their rights via direct appeal and empowered appellate courts to impose remedies. *Antoine*, 245 Md. App. at 541–42. Because the amendments were remedial, they must be applied liberally to effectuate legislative intent. *Opert v. Crim. Injs. Comp. Bd.*, 403 Md. 587, 594 (2008). Maryland courts could henceforth grant relief when victims with "direct and substantial interests" are denied their participatory rights. *Cf. Hoile v. State*, 404 Md. 591, 606–07 (2008) (quoting *Lopez-Sanchez v. State*, 388 Md. 214, 227 (2005)); *see also Lopez-Sanchez*, 388 Md. at 227 (listing examples where direct and substantial interests are affected).

The Assembly drafted the Vacatur Statute in light of existing rights. Because of the prosecutor's and defendant's unique alignment, the Vacatur Statute bakes in a role for victims. It requires that victims "be notified" of and allowed "to attend" proceedings. CP § 8-301.1(d). Moreover, through its implementing rule, it incorporates a victim's right to speak. *See* Md. Rule 4-333(h) ("**Cross-reference:** For the right of a victim or victim's representative to address the court during a sentencing or disposition hearing, see Code, Criminal Procedure Article, § 11-403."). These rights ensure a thorough hearing and afford the victim dignity and respect.

(1991). Victims are entitled to a hearing to challenge defense subpoenas of their private records. *Goldsmith v. State*, 337 Md. 112, 122 (1995). Victims may also present evidence at pre-trial release hearings and sentencing alteration hearings concerning the threat a defendant might pose. *See* CP §§ 5-201; 8-106.

2. The Vacatur Statute Envisions Meaningful Participation Including the Right to Speak

The Vacatur Statute, which explicitly permits the victim to attend a vacatur hearing, CP § 8-301.1 (d), envisions them playing a meaningful role when direct and substantial interests are affected, such as personal safety, finality, privacy, and confidence in the justice system.[13] Vacatur hearings can put all such interests at risk. The Statute requires the circuit court to hold a hearing on any vacatur motion that it does not dismiss. CP § 8-301.1(e), Rule 4-333(h). When a vacatur is contested, the Statute's purpose will be met only if the sole litigant willing and able to present a challenge—the victim—is permitted to do so.

First and foremost, the right to speak is incorporated by Md. Rule 4-333(h), which cross-references CP § 11-403. A cross-reference makes the cited statute part of the law. *See Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019) ("[A] statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted."); *Hassett v. Welch*, 303 U.S. 303, 314 (1938) ("Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute."); *In re Heath,* 144 U.S. 92, 93–94 (1892) ("Prior acts may be incorporated in a subsequent one in terms or by relation."); Singer & Singer, 2b Sutherland Statutory Construction § 51:7 (7th ed. 2019).

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[13] *See* Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 Drexel L. Rev. 43, 62–66 (2016) (discussing victims' interests).

Second, even if the cross reference was not directly incorporated, courts "read the Rules in light of the Committee notes." *Bijou v. Young–Battle*, 185 Md. App. 268, 288 (2009); *see also Aguilera v. State*, 193 Md. App. 426, 442 (2010). Likewise, rules relating to the same subject matter should, when possible, be construed in harmony with each other to not produce an unreasonable result. *See Doe*, 439 Md. at 228. Absent clear indication to the contrary, this Court assumes that a rule is not intended to amend, nullify, or supersede the common law. *See Holmes v. State*, 350 Md. 412, 422 (1998). And if the text of a court rule being construed admits of more than one reasonable meaning, courts should turn to secondary indicia, such as legislative history, case law, and purpose. *See Nationwide Mut. Ins. Co. v. Regency Furniture, Inc.*, 183 Md. App. 710, 738–39 (2009). These canons favor interpreting a victim's right to speak under CP § 11-403 as implicit in the Vacatur Statute.

Third, a victim's right to speak should be inferred as inherent in the statutory scheme. Significantly, the Maryland Judiciary originally opposed the bill, in part because it permitted courts to grant vacatur without any victim participation. (Apx 13) The Assembly revised the bill to ensure that hearings would always be held, which victims could attend. (Apx 1) The Appellate Court ruled that "the intent of the General Assembly" was to permit victims to attend vacatur hearings in person. *Lee*, 257 Md. App. at 539. But the right to receive notice and attend a proceeding is not an end onto itself: it "protects the right to be heard at that hearing"; the rights exist "hand in glove." *Lamb v. Kontgias*, 169 Md. App. 466, 480 (2006). The Vacatur Statute's explicit inclusion of a right to notice implies a right to participate as a matter of procedural due process. *See Reese v. Dep't of Health & Mental Hygiene*, 177 Md. App. 102, 150 (2007) (summarizing cases). Otherwise,

the victim becomes a mere prop. Strikingly, many of the witnesses at the Judiciary Committee's hearings presumed that victims had the right to speak under the bill as drafted.[14]

Finally, the Statute established key requirements that the prosecutor and court must meet to grant vacatur. *See* CP § 8-301.1(b)(2), (f)(2), (g). The State's burden of proof is meaningless if no one may stand in opposition. In no other instance does our system rely on one-sided argument—it depends, instead, on the adversarial process. *See Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("[O]ur adversarial system of justice . . . is premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question.'"); *In re Riddlemoser*, 317 Md. 496, 505 (1989) ("[I]t is the adversarial nature of a legal proceeding that provides the necessary incentive to the parties to vigorously research the issues and present the relevant arguments that enable the court to fairly consider the merits of the controversy."). A ruling preventing one side from mounting a full challenge to the other party's evidence "deprive[s] the court of

[14] Maryland Gen. Assembly, House Judiciary Committee Hearing (Feb. 26, 2019), https://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=jud&ys=2019RS&clip=JUD_2_26_2019_meeting_1&url=https%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2F474bb5ed-4a8c-4950-9d07-cf075b4a2300%3Fcatalog%2F03e481c7-8a42-4438-a7da-93ff74bdaa4c%26playfrom%3D459000 (at 12:20, U.S. Attorney for the District of Maryland Erek Barron saying "any named victim should be heard"); at 38:38, Chief Counsel for Baltimore City State's Attorney's Office Antonio Gioia saying victims "most certainly would" have a right to be heard; at 48:08, Maryland Public Defender Paul DeWolfe saying the Statute would allow a "victim of the crime to weigh in and to give statements").

one of the core benefits of the adversarial system: the progression towards truth through the presentation of counter-evidence." *Sumpter v. Sumpter*, 436 Md. 74, 85 (2013).

Victims' right to speak at certain hearings is not just for their own benefit; it advances the search for truth. As the Appellate Court recognized, victims are permitted to testify in sentencing hearings because "a relevant factor is the impact that the crime had on the victim," *Lee*, 257 Md. App. at 545. In-person victim-impact statements may be on any non-prejudicial subject, and written statements are limited only in that they must address "one of the very broad content requirements listed under CP § 11-402(e)." *See Lopez v. State*, 458 Md. 164, 189, 203–04 (2018) (going so far as to permit a video-taped victim-impact statement set to music). Here, Mr. Lee could protect his interests and assist the circuit court's vacatur decision by probing the State's arguments and the evidence presented. With no party performing this role, Mr. Lee's input would be just as meaningful to the vacatur decision as it would be to a sentencing court's sentencing decision. He had an invaluable role to play, which the circuit court upended.

The Appellate Court in *Antoine* recognized that when a victim's rights are violated, he "should be placed in the position he occupied before the violations occurred." 245 Md. App. at 550. Doing anything less would be "an empty ritual." *Id.* at 555. (emphasis added). Here, for the new hearing to be more than an empty ritual, the circuit court must not just redo the original proceeding but do it properly. That means that Mr. Lee may meaningfully participate, with the right to review and speak to the evidence. The Vacatur Statute and victims' rights protections demand as much.

D. Recognizing Victims' Rights Under the Vacatur Statute Will Not Produce Unmanageable Results

Maryland has marched steadily for 30 years towards a growing embrace of victims' rights. The voters ratified Article 47, "the Victims' Right Amendment," in 1994, representing "the strong public policy that victims should have more rights and should be informed of the proceedings, that they should be treated fairly, and in certain cases, that they should be heard." *Hoile*, 404 Md. at 605 (quoting *Lopez–Sanchez*, 388 Md. at 229); *see also Cianos v. State*, 338 Md. 406, 412–13 (1995) (discussing prior history of victims' rights legislation). In 2013, the Assembly expanded on those rights by providing victims greater opportunities to appeal. *See Lee*, 257 Md. App. at 549–50. To deny victims their crucial role in the sentencing or vacatur process, as the circuit court did here, turns back the tide of history.

Recognizing victims' right to participate in Vacatur Statute hearings where there is no party filling the adversarial role protects judicial transparency and maintains consistency in the law. Victims already contribute meaningfully to sentencing hearings. *See, e.g.*, *Cianos*, 338 Md. at 413; *Lopez*, 458 Md. at 189. It is also clear that, as matter of course, judges often grant victims the opportunity to participate in other post-conviction relief hearings. *See, e.g.*, *Fowler v. State*, No. 683, Sept. Term, 2022, 2023 WL 2534676, at *2, *7 (Md. App. Mar. 16, 2023) (discussing victim speaking in a vacatur hearing under UPPA); *Hoile*, 404 Md. at 598–601 (discussing a circuit court reversing its prior resentencing ruling under Md. Rule 4-345 because it failed to give proper notification and

permit the victim to participate). Recognizing a victim's right to speak at contested Vacatur Statute hearings simply conforms to what is already common in the law.

Mr. Syed contends that granting Mr. Lee a right to speak will lead to a parade of horribles where victims infiltrate all stages of litigation. (Ans. to Cross-Pet., at 2–3). Such fears are meritless.

First, it is unlikely that such a ruling will even affect application of the Vacatur Statute in most instances. As discussed, the Vacatur Statute was primarily envisioned for use in victimless crimes. (Apx 4–5, 7–8, 15) And when victims do exist but there is overwhelming evidence of injustice or an erroneous prosecution, it is highly likely that the victim would support vacatur.[15] Mr. Lee himself would favor vacatur if the State, acting transparently, instilled sufficient faith in him that Mr. Syed's conviction was unjust and should not stand. The State took the opposite tack.

Second, it defies logic that recognizing the right to speak in this case would expand to plea agreements, evidentiary stipulations, "and even unopposed motions to continue a hearing date." (Ans. to Cross-Pet., at 4) At the outset, this Court should focus on the exceptional nature of the Vacatur Statue. Plea agreements, evidentiary stipulations, and joint motions are very different. Although the parties may operate in agreement, they

[15] *See* Jeanne Bishop & Mark Osler, *Prosecutors and Victims: Why Wrongful Convictions Matter*, 105 J. Crim. L. & Criminology 1031, 1047 (2015) ("We must recognize the strong interests that prosecutors and victims have in avoiding wrongful convictions and seek to encourage a more whole and true role for them in the drama of prosecution and review."); Glenn A. Fait, *Victims' Rights Reform - Where Do We Go from Here? - More Than A Modest Proposal*, 33 McGeorge L. Rev. 705, 706 (2002) ("Most victims believe in due process and the rights of the accused. In fact, it is some of those same basic rights that victims want for themselves.").

remain adversarial, with the prosecutor acting on the public's behalf. Likewise, especially for plea agreements, there are strict dictates for court oversight. *See* Md. Rule 4-243. And of the three, only plea agreements have the dispositive impact of a vacatur proceeding. Even then, plea agreements still allow victims to participate. *E.g.*, CP §§ 11-102(a), 11-104(e), 11-603 (victims have a right to notice, presence, and to seek restitution at plea hearings); *cf. Antoine*, 245 Md. App. at 534–37, 539 (court erred where it agreed to plea agreement before hearing from victim). Any argument that recognizing a right to speak under the Vacatur Statute would affect courts' conduct in such unrelated scenarios is pure scaremongering.

Third, there should be no concern that victims will even gain the right to address the evidence at hearings for writs of actual innocence, CP § 8-301—the law most akin to the Vacatur Statute. Key differences remain between the two, including that the parties arguing writs of actual innocence are still adversarial. The law also explicitly permits submission of opposing evidence that the court must review and weigh, unlike the Vacatur Statute. CP § 8-301(f). Furthermore, unlike the Vacatur Statute, that law's implementing rule does not incorporate the right to speak. *Compare* Md. Rule 4-332, *with* Md. Rule 4-333(h) (cross-reference).

Consequently, the Court may recognize Mr. Lee's right to speak under the Vacatur Statute without opening Pandora's Box.

IV. The Appellate Court Correctly Recognized Mr. Lee's Rights to Notice and In-Person Attendance but Erred in Denying Him His Right to Speak

The Appellate Court held that the circuit court had erred in multiple ways, but it reached the wrong conclusion as to Mr. Lee's right to speak. The remedy the Appellate Court should have granted was not just a redo of the original hearing with Mr. Lee sitting mutely in attendance, but one in which he could serve a meaningful role.

A. The State Violated Mr. Lee's Right to Notice

The State was woefully deficient in notifying Mr. Lee before moving to vacate. The circuit court held that notice was adequate because the State followed the bare letter of the law, which does not expressly specify that notice must be reasonable. (E 137:20–24) Under this logic, a prosecutor could give a victim mere minutes notice. Mr. Lee's statutory rights to notice and appearance required more than an empty formality. In implementing these rights, the circuit court was also obliged to protect his constitutional right to "dignity, respect, and sensitivity." Md. Const. art. 47; *see Cianos*, 338 Md. at 413 ("[T]rial judges *must* give appropriate consideration to the impact of crime upon the victims."); *Lopez*, 458 Md. at 168 (discussing the court's need "to balance these opposing interests in light of the law" for victims).

