No. 1291, Sept. 2022 Term

In the Appellate Court of Maryland

YOUNG LEE, AS VICTIM'S REPRESENTATIVE, APPELLANT

v.

STATE OF MARYLAND, APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
FOR BALTIMORE CITY (CASE NO. 199103042)
(THE HONORABLE MELISSA PHINN, J.)

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLEE ADNAN SYED, BY WRITTEN CONSENT

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association founded in 1958. NACDL works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a nationwide membership of approximately 10,000 lawyers, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to the criminally accused, criminal defense lawyers, and the criminal legal system as a whole.

This appeal presents an issue of critical importance to our members who practice in Maryland courts. While a victim or victim's representative has the right to receive notice of, and attend, a hearing on a motion to vacate the judgment of conviction, Maryland law does not grant victims the right to be heard or to challenge the evidence at such a hearing. The resolution of this issue is crucial to the fair and efficient administration of justice in Maryland.

INTRODUCTION

Under Maryland law, a victim has the right to receive notice of, and attend, a hearing on a motion to vacate the judgment of conviction. Maryland law does not provide victims the right to be heard at a vacatur hearing, let alone the right to challenge the evidentiary grounds for vacatur. While the victim's rights to notice and attendance are expressly provided by statute, there is nothing in either the text or legislative history of the vacatur statute, Md. Code, Crim. Proc. § 8-301.1, suggesting that a victim is entitled to be heard or challenge the evidence at a vacatur hearing. This distinction was not an accident, or oversight on the part of the Legislature. When the Legislature has chosen to provide such rights to victims, it has done so expressly. For example, the Legislature has given victims the express right to be heard at parole hearings. It likewise has given victims the express right to submit victim impact statements in connection with consideration of a pardon, commutation, or sentencing. The Legislature made a choice to treat vacatur proceedings differently. Unless the right to be heard is explicitly authorized, it cannot be read into a statute in which the Legislature chose not to include it. Appellant cites no authority to the contrary.

Instead, Appellant simply assumes that vacatur proceedings should be treated the same way as sentencing proceedings, despite the

fact that the sentencing statute provides a victim the express right to be heard while the vacatur statute does not. That assumption ignores the difference in the plain text of the statutes relating to vacatur and sentencing, as well as crucial differences in the purposes of each type of proceeding. Vacatur is a limited proceeding where a victim's allocution has no bearing on the key issue of whether newly discovered evidence calls into question the integrity of the conviction. By contrast, sentencing is a holistic inquiry, and the victim's right to be heard has long been recognized as an important part of that inquiry.

Even if Maryland did provide victims the right to be heard at a vacatur hearing, which it does not, that would not mean that victims have the *additional* right to participate at such hearings by challenging the evidence. There is no precedent for a victim or victim's representative to adopt an adversarial position and challenge the evidentiary basis for vacatur in a proceeding to which it is not a party. To the contrary, numerous courts have declined to expand a victim's right to be heard to include a right of active participation, and for good reason. Giving victims the right to challenge evidence or dispute substantive rulings would effectively allow them to usurp the role of prosecutors. Not only is such a broad expansion of victims' rights unprecedented, it would violate due

process by permitting victims, who have a personal stake in the outcome, to become parties to the prosecution.

NACDL respectfully submits that the judgment below should be affirmed.

STATEMENT OF CASE

NACDL hereby adopts the Statement of the Case and the Statement of Facts set forth in the Brief of Appellee Adnan Syed.

QUESTIONS PRESENTED

1. Does a victim or a victim's representative have the right to be heard at a hearing on a motion to vacate the judgment of conviction?

2. Does a victim or victim's representative have the right to participate at the hearing by adopting an adversarial position and challenging the evidentiary grounds for vacatur?

The appeal raises additional questions of law and fact on which NACDL does not opine as *amicus curiae*.

ARGUMENT

I. THE RIGHT TO BE HEARD IS NOT THE SAME AS THE RIGHTS TO ATTEND AND TO BE NOTIFIED.

Under Maryland law, a victim's right to be heard is distinct from the rights to attend and to be notified. Each of these rights has been expressly granted by the Maryland legislature in various contexts through statutes and rules. The plain language of the vacatur statute

and rule makes clear that the right to be heard does *not* apply to hearings on a motion to vacate the judgment of conviction.

