In The

Court of Special Appeals of Maryland

No. 1291
September Term, 2022
MDEC No. CSA-REG-1291-2022

YOUNG LEE, AS VICTIM'S REPRESENTATIVE,
Appellant,

v.

STATE OF MARYLAND,
Appellee.

Appeal from the Circuit Court for Baltimore City in Case No. 199103042 (Hon. Melissa Phinn, Judge)

CORRECTED BRIEF FOR APPELLANT

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STATEMENT OF THE CASE

Young Lee appeals the denial of his rights as a crime victim representative. The circuit court denied him proper notice and the right to be heard at the vacatur proceedings for his sister's convicted murderer, Adnan Syed. This appeal is ripe and not moot because Mr. Lee seeks an effective, tangible form of relief: a redo of the vacatur hearing with the proper procedures and safeguards.

This Court should reverse the vacatur of Mr. Syed's conviction and remand the case for an evidentiary hearing compliant with the vacatur statute and constitutional and statutory victims' rights. Such a remedy is called for by this Court's binding precedent in *Antoine v. State*, 245 Md. App. 521 (2020).

Antoine ended the era for Maryland crime victims of rights without remedies. *Id.* at 549. As *Antoine* recognized, despite the "'supposed beneficence' to victims embodied in Article 47 [of the Maryland Constitution] and Maryland's victims' rights statutes, until recently the General Assembly 'made those hard-won rights largely illusory' by declining to 'afford[] victims the right to appeal.'" *Id.* at 540 (quoting *Lopez-Sanchez v. State*, 388 Md. 214, 230–31 (2005)). That changed in 2013, with amendments to Maryland Code, Criminal Procedure ("CP") Section 11-103. Crime victims now have "standing to challenge the circuit court's alleged violations of [their] rights, and to seek an appropriate remedy." *Antoine*, 245 Md. App. at 542. If victims' rights are

violated, "§ 11-103(e)(2) . . . authorizes a remedy that is both effective and respectful of the constitutional rights of defendants." *Id.* at 531. "To rectify the violations . . . [the victim] should be placed in the position [he] occupied before the violations occurred." *Id.* at 550.

The State and circuit court violated Mr. Lee's rights. The state's attorney gave him less than one business-day's notice of the relevant hearing. Neither the State's motion nor in-court proffer provided enough detail for him to understand, let alone challenge, the evidence purportedly supporting vacatur. Further, the circuit court admitted no evidence, sat no witnesses, and asked no questions about the basis for vacatur—instead reading a prepared opinion parroting the State's arguments and ignoring Mr. Lee's position on the merits.

Conducting a new, legally compliant vacatur hearing is the one adequate remedy under *Antoine* because there is no other way to put Mr. Lee in his original position. Moreover, because Mr. Lee and his family are the only participants with an interest in contesting purported evidence supporting vacatur, he is entitled to full participation by presenting evidence, calling witnesses, and challenging the State's evidence and witnesses. That is meaningful participation under CP § 8.301.1 (the "Vacatur Statute") and Mr. Lee's statutory and constitutional rights. Moreover, such a hearing is authorized as an appellate remedy by CP § 11-103 because it does not violate double-jeopardy protections.

Even if this Court finds the appeal moot, it should exercise discretion to consider the appeal as it falls within well-recognized mootness exceptions. Absent this Court's intervention, prosecutors could moot the most egregious victims' rights violations by dismissing charges before the appeal is heard. Moreover, as the circuit court did here, courts might misapply Maryland's new Vacatur Statute by ignoring victims' rights. The issue is likely to recur based on the number of anticipated vacatur proceedings, and the issue will evade appellate review because of the short timeline for dismissing cases. The circuit court's narrow reading erodes long-held rights, so this Court must intercede.

In vacating Mr. Syed's conviction, the State and the circuit court did an end run around the Court of Appeals' 2019 affirmation of his conviction. By entering *nolle prosequi*, the state's attorney attempted to evade appellate review, mocking the General Assembly's intent to curb prosecutorial overreach. Accordingly, this Court should remand this case for a hearing that complies with Appellant's statutory and constitutional rights.

QUESTION PRESENTED

(1) Is this appeal moot where Appellant seeks a proceeding in which his rights are restored?

(2) Even if the appeal is moot, should this Court exercise discretion to rule on the merits?

(3) On the merits, did the state's attorney and circuit court violate Appellant's rights by providing minimal notice of the vacatur hearing and no opportunity to challenge the evidentiary grounds for vacatur?

STATEMENT OF FACTS

Adnan Syed's Conviction

On February 25, 2000, Adnan Syed was convicted of murdering his ex-girlfriend, Hae Min Lee. *Syed v. State*, 236 Md. App. 183, 193 (2018). The trial court sentenced Mr. Syed to life in prison with the possibility of parole. *Id.* Years after this Court upheld his conviction on direct appeal, Mr. Syed filed a petition for post-conviction relief, which was denied in 2014. *State v. Syed*, 463 Md. 60, 68–69 (2019). Mr. Syed appealed, and the circuit court conducted further fact-finding on remand. *Id.* at 69–70. Following a hearing, that court granted Mr. Syed a new trial. *Id.* at 70. This Court affirmed the judgment of the circuit court in 2018. *Syed*, 236 Md. App. at 286. But in 2019, the Court of Appeals reversed this Court's decision and affirmed the original conviction. *Syed*, 463 Md. at 105.