On September 14, 2022, the State moved to vacate Syed's conviction. (E 54, 73–93) But despite having vacatur in the works for nearly a year, the State first notified Mr. Lee that it would pursue a motion on September 12, just two days before filing. (E 180) Even then, it disclosed no relevant details and did not tell Mr. Lee that there could be a hearing. (E 179–80)

On September 16, two days after filing, the State advised Mr. Lee that an "in-person hearing" was set for the next business day. (E 179) Prosecutors offered the option of watching via Zoom but did not say that he could participate. (*Id.*) Mr. Lee did not respond. (E 181) He wished to attend in person, (E129:21–25) but he could not travel cross-country on such short notice.

Mr. Lee was also excluded from the *in-camera* hearing held on September 16, where prosecutors and Mr. Syed's counsel discussed the State's motion and persuaded the court to vacate the conviction. *Lee*, 257 Md. App. at 496–97. Mr. Lee did not even learn about this event until its disclosure at the vacatur hearing—after his Zoom appearance. (E 150:7–10)

On the day of the hearing, Mr. Lee's counsel moved for a postponement to afford him time to see the evidence and appear in person. (E 103–10) The court rejected this motion, holding that notice to the victim need not be reasonable. (E 132:12–14, 137:23–38:2) Mr. Syed argues that the sprint to release him was justified by the fact that he had served two decades in prison. (Appellant's Br. at 33) The Appellate Court found this same argument baseless. *See Lee*, 257 Md. App. at 541. A one-week postponement in a contested proceeding was reasonable. *Cf. Tweedy v. State*, 380 Md. 475, 495–96 (2004) (deciding whether a sentencing hearing should continue with a defendant absent and finding that it should be delayed because sentencing lacks the time pressures of trial). Mr. Syed does not claim that anything had changed to put him at sudden risk, the State admitted that its investigation was incomplete, and Mr. Lee had independent authority to move to vacate with the same evidence at any time. (E 86 n.26) Vacatur was neither ripe nor urgent.

The circuit court erred. Maryland recognizes that "[p]arties are entitled to adequate notice of the subject matter of a hearing, so that they may prepare to address the issues." *In re Katherine C.*, 390 Md. 554, 579–80 (2006). A "fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Notice must also "afford a reasonable time for those interested to make their appearance." *Id*. The Vacatur Statute incorporates the reasonableness requirement through Rule 4-333(g), which requires "[r]easonable efforts . . . to locate defendants, victims, and victims' representatives and provide the required notices." *See id.* committee note. Notice here was plainly deficient.

B. The Circuit Court Violated Mr. Lee's Right to In-Person Presence

Upon learning of the hearing, Mr. Lee scrambled to secure counsel and move to postpone, citing his right to meaningfully participate. (E 103–10, 131:3–5) The circuit court's consideration of his motion was perfunctory at best, resulting in the consolation of a statement via Zoom. (E 137:23–38:2) Remote attendance was insufficient in this context. *See Kenna v. U.S. Dist. Ct. for C.D. Cal.*, 435 F.3d 1011, 1016 (9th Cir. 2006) (discussing the need for in-person victim statements); *United States v. Moussaoui*, 483 F.3d 220, 234 (4th Cir. 2007) (citing *Kenna* with approval). Had Mr. Lee not moved to appear in person, the Lee family would have been erased from proceedings—reduced to silent observer status, watching the same erratic internet video available widely online. As it was, the circuit let in Mr. Lee's disembodied voice for mere minutes, and then made him an

afterthought. The court could not see him or his reactions to the evidence.[16] Mr. Lee's counsel, whom the circuit court had already dismissed, could not object. (E 142:23–143:5) So, the victim's family had no presence at the end of their long ordeal. The circuit could not benefit from Mr. Lee's insights, observations, and concerns.[17]

The Appellate Court considered the circuit court's conduct wanting. It recognized that remote attendance had become more common during the COVID-19 pandemic, but the Vacatur Statute was drafted before COVID-19, and there was a strong desire among all participants to be in the courtroom. *Lee*, 257 Md. App. at 538–39. It correctly found that Mr. Lee, even if not an official party, had strong interests in the case and equivalent attendance rights. *See id.* It held that "a court is not permitted to *require* a victim" to attend remotely—at least absent compelling circumstances. *Id.* at 540–41. The Appellate Court's ruling is sound.

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[16] *Cf. Garcia-Martinez v. City and Cnty. of Denver*, 392 F.3d 1187, 1191 (10th Cir. 2004) ("When the 'key factual issues' at trial turn on the 'credibility' and 'demeanor' of the witness, we prefer the finder of fact to observe live testimony of the witness."); *Fairstein v. Netflix, Inc.*, No. 2:20-cv-180, 2020 WL 5701767, at *8 (M.D. Fla. Sept. 24, 2020) ("Virtual proceedings may not be enough for the Court (or jurors) to properly evaluate the witnesses' credibility."); *Wolfkiel v. Krug*, No. 11-cv-3170, 2012 WL 3245962, at *3 (D. Colo. Aug. 7, 2012) ("[C]redibility determinations are easier to make, and likely to be better-reasoned, when the witness appears in person, where his demeanor and other intangibles can be readily assessed.").

[17] Mr. Syed cites to Md. Rule 21-301, arguing that the State now requires remote hearings in criminal proceedings with the defendant's approval. (Appellant Br. at 29–30) But that Rule, enacted July 1, 2023, was not in effect when the vacatur hearing occurred. And its plain text says, "[r]emote proceedings generally are not recommended when the finder of fact needs to assess the credibility of evidence." Md. Rule 21-301, note (1) to section (d). Even if parties consent—Mr. Lee, a victim with established rights, did not consent—the court must balance competing interests. *See You v. Jeon*, No. 467, Sept. Term, 2022, 2023 WL 4572077, at *7 n.7 (Md. App. July 18, 2023).

The import is clear. Mr. Lee lacked notice and a meaningful opportunity to participate. He was excluded from the *ex parte* proceeding at which the prosecutor and circuit court apparently decided the outcome. The court refused him the dignity and respect it owed. Md. Const. art. 47.

C. The Appellate Court Erred by Not Recognizing Mr. Lee's Right to Speak

1. The Appellate Court Correctly Acknowledged Its Power to Fashion Relief but Failed to Grant all Relief Required Under the Circumstances

The Appellate Court recognized that the 2013 Amendments to CP § 11-103 afforded courts expanded powers to fashion relief for victims. *See Lee*, 257 Md. App. at 533–34, 547–49. In *Antoine*, the Court recognized that "[t]he statutory rights to present victim impact evidence are therefore meaningful only if they are afforded *before a trial court formally binds itself* to a particular disposition of a case." *See* 245 Md. App. at 547 (emphasis added).

Here, by all appearances, the circuit court determined the vacatur motion's outcome before Mr. Lee's statement via Zoom. At the official hearing on September 19, it required Mr. Lee to speak perfunctorily before the State presented its position, before he could hear arguments or see evidence. The court handed down its sparse ruling, noting only that it was based on "*in camera* review of the evidence," the motion, proceedings, and "oral arguments of counsel." (E 162). If this had been an open process, the circuit court would not have prejudged the matter before seeing all evidence and hearing from all interested litigants.

The Appellate Court correctly recognized the need to rewind proceedings, remanding the case for a new legally compliant hearing. *Lee*, 257 Md. App. at 549–50. This

will place Mr. Lee "in the position he occupied before the violations occurred." *Antoine*, 245 Md. App at 550. But if the remedy is to have teeth, Mr. Lee must also be empowered to protect his interests under the law. This Court should instruct the circuit court to conduct an evidentiary hearing where Mr. Lee may speak to the actual evidence. *See* CP § 11-103(e)(2); Md. Rule 4-333(h).

2. The Appellate Court Erred in Ruling on a Victim's Right to Speak

In its decision, the Appellate Court raised grave doubts about the basis for vacatur and the circuit court's review of the motion. "We may think it advisable to allow the victim the right to be heard at a vacatur hearing," the Court said, "particularly where there is no one advocating for the conviction to be upheld." *Lee*, 257 Md. App. at 544. Yet, it stopped short of ruling that such was required. The Court erred in three ways.

First, the Appellate Court misinterpreted the Vacatur Statute's incorporation by cross-reference of CP § 11-403. It held that the cross-reference in Md. Rule 4-333 did not serve to incorporate the right to speak but did the opposite—contrasted the Vacatur Statute with the right to speak offered in sentencing hearings. *See Lee*, 257 Md. App. at 546. The only support the Court provided for this was the Rule Committee's *Report of the Standing Committee on Rules of Practice and Procedure* for Rule 4-333. But the Report says nothing to support the Appellate Court's stark finding. The Committee's entire statement was: "A cross reference to Code, Criminal Procedure Article § 11-403 is included after section (h) to highlight the right of the victim or victim's representative to address the court during a sentencing or disposition hearing." (Apx. 59) The Committee did not opine that its intent was to offer a contrast. *See* "highlight," Merriam-Webster Online Dictionary (listing

definitions including "to center attention on" and "to throw a strong light on" but not *to contrast*). This basis for denying the cross-reference's effect is entirely unsupported.

Second, the Appellate Court ruled that the cross-reference to CP § 11-403 "suggests . . . a comparison" with available rights, not an establishment of that right. 257 Md. App. at 546. It beggars belief to suggest that the General Assembly incorporated a reference to a clearly established right in criminal proceedings to show that such a right did not exist in vacatur hearings. Mr. Lee knows of no other instance in which a statutory cross-reference has been so construed. Although the Appellate Court read the cross reference as a contrast, better-suited canons suggest the opposite. Statutes are to be interpreted to avoid surplusage; if the cross-reference to § 11-403 was surplusage, it would not have been included. *See Johnson v. State*, 467 Md. 362, 372 (2020). Further, a court must consider the statutory scheme as a whole, including any related enactments, and effectuate the Legislature's overall purpose. *Id*. at 372–73. Additionally, the Related-Statutes Canon states that statutes *in pari materia* are to be interpreted together. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* § 39 (2012); *see Johnson*, 467 Md. at 372; *Doe*, 439 Md. at 228. Likewise, under the Presumption Against Implied Repeal Canon, repeals by implication are "very much disfavored." Scalia & Garner § 55. Only a provision that flatly contradicts an earlier-enacted one annuls it. *The Last Best Beef, LLC v. Dudas*, 506 F.3d 333, 338–39 (4th Cir. 2007). The right to speak is provided for in hearings that affect a sentence, CP § 11-403(b), and Md. Rule 4-333(h) explicitly incorporates this right. The Vacatur Statute and right to speak are not just related, they are paired. Had the Assembly intended otherwise, it would have said so.

Finally, the Appellate Court correctly rejected Mr. Syed's argument that CP § 11-403 applies only to sentencing hearings. *Lee*, Md. App. at 545 (finding "that the vacatur of a defendant's conviction is the ultimate alteration of a sentence"). But the Court then took another path to the same erroneous end. It distinguished vacaturs from sentencings in that sentencings are discretionary. *Id*. 545–46. It concluded that the Vacatur Statute is like other non-discretionary post-conviction procedures, which do not provide a right to speak.[18] *Id*. Such logic is flawed. Victim participation is essential under the Vacatur Statute because the victim is the one potential adversary situated to assist the circuit court's factfinding. This is not so in other post-conviction proceedings. Nothing in CP § 11-403 indicates that a victim's right to speak applies only to discretionary rulings.

The Appellate Court recognized most of the harms imposed by the circuit court's ruling; it agreed that it had "the power and obligation to remedy that injury." *Lee*, 257 Md. App. at 549 (quoting *Antoine*, 245 Md. App. at 561). But a victim's right to notice and attendance is only fully realized if it carries with it the right to speak and to address the evidence. The Appellate Court's remand, as issued, lets the circuit decide whether Mr. Lee may participate meaningfully or be set aside like any public attendee in the gallery. The

[18] Of the statutes listed, only UPPA even mentions CP § 11-403 (*see* Md. Rule 4-406). And in practice, circuit courts do sometimes allow victims to speak in proceedings conducted under UPPA. *See, e.g.*, *Fowler v. State*, No. 683, Sept. Term, 2022, 2023 WL 2534676, at *2, *7 (Md. App. Mar. 16, 2023) (noting that "the [victim] had the opportunity to be heard during the hearing and to submit victim impact statements"). Whether that right is statutory under UPPA or merely customarily granted is undecided as far as Appellee/Cross-Appellant can determine.

Vacatur Statute intended to vest victims with special rights given their unique status and interests. This includes the right to speak.

V. Barring Lee from Meaningfully Participating Prejudiced the Outcome

The circuit court's failure to grant Mr. Lee his full rights foreclosed meaningful review of the evidence and ensured a predetermined outcome. Without anyone to question the validity of the State's evidence or the basis for vacatur, the court accepted the State's claims at face value and granted the motion without inquiry. Mr. Syed did not argue that the case should be reviewed for harmless error in the Appellate Court.[19] Regardless, he argues now that it erred by not doing so. (Appellant's Br. at 37–44) His contentions misstate the burden of proof for proving harmless error and ignore glaring evidence that the outcome of the hearing, if properly conducted, was unknown.

At the outset, harmless error analysis is not appropriate with respect to denial of a victim's constitutional and statutory rights to participate in proceedings. In none of the relevant cases—*Antoine*, *Lopez*, or *Cianos*—did the Court ask whether the outcome of the proceeding was affected by the victim's absence. Participatory rights provided under Maryland law are an end onto themselves. The right is not to a substantive outcome but to be treated with dignity and respect. Violations are remediable by redoing the proceedings with appropriate safeguards in place. It does not matter if the victim's statements would

[19] Mr. Syed first raised harmless error review in his motion for reconsideration. There is no requirement that an appellate court review for harmless error *sua sponte*. *Cf. Gilchrist v. State*, 340 Md. 606, 628 n.4 (1995); *see, e.g.*, *Bailey v. State*, 464 Md. 685, 702 (2019). Likewise, appellate courts should not do so especially when the facts are close. *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1101 (9th Cir. 2005) (summarizing similar rulings).

have altered the outcome of the hearing, for instance, based on how articulate or persuasive she was.

