STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT
v.	*	FOR
ADNAN SYED,	*	BALTIMORE CITY
Defendant.	*	Case Nos. 199103042-46

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SYED'S REPLY IN SUPPORT OF MOTION FOR PRETRIAL RELEASE

Adnan Syed, by undersigned counsel, hereby replies to the State's response to his Motion for Release Pending Appeal. This Reply is intended to briefly clarify some of the State's mischaracterizations of Maryland law.

When the law is properly applied to the facts of this case, it is apparent that Syed is both legally eligible for release and factually qualified for release. He is neither a flight risk nor a danger to the community, and the State's arguments fail to demonstrate otherwise.

What is perhaps most remarkable about the State's Response is what it fails to address. The State does not dispute Syed's extensive community support, or his non-violent record while incarcerated. The State does not dispute that the credibility of its star witness is virtually nonexistent. The State does not dispute that forensic evidence makes its timeline entirely implausible. Nor does the State address this Court's rejection of the State's "misleading" theory about incoming phone calls allegedly tying Syed to the scene where the victim was buried. Slip Op. at 43.

Instead, the State seems to be asking this Court to ignore these well grounded facts based on a series of legally flawed procedural arguments.

Argument

The State makes three fundamental errors in its analysis of the pretrial release question. First, the State mischaracterizes the Maryland statute permitting pretrial release under the current procedural posture. Second, the State misconstrues Maryland's primary bail statute, which sets forth the factors a court must consider when making a bail determination. Third, the State mistakenly suggests that the Court should consider the evidence against the defendant as it stood in 1999, not as it stands today. Each of these issues is addressed in turn.

a. The Maryland Code provides for pretrial release.

Contrary to what the State argues, this Court may issue a stay – as it has done – and also release Syed on bail. This interpretation of the controlling Maryland statute is based upon fundamental principles of statutory construction and relevant case law explaining the effect of a stay.

The statute in question, and upon which Syed relies, is Md. Code Ann., Crim. Proc. § 7-109(b)(2). The statute states the following: "[i]f the Attorney General or a State's Attorney states an intention to file an application for an appeal under this section, the court may: (i) stay the order; and (ii) set bail for the petitioner."

To interpret this (or any) statute, the Court must determine legislative intent, and, if possible, accomplish this by giving the words in the statute their commonly understood meaning. *Comptroller of Treasury v. Fairchild Industries*, 303 Md. 280, 284 (1985).

The pertinent language in this statute is straightforward. Subsections (i) and (ii) are joined by the word "and," thereby making the phrases conjunctive. Conjunctive phrases have a cumulative relationship.

The Court of Appeals has analyzed the word "and" in a similar context. In *Comptroller of Treasury v. Fairchild Industries*, the court did so by looking at the word's dictionary definition. The court noted that Black's Law Dictionary defines "and" as "[a] conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first..." 303 Md. 280, 285 (1985) (quoting Black's Law Dictionary 79 (5th ed. 1979)). Applying this plain meaning to the statute produces an obvious result: the Court may stay the post-conviction order *and* grant Syed pretrial release.

The State, though, has fundamentally mischaracterized the statute by grafting the disjunctive "or" where the legislature used "and." If the legislature had intended to strip this Court of its power to grant bail upon the issue of a stay, the statute would state that the "the court may: (i) stay the order; or (ii) set bail for the petitioner." It did not do so.

This plain-language interpretation of the statute is consistent with the legal theory behind a stay. In *Weston Builders & Developers, Inc. v. McBerry, LLC*, 167 Md. App. 24, 44 (2006), the Court of Special Appeals considered the breadth of a stay, and whether it applied to the judgment itself or to merely the execution of the judgment. The court ruled that the stay only applied to the execution of the judgment. "We are not dealing with a plenary stay of anything and everything," the court stated. "Most empathetically for present purposes, a stay does not trigger a universal freeze of the status quo." *Id.* In other words, the stay did not undo the judgment in favor of the prevailing party; it only put on hold the execution of the judgment (or remedy).

Likewise, here, the Court vacated Syed's conviction, and ordered a new trial. The stay did not alter the basic fact that the Court vacated the conviction. As much as the

State may want to wish away the vacatur of the conviction, the finding that Syed's trial was unconstitutional persists. What the stay does do, however, is put the new trial on hold. It means that the Court does not have to conduct an initial appearance and an arraignment, nor does the speedy trial clock start to run. The Court may exercise its statutory power to simultaneously effect complementary results: the temporary halting of the new trial and the pretrial release of the defendant. This is supported by the plain meaning of Md. Code Ann., Crim. Proc. § 7-109(b)(2). It also makes good sense.

b. The Court must consider the "nature of the State's evidence."

The State is incorrect when it contends that the Court may not consider the strength (or weakness) of the evidence against Syed when contemplating pretrial release. Quite to the contrary, the Court *must* take into account the State's evidence.

The controlling rule setting forth the factors a court must weigh in a bail hearing is Maryland Rule 4-216(e)(1)(A). When discussing the rule in its Response,[1] however, the State omits the most relevant language from this provision. The actual rule states the following: "In determining whether a defendant should be released and the conditions of release, the judicial officer shall take into account the following information, to the extent available: (A) the nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction…" Md. Rule 4-216(e)(1) (emphasis added).

The phrase "the nature of the evidence against the defendant" means what it says, and the relative strength of the State's evidence, when available, must be considered in a

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[1] The State in its brief actually cites to a non-existent rule, "Maryland Rule 4-216(d)(1)(A)," but this appears to be a mistake. For purposes of this argument, Syed will assume the State intended to refer to Maryland Rule 4-216(e)(1)(A).

