ADNAN SYED,	*	IN THE
Petitioner,	*	CIRCUIT COURT FOR
v.	*	BALTIMORE CITY
STATE OF MARYLAND,	*	CASE NOs. 199103042-46
Respondent.	*	PETITION NO. 10432

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CONSOLIDATED RESPONSE IN OPPOSITION TO PETITIONER'S MOTION AND SUPPLEMENT TO REOPEN POST-CONVICTION PROCEEDINGS

The State of Maryland, by its attorneys, Brian E. Frosh, Attorney General of Maryland, Thiruvendran Vignarajah, Deputy Attorney General, and Edward J. Kelley, Assistant Attorney General, hereby files this consolidated response to Petitioner Adnan Syed's motion to reopen post-conviction proceedings as well as Syed's supplemental filing. For reasons set forth below, the State respectfully requests that Syed's motions be summarily denied and that the matter be returned to the Court of Special Appeals for further resolution.

I. SUMMARY OF ARGUMENT

A.

In the course of Syed seeking leave to appeal this Court's post-conviction order denying relief, Syed submitted to the Court of Special Appeals a supplemental filing with the January 2015 affidavit of Asia McClain. The State asked that the supplement be struck, noting in its response that the proper procedure for raising the latest affidavit by McClain was a motion to reopen the post-conviction proceedings. Consistent with the State's suggestion, the Court of Special Appeals granted Syed a limited remand and 45 days in order to provide him with an opportunity to file with this Court, if he wished, a motion to reopen.

On June 30, 2015, Syed elected to file a motion to reopen post-conviction proceedings. Syed begins his motion by erroneously asserting that the Court of Special Appeals had already determined

that it is in the interest of justice to reopen this case and that this Court was deprived of discretion to consider whether *vel non* to grant his motion. This contradicts the plain language and purpose of the remand order. The Court of Special Appeals stated only that "a limited remand . . . [was] in the interest of justice" and that the "purpose of . . . the remand" is to give Syed an opportunity to file "a request" to reopen the closed proceedings. May 18, 2015 Remand Order at 3-4. The appellate court further stated that "[i]n the event that the circuit court grants a request to re-open the post-conviction proceedings, the circuit court may, in its discretion, conduct any further proceedings it deems appropriate." *Id.* at 4. Thus, while the Court of Special Appeals granted Syed an opportunity to ask this Court to reopen post-conviction proceedings, it certainly did not already decide that it was in the interest of justice to grant that request. Syed's attempt to frame the motion to reopen as a preordained result is an understandable tactic in a case where, on the merits, the motion should be summarily denied. In fact, because the evidence presented by Syed's motion cannot, as a matter of law, justify altering this Court's prior decision, the State respectfully submits that Syed's motion to reopen can and should be denied without a hearing. *See Harris v. State*, 160 Md. App. 78, 97-98 (2005) (quoting *Stovall v. State*, 144 Md. App. 711, 715-16 (2002)) ("There is no entitlement to have a closed postconviction proceeding reopened unless the petitioner asserts facts that, 'if proven to be true . . . establish that postconviction relief would have been granted but for the ineffective assistance of . . . postconviction counsel.'").

B.

As to why a motion to reopen should be granted, Syed asserts that Asia McClain, a supposed alibi witness, chose not to participate in a post-conviction proceeding because of a conversation she had with one of the original prosecutors, Kevin Urick. Syed further claims that, had McClain not been dissuaded from attending the post-conviction hearing, she would have testified (1) that she could

have accounted for Syed's whereabouts after school on January 13, 1999, and (2) that she was not contacted by defense counsel prior to Syed's trial.

But this Court, in rejecting Syed's claim of ineffective assistance of counsel, did not dispute that Syed's trial attorney, M. Christina Gutierrez, declined to pursue McClain as an alibi witness. Rather, armed with essentially the same information that Syed seeks a second opportunity to present, the Court found "several reasonable strategic reasons for trial counsel's decision to forego pursuing Ms. McClain as an alibi witness," and properly denied Syed's claim on the ground that counsel's performance was not deficient based upon what Gutierrez knew at the time of her decision.

Because this Court's ruling rested on the first prong of *Strickland*'s two-part test, *i.e.*, deficient performance, and because deficient performance is evaluated based upon what was known to the attorney at the time of the decision, reopening the post-conviction proceeding to now hear from Asia McClain would be inconsequential theater and not in the interest of justice. No matter how vividly McClain now claims to remember the hour after school on January 13, 1999, her proposed testimony cannot influence the analysis of whether trial counsel's actions were constitutionally adequate, since that judgment must be rendered based upon what the attorney knew at the time of the decision in question. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."); *State v. Thomas*, 328 Md. 541, 559 (1992) ("Moreover, in deciding ineffectiveness claims, we must apply a heavy measure of deference to counsel's judgments and judge the reasonableness of counsel's challenged conduct on the facts of the particular case viewed as of the time of counsel's conduct.").

C.

Syed invokes McClain's affidavit for one more purpose: to accuse Urick of interfering with a prospective defense witness. This allegation is simply without merit. The record, even augmented by McClain's latest affidavit, cannot sustain the conclusion that McClain evaded defense counsel's efforts to procure her participation because of a single, unsolicited conversation over a decade after the trial with a prosecutor who had, by the time of McClain's call to him, long since left the city prosecutor's office and was unaware of Syed's post-conviction petition or the basis of his claims. Furthermore, the argument advanced by Syed, which is premised mainly on a nebulous assertion contained in McClain's affidavit, is insufficient to establish even a prima facie case of prosecutorial misconduct. It certainly does not justify reopening these proceedings since, even if the remedy Syed seeks is granted and McClain is permitted to testify, for the reasons stated earlier, the outcome would be no different.

For this same reason, it is also of no legal moment whether Urick was correct or mistaken with respect to what McClain told him about being pressured to sign an affidavit *after* Syed's trial had concluded. Again, the relevant timeframe for evaluating the adequacy of trial counsel's performance is not after a verdict is reached, but rather when the decision at issue is made. Consistent with this principle, this Court correctly evaluated Gutierrez's performance based upon the contents of two letters McClain sent to Syed in March 1999 and the breadth of Gutierrez's pretrial investigation, which produced 80 possible alibi witnesses whose accounts, unlike McClain's, promised to reinforce Syed's own story to police. In rendering its decision as to deficient performance with respect to pursuing McClain as a witness, this Court rightly did not consider affidavits or information that surfaced after the trial ended. Those post hoc considerations carry the risk of the distorting effects of hindsight, and they are not proper factors in deciding deficient performance. This is why a manufactured dispute about the circumstances leading to the preparation of McClain's post-trial affidavit (as opposed to her pretrial letters) cannot justify reopening these proceedings.

To be fair, several of the issues now raised by Syed were vigorously disputed at the post-conviction hearing itself and may have become germane if this Court had needed to reach the second step of *Strickland* and considered the issue of prejudice. But because Syed's Sixth Amendment claim with respect to McClain was resolved on deficient performance grounds (and not on prejudice grounds), the evidence Syed now asks to present could not, as a matter of law, change the outcome and therefore does not, in the interest of justice, warrant reopening these proceedings. *See Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

D.

On August 24, 2015, Syed submitted an untimely supplemental filing asserting that the State misused cell tower evidence and that Syed's counsel was ineffective for not exploring and exploiting a supposed vulnerability contained in boilerplate language on fax cover sheets supplied by AT&T in this case. The misleading claims Syed raises in this unauthorized, untimely filing are beyond the scope of the remand order, patently waived, and facially meritless. Syed acknowledges that the fax cover sheet he heralds as the catalyst for this argument has long been in defense counsel's possession and provides no more than a promise that he will later explain why waiver should not bar this claim. Motion to Reopen at 14 n.3.

Waiver should be the beginning and end of the argument. The State is compelled, however, to also point out that even a cursory review of the cell tower records and fax cover sheets makes it clear that what Syed characterizes as an "unambiguous warning" does not relate to the cell tower records relied upon at trial by the State's expert and admitted into evidence, but rather applies to information listed on documents titled "Subscriber Activity" reports. These "Subscriber Activity" reports were neither identified as exhibits nor admitted into evidence. Accordingly, the failure to

confront the State's expert witness with a fax cover sheet that corresponded to an altogether different document falls far short of ineffective assistance of counsel.

Syed's recent series of motions amount to an unmeritorious campaign to revive and relitigate Sixth Amendment claims that this Court has already thoroughly considered and properly denied. To be sure, enshrined in the Constitution is a guarantee that every criminal defendant will have effective representation. The importance of this bedrock commitment to the fairness of the criminal justice system cannot be overstated. But that safeguard is not an invitation to second guess tactical decisions and trial strategy, nor does it give license to smear the reputation of defense attorneys from the comfortable perch of history and of hindsight. The promise of the Sixth Amendment is sacrosanct, and there are no doubt defendants who are deprived of it. Adnan Syed, however, is no such victim.