The Court of Appeals' Decision

The Court identified "substantial" corroborating evidence of Mr. Syed's guilt. *Id.* at 97. It held that a purported alibi that defense counsel failed to investigate was not substantially likely to have changed the outcome. *Id.* The Court went on to highlight the most persuasive evidence, *id.* at 93, and stress

"the evidentiary value of circumstantial evidence" at trial. *Id.* at 95. Specifically, the Court underscored significant witness testimony, cellphone tower location records, and forensic evidence that established Mr. Syed's motive and opportunity to kill Ms. Lee:

- Jay Wilds' testimony that Mr. Syed left his car and cell phone with Mr. Wilds on the morning of January 13, 1999, the day of Ms. Lee's murder. *Syed*, 236 Md. App. at 197. Before Mr. Syed exited his car, he "complained of Ms. Lee's treatment of him and said that he intended 'to kill that bitch.'" *Syed*, 463 Md. at 93. Later that afternoon, Mr. Wilds met Mr. Syed at a Best Buy where Mr. Syed showed him Ms. Lee's body in the trunk of her car and "boasted: 'I killed somebody with my bare hands.'" *Id.* at 96; *Syed*, 236 Md. App. at 197.
- Mr. Wilds' testimony that Mr. Syed described strangling Ms. Lee and stated that while she was struggling, she "kicked off the turn signal in the car[.]" *Syed*, 236 Md. App. at 200. When police officers located Ms. Lee's car, they found the windshield wiper control was broken. *Id*. at 200 n.11.
- Mr. Wilds' testimony that he helped Mr. Syed bury Ms. Lee's body in Leakin Park on the night of January 13. Mr. Syed then ditched Ms. Lee's car and drove with Mr. Wilds to Westview Mall, where he disposed of the shovels and "threw Hae's wallet, prom picture, and other possessions into a dumpster." *Syed*, 236 Md. App. at 204. Mr. Wilds later led police to Ms. Lee's abandoned car, after law enforcement had been unable to locate it for several weeks. *Syed*, 463 Md. at 93.
- Cell phone tower location records that placed Mr. Syed and Mr. Wilds together throughout the afternoon and evening of January 13 and showed that Mr. Syed received a call "in the vicinity of Leakin Park at the time that Mr. Wilds claimed that they buried Ms. Lee's body." *Id*.
- Jennifer Pusateri's testimony that she saw Mr. Wilds with Mr. Syed's phone and car during the afternoon of January 13. *Syed*, 236 Md. App. at 868. Ms. Pusateri picked up Mr. Wilds from Westview Mall that night, where she saw Mr. Wilds with

Mr. Syed. *Syed*, 463 Md. at 88. Ms. Pusateri told police and testified that Mr. Wilds revealed that Mr. Syed strangled Ms. Lee. The cause of Ms. Lee's death (strangulation) had not been publicly released when Ms. Pusateri gave her statement. *Id*. at 93.

- Mr. Syed's contradictory statements to law enforcement about his whereabouts and interactions with Ms. Lee on January 13. Mr. Syed first stated that "he was suppose[d] to get a ride home from the victim, but he got detained at school and felt that she just got tired of waiting and left." *Id*. at 90. When he was interviewed two weeks later, he "said that he had attended track practice after school." *Id*. Then, on February 26, he told investigators that "he could not remember what he did on January 13." *Id*. at 157.
- Mr. Syed's palm print was discovered "on the back cover of a map book that was found inside Ms. Lee's car; the map showing the location of Leakin Park had been removed from the map book." *Id*. at 93.
- Evidence of Mr. Syed's motive to kill Ms. Lee, including her breakup note found in Mr. Syed's room. The words "I'm going to kill" were written on the back. *Syed*, 236 Md. App. at 278.

Citing the strength of the evidence, the Court concluded that the case against Mr. Syed "could not have been substantially undermined" by proposed alibi testimony and affirmed the conviction. *Syed*, 463 Md. at 97, 105.

The State's Motion to Vacate

On September 14, 2022, the State moved to vacate Mr. Syed's conviction, claiming newly discovered exculpatory evidence, a purported *Brady* violation, and potentially "two alternative suspects." (E 73) The motion stated that the Baltimore City State's Attorney's Office and Mr. Syed's defense counsel had conducted "nearly a year-long investigation" into Syed's conviction. (*Id*.)

Despite the lengthy investigation, the State did not notify the Lee family of its intent to move to vacate until September 12. (E 180) Even then, the State did not share any details of its investigation, the purported exculpatory evidence, or the new suspects' identities. (E 179–80)

Secretive, Ex Parte Proceedings with No Notice to Mr. Lee

On Friday, September 16, 2022, a closed in-Chambers proceeding was conducted before the Honorable Melissa Phinn. (E 150:7–9) Assistant State's Attorney Becky Feldman and, presumably, Mr. Syed's counsel were the only other participants. Mr. Lee was neither notified of the hearing nor given an opportunity to be present—much less heard. The record is unclear whether the State presented the circuit court with the note giving rise to the purported *Brady* violation then.[1] (*Id.*)

The State's Deficient Notification of Vacatur Hearing

Later that afternoon, Ms. Feldman emailed Mr. Lee saying that an "in-person hearing" had been scheduled for the next business day—Monday, September 19. (E 179) Ms. Feldman indicated that Mr. Lee could "watch" via Zoom but did not tell him that he could participate or be heard. (*Id.*) Mr. Lee wanted to attend in person, (E 129:21–25) but could not travel from California

[1] At the September 19 vacatur hearing, Ms. Feldman noted "for the record" that she "show[ed] the Court the two documents containing the *Brady* information in camera last week," but did not move to admit those documents. (E 150:7–9)

on such short notice. He retained counsel and moved to postpone the hearing. The circuit court did not rule on the motion before the hearing.

