

ADNAN SYED,

Petitioner/Cross-Respondent,

v.

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

Appellee/Cross-Appellant.

IN THE

SUPREME COURT

OF MARYLAND

September Term, 2023

No. 7

Mr. Lee's Response to Petitioner's Motion to Strike

One year ago, Adnan Syed, the State, and the circuit court, hid Mr. Syed's entire vacatur process from Hae Min Lee's family. Again, on appeal, Mr. Syed sought to deflect the Appellate Court and this Court from the substance of Young Lee's claims by trying to render the case moot and then relitigating the merits of Mr. Syed's underlying innocence—an issue not on review. Now, one year after this chaotic effort began, Mr. Syed is again trying to silence anyone who would argue against his position. This Court should deny Mr. Syed's Motion to Strike Argument II(D) of the Brief of Respondent State of Maryland ("Motion") and hear the full contentions of all parties to this appeal.

1. In Mr. Lee's Cross-Petition for Writ of Certiorari, he offered the following question presented: "Whether a victim's right to speak, as enshrined in Maryland's laws and constitution, is incorporated into the Vacatur Statute, CP § 8- 301.1, where no party or entity other than the victim has an interest in challenging the evidence alleged to support vacatur?" (Cross-Pet. for Cert. at 3) The State answered Mr. Syed's Petition and Mr. Lee's Cross-Petition, agreeing that this Court should hear the case. (Ans. to Pet. and Cross-Pet.

at 1) It noted that it agreed with the decision below. (*Id.*) On June 28, 2023, this Court ordered that both Mr. Syed’s Petition and Mr. Lee’s Cross-Petition should be granted, and that the State should file a brief as respondent. (Sup. Ct. Order 06/28/2023 at 1–2)

2. On August 28, 2023, Mr. Lee submitted his Appellee/Cross-Appellant Brief, arguing that as the victim’s representative, he had the right to be heard in hearings under the Vacatur Statute. (Appellee/Cross-Appellant Br. at 22–25) Specifically, he argued that the Vacatur Statute and Maryland’s laws and constitution provide him “with the right to review and *speak to* the evidence.” (*Id.* at 25) (emphasis added) Also on August 28, the State filed its Respondent Brief, in which it argued, among other things, that victims have the right to speak at Vacatur Statute hearings and granting that right would be “consistent with the numerous other procedural requirements that must be met in order for the State to vacate a defendant’s convictions.” (Resp. Br. at 41–43)

3. It is instructive to look back at the State’s argument before the Appellate Court. There the State took the position “that CP § 11-403(b) provides Mr. Lee with the right to give a statement.” *Lee v. State*, 257 Md. App. 481, 542 (2023). The only difference between its position then and now was that at the Appellate Court stage the State argued that Mr. Lee lacked the right “to present evidence, call witnesses, and challenge the [S]tate’s evidence and witnesses,” *id.*, whereas now, the State seems to concede that Mr. Lee may challenge the State’s evidence—arguing instead that the only limit on his right to speak is “the right to present evidence or call witnesses.” (Resp. Br. at 41 n.9)

4. On September 1, 2023, Mr. Syed filed his Motion, involving the State’s right to assert its support for Mr. Lee’s right to speak. Mr. Syed makes two arguments. First, that

the State waived its rights to argue in favor of Mr. Lee’s right to speak because it may only address issues raised in its 101-word Answer to the Petition and Cross-Petition. (Mot. to Strike ¶ 6) Second, Mr. Syed claims that the State is barred from now arguing in favor of Mr. Lee’s right to speak on grounds of judicial estoppel because it is at odds with the State’s position at the petition stage.¹ (*Id.* ¶ 7) Both arguments are meritless.

5. The State Did Not Waive Its Right to Argue That Mr. Lee Had the Right to Speak. A party does not waive its right to argue its position by failing to present it at the petition stage if this Court grants another petition or cross-petition for writ of certiorari agreeing to hear that issue. *Robeson v. State*, 285 Md. 498, 503–04 (1979) (recognizing that only an “issue which was not raised in the petition for a writ of certiorari, in a cross-petition or in the Court’s order granting certiorari” is typically waived). It is of no significance that the State did not file a separate cross-petition. The State is the Respondent to both Mr. Syed and Mr. Lee. It was the party responsible for leading the underlying vacatur process. Its position on Mr. Lee’s right to speak is relevant, and under Md. Rule 8-504(a)(6), it must present an “[a]rgument in support of the party’s position on each issue.” Indeed, had the State failed to address the right to speak in its brief, it would have abandoned its right to take any position on that question. *See HNS Dev., LLC v. People’s Couns. for Balt. Cnty.*, 425 Md. 436, 458–59 (2012). As the issue of Mr. Lee’s right to speak was squarely before

¹ Mr. Syed also contends that Mr. Lee seeks “party status.” (Mot. to Strike § 5) This is not true. Mr. Lee has not argued before this Court that he was a party at Mr. Syed’s vacatur hearing but, instead, a litigant with “direct and substantial interests” in the outcome. (Appellee/Cross-Appellant Br. at 22.)