II.

A. Factual Background

For consistency and ease of reference, the State herein sets forth portions of the factual background contained in its briefing to the Court of Special Appeals:

1. The Evidence at Trial

On January 13, 1999, Adnan Syed strangled to death and buried in a shallow grave his ex-girlfriend, 18-year-old, Hae Min Lee. (T. 2/2/00 at 39-41; T. 2/23/00 at 22-23, 38). Syed and Lee, both students at Woodlawn High School, had broken up and reunited at least twice during the course of their turbulent ten-month relationship, but never before had Lee become involved with someone else. (T. 1/28/00 at 237-40; T. 2/16/00 at 300); State's Exhibit 2. That changed two weeks before the murder, when Lee went on a first date with a new romantic interest, an older co-worker named Donald Cliendinst. (T. 2/1/00 at 72).

The week of the murder, as Lee's affection for Syed visibly flickered, her relationship with Cliendinst at once became sexually intimate and public at school. (T. 1/28/00 at 239; T. 2/1/00 at 88;

T. 2/4/00 at 12). That same week, Syed activated a new cell phone, which was instrumental in Lee's murder, and told Jay Wilds — an accessory to the crime enlisted by Syed — that he intended "to kill that bitch" (referring to Lee) because of how she was treating him. (T. 1/28/00 at 185; T. 2/4/00 at 125-26; T. 2/18/00 at 186). On the morning of January 13, Syed lent Wilds his vehicle and his new cell phone and directed him to await his call. (T. 2/4/00 at 125-26). That day at Woodlawn, Syed lured Lee away from the high school campus, falsely claiming he needed a ride to pick up his car. (T. 1/28/00 at 209; T. 1/31/00 at 8). Syed then strangled Lee inside her vehicle and stashed her body in the trunk of the car. (T. 2/2/00 at 39-41; T. 2/4/00 at 131). After the murder, Syed bragged to Wilds that he had killed Lee with his bare hands and that she had tried to apologize to Syed with her last breath. (T. 2/4/00 at 142-43). The two men disposed of Lee's crumpled body in Leakin Park in Baltimore City and abandoned her car near Edmondson Avenue. (T. 2/4/00 at 148-51; T. 1/27/00 at 202).

Hae Min Lee's decomposing body was found on February 9, 1999, nearly four weeks after she vanished from Woodlawn High School. (T. 2/23/00 at 4). On February 12, 1999, an anonymous caller encouraged police to concentrate on Adnan Syed; the caller also gave police the name, high school, and home phone number of a friend of Syed's. (T. 2/24/00 at 58-60). According to the caller, Syed had told this friend that if he (Syed) ever hurt his girlfriend he would drive her car into a lake. *Id.* Police traced the home number provided by the caller to one of Syed's closest friends, Yasser Ali. According to Syed's cell phone records, Ali received two calls from Syed's cell phone on the night of the murder. *Id.* at 60; State's Exhibit 34; (T. 2/3/00 at 79-83). Although police originally considered other suspects, particularly Alonzo Sellers (the person who came across the body in Leakin Park), the evidence uniformly converged on Syed beginning with the tip provided by the anonymous caller. State's Exhibit 29; (T. 2/1/00 at 71-75; T. 1/31/00 at 10-11; T. 2/24/2000 at 21-26, 58-60, 71-72; T. 2/17/00 at 226-31).

Ensconced in a relationship complicated by culture and custom, Syed and Lee were nevertheless consumed with one another. (T. 2/3/00 at 85-87; T. 1/28/00 at 140-43; T. 2/16/00 at 299, 309). At the same time, to friends and in her diary, Lee described Syed as possessive, jealous, and overprotective. (T. 2/17/00 at 136-37); State's Exhibit 2. When police executed a search warrant at Syed's residence, they found a November 1998 letter from Lee tucked into a textbook, in which Lee sought to reassure Syed that they would both survive a breakup: "Your life is NOT going to end. You'll move on and I'll move on. But, apparently you don't respect me enough to accept my decision . . . I NEVER wanted to end like this, so hostile + cold. Hate me if you will. But you should remember that I could never hate you." (T. 1/27/00 at 184-86); State's Exhibit 38. Syed's apparent answer was scrawled on the back: "I'm going to kill." State's Exhibit 38.

By December 1998, Lee felt compelled to keep her growing interest in Cliendinst a secret from Syed, concerned he would never forgive her. State's Exhibit 2. Her anxieties were not without basis. Syed had told a classmate, Deborah Warren, that he was convinced Lee was having a relationship with Cliendinst while she was still involved with him. (T. 2/16/00 at 301-03). Syed was reassured by Warren at the time, but by the week of the murder, as Warren testified and Cliendinst confirmed, Lee had spent the night with Cliendinst. (T. 2/16/00 at 304; T. 2/1/00 at 88). And by then teachers and classmates knew of the relationship. (T. 1/28/00 at 145, 250; T. 2/4/00 at 12; T. 2/16/00 at 304).

During the trial, the State also proved the steps Syed took in the 24 hours before he killed Lee. On a newly-acquired cell phone, which was activated a day before the murder, Syed called Wilds to determine if he was available the next day. (T. 2/4/00 at 119); State's Exhibit 34. That same evening, after talking with Wilds, Syed attempted to call Hae Min Lee three times just before and after midnight. State's Exhibit 34. During the third call, Syed gave Lee his new number, which she scribbled in the margin of her diary on the same page where she wrote "Don" 127 times. State's Exhibit 2. Opposite

this page is Lee's last diary entry, dated January 12, the night before she was killed: "I love you, Don. I think I have found my soul mate. I love you so much." *Id.*

Syed's first call the next morning was to Wilds, whom Syed then left school to pick up. (T. 2/4/00 at 121-23); State's Exhibit 34. While driving, Syed told Wilds about how hurt he was by Lee's treatment of him, how mad she made him, and said to Wilds, "I'm going to kill that bitch." (T. 2/4/00 at 125). Wilds — who pled guilty to being an accessory to the murder and agreed to take the stand for the State — testified that Syed left him his cell phone and car, instructing him to be ready to retrieve Syed when he called. (T. 2/4/00 at 125-26).

In addition, Crystal Myers, a mutual friend of Syed and Lee, testified about a conversation she had with Syed at school on the day Lee was killed. Syed told her that Lee was supposed to drive him after school to pick up his car, either from the repair shop or from Syed's brother. (T. 1/28/00 at 209). Syed similarly advised Officer Scott Adcock — who called Syed on January 13 after Lee was reported missing — that he was supposed to get a ride home from Lee, but that he was delayed and assumed Lee had left by the time he was ready. (T. 1/31/00 at 8). Two weeks later, on February 1, Syed retracted these statements when Officer Joseph O'Shea confronted him with what he had said to Officer Adcock. This time, contradicting what Syed had told Myers (*i.e.*, that Lee was going to give him a ride to pick up his car) and what he told Officer Adcock (*i.e.*, that Lee was supposed to give him a ride home), Syed stated that he would not have needed a ride from Lee since he had his own car. (T. 1/31/00 at 27).

But not only did Syed eventually disavow any plans to get a ride after school from Lee; he also shifted from telling Officer O'Shea, on the one hand, that he went to track practice after last seeing Lee during the final class period of the day to, on the other hand, feigning that he had no memory at all of the day his ex-girlfriend vanished when asked by the lead homicide detective a month later. *Id.* at 25-26.

The jury learned from Wilds and other witnesses that all of Syed's vacillating accounts were untrue. After school ended, Wilds received a call from Syed who directed him to the Best Buy store on Security Boulevard. (T. 2/4/00 at 130). Parked to the side of the building was Lee's gray Sentra. After repeatedly asking Wilds if he was "ready for this," Syed opened the trunk and revealed the dead body of Hae Min Lee. *Id.* at 131.

Wilds testified that over the next few hours he and Syed alternated between driving around in search of marijuana, attempting to establish an alibi for Syed, and disposing of the body. *Id.* at 132-57. They initially moved Lee's car, with her body still inside, to the Park & Ride at Interstate 70 and Security Boulevard, just west of Leakin Park. *Id.* at 132. Wilds later dropped Syed off at track practice at the high school so that Syed could be "seen," only to return a short time later to pick him up. *Id.* at 142, 144.

Both men then proceeded to the home of Kristi Vincent. *Id.* at 144. Around that time, Syed received phone calls from the victim's brother, Young Lee, and Officer Adcock, asking if Syed knew where his ex-girlfriend was. *Id.* at 145.[1] After one of the calls, Syed abruptly motioned to Wilds that it was time to leave. *Id.* at 146-47.

