

YOUNG LEE, AS VICTIM'S  
REPRESENTATIVE,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

IN THE

COURT OF SPECIAL APPEALS

OF MARYLAND

September Term 2022

No. 1291

Circuit Court Case

No. 199103042-46

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**APPELLANT YOUNG LEE'S OPPOSITION TO ADNAN  
SYED'S (1) RESPONSE TO APPELLANT AND (2) MOTION  
TO STRIKE JUDGE HEARD'S AFFIDAVIT**

Adnan Syed's submission of October 28 fails to negate Young Lee's ongoing constitutional and statutory injury, which Maryland courts have the power to remedy.

This Court should reject Mr. Syed's arguments because they are directly at odds with the binding precedent of *Antoine v. State*. 245 Md. App. 521 (2020). In *Antoine*, then-chief judge Fader ended the era in which courts neglected victims' rights and provided no remedies. *Id.* at 549. As Judge Fader stated, "notwithstanding 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 if those basic rights were denied." *Id.* at 540 (cleaned up). "As a result of the 2013 Amendments" to Maryland

Annotated Code, Criminal Provisions (“CP”) Section 11-103, a victim now has “standing to challenge the circuit court’s alleged violations of his rights, and to seek an appropriate remedy.” *Id.* at 542. When a crime victim’s constitutional or statutory right is violated, “§ 11-103(e)(2) of the Criminal Procedure Article . . . authorizes a remedy that is both effective and respectful of the constitutional rights of defendants.” *Id.* at 531. “To rectify the violations of [their] rights, [the victim] should be placed in the position [the victim] occupied before the violations occurred.” *Id.* at 550. Appellate courts are now authorized to “grant the victim relief provided the remedy does not violate the constitutional right of a defendant . . . to be free from double jeopardy.” *Id.* at 542 (quoting CP § 11-103(e)(2)).

*Antoine* further stands for the proposition that a victim’s right to be heard is only vindicated if a trial court considers the victim’s input before deciding on the merits of the issue about which the victim will speak. *See Antoine*, 245 Md. App. at 547–48. In *Antoine*, much like the secret proceedings that took place here, the trial court, the prosecutor, and the defense negotiated a binding plea deal without the victim being present. *Id.* at 535–37. The victim objected and, through counsel, asked the trial court to “start over.” *Id.* at 537. The trial court acknowledged that it violated the victim’s rights but held that the only remedy would be to allow the victim to give a belated statement—though it could not possibly impact the sentence that had been rendered. *Id.*

This Court found that the victim's rights to be heard are "meaningful only if they are afforded before a trial court formally binds itself to a particular disposition of a case." *Id.* at 547. So, this Court vacated the defendant's sentence and remanded the case with instructions that the sentencing be redone in compliance with Maryland's victim rights laws. *See id.*; *see also* Md. Decl. Rts., art. 47; CP § 11-103(e)(2).

Similarly, here, Mr. Lee was denied his rights to meaningfully participate in the vacatur proceeding. This would have had required the State's Attorney to provide adequate notice, along with the proposed basis for vacatur including the relevant facts and evidence relied upon. After receiving that information, Mr. Lee was entitled to an opportunity to challenge the vacatur determination. As in *Antoine*, Mr. Lee is entitled to a do-over of the vacatur hearing in which he is afforded these rights.

To reject this appeal as moot would be to repudiate *Antoine*. In the same manner as the victim in *Antoine*, Mr. Lee was denied his right to be heard on the merits. Here, the circuit court provided Mr. Lee only a semblance of his rights: he was allowed to give a "statement" without the benefit of his counsel, with no knowledge of the secret evidence that purportedly supported the State's Attorney's motion to vacate Mr. Syed's sentence, and only after the circuit court had decided to grant the State's motion. Furthermore, the State's Attorney's subsequent *nolle prosequi* decision does not moot Mr. Lee's demand

for a legally compliant vacatur hearing because it could have never occurred without the tainted vacatur. Only after Mr. Syed's sentence was vacated could the prosecutor elect not to re-prosecute.