The Procedurally Erroneous September 19 Vacatur Hearing

At the hearing, Judge Phinn allowed argument from Mr. Lee's counsel on his motion. Counsel argued that the State's late-Friday-afternoon notice for "a family of Korean national immigrants" informing them of "a motion that has been contemplated for one year" was "patently unreasonable" and prevented them from attending. (E 126:12–17) Counsel also corrected the circuit court's mistaken belief that Mr. Lee had agreed to the hearing date and to participate by Zoom. (E 130:14–31:14, 181–82) Counsel contended that the State had taken the explicit position that Mr. Lee had no right to participate. (E 126:18–27:1)

The circuit court responded that it was Mr. Lee's obligation to understand his rights and inform the prosecutor that he wished to attend in person. (E 131:15–24) It also ruled that there was no requirement that victim notification be "reasonable." (E 132:12–14)

Counsel then argued that the State was violating victims' rights provisions—Maryland Declaration of Rights article 47 and CP §§ 11-102 and 11-403—that required the court to permit Mr. Lee to be heard. (E 127:8–28:22, 134:19–35:6) The court reiterated that "he had plenty of time to seek an attorney," (E 137:20–22) and it stated, "11-403[,] [t]hat has to do with

sentencing or disposition hearings. That's not what this is. . . . This is a motion to vacate." (E 135:21–36:1)

The court denied Mr. Lee's motion and instead told counsel that if Mr. Lee wanted to address the court, he needed to do so via Zoom—immediately. (E 137:23–38:2) Mr. Lee raced home from work and, with no opportunity to confer with counsel, made a short, flustered statement. He reaffirmed his strong wish to attend in person, expressed that he was "not an expert in legal matters" and could not opine adequately, but that the experience of watching Mr. Syed's conviction vacated without his family's involvement felt "unfair." "What we're going through, our family, it's killing us." (E 140:23–42:13) The court ruled that allowing this short statement—which did not address the merits—fulfilled all statutory and constitutional obligations to Mr. Lee. (E 143:6–9) Counsel asked to be heard again on behalf of Mr. Lee, but the court refused. (E 142:23–43:5) It then granted the vacatur motion and ordered that Mr. Syed be immediately released. (E 163:12–64:3)

New Revelations About the State's Secret Evidence Add to the Need to Hear from the Victim's Family

After the hearing, the Baltimore Banner published a headline story[2]

[2] Tim Prudente & Dan Segelbaum, *A Decades-Old Note Helped Adnan Syed Get Out of Prison. The Author Says It Was Misinterpreted*, Balt. Banner, (Nov. 01, 2022) https://www.thebaltimorebanner.com/community/criminal-justice/adnan-syed-note-kevin-urick-handwriting-document-serial-podcast-release-2I3GK2ZD6ZBRHPJW7KJLWZGCIQ.

about the handwritten note that was part of the State's basis for asserting a *Brady* violation. (*See* E 150:7–17) The state never shared this note with Mr. Lee, revealing it to the circuit court only *ex parte*. (*See id.*) But the Banner obtained a type-written transcription by its author, the original prosecutor. *See* Prudente & Segelbaum, *supra* note 2. The State framed the note as though it suggested an alternative suspect, and the circuit court apparently accepted this interpretation. But the Banner cast doubt, revealing that the prosecutor "was not asked about the meaning of his words before" the State moved to vacate, and he clarified that the note referred only to Mr. Syed as a suspect—not a third party. *Id.*

Mr. Lee's Appeal to this Court

On September 28, 2022, Mr. Lee filed a notice of appeal pursuant to CP § 11-103(b), which provides the right to appeal a final order that "denies or fails to consider a right secured to the victim" by Maryland law. Under the Vacatur Statute and Rule 4-333(i), the state's attorney must enter a *nolle prosequi* of the vacated charges or take other action within 30 days of vacatur. Accordingly, on September 29, Mr. Lee moved for a stay pending the appeal. He asked the circuit court to rule on the motion by the close of business that day. The court had not ruled as of October 5, so Mr. Lee moved in this Court to stay further proceedings pursuant to Rules 8-422 and 8-425.

The Nolle Prosequi and this Court's Order to Show Cause

On October 11, 2022, the Baltimore City State's Attorney emailed the undersigned: "Please give me a call. . . . I have an update for your clients regarding the Adnan Syed case." This was mere minutes before the state's attorney's dismissal became widespread news.[3] The State had decided to drop charges even earlier—Friday, October 7—but waited until the dismissal had been entered to notify Mr. Lee.[4] As a result of the dismissal, on October 12, this Court ordered Mr. Lee to show cause why this appeal should not be dismissed as moot. On October 27, Mr. Lee responded. This Court ruled that the appeal could proceed.

STANDARD OF REVIEW

Antoine instructs that a trial court errs as a matter of law by failing to afford victims the opportunity to be heard at proceedings where the victim has that right. *See* 245 Md. App at 543. The issue here is whether the circuit court violated Mr. Lee's right to be notified, present, and meaningfully heard under Maryland's victims' rights provisions, including CP §§ 8-301.1, 11-403, and 11-103, and Article 47 of the Maryland Declaration of Rights. Whether the court

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[3] *See* @alex_mann10, Twitter (Oct. 11, 2022, 9:23 am), https://twitter.com/alex_mann10/status/1579825072378109953 ("Baltimore prosecutors drop charges against Adnan Syed").

[4] *See* Amanda Holpuch, *Baltimore Prosecutors Drop Charges Against Adnan Syed*, N.Y. Times (Oct. 11, 2022), https://www.nytimes.com/2022/10/11/us/adnan-syed-charges-dropped.html.

violated Mr. Lee's rights turns on an interpretation of statutory and constitutional law, so a *de novo* standard applies. 245 Md. App at 542–43.

ARGUMENT

I. This Appeal Is Not Moot Because Mr. Lee's Rights Were Violated in a Manner that this Court Can Remedy

As *Antoine* recognized, crime victims' representatives may appeal any proceeding in which their rights are violated. At Mr. Syed's vacatur hearing, the State and circuit court violated Mr. Lee's rights by providing inadequate notice and no meaningful opportunity to be heard. The State's subsequent entry of *nolle prosequi* does not moot the right to a compliant hearing because the State had no authority to *nolle pros* but for the deficient vacatur hearing.

Victims' rights violations demand "a remedy." *Id.* at 531. "To rectify the violations of [their] rights, [victims] should be placed in the position [they] occupied before the violations occurred." *Id.* at 550. Here, this Court can restore Mr. Lee to his prior position by mandating a new vacatur hearing that fully complies with the law.