Wilds testified that, afterwards, Syed convinced him to help dispose of the body. *Id.* at 147. Wilds told the jury that he dealt drugs, that he lived with his grandmother, and that he did not want trouble for her. *Id.* So he joined Syed who had secured two shovels and returned to the Park & Ride to retrieve Lee's car. *Id.* at 147-48. They settled on dumping the body in Leakin Park, where they went to an area a distance off the road and started digging Lee's grave. *Id.* at 148-50. Wilds estimated it was around 7 p.m.; a little earlier, Wilds had used Syed's cell phone to page a friend of his, Jennifer Pusateri, to alert her that they would not be meeting up as they had previously planned. *Id.* at 149-50. While

[1] It was during this call with Officer Adcock that Syed said that he had expected to get a ride from Lee after school that day, but that he had been delayed. (T. 1/31/00 at 8).

Syed and Wilds were at Leakin Park, Pusateri returned the page, calling Syed's phone in order to speak to Wilds. *Id.* at 151. Syed answered and told Pusateri that Wilds was busy, but that he would call her back later. *Id.*

After the makeshift grave was prepared, Syed and Wilds returned the shovels to Syed's car. *Id.* at 153. Wilds told the jury that he refused to help move Lee's body from the trunk of her car, so Syed transported the corpse to the grave site by himself and "started to throw dirt on her head." *Id.* at 151-52. For Syed and Wilds, there were points during the burial at Leakin Park where both men seemed disturbed and disoriented by the gravity of the moment. *Id.*

They left the city park as they had arrived, Syed operating his victim's car and Wilds driving Syed's. *Id.* at 154. After trailing one another for some time, Syed eventually abandoned Lee's vehicle behind apartments and returned to his own car, which until then Wilds had driven. *Id.* They then proceeded to Westview Mall, where they discarded the shovels and where Pusateri recalled joining the two of them a little later. *Id.* at 156-57.

During the course of that fateful night, Syed detailed, reflected on, and bragged to Wilds about what he had done. Syed reported that during the struggle Lee had kicked off the car's turn signal and had attempted to apologize to him. *Id.* at 142. He told Wilds that killing Lee "kind of hurt him," but that when someone treated him the way she had, that person deserved to die *Id.*; Syed later added that the murder, "kind of makes [me] feel better and then again it doesn't." *Id.* at 156. Syed also derived a measure of pride in the method of the murder: "motherfuckers think they are hard, I killed somebody with my bare hands." *Id.* at 142.

The State called additional witnesses who fortified key facts and critical features of the narrative and timeline established by the State at trial. For example, Nisha Tanna, a friend of Syed's, claimed she remembered receiving a call from Syed who, conspicuously, then placed Wilds on the phone, just as Wilds testified. *Id.* at 136-37; (T. 1/28/00 at 189-90). Syed's cell phone records also

confirmed two calls to Tanna on January 13 during the time Syed and Wilds were together. State's Exhibit 34.

Kristi Vincent also observed Syed and Wilds together the evening of the murder. Vincent told the jury, consistent with Wilds' testimony, that Wilds arrived at her apartment with Syed, whom she had never met and whom Wilds never introduced, at around 6 p.m. (T. 2/16/00 at 209-215, 225-33; T. 2/4/00 at 144). She recalled the episode because both men were acting "real shady," and she noticed that Syed seemed to be hiding his face. (T. 2/16/00 at 237-39). Syed and Wilds left abruptly after Syed answered a call on his cell phone and said to the caller, "they're going to come talk to me . . . what should I say, what should I do?" *Id.* at 213-14.

Also significant at trial was the testimony of Pusateri. She first came to the attention of police when — soon after the anonymous caller identified Syed as a suspect — police traced to Pusateri's address a phone number that had multiple contacts with Syed's cell phone on the day of the murder. (T. 2/17/00 at 154-55, 159). Pusateri first met with detectives on February 26, 1999, *Id.*; she told them she had heard that Lee had been strangled, a fact that had not been released to the public. *Id.* at 314-15. Pusateri also encouraged police, at Wilds' suggestion, that they should talk with Wilds. (T. 2/15/00 at 204). The next day, unsolicited, Pusateri returned to police headquarters along with her mother and an attorney; she then outlined for detectives what she had learned from Wilds on the very night of the murder. *Id.* at 202-03.

At trial, Pusateri reinforced crucial elements of the State's case. She corroborated, for instance, Wilds' testimony with respect to the afternoon, stating that Wilds had been at her home playing video games, waiting for a phone call. *Id.* at 186-87. She explained that she later received a page from Wilds from an unknown number; when Pusateri called back, someone besides Wilds answered and said that Wilds was busy and would return her call when he was ready to be picked up. *Id.* at 188-90. A short time later, Wilds paged Pusateri, asking her to meet him at Westview Mall. *Id.* at 191-92. She testified

that, when she arrived, Syed and Wilds pulled up in a car driven by Syed. *Id.* at 194. Soon after Wilds got into Pusateri's car, he confided in her that Syed had strangled Lee in the Best Buy parking lot and urged her not to tell anyone. *Id.* at 195-96. Pusateri added that they later returned to Westview Mall, so that Wilds could make sure there were no prints on the shovels they had left behind. *Id.* at 196.

The testimony of witnesses familiar with Syed, Lee, and the events of January 13 were one component of the State's case. Also persuasive was the prosecution's presentation of phone records and location data derived from the calls Syed and Wilds made in the hours before and after the murder. For one thing, the timing of calls to Hae Min Lee the night before her murder, as well as calls to Jay Wilds, Jennifer Pusateri, Nisha Tanna, and Yasser Ali on the day of the murder, reinforced the testimony of the State's witnesses and the prosecution's theory of what happened when and why.

The State's expert witness, Abraham Waranowitz, also plotted the location of cell towers corresponding to each call Syed and Wilds made that day. In order to validate this information, the expert actually visited locations where a call was supposedly made and initiated a test call to determine what tower the call engaged. (T. 2/8/00 at 83). For example, Waranowitz made three calls from the 4700 block of Gateway Terrace and found that two cell towers had strong signals on that street — those two towers coincided with the three calls on Syed's cell phone between 6 p.m. and 6:30 p.m. when Syed and Wilds were at Kristi Vincent's apartment, which was located at 4703 Gateway Terrace. *Id.* at 96-97; State's Exhibit 34. The State's expert similarly confirmed that the two calls just after 7 p.m. — when Wilds placed himself and Syed at Leakin Park — connected to a tower at 2121 Windsor Garden Lane, due north of the spot where Syed buried Lee's body. (T. 2/8/00 at 97-98); State's Exhibit 34.

Furthermore, the State established that Syed's palm print was on the back cover of a map book inside Lee's car and that a page showing Leakin Park was torn from that book; the standalone page was also recovered from the middle of the back seat of Lee's car, where it could be reached from the

driver's seat. (T. 1/31/00 at 58-60, 118-119; T. 2/1/00 at 24-29). The State also showed that the wiper lever inside of Lee's car was broken, which was consistent with Wilds' testimony that Syed described Lee kicking as he strangled her in the front seat of the car. State's Exhibit 6; (T. 2/25/00 at 50).

Also illuminating was Syed's conduct in the weeks following the murder. Some at Woodlawn High School were concerned about Lee's whereabouts. Hope Schab, a teacher at Woodlawn, worked with detectives to ask for information and distributed written questions within the high school community. (T. 1/28/00 at 146-48). Not only did Syed decline to participate in these efforts, he affirmatively sought to thwart them, especially once he learned that he was a subject of interest. Schab testified that Syed asked her to stop raising questions about him; he claimed to Schab that he was concerned his parents would learn too much about his personal life. (T. 1/28/00 at 149). Similarly, Deborah Warren told the jury that Syed once borrowed her journal, but that when he returned it, all the papers inside were gone, including one with questions about him and Lee. (T. 2/16/00 at 317). Syed also elected not to attend the memorial service for Lee, telling Inez Hendricks, another teacher at Woodlawn, that he skipped the service because he and Lee practiced different religions. (T. 2/4/00 at 24-25). Also curious, although Syed regularly called Lee in the days, weeks, and months before her disappearance (including three times around midnight on January 13), between when Syed learned Lee was missing and when her body was discovered in Leakin Park, Syed never attempted to contact her. Not once. (T. 10/25/12 at 57-59); State's Exhibit 34.