this Court, the State appropriately responded by agreeing with Mr. Lee. (Resp. Br. at 41–43)²

6. The State’s Argument on the Right to Speak Is Not Barred by Judicial Estoppel. Mr. Syed argues that based on judicial estoppel, the State may not make arguments inconsistent with its prior position. (Mot. to Strike ¶ 7) This is incorrect. Three conditions must exist for judicial estoppel to apply: (1) a party takes a position inconsistent with a position it took in previous litigation; (2) “the previous inconsistent position was accepted by a court,” and (3) the party intentionally misled the court to gain an unfair advantage. *Dashiell v. Meeks*, 396 Md. 149, 171 (2006). All three conditions are missing. First, the State’s present position is not inconsistent with its position before the Appellate Court. Here at this Court, the State argued that the Vacatur Statute and other victims’ rights protections provide Mr. Lee with a right to be heard. (Resp. Br. at 41–43) The only difference now from its position at the Appellate Court is that the State argues a slightly broader understanding of what it means to be heard, having dropped its contention that Mr. Lee may not “challenge the [S]tate’s evidence.” *Lee*, 257 Md. App. at 542. Moreover, even if the State’s present argument were inconsistent, judicial estoppel applies only where the position is “inconsistent with one taken in previous litigation[;] not where a party takes an

² Moreover, this Court may consider any argument it chooses, even ones not raised in a petition for writ of certiorari, if judicial economy supports it and the record on the issue is clearly established. *See, e.g., Kumar v. State*, 477 Md. 45, 61 (2021) (“In this case, considerations of judicial economy and the desire to avoid unnecessary appellate litigation persuade us to address the issue of preservation[.]”); *State v. Parker*, 334 Md. 576, 596–97 (1994) (“The use of the term ‘ordinarily’ [in Md. Rule 8-131(b)] implies that this Court possesses the discretion to consider issues that were not necessarily raised in the petition or order for a Writ of Certiorari.”).

inconsistent position within the same litigation.” *Lillian C. Blentlinger, LLC v. Cleanwater Linganore, Inc.*, 456 Md. 272, 298 (2017). So, the evolution in the State’s argument is not estopped. Second, the Appellate Court did not accept the inconsistent position, as it denied that Mr. Lee had the right to speak or be heard. *Lee*, 257 Md. App. at 547. Without a ruling in the State’s favor, that requirement is missing. Third, Mr. Syed makes no argument that the State intended to mislead either court to gain an unfair advantage, nor what sort of advantage the State might have gained. Absent such evidence, the equitable principles of judicial estoppel do not apply. *See, e.g., Bank of New York Mellon v. Georg*, 456 Md. 616, 664–65 (2017) (“The record simply does not contain any evidence of an intent to mislead[.]”). The State is not estopped from arguing in support of Mr. Lee’s right to be heard.³

7. Mr. Lee’s right to speak to the evidence at Vacatur Statute hearings is a central dispute in this litigation. As a party, the State must respond to that question. It has done so in a manner consistent with its argument at the Appellate Court. As such, this Court should consider the State’s current perspective in full and deny Mr. Syed’s Motion.

³ The case Mr. Syed relies on to argue that a party may not take a position at odds with a judgment to which it consented is off point. (Mot. to Strike ¶ 7) That case, *Parker v. State*, stands for the proposition that a party “may not obtain *appellate review* of a judgment to which the party consented.” 402 Md. 372, 405 (2007) (emphasis added). Here, because the Court granted Mr. Lee’s Petition for Writ of Certiorari, the question of a victim’s right to speak was already before this Court. *Parker* says nothing about the State’s right to argue that matter now in its merits brief.

Respectfully Submitted,

/s/DAVID W. SANFORD

DAVID W. SANFORD

ARI B. RUBIN

SANFORD HEISLER SHARP, LLP

700 Pennsylvania Avenue SE, Suite 300

Washington, DC 20003

(202) 499-5232

dsanford@sanfordheisler.com

arubin@sanfordheisler.com

Attorneys for Appellee/Cross-Appellant

CERTIFICATION OF WORD COUNT AND
COMPLIANCE WITH RULE 8-112

1. This brief contains 1,551 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/DAVID W. SANFORD

DAVID W. SANFORD

ARI B. RUBIN

SANFORD HEISLER SHARP, LLP

700 Pennsylvania Avenue SE, Suite 300

Washington, DC 20003

(202) 499-5232

dsanford@sanfordheisler.com

arubin@sanfordheisler.com

Attorneys for Appellee/Cross-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September, 2023, a copy of the foregoing in the captioned case was delivered via the MDEC system to:

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

Daniel J. Jawor
Derek Simmons
Office of the Attorney General
Criminal Appeals Division
200 Saint Paul Place, 17th Floor
Baltimore, MD 21202

/s/ DAVID W. SANFORD
DAVID W. SANFORD