Recent events underscore the reckless way in which the Baltimore City State's Attorney and circuit court reached the vacatur ruling. In particular, the State relied on a handwritten note from Mr. Syed's original prosecutor and claimed that it pointed to the existence of another suspect. The State argued that his failure to disclose it constituted a *Brady* violation. But new reporting shows that the prosecutor who wrote the note disputes that interpretation and confirms that the note referred to Mr. Syed as the perpetrator. Combined with other lingering questions, these revelations underscore that a full, public evidentiary hearing was necessary here. Any ambiguity in the note could have been cleared up by calling the original prosecutor at the vacatur hearing. But neither the State nor the circuit court called for his or any other testimony.

*Antoine* affirmed that victims' rights are no longer empty promises. Under *Antoine*, the only remedy that can place 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 open evidentiary hearing that complies with Maryland's vacatur statute and affords Mr. Lee his constitutional and

statutory rights.<sup>1</sup> See 245 Md. App at 550, 556–57. That remedy is fully authorized under CP § 11-103, and Maryland law contains no provision that would prevent this Court from ordering a remedy mirroring the one in *Antoine*.

Mr. Syed’s argument that the appeal is moot because Mr. Lee’s injury is not continuing is likewise baseless. Maryland’s longstanding doctrine of “collateral consequences” recognizes that courts should not consider cases moot where, as here, the collateral consequences of the ruling continue. See *D.L. v. Sheppard Pratt Health Sys., Inc.*, 465 Md. 339, 352 (2019) (holding that a case is not moot if a party demonstrates just the possibility of negative consequences from an earlier adverse ruling). Mr. Lee and his family continue to suffer grave harm because of their exclusion from the vacatur process. Because of the circuit court’s flawed procedures at the vacatur hearing, which violated constitutional and statutory requirements, no one was in a position to advocate for the family’s rights as victims. This appeal is an appropriate mechanism to rectify those consequences.

Mr. Syed also seeks to strike Judge Wanda K. Heard’s affidavit.<sup>2</sup> But Syed’s motion is likewise meritless. Judge Heard’s Affidavit is properly before

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<sup>1</sup> Md. Code. Ann., Criminal Provision (“CP”) § 8-301.1 (the “Vacatur Statute”).

<sup>2</sup> The Affidavit of the Honorable Wanda K. Heard was attached as Exhibit A to Appellants Response.

this Court because it pertains only to this Court's Order to Show Cause and will not be submitted for consideration on the merits.

For these reasons, Appellant Young Lee respectfully requests that this appeal be permitted to proceed and that Mr. Syed's motion to strike be denied.

### **ARGUMENT**

Mr. Syed's arguments fail because they directly conflict with *Antoine* and Maryland victims' rights statutes. Mr. Syed primarily argues that the State's Attorney's entry of the *nolle prosequi* cuts off Mr. Lee's right to seek a remedy on appeal. Because the prosecutor has nearly "unfettered discretion" to dismiss cases, he claims that the dismissal "cannot be undone." (Motion to Strike Exhibit A to Appellant's Response and Reply to Responses by Appellant and the Office of the Attorney General ("Motion") at 5.) This is incorrect. Without the defective vacatur, Mr. Lee would still remain under his original sentence and the State's Attorney could not have elected to drop the case. Under *Antoine*, Mr. Lee is entitled to a redo of the vacatur proceeding in which he is afforded his rights as a crime victim.

#### **A. This Court Reviews the Trial Court's Decision *De Novo***

When the decision to admit victim impact evidence "involves a question of law . . . that legal issue is reviewed de novo." *Antoine*, 245 Md. App. at 542–43. The issue here is whether the court prevented Mr. Lee from being meaningfully heard in violation of victims' rights laws including CP §§ 8-301.1,

11-403, and 11-103. *Antoine* instructs that a circuit court errs as a matter of law by failing to afford victims the opportunity to be heard in proceedings in which the victim has that right. *See* 245 Md. App at 543. This matter turns on the court’s interpretation of the underlying law, so the appropriate standard of review is *do novo*.