[2] *Available at* http://www.marylandattorneygeneral.gov/News%20Documents/Rules_

bail inquiry. The court's analysis in *Schmidt v. State*, 60 Md. App. 86 (1984), is instructive. In *Schmidt*, the Court of Special Appeals reviewed a colloquy between a judge and a defendant that occurred during a bail review hearing. Specifically, the court had asked the defendant whether he was acquainted with the victim, thereby attempting to ascertain whether the victim could identify the defendant at trial with certainty. The court explained the rationale for this inquiry: "Whether the victim and the accused were acquaintances or total strangers may affect the nature and strength of the evidence against the accused." *Id.* at 99. The court, while considering a different issue, noted that this was a proper inquiry at a bail hearing, and that "these factors are clearly relevant to pretrial release." *Id.*

The same reasoning applies here. If the State's case has fallen apart and there remains no credible evidence, the Court must consider this at the detention hearing. Conversely, if the State possesses overwhelming evidence of guilt, that too must factor into the equation.

The State's position in its Response appears also to be at odds with the Attorney General's recent statements regarding bail reform. On October 11, 2016, the Attorney General issued a letter to members of the General Assembly urging reforms to Md. Rule 4-216, and making clear that a defendant has the "right to individualized inquiry before [a] determination of pretrial release."[2] The Attorney General wrote that "[i]n *DeWolfe v Richmond*, 434 Md. 403, 429 (2012) (Richmond I), the Court [of Appeals] observed that the determination of whether to allow pretrial release involves a '*fact-laden*' inquiry into

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[2] *Available at* http://www.marylandattorneygeneral.gov/News%20Documents/Rules_Committee_Letter_on_Pretrial_Release.pdf.

considerations listed in Rule 4-216," which would necessarily include a review of the nature of the evidence against the defendant. And the Attorney General further explained that "the specified factors listed in Rule 4-216" are ones "that a judicial officer 'must' consider during a pretrial release proceeding." So the State's position here – that now is not an "appropriate . . . occasion" to consider the evidence in this case,[3] Resp. at 4 – is contrary not only to the statute governing this issue but also to the guidance recently offered by the Attorney General himself.

Meanwhile, the State offers no credible support of its contrary position.[4] The only case the State cites is a Ninth Circuit case that has nothing to do with this matter. Syed respectfully suggests that this Court must follow the statute and the law and consider the State's evidence against the defendant when making a bail determination.

c. The State cannot turn back the clock.

Finally, in what may be the State's most puzzling argument, the State urges the Court to consider the evidence as if it were frozen in time, circa 1999-2000. Never mind that the cell tower evidence was discredited by this Court. Never mind that the State's star witness admitted in a recent interview to having given false testimony. Never mind that a credible witness testified under oath that she was with Syed when the State theorized the murder took place. And never mind that this Court determined that "there is a substantial possibility that . . . the result of the trial would have been different" if Syed had been represented by constitutionally effective counsel.

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[3] Curiously, the State appears to suggest that only defendants who plead guilty are suitable for bail. *See* Resp. at 7 (stating that "Syed is an exquisitely unsuitable candidate for parole since he refuses to accept responsibility . . . .").

[4] The State also misleadingly quotes in its Response Maryland Rule 4-349(b). This rule, however, applies to when a defendant has been convicted and is seeking direct review from the appellate court – a scenario inapposite to Syed's procedural posture.

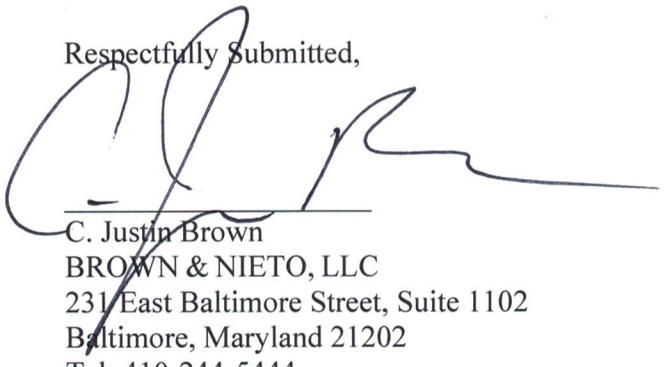
The State's argument makes no sense. The whole purpose of the Court assessing the "strength of the evidence against the accused," *Schmidt*, 60 Md. App. at 99, is so that the Court can make a determination of the likelihood that the defendant will be convicted at trial. If the evidence is overwhelmingly strong, the Court might conclude that the defendant is likely to have incentive to flee. If the evidence is weak, the Court might conclude the opposite – that the defendant is likely to show up in court to clear his name – or the Court might conclude that an individual who is presumed innocent should not have his liberty taken away based on the mere possibility of a conviction on flimsy evidence.

There would be no utility, however, in the Court analyzing facts that are no longer applicable. While these arguments may make for colorful reading, they have no bearing on whether Syed is a flight risk or a danger to the community. If the Court now knows that some – if not most of – of the evidence presented 17 years ago is unreliable, it should not consider that evidence.

Conclusion

For the reasons described above, Syed respectfully asks that this Court grant him a bail hearing, consider the statutorily relevant factors, and fashion conditions of pretrial release that will ensure the safety of the community and his attendance at future court proceedings.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18TH day of NOV., 2016, a copy of the foregoing was mailed to the following:

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