2. The Pursuit of an Alibi

In preparation for trial in Syed's case, Gutierrez assembled a team consisting of a private investigator and law clerks to assist with the pretrial investigation. (T. 10/25/12 at 8-32). Fashioning an alibi for Syed's whereabouts that supported Syed's statements to police was a clear priority for Gutierrez. Attachment 5. In fact, Gutierrez, aware that Maryland rules required her to disclose

potential alibi witnesses in advance of trial so that the State would have an opportunity to investigate the basis of the alibi, provided to the State a list of 80 potential alibi witnesses on October 5, 1999. Attachment 5. According to the alibi notice:

> These witnesses will be used to support the defendant's alibi as follows: On January 13, 1999, Adnan Masud Syed attended Woodlawn High School for the duration of the school day. At the conclusion of the school day, the defendant remained at the high school until the beginning of track practice. After track practice, Adnan Syed went home and remained there until attending services at his mosque that evening. These witnesses will testify to [sic] as to the defendant's regular attendance at school, track practice, and the Mosque; and that his absence on January 13, 1999 would have been missed.

Attachment 5. Because Syed had spoken to police on multiple occasions before he was charged and before he retained counsel, the alibi framed in Gutierrez's notice to the State had the advantage of comporting with what Syed had already said to law enforcement. (T. 1/31/00 at 5-14, 25-39; T. 2/17/00 at 256-73; T. 2/18/00 at 191-94).

Gutierrez also pursued an alibi defense at trial, through subtle cross-examination of witnesses presented by the State (*See, e.g.*, T. 2/4/00 at 97-100; T. 2/3/00 at 88-133), by substantiating a reliable routine that Syed followed every day, *i.e.*, attendance at school followed by track practice followed by services at the mosque (T. 2/23/00 at 79-81, 100-04, 274-75; T. 2/24/00 at 16-17, 116-17, 151, 185, 193-96), and by calling to testify for a specific alibi Syed's father, a credible and sympathetic figure who asserted that on the evening of Lee's disappearance he went to the mosque with his son at approximately 7:30 p.m. for an 8 p.m. prayer meeting (T. 2/24/00 at 16). Importantly, the trial court agreed to give an alibi instruction to the jury, thus finding that an alibi defense had been generated by the facts established by Gutierrez at trial. (T. 2/25/00 at 32-33).

Notwithstanding Gutierrez's extensive pretrial investigation and efforts during trial, Syed claims that Gutierrez was constitutionally ineffective for her alleged failure to adequately investigate one additional alibi witness, Asia McClain.

Asia McClain was a fellow student at Woodlawn High School. (T. 10/11/12 at 5). After Syed's arrest, McClain sent Syed two letters, dated March 1, 1999, and March 2, 1999, requesting to talk with him to explore the relevance of a conversation McClain recalls having on January 13, 1999, at the nearby public library. Defense P.C. Exhibits 6 & 7. She does not say in this set of correspondence why she remembers that day or what precisely she recalls. *Id.* Both letters express hope that Syed is innocent and simultaneously relay concerns that he is not: "I want you to look into my eyes and tell me of your innocence. If I ever find otherwise I will hunt you down and wip [sic] your ass . . . I hope that you're not guilty and I hope to death that you have nothing to do with it. If so I will try my best to help you account for some of your unwitnessed, unaccountable lost time (2:15-8:00)" Defense P.C. Exhibit 7; "The information that I know about you being in the library could helpful [sic], unimportant or unhelpful to your case. . . . I guess that inside I know that you're innocent too. It's just that the so-called evidence looks very negative." Defense P.C. Exhibit 6. In neither letter does McClain specify a particular time when she saw Syed at the library. Defense P.C. Exhibits 6 & 7. She notes however that she aspires to become a criminal psychologist for the FBI. Defense P.C. Exhibit 6.

Syed presented evidence to this Court that he made his defense team aware of these two original letters. To corroborate this, he referred to the notes of one of Gutierrez's law clerks, which suggest that McClain was discussed at a meeting between Syed and the clerk. (T. 10/25/12 at 4-5). Syed testified at the post-conviction hearing that he was "fairly certain" that his presence at the public library would have been to access his email account. *Id.* at 30-32. Consistent with this, Syed's email username and password are contained in the same section of the clerk's notes. Defense P.C. Exhibit 5. In addition, Syed testified that he personally asked Gutierrez if she had looked into the McClain alibi angle. (T. 10/25/12 at 33-34, 38- 39). Syed acknowledged that Gutierrez advised him that she had "looked into it and nothing came of it." (T. 10/25/12 at 33).

Syed also introduced an affidavit McClain signed a year later, on March 25, 2000, in which McClain claimed she saw Syed at a specific time at the library on the day of Lee's murder, and that she was never contacted by Syed's defense team. (T. 10/11/12 at 57-60); Defense P.C. Exhibit 2. This affidavit, signed a month after Syed was convicted, was prepared in the presence of Rabia Chaudry, a close family friend of Syed's and a law student at the time. Defense P.C. Exhibit 2. In this post-trial affidavit, McClain recalled with pinpoint accuracy that she had waited for her boyfriend at 2:20 p.m., that she held a 15-20 minute conversation with Syed, and then left at 2:45 p.m. *Id.* Nothing in the affidavit explained why McClain was now able to provide a concrete, narrow alibi for Syed when details like this were notably absent from her original letters to Syed. *Id.* Whatever the reason, the times neatly coincided with the State's postulation at Syed's trial as to when Syed may have killed Hae Min Lee. *Id.*

At the hearing, Chaudry stated that she spoke to Syed on multiple occasions by phone from the time of his arrest and throughout both trials; she attended most of the second trial and participated in two meetings between Gutierrez and Syed's parents. (T. 10/12/12 at 33-78). Chaudry claimed, however, that it was not until after Syed was convicted that she asked him to account for his whereabouts at the time of the murder. *Id.* at 43-44, 76. According to Chaudry, Syed told her that, "it was like any other day for me," and that he had no specific memory of speaking to McClain (or anyone else at the library) that day. *Id.*

Kevin Urick, one of the original prosecutors, testified that McClain called him after the post-conviction was filed to say she had written the affidavit only because of pressure from the defendant's family and hoped that, by doing so, they would leave her alone. (T. 10/11/12 at 30). She expressed to Urick concerns about participating in the post-conviction hearing, and ultimately she did not testify. *Id.* Urick's characterization of McClain's reticence is confirmed by Syed's present counsel who said

that although he tried to produce McClain, she evaded service of the defense subpoena. (T. 10/25/12 at 106).

For his part, Syed testified at the post-conviction hearing that he received the letters from McClain within a week of his arrest and that the letters "fortified" the memory that he had of going to the library after school and staying there from 2:40 p.m. to 3 p.m. *Id.* at 26-28. He further stated that he remembers exactly who he spoke with and what they spoke about. *Id.* at 29. Syed's sharpened recollection nearly 14 years after the murder stood in contrast to the statements he gave police in the early days of the investigation and contradicted Chaudry's testimony of his statements to her that, even after he was convicted of murder, he had no memory of where he was after school on January 13, 1999.

B. Procedural History

In February 1999, Adnan Syed was charged with the murder of Hae Min Lee. Prior to trial, Syed was represented by two prominent attorneys, both law professors today, Michael Millemann and Douglas Colbert. (T. 10/11/12 at 98-99; T. 10/25/12 at 8). With financial assistance from family and friends, Syed later retained the late Christina Gutierrez as his trial attorney, and he elected — twice — to be tried by a jury. The first resulted in a mistrial; the second ended on February 25, 2000, in Syed's conviction for murder and other related charges.

On March 6, 2000, Gutierrez filed a motion for a new trial alleging a wide range of claims including prosecutorial misconduct for failing to disclose exculpatory evidence and errors by the trial court for limiting Gutierrez's defense. Syed's counsel also reserved the right to raise other issues at the hearing. (R. Motion for New Trial; T. 6/6/00 at 2-6). A hearing on the motion for new trial and sentencing was scheduled for April 5, 2000.

On March 30, 2000, Syed's parents privately wrote to Gutierrez and asked her to include in the motion for new trial a claim based on "newly discovered evidence provided by Ms. Asia McClain."

Petition for Post-Conviction Relief, Exhibit 6. On April 3, 2000, Syed's parents wrote to Judge Heard, copying prosecutors, asking that the April 5th hearing be postponed because Gutierrez had been discharged from the case. Petition for Post-Conviction Relief, Exhibit 7. Among the stated reasons for discharging Gutierrez was her refusal to meet with Syed to prepare for sentencing, her refusal to amend the motion for new trial, and her refusal "to schedule mitigating witnesses for sentencing." *Id.* The letter shared with the trial judge and the state prosecutors made no reference to Asia McClain.

At a hearing held on April 5, 2000, the court granted a postponement and discharged Gutierrez at Syed's request. (T. 4/5/00 at 6). The court noted that "the defense presented an admirable case" and applauded Gutierrez even as she granted Syed's petition for new counsel: "I was impressed by the way in which Ms. Gutierrez conducted herself. When I say 'impressed,' I wasn't always happy because she was being such an advocate that at times she stepped over the line, and she and I had a little bit of a discussion about that. But she was doing her job. And for that reason, I respect her as a lawyer. And I just want you to know that." (T. 4/5/00 at 6).