Even if harmless error review were appropriate, there is no bright-line rule for which party should bear the burden of proving or rebutting the error here. In many civil proceedings, the complainant bears the burden, *see Harris v. David S. Harris, P.A*,. 310 Md. 310, 319 (1987), but this is not a civil proceeding.[20] For most criminal appeals and some appeals of civil hearings, there is a strong presumption of error, and the burden is on the respondent to rebut the prejudice. *See State v. Stringfellow*, 425 Md. 461, 474 (2012). "This means that a reviewing court, upon an independent review of the record, 'must thus be satisfied that there is no reasonable possibility' that the assumed error caused impermissibly the [challenged] verdict." *Id.* (quoting *Lee v. State*, 405 Md. 148, 164 (2008)).

Mr. Lee's role as victim's representative was essential because he, and only he, could have called the court's attention to the State's deficient arguments and evidence—had he been provided adequate notice and participation rights. Even civil cases weighing less-grave errors have presumed prejudice. *See, e.g.*, *Harris*, 310 Md. at 319–20 & 319 n.6 (presuming rebuttable prejudice from erroneous disqualification of plaintiff's attorney);[21]

[20] Analogously, this Court has implied that proceedings for motions for writs of actual innocence are not civil. *See Seward v. State*, 446 Md. 171, 181 (2016) (reversing ruling that CP § 8-301 decisions are final, appealable decisions under a law that applies to only civil proceedings). Likewise, the statute permitting Mr. Lee's appeal applies only to criminal cases. CP § 11-103(b).

[21] Mr. Syed erroneously relies on this case to argue that burden is on the complainant. (Appellant Br. at 38)

Murrell v. Baltimore, 376 Md. 170, 197 (2003) (violating procedure established in city code may present structural trial error whereby prejudice is presumed); *King v. State Roads Comm'n,* 284 Md. 368, 372 (1979) (noting that prejudice may be presumed where deviation from prescribed court procedure impairs or denies full exercise of peremptory challenges).

The civil case *Safeway Stores, Inc. v. Watson*, 317 Md. 178 (1989), is instructive. There, the court excluded a witness who would testify on the company's behalf and serve as its designated corporate representative. *Id.* at 179. Before *voir dire*, the plaintiff asked that all witnesses leave the courtroom, and the court denied Safeway's request for the witness to stay. *Id.* at 179–80. This Court held that the error was not harmless. *Id.* at 184. Among other factors, it found that the decision robbed the defendant's counsel's ability to "humanize" the defendant and that "a party is entitled to be present to have a firsthand view of the proceedings[.]" *Id.* The same is true here. The factfinder was robbed of the possibility of hearing from Mr. Lee, having the victim personified, and considering additional input that he might offer.

Regardless of which party now bears the burden of proof, the prejudice is evident. Had Mr. Lee received full participatory rights he could have done at least the following:

With Reasonable Notice	With In-Person Attendance	With Right to Speak to Evidence
He could have engaged counsel in a timely manner and traveled to the hearing.	He could have been seen, like all other litigants. *See supra* note 16.	He could have asked why the State felt compelled to move for vacatur while its investigation was ongoing. (E 73)
He could have conferred with counsel about the motion and the materials submitted in support of it.	He could have asked to speak on the evidence and objected if the circuit court denied the request.	He could have argued that his due process rights were violated by the State presenting evidence only *in camera* and asked that all evidence be aired in open court.
He could have requested to see the missing exhibits cited in the motion.	He could have asked to speak after the prosecutor to address the State's facts and arguments.	Had he seen the evidence, he could have raised now widespread doubts about it: for example, much of it was considered and undermined in prior proceedings.[22]
He could have investigated the evidence and inquired about the State's conclusions in its motion.	He could have learned about the *in-camera* review of evidence sooner and objected before the court ruled. (E 162)	He could have asked why non-conclusive DNA evidence from the victim's shoe was sufficient to decide to *nolle pros*, when the State had not relied on DNA evidence to convict. *See Syed*, 236 Md. App. at 204–05 (listing forensic evidence).[23]
He could have prepared a statement and counterarguments.	His in-person presence could have benefitted the court's evidentiary review. *See supra* note 16.	He could have highlighted the requirement for the State to decide whether to *nolle pros* within 30 days as a reason why the hearing was premature.

[22] *See* Hammel, *supra* note 4.

[23] *See* Hammel, *supra* note 4 ("But even if Adnan's DNA had been on the shoes, it would hardly have been conclusive. Ultra-sensitive modern DNA tests detect innumerable red-herring samples, and shoes are notorious for being veritable Petri dishes of random DNA. And Hae's DNA wasn't found on her own shoes.").

Even if Mr. Lee were not afforded the same rights as a party—presenting evidence and cross-examining witnesses—he could have played an invaluable role by calling the circuit court's attention to the weaknesses in the State's case. Even if the court had merely permitted him to be in the room, face the judge and Mr. Syed, and respond to the prosecutor's arguments, the outcome could well have been different. Where, as here, the outcome of a hearing is fact-dependent and there are "indicia of the trier's belief that the case is 'close,'" the State does not carry its burden of rebutting presumed prejudice beyond a reasonable doubt. *Dionas v. State*, 436 Md. 97, 112 (2013) (quoting *Brooks v. United States*, 367 A.2d 1297, 1310 (D.C. 1976)).

Mr. Syed, devaluing the role of in-person attendance, argues that excluding even criminal defendants from court proceedings does not support a presumption of prejudice and is often harmless. (Appellant Br. at 38–39) First, Mr. Syed either misstates or misunderstands the law. Although "[p]rejudice will not be *conclusively* presumed" from the exclusion of a criminal defendant, *Noble v. State*, 293 Md. 549, 568–69 (1982) (emphasis added), such error does establish a presumption of prejudice that the State must rebut. *See State v. Hart*, 449 Md. 246, 263 (2016) (recognizing that a "silent" or "ambiguous record cannot support a harmless error argument" (quoting *Denicolis v. State*, 378 Md. 646, 659 (2003))). The inquiry is fact-specific and in many cases, the error is not harmless. *See, e.g.*, *Hart*, 449 Md. at 275; *Taylor v. State*, 352 Md. 338, 354–55 (1998); *Stewart v. State*, 334 Md. 213, 229 (1994).

Mr. Syed also suggests that virtual versus in-person appearance is a harmless distinction. (Appellant's Br. at 39–41) But the cases he cites in support are far afield. All of them are from other jurisdictions. And none shares the unique circumstances present here. For instance, in *Gibson v. Kentucky*, all parties attended remotely while the COVID-19 public emergency was raging. No. 2020-SC-0250, 2021 WL 3828558, at *4 (Ky. Aug. 26, 2021). The same was true in *State v. Byers*, 875 S.E.2d 306, 318 (Va. 2022). Here, the hearing was post-pandemic, Mr. Lee was the only litigant excluded to which he objected, and there was complete alignment between the only two litigants permitted to attend. Although Mr. Lee spoke briefly at the beginning, he did not know the evidentiary basis for vacatur, could not address the substance of the State's motion, and had only 30 minutes to rush home and prepare. His contribution was piped into the courtroom and lacked any of the impact the other litigants' physical presence provided. Finally, the circuit court gave no consideration to Mr. Lee's statement; all indications were that it had already made its decision prior to the hearing. *See supra* Part I.B.

Finally, and once again, Mr. Syed's Chicken-Little contention that the Appellate Court's ruling opened the flood gates to victims' rights appeals is off the mark. (Appellant's Br. at 41) To the contrary, his arguments, taken to their logical end, would establish a new *per se* rule that any victims' right violation is harmless because no permissible victim involvement could conclusively affect the outcome of a proceeding. As indicated in *Antoine*, this would render Maryland's victims' rights protections empty rituals because victims could never appeal any infringements.

The circumstances in this case are extraordinary and the prejudice evident. This Court must not let the parties' contested vacatur deal—which now leaves the Lee family's search for truth upended and potentially unresolved forever—elude scrutiny as harmless.

CONCLUSION

At bottom, the constitutional and statutory protections at issue ensure that victims and their representatives have a meaningful voice in Vacatur Statute hearings. By orchestrating the result in an *in-camera* session, permitting inadequate notice, and barring Mr. Lee from addressing the evidence, the court ran roughshod over these rights in the parties' apparent zeal to free Mr. Syed unimpeded. Mr. Lee is entitled to renewed vacatur proceedings with his full rights and dignity restored.

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains state 12,796 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. The font for this brief is Times New Roman, and the font size is 13 points.

/s/ David W. Sanford

APPENDIX

STATEMENT PURSUANT TO RULE 8-501(e)

In compliance with Maryland Rule 8-501(e), Appellee/Cross-Appellant attaches these appendix materials because they are relevant to this Court's interpretation of the Vacatur Statute, which underlies this appeal, CP § 8-301.1. Additionally, the Appellate Court cited these materials in its ruling. *E.g.*, *Lee v. State*, 257 Md. App. 481, 543–44, 546 (2023).

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SENATE JUDICIAL PROCEEDINGS COMMITTEE
BOBBY A. ZIRKIN, CHAIR · COMMITTEE REPORT SYSTEM
DEPARTMENT OF LEGISLATIVE SERVICES · 2019 MARYLAND GENERAL ASSEMBLY

FLOOR REPORT

House Bill 874

Criminal Procedure - Postconviction Review - State's Motion to Vacate

SPONSORS: (Delegate Barron, et al.)

COMMITTEE RECOMMENDATION: **Favorable with Amendments (2)**

SHORT SUMMARY:

As amended, this bill authorizes a court with jurisdiction over the case, on motion of the State, to vacate a probation before judgment or conviction when (1) there is newly discovered evidence that could not have been discovered by due diligence in time to move for a new trial and creates a substantial or significant probability that the result would have been different or (2) the State receives 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. The interest of justice and fairness must also justify vacating the probation before judgment or conviction.

COMMITTEE AMENDMENTS: **There are two (2) committee amendments.**

AMENDMENT NO. 1: Is technical.

AMENDMENT NO. 2: Alters the criteria for granting a motion and requires a hearing on a motion as specified.

SUMMARY OF BILL:

The bill establishes requirements for filed motions, requires notification of the defendant and the victim or the victim's representative, and authorizes a defendant to file a response to the motion.

The State may make a motion at any time after the entry of the probation before judgment or conviction in the case. The court must hold a hearing on a motion if the bill meets the specified requirements for a motion and a hearing was requested. The State has the burden of proof in a proceeding on the motion. 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. In ruling on a motion, the court, as it considers appropriate, may vacate the conviction or

probation before judgment and discharge the defendant or deny the motion. Either party may take an appeal from an order entered on the motion.

CURRENT LAW:

A person convicted of a crime has a number of alternatives for seeking review of a conviction. The options include (1) an appeal; (2) review at the trial court level (motion for new trial and a petition for writ of actual innocence); (3) petition under the Uniform Postconviction Procedure Act; and (4) coram nobis. In general, a defendant is not limited to any particular option for judicial review and may pursue multiple avenues for review in connection with a single conviction. However, the pursuit of these options must be initiated by the defendant, not the State. Some of these options are discussed below.

Motion for a New Trial

In general, a defendant has 10 days after the verdict to file a motion for a new trial, and the trial court has discretionary authority to grant a new trial if the court finds that a new trial is in the interest of justice. There are several grounds on which a defendant may base a motion for a new trial. However, there are specific grounds that allow the defendant more time to file the motion, including (1) an unjust or improper verdict; (2) fraud, mistake, or irregularity; (3) newly discovered evidence; or (4) an act of prostitution as a victim of human trafficking.

A defendant has 90 days after sentencing to file a motion for a new trial based on either an unjust or improper verdict, such as a verdict contrary to evidence, or fraud, mistake, or irregularity. Allegations that constitute fraud, mistake, or irregularity include misconduct of a juror, bias and disqualification of jurors, misconduct or error of the judge, and prosecutorial misconduct.

A defendant has one year after sentencing or the date on which the court received a mandate (i.e., ruling) from the Court of Appeals or the Court of Special Appeals, whichever is later, to file a motion for a new trial based on newly discovered evidence. This motion must allege that newly discovered evidence exists that could not have been discovered by due diligence within 10 days after the original verdict. However, a defendant may file a motion for a new trial based on newly discovered evidence at any time, if the newly discovered evidence is based on DNA identification testing or other generally accepted scientific techniques, the results of which, if proven, would show the defendant is actually innocent of the crime.

Uniform Postconviction Procedure Act

Any person convicted of a crime in the District Court or a circuit court has a right to institute a proceeding for postconviction relief in a circuit court to set aside or correct a

verdict. This right extends to a sentence of parole or probation, as well as confinement. Relief under the Uniform Postconviction Procedure Act is available to a person confined under sentence of imprisonment or on parole or probation.

A postconviction proceeding is not an inquiry into guilt or innocence; the trial and appellate review are where that issue is determined. Postconviction proceedings focus on whether the sentence or judgment imposed is in violation of the U.S. Constitution or the constitution or laws of the State. In theory, the scope of this inquiry is quite broad. The postconviction court may not, however, grant relief based on an allegation of a particular error if the petitioner has finally litigated or waived the error. As a practical matter, this requirement bars the petitioner from obtaining relief for most trial errors.

Unless extraordinary cause is shown, a petition for postconviction relief must be filed within 10 years of the sentence. The petition must be filed in the circuit court for the county where the conviction took place. A person may only file one petition arising out of each trial or sentence. A defendant is entitled to a hearing on the merits, the assignment of counsel, and a right of appeal. In the interests of justice, a court may reopen a postconviction proceeding that was previously decided.

Writ of Error Coram Nobis

Another way to challenge the legality of a conviction is to file a petition for a writ of error coram nobis. The writ is only available to a person who (1) challenges a conviction based on constitutional, jurisdictional, or fundamental grounds, whether factual or legal; (2) rebuts the presumption of regularity that attaches to the criminal case; (3) faces significant collateral consequences from the conviction; (4) asserts an alleged error that has not been waived or finally litigated in a prior proceeding; and (5) is not entitled to another statutory or common law remedy. The purpose of the writ of error coram nobis is to request that a court reopen or reconsider a matter that the court has already decided, based on an error of fact or law that was not raised as an issue at trial. For example, one ground for a writ of error coram nobis is that the defendant entered into an involuntary guilty plea.

