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

* * * * * * * * * * * * * *

APPLICATION FOR LEAVE TO APPEAL

The State of Maryland, by its attorneys, Brian E. Frosh, Attorney General of Maryland, and Thiruvendran Vignarajah, Deputy Attorney General, pursuant to Section 7-109(b) of the Criminal Procedure Article of the Maryland Code and Maryland Rule 8-204, applies for leave to appeal the post-conviction court's order vacating Respondent's convictions and granting him a new trial on the ground that his trial counsel was constitutionally deficient for failing to use a disclaimer found on a fax cover sheet to cross examine more effectively an expert witness who presented corroborative cellphone evidence for the prosecution.

As set forth in greater detail below, the State respectfully submits (1) that the court erred in reopening the post-conviction proceedings to consider this particular claim of ineffective counsel; (2) that this argument could have been, but was not, raised by Syed on direct appeal or in his original post-conviction petition and therefore was waived; (3) that Syed's defense attorney, Cristina Gutierrez, was not ineffective for failing to raise a novel challenge to cell site evidence based upon a disclaimer whose relevance remains a subject of expert dispute; and (4) that the supposed error was not — in the face of overwhelming evidence of guilt — prejudicial. For these reasons, the State asks this Court to review, and reverse, the post-conviction court's ruling that Syed's trial attorney was constitutionally ineffective in her cross examination of the State's cellphone evidence.

Because of the unusual circumstances and procedural posture of this case — and in light of new evidence previously unknown and unavailable to the State that bears on Syed's alternate claim that his attorney was ineffective for failing to investigate a supposed alibi witness, Asia McClain — the State also asks this Court, in the interest of justice and in a separate application, for leave to appeal and for a limited remand under Section 7-109(b)(3)(ii)(2) solely to incorporate into the record testimony from two of McClain's classmates (who are sisters), who state *inter alia* that shortly after Syed's arrest, one of the sisters got into a heated argument with McClain who said she was going to lie to help Syed avoid a conviction. The State conditionally asks this Court to consider this request only if Syed persists with the claim that his attorney was ineffective for failing to pursue McClain; should he elect to abandon the claim on appeal or decline to apply for leave to appeal, no remand for the purpose of completing the record is needed. *See* Conditional Application for Limited Remand.

I. Summary of Argument

Pursuant to a limited remand granted by this Court, Syed filed a motion to reopen post-conviction proceedings on the basis of a new affidavit by a putative alibi witness named Asia McClain. Eight weeks later, Syed filed a freestanding supplemental motion based upon a disclaimer discovered on fax cover sheets supplied by AT&T that indisputably were in Syed's possession since the time of trial. At issue is whether this disclaimer should have been exploited by Gutierrez to undercut the reliability of cell site data that the State presented at Syed's trial.

Police originally obtained a full subscriber activity report for Syed's cellphone soon after an anonymous tip pointed investigators in Syed's direction. (B-0360-B0378). Accompanied by a fax cover sheet, this technical report had fourteen separate columns including one titled "Location1" (which listed what experts term "switch" information); it also had two blacked-out columns, titled "ICell" and "LCell," that contained cell site data that could only be obtained with a court order signed by a judge. (B-0379-B0383). Accordingly, detectives transmitted to AT&T a signed court order and

a couple days later received a condensed report with just four columns that listed for each call the dialed number, the call time, its duration, and a cell site code; the code in the "Cell Site" column corresponded to an address that was listed on an index of cell sites that AT&T had separately sent to police the same day. (B-0394-B-0420; B0384-B0393). The index and condensed report both came with the same fax cover sheet that had accompanied the full subscriber activity report. In anticipation of trial, prosecutors eventually requested from AT&T a business record certification for three pages of the condensed report, which reflected Syed's calls and cell site data for the day of the murder (as well as the day before and the day after).[1] Petitioner's Exhibit PC2-18. The prosecution entered into evidence and relied upon these certified records at Syed's trial. State's Exhibit 31.

At the bottom of the AT&T fax cover sheets was a technical legend titled "How to read 'Subscriber Activity' Reports," and both the full and condensed reports had the term "subscriber activity" at the top of at least one page. The disclaimer in question, listed second-to-last among a series of instructions in the boxed legend, reads: "Outgoing calls only are reliable for location status. Any incoming calls will NOT be considered reliable information for location." The question that is now the subject of expert dispute is whether this disclaimer refers to data in the "Location1" column on the full subscriber activity report or whether it applies to cell site data in the "Cell Site" column on the condensed report, three pages of which were entered at trial as Exhibit 31. And the attendant constitutional question is whether Gutierrez's failure to cross examine the State's expert based upon one of the competing interpretations of the disclaimer deprived Syed of effective representation at trial. (For a side-by-side comparison of the documents at issue, see Attachment 2.)