In order to provide Syed's new attorney, Charles Dorsey, with a chance to review and potentially amend Syed's motion for a new trial, the court rescheduled the sentencing and motions hearing for June 6, 2000. (T. 6/6/00 at 1-2). Dorsey did not file an amendment to the original motion for new trial, and Syed proceeded on the claims raised in the motion for new trial filed by Gutierrez. (T. 6/6/00 at 1-2). The trial court denied Syed's motion, *id.* at 2-6, and Syed was sentenced to serve life in prison for murder. Syed and Dorsey were provided opportunities to raise additional arguments, and neither mentioned Asia McClain nor did they press any other claims besides those contained in Gutierrez's original motion for a new trial. (T. 6/6/00 at 5-6).

Syed then unsuccessfully pursued direct appeals, retaining yet another set of attorneys, Warren Brown and Lisa Sansone, who raised four claims in their pleadings to the Court of Special Appeals including evidentiary challenges and allegations of prosecutorial misconduct. The intermediate

appellate court denied Syed's appeal, and the Court of Appeals denied Syed's pro se petition for a writ of certiorari. *Syed v. State*, 376 Md. 52 (2003).

For the next seven years, Syed's case was dormant, until May 28, 2010, when Syed through present counsel, Justin Brown, filed a petition for post-conviction relief. This petition alleged ineffective assistance of counsel by Syed's trial attorney, Christina Gutierrez, ineffective assistance of counsel at sentencing by his next attorney, Charles Dorsey, and ineffective assistance of appellate counsel by Warren Brown. This petition mentioned for the first time Asia McClain, a potential alibi witness, and also accused Syed's attorneys of various other failures at trial, at sentencing, and on appeal, including errors related to allowing the State's cellphone expert, Abraham Waranowitz, to testify beyond the scope of his expertise.

On July 23, 2010, the court scheduled the post-conviction hearing for December 20, 2010. Over the next two years, the hearing was postponed a total of seven times. At two of these dates, Syed's counsel sought certification that an out-of-state witness, Asia McClain, was needed, and these motions were granted by the Court. In June 2011, Syed supplemented his petition, affixing an additional claim of ineffective assistance of counsel directed at Dorsey. Supplement to Petition for Post-Conviction Relief. Finally, an evidentiary hearing on the claims raised in the post-conviction petitions was held on October 11, 2012, and October 25, 2012. Asia McClain, having never been served with a subpoena, did not testify at the hearings. On January 6, 2014, the circuit court filed an opinion denying post-conviction relief.

Syed filed an application for leave to appeal the post-conviction court's ruling, arguing that the post-conviction court erred when it rejected his claims that trial counsel was ineffective for (1) failing to investigate a possible alibi witness and (2) failing to honor his request to seek a plea offer. By order dated September 10, 2014, the Court of Special Appeals directed the State to file a response addressing only the second of these two questions, which the State did on January 14, 2015. On

January 20, 2015, Syed filed a supplement to his application for leave to appeal supported by an affidavit authored by McClain on January 13, 2015, and requesting a remand in light of the new evidence.

On February 6, 2015, the Court of Special Appeals set the case in for regular briefing. On May 18, 2015, after opening and responsive briefs were filed, but before the scheduled oral argument, the Court of Special Appeals stayed the appeal and issued a limited remand to this Court in order to provide Syed with the opportunity to file a request to reopen the previously closed post-conviction proceedings in light of McClain's January 13, 2015, affidavit. The order required Syed to file the motion to reopen within 45 days of the Court's order.

On June 30, 2015, Syed filed a motion reopen his closed post-conviction proceedings arguing that it was in the interests of justice to reopen his post-conviction proceedings so that McClain could testify. On August 12, 2015, this Court provided until September 8, 2015, for the State to file a response. On August 24, 2015, Syed filed an untimely and unauthorized supplement to his motion to reopen his post-conviction proceedings, raising for the first time ever a claim that his cell phone records were used improperly by the State and that Gutierrez was also ineffective for failing to make a proper objection. In light of Syed's supplemental filing, the State requested, with no objection from defense counsel, an opportunity to file a consolidated response to Syed's motion to reopen and his supplement, which the Court granted.

On September 23, 2015, the State hereby files its consolidated response.

III. DISCUSSION

A. The Court of Special Appeals Issued a Limited Remand to Permit this Court to Decide Whether *Vel Non* to Grant Syed's Motion to Reopen Post-Conviction Proceedings.

Section 7-104 of the Criminal Procedure Article provides that a circuit court "may reopen a post-conviction proceeding that was previously concluded if the court determines that the action is in the interest of justice." Md. Code Ann., Crim. Pro., § 7-104 (2008). In *Gray v. State*, 388 Md. 366

(2005), the Court of Appeals observed that the legislature vested the circuit court with the duty to determine "when 'the interests of justice' require[d] reopening" and held that the circuit court's determination was reviewed on appeal for an abuse of discretion. *Id.* at 383 n.7. In interpreting this standard in the context of a claim of ineffective assistance of post-conviction counsel, the Court of Special Appeals has stated: "'There is no entitlement to have a closed postconviction proceeding reopened unless the petitioner asserts facts that, 'if proven to be true at a subsequent hearing[,] establish that post-conviction relief would have been granted but for the ineffective assistance of . . . postconviction counsel.'" *Harris v. State*, 160 Md. App. 78, 97-98 (2005) (quoting *Stovall v. State*, 144 Md. App. 711, 715-16 (2002)).

In his motion to reopen, Syed argues that the Court of Special Appeals already determined that it is in the interest of justice to reopen these proceedings and that this Court is bound to grant Syed's motion under the "law of the case" doctrine. Motion to Reopen at 7-10. This argument, however, is refuted by the language of the remand order. The Court of Special Appeals stated in its order that "[t]he purpose of the stay and the remand is to provide Syed with the opportunity to file with the circuit court a request, pursuant to § 7-104 of the Criminal Procedure Article of the Md. Code, to re-open the previously closed post-conviction proceedings in light of Ms. McClain's January 13, 2015, affidavit which has not heretofore been reviewed or considered by the circuit court." Petitioner's Exhibit 8 at 4; *see also* May 18, 2015 Remand Order. ("We shall, therefore, remand the case to the circuit court, without affirmance or reversal, to afford Syed the opportunity to file such a request to re-open the post-conviction proceedings.")). The Court of Special Appeals explicitly recognized that the circuit court retained discretion to grant or deny the motion to reopen: "*In the event* that the circuit court grants a request to re-open the post-conviction proceedings, the circuit court may, in its discretion, conduct any further proceedings it deems appropriate. *If that occurs*, the parties will be given,

if and when the matter returns to this Court, an opportunity to supplement their briefs and the record." *Id.* (emphasis added).

The plain language of the appellate court's order should also be interpreted bearing in mind the circumstances that led to the limited remand. Syed had attempted to introduce an affidavit by a fact witness into the appellate proceedings at the very time when Syed was in the process of applying for leave to appeal. In that circumstance, either the Court of Special Appeals could take the unusual step of incorporating an unauthorized affidavit into the appellate record, or it could strike the supplement knowing that, as the State noted in its response, Syed could then file a motion to reopen with the post-conviction court. But that latter scenario would have resulted in the case proceeding on two parallel tracks concerning what amounted to a single narrow issue. To avoid this, the Court of Special Appeals issued a limited remand only so that Syed could file a motion to reopen. Whether to grant that motion and conduct a hearing remains for this Court to decide, and the State respectfully submits that Syed should not be rewarded with an automatic public hearing to parade before this Court a legally deficient claim.[2]

B. Asia McClain's Latest Affidavit Supplies No Evidence that Could Alter the Post-Conviction Court's Conclusion that Gutierrez's Performance Was Not Deficient.

As this Court recognized in its prior opinion, claims of ineffective assistance of counsel are evaluated under the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). *Kulbicki v. State*, 440 Md. 33, 46 (2014). To succeed on an ineffective assistance claim, a petitioner

[2] Indeed, if this Court yields to Syed's law-of-the-case argument and fails to exercise discretion in determining whether to reopen Syed's post-conviction proceedings, that could constitute reversible error. *See 101 Geneva LLC v. Wynn*, 435 Md. 233, 241 (2013) ("A proper exercise of discretion involves consideration of the particular circumstances of each case. . . [and a] court's failure to exercise this discretion results in a failure to fulfill this function and 'is, itself, an abuse of discretion[.]'") (citation omitted); *Arrington v. State*, 411 Md. 524, 552 (2009) ("[D]iscretion is always tempered by the requirement that the court correctly apply the law applicable to the case"); *see also Kusi v. State*, 438 Md. 362, 385 (2014) (opining that when a "court exhibits a clear 'failure to consider the proper legal standard in reaching a decision,' such an action constitutes an abuse of discretion").

must establish that (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's deficient performance was prejudicial. *Strickland*, 466 U.S. at 687; *Kulbicki*, 440 Md. at 46. Importantly, "[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700.