The writ is used "to bring before the court facts which were not brought into issue at the trial of the case, and which were material to the validity and regularity of the proceedings, and which if known by the court, would have prevented the judgment." Skok v. State, 361 Md. 52, 68 (2000) (quoting Madison v. State, 205 Md. 425, 432 (1954)).

Coram nobis may be used by a defendant who is not in custody (i.e., not incarcerated, or on parole or probation) and faces collateral consequences as a result of a conviction.

Writ of Actual Innocence

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 writ of actual innocence in the circuit court for the county in which the conviction was imposed. If the conviction resulted from a trial, the person must claim that there is newly discovered evidence that (1) creates a substantial or significant possibility that the result may have been different and (2) could not have been discovered in time to move for a new trial. If the conviction resulted from a guilty plea, an Alford plea, or a plea of nolo contendere, the person must claim that there is newly discovered evidence that (1) establishes by clear and convincing evidence the petitioner's actual innocence and (2) could not have been discovered in time to move for a new trial.

The State must be notified of the petition and may file a response. A victim or the victim's representative must be notified, as well, and has the right to attend the hearing on the petition. If the court finds that the petition fails to assert grounds on which relief may be granted, the court may dismiss the petition without a hearing.

In the case of a petition where the conviction resulted from a trial, the court may (1) set aside the verdict; (2) resentence; (3) grant a new trial; or (4) correct the sentence, as the court considers appropriate.

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.

If the court determines that the evidence establishes the petitioner's actual innocence by clear and convincing evidence, the court may allow the petitioner to withdraw the guilty plea, Alford plea, or plea of nolo contendere and (1) set aside the conviction; (2) resentence; (3) schedule the matter for trial; or (4) correct the sentence, as the court considers appropriate. 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. The State or the petitioner may appeal an order entered by the court on a petition filed for a conviction that

BACKGROUND:

The Baltimore City Gun Trace Task Force was created in 2007 as an elite unit within the Baltimore City Police Department intended to pursue violent criminals and persons illegally possessing and using guns. In 2017, eight of the nine members of the task force were charged with crimes including racketeering, robbery, extortion, overtime pay fraud, and filing false paperwork. The officers allegedly pocketed hundreds of thousands of

dollars discovered while searching the homes and cars of criminals and some innocent civilians. All eight members who were indicted either pled guilty or were convicted of several federal charges.

According to news reports, an estimated 1,300 cases may have been affected by the task force's activities. The Office of the State's Attorney for Baltimore City is reviewing past cases where task force officers were material witnesses to determine if convictions need to be vacated. The officers involved may have committed crimes as far back as 2008.

FISCAL IMPACT:

State Effect: The bill can be handled with existing budgeted resources.

Local Effect: The bill can be handled with existing budgeted resources.

Small Business Effect: None.

ADDITIONAL INFORMATION:

Prior Introductions: None.

Cross File: SB 676 (Senator West) - Judicial Proceedings.

COUNSEL: Jamie Lancaster (x5372)

House Bill 874

Criminal Procedure - Postconviction Review - State's Motion to Vacate

SPONSORS:
(Delegate Barron, et al.)

COMMITTEE RECOMMENDATION: FAVORABLE WITH AMENDMENT

COMMITTEE AMENDMENT: alters the grounds for the filing of a motion to vacate under the bill.

BILL SUMMARY:

As amended, this bill authorizes a court with jurisdiction over the case, on motion of the State, to vacate a probation before judgment or conviction when (1) there is newly discovered evidence that meets specified criteria; or (2) the State presents information that justifies vacating the probation before judgment or conviction in the interest of justice and fairness or calls into question the integrity of the conviction or probation before judgment.

The bill establishes requirements for filed motions, requires notification of the defendant and the victim or the victim's representative, and authorizes a defendant to file a response to the motion.

The State may make a motion at any time after the entry of the probation before judgment or conviction in the case. The court must hold a hearing on a motion if the bill meets the specified requirements for a motion and a hearing was requested. The State has the burden of proof in a proceeding on the motion. 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. In ruling on a motion, the court, as it considers appropriate, may vacate the conviction or probation before judgment and discharge the defendant or deny the motion. Either party may take an appeal from an order entered on the motion.

CURRENT LAW:

While there are several acts that were once but are no longer crimes, the most likely former crime to which the bill applies is the use or possession of less than 10 grams of marijuana. Pursuant to Chapter 158 of 2014, possession of less than 10 grams of marijuana is a civil offense punishable by a fine of up to $100 for a first offense and $250 for a second offense. The maximum fine for a third or subsequent offense is $500. For a third or subsequent offense, or if the individual is younger than age 21, the court must (1) summon the individual for trial upon issuance of a citation; (2) order the individual to attend a drug education program approved by the Maryland Department of Health; and (3) refer him or her to an assessment for a substance abuse disorder. After the assessment, the court must refer the individual to substance abuse treatment, if necessary.

Otherwise, use or possession of marijuana is a misdemeanor, punishable by imprisonment for up to six months and/or a $1,000 maximum fine.

Chapter 4 of 2016 repealed the criminal prohibition on the use or possession of marijuana paraphernalia and eliminated the associated penalties. The law also established that the use or possession of marijuana involving smoking marijuana in a public place is a civil offense, punishable by a fine of up to $500. Penalties under § 5-619 of the Criminal Law Article for paraphernalia offenses other than use or possession still apply to acts involving marijuana.

BACKGROUND:

In January 2019, Baltimore City State's Attorney Marilyn Mosby

announced that her office would cease prosecutions for possession of marijuana. She also filed motions to vacate convictions in approximately 5,000 marijuana possession cases. She cited the social and economic collateral consequences of these convictions and the disproportionate enforcement of marijuana possession laws on minorities as reasons behind her decision. According to news reports, the office used petitions for writs of error coram nobis to pursue the vacating of these convictions.

Under the English common law, a writ of error coram nobis was a remedy allowing a court to correct an error in fact. The writ was used "to bring before the court facts which were not brought into issue at the trial of the case, and which were material to the validity and regularity of the proceedings, and which if known by the court, would have prevented the judgment." Skok v. State, 361 Md. 52, 68 (2000) (quoting Madison v. State, 205 Md. 425, 432 (1954)). In Skok v. State, the Court of Appeals extended the writ of error coram nobis to apply to errors in law. See Skok at 78.

A petition for a writ of error coram nobis "provides a remedy for a person who is not incarcerated and not on parole or probation, who is faced with a significant collateral consequence of his or her conviction, and who can legitimately challenge the conviction on constitutional grounds." Parker v. State, 160 Md. 672, 677 (2005) (citing Skok v. Stae, 361 Md. 52, 78 (2000)). The petitioner bears the burden of proof "to show that the grounds for challenging the criminal conviction are of a constitutional, jurisdictional, or fundamental character; that the petitioner is suffering or facing significant collateral consequences from the conviction; and that there is no other statutory or common law remedy available." See Parker at 678 (citing Skok at 78-80).

FISCAL IMPACT:

State Effect: Minimal increase in general fund expenditures to handle increased court workloads. Revenues are not affected.

Local Effect: Minimal increase in local expenditures to handle increased court workloads. Revenues are not affected.

Small Business Effect: None.

ADDITIONAL INFORMATION:
Prior Introductions: None.

Cross File: SB 676 (Senator West) - Judicial Proceedings.

Judiciary

2/26/2019

HB0874 - Delegate Barron

Criminal Procedure - Postconviction Review - State's Motion to Vacate

TOTALS: Panels: 2 FAV: 19 FWA: 0 UNF: 2 INFO: 0 Oral: 20 Written: 2 **2/26/2019 1:00 PM**

Type	Position	Testify	Name	Organization	Address	Phone	Email
Panel - Bill Sponsor	FAV	Oral	Delegate Barron				
	FAV	Oral	MARILYN MOSBY	BALTIMORE CITY STATE'SVATTORNEY			
	FAV	Oral	TONY GIOIA	BALTIMORE CITY STATE'S ATTORNEY'S OFFICE			
	FAV	Oral	JUDGE (RET.) ALEX WILLIAMS	GTTF COMMISSION TO RESTORE PUBLIC TRUST			
	FAV	Oral	AISHA BRAVEBOY	PRINCE GEORGE'S COUNTY STATE'S ATTORNEY			
	FAV	Oral	DAVID LABAHN	CEO, ASSOCIATION OF PROSECUTING ATTORNEYS			
Panel - Public	FAV	Oral	PAUL DEWOLFE	MD Public Defender			

Judiciary
2/26/2019

HB0874 - Delegate Barron

Criminal Procedure - Postconviction Review - State's Motion to Vacate

TOTALS: Panels: 2 FAV: 19 FWA: 0 UNF: 2 INFO: 0 Oral: 20 Written: 2 **2/26/2019 1:00 PM**

Type	Position	Testify	Name	Organization	Address	Phone	Email
Panel - Public	FAV	Oral	sean malone	commission to restore trust in policing			
	FAV	Oral	michele nethercott	UB innocence project			
	FAV	Oral	toni holness	ACLU			
	FAV	Oral	Dayvon love	leaders of a beautiful struggle			
	FAV	Oral	nicole hansen	out 4 justice			
Individual	FAV	Oral	doug colbert	university of maryland school of law			
Individual	FAV	Oral	Alan Drew	Maryland Criminal Defense Attorneys Association			
Individual	FAV	Both	Douglas Colbert	university of maryland law school			
Individual	UNF	Oral	joe riley	md state's attys	denton		
Individual	FAV	Oral	Ivan potts	Out for Justice			
Individual	FAV	Oral	nicole hanson	out for justice			
Individual	UNF	Oral	andrew rappaport	msaa	3300north ridge road		
Individual	FAV	Oral	Doug Colbert				

Judiciary
2/26/2019

HB0874 - Delegate Barron

Criminal Procedure - Postconviction Review - State's Motion to Vacate

TOTALS: **Panels: 2** **FAV: 19** **FWA: 0** **UNF: 2** **INFO: 0** **Oral: 20** **Written: 2** **2/26/2019 1:00 PM**

Type	Position	Testify	Name	Organization	Address	Phone	Email
Individual	FAV	Written	Toni Holness	ACLU			

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Mary Ellen Barbera
Chief Judge

580 Taylor Avenue
Annapolis, MD 21401

MEMORANDUM

TO:	House Judiciary Committee
FROM:	Legislative Committee Suzanne D. Pelz, Esq. 410-260-1523
RE:	House Bill 874 Criminal Procedure – Postconviction Review – State's Motion to Vacate
DATE:	February 20, 2019 (2/26)
POSITION:	Oppose

The Maryland Judiciary opposes House Bill 874. This bill would allow a court, with jurisdiction over the case and subject to motion by the state, to vacate either a probation before judgment or conviction for the reasons enumerated in the proposed bill. The legislation also calls for victim notification, notification of the defendant, allows for a response to the motion by the defendant, and a request for a hearing if sought by the state.

This bill requires finding the victim before a hearing, but if no one requests a hearing the victim has no way of receiving notice to exercise the victim's rights. In addition, the bill indicates that in addition to a right to notice, a victim has a right to attend a hearing but it is not clear under this legislation if the victim has a right to be heard at the hearing.

The Judiciary also believes this bill is unnecessary as numerous postconviction laws, including Criminal Procedure § 8-301, address this issue. In addition, the Judiciary is concerned that § 8-303(a)(5) of the bill is vague in requiring courts to determine whether "the interest of justice and fairness justifies vacating the probation before judgment or conviction." Further, the bill is inconsistent as it authorizes a court to dismiss a motion without a hearing but also provides that a court shall state the reasons for a ruling on the record. It is unclear if this means the court would have to then hold a hearing to state the reasons for dismissing the motion without a hearing on the record.

cc. Hon. Erek Barron
Judicial Council
Legislative Committee
Kelley O'Connor

Maryland Commission to Restore Trust in Policing

House Bill 874: Criminal Procedure-Postconviction Review – State's Motion to Vacate

The Maryland Commission to Restore Trust in Policing Support for a Favorable Report

The Maryland Commission to Restore Trust in Policing has voted unanimously to support and request a favorable report on House Bill 874, entitled Criminal Procedure-Postconviction Review-State's Motion to Vacate. We firmly believe this critical legislation is an essential first step to address the wrongful convictions attained as a result of the criminal actions of the Gun Trace Task Force (GTTF).

Senate Bill 1099 (Chapter 753) of 2018 established the Commission to Restore Trust in Policing which under the leadership of the Honorable Alexander Williams, is tasked with reviewing the operation of the Baltimore Police Department's GTTF and make recommendations to enact policies and best practices to restore trust in the Baltimore Police Department. Effective policing relies on public trust and established practices to avoid police misconduct and ensure accountability for wrongdoers.

The commission during its public meetings has heard significant amounts of testimony regarding the devastating impact of the rouge GTTF. Several witnesses have expressed extreme concern about the damage done to Baltimore City by GTTF and emphasized the importance of the work of the commission in restoring Baltimore citizens' faith and trust in government. The actions of these officers resulted in bogus charges and convictions of many Baltimore citizens. The commission strongly believes HB 874 is a tool the State's Attorney of Baltimore needs to mitigate the significant harm done by this rogue band of criminal officers.

HB 874 enables a court on a motion of the State's Attorney to vacate a conviction or entry of probation of judgment under circumstances which serve the interest of justice and fairness. In particular, the commission believes the General Assembly should enable a court, when petitioned by the State's Attorney, to vacate the entry of a probation of judgment or conviction when newly discovered evidence which was not available at the time for a motion for a new trial under Maryland Rule 4-331 (c) and that evidence creates a substantial possibility that the probation before judgment or conviction would not have occurred.