**B. Mr. Lee Has Standing to Appeal His Violation Under CP § 11-103 and *Antoine v. State***

**1. Under *Antoine*, Victims’ Rights Laws Are No Longer Toothless and Are Enforceable by a Redo of Defective Proceedings**

In *Antoine*, this Court traced the evolution of victims’ rights in Maryland, explaining that “[a]s early as 1985, the Court of Appeals observed that . . . [the statute giving victims the right to be heard] had ‘no teeth’ because it did not allow courts to invalidate a sentence if victims’ rights were denied.” 245 Md. App. at 540. To further illustrate this point, the Court discussed *Cianos v. State*, in which the Court of Appeals held that a victim had no standing to appeal a sentence because any remedy to the victim “cannot result in a reversal of the judgment and a reopening of the case.” 338 Md. 406, 410 (1995). “Similarly, in *Hoile v. State*, the Court of Appeals held that, under the then-current version of § 11-103, a victim whose rights had been violated when a trial court reduced a defendant’s sentence without the victim’s input was

‘powerless to have that judgment reopened or vacated.’” *Antoine*, 245 Md. App. at 541 (quoting *Hoile v. State*, 404 Md. 591, 627 (2008)). This has all changed.

## **2. The 2013 Amendments to CP § 11-103 Give Victims Standing to Seek an Effective Remedy on Appeal**

In 2013, the General Assembly passed amendments to CP § 11-103 that empowered crime victims to seek redress when their rights are denied. The amendments must be viewed as remedial legislation, and this Court should apply them liberally to effectuate the legislature’s intent. *Opert v. Crim. Injs. Comp. Bd.*, 403 Md. 587, 594 (2008). Among the significant changes were providing victims with the right to direct appeal; expanding this court’s power to create effective remedies, if they do not violate defendants’ double jeopardy rights; and specifically contemplating remedies that impact offenders’ incarceration and sentence. *See Antoine*, 245 Md. App. 521, 541–42.

These changes also provide victims with standing to seek redress on appeal for violations of their rights to participate in criminal proceedings. Specifically, CP § 11-103(e) provides:

- (1) In any court proceeding involving a crime against a victim, the court shall ensure that the victim is in fact afforded the rights provided to victims by law.
- (2) If a court finds that a victim's right was not considered or was denied, the court may grant the victim relief provided the remedy does not violate the constitutional right of a defendant . . . to be free from double jeopardy.



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

*Antoine* requires this Court to fashion an actual remedy when a victim's statutory right to be heard is violated. *See* 245 Md. App. 556–57. 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 if it finds that those rights have not been protected; and § 11-103(e)(3) expressly contemplates that such a remedy might include the modification or alteration of a sentence.” *Id.* at 533–34. The only limitation on the remedy is that it cannot violate the defendant’s “constitutional right . . . to be free from double jeopardy.” *Id.* at 549.

*Antoine* provides that this Court must answer two essential questions when considering a CP § 11-103 appeal: (1) were the victim’s rights violated; and (2) if so, what remedy would restore the victim to his or her pre-violation position without violating double jeopardy.<sup>3</sup>

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<sup>3</sup> Section 11-103(e)(3) also requires the victim to file a notice of appeal within 30 days to seek to alter a defendant’s sentence or incarceration. Mr. Lee filed his family’s Notice of Appeal within 30 days of the Court’s vacatur order, which was entered on September 19, 2022. *See* Notice of Appeal (filed Sept. 28, 2022).

### **3. The State's Attorney and Circuit Court Were Required to Honor Mr. Lee's Essential Statutory and Constitutional Rights at the Vacatur Hearing**

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). Article 47 further provides victims with the “right to be notified of, to attend and to be heard” at criminal justice proceedings. *Id.* art. 47(b). Additional statutes elaborate on those rights. For instance, CP § 11-102 states that a victim or victim’s representative “has the right to attend any proceeding in which the right to appear has been granted to a defendant.” CP § 11-102(a). In addition, CP § 11-403 requires a court, if practicable, to allow a victim or victim’s representative to address the court in any hearing where an “alteration of a sentence” is considered. CP § 11-403(a). The Vacatur Statute itself provides that a victim “shall be notified” and “has the right to attend a hearing on a motion filed under this section.” CP § 8-301.1(d). Moreover, “the right to receive notice of a sentencing hearing protects the right to be heard at that hearing”; the rights exist “hand in glove.” *Lamb v. Kontgias*, 169 Md. App. 466, 480 (2006).