A legally compliant hearing means a complete and transparent accounting of the evidence on which vacatur is based. Furthermore, because Mr. Lee is the only party in an adversarial position to the vacatur motion, the circuit court should permit him to hear and challenge the evidence presented.

a. History of Maryland's Victims' Rights Laws

1. Maryland Affords Crime Victims Formidable Rights

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. Decl. of Rts. Art. 47(a). But early victims' rights laws limited the right to appeal. *See Hoile v. State*, 404 Md. 591, 627 (2008). "As early as 1985, the Court of Appeals observed that . . . [the statute affording victims the right to be heard] had 'no teeth' because it did not allow courts to invalidate a sentence if victims' rights were denied." *Antoine,* 245 Md. App. at 540; *see also Cianos v. State*, 338 Md. 406, 410 (1995).

In 2013, the Assembly passed amendments to CP § 11-103 that greatly expanded victims' rights. The amendments provided for direct appeal and expanded this Court's power 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).

The right of appeal is among a suite of guarantees for Maryland victims. Under CP § 11-102(a), a victim's representative "has the right to attend any proceeding in which the right to appear has been granted to a defendant." CP § 11-403(a) requires a court to allow a victim's representative to be heard in any hearing where an "alteration of a sentence" is considered. If

the representative does not appear, the prosecutor must put on record why proceeding is justified. CP § 11-403(e)(1). If the court is dissatisfied with the prosecutor's statement, it may postpone the hearing. CP § 11-403(e)(2).

As amended, CP § 11-103(e)(1) requires a court to ensure that a victim's statutory rights are protected; § 11-103(e)(2) authorizes a court to provide a remedy when those rights are infringed; and § 11-103(e)(3) expressly contemplates that such remedy might include the modification or alteration of a sentence. *Antoine*, 245 Md. App at 533–34. The only limitation is that a remedy cannot violate the proscription on double jeopardy. *Id.* at 549. With these amendments, the era of neglecting victims' rights ended. *Id.* Appellate courts now have the power to fashion an actual remedy. *Id.* at 556–57.

2. The New Vacatur Statute Is Not in Tension with Existing Victims' Rights Laws

The Vacatur Statute, effective January 2020, creates a new mechanism to vacate past convictions. *See* CP § 8-301.1; Md. Rule 4-333. Unlike previously available tools that require a defendant to move for relief, the Statute permits a prosecutor to start the process. *See* Md. House Bill 874, Bill File ("H.B. 874 Bill File") at 1–5 (2019). The Statute provides the prosecutor extraordinary control over the defendant's fate by requiring prosecutors to decide whether to set a new trial date or enter a *nolle prosequi* within 30 days after vacatur. Rule 4-333(i). This means that the State may terminate the existing charging

document before any appellate review is possible. Because the motion is generally filed with the consent of the defendant, no party **other than the victim** has any legal interest in challenging it.

Hence, the Vacatur Statute provides that a victim "shall be notified" and "has the right to attend a hearing on a motion" for vacatur. CP § 8-301.1(d). Of course, "the right to receive notice of a sentencing hearing protects the right to be heard at that hearing." *Lamb v. Kontgias*, 169 Md. App. 466, 480 (2006). The rights exist "hand in glove." *Id.* The Statute also requires that a prosecutor "state in detail the grounds on which the motion is based," including by "describ[ing] [any] newly discovered evidence," CP § 8-301.1(b); such evidence is only sufficient if it gives rise to a "substantial or significant possibility" of a different outcome. Md. Rule 4-333(d)(7).

Importantly, neither the text nor legislative history demonstrates any intent to do away with existing victims' rights provisions in vacatur proceedings. The Vacatur Statute must be read in conjunction with existing rights under Maryland law. *Allen v. McCurry*, 449 U.S. 90, 99 (1980) ("repeals by implication are disfavored"); *Mayor & City Council of Balt. v. Clerk of Superior Ct.*, 270 Md. 316, 319 (1973) ("[T]he intention of the Legislature to do so must be clear and manifest.").

Here, Mr. Lee appeals a violation of rights afforded by the Vacatur Statute and other victims' rights provisions. On appeal, *Antoine* and CP § 11-

103 require this Court to answer: (1) were Mr. Lee's rights violated; and (2) what remedy would restore him to his pre-violation position without implicating double jeopardy.

b. The State and Circuit Court Violated Mr. Lee's Rights to Reasonable Notice, to Appear, and to Be Heard

The State and circuit court violated Mr. Lee's rights to be present at the vacatur proceeding and be heard on the merits. The court erred by endorsing inadequate notice, relying on secret evidence, and entertaining only perfunctory input from Mr. Lee after it had predetermined its holding.

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

The State was woefully deficient in notifying Mr. Lee before moving to vacate. On September 14, 2022, the State moved to vacate Syed's conviction, alleging newly discovered exculpatory evidence and the discovery of two alternative suspects. (E 73) But despite having vacatur in the works for nearly a year, the State first notified Mr. Lee of the 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 would be a hearing. (E 179–80)

On September 16, two days after filing, Ms. Feldman informed Mr. Lee that an "in-person hearing" was set for the next business day—Monday, September 19. (E 179) She offered the option of watching via Zoom but did not tell him that he had a right to participate. (*Id.*) Mr. Lee did not respond to that

email. (E 181) He wished to attend in person, (E 129:21–25) but he could not travel cross-country on such short notice.

Mr. Lee was also excluded from the *ex parte* proceeding held on Friday, September 16, at which Ms. Feldman and presumably Mr. Syed's counsel discussed the State's motion on the merits with the court. Mr. Lee did not even learn about this event until its disclosure at the vacatur hearing. (E 150:7–9)

On the day of the hearing, Mr. Lee's counsel moved for a postponement to afford Mr. Lee time to see the evidence and appear in person. (E 103–10) At the hearing, the court rejected Mr. Lee's motion, holding that notice to the victim **need not be reasonable**. (E 132:12–14, 137:23–38:2) Presumably, under its ruling, notice could be given mere seconds before the hearing.

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.