Additionally, HB 874 infuses the criminal justice system with a broad but reasonable standard to enable the reversal of unjust convictions when the interest of justice and fairness justifies in the eyes of the court dictates. In Baltimore, citizens were prosecuted and convicted based on tainted and often false evidence and testimony manufactured by members of the GTTF. According to testimony by the Baltimore State's Attorney's office, current court rules hinder their efforts to reverse the wrongful convictions which have left many citizens convicted, imprisoned and burdened with a felony conviction. The commission feels strongly that HB 874 provides an intelligent approach to addressing the unjust outcomes and harms caused by the unlawful actions of the GTTF by providing a new course to reverse wrongful convictions.

We respectfully request a favorable report of HB 874.

EREK L. BARRON
Legislative District 24
Prince George's County

Health and Government Operations Committee

Subcommittees
Government Operations and Estates and Trusts

Public Health and Minority Health Disparities

The Maryland House of Delegates
6 Bladen Street, Room 216
Annapolis, Maryland 21401
301-858-3692 · 410-841-3692
800-492-7122 *Ext.* 3692
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THE MARYLAND HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401

February 26, 2019

Delegate Luke Clippinger
Chairman, House Judiciary
Vanessa Atterbeary
Vice Chair, House Judiciary
House Office Building
Annapolis, MD 21401

Re: Request for a favorable report on House Bill 874

Dear Chair Clippinger, Vice Chair Atterbeary and Members of the Judiciary Committee:

Sometimes, long before the defendant, it is the prosecutor who may learn of credible and material information of a wrongful conviction or sentence or some other reason to make a reexamination of a case after it has become final. In Maryland, there is no clear tool for the prosecutor when this happens.

House Bill 874 provides a mechanism for a prosecutor to do what he or she is legally, ethically, and by well-tread standards, bound to do. As an attorney and officer of the court, the prosecutor is unique and by codifying this responsibility, the proposed provisions would not only protect individual rights but also serve to enhance public confidence in our justice system.

The U.S. Supreme Court, in *Berger v. United States*, 295 U.S. 78, 88 (1935), stated that prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

The Maryland Lawyer's Rules of Professional Conduct has particular rules for prosecutors - the Comments to Rule 3.8, Special Responsibilities of a Prosecutor, state: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."

The National District Attorneys Association, National Prosecution Standards 8-1.8 states, "When the prosecutor is satisfied that a convicted person is actually innocent, the prosecutor should notify the appropriate court...and seek the release of the

[redacted]

defendant if incarcerated. If the prosecutor becomes aware of material and credible evidence which leads him or her to reasonably believe a defendant may be innocent of a crime for which the defendant has been convicted, the prosecutor should disclose, within a reasonable period of time, as circumstances dictate, such evidence to the appropriate court." These standards also say that the "primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth" and that this responsibility includes "that the innocent are protected from unwarranted harm."

This standard is also embedded within the American Bar Association's Criminal Justice Standards for the Prosecution Function, Standard 3-8.3, which says that "[i]f a prosecutor learns of credible and material information creating a reasonable likelihood that a defendant was wrongfully convicted or sentenced or is actually innocent, the prosecutor should...develop policies and procedures to address such information, and take actions that are consistent with applicable law, rules, and the duty to pursue justice."

The American Bar Association Model Rules of Professional Responsibility, Rule 3.8(g) and (h) outlines "Special Responsibilities of a Prosecutor" requiring, among other things, that if he or she knows of clear and convincing evidence establishing a wrongful conviction, the prosecutor shall seek to remedy the conviction.

Thus, a prosecutor has clearly established obligations under case law, ethical rules, and standards established by national prosecutor organizations. House Bill 874 provides a clear mechanism for him or her to fulfill these responsibilities. Under the bill, it's still up to a judge to make the ultimate decision.

This is simply one tool to empower a prosecutor, at his or her discretion, to do justice and I urge your favorable vote.

Respectfully,

Erek L. Barron

Delegate Erek L. Barron

Ariz. R. Crim. P. 24.2

Copy Citation

Current through changes received by the publisher as of October 15, 2018, except for the re-promulgation of the rules of Family law procedure, which will be available when effective on January 1, 2019.

- **Arizona Court Rules**
- **RULES OF CRIMINAL PROCEDURE**
- **IV. PRETRIAL PROCEDURES**
- **RULE 24. POST-TRIAL MOTIONS**

Rule 24.2. Motion to **vacate** judgment

(a) Grounds. -- The court must **vacate** a judgment if it finds that:
(1) the court did not have jurisdiction;
(2) newly discovered material facts exist satisfying the standards in Rule 32.1(e); or
(3) the conviction was obtained in violation of the United States or Arizona constitutions.
(b) Time for filing. -- A party must file a motion under this rule no later than 60 days after the entry of judgment and sentence, or, if a notice of appeal has already been filed under Rule 31, no later than 15 days after the appellate clerk distributes a notice under Rule 31.9(e) that the record on appeal has been filed.
(c) Motion filed after notice of appeal. -- If a party files a motion to **vacate** judgment after a notice of appeal is filed, the superior court clerk must immediately send copies of the motion to the Attorney General and to the clerk of the appellate court in which the appeal was filed.
(d) Appeal from a decision on the motion. -- In noncapital cases, the party appealing a final decision on the motion must file a notice of appeal with the trial court clerk no later than 20 days after entry of the decision for a superior court case, or no later than 14 days after entry of the decision for a limited jurisdiction court case. In a capital case, if the court denies the motion, it must order the clerk to file a notice of appeal from that denial.
(e) State's motion to vacate judgment. -- Notwithstanding (b), the State may move the court to **vacate** the judgment at any time after the entry of judgment and sentence if:
(1) clear and convincing evidence exists establishing that the defendant was convicted of an offense that the defendant did not commit; or
(2) the conviction was based on an erroneous application of the law.

Attachment A

Assembly Bill No. 1793

CHAPTER 993

An act to add Section 11361.9 to the Health and Safety Code, relating to cannabis.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1793, Bonta. Cannabis convictions: resentencing.

Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), enacted by the voters at the November 8, 2016, statewide general election, regulates the cultivation, distribution, and use of cannabis for nonmedical purposes by individuals 21 years of age and older. Under AUMA, a person 21 years of age or older may, among other things, possess, process, transport, purchase, obtain, or give away, as specified, up to 28.5 grams of cannabis and up to 8 grams of concentrated cannabis. Existing law authorizes a person to petition for the recall or dismissal of a sentence, dismissal and sealing of a conviction, or redesignation of a conviction of an offense for which a lesser offense or no offense would be imposed under AUMA.

This bill would require the Department of Justice, before July 1, 2019, to review the records in the state summary criminal history information database and to identify past convictions that are potentially eligible for recall or dismissal of sentence, dismissal and sealing, or redesignation pursuant to AUMA. The bill would require the department to notify the prosecution of all cases in their jurisdiction that are eligible for recall or dismissal of a sentence, dismissal and sealing, or redesignation. The bill would require the prosecution to, on or before July 1, 2020, review all cases and determine whether to challenge the resentencing, dismissal and sealing, or redesignation. The bill would authorize the prosecution to challenge the resentencing, dismissal and sealing, or redesignation if the person does not meet the eligibility requirements or presents an unreasonable risk to public safety. The bill would require the prosecution to notify the public defender and the court when they are challenging a particular resentencing, dismissal and sealing, or redesignation, and would require the prosecution to notify the court if they are not challenging a particular resentencing, dismissal and sealing, or redesignation. By imposing additional duties on local entities, this bill would create a state-mandated local program. The bill would require the court to automatically reduce or dismiss the conviction pursuant to AUMA if there is no challenge by July 1, 2020. The bill would require the department to modify the state summary criminal history information database in conformance with the recall or dismissal of sentence, dismissal

and sealing, or redesignation within 30 days and to post specified information on its Internet Web site.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

The people of the State of California do enact as follows:

SECTION 1. Section 11361.9 is added to the Health and Safety Code, to read:

11361.9. (a) On or before July 1, 2019, the Department of Justice shall review the records in the state summary criminal history information database and shall identify past convictions that are potentially eligible for recall or dismissal of sentence, dismissal and sealing, or redesignation pursuant to Section 11361.8. The department shall notify the prosecution of all cases in their jurisdiction that are eligible for recall or dismissal of sentence, dismissal and sealing, or redesignation.

(b) The prosecution shall have until July 1, 2020, to review all cases and determine whether to challenge the recall or dismissal of sentence, dismissal and sealing, or redesignation.

(c) (1) The prosecution may challenge the resentencing of a person pursuant to this section when the person does not meet the criteria established in Section 11361.8 or presents an unreasonable risk to public safety.

(2) The prosecution may challenge the dismissal and sealing or redesignation of a person pursuant to this section who has completed his or her sentence for a conviction when the person does not meet the criteria established in Section 11361.8.

(3) On or before July 1, 2020, the prosecution shall inform the court and the public defender's office in their county when they are challenging a particular recall or dismissal of sentence, dismissal and sealing, or redesignation. The prosecution shall inform the court when they are not challenging a particular recall or dismissal of sentence, dismissal and sealing, or redesignation.

(4) The public defender's office, upon receiving notice from the prosecution pursuant to paragraph (3), shall make a reasonable effort to notify the person whose resentencing or dismissal is being challenged.

(d) If the prosecution does not challenge the recall or dismissal of sentence, dismissal and sealing, or redesignation by July 1, 2020, the court shall reduce or dismiss the conviction pursuant to Section 11361.8.

(e) The court shall notify the department of the recall or dismissal of sentence, dismissal and sealing, or redesignation and the department shall modify the state summary criminal history information database accordingly.

(f) The department shall post general information on its Internet Web site about the recall or dismissal of sentences, dismissal and sealing, or redesignation authorized in this section.

(g) It is the intent of the Legislature that persons who are currently serving a sentence or who proactively petition for a recall or dismissal of sentence, dismissal and sealing, or redesignation pursuant to Section 11361.8 be prioritized for review.

SEC. 2. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

O

NY Criminal Procedure Law

S 440.10 **Motion to vacate judgment.**

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

(a) The court did not have jurisdiction of the action or of the person of the defendant; or

(b) The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or

(c) Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false; or

(d) Material evidence adduced by the people at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution of this state or of the United States; or

(e) During the proceedings resulting in the judgment, the defendant, by reason of mental disease or defect, was incapable of understanding or participating in such proceedings; or

(f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or

(g) New evidence has been discovered since the entry of a judgment

Attachment C

based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence; or

(g-1) Forensic DNA testing of evidence performed since the entry of a judgment, (1) in the case of a defendant convicted after a guilty plea, the court has determined that the defendant has demonstrated a substantial probability that the defendant was actually innocent of the offense of which he or she was convicted, or (2) in the case of a defendant convicted after a trial, the court has determined that there exists a reasonable probability that the verdict would have been more favorable to the defendant.

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States; or

(i) The judgment is a conviction where the arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense, provided that the defendant was not alleged to be loitering for the purpose of patronizing a person for prostitution or promoting prostitution) or 230.00 (prostitution) or 230.03 (prostitution in a school zone) of the penal law, and the defendant's participation in the offense was a result of having been a victim of sex trafficking under

section 230.34 of the penal law, labor trafficking under section 135.35 of the penal law, aggravated labor trafficking under section 135.37 of the penal law, compelling prostitution under section 230.33 of the penal law, or trafficking in persons under the Trafficking Victims Protection Act (United States Code, title 22, chapter 78); provided that

(i) a motion under this paragraph shall be made with due diligence, after the defendant has ceased to be a victim of such trafficking or compelling prostitution crime or has sought services for victims of such trafficking or compelling prostitution crime, subject to reasonable concerns for the safety of the defendant, family members of the defendant, or other victims of such trafficking or compelling prostitution crime that may be jeopardized by the bringing of such motion, or for other reasons consistent with the purpose of this paragraph; and

(ii) official documentation of the defendant's status as a victim of trafficking, compelling prostitution or trafficking in persons at the time of the offense from a federal, state or local government agency shall create a presumption that the defendant's participation in the offense was a result of having been a victim of sex trafficking, compelling prostitution or trafficking in persons, but shall not be required for granting a motion under this paragraph.

2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:

(a) The ground or issue raised upon the motion was previously

determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; or

(b) The judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal. This paragraph shall not apply to a motion under paragraph (i) of subdivision one of this section; or

(c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him; or

(d) The ground or issue raised relates solely to the validity of the sentence and not to the validity of the conviction.

3. Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the

ground or issue in question was not subsequently determined upon appeal. This paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right, or to a motion under paragraph (i) of subdivision one of this section; or

(b) The ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue; or

(c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

Although the court may deny the motion under any of the circumstances specified in this subdivision, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment.

4. If the court grants the motion, it must, except as provided in subdivision five or six of this section, vacate the judgment, and must dismiss the accusatory instrument, or order a new trial, or take such other action as is appropriate in the circumstances.

5. Upon granting the motion upon the ground, as prescribed in paragraph (g) of subdivision one, that newly discovered evidence creates

a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant in that the conviction would have been for a lesser offense than the one contained in the verdict, the court may either:

(a) Vacate the judgment and order a new trial; or

(b) With the consent of the people, modify the judgment by reducing it to one of conviction for such lesser offense. In such case, the court must re-sentence the defendant accordingly.

6. If the court grants a motion under paragraph (i) of subdivision one of this section, it must vacate the judgment and dismiss the accusatory instrument, and may take such additional action as is appropriate in the circumstances.

7. Upon a new trial resulting from an order vacating a judgment pursuant to this section, the indictment is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except (a) those upon or of which the defendant was acquitted or deemed to have been acquitted, and (b) those dismissed by the order vacating the judgment, and (c) those previously dismissed by an appellate court upon an appeal from the judgment, or by any court upon a previous post-judgment motion.