In analyzing a claim of deficient performance generally, the question is not what the best lawyer would have done, but whether counsel's "representation fell below an objective standard for reasonableness." *Kulbicki*, 440 Md. at 46 (citation omitted). Courts must evaluate counsel's challenged conduct based upon what was known to the attorney at the time. *See Strickland*, 466 U.S. at 689; *State v. Thomas*, 328 Md. 541, 559 (1992). The inquiry rests on the reasonableness of counsel's actions when counsel took them, with a strong presumption that the attorney's actions are reasonable. *Id.* ("Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable profession assistance.").

Counsel does not have to pursue every line of defense if counsel reasonably believes it would not advance a defendant's interest. *Strickland*, 466 U.S. at 690-91. This is particularly true when the defendant has given counsel reason to believe that pursuing certain investigations would be fruitless. *Id.* "[S]trategic choices made after thorough investigation of the law and facts relevant to possible options are virtually unchallengeable." *Id.* at 690. If it is determined that trial counsel's investigation and strategic choices met constitutional performance standards, the analysis ends because the failure to establish either prong of the *Strickland* test precludes relief. *Id.* at 700.

The main thrust of Syed's motion is that reopening these proceedings is in the interest of justice because Asia McClain is now ready to testify that (1) on the day Hae Min Lee disappeared, she saw Syed at the Woodlawn Library between 2:30 p.m. and 2:40 p.m., and (2) she was never contacted by Syed's lawyer. Motion to Reopen at 10-17. According to Syed, McClain's testimony in this regard would make it reasonably likely that this Court would award him a new trial on the basis that his

attorney was ineffective for failing to investigate and present McClain's testimony. *Id.* Yet, McClain's March 25, 2000 affidavit contained essentially the exact same information: (1) that she spotted Syed between 2:20 p.m. and 2:40 p.m. on the day in question and that they conversed, and (2) that no attorney ever contacted her about this information. Thus, with full knowledge of the same information Syed now seeks an opportunity to present, this Court previously determined that Gutierrez declined to pursue McClain as an alibi witness and still satisfied the performance prong of *Strickland* by investigating an alibi defense and making appropriate strategic decisions based on that investigation.

Moreover, *Strickland*'s first prong is not concerned with what a witness claims she would have said with the benefit of hindsight, but rather with what the attorney knew at the time of the contested decision. *See Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (adopting "the rule of contemporary assessment of counsel's conduct"). Thus, the flaw in Syed's motion to reopen is not just that the information supplied by McClain's 2015 affidavit is materially identical to what was already before this Court based on her earlier affidavit, but also that because McClain cannot offer any new information about what Gutierrez knew before trial, Syed is unable to present a reason to change this Court's decision on deficient performance. Under these circumstances, it would be a futile exercise to reopen these proceedings in order to receive testimony from McClain only to render the same result on the basis of the same evidence, never reaching the new evidence, which at best would only bear on the prejudice prong of *Strickland* and not on deficient performance.

The narrow temporal focus of this Court's performance analysis was confirmed by the rationale set forth in the Court's order, which referred principally to what Gutierrez knew and did before trial.

> The evidence shows that trial counsel conducted a thorough investigation of the potential alibi witnesses in Petitioner's case and made a strategic decision against using them at trial. Trial counsel identified more than eighty (80) potential alibi witnesses prior to Petitioner's trial. Trial counsel also noted how each witness could be used to

> support Petitioner's own stated alibi; that he had remained at school from 2:15 p.m. until track practice at 3:30 p.m. on the day of the murder.

P.C. Memorandum Opinion at 9.

The same paradigm governed this Court in rejecting Syed's further claim that Gutierrez failed to adequately investigate McClain or call her to testify. First, this Court concluded that Gutierrez was not deficient for opting not to do more with respect to McClain because the information supplied by McClain to Syed in the form of two letters did not set forth a viable alibi defense:

> Based on Petitioner's assertion that he informed trial counsel of Ms. McClain's potential to be an alibi witness and trial counsel's notations indicating that such an interaction with Petitioner took place, it appears that trial counsel was made aware of Ms. McClain and made a strategic decision not to pursue her for the purpose of an alibi. Defense Post-Conviction Exhibit 1 (Trial Counsel's Notes). However, the Court finds several reasonable strategic grounds for trial counsel's decision to forego pursuing Ms. McClain as an alibi witness in Petitioner's case.
>
> Firstly, the letters sent from Ms. McClain to Petitioner do not clearly show Ms. McClain's potential to provide a reliable alibi for Petitioner. In the first letter, sent on March 1, 1999, Ms. McClain recounted that she saw Petitioner in the public library on January 13, 1999, but did not state the exact time during which the encounter took place. Defense Post-Conviction Exhibit 7. The only indication of Ms. McClain's potential to be an alibi witness for Petitioner is in Ms. McClain's offer to "account for some of [Petitioner's] un-witnessed, unaccountable lost time (2:15 - 8:00; Jan 13th)." *Id.* In the letter sent on March 2, 1999, the following day, Ms. McClain again told Petitioner that she saw the Petitioner in the public library on January 13th and conjectured, "maybe if I would have stayed with you or something this entire situation could have been avoided." Defense Post-Conviction Exhibit 6. To require counsel to interpret such vague language as evidence of a concrete alibi would hold counsel to a much higher standard than is required by *Strickland.* In addition, trial counsel could have reasonably concluded that Ms. McClain was offering to lie in order to help Petitioner avoid conviction.

P.C. Memorandum Opinion at 11-12.

Second, this Court found that Gutierrez was not deficient for opting not to do more with respect to McClain because the information supplied by McClain contradicted the version of the events Syed relayed to the police and presumably to his defense team:

> Secondly, the information in Ms. McClain's letters stating the Petitioner was present at the public library contradicted Petitioner's own version of the events of January 13th, namely Petitioner's own stated alibi that he remained on the school campus from 2:15 p.m. to 3:30 p.m. Based on this inconsistency, trial counsel had adequate reason

> to believe that pursuing Ms. McClain as a potential alibi witness would not have been helpful to Petitioner's defense and may have, in fact, harmed the defense's theory of the case.
>
> Consequently, trial counsel was not deficient in failing to further pursue Ms. McClain as a potential alibi witness and trial counsel's decision in that regard was the result of a sound and reasonable trial strategy. Therefore, Petitioner is not entitled to relief for this claim of ineffective assistance of counsel.

P.C. Memorandum Opinion at 12.

This Court could not have been clearer: in terms of both its analysis and what evidence it considered, Syed's claim was dismissed on the basis of the first prong of *Strickland*'s two-step test, removing the need to consider the secondary issue of prejudice. Consequently, because McClain's testimony does not bear upon, and cannot change, what Gutierrez knew at the time of her decision, it also cannot lead to a reversal of this Court's decision.[3]

Put simply, because the Court denied relief on defective performance grounds (and not on the basis of prejudice), the State respectfully submits that nothing McClain offers to now say can be a valid basis for revisiting the Court's decision. Syed's motion should therefore be denied.

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[3] It should be noted that Syed's continued reliance in his motion to reopen on cases that held that trial counsel failed to investigate alibi witnesses adequately is misplaced. Motion to Reopen at 5, n.2. Unlike those cases, there was ample evidence here of proactive pursuit of an alibi defense, and there were serious risks to expanding that defense to include an unpredictable and potentially contradictory witness. Put simply, Gutierrez's team assiduously developed 80 alibi witnesses that would conform to the account provided by Syed to police. To demand that a skilled and seasoned trial attorney like Christina Gutierrez abandon — or risk compromising — one alibi strategy to chase after another is inconsistent with the constitutional guarantee of effective counsel.

In response, Syed relies on the fact that Gutierrez did not contact McClain personally. Motion to Reopen at 3, 16. Speaking to McClain, however, is not the only way for Gutierrez to have assessed the value and veracity of the potential alibi. In fact, the evidence before this Court makes clear that other methods of inspecting the potential alibi existed. After all, the law clerk's notes upon which Syed relied to show that the defense was aware of the McClain letters in the first place also reveal that, on the same date the McClain correspondence was discussed, the defense team obtained — presumably from Syed — his email account information and were made aware that the public library may have had surveillance cameras. *See* Defense Post-Conviction Exhibit 5. Syed himself indicated that he was "fairly certain" that use of his email account would have been the principal reason for this presence at the Woodlawn Library between the end of school and the start of track practice. (T. 10/25/12 at 30-32). Thus, by simply entering the login and password scribbled on the law clerk's note, Gutierrez's team could have swiftly evaluated the potential alibi by determining whether Syed's email account had activity during the relevant timeframe. And where a seasoned defense attorney like Gutierrez generates a list of 80 potential alibi witnesses, it is reasonable to conclude that some inspection of this 81st alibi witness was performed.