2. The Circuit Court Violated Mr. Lee's Right to Be Heard

Upon learning of the hearing, Mr. Lee scrambled to secure counsel to effectuate his rights and, shortly before the hearing, moved to postpone, citing his right to meaningfully participate. (E 103–10, 131:3–5) The circuit court's consideration of Mr. Lee's argument was perfunctory at best, resulting in the trifling consolation of making a statement via Zoom. (E 137:23–38:2) Remote attendance was insufficient in this circumstance. *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). The court gave Mr. Lee only 30 minutes' notice to race home, gather his thoughts without the input of counsel, and speak extemporaneously about his sister's murder—with no information about the evidentiary basis for vacatur.

Moreover, the circuit court gave no consideration to Mr. Lee's statement; all indications are that it had already made its decision prior to the hearing. The court heard no evidence and asked no questions. (E 162:21–63:11) It read from a prepared statement that rubber stamped the State's motion without

any reference to Mr. Lee's comments. (*Id.*) The court was aware that the State and defense had arranged a joint press conference, which the court announced at the end of the hearing. (E 164:5–11) And the court apparently **coordinated with Mr. Syed's correctional facility** to ensure that he had his property and street clothes on hand. (*See* State's Response to Motion to Disqualify at 23–24) At the end, it announced in an unorthodox and dramatic fashion, **"remove the shackles"** and **permitted Mr. Syed to emerge from the courthouse a free man**. (E 164:2–7).[5]

The Vacatur Statute refers to the victim's right to be "notified" and "present," and it is long established that "the right to receive notice . . . protects the right to be heard at that hearing"—the rights exist "hand in glove." *Lamb*, 169 Md. App. at 480. Rule 4-333 specifically cross-references CP § 11-403(b), which also requires that the court, upon request and "if practicable, shall allow . . . the victim's representative to address the court under oath before the imposition of sentence or other disposition." Judge Phinn disregarded the law, asking "[w]hat is attendance, what is presence?" (E 129:1) She ignored the text of Rule 4-333, declaring that CP § 11-403 "has to do with sentencing or

[5] *See also* Lee O. Sanderlin & Alex Mann, *Adnan Syed Walked Free from Court After His Conviction Was Vacated. Why Can't Others Do the Same?*, Balt. Sun (Sept. 20, 2022), https://www.baltimoresun.com/news/crime/bs-md-ci-cr-adnan-syed-hearing-differs-from-priveleges-afforded-other-defendants-20220920-yp5ul6xy3zagje6plrdkraaghu-story.html.

disposition hearings. That's not what this is." (E 135:22–23) The court held that the Vacatur Statute does not grant victims the right to speak. (E 135:21–36:1) It required Mr. Lee to participate via Zoom and barred his lawyer from speaking on his behalf. (E 142:23–43:5)

Judge Phinn seemed to believe that vacatur was not a "disposition" of a criminal matter. She wrongly implied that the Vacatur Statute weakened victims' rights laws. *See Mayor & City Council of Balt.*, 270 Md. at 319. But the Statute's legislative history demonstrates otherwise—the Assembly sought to reinforce, not erode, victims' rights. Significantly, the Maryland Judiciary originally opposed the bill, in large part because victims' rights provisions were not even more explicit. The Judiciary explained how the notice provision should be drafted to avoid misinterpretation and stated concerns that the bill should more clearly state that victims have the right to be heard. *See* H.B. 874 Bill File at 13. The Assembly revised the bill accordingly to ensure that victims are always notified.

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 state's attorney and circuit court apparently decided the outcome. Nothing Mr. Lee might have said in opposition could have altered the result. His statement was, at best, an empty ritual.

3. The Circuit Court Conducted Neither a Full nor Transparent Review of Long-Since Discounted Evidence

The State's "newly discovered" evidence was not actually new, nor did it create a substantial probability that the original trial result would have been different. The circuit court erred by granting the motion without adequate review, including Mr. Lee's participation. *See* CP § 8-301.1(a)(1)(i).

The State's vacatur motion asserted newly discovered evidence, all from the original case file—including an alleged *Brady* violation. (E 79–80) But the State's presentation raised critical questions. The State alleged six categories of newly discovered evidence but attached none of the underlying documents and relied instead on its own conclusions about what the evidence showed. (E 79-84) The motion loosely described evidence indicating that Ms. Lee's car was found near a home where one of the purported alternative suspects lived but did not identify what that evidence was nor how it could have changed the outcome. (E 81–82) The remainder of the State's argument about other suspects relies on claims about their past misconduct without any explanation of why such acts were material or whether such character evidence would even have been admissible. (E 82–84) A proper motion must "state in detail the grounds on which the motion is based" and "describe the newly discovered evidence." CP §8-301.1(b)(2)–(3); the State bears the burden of proof. CP §8-301.1(g). Accordingly, the State ignored the Vacatur Statute's requirements.

At the hearing, Ms. Feldman submitted no evidence save one exhibit—her own affidavit describing how she came upon the notes that are the basis of the *Brady* claim. (E 149:24–50:6) The record suggests that the only actual evidence the court reviewed were two notes that the state's attorney shared at the *ex parte* hearing. (E 150:7–10) Reliance on the notes is suspect. The State's Attorney's Office never spoke with the prosecutor who drafted them, even though Ms. Feldman admitted that the handwriting was hard to read. (E 147:20–24, 148:19–20) The State selectively quoted a description of a threat against Ms. Lee but omitted inculpatory statements consistent with the trial evidence against Mr. Syed. (E 148:7–9); *see, e.g.*, *Syed*, 236 Md. App. at 204. In fact, the note's author now claims that the reference was to Mr. Syed and not another suspect. *See* Prudente & Segelbaum, *supra* note 2. Finally, a significant portion of the State's argument was based on alleged misconduct by the investigating detective (E 155:7–57:5, 99–100), but the State presented no proof of misconduct—only aspersions drawn from unsworn allegations in a federal lawsuit.