### **4. The State's Attorney and Circuit Court Violated Mr. Lee's Statutory and Constitutional Rights**

Mr. Syed’s vacatur hearing violated Mr. Lee’s constitutional and statutory rights in multiple ways. Based on a rushed reading of the Vacatur

Statute, the circuit court ignored all the other applicable, post-conviction victims' rights that apply in vacatur proceedings and found that notice to the victim must merely be made; such notice **need not** be reasonable. (*See* Tr. at 13:12–14 (stating that the language “says notice. It doesn’t have anything about **reasonable notice**”) (emphasis added)). The circuit court also held that the Vacatur Statute does not grant victims the right to speak and any such right is within the circuit court’s discretion. (Tr. at 16:21–17:1 (deciding that CP §11-403, which grants victims the right to be heard, does not apply at vacatur hearings).) Finally, after the court required Mr. Lee, over the objections of his counsel, to give his statement via Zoom, the court barred Mr. Lee’s lawyer from speaking on Mr. Lee’s behalf. (*See* Tr. at 23:23–24:5.)

The circuit court’s rulings constitute legal error. In direct conflict with *Antoine*’s teachings, it transmuted the victims’ rights afforded by the Maryland constitution and supporting statutes into empty formalities. The entire course of proceedings appeared to be a calculated maneuver to deny Mr. Lee’s right to be heard and to potentially influence the outcome. This Court must provide a remedy.

#### **5. A New Vacatur Hearing is the Only Effective Remedy for These Violations**

Both CP § 11-103 and *Antoine* require appellate courts to create remedies that place the victim “in the position [he] occupied before the violations

occurred” while not violating the defendant’s Fifth Amendment rights. *Antoine*, 245 Md. App. at 550.

Applying these standards in *Antoine*, this court held that the only appropriate remedy for the trial court’s failure to hear from the victim prior to deciding on the sentence was to vacate the sentence and remand the case for a new sentencing. *See id.* The trial court’s attempt to admit the victim impact statement after it had already determined the sentence was insufficient because a victim’s right to be heard cannot be vindicated if the court cannot or will not change its decision based on “anything the victim might say.” *Id.* at 555. Such an exercise would be “an empty ritual.” *Id.*

**6. The State’s Attorney and Circuit Court Worked in Secret to Vacate Mr. Syed’s Conviction and Forced Appellant to Engage in an Empty Ritual**

The circuit court endorsed the prosecutor’s actions in providing minimal notice, allowed the prosecution to rely on secret evidence, and entertained only perfunctory input from Mr. Lee before it announced its predetermined decision to vacate. A review of the hearing transcript shows that the circuit court gave no consideration to Mr. Lee’s statement. The transcript also demonstrates that the court had already made its determination prior to the hearing. The court heard no evidence and asked no questions. (Tr. at 43:21–44:11.) It read from a prepared statement to rubber stamp the State’s (highly deficient) motion. And, showing that the result was preordained, the circuit court was fully aware that

the State and defense had arranged a joint press conference, which the court itself announced at the end of the hearing. Moreover, the court apparently **coordinated with Mr. Syed’s correctional facility** ahead of time to ensure that he had his property and street clothes at the hearing. (See State’s Response to Motion to Disqualify Office of the Attorney General as Counsel for the State of Maryland or Strike the State as a Party to the Appeal at 23–24.) Finally, the court announced in a highly unorthodox and dramatic fashion, **“remove the shackles,” and then permitted Mr. Syed to emerge from the courthouse to the media and waiting arms of his throngs of supporters.** (See Tr. at 45:2–7); 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, 7:28 pm), <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-adnan-syed-hearing-differs-from-priveleges-afforded-other-defendants-20220920-yp5ul6xy3zagje6plrdkraaghu-story.html>.

The import is clear. Mr. Lee lacked notice and a meaningful opportunity to participate in the vacatur hearing. He was completely excluded from the prior *ex parte* proceeding at which the State’s Attorney and circuit court apparently discussed and decided on how to rule on the State’s motion. Together, this meant that nothing Mr. Lee might have said in opposition to vacatur could have altered the circuit court’s ruling.

Accordingly, the only effective remedy here under *Antoine* and CP § 11-103 is a new evidentiary hearing that fully complies with the Vacatur Statute and with all applicable victims' right laws. *See* 245 Md. App. at 556–57 (explaining that “to afford a crime victim a meaningful right to [be heard], as required by §§ 11-402(b) and (d) and 11-403(b), a court must allow the victim an opportunity to present such evidence before binding itself to a particular sentence,” and when a lower court fails to do that, this Court “must . . . vacate the trial court’s” sentence so that it may properly conduct proceedings). Mr. Lee must be afforded reasonable notice and opportunity to meaningfully participate in a hearing of critical importance to his family’s life.