C. Syed's Meritless Allegation of Prosecutorial Interference Does Not Excuse McClain's Absence at the Prior Post-Conviction Proceedings.

Syed does not claim that McClain's latest affidavit contains new evidence of his alibi. Rather, in order to justify McClain's absence at prior post-conviction hearings that were scheduled to begin in late 2010, Syed bluntly accuses Urick of interfering with a witness and blames him for McClain's reticence to participate in these proceedings. Motion to Reopen at 10-17. These allegations of Urick's interference are meritless and unavailing and on their face cannot conceivably sustain Syed's assertion of prosecutorial misconduct.

In fact, even apart from Urick's prior testimony about McClain's reluctance to participate, the record is replete with examples of her vacillating attitudes about cooperating with the defense. For instance, in her current affidavit, McClain states: "In late spring of 2010, I learned that members of the Syed defense team were attempting to contact me. I was initially caught off guard by this and I did not talk to them." McClain Affidavit ¶ 25 (1/13/15). Moreover, after "encountering the Syed defense team," McClain chose to make contact with a state prosecutor rather than anyone else. *Id.* ¶ 26. In addition, Syed's attorney testified at the post-conviction hearing that he had made efforts to secure her presence at the hearing and that although they had traced her to Oregon, "she evaded service in Oregon." (T. 10/25/12 at 106.) It should also be emphasized that the post-conviction proceedings were "scheduled and postponed seven times before the hearing took place," giving Syed ample opportunity to secure her presence. P.C. Memorandum Opinion at 5 n.4. The original hearing was scheduled to begin in December 2010 and was repeatedly rescheduled at fairly regular intervals over the next two years. Even accounting for McClain's muddled characterization of a single conversation she had with Urick at some point before October 2012, there is nothing to suggest that Urick had any influence over the service of process or her decision to evade Syed.

In truth, as Urick testified, he was oblivious even to the fact that a post-conviction petition had been filed until he fielded an unanticipated, unsolicited phone call from a young woman named

Asia McClain. (T. 10/11/12 at 30). Long before he received the call, Urick had left the Baltimore City State's Attorney's Office where he had originally handled the prosecution of Adnan Syed, and when McClain called him, he did not know the posture of the case or what claims were contained in Syed's petition. (*Id.*). To Urick, in 2011, Asia McClain was not a vital alibi witness whose notoriety had soared thanks to a wildly popular podcast. She was then, and for all the years between trial and the filing of Syed's post-conviction petition, a stranger to the prosecution. After all, Syed's family had sent a private letter to Gutierrez mentioning McClain's identity and significance, and expressed frustration that Gutierrez refused to move for a new trial on the basis of McClain's information, but any mention of McClain was conspicuously absent in the letter Syed sent to the court, a copy of which prosecutors received. Defense P.C. Exhibits 3, 4. For his part, Dorsey (the attorney who replaced Gutierrez), even after receiving a two-month postponement to investigate whether to supplement Gutierrez's motion for a new trial, declined to add any claims, let alone a claim based upon Asia McClain. (T. 6/6/00 at 1-2). McClain was not discussed at sentencing, nor was she referenced in any way in any of Syed's filings on direct appeal. Under these circumstances, where Urick had no reason to know what significance if any McClain had for the defense, the suggestion that he engaged in prosecutorial misconduct to discourage a possible witness from participating in a proceeding that he knew nothing about is, respectfully, preposterous.

Thus, there is insufficient evidence in the record to substantiate the serious charge Syed directs at Urick, and a motion to reopen for this reason should be summarily denied. It should be emphasized that, even if McClain was permitted to testify on the ground that she was discouraged from participating in Syed's post-conviction proceedings, because her testimony (for the reasons repeated above) cannot justify changing this Court's prior decision, it is not in the interest of justice to conduct a hearing only to arrive at the same result.

D. Syed's Waived and Misleading Claims with Respect to the Reliability of Cell Tower Records Fall Outside the Scope of the Remand Order and Are Unmeritorious.

Syed's unauthorized supplement contends for the first time that the State improperly presented cell tower information in relation to two incoming calls that "put Syed at the site where the victim was buried on the evening of her disappearance." *See* State's Attachment 1, Supplement at 1. Syed asserts that it was improper for the State to use these calls for this purpose because of language contained on a fax cover page from AT&T, and that his attorney should have used this cautionary language as a basis to exclude certain aspects of the State's expert testimony, or at a minimum to create doubt as to the reliability of the expert's conclusions. *Id.* at 2. Syed claims that these putative errors, by the State and his attorneys, amounted to prosecutorial misconduct, due process violations, and ineffective assistance of counsel. Syed's argument fails for no less than three reasons.

First, the Court of Special Appeals remanded this case solely to allow this Court to consider whether Syed's post-conviction proceedings should be reopened based on allegations contained in McClain's January 13, 2015, affidavit. The Court of Special Appeals did not extend to Syed an open invitation to raise additional claims. Because the claims presented in the unauthorized supplement are beyond the scope of the appellate court's "limited remand," they should be rejected.

Second, even if Syed's supplement is construed as a standalone motion to reopen and consolidated for efficient resolution, his claims do not satisfy the standard for reopening because they have been repeatedly waived. Syed does not dispute that the fax cover sheets that are the centerpiece of his claim were provided in initial discovery and thus this argument could have been articulated prior to trial. Accordingly, Syed's original trial counsel or any of his numerous subsequent attorneys could have raised this argument, including his present counsel when Syed filed his initial post-conviction petition. The repeated failure to make an allegation of error in all prior proceedings results in an undeniable waiver of this claim. Md. Code Ann., Crim. Pro. Art., §§ 7-106 (b)(1)(i)-(b)(2) (2008); *McElroy v. State*, 329 Md. 136, 140-42 (1993); *Curtis v. State*, 284 Md. 132 (1978).

Waiver principles promote judicial economy by requiring a petitioner to raise ripe claims at the first opportunity and forbidding the piecemeal assertion of claims at a petitioner's whim. It is undisputed in this case that the claims asserted in Syed's supplement were not raised on direct appeal or in his prior post-conviction proceedings. Accordingly, these claims are waived and do not serve as a valid basis for reopening Syed's post-conviction proceedings. *See McElroy,* 329 Md. at 148-49 (finding claim waived where the conditions to overcome waiver were not established by petitioner).[4]

Beyond the insuperable procedural hurdles, Syed's claims are also substantively meritless for several independent reasons. For one thing, in an effort to tether his argument to the only claim he was permitted to raise on remand, Syed contends that this Court should allow him to present a fax cover sheet because he claims it is inextricably related to the issue of alibi and thus bears on the prejudice he must prove under *Strickland*. Supplement at 8-9. But this is unavailing for the same reasons set forth in detail in Section III.A.: this Court's prior order was decided on deficient performance grounds and thus the Court did not need to undertake an analysis of prejudice.

These legal and procedural obstacles to raising the issue are not mere academic nuisances, and they alone provide sufficient reason for this Court to summarily deny Syed's claim. Nevertheless, the State feels compelled to go further and to expose the misrepresentation at the heart of Syed's assertions about the State's cell tower evidence.

To substantiate his claim that cell tower evidence was not reliable with respect to incoming calls, Syed includes in his supplement Exhibit 1, a two-page document that together gives the

[4] Syed consciously elected not to address waiver in his supplement even as he expressly identified the issue. Instead, Syed informed this Court that he has "reserve[d] the right to supplement" his unauthorized supplement if the State asserted waiver or another procedural bar. *See* State's Attachment 1, Supplement at 2 n.3. The time for Syed to address waiver has passed, and this Court need not, and should not, entertain Syed's preferences in this respect.

impression that the information contained in a boilerplate legend on page 1 (a fax cover sheet) relates to the cell tower records on page 2. *See* State's Attachment 2. This, in fact, is not the case.[5]

The first page of Syed's Exhibit 1 is an AT&T fax cover sheet, near the bottom of which is a boxed boilerplate legend titled "How to read 'Subscriber Activity' Reports." This generic cover sheet accompanied all documents faxed by AT&T to the detectives in this case, whether the attached document was a Subscriber Activity report or not. A Subscriber Activity report supplied by AT&T in this case, which was faxed on February 17, 1999, is attached as an example as *See* State's Attachment 4. The boilerplate legend on every fax cover sheet provides guidance on how to read Subscriber Activity reports. It defines, for example, certain codes that are found on those reports, and it explains what information is blacked out (*i.e.*, cell site locations) and how to obtain that information (*i.e.*, by court order). The legend also explains that the information contained in the "location" column on a Subscriber Activity report will not be reliable for incoming calls.