If the State's allegations at the vacatur hearing had truly been new and persuasive, Mr. Lee would not have objected to vacatur. But these same arguments, evidentiary discussions, and alternative suspects have made their way to the Court of Appeals, and the Court ruled decisively that they "could not have substantially undermined" the original conviction. *See Syed*, 463 Md.

at 93–97. The State's motion and the circuit court's conclusory holding disregarded the Court of Appeals' findings and all but mocked the requirement that the court "state the reasons for a ruling." CP §8-301.1(f)(2); (E 162:21–63:11). Aside from not detailing the evidence—because the State presented none—the circuit court made no requisite findings to establish a *Brady* violation, including that the purportedly exculpatory evidence was material. *See Att'y Grievance Comm'n of Md. v. Cassilly*, 476 Md. 309, 389 (2021).

This case has drawn widespread publicity. The State's vacatur motion does not advance the case for innocence beyond the highly debated arguments presented in the media. *See, e.g.*, Prudente & Segelbaum, *supra* note 2 (describing inadequacies in the State's basis for vacatur). Furthermore, the State's conduct surrounding the motion is highly suspicious: (i) it felt compelled to file for vacatur though its investigation remained ongoing (E 73)—doing so just months before the Baltimore City State's Attorney was to leave office; (ii) the vacatur hearing was rushed, despite the court's busy docket, occurring just three days after the motion was filed; and (iii) Mr. Syed was released immediately, in his own street clothing that had been brought to court in seeming foreknowledge of the outcome.[6] *See* Sanderlin & Mann, *supra*

[6] As an additional irregularity, the State's Attorney alleged that part of its basis for moving for vacatur was that it had received initial results from new DNA testing but made no argument as to why the preliminary results were exculpatory. (E 83, 144:10–45:6)

note 5. It does no one justice to proceed in this manner. This Court should ensure that the State meet its burden with admissible evidence and that the circuit court give the victim's representative—the only adverse party—the opportunity to review and confront it.

c. This Court Is Capable of Fashioning Relief that Restores Mr. Lee to His Original Position

Under *Antoine,* the only remedy that places Mr. Lee "in the position he occupied before the violations occurred" would be to remand this case and instruct the circuit court to conduct an evidentiary hearing that complies with the law. *See* CP § 11-103(e)(2); 245 Md. App at 542, 550, 556–57. In *Antoine*, this Court held that the appropriate remedy for the trial court's failure to hear from the victim prior to a sentencing disposition was to vacate the sentence and remand for a new hearing. *See id.* There, the trial court admitted a victim impact statement only after it had determined the defendant's sentence, making the victim's right to be heard "an empty ritual"—nothing he might say could change the court's decision. *Id.* at 555. Here, too, the vacatur hearing was an empty ritual because the State and circuit court undermined Mr. Lee's opportunity to attend, prevented him from examining and challenging the evidence, and allowed him to speak only after determining the outcome.

For the remedy to be meaningful, Mr. Lee must be permitted to present evidence, call witnesses, and challenge the state's evidence and witnesses.

Maryland recognizes numerous instances in which crime victims are entitled such rights. For instance, victims have the right to 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; they 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 also introduce evidence, including expert testimony, when seeking to permit a child-victim to testify via closed circuit television. *See* CP § 11-303. Similarly, victims are entitled to a hearing to challenge defense subpoenas of their private records. *Goldsmith v. State*, 337 Md. 112, 122 (1995). Finally, victims may present evidence at pre-trial release hearings and sentencing alteration hearings concerning the threat a defendant might pose. CP §§ 5-201; 8-106.

A fully compliant hearing means one where the State presents the evidence supporting vacatur, CP § 8-301.1(b), and Mr. Lee is permitted to review and confront that evidence. *See generally* CP §§ 5-201, 8-106, 11-303; *In re Cody H.*, 452 Md. at 186. Many other similarly critical judicial hearings require these elements to ensure due process. *See, e.g.*, *Ford v. Wainwright*,

477 U.S. 399, 417 (1986);[7] *Sapero v. Mayor & City Council of Balt.*, 398 Md. 317, 346 (2007).[8] In any proceeding where one side bears a burden of proof—as the State did here, CP § 8-301.1(g)—the adversarial system requires that the opposing side have an opportunity to review and challenge the evidence. *See Canaj, Inc. v. Baker & Div. Phase III, LLC*, 391 Md. 374, 424 (2006) ("[T]he fundamental requisite of due process of law is the opportunity to be heard."). The very notion of open courts requires as much. *See generally Longus v. State*, 416 Md. 433, 445 (2010) ("The purpose of a public trial is to guarantee fairness, the appearance of fairness, and public confidence in the criminal justice system.").

d. Relief Does Not Create Double Jeopardy

The only limitation on this Court's grant of relief is that it must not violate the protection against double jeopardy. *See Antoine*, 245 Md. App. at 542 (citing CP § 11-103(e)(2)). To constitute double jeopardy, the circuit court's vacatur must have carried "the finality of an acquittal" that forecloses

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[7] In *Ford*, the U.S. Supreme Court overturned a Florida procedure for determining death row inmates' sanity: "[T]he lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination. . . . Fidelity to these principles is the solemn obligation of a civilized society." 477 U.S. at 417.

[8] "Procedural due process protections dictate that, at a minimum, the deprivation of property by adjudication requires that a party receive notice and a reasonable opportunity to be heard consistent with the circumstances of the taking." *Sapero,* 398 Md. at 346.

Mr. Syed from ever being charged with the offenses at issue. *Antoine,* 245 Md. App. at 559.

Vacatur is not akin to an acquittal. "The ordinary consequence of vacatur, if the Government so elects, is a new trial shorn of the error that infected the first trial." *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 363 (2016); *see, e.g.*, *Alston v. State*, 425 Md. 326, 341–42 (2012) (defendant whose conviction had been vacated stood "in the position of one who was awaiting trial on those charges"). Moreover, under the plain language of the Vacatur Statute, vacatur—unlike acquittal—gives the State the option of re-prosecuting the vacated charges. *See* Md. Rule 4-333(i).