**7. This Court Should Grant a New Vacatur Hearing and This Would Not Violate Double Jeopardy**

Granting Mr. Lee a new hearing would not violate the prohibition against double jeopardy. To constitute double jeopardy, the circuit court’s vacatur would have to carry “the finality of an acquittal” that forecloses Mr. Syed from ever being charged with the offenses at issue. *Antoine*, 245 Md. App. at 559. The vacatur is not akin to an acquittal under the plain language of the Vacatur Statute because it gives the state the option of re-prosecuting or entering a *nolle prosequi* of the vacated charges. *See* Md. Rule 4-333(i).

Similarly, Maryland courts recognize that a *nolle prosequi* does not have the legal effect of an acquittal because it is merely a prosecutor’s dismissal of

criminal charges contained within a particular charging document, which does not prevent the prosecutor from initiating new charges based on the same offense. *See State v. Simms*, 456 Md. 551, 578 (2017).

Further, there is no procedural bar preventing this Court from striking the *nolle prosequi*. The State’s Attorney could not have entered the *nolle prosequi* unless the circuit court had first granted vacatur.<sup>4</sup> The vacatur was defective and must be redone, so it is as if the *nolle prosequi* never happened.

Moreover, CP § 11-103(e)(3) specifically contemplates a remedy that “modifies a sentence of incarceration of a defendant,” and the only limitation on this Court’s power to create a remedy under the provision—which the legislature passed as a remedial amendment—is CP § 11-103(e)(2)’s bar against double jeopardy. Here, as in *Antoine*, this Court has the authority to order a new vacatur hearing as a remedy.<sup>5</sup>

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<sup>4</sup> Here, the State’s Attorney’s only authority for entering the *nolle prosequi* was the circuit court’s vacatur of Mr. Syed’s conviction. *See* CP § 8-301.1; Md. Rule 4-333. Because the State’s Attorney and the circuit court failed to comply with the Vacatur Statute and Maryland victims’ rights law, the vacatur was improper and the State’s Attorney had no rightful basis to enter the *nolle prosequi*. *Cf. Simms*, 456 Md. at 578; Md. Rule 4-333.

<sup>5</sup> Furthermore, a new vacatur hearing on its own would not trigger double jeopardy protections because such a hearing “does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence.” *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980); *see Antoine*, 245 Md. App. at 559–60 (discussing *DiFrancesco*).

Mr. Lee therefore has standing to seek an appropriate remedy for the violation of his rights and the only proper remedy is to remand this case for a vacatur hearing that complies with the law.<sup>6</sup>

**C. Grave New Revelations About the State’s Secret Evidence Add to the Need to Hear from the Victim’s Family**

Critically, additional evidence is emerging, which undermines the purported basis for the vacatur. Just a few days before the filing of this opposition, the Baltimore Banner published a breaking story about the handwritten note that was part of the State’s basis for asserting an alleged *Brady* violation and the circuit court’s basis for vacating Mr. Syed’s conviction. (See Tr. at 31:7–17); Tim Prudente & Dylan Segelbaum, *A Decades-Old Note Helped Adnan Syed Get Out of Prison. The Author Says It Was Misinterpreted.*, Balt. Banner (updated Nov. 1, 2022, 1:18 pm), <https://www.thebaltimorebanner.com/community/criminal-justice/adnan-syed-note-kevin-urick-handwriting-document-serial-podcast-release-2I3GK2ZD6ZBRHPJW7KJLWZGCIQ>. The supposedly exculpatory note was

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<sup>6</sup> Mr. Syed’s attempt to distinguish *Antoine* is unconvincing. Although this Court vacated a sentence in that case and allowed for the victim to be heard at the new sentencing, there is no meaningful difference between entering a sentence and vacating a conviction where it comes to how the harm impacts the victim. Mr. Syed offers no legal support to the contrary. The victim’s right to be heard is protected at post-conviction proceedings, and the victim may appeal any violation of such rights. See CP §§ 11-103(b); 11-403(b), (f).