A. The right to be heard does not apply to vacatur hearings in Maryland.

Under the Maryland Declaration of Rights, as implemented by the Maryland Legislature, victims have three distinct types of rights with respect to proceedings involving the accused: (1) the right to be notified; (2) the right to attend; and (3) the right to be heard or make a statement.

However, not all of these rights apply in every type of proceeding. In 1994, Maryland amended its Declaration of Rights to state that "a victim of a crime shall have the right to be informed of the rights established in this Article, and upon request and if practicable, to be notified of, to attend, and to be heard at a criminal justice proceeding, ***as these rights are implemented***." Md. Const. Decl. of Rts. art. 47 (emphasis added). Article 47 represents "the strong public policy that victims should have more rights and should be informed of the proceedings, that they should be treated fairly, ***and in certain cases***, that they should be heard." *Lopez–Sanchez* v. *State*, 388 Md. 214, 229 (2005) (emphasis added).

In 1997, Maryland passed the Victims' Rights Act, which implemented Article 47. *See* 1997 Md. Laws, ch. 311. Through this Act and

subsequent amendments, Maryland has made clear that a victim's rights to be notified, to attend, and to be heard are distinct rights, and that not all of those rights apply to every type of criminal proceeding.

Right to Notice. Maryland has granted victims the basic right to be notified of certain proceedings and occurrences involving the accused, including "any plea agreement, judicial action, and proceeding that affects the interests of the victim or victim's representative, including a bail hearing, change in the defendant's pretrial release order, dismissal, nolle prosequi, stetting of charges, trial, disposition, and postsentencing court proceeding." Md. Code, Crim Proc. § 11-104(e)(3).

Right to Attend. Maryland has granted victims the right to attend "any proceeding in which the right to attend is granted to a defendant." Md. Code, Crim. Proc. § 11-102(a).

Right to Be Heard. By contrast, Maryland law does not grant victims the right to be heard at every proceeding. Rather, Maryland law expressly grants victims the right to be heard at certain proceedings only, and as to those proceedings specifies the manner in which victims shall be heard. For example, Maryland expressly grants victims the right to be heard at sentencings. *See* Md. Code, Crim. Proc. § 11-403(b).

Maryland also gives victims the express right to be heard at parole hearings and to submit a victim impact statement in connection with consideration of a pardon or commutation. *See id.* § 11-505.

Here, the relevant statute, which governs a motion to vacate the judgment of conviction, similarly grants certain defined rights, but not others, to victims expressly. The statute grants victims the right to be notified of, and to attend, the vacatur hearing. *See* Md. Code, Crim. Proc. §§ 8-301.1(d)(1)–(2). But, unlike the statutes pertaining to sentencing and parole hearings, there is nothing in the plain text or legislative history of section 8-301.1(d) suggesting that a victim has the express (or implied) right to be heard at a vacatur hearing.[1]

Where the Legislature "includes particular language in one section of a statute but omits it in another, it is generally presumed that [it] acts intentionally and purposely in the disparate inclusion or exclusion." *Gardner* v. *State*, 420 Md. 1, 11 (2011). The Legislature could have written a statute expressly authorizing a victim to be heard at the vacatur hearing—as it did with regard to sentencings and parole hearings. The fact that the Legislature chose not to include such authorization in the

[1] *See, e.g.*, Md. Fisc. Note, 2019 Sess. H.B. 874 (Feb. 26, 2019) (noting only that the bill "requires notification of the defendant and the victim or the victim's representative").

vacatur statute demonstrates that it did not intend to provide a right to be heard in that context.

This is further evidenced by Maryland Court Rule 4-333, which applies to vacatur hearings. The Rule provides that the State's Attorney shall send written notice of the proceeding to the victim or victim's representative. *See* Md. Rule 4-333(g)(2). It also contains a cross-reference, which states that "[f]or the right of a victim or victim's representative to address the court ***during a sentencing or disposition hearing***, see Code, Criminal Procedure Article, § 11-403." *Id.* (emphasis added). Section 11-403 in turn grants victims the right to be heard at a sentencing or disposition hearing, but not at other types of hearings. *See* Md. Code, Crim. Proc. §§ 11-403(a)–(b). By its very terms, section 11-403 applies *only* to "a hearing at which the imposition of a sentence, disposition in a juvenile court proceeding, or alteration of a sentence or disposition in a juvenile court proceeding is considered." *Id.* § 11-403(a). The Rule thus further confirms that the Legislature did not intend to grant victims the right to be heard at a vacatur hearing, whereas it did grant that right with respect to sentencings.