8. Upon an order which vacates a judgment based upon a plea of guilty to an accusatory instrument or a part thereof, but which does not

dismiss the entire accusatory instrument, the criminal action is, in the absence of an express direction to the contrary, restored to its prepleading status and the accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time of the entry of the plea, except those subsequently dismissed under circumstances specified in paragraphs (b) and (c) of subdivision six. Where the plea of guilty was entered and accepted, pursuant to subdivision three of section 220.30, upon the condition that it constituted a complete disposition not only of the accusatory instrument underlying the judgment vacated but also of one or more other accusatory instruments against the defendant then pending in the same court, the order of vacation completely restores such other accusatory instruments; and such is the case even though such order dismisses the main accusatory instrument underlying the judgment.

Barron, Erek Delegate (Laptop)

From: Barron, Erek Delegate (Laptop)
Sent: Monday, February 25, 2019 5:53 PM
To: West, Chris Senator
Subject: RE: SB 676

Hey, just confirming that I do not have a big problem with the proposed changes and agree that (1) the conviction no longer a crime provision, (2) the possession of marijuana provision, (3) drug paraphernalia provision, and (4) the newly discovered evidence provision in the original bill are all included in the "interest of justice and fairness" provision. Judges should give strong deference to a prosecutor's decision and judgement to move pursuant to this new mechanism.

From: Barron, Erek Delegate
Sent: Monday, February 25, 2019 12:59 PM
To: Barron, Erek Delegate (Laptop) <Delegate.E.Barron@house.state.md.us>
Subject: FW: SB 676

From: West, Chris Senator
Sent: Monday, February 25, 2019 10:45 AM
To: Barron, Erek Delegate <Erek.Barron@house.state.md.us>
Subject: FW: SB 676

Erek, I just took a look at Scott's proposed changes. They actually seem to broaden the bill and would enable the State to move to vacate on any ground at all if the State feels that the interest of justice and fairness justifies vacating the probation before judgment or the conviction. Let's talk about this when we meet.

From: Scott Shellenberger [mailto:sshellenberger@baltimorecountymd.gov]
Sent: Monday, February 25, 2019 8:36 AM
To: West, Chris Senator <Chris.West@senate.state.md.us>
Cc: Lazerow, Marc <MLazerow@senate.state.md.us>; MSchatzow@stattorney.org
Subject: SB 676

I think SB 676 needs to have some amendments as parts of it are unnecessary and other parts are too broad. Attached is our marked up version of how we would like the bill to look. We believe by making it more general you capture what you were aiming for.

Attachment D

Changes I would like.

1. Remove (A) (1)(2)(3) in each of these listed there already exists an ability to expunge under well-established conditions. Reopening and having the ability to expunge will be redundant and create confusion.
2. Remove (4) is already covered by rules moving for new trials again with well-established rules and conditions.
3. Have section (A) now read like this which I believe captures your original intent:

(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:

If in the judgement of the state THE INTEREST OF JUSTICE AND FAIRNESS JUSTIFIES VACATING THE PROBATION BEFORE JUDGMENT OR CONVICTION

HB 874 2/26

SENATE BILL 676

2/27

E2 9lr2515
CF 9lr1669

By: Senator West
Introduced and read first time: February 4, 2019
Assigned to: Judicial Proceedings

A BILL ENTITLED

AN ACT concerning

Criminal Procedure – Postconviction Review – State's Motion to Vacate

FOR the purpose of authorizing a court to vacate a certain probation before judgment or judgment of conviction under certain circumstances; establishing the requirements for a certain motion; requiring the State to notify a certain defendant of the filing of a certain motion in a certain manner; authorizing the defendant to file a response to a certain motion within a certain time period; requiring that a certain victim or victim's representative be notified of a certain hearing; providing that a victim or victim's representative has the right to attend a certain hearing; requiring the court to hold a hearing on a certain motion under certain circumstances; authorizing the court to dismiss a certain motion without a hearing under certain circumstances; authorizing the court to take certain actions in ruling on a certain motion; requiring the court to state the reasons for a certain ruling in a certain manner; establishing that the State has the burden of proof in a certain proceeding; authorizing certain parties to take an appeal from a certain order; and generally relating to postconviction review.

BY adding to
Article – Criminal Procedure
Section 8–303
Annotated Code of Maryland
(2018 Replacement Volume)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – Criminal Procedure

8–303.

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter deleted from existing law.

(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) THE DEFENDANT RECEIVED A PROBATION BEFORE JUDGMENT FOR OR WAS CONVICTED OF A CRIME AND THE ACT ON WHICH THE PROBATION BEFORE JUDGMENT OR CONVICTION WAS BASED IS NO LONGER A CRIME;

(2) THE DEFENDANT RECEIVED A PROBATION BEFORE JUDGMENT FOR OR WAS CONVICTED OF POSSESSION OF MARIJUANA UNDER § 5–601 OF THE CRIMINAL LAW ARTICLE;

(3) THE DEFENDANT RECEIVED A PROBATION BEFORE JUDGMENT FOR OR WAS CONVICTED OF AN OFFENSE RELATING TO DRUG PARAPHERNALIA FOR MARIJUANA UNDER § 5–619 OF THE CRIMINAL LAW ARTICLE;

(4) THERE IS NEWLY DISCOVERED EVIDENCE THAT:

(I) COULD NOT HAVE BEEN DISCOVERED BY DUE DILIGENCE IN TIME TO MOVE FOR A NEW TRIAL UNDER MARYLAND RULE 4–331(C); AND

(II) CREATES A SUBSTANTIAL OR SIGNIFICANT POSSIBILITY THAT THE RESULT WOULD HAVE BEEN DIFFERENT, AS THAT STANDARD HAS BEEN JUDICIALLY DETERMINED; OR

~~(5)~~ IF IN THE JUDGMENT OF THE STATE THE INTEREST OF JUSTICE AND FAIRNESS JUSTIFIES VACATING THE PROBATION BEFORE JUDGMENT OR CONVICTION.

(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~~ ANY NEWLY DISCOVERED EVIDENCE; AND

(4) CONTAIN OR BE ACCOMPANIED BY A REQUEST FOR A HEARING IF A HEARING IS SOUGHT.

(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.

(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, AND HAS THE RIGHT TO BE HEARD AT THE HEARING

(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 AND A HEARING WAS REQUESTED.

(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.

(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.

(G) THE STATE IN A PROCEEDING UNDER THIS SECTION HAS THE BURDEN OF PROOF.

(H) AN APPEAL MAY BE TAKEN BY EITHER PARTY FROM AN ORDER ENTERED UNDER THIS SECTION.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2019.

UNIVERSITY of MARYLAND
FRANCIS KING CAREY
SCHOOL OF LAW

Douglas Colbert, Esq.
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Access to Justice Clinic: Effective Assistance of Counsel at Bail

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February 25, 2019

The Honorable Luke Clippinger
Chair, House Judiciary Committee
6 Bladen Street
Annapolis, Maryland 21401

Re: HB 874

Dear Chairman Clippinger and House Judiciary Members,

I write in strong support of HB 874 in my individual capacity as a full-time law professor at Maryland Francis King Carey School of Law, where I currently teach Legal Profession and professional ethics, constitutional criminal procedure, and criminal justice courses.

Proposed HB 874 provides statutory authority for Maryland prosecutors to take remedial action and vacate a defendant's prior conviction or probation of judgment (PBJ) sentence in any of the following situations. First, the crime itself may no longer exist. Second, the previous conviction or PBJ involved possession of marijuana or of marijuana paraphernalia. Third, newly-discovered evidence raises a "substantial or significant possibility" of a different outcome had the evidence been introduced at trial. See, section 8-303 (A)(4)(II). Lastly, the interests of justice and fairness require a court vacating the prior conviction or PBJ. I find each of these grounds to justify and explain why a prosecutor would properly initiate a motion to vacate.

Essentially, HB 874 incorporates into law a prosecuting attorney's ethical obligation to do justice and to exercise discretion in a manner consistent with assuming the role of a "minister of justice." Maryland Rule 19-303.8, comment 1; American Bar Association Rule 3.8. In clear terms, a prosecutor's duty as an advocate extends beyond convicting the guilty; it also includes taking "special precautions to prevent and to rectify conviction of innocent persons." Id. at cmt. 1. A prosecutor also must be permitted to exercise its charging responsibilities in a manner that takes into account the office's limited resources in fighting serious and violent crime. While some may disagree with a prosecutor's choices, HB 874 recognizes prosecutorial power and discretion to select which crimes merit prosecution and where resources can be used more wisely and prudently by refraining to prosecute marijuana possession cases.

HB 874 provides the requisite due process that allows a judge to review the grounds raised and the newly-discovered evidence presented, while giving notice to the defendant and crime victim to attend and presumably the opportunity to respond and be heard. For all of these reasons, I urge your approval and passage of HB 874.

Sincerely,

Doug Colbert

Professor Doug Colbert

LEGISLATIVE BLACK CAUCUS OF MARYLAND, INC.

The Maryland House of Delegates, 6 Bladen Street, Room 300, Annapolis, Maryland 21401
410-841-3557 • 301-858-3557 • 800-492-7122 Ext. 3557 • Fax 410-841-3498 • 301-858-3498 • Black.Caucus@house.state.md.us

February 25, 2019

Delegate Luke Clippinger
Chairman
Judiciary Committee
Room 101
House Office Building
Annapolis, MD 21401

Re: HB0874 - Criminal Procedure – Post-Conviction Review - State's Motion to Vacate

Dear Chairman Clippinger and Committee Members:

I am writing in support of HB0874, *Post-Conviction Review – State's Motion to Vacate,* sponsored by Delegate Erek L. Barron, and co-sponsored by Delegate Charles Sydnor and others, and scheduled to be heard before your committee on February 26, 2019 at 1:00 pm.

This bill will provide a mechanism for prosecutors throughout Maryland to file motions to The Court to vacate unjust and wrongful convictions. As you know, probations before judgment and other criminal convictions can have severe consequences beyond time spent on probation or incarcerated. Indeed, a criminal record can make one ineligible for employment, and potentially impact an individual's access to private and public housing, student loans, military service and legal status to remain in the United States.

For those who have been convicted of offenses which are no longer a crime and in such other instances where "fairness and justice" dictate, prosecutors have an affirmative responsibility to seek justice by righting the wrongs of the past, present and future. And, as we as a society seek to find new ways to encourage hope, and to provide access and opportunity for those who most need it, passage of this bill is a necessary step towards that end.

For these reasons, HB0874 has the full support of the Legislative Black Caucus of Maryland, Inc. Please do not hesitate to contact me if I can answer any questions.

Sincerely,

Darryl Barnes
Chair, Legislative Black Caucus of Maryland

Edith Patterson
1st Vice Chair, Legislative Black Caucus of Maryland

EREK L. BARRON
Legislative District 24
Prince George's County

Health and Government Operations Committee

Subcommittees
Government Operations and Estates and Trusts

Public Health and Minority Health Disparities

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THE MARYLAND HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401

February 26, 2019

Delegate Luke Clippinger
Chairman, House Judiciary
Vanessa Atterbeary
Vice Chair, House Judiciary
House Office Building
Annapolis, MD 21401

Re: Request for a favorable report on House Bill 874

Dear Chair Clippinger, Vice Chair Atterbeary and Members of the Judiciary Committee:

Sometimes, long before the defendant, it is the prosecutor who may learn of credible and material information of a wrongful conviction or sentence or some other reason to make a reexamination of a case after it has become final. In Maryland, there is no clear tool for the prosecutor when this happens.

House Bill 874 provides a mechanism for a prosecutor to do what he or she is legally, ethically, and by well-tread standards, bound to do. As an attorney and officer of the court, the prosecutor is unique and by codifying this responsibility, the proposed provisions would not only protect individual rights but also serve to enhance public confidence in our justice system.

The U.S. Supreme Court, in *Berger v. United States*, 295 U.S. 78, 88 (1935), stated that prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

The Maryland Lawyer's Rules of Professional Conduct has particular rules for prosecutors – the Comments to Rule 3.8, Special Responsibilities of a Prosecutor, state: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."

The National District Attorneys Association, National Prosecution Standards 8-1.8 states, "When the prosecutor is satisfied that a convicted person is actually innocent, the prosecutor should notify the appropriate court…and seek the release of the

defendant if incarcerated. If the prosecutor becomes aware of material and credible evidence which leads him or her to reasonably believe a defendant may be innocent of a crime for which the defendant has been convicted, the prosecutor should disclose, within a reasonable period of time, as circumstances dictate, such evidence to the appropriate court." These standards also say that the "primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth" and that this responsibility includes "that the innocent are protected from unwarranted harm."

This standard is also embedded within the American Bar Association's Criminal Justice Standards for the Prosecution Function, Standard 3-8.3, which says that "[i]f a prosecutor learns of credible and material information creating a reasonable likelihood that a defendant was wrongfully convicted or sentenced or is actually innocent, the prosecutor should...develop policies and procedures to address such information, and take actions that are consistent with applicable law, rules, and the duty to pursue justice."

The American Bar Association Model Rules of Professional Responsibility, Rule 3.8(g) and (h) outlines "Special Responsibilities of a Prosecutor" requiring, among other things, that if he or she knows of clear and convincing evidence establishing a wrongful conviction, the prosecutor shall seek to remedy the conviction.

Thus, a prosecutor has clearly established obligations under case law, ethical rules, and standards established by national prosecutor organizations. House Bill 874 provides a clear mechanism for him or her to fulfill these responsibilities. Under the bill, it's still up to a judge to make the ultimate decision.

This is simply one tool to empower a prosecutor, at his or her discretion, to do justice and I urge your favorable vote.

Respectfully,

Erek L. Barron

Delegate Erek L. Barron

ACLU Maryland

Testimony for the House Judiciary Committee
February 26, 2019

TONI HOLNESS
PUBLIC POLICY DIRECTOR

HB 874 Criminal Procedure - Postconviction Review - State's Motion to Vacate

FAVORABLE

The ACLU of Maryland urges a favorable report on HB 874, which would allow courts to vacate a probation before judgment or conviction in certain circumstances.