How to read "Subscriber Activity" Reports

Please note: All call times are recorded in Eastern Standard time.

Type codes are defined as the following:

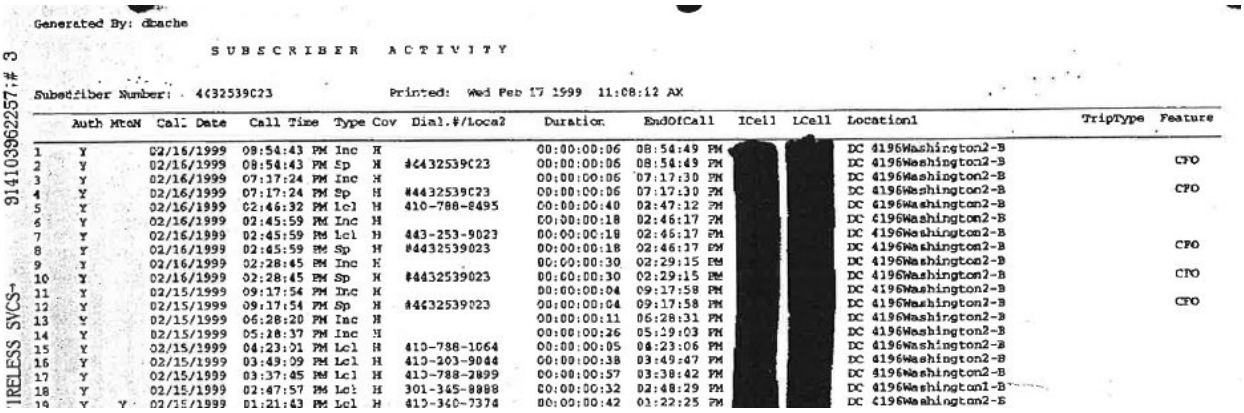
Int Outgoing long distance call
CFO = Call forwarding
Inc Incoming Call
Lcl = Outgoing local call
Sp = Special Feature

When "Sp" is noted in the "Type" column and then the "Dialed #" column shows "# and the target phone number" for instance "#7182225555", this is an incoming call that was not answered and then forwarded to voice mail. The preceding row (which is an incoming call) will also indicate "CFO" in the "feature" column.

Outgoing calls only are reliable for location status. Any incoming calls will NOT be considered reliable information for location.

Blacked out areas on this report (if any) are cell site locations which need a court order signed by a judge in order for us to provide.

[5] In fact, page 1 of Syed's supplement Exhibit 1 (a fax cover sheet for a 10-page document from AT&T to Detective Ritz) did not even accompany page 2 of the attachment, which was sent from Detective Ritz to an AT&T analyst with a Baltimore Police Department fax cover sheet. *See* State's Attachment 3. To be clear, all documents transmitted by fax from AT&T in this case had similar fax cover sheets to page 1 of Syed's attachment. But the inclusion of these two pages alone in Syed's attachment gives the misleading impression that they arrived together and correspond to one another—when in fact they do not.



Generated By: dbache

SUBSCRIBER ACTIVITY

Subscriber Number: 4432539C23 Printed: Wed Feb 17 1999 11:08:12 AM

	Auth	MtoN	Call Date	Call Time	Type	Cov	Dial#/Local	Duration	EndOfCall	ICell	LCell	Location1	TripType	Feature
1	Y		02/16/1999	08:54:43 PM	Inc	H		00:00:00:06	08:54:49 PM	[redacted]		DC 4196Washington2-B		
2	Y		02/16/1999	08:54:43 PM	Sp	H	4432539C23	00:00:00:06	08:54:49 PM			DC 4196Washington2-B		CFO
3	Y		02/16/1999	07:17:24 PM	Inc	H		00:00:00:06	07:17:30 PM			DC 4196Washington2-B		
4	Y		02/16/1999	07:17:24 PM	Sp	H	4432539C23	00:00:00:06	07:17:30 PM			DC 4196Washington2-B		CFO
5	Y		02/16/1999	02:46:32 PM	Lcl	H	410-788-8495	00:00:00:40	02:47:12 PM			DC 4196Washington2-B		
6	Y		02/16/1999	02:45:59 PM	Inc	H		00:00:00:18	02:46:17 PM			DC 4196Washington2-B		
7	Y		02/16/1999	02:45:59 PM	Lcl	H	443-253-9023	00:00:00:18	02:46:17 PM			DC 4196Washington2-B		
8	Y		02/16/1999	02:45:59 PM	Sp	H	4432539023	00:00:00:18	02:46:17 PM			DC 4196Washington2-B		CFO
9	Y		02/16/1999	02:28:45 PM	Inc	H		00:00:00:30	02:29:15 PM			DC 4196Washington2-B		
10	Y		02/16/1999	02:28:45 PM	Sp	H	4432539023	00:00:00:30	02:29:15 PM			DC 4196Washington2-B		CFO
11	Y		02/15/1999	09:17:54 PM	Inc	H		00:00:00:04	09:17:58 PM			DC 4196Washington2-B		
12	Y		02/15/1999	09:17:54 PM	Sp	H	4432539023	00:00:00:04	09:17:58 PM			DC 4196Washington2-B		CFO
13	Y		02/15/1999	06:28:20 PM	Inc	H		00:00:00:11	06:28:31 PM			DC 4196Washington2-B		
14	Y		02/15/1999	05:28:37 PM	Inc	H		00:00:00:26	05:29:03 PM			DC 4196Washington2-B		
15	Y		02/15/1999	04:23:01 PM	Lcl	H	410-788-1064	00:00:00:05	04:23:06 PM			DC 4196Washington2-B		
16	Y		02/15/1999	03:49:09 PM	Lcl	H	410-203-9044	00:00:00:38	03:49:47 PM			DC 4196Washington2-B		
17	Y		02/15/1999	03:37:45 PM	Lcl	H	410-788-2899	00:00:00:57	03:38:42 PM			DC 4196Washington2-B		
18	Y		02/15/1999	02:47:57 PM	Lcl	H	301-345-8888	00:00:00:32	02:48:29 PM			DC 4196Washington1-B		
19	Y	Y	02/15/1999	01:21:43 PM	Lcl	H	410-340-7374	00:00:00:42	01:22:25 PM			DC 4196Washington2-B		

9141039622257;# 3

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The flaw in Syed's argument is that the cellphone records relied upon by the State's expert and entered into evidence at trial were not Subscriber Activity reports. They had no blacked out columns; they had none of the codes discussed in the boilerplate legend; they lacked a column titled "location." *See* State's Exhibit 31. Accordingly, it is flatly erroneous to say that the statement about the reliability of incoming calls — which relates to Subscriber Activity reports — applies to the altogether different records used by the State. Indeed, the "Subscriber Activity" reports were neither identified as exhibits nor admitted into evidence. What was admitted into evidence were cellphone records accompanied by a certification of authenticity, signed by an AT&T security analyst, and relied upon by the State's expert who himself was employed by AT&T as a radio frequency engineer.

Under these circumstances — and having corrected the misimpression advanced, presumably inadvertently, by Syed — counsel's failure to confront the State's expert witness with a fax cover sheet that corresponded to an altogether different document can hardly be called ineffective, particularly where the cellphone records not only corroborate other parts of the State's case but were also themselves corroborated by the State's witnesses, the location of the victim's corpse and car, and the overall timeline established by the State at trial. (*See* T. 2/25/00 at 61-62) ("Well, ladies and gentlemen, the cell phone records support what those witnesses say and the witnesses support what those phone records say."); (T. 2/25/00 at 125-26) (noting that cell phone records and witness testimony "mesh

together"). Indeed, had Gutierrez challenged the State's expert with a notation in a boilerplate legend from a generic fax cover sheet that applied to a separate report, she would have run the unwarranted risk of looking foolish or disingenuous to the jury.

IV. CONCLUSION

The State is certainly prepared to conduct a public hearing, cross-examine Syed's witnesses and call witnesses of its own, in order to reaffirm the integrity and veracity of this Court's original decision. But, the State respectfully submits that, as a matter of law, Syed's claims are barred and do not justify the exceptional remedy of reopening a closed post-conviction proceeding.

Procedural rules matter. They are not guidelines for ordinary cases that can be ignored or discarded when they become inconvenient or unpopular. They ensure the integrity of outcomes; they promise that cases and defendants are treated the same; they provide finality and closure and shield victims and their families from endless appeals; and they discourage inefficient piecemeal resolution of claims. They govern all cases, and *State v. Adnan Syed* is no exception.

Respectfully submitted,

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