B. Other states' laws are in accord.

Other states have taken similar approaches, expressly granting victims the right to be heard only at sentencings and parole hearings.

For example, Delaware follows the same approach as Maryland. It grants victims the right to be present whenever the accused has the right to be present, *see* Del. Code tit. 11, § 9407, and the right to provide a victim impact statement at sentencing and to address the parole board in writing or in person, *see* Del. Code tit. 11, §§ 4331, 9416. Similarly, New York provides the right for a victim to make a statement at the time of sentencing, *see* N.Y. Crim. Proc. Law § 380.50, and provides the right for victims to submit an impact statement for the pre-sentencing report and at parole hearings, *see* N.Y. Crim. Proc. Law § 390.30. Neither Delaware nor New York provide the right to be heard at vacatur hearings. *See* N.Y. Crim. Proc. Law § 440.10 (no mention of victims' rights); Del. Crim. R. C.P. 61 (same).

Certain other states, as well as the federal government, have expressly granted victims the right to be heard at a broader array of proceedings, including certain post-conviction release proceedings. Under federal law, for example, victims have the right to be "reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." *See* 18 U.S.C. § 3771(a)(4). In California, victims have the constitutional right to be heard, upon request, at any hearing "involving a post-arrest release decision, plea, sentencing, *post-conviction release* decision, or any proceeding in which a right of the

victim is at issue." Cal. Const., art. I, § 28(b)(8) (emphasis added). Likewise, Arizona grants victims the right "[t]o be heard at any proceeding when any *post-conviction release* from confinement is being considered." Ariz. Const. art. 2 § 2.1(A)(9) (emphasis added).

These states' laws further confirm why there is no basis to imply a right to be heard that Maryland chose not to grant expressly. As discussed above, the Maryland legislature chose to implement the right to be heard with respect to certain specified proceedings only, and not with respect to vacatur hearings.

Moreover, despite the broader right to be heard in some states, it is not clear whether a vacatur hearing would even qualify as a "post-conviction release" proceeding in those jurisdictions. For example, the Arizona Supreme Court has held that the right to be heard at "post-conviction release" proceedings as stated in the Arizona Constitution covers proceedings involving "parole, work furlough, community supervision, temporary release, or other such discharges from confinement." *State* v. *Lamberton*, 183 Ariz. 47, 50 (1995). As such, post-conviction *release* proceedings are distinct from post-conviction *relief* proceedings, such as those determining whether a sentence was cruel and unusual punishment. *Id.* Thus, the court found that the plain language of Arizona's

constitutional provision granting victims the right to be heard did not apply to post-conviction *relief* proceedings. *Id.*

A hearing on a motion to vacate the judgment of conviction would similarly constitute a post-conviction *relief* proceeding because it involves voiding a conviction *ab initio*, as opposed to the mere release of the accused. *See, e.g.*, *A.C.* v. *State*, --- N.E. 3d ----, 2022 WL 17748236, at *1 (Ind. Ct. App. Dec. 19, 2022) (referring to motion under Indiana vacatur statute as a "post-conviction relief" petition).

Similarly, a California appellate court examined whether a victim had the right to be heard at a factual innocence hearing. *See People* v. *Howard*, 2017 WL 678463 (Cal. Ct. App. Feb. 21, 2017). It found that the victim did not have the right to be heard, because a factual innocence hearing is neither a "post-conviction release decision" or "a proceeding in which a right of the victim is at issue" under California's Constitution. *Id.* at *4. In doing so, the court observed that a "prosecutor's discretionary powers would be undermined if the alleged crime victim had the right to participate in factual innocence proceedings." *Id.* at *5. The same reasoning applies to vacatur proceedings, which are initiated upon the State's motion because newly discovered evidence calls into question the integrity of the conviction. *See* Md. Code, Crim. Proc. § 8-301.1.