A criminal record severely undermines an individual's employability in the job market, which bars reentry into society and thereby predisposes that individual to further criminal justice entanglement. The collateral consequences reach far beyond employment—a criminal record may compromise one's eligibility for tuition assistance and stable housing. Moreover, these collateral consequences are particularly stark for communities of color.

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COLEMAN BAZELON
PRESIDENT

SUSAN GOERING
EXECUTIVE DIRECTOR

ANDREW FREEMAN
GENERAL COUNSEL

Criminal records for non-violent offenses excludes individuals from employment, educational opportunities, public benefits, and stable housing

The existence of a criminal record can and does create a barrier to employment for many Marylanders. Under current regulations, a misdemeanor conviction in Maryland may result in the denial, suspension, or revocation of myriad business licenses, including: a barber license,[1] a cosmetology license,[2] an electrician license,[3] professional engineer license,[4] a landscape architect license,[5] an interior designer certificate,[6] and countless others.

Misdemeanor convictions also serve to exclude persons from educational opportunities. A recent study found that a majority (66%) of colleges collect criminal justice information as part of the admissions process.[7] A misdemeanor conviction also hinders an individual's access to stable housing and a range of public benefits. A misdemeanor conviction record may bar individuals from residing at certain homes,[8] and exclude individuals from low-income utility payment plans[9] as well as food stamps.[10]

HB 874 will allow for individuals with certain convictions to access a broader range of services and opportunities, including but not limited to, employment, schooling, public benefits, and housing, and thereby contribute productively to the state's economy. By

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[1] Md. Business Occupations and Professions, Code Ann. § 4-314
[2] Md. Business Occupations and Professions, Code Ann. § 5-314
[3] Md. Business Occupations and Professions, Code Ann. § 6-316.
[4] Md. Business Occupations and Professions, Code Ann. § 14-317.
[5] Md. Business Occupations and Professions, Code Ann. § 9-310.
[6] Md. Business Occupations and Professions, Code Ann. § 8-310.
[7] Center for Community Alternatives—Innovative Solutions for Justice, *The Use of Criminal Records in College Admissions, Reconsidered* (available at http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf).
[8] *See for example,* COMAR 35.04.01.04.
[9] COMAR 20.31.01.08.
[10] Md. Human Services Code Ann. § 5-601.

increasing access to this broad range of services, HB 874 can be expected to generate greater socioeconomic stability and productivity in Maryland's communities.

Misdemeanor convictions disparately disadvantage individuals, families, and communities of color

A startling one in three Black men born today can expect to go to prison in their lifetime, compared with one in six Latino men, and one in seventeen White men.[11] In addition to facing higher imprisonment rates, persons of color, once arrested, are more likely to be convicted, and once convicted, are more likely to face longer sentences than their White counterparts.[12] With higher conviction rates, persons of color necessarily bear the brunt of collateral consequences stemming from misdemeanor convictions.

For the foregoing reasons, the ACLU of Maryland urges a favorable report on HB 874.

AMERICAN CIVIL LIBERTIES UNION OF MARYLAND

[11] Saki Knafo, 1 In 3 Black Males Will Go To Prison In Their Lifetime, Report Warns (HUFFINGTON POST, Oct. 4, 2013).
[12] *Id.*

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February 25, 2019

The Honorable Luke Clippinger
Chair, House Judiciary Committee
6 Bladen Street
Annapolis, Maryland 21401

Re: HB 874

Dear Chairman Clippinger and House Judiciary Members,

I write in strong support of HB 874 in my individual capacity as a full-time law professor at Maryland Francis King Carey School of Law, where I currently teach Legal Profession and professional ethics, constitutional criminal procedure, and criminal justice courses.

Proposed HB 874 provides statutory authority for Maryland prosecutors to take remedial action and vacate a defendant's prior conviction or probation of judgment (PBJ) sentence in any of the following situations. First, the crime itself may no longer exist. Second, the previous conviction or PBJ involved possession of marijuana or of marijuana paraphernalia. Third, newly-discovered evidence raises a "substantial or significant possibility" of a different outcome had the evidence been introduced at trial. See, section 8-303 (A)(4)(II). Lastly, the interests of justice and fairness require a court vacating the prior conviction or PBJ. I find each of these grounds to justify and explain why a prosecutor would properly initiate a motion to vacate.

Essentially, HB 874 incorporates into law a prosecuting attorney's ethical obligation to do justice and to exercise discretion in a manner consistent with assuming the role of a "minister of justice." Maryland Rule 19-303.8, comment 1; American Bar Association Rule 3.8. In clear terms, a prosecutor's duty as an advocate extends beyond convicting the guilty; it also includes taking "special precautions to prevent and to rectify conviction of innocent persons." Id. at cmt. 1. A prosecutor also must be permitted to exercise its charging responsibilities in a manner that takes into account the office's limited resources in fighting serious and violent crime. While some may disagree with a prosecutor's choices, HB 874 recognizes prosecutorial power and discretion to select which crimes merit prosecution and where resources can be used more wisely and prudently by refraining to prosecute marijuana possession cases.

HB 874 provides the requisite due process that allows a judge to review the grounds raised and the newly-discovered evidence presented, while giving notice to the defendant and crime victim to attend and presumably the opportunity to respond and be heard. For all of these reasons, I urge your approval and passage of HB 874.

Sincerely,

Doug Colbert

Professor Doug Colbert

STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

NOTICE OF PROPOSED RULES CHANGES

The Rules Committee has submitted its Two Hundred and First Report to the Court of Appeals, transmitting thereby proposed new Rules 3-623, 4-333, 9-204.1, 9-204.2 and 10-106.1, proposed amendments to current Rules 2-124, 2-512, 2-601, 2-623, 2-625, 2-632, 2-645, 3-124, 3-623, 3-632, 3-645, 4-245, 4-345, 6-171, 6-417, 9-203, 9-204, 9-205, 10-106, 10-106.1, 10-110, 10-111, 10-112, 10-206, 10-209, 10-403, 10-404, 10-707, 10-708, 16-907, 17-205, 17-206, 17-304, 17-405, 17-603, 18-603, and 19-301.8 and proposed amendments to Appendix: Maryland Guidelines for Court Appointed Attorneys in Guardianship Proceedings.

The Committee's Two Hundred and First Report and the proposed Rules changes are set forth below.

Interested persons are asked to consider the Committee's Report and proposed Rules changes and to forward on or before October 15, 2019 any written comments they may wish to make to:

Sandra F. Haines, Esq.

Reporter, Rules Committee

2011-D Commerce Park Drive

Annapolis, Maryland 21401

Suzanne Johnson
Clerk
Court of Appeals of Maryland

September 12, 2019

The Honorable Mary Ellen Barbera,
Chief Judge
The Honorable Robert N. McDonald,
The Honorable Shirley M. Watts
The Honorable Michele D. Hotten
The Honorable Joseph M. Getty
The Honorable Brynja M. Booth,
Judges
The Court of Appeals of Maryland
Robert C. Murphy Courts of Appeal Building
Annapolis, Maryland 21401

Your Honors:

The Rules Committee submits this, its Two Hundred First Report, and recommends that the Court adopt the new Rules and amendments to existing Rules transmitted with this Report. The Report consists of eight categories of proposed changes.

Category 1 consists of proposed new Rule 4-333, which would implement 2019 Md. Laws, Ch. 702 (Code, Criminal Procedure Article, § 8-301.1), attached as **Appendix 1**. The statute permits a court, on motion by the State, to vacate a criminal conviction or a probation before judgment (PBJ) entered in a criminal case, upon findings that:

(1) newly discovered evidence that could not have been discovered in time to move for a new trial under Rule 4-331 (c) creates a substantial or significant probability that the result in the case would have been different; or

(2) the prosecutor received new information after entry of the conviction or PBJ that calls into question the integrity of the conviction or PBJ; and

(3) the interest of justice and fairness justifies vacating the conviction or PBJ.

The Rule tracks the procedures set forth in the statute but fills in some additional details. For example:

(1) Although the statute speaks of a motion by "the State," the Committee and its consultants believed that the intent was that the motion could be filed only by the office that prosecuted the case that led to the conviction or PBJ -- the State's Attorney or, when authorized, the Attorney General or the State Prosecutor. The defendant has no right to file a motion under § 8-301.1. The Committee believed, however, that the defendant may have a right to seek relief under other statutes or Rules, and, if the defendant does so, those proceedings may be consolidated with the one under § 8-301.1. A Committee note to that effect is proposed under section (e) of the Rule.

(2) Because the statute permits the motion to be filed "at any time after" entry of the conviction or PBJ but requires that it be filed in "the court with jurisdiction over the case," it is possible that the case may be on appeal to the Court of Special Appeals or Court of Appeals when the motion is filed, which can create some practical and legal issues regarding the taking of evidence and potential mootness. A Committee note is added suggesting that the appellate court consider remanding the case for the trial court to resolve the motion. That would allow the trial court to take the necessary evidence and make its findings, which, if the court grants the motion, may moot the appeal. It is not clear whether this would be a problem when a *de novo* appeal from a District Court conviction or PBJ is pending in a Circuit Court.

(3) The judgment of conviction or PBJ may encompass more than one crime (or count), and it is possible that the prosecutor may seek vacation of fewer than all of them. Language is added throughout the Rule to take account of that prospect.

(4) The statute requires that the State "shall notify the defendant in writing of the filing of the motion," but the Committee was advised that it may be impossible to locate some of the defendants, particularly if a substantial amount of time has elapsed since the conviction or PBJ was entered. The view was expressed -- and the Committee agreed -- that, when the

prosecutor is convinced that the conviction or PBJ was wrongly entered, the prosecutor should be able to proceed, provided an adequate attempt was made to locate the defendant, but that, if the court denies the motion, the denial should be without prejudice to refile. The Rule also sets forth what must be in the notice to the defendant.

(5) The statute requires that, prior to a hearing on the motion, any victim or victim's representative be notified in accordance with Code, Criminal Procedure Article, § 11-104 or § 11-503. The Rule specifies what must be in the notice and, in a Committee Note, urges that reasonable efforts should be made to locate victims or their representatives, beyond merely relying on the last known address in a court record. If a defendant, a victim, or a victim's representative is not present for the hearing, the Rule requires the prosecutor to state on the record the efforts made to provide notice.

(6) There is one gap in the statute that the Committee did not feel could be addressed by Rule, namely, what, if any, impact a vacation of the conviction or PBJ might have on actions that occurred while the conviction or PBJ was in effect, such as the payment by the defendant of restitution to a victim or costs assessed against him/her. The Committee was advised that, in most cases, though perhaps not in all, if the conviction or PBJ is vacated, the State would then *nol pros* the charging document. It is not clear whether an action would lie to recoup those payments.

Category 2 consists amendments to Rules 2-601 (a), 2-623, 3-623, 2-625, 3-625, 2-632, 3-632, 2-645, and 3-645, dealing with civil judgments.

Rule 2-601(a)(1) requires each civil judgment to be "set forth on a separate document and include a statement of an allowance of costs as determined in conformance with Rule 2-603." Sometimes, however, costs have not yet been determined when the judgment document is filed or for other reasons the judge or clerk who signs the document neglects to include such a statement.

The question has been raised whether, in that event, the judgment is final under Rule 2-602, at least where costs were sought. In *Mattison v. Gelber*, 202 Md. App. 44 (2011), the Court of Special Appeals, after tracing the history of Rule 2-

601 (a)(1), held that the absence of a statement of costs does not affect the finality of the judgment, but the Committee believes it would be helpful to litigants, judges, and clerks (1) to delete the **requirement** that costs be included in the judgment document, (2) to state that they **should** be included in that document, and (3) to add a Committee note that calls attention to *Mattison* and makes clear that the absence of such a provision does not preclude the judgment from being final.

Rules 2-625 and 3-625 provide that, subject to renewal, a money judgment expires 12 years from the date of entry or from the most recent renewal. Provisions of the Md. Code, however, make clear that an unrenewed money judgment held by the State does not expire after 12 years. *See* Code, Courts Article, 5-102(c); C*omptroller of Md. v. Shipe*, 221 Md. App. 425 (2015); and *Central Collection Unit v. Buckingham*, 214 Md. App. 672 (2013). The Committee proposes that a Committee note be added to both Rules calling attention to § 5-102 and to the two cases.

Rule 2-623 deals with foreign judgments presented for recording and indexing in a Maryland court. The proposed amendments to that Rule take account of affidavit and notice provisions in Code, Courts Article, § 11-803. There currently is no counterpart to that Rule for the District Court, but foreign judgments are presented to the District Court, so the Committee proposes a comparable new Rule 3-623. Identical amendments are proposed to Rules 2-632 and 3-632 to take account of provisions in Code, Courts Article, § 11-804 dealing with a stay of enforcement of a foreign judgment.

The proposed amendments to Rules 2-645 and 3-645, which deal with the garnishment of property other than wages, were recommended by the Maryland Bankers Association. The Committee was advised that there are many instances in which a bank receives a writ of garnishment of an account or other property of a customer, places a hold on the account or property as required (including on funds or property added during the life of the writ), files an answer confessing the funds or property, and then nothing happens. Neither the judgment debtor nor the judgment creditor seeks to enforce or dismiss the writ, and it remains dormant. The Committee recommends that, if there is no further filing within 120 days after the garnishee's answer is filed, after proper notice to both the judgment debtor and the judgment creditor, the garnishee be able to terminate the writ so the funds or property may be released.

Category 3 consists of an amendment or Rule 9-203 (b). That Rule sets forth the form of financial statement required in order to determine proper child support under the Child Support Guidelines. The amendment is needed to conform to a statutory change (2019 Laws of Maryland, Ch. 436).

