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| State of Maryland, | * | IN THE COURT OF SPECIAL APPEALS |
| *Applicant*, | * | OF MARYLAND |
| v. | * | Sept. Term 2015, Application No. 10432 |
| Adnan Syed, | * | (Circuit Court for Baltimore City |
| *Respondent*. | * | No. 199103042-46) |

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**Brief of *Amici Curiae* National Association of Criminal Defense Lawyers and Maryland Criminal Defense Attorneys' Association Regarding the State's Application for Leave to Appeal**

The National Association of Criminal Defense Lawyers and the Maryland Criminal Defense Attorneys' Association (collectively, "*amici*"), by undersigned counsel, submit this *amici curiae* brief with respect to the State's application for leave to appeal under Md. Code, Criminal Procedure § 7-109. *Amici* submit this brief to make two key points of public importance. First, the State does not get a free pass when it is the § 7-109 applicant. Second, with the world watching, the public interest favors a prompt retrial, without an appeal. A prompt retrial is better suited to resolve this case in a manner that promotes public confidence in the Maryland criminal justice system.

## Argument

### A. The Court must hold the State to at least the same high standard that it applies to prisoners' § 7-109 applications.

The grant of a § 7-109 application is unusual. Although there is no case law addressing the standard for granting a § 7-109 application, the Court grants such applications sparingly. Since 2010, the Court has granted between 0% and 5% of post-conviction applications annually. *See* Maryland Judiciary, Annual Statistical Abstract,

Fiscal Year 2015, at COSA-4 (statistics for FY2013–15); Maryland Judiciary, Annual Statistical Abstract, Fiscal Year 2012, at COSA-4 (statistics for FY2010–12). The statistical tables do not distinguish between applications by the State or by prisoners.

Nevertheless, § 7-109 is notable for the very fact that it requires the State, just like an aggrieved prisoner, to seek leave to appeal. In this regard, the statute contrasts with federal post-conviction procedure. In federal court, a prisoner must obtain a certificate of appealability, but a "certificate of appealability is not required when a state or its representative or the United States or its representative appeals." Fed. R. App. P. 22(b)(3). To give meaning to the General Assembly's deliberate choice to require the State to seek leave to appeal, the Court can and should hold the State's application to at least as high a standard as would apply to a prisoner's application.

If there is any difference between State and prisoner applications, the standard should be higher for the State. Commentators have suggested that certiorari-like factors guide whether a Court should grant a § 7-109 application. *See* Marc A. DeSimone, *Criminal Defense Appeals in Maryland: The Defense Perspective*, in Sandler & Levy, APPELLATE PRACTICE FOR THE MARYLAND LAWYER: STATE AND FEDERAL 307 (4th ed. 2014). Built into that public interest analysis is the fact that, when this Court denies the State's application for leave to appeal a new trial order, the State's case remains live. It can – barring some kind of prejudice, which the State does not claim here – retry the defendant.

When this Court denies a prisoner's § 7-109 application, however, the state courts' review of his constitutional claim is at an end. While a prisoner can still file a federal habeas petition, that "federal court safety-valve was abruptly dismantled in 1996 when Congress passed and President Clinton signed the Antiterrorism and Effective Death Penalty Act …. AEDPA is a cruel, unjust and unnecessary law that effectively removes federal judges as safeguards against miscarriages of justice." Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xli (2015). In nearly every post-conviction case, this Court is the prisoner's last realistic hope. For those rare cases when a prisoner can convince a circuit court to grant a new trial, the State's ability to retry the defendant should weigh against the grant of the State's application for leave to appeal.

This case highlights why the Court should subject the State's application to rigorous scrutiny. Judge Welch's thoughtful, comprehensive opinion illustrates the time and resources it took to get this far. The post-conviction statute places great trust in the judgment and discretion of the circuit court. *State v. Adams-Bey*, __ Md. __ (2016), slip op. at 7–12. The rules provide little guidance for seeking review of Judge Welch's ruling, but the application must be "concise." Rule 8-204(b)(3). By being concise, an applicant can show his challenge is a good fit with the appellate process. The State instead takes 17,000 words, nearly double the 9,100-word limit for a merits brief. Its fact-intensive challenges to Judge Welch's fact-intensive opinion are better suited to retrial than to appeal. For this reason alone, the Court should deny the application in favor of retrial.

### B. A prompt retrial is better calculated to promote public confidence in the Maryland criminal justice system.

This case is a global phenomenon. The Peabody Award-winning Season 1 of the *Serial* podcast was "the world's most popular podcast, with 80 million downloads" as of early this year. Monica Hesse, *'Serial' Takes the Stand: How a Podcast Became a Character in Its Own Narrative*, WASH. POST, Feb. 8, 2016. Since then, millions have been debating Mr. Syed's guilt or innocence. Without taking sides in that debate, one thing is clear – if the Court were to grant the State's application and reverse, as the State requests, this controversy will not disappear. Millions will continue to passionately believe that the Maryland criminal justice system failed Mr. Syed, and that he would prevail in a fair trial with competent counsel. The only satisfactory way to resolve the debate between the believers and doubters is through a retrial.

Nowhere in the State's lengthy application does it claim it would face prejudice in the event of retrial. *Cf. Jones v. State*, 445 Md. 324, 358 (2015) (holding that State's ability to reprosecute is part of prejudice analysis in deciding whether laches bars *coram nobis* claim). None of the witnesses have died or are otherwise unavailable. The State's application cites what it believes to be overwhelming evidence, all of which remains available for the State to present at retrial. Indeed, the State's application claims that it continues to find new witnesses who can attack Mr. Syed's defense.

The landscape may be different by the time the appellate process concludes. In a best-case scenario, it likely would take about six months for this Court to resolve this appeal

after a grant of the application. *See, e.g.*, *State v. Potter*, No. 1309/13 (Md. Ct. Spec. App. Aug. 4, 2016).[1] Bypass review before the Court of Appeals is often available in high-profile appeals, but the Court of Appeals has held that bypass review is unavailable in § 7-109 cases. *Stachowski v State*, 416 Md. 276, 298 (2010). The appeal process could easily take two years or more. If Mr. Syed prevails at the end of the appellate review process, there is no guarantee that both sides' witnesses will still be available.

A prompt retrial, with all witnesses still available, is the best way for the judiciary to remove any cloud over its processes. This case focuses on deficient performance by the late Maria Cristina Gutierrez. She was admitted to the bar by a divided Court of Appeals, on the recommendation of a divided character committee. *In re Maria C.*, 294 Md. 538, 538–41 (1982) (Smith, J., dissenting) ("I would be derelict in my responsibility to the people of Maryland were I to join in certifying that this young woman has the requisite moral character to handle the affairs of others."). Judge Smith expressed "hope she will prove my fears unfounded." *Id.* at 541. His fears came true when Ms. Gutierrez was disbarred by consent following complaints from a dozen clients. *See* Sarah Koenig, *Lawyer Gutierrez Agrees to Disbarment*, BALT. SUN, June 2, 2001. Mr. Syed is one of the many clients whom Ms. Gutierrez failed as her own health deteriorated. The public interest

[1] *Amici* do not cite *State v. Potter* as precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

strongly favors denial of the State's application and a prompt retrial, to promote public confidence in the Maryland criminal justice system.

## Conclusion

For the foregoing reasons, *amici* urge the Court to deny the State's application for leave to appeal.

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