not made available to Mr. Lee at any point prior to the vacatur hearing; it was shared with the circuit court on an *ex parte* basis. (*Id.*) But the Baltimore Banner obtained a copy and a type-written transcription by its author, the original prosecutor. *See supra*, Prudente & Segelbaum. As the news article states, the prosecutor “was not asked about the meaning of his words before” the State’s Attorney moved to vacate Mr. Syed’s sentence, and the “public revelation of the documents leaves dueling explanations for the crucial note.” *See id.* In particular, the State contended that the note indicates that another suspect had committed the crime (and the circuit court apparently accepted this interpretation), but the original prosecutor has confirmed that the note refers to Syed himself and not some phantom third party.<sup>7</sup> This kind of confusion underscores the compelling importance of conducting a full evidentiary hearing—one that complies with the law.

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<sup>7</sup> According to the note’s author, the original prosecutor, the State’s Attorney misinterpreted the key portion of the note referenced in the vacatur proceeding: “He told her that he would make her disappear; he would kill her.” *See supra*, Prudente & Segelbaum. Without consulting with the note’s author, the State argued that the “He” (referencing the person who made the threat), was an alternative suspect. But it actually referred to Adnan Syed. *Id.*

#### **D. This Appeal Is Also Proper Based on the Collateral Consequences Doctrine**

The Court of Appeals recently reaffirmed that “mootness will not preclude appellate review in situations where a party can demonstrate that collateral consequences flow from the lower court’s disposition.” *D.L. v. Sheppard Pratt Health Sys., Inc.*, 465 Md. 339, 352 (2019). “[C]ollateral consequences need not be concrete and actual; instead, a [party] must demonstrate only the possibility of collateral legal consequences to preclude a finding of mootness.” *Id.* at 521.

The collateral consequences faced by Hae Min Lee’s family are critically important. Primarily, the family has a direct legal interest in the finality of the jury conviction. As the Supreme Court recognized in *Calderon v. Thompson*:

Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike.

523 U.S. 538, 556 (1998). Numerous statutes and Article 47 of the Declaration of Rights embody and protect this interest. In Maryland, post-conviction rights for crime victims are especially important. *See* CP § 11-403(a). Relatedly, the family has a strong interest in ensuring that Hae Min Lee’s actual murderer is brought to justice. That is impossible if prosecutors and the court rely on secret evidence and vague characterizations of purported other suspects.

Furthermore, the family suffers growing scorn and misplaced criticism because of the circuit court's procedurally flawed ruling. Absent relief from this Court, the family's injury will be ongoing for as long as justice remains undone.<sup>8</sup>

**E. The Court Should Deny Mr. Syed's Motion to Strike Judge Heard's Affidavit**

Mr. Syed seeks to strike Judge Heard's affidavit for two reasons: (1) she is biased; and (2) her affidavit is not part of the record. (*See* Motion at 1–2.)

The first contention is baseless. The circuit court granted the State's Attorney's Motion to Vacate solely based on supposed newly discovered evidence and alleged newly discovered *Brady* violations. (Tr. at 43:32–44:11.) Judge Heard thus has no motive to defend her own reputation. Mr. Syed has challenged Judge Heard's rulings in every possible judicial forum and lost. Mr. Syed's willingness to impugn Judge Heard's motives and describe her submission as "highly improper" is striking given considering her decades of distinguished public service, including serving as the first African American woman on the Circuit Court for Baltimore City.

Additionally, Judge Heard's Affidavit is properly before this Court for the limited purpose of responding to this Court's Order to Show Cause. The

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<sup>8</sup> The exceptions to the mootness doctrine are detailed and analyzed in Appellant's Response and need not be repeated here. (*See* App. Resp. at 19–30.)

Affidavit does not constitute new evidence but merely highlights the trial evidence already detailed in published opinions by this Court and the Court of Appeals. *See, e.g., State v. Syed*, 463 Md. 60 (2019); *Syed v. State*, 236 Md. App. 183 (2018). The Court of Appeals cited the same evidence in holding that Mr. Syed’s claim of ineffective assistance of counsel did not create a substantial likelihood of a different result given the strength of the evidence presented at trial. *See State v. Syed*, 463 Md. at 93.<sup>9</sup>

Judge Heard’s Affidavit underscores the stark contrast between the convincing evidence presented at trial and the complete lack of evidence supporting the circuit court’s vacatur ruling. The State’s Attorney failed to comply with the Vacatur Statute’s requirement that she must “state in detail the grounds on which the motion is based” and “where applicable, describe the newly discovered evidence.” CP § 8-301.1. Similarly, newly discovered evidence must give rise to a “substantial or significant possibility” of a different outcome