Thus, even in states that provide broader rights to be heard at all post-conviction *release* proceedings, there is not necessarily a right to be heard at a post-conviction *relief* hearing like vacatur. Regardless, there is no right for the victim to be heard at a vacatur hearing in Maryland.

II. APPELLANT CONFLATES THE RIGHT TO NOTICE OF THE VACATUR HEARING WITH THE RIGHT TO BE HEARD AT SENTENCING.

Citing *Lamb* v. *Kontgias*, 169 Md. App. 466 (2006), which involved a sentencing modification hearing, Appellant argues that a victim's right to notice of the vacatur hearing exists "hand in glove" with the right to be heard at that hearing. (Appellant's Br. at 15, 19.) As discussed, that argument ignores the explicit difference between the vacatur statute, which does not contain an express right to be heard, and the sentencing statute, which does. Appellant's argument also draws a false equivalence between two different types of proceedings.

Vacatur is a narrow proceeding requiring the prosecutor to "state in detail the grounds on which the motion is based" and, "where applicable, describe the newly discovered evidence." Md. Code, Crim. Proc. § 8-301.1(b). Such evidence is sufficient if it gives rise to a "substantial or significant possibility" of a different outcome. Md. Rule 4-333(d)(7). The court must also determine whether "the interest of justice and fairness justifies vacating . . . the conviction." Md. Code, Crim. Proc. § 8-

301.1(a)(2). A victim impact statement will not have any bearing on whether the newly discovered evidence creates a substantial possibility of a different outcome, or whether it undermines the integrity of the conviction.

By contrast, at sentencing, the judge is accorded "broad latitude to best accomplish the objectives of sentencing-punishment, deterrence and rehabilitation." *Smith* v. *State*, 308 Md. 162, 166 (1986). The sentencing judge must make a holistic inquiry into "the facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background." *Jackson* v. *State*, 364 Md. 192, 199 (2001) (quoting *Poe* v. *State*, 341 Md. 523, 532 (1996)).

The victim's right to be heard at sentencing is an important part of this holistic inquiry. *See Reid* v. *State*, 302 Md. 811, 820–21 (1985). "The purpose of victim impact evidence is 'to provide the victim access to the sentencing process by ensuring that at least in one way the effects of the crime on the victim will be presented to and considered by the sentencing judge.'" *Antoine* v. *State*, 245 Md. App. 521, 546 (2020) (quoting *Lopez* v. *State*, 458 Md. 164, 175 (2018)).

Given the clear difference in focus between vacatur and sentencing, it is entirely reasonable that the Legislature would grant different rights to victims with respect to each of those proceedings.

III. EVEN IF MARYLAND RECOGNIZED A VICTIM'S RIGHT TO BE HEARD AT THE VACATUR HEARING, WHICH IT DOES NOT, THERE IS NO RIGHT TO CHALLENGE THE EVIDENTIARY GROUNDS FOR VACATUR.

The fact that Maryland does not expressly provide a victim with the right to be heard at a vacatur hearing is dispositive of the central issue on this appeal. But even if there were an implicit right to be heard, that would not mean, as Appellant contends (Br. at 12, 24–26), that a victim has the right to participate at the hearing by challenging the evidentiary basis for vacatur. Several state courts have declined to transform a victim's right to be heard into a right of active participation, because giving victims the ability to adopt an adversarial position would effectively allow them to usurp the role of prosecutors, even though they are not a party to the criminal prosecution. Such a broad expansion of victims' rights is unprecedented and would violate due process.

For example, the Oregon Constitution provides that a crime victim has the right "to be heard at the . . . juvenile court delinquency disposition." Or. Const., art. I, § 42(1)(a). In construing this provision, the Oregon Court of Appeals held that the victim's right to be heard "is limited"

to "what the plain terms of the constitution and implementing statute suggest: a right to be 'heard,' that is, a right to 'reasonably express any views relevant to the issues before the court.'" *Matter of C.P.*, 518 P.3d 598, 606–07 (Or. Ct. App. 2022) (quoting Or. Rev. Stat. § 419C.273(2)(b)(C)). In other words, the right to be heard "is analogous to the right of allocution—a limited right to be heard on matters relevant to the issues before the court." *C.P.*, 518 P.3d at 607. "It does not encompass a right to discovery, a right to present evidence, a right to cross-examine the adjudicated youth, or the power to, in effect, control the prosecution of the case against the youth." *Id.* at 607.