At the post-conviction hearing conducted in February 2016, experts steadfastly disagreed on whether the 1999 disclaimer about "location" applied to data contained in a column titled "Location1"

[1] The full complement of the fax transmissions between police and AT&T was entered at the post-conviction proceeding. (B-0357-0473). Those transmissions, as well as the State's request for certified records, referenced in this paragraph are included with this filing as Attachment 1.

on the full subscriber activity report that had all the columns and markers referenced in the technical legend, *or* whether the disclaimer referred to codes in the column titled "Cell Site" on the condensed report, which lacked many of the columns and markers referenced in the legend.

Syed's expert, Gerald Grant, Jr., interpreted the disclaimer to refer to cell site codes on the partial report, reasoning that those codes, once cross-referenced with the index of addresses, provide a kind of location information. In contrast, based upon his own experience working in 1999, careful inspection of the content of the reports, and after consulting with other experts and AT&T employees working in the field back then, the State's expert witness, Special Agent Chad Fitzgerald (FBI), concluded that the "location" disclaimer applied only to data in the "Location1" column of a full subscriber activity report and did not bear at all on the reliability of cell site information presented at Syed's trial. Abe Waranowitz, the prosecution's expert in 2000 who had provided an affidavit to defense counsel in October 2015 stating he was unaware of the disclaimer when he testified, executed a second affidavit for Syed on February 8, 2016, stating he found the fax cover sheet legend "ambiguous" and that, contrary to Grant's and Agent Fitzgerald's opinions, he believed it "most likely" applied to both reports. Exhibit PC2-66.

Notwithstanding sharp disagreement among experts on the meaning of the disclaimer, the post-conviction court ruled that Gutierrez was constitutionally ineffective for failing to cross examine the State's cellphone expert more effectively based upon the disputed disclaimer from a fax cover sheet. The State respectfully submits that the court's decision flatly disregards important procedural rules and significantly rewrites the constitutional guarantees of the Sixth Amendment.

For one thing, the post-conviction court abused the discretion it was accorded by this Court when it allowed Syed to present a novel standalone claim in reopened proceedings that were supposed to be predicated on the newly-available affidavit of Asia McClain. Maryland's courts have imposed few limits on what qualifies as in the "interests of justice," but limits remain. *See Gray v. State*, 158 Md.

App. 635, 646 n.3 (2004) ("In the context of reopening a postconviction proceeding, whatever latitude that may be assigned to the exercise of judicial discretion 'in the interests of justice' would be somewhat circumscribed by the statutory constraints of the [Uniform Post-Conviction Procedure Act] and the types of claims to which it affords a remedy."). To reopen post-conviction proceedings for an unpreserved claim when there has been no new evidence, no change in law, no material link to the original justification for remand, and no reason why the claim could not have been raised at numerous prior proceedings is to abandon altogether the requirements and context of the Uniform Post-Conviction Procedure Act ("UPPA"), Md. Code Ann., Crim. Proc. §§ 7-101 et seq.

Second, the post-conviction court failed to apply settled principles of waiver to the circumstances of this case. Even after rejecting the only argument Syed advanced to overcome waiver, *i.e.*, a futile *Brady* claim, the court *sua sponte* grafted into the context of ineffective counsel claims an "intelligent and knowing" standard that does not belong. The result violates the text and spirit of the UPPA, and it creates both a limitless opportunity to file successive post-conviction petitions and an unworkable standard that allows the application of procedural rules to depend on the perceived intelligence of the petitioner before the court.

Third, even if this Court were to decide that Syed's claim has not been irretrievably waived, it should still reverse the post-conviction court's ruling on the ground that Gutierrez was far from ineffective in her challenge of the State's cellphone evidence. For one thing, there is no consensus among experts in the forensic community that Syed's interpretation of the fax cover sheet is valid. Where one expert concludes the disclaimer does not apply, another finds it does, and yet a third opines it is ambiguous, trial counsel cannot be declared ineffective for a sustained and vigorous cross examination that does not incorporate an uncertain line of attack. This is especially true when the cross examination strategy deployed by the attorney, if successful, would have been more damaging and more fundamental than the questionable tactic proposed in hindsight. Gutierrez's dogged

preparation and array of attacks produced a blueprint for cross examination of cellphone evidence that continues to be followed today. By comparison, neither expert who testified at the hearing could provide to the court a single instance in the history of cellphone forensics of a defense attorney following Syed's proposed avenue of inquiry.

Finally, even if the post-conviction court was correct to reopen to hear this uninvited claim, right in applying an obsolete waiver standard that appears to have no recent application, and fair in its assessment of Gutierrez's performance, Syed still should be denied relief. As the facts set forth in the State's opening brief and set forth in some detail below demonstrate, Syed was convicted because the prosecution presented to a jury of his peers overwhelming evidence of him strangling and burying in a shallow grave his ex-girlfriend, Hae Min Lee.