Likewise, the entry of *nolle prosequi* is not the equivalent of an acquittal. *See State v. Simms*, 456 Md. 551, 578 (2017). "[W]here a nolle prosequi is entered before jeopardy attaches," that is, before the empaneling of a jury or the start of trial, "the State is only precluded from prosecuting the defendant further under that [same] indictment, but the defendant may be proceeded against for the same offense by another indictment or information." *Id*. at 560 (quoting *Blondes v. State*, 273 Md. 435, 443–44 (1975)).[9] In other words,

[9] There are even some situations where charges may be brought again under the same indictment after an initial trial. In *Ward*, the Court explained:

> where the nolle prosequi as to one charge is induced by a guilty plea on another charge . . . and the defendant thereafter successfully challenges

vacatur placed Mr. Syed back as an unprosecuted defendant—as though the first trial never occurred. "Absent constitutional or statutory provisions governing the effect of a nolle prosequi such as exist in some jurisdictions, there is nothing inherent in the nature of a nolle prosequi which causes its entry to operate as an acquittal of the underlying offense." *Ward v. State*, 290 Md. 76, 85 (1981); *accord Dealy v. United States*, 152 U.S. 539, 542 (1894) ("[A] nolle works no acquittal, and leaves the prosecution just as though no such count had ever been inserted in the indictment."). This must be so because as a general rule, a prosecutor may not *nolle pros* charges after jeopardy attaches. *Simms*, 456 Md. at 575; *see also Hook v. State*, 315 Md. 25, 44 (1989) ("[P]rotection against double jeopardy generally does not limit the power of a competent tribunal to retry a defendant who has succeeded in getting his first conviction set aside on grounds other than the sufficiency of the evidence."). Thus, the State could refile the *nolle prossed* charges.[10]

> the validity of the guilty plea and obtains a new trial, thereby rescinding the plea arrangement, the new trial ordinarily may . . . embrace the nolle prossed charge without the necessity of the State's obtaining a new charging document. This is true regardless of whether the nolle prosequi was entered before or after the attachment of jeopardy at the first trial.

290 Md. at 84 n.7. The circumstances here are similar, in that with the original conviction presently vacated, no double jeopardy risk exists.

[10] For the same reason, nothing about the requested relief would undercut Mr. Syed's legitimate expectations in the finality of the vacatur—he was or should have been aware that the circuit court's ruling was not the last

The circuit court and State violated Mr. Lee's rights. This Court may and should overturn the circuit court's vacatur and remand for a new hearing. This relief would not implicate double jeopardy. So, this matter is not moot.[11]

II. Even if this Case Is Moot, this Court Should Rule on the Merits Because the Injury Is Certain to Recur and Evade Relief

The Court may "address the merits of a moot case if [] convinced that the case presents unresolved issues in matters of important public concern that, if decided, will establish a rule for future conduct." *Coburn v. Coburn*, 342 Md. 244, 250 (1996). Hearing such cases is important where the matter involved is likely to recur frequently and the difficulty that prevented the appeal from being heard in time is likely to persist. *See In re S.F.*, 477 Md. 296, 318–19

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word. *See Antoine*, 245 Md. App. at 560. The Vacatur Statute allows the State to re-prosecute the vacated count. *See* Md. Rule 4-333(i). Even absent appeal, no bar existed against the State's Attorney filing a new indictment.

[11] Mr. Syed's argument that the appeal is moot because Mr. Lee's injury is not continuing is baseless. The longstanding doctrine of "collateral consequences" recognizes that cases are not moot where, as here, the collateral consequences of the ruling continue. *See D.L. v. Sheppard Pratt Health Sys.*, 465 Md. 339, 352 (2019). Mr. Lee and his family continue to suffer grave harm because Hae's murder now becomes a cold-case mystery. As far as the family knows, her killer walks free, endangering them and others. A victim's healing requires closure, and its absence is an ongoing harm. *See* Marilyn Peterson Armour & Mark S. Umbreit, *Assessing the Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison*, 96 Marq. L. Rev. 1, 20–22 (2012) (summarizing the harmful effects of unresolved crimes on victims, including a sense of "powerlessness," and finding that "the restoration of a sense of control may be an essential element in victim healing"). Of course, the family does not want an innocent man to suffer so that they may have closure, but the State has not furnished evidence establishing a miscarriage of justice.

(2022). This case meets all essential elements for a mootness exception: (1) it involves an important matter of significant public interest; (2) the issues are like to recur; and (3) the Vacatur Statute's strict time limits in which a prosecutor must *nolle pros* vacated charges mean that this issue—if a *nolle prosequi* can moot it—will always evade review.[12]

a. Victims' Rights Are an Important Matter of Public Concern

The circuit court's erroneous reading of the new Vacatur Statute in isolation from existing crime victim protections creates a significant issue of public concern. Appellate guidance is manifestly needed.

A moot case may be heard on appellate review "in instances where[ ] the urgency of establishing a rule of future conduct in matters of important public concern is imperative and manifest." *In re S.F.*, 477 Md. at 318 (quoting *J.L. Matthews, Inc. v. Md.-Nat'l Cap. Park & Plan. Comm'n*, 368 Md. 71, 96 (2002)). Appellate courts hold that threatening vulnerable groups' rights implicates matters of important public concern—including students facing discipline and criminal enforcement, *id.* at 321, child abuse victims seeking shelter outside

[12] Some courts have also invoked a mootness exception when the issue potentially affects a large group, and the litigant is an appropriate surrogate. *See Powell v. Md. Dep't of Health*, 455 Md. 520, 541 (2017). Here, the State will always be the party seeking vacatur. *See* CP § 8-301.1(a). And because victims are the only ones in an adversarial position, victims will be the parties who appeal such matters, representing the same concerns Mr. Lee presses here.

the family home, *In re O.P.*, 470 Md. 225, 249–50 (2020), and abuse victims seeking to have evidence of prior abusive conduct heard in protective proceedings, *Coburn*, 342 Md at 249–50.