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<sup>9</sup> To the extent deemed necessary, Appellant requests in the alternative that this Court treat this filing as a motion to correct the record pursuant to Maryland Rule 8-414. That rule vests this Court with wide discretion to supplement the record. Moreover, the Committee Note to Rule 8-414 specifically states that “[t]his Rule does not preclude the appellate court from considering facts of which the appellate court may take judicial notice, including facts bearing on mootness.” Judge Heard’s affidavit presents facts contained within this Court’s own opinions that relate directly to the mootness issue. Because these facts are in the public record, this Court may take judicial notice of the affidavit and consider it as part of this appeal.

had the evidence been presented to a jury. Md. Rule 4-333(d)(7). Establishing a *Brady* violation imposed another heightened burden of proof. *See State v. Grafton*, 255 Md. App. 128, 144 (2022). Although the circuit court found that the State discovered new evidence that created a substantial likelihood of a different result at trial, it offered no explanation or support. (Tr. at 43:21–44:11) As Judge Heard’s affidavit demonstrates, the State’s Attorney and circuit court’s conduct did not meet the Vacatur Statute’s substantive or procedural requirements.<sup>10</sup>

Judge Heard’s affidavit is directly on point with regard to the mootness question, and this Court should not strike it.

## CONCLUSION

Despite Mr. Syed’s obfuscation, the Lee family’s claim for relief is not moot. It has long been established that a right without a remedy is no right at all, *e.g.*, *Marbury v. Madison*, 5 U.S. 137, 147 (1803); a principle reaffirmed in

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<sup>10</sup> Mr. Syed argues that Judge Heard’s affidavit is not relevant to this Court’s mootness inquiry (*See Motion* at 1–2.) But mootness is directly intertwined with the State’s Attorney’s failure to share the new exculpatory evidence with Mr. Lee and the circuit court’s refusal to meaningfully hear from him. Because these rights were denied, the Lee family is entitled to a transparent hearing at which the evidence is provided on the record and the family is permitted to challenge it. Judge Heard’s affidavit is relevant because it sets forth Mr. Lee’s view that “[a] reading of the trial transcript will show that the jury verdict was supported by substantial direct and circumstantial evidence.” (*See Heard Aff.* ¶ 11, Ex. A to Appellants Response.)

the 2013 amendments and by this Court in *Antoine*. Here, the family was denied its essential rights as crime victims and is entitled to a new vacatur proceeding that abides by the Declaration of Rights and victims' rights laws. If, following a proper hearing, Mr. Syed's sentence is still vacated, the prosecutor may then exercise its discretion to enter *nolle prosequi*. But, under *Antoine*, it cannot simply nullify rights that were never provided.

In addition, this Court should consider the affidavit of Judge Heard and afford it the weight that it deserves. There is no valid basis to strike it.

Respectfully submitted,



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Steven J. Kelly, 0312160392  
Ari B. Rubin, 2012180050  
Sanford Heisler Sharp, LLP  
111 S. Calvert St., Ste. 1950  
Baltimore, MD 21202  
Phone: 410-834-7416  
Fax: 410-834-7425  
[skelly@sanfordheisler.com](mailto:skelly@sanfordheisler.com)  
[arubin@sanfordheisler.com](mailto:arubin@sanfordheisler.com)

Counsel for Appellant

## **Certification of Word Count and Compliance With Md. Rules 8-112**

This brief complies with the font, line spacing, and margin requirements of Md. Rules 8-112 and contains 5,300 words, excluding the parts exempted from the word count by Md. Rules 8-503.

A handwritten signature in blue ink, appearing to read 'S. Kelly', with a long horizontal flourish extending to the right.

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Steven J. Kelly, 0312160392

Counsel for Appellant

## Certificate of Service

I certify that on this day, November 2, 2022, a copy of the foregoing Response in Opposition to Adnan Syed's Motion to Strike and Reply was served on counsel of record via the Court's electronic filing system.

A handwritten signature in blue ink, appearing to read 'SJK', followed by a horizontal line extending to the right.

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Steven J. Kelly, 0312160392

Counsel for Appellant