The State sets forth the procedural history and factual background relating to the prosecution's cellphone evidence at some length because it underscores the many opportunities Syed previously had to raise this argument, as well as Gutierrez's meticulous preparation and scrutiny before trial and her vigorous attack of the cellphone evidence at trial. In light of this context and the legal arguments outlined in this Application, the State respectfully submits that appellate review is warranted.

II. Procedural History

A. Criminal Trial & Appellate Review

On February 28, 1999, Adnan Syed was charged with the murder of Hae Min Lee. Two months later, Syed retained Cristina Gutierrez who, after inheriting the case from his original attorneys and defeating the State's motion to disqualify her,[2] represented Syed through two trials. The first

[2] Initially, Douglas Colbert and Christopher Flohr represented Syed in the weeks after he was arrested, including at his bail review, which took place on March 31, 1999. Although Gutierrez was retained in April, the State moved to disqualify the celebrated attorney on the ground that she already represented two grand jury witnesses. (T. 7/9/99). Representing Syed at the hearing was Michael Millemann who had filed a response to the State's motion in which he vigorously advocated for Syed's right to retain Gutierrez: "As the prosecutor in this case knows full well, Defense Counsel in this case will provide zealous and independent representation to Defendant. Indeed, *this* is what the State fears.

concluded in a mistrial before the State finished its presentation of evidence; the second ended on February 25, 2000, in Syed's conviction on all charges including first-degree murder.

Gutierrez filed a motion for a new trial on various grounds but was discharged by Syed prior to sentencing. The presiding judge commended Gutierrez's performance at trial,[3] accepted Syed's request to substitute counsel, and postponed sentencing and the motions hearing in order to give Syed's new attorney, Charles Dorsey, an opportunity to add to or amend the motion for a new trial. No additional claims of error were presented beyond those in Gutierrez's original filing, and the motion for a new trial was denied. Syed was sentenced to life in prison on June 6, 2000.

On direct appeal, represented by Warren Brown and Lisa Sansone, Syed asserted claims of prosecutorial misconduct, violations of *Brady v. Maryland*, and errors in evidentiary rulings. The Court of Special Appeals affirmed Syed's conviction on March 19, 2003, and the Court of Appeals denied Syed's pro se petition for a writ of certiorari on June 20, 2003.

Shortly before the ten-year filing period expired, on May, 28, 2010, Syed filed a petition for post-conviction relief, which was supplemented thirteen months later on June 27, 2011. The petition and supplement, both filed by Syed's present counsel, Justin Brown, alleged ineffective assistance of counsel by Syed's trial attorney, Cristina Gutierrez, ineffective assistance of counsel by his attorney at sentencing and on the motion for a new trial, Charles Dorsey, and ineffective assistance by his appellate counsel, Warren Brown. With respect to Gutierrez, Syed argued she had (1) failed to establish a timeline that would have disproved the State's case, (2) failed to pursue a putative alibi

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It has filed its Motion *to deny, not protect* Defendant's right to zealous and independent representation." Def's Response to State's Mot. to Disqualify, at 4.

[3] The Honorable Judge Wanda Heard presided over Syed's trial. With respect to Gutierrez, she said to Syed: "I must tell you that . . . the defense presented an admirable case. 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).

witness, Asia McClain, (3) failed to move for a new trial based on McClain's statement, (4) failed to adequately cross examine Deborah Warren, (5) failed to approach the prosecution about a possible plea deal, (6) failed to request a change of venue, and (7) failed to investigate Jay Wilds for impeachment evidence. Syed also claimed (8) cumulative ineffective assistance of trial counsel and appellate counsel, (9) that Dorsey was ineffective for failing to request that a motion for modification of Syed's sentence be held in abeyance, and (10) that appellate counsel was ineffective for failing to challenge testimony by the prosecution's cellphone expert that was beyond the scope of his expertise.[4]

After motions hearings on November 29, 2010 and February 6, 2010, and evidentiary hearings on October 11, 2012 and October 25, 2012, the post-conviction court denied Syed's petition on January 6, 2014. On January 27, 2014, Syed filed a timely application for leave to appeal the post-conviction court's ruling, limiting his request for appellate review to two issues: (1) whether his trial counsel was ineffective for failing to pursue the possible alibi witness of McClain, and (2) whether his trial counsel was ineffective for failing to honor his request to seek a plea offer.