Post-conviction rights for crime victims are a serious matter. Victims depend upon release notifications, for instance, to know whether an offender who poses a threat to them has been set free.[13] The Assembly has proven its strong concern for victims' rights with broad legal protections. The circuit court's application of the Vacatur Statute violated the Statute and Mr. Lee's other statutory and constitutional rights. This appeal is important because, without appellate guidance, such protections could be eroded in any future application of the Vacatur Statute, effectively reversing this Court's precedent in *Antoine*. *See, e.g.*, *State v. Peterson*, 315 Md. 73, 84–85 (1989) (hearing an appeal despite mootness where it involved important matters of judicial administration, requiring statutory interpretation and prompt guidance); *Potomac Abatement, Inc. v. Sanchez*, 424 Md. 701, 710 (2012) (need for "guidance to avoid future inconsistent rulings" overcomes mootness).

b. Violations of Victims' Rights Are Likely to Occur Frequently Under the Vacatur Statute

Although no dispute involving victims' rights under the Vacatur Statute

[13] Maryland's automated victim notification system has over 44,000 users. *See Victim Information & Notification Everyday (VINE)*, Maryland.gov, http://goccp.maryland.gov/victim-services/rights-resources/vine/.

has yet reached this Court, this case is surely the front of a looming wave.

The Vacatur Statute is new, and prosecutors are only beginning to utilize it. According to the Statute's bill files, thousands of motions are likely in the works. *See* H.B. 874 Bill File, pp. 6, 8. For example, the Senate Judicial Proceedings Committee Floor Report mentions misconduct by Baltimore's Gun Trace Task Force as a basis for passing the law and notes an estimated 1,300 cases affected by those activities. *See id.* at 6.

With each vacatur motion, the potential for victims' rights violations is compounded. The Vacatur Statute did not abrogate existing protections. *See Mayor & City Council of Balt.*, 270 Md. at 319. But the record demonstrates that Judge Phinn disregarded those rights when she ruled. As to the provision permitting a victim to appear, CP § 8-301.1(d)(2), she asked "[w]hat is attendance, what is presence?" (E 129:1) She expressed uncertainty about how to apply the law, noting, "nothing . . . indicates that the victim's family would have a right to be heard," and yet stating, "of course, if Mr. Lee was present today . . . I would allow him to speak." (E 129:18–22) She added that the Statute "says notice; it doesn't have anything about reasonable notice." (E 132:12–14) The court barred Mr. Lee's meaningful participation. Other courts might misread the law again. This Court should delineate the Statute's requirements. *See Robinson v. Lee*, 317 Md. 371, 376 (1989) ("[T]he need for clarity . . . is a matter of great public concern and is something which can frequently recur.");

State v. Ficker, 266 Md. 500, 507 (1972) ("[A]n appeal, even though moot, will not be dismissed where the urgency of establishing a rule of future conduct in matters of important public concern is both imperative and manifest.").

c. Victims' Rights Appeals Are Likely to Evade Review if this Appeal Is Dismissed as Moot

The Vacatur Statute gives the prosecutor—the same one who moved for vacatur—30 days to decide whether to file new charges. Rule 4-333(i). No appeal could run its course in so little time. The victim is the only party likely to appeal a vacatur because, under the Statute, the State's and defendant's interests are aligned.

If this Court will not hear an appeal once a prosecutor has decided to *nolle pros* charges, no appeal will ever be heard, and prosecutors will have plenary power to moot their own cases—a manifest distortion of executive power. *See Simms*, 456 Md. at 575 ("Despite the State's characterization of expediting justice for the defendant . . . the State may not employ its nol pros authority to enter a final judgment and thereby dismiss the appeal."). Here, the state's attorney openly boasted about her ability to moot the appeal.[14] This

[14] At a press conference, Ms. Mosby crowed that she had mooted the Lee family's rights: "I've utilized my power and discretion to dismiss the case. . . . There is no more appeal, it's moot." Ava-Joye Burnett, *Family of Hae Min Lee Contends Case Against Adnan Syed Is Still Alive in Appeal*, CBS Balt. (Oct. 28, 2022), https://www.cbsnews.com/baltimore/news/family-of-hae-min-lee-contends-case-against-adnan-syed-is-still-alive-in-appeal.

is antithetical to the interests of justice and the separation of powers, and on its own, should motivate this Court to consider the case. *See Stidham v. R.J. Reynolds Tobacco Co.*, 224 Md. App. 459, 471 (2015), *aff'd* 448 Md. 497 (2016) ("Because a court ruling on a matter of public concern should not be insulated from appellate review . . . we are persuaded to reach the merits even though the case is moot."); *see, e.g.*, *In re O.P.*, 470 Md. 225, 250 (2020) (because certain administrative proceedings "are inevitably on a fast track, an appeal from a denial of shelter care will almost always be moot by the time the appellate court would render its decision on a disputed question of law").

Even if this matter were moot, the need for this Court to address the case on the merits is overwhelming.

CONCLUSION

Under *Antoine,* the Court should find that Mr. Lee's rights were violated and that the only appropriate remedy is to remand the matter with instructions to conduct an evidentiary hearing that fully complies with the law. Mr. Lee must be afforded the opportunity to challenge the state's evidence and witnesses and to present his own.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 8,588 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 state in Rule 8-112. This brief was printed using a 13 point Times New Roman font.

Respectfully submitted,

/s/ Steven J. Kelly
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Court of Special Appeals of Maryland
MDEC No. CSA-REG-1291-2022
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YOUNG LEE, AS VICTIM'S REPRESENTATIVE,
Appellant,
v.
STATE OF MARYLAND,
Appellee.
----------)

CERTIFICATE OF SERVICE

I, Robyn Cocho, 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 LAW OFFICES OF SANFORD HEISLER SHARP, LLC, counsel for Appellant to print this document. I am an employee of Counsel Press.

On the **9th Day of December, 2022**, the within Brief for Appellant and Record Extract have been filed and served electronically to registered users via the Court's MDEC system. Additionally on this date I will serve paper copies upon:

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Unless otherwise noted, 8 copies of both the Brief and Record Extract have been sent to the Court on this day via overnight delivery.

December 9, 2022

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