Category 4 consists of amendments to Rules 9-204 and 9-205 and new Rules 9-204.1 and 9-204.2, dealing with parenting plans in cases involving issues of parenting time (physical custody) and decision-making authority (legal custody). These changes were recommended by the Domestic Law Committee of the Judicial Council. The thrust of the changes is to require the parents to make a reasonable effort to determine for themselves what arrangements are practical and in the best interest of their child(ren), to develop a written parenting plan for consideration by the court, and to give some guidance to them in addressing those issues. The amendments to Rule 9-205, which deals with mediation in divorce and child access cases, permits a mediator to assist the parties in developing a parenting plan. These proposals are modeled, to some extent, on the marital property statement required under Rule 9-207. The Committee was advised that most States have enacted similar requirements.

Category 5 consists of a new Rule 10-106.1, the renumbering of current Rule 10-106.1, and amendments to current Rules 10-106, 10-110, 10-111, 10-112, 10-206, 10-209, 10-403, 10-404, 10-707, 10-708, and 16-907, and the Appendix: *Maryland Guidelines for Court-Appointed Attorneys in Guardianship Proceedings*, all dealing with guardianship proceedings. These changes emanated from recommendations by the Guardianship and Vulnerable Adult Work Group of the Judicial Council.

The proposed changes to Rule 10-106 – a text amendment and a new Committee Note – address a practice by some courts of requiring an attorney for a minor or alleged disabled person to file an investigative report with the court. Concern was expressed that placing such a duty on an attorney for the subject of the guardianship may intrude on the attorney-client privilege and create a conflict of interest. The court does have the power to appoint an independent investigator, and the attorney for the subject may, of course, present relevant information to the court on the client's behalf that does not contravene the privilege (*see* proposed new Rule 10-106.1 and Rules 10-205 and 10-304), but the Committee believes that the court should not require the attorney to make a report.

New Rule 10-106.1 (Pre-Hearing Statement) is intended to give the court a sense of what the issues are likely to be and to make the hearing on the petition more focused and efficient. Rule 10-106.2 is simply a renumbering of current Rule 10-106.1. The amendment to Rule 10-403 (d) conforms the Rule to a statutory requirement in Code, Estates and Trusts Article, § 13-904(f)(2). Conforming amendments are added as well to a cross-reference at the end of the Rule and in the Committee Note in Rule 10-404.

With one important exception, the proposed amendments to Rule 10-110 require, when guardianship of more than one alleged disabled person or minor is sought, that separate petitions be filed for each such individual. The Committee was advised that, in some instances, the guardianship of several individuals has been sought through a single petition and that has caused reporting and tracking problems when the court reports guardianship case information to the F.B.I. for use in the National Instant Criminal Background Check System (NICS). NICS needs the information to determine who may be disqualified from possessing firearms. The exception is that a single petition may be used with respect to a guardianship of minors who are full siblings. That is currently the practice in the Circuit Court for Anne Arundel County. Even in that situation, however, a separate order will be required for each minor because the conditions of the guardianship and its ultimate termination may differ from one child to another.

The proposed amendments to Rules 10-111 and 10-112, which set out the forms for guardianship petitions, are mostly clarifying or conforming in nature.

Rule 10-206(e) currently sets out the form of the guardian's annual report. The Committee proposes to delete the form from the Rule and provide that it shall substantially conform to the form approved by the State Court Administrator and published on the Judiciary website. As a matter of proposed policy, the Committee believes that many (but not all) of the forms now set forth in Rules can as easily be developed by Forms Committees that operate under the umbrella of the Judicial Council, subject to approval by the State Court Administrator and publication on the Judiciary website, so that changes to them can be made more easily without invoking the more cumbersome Rules process. Similar amendments are proposed for Rules 10-707 (Information and Inventory Report) and 10-708 (Fiduciary's Account and Report of Trust Clerk).

In Rule 10-209, the Committee proposes to delete the requirement for termination of a guardianship due to the death of the subject that a certified copy of the death certificate accompany the petition. The Committee was advised by the Guardianship and Vulnerable Adults Workgroup of the Judicial Council Domestic Law Committee that a *certified* copy is unnecessary.

As a result of the changes to these guardianship Rules and some previously adopted, the guardianship court will be getting additional sensitive information that will find its way into case records. The Guardianship and Vulnerable Adults Workgroup has expressed a need to provide better protection of the confidentiality of some of that information. At its most recent meeting on September 5, 2019, the Rules Committee approved a general revision of the access Rules in Title 16, Chapter 900, which include the proposed changes submitted in this Report. Those changes will be submitted to the Court in a later, separate Report, but it will be several months before the Court will be able to consider that Report, and the Workgroup has requested more immediate protection for certain case records in guardianship cases. The Committee recommends that current Rule 16-907 be amended to provide that protection by shielding all guardianship records other than docket entries and orders entered by the court.

The current Guidelines for attorneys representing minors and disabled persons in guardianship proceedings apply only to court-appointed attorneys. The amendments expand the scope of the Guidelines to all attorneys for those individuals and conform the Guidelines to the proposed amendments to Rule 10-106.

Category 6 consists of proposed amendments to Rules 17-205, 17-206, 17-304, 17-405, and 17-603. The proposed amendments are the same for each of those Rules. They require that court-designated mediators and settlement conference presiders comply with applicable standards adopted by Administrative Order of the Court of Appeals and posted in the Judiciary website. Standards for court-appointed ADR practitioners have been developed by the ADR Committee of the Judicial Council. They are not part of the Rules but are presented to the Court on behalf of the ADR Committee as **Appendix 2** to this Report.

Category 7 consists of amendments to Rule 6-417 adding a Committee note to subsection (b)(4) calling attention to a statutory waiver of certain fees and clarifying in sections (d)

and (f) that exceptions to an account may be filed within 20 days after the order approving the account is docketed. Clarifying and conforming amendments to Rule 6-171 also are proposed.

Category 8 consists of housekeeping amendments (1) to cross references following Rules 2-124, 2-512 (c), and 3-124; (2) to Rule 4-345, by adding a cross reference to *State v. Brown*, 464 Md. 237 (2019); (3) to Rule 18-603 by removing surplus language from section (b); and (4) to Rule 19-301.8 to correct a stylistic error. Amendments are made to Rule 4-245 to provide that certain notices be substantially in a form approved by the State Court Administrator and posted on the Judiciary website.

For the guidance of the Court and the public, following each proposed new Rule and amendment to each current Rule is a Reporter's note describing in further detail the reasons for the proposals. *We caution that the Reporter's notes are not part of the Rules, have not been debated or approved by the Committee, and are not to be regarded as any kind of official comment or interpretation*. They are included solely to assist the Court in understanding some of the reasons for the proposed changes.

Respectfully submitted,

Alan M. Wilner
Chair

AMW:cmp
cc: Suzanne C. Johnson, Clerk

MARYLAND RULES OF PROCEDURE

TITLE 4 – CRIMINAL CAUSES

CHAPTER 300 – TRIAL AND SENTENCING

ADD new Rule 4-333, as follows:

Rule 4-333. MOTION TO VACATE JUDGMENT OF CONVICTION OR PROBATION BEFORE JUDGMENT

(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.

Committee note: Rule 4-102 (l) defines "State's Attorney" as "a person authorized to prosecute an offense." That would include the State Prosecutor and the Attorney General with respect to cases they prosecuted.

(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.

Committee note: Code, Criminal Procedure Article, § 8-301.1 (a) permits the State's Attorney to file the motion "at any time after the entry of a probation before judgment or judgment of

conviction," and permits "the court with jurisdiction over the case" to act on it. If an appeal is pending in the Court of Appeals or Court of Special Appeals when the motion is filed, that Court would have jurisdiction over the case but no practical ability to take evidence with regard to the State's Attorney motion. If the appeal is successful, it could make the motion moot, but if the motion were to be granted and the State's Attorney then enters a *nolle prosequi*, the appeal may become moot, at least with respect to the judgments vacated. The simplest solution in most cases would be for the appellate court to remand the case for the trial court to consider the motion. Rule 8-604 (d) permits the appellate courts to remand cases "where justice will be served by permitting further proceedings."

(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 the 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;

Committee note: This Rule anticipates that the State's Attorney may seek to vacate the entire judgment of conviction or probation before judgment or only parts of it.

(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.

Committee note: Although the defendant may not seek affirmative relief under this Rule, nothing in the Rule precludes the defendant from contemporaneously seeking affirmative relief

under any other applicable Rule. The court, on motion, may consolidate the two proceedings.

(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.

Committee note: Because a motion under Code, Criminal Procedure Article, § 8-301.1 may be filed years after the judgment of conviction or probation before judgment was entered, locating defendants, victims, and victim's representatives may be

difficult. Reasonable efforts, beyond merely relying on the last known address in a court record, should be made by the State to locate defendants, victims, and victims' representatives and provide the required notices.

(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.

Cross reference: For the right of a victim or victim's representative to address the court during a sentencing or disposition hearing, see Code, Criminal Procedure Article §11-403.

(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.

Source: This Rule is new.

REPORTER'S NOTE

Code, Criminal Procedure Article § 8-301.1 was added by Chapter 702, 2019 Laws of Maryland (HB 874). The new statute authorizes a court with jurisdiction over a case to vacate a probation before judgment or conviction, on motion of the State. The bill establishes requirements for filed motions, requires notification of the defendant and the victim or the victim's representative, and authorizes a defendant to file a response to the motion.

Proposed new Rule 4-333 sets forth procedural requirements pertaining to the new statute.

Section (a) provides the scope of Rule 4-333. The Committee note following section (a) makes clear that the term "State's Attorney" includes the State Prosecutor and the Attorney General.

Section (b) requires that the motion be filed in the criminal action in which the judgment of conviction or probation

before judgment was entered. See Code, Criminal Procedure Article, § 8-301.1(a). The Committee note following section (b) addresses the filing of a motion to vacate when an appeal is pending in the Court of Appeals or the Court of Special Appeals.

Section (c) states that the motion may be filed at any time after entry of the judgment of conviction or probation before judgment. See Code, Criminal Procedure Article, § 8-301.1(a).

Section (d) sets forth the required contents of the State's Attorney's motion to vacate and identifies the two grounds upon which a motion may be based. The first ground is when there is newly discovered evidence that could not have been discovered by due diligence in time to move for a new trial and creates a substantial or significant possibility that the result would have been different. See Code, Criminal Procedure Article, § 8-301.1(a)(1)(i). The second ground is when the State's Attorney has 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. See Code, Criminal Procedure Article, § 8-301.1(a)(1)(ii). The State's Attorney must also state that the interest of justice and fairness justifies vacating the probation before judgment or conviction. See Code, Criminal Procedure Article, § 8-301.1(a)(2).

Section (e) contains provisions pertaining to notice to the defendant. See Code, Criminal Procedure Article, § 8-301.1(c). § 8-301.1(c)(2) states:

> 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.

Because of uncertainty in determining the date of "receipt of the notice" -- or whether the notice ever was received -- the Committee recommends including in the notification to the defendant the right to file a response within 30 days after the notice is "sent," which is a more readily ascertainable date. Although, for case management purposes, it is preferable for any response to be filed by that date, the Rule does not prohibit the filing of a response after the date.

A Committee note following section (e) addresses affirmative relief that the defendant may seek in a

contemporaneously filed proceeding, which may, on motion, be consolidated with a proceeding under this Rule.

Section (f) requires the court to make an initial review of the motion to determine whether a hearing will be held. See Code, Criminal Procedure Article, § 8-301.1(e).

Section (g) pertains to notices of the hearing that must be sent to the defendant and to the victim or victim's representative. See Code, Criminal Procedure Article, § 8-301.1(d). A Committee note following section (g) recognizes the difficulties that may be encountered in locating defendants, victims, and victim's representatives when the motion is filed many years after the judgment of conviction or probation before judgment was entered.

Section (h) governs conduct of the hearing.

Subsection (h)(1) requires that the State's Attorney state on the record the efforts made to contact a defendant, victim, or victim's representative who is not present at the hearing.

Subsection (h)(2) states that it is the State's Attorney's burden to prove grounds for vacating the judgment of conviction or probation before judgment. See Code, Criminal Procedure Article, § 8-301.1(g).

Subsection (h)(3) governs disposition of the motion. If the court finds that the State's Attorney has met the burden of proof and that the interest of justice and fairness justifies vacating the judgment of conviction or probation before judgment, the court is required to vacate the conviction or probation before judgment. Otherwise, the court must deny the motion and advise the parties of their right to appeal. The court is required to state its reasons on the record. See Code, Criminal Procedure Article, § 8-301.1(f). If the court denies the State's Attorney's motion, and the defendant had not received actual notice of the proceedings, the denial is without prejudice.

A cross reference to Code, Criminal Procedure Article §11-403 is included after section (h) to highlight the right of the victim or victim's representative to address the court during a sentencing or disposition hearing.

Section (i) governs post-disposition action by the State's Attorney. Under this section, the State's Attorney is required

to enter a nolle prosequi of the vacated count or take other appropriate action as to that count within 30 days after the court enters an order vacating the judgment of conviction of probation before judgment.

CERTIFICATE OF SERVICE

Supreme Court of Maryland
No. SCM-REG-0007-2023
----------)
Adnan Syed

v.

Young Lee, as Victim's Representative, et al
----------)

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

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

On the **28th Day of August 2023**, the within **Brief for Appellee/Cross-Appellant** have been filed and served electronically via the Court's MDEC system. Additionally, I will serve paper copies upon:

Party: Adnan Syed – Appellant
Erica J. Suter,
Innocence Project Clinic University of Baltimore School of Law
& Office of the Public Defender
1401 N. Charles Street
Baltimore, MD 21201

Brian L. Zavin
Chief Attorney
Office of the Public Defender
Appellate Division
6 St. Paul Street, Suite 1400
Baltimore, MD 21202

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

via Express Mail, by causing 2 true copies of each to be deposited, enclosed in a properly addressed wrapper, in an official depository of the United States Postal Service.

Unless otherwise noted, 8 copies of the documents have been sent to the Court on this day via overnight delivery.

August 28, 2023

/s/ Elissa Diaz
Elissa Diaz
Counsel Press