"Because the victim is not a party," the court concluded, "neither she nor her lawyer would participate in testing evidence through examination or cross-examination and her asserted 'need' for that purpose diminishes." *Id.* at 608. Thus, Oregon declined to extend a victim's right to be heard to include the right to challenge evidence.

Alaska also confers broad rights on victims, but the Alaska Court of Appeals has held that victims do not have the right to independently challenge the judge's sentence. *See Cooper* v. *District Court*, 133 P.3d 692, 705 (Alaska Ct. App. 2006). The court drew a distinction between the right to be heard at sentencing and the right to participate as a party to the criminal prosecution:

> Many states have enacted victims' rights acts, either by constitutional amendment or by legislation or both. And among these states, many courts are prepared to recognize a crime victim's standing to sue for enforcement of the procedural rights granted by the victims' rights act—the rights to notice, to attend court proceedings, and to offer their views on certain decisions (especially sentencing and parole release). ***But no court has endorsed the position . . . that the enactment of a victims' rights act gives crime victims the right to participate as independent parties to a criminal prosecution or to otherwise challenge the substantive rulings of the trial court.***

Id. (emphasis added).

The court acknowledged that prosecutors and judges "may sometimes make decisions that run contrary to the interests or the wishes of crime victims." *Id.* at 710. However, it held that, consistent with due process, "the fairest way to resolve these questions is to put the responsibility in the hands of public officials—prosecutors and judges—who have no personal interest in the case." *Id.*

Numerous courts have likewise relied on these principles to reach the same conclusions: victims are not parties to the prosecution and may not challenge the substantive decisions made by prosecutors or judges. *See, e.g.*, *State* v. *Lamberton*, 183 Ariz. 47, 50–51 (1995) (while victims have the right to appeal the denial of their statutory rights, they do not have standing to challenge the trial court's decision to grant post-conviction relief and order resentencing); *Gansz* v. *People*, 888 P.2d 256, 257–

59 (Colo. 1995) (despite enactment of a victims' rights amendment, the Colorado Constitution does not give victims the right to appeal a court's dismissal of criminal charges); *Dix* v. *Superior Court*, 807 P.2d 1063, 1067 (Cal. 1991) (victims have no right to challenge prosecutor's decision to ask the sentencing judge to vacate the accused's sentence and allow the accused to be resentenced at a later time, so that the accused could testify against other offenders and potentially earn a sentence reduction); *Reed* v. *Becka*, 511 S.E.2d 396, 400 (S.C. Ct. App. 1999) (victims have no right to veto plea agreement despite possessing the right to confer with prosecutors during plea negotiations).

These precedents further confirm there is no right for victims attending a vacatur proceeding to substantively challenge the evidentiary grounds for vacatur or dispute the judge's ruling. To hold otherwise would allow victims to functionally overrule prosecutorial discretion (including the decisions to seek vacatur and enter a *nolle prosequi*) and give them standing to challenge the substantive rulings of judges.

Such a result is both unprecedented and would violate due process by permitting victims or their representatives, who are personally invested in the case, to become parties to the prosecution. It is well established that a victim is not a party to the prosecution despite possessing certain rights. *See* Md. Code, Crim. Proc. § 11-103(b) (noting that victim

is "not a party to a criminal or juvenile proceeding"); *Lopez-Sanchez*, 388 Md. at 224 ("A victim is not a party to a criminal prosecution"). Nothing in Maryland's victims' rights law changes that.

CONCLUSION

For these reasons, NACDL respectfully requests that this Court affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT AND COMPLIANCE

1. This brief contains 3,871 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.

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CERTIFICATE OF SERVICE

Pursuant to Rule 20-201, I certify that, on January 9, 2023, the foregoing Brief of *Amicus Curiae* in Support of Appellee Adnan Syed was served via the MDEC system, and pursuant to Rule 8-502(c), two copies each were mailed, first-class, postage prepaid, to:

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