At the request of the Court of the Special Appeals, on January 14, 2015, the State filed a response addressing the second of these two questions. A week later, Syed filed a supplement to his application for leave to appeal that included an affidavit authored by McClain on January 13, 2015, and requested a remand in light of the new evidence. This Court granted Syed's application to appeal but, after the parties had submitted opening briefs, stayed the appeal and issued a "limited remand" to provide Syed with an opportunity to ask the post-conviction court to reopen proceedings in light of McClain's affidavit. This Court noted that because the affidavit had not been presented during the

[4] Syed's original 2010 petition said: "When the State sought to introduce Abraham Waranowitz as an expert in cellular towers, the trial Court correctly limited the witness to expert testimony regarding the equipment with which he had actually worked: AT&T cellular towers and Erickson cellular telephones, (T. 2/9/00 at 31-32). However, Waranowitz' testimony frequently strayed from these topics. Gutierrez raised a continuing objected [sic] on the record, thereby preserving the issue for appeal. *Id.* at 82, 115." Pet. for Post-Conviction Relief at 19 (May 28, 2010).

original proceedings "as it did not then exist," it was not a part of the post-conviction record and could not therefore properly be considered on appellate review. The Court also stated that if the circuit court reopened post-conviction proceedings, it could, "in its discretion, conduct any further proceedings it deems appropriate." This Court further advised that if the matter returned to the Court of Special Appeals, the parties would be given "an opportunity to supplement their briefs and the record." The order, dated May 18, 2015, gave Syed 45 days to file a motion to reopen.

B. Motion to Reopen Post-Conviction Proceedings

On June 30, 2015, Syed filed a motion to reopen his closed post-conviction proceedings on the ground that it was in the interests of justice to give Asia McClain an opportunity to testify. On August 12, 2015, the post-conviction court inquired whether the State intended to respond, and upon confirming that it did, gave the State until September 8, 2015, to file a response. Before the State answered, on August 24, 2015, Syed filed a supplement to his motion to reopen, raising for the first time arguments based on a disclaimer contained on a fax cover sheet from AT&T that Syed admitted was "turned over to [Gutierrez] in discovery." Pet'r's Supp. to Mot. to Re-Open Post-Conviction Proceedings at 10 (Aug. 24, 2015). Syed asserted this information raised "separate claims of ineffective assistance of counsel, prosecutorial misconduct, and a denial of Syed's due process." *Id.* at 2.

The State objected that Syed's request to reopen proceedings to hear from McClain was unwarranted in light of the court's original decision. The State also opposed Syed's insertion of a new uninvited claim on remand:

> 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.

Consolidated Resp. in Opp'n to Pet'rs Mot. and Supplement to Reopen at 5.

On October 13, 2015, Syed filed a reply defending the need to present McClain and stating, with respect to his cellphone-related claims, that "it is now apparent that the State committed a violation of *Brady v. Maryland* . . . and that the violation was not discoverable until the recent filing of the State's Opposition." Reply to State's Consolidated Response at 9 n.4. "This fact," Syed asserted in the accompanying footnote, "resolves any waiver arguments the State may make." *Id.*

On November 15, 2015, the post-conviction court granted Syed's motion to reopen proceedings to consider (1) "(a) trial counsel's failure to contact McClain as a potential alibi witness and (b) alleged prosecutorial misconduct during the post-conviction proceedings," and (2) "(a) trial counsel's alleged failure to cross examine [the State's] expert on the reliability of the cell tower location evidence and (b) potential prosecutorial misconduct during trial." The court stated that reopening proceedings with respect to these issues comported with this Court's remand order and would be in the interests of justice under *Gray v. State*, 388 Md. 366 (2005). Statement of Reasons and Order of the Court (Nov. 6, 2015). After consulting with the parties, the post-conviction court scheduled hearings for February 2016.

C. Reopened Post-Conviction Hearing

At the five-day hearing, which began on February 3, 2016 and concluded on February 9, 2016, Syed and the State presented a total of nine witnesses,[5] several affidavits,[6] and numerous documents.[7]

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[5] Including his cellphone expert, Gerald Grant, Syed called seven of the witnesses. The State called Agent Fitzgerald on the cellphone issue, as well as a private security officer who worked at the Woodlawn public library in January 1999 (when Hae Min Lee was murdered) and was, according to a billing record found in the defense file, interviewed three days after Syed was arrested by a private investigator working with Syed's original attorneys. *See* Attachment 3 (A-374).

[6] In addition to prior affidavits such as McClain's, Syed submitted new affidavits from William Kanwisher, Abe Waranowitz, and Ju'uan Gordon. The State entered an affidavit from Special Agent Richard Fennern (FBI), with whom Special Agent Fitzgerald had consulted in relation to this case.

[7] At the February 2016 hearing, the State entered into evidence two compilations of documents, numbered A-0001 to A-1132 and B-0001 to B-0473, which were explained in correspondence dated February 2, 2016. *See* Attachment 4. For consistency, the same references will be used here.

It should be noted that the "A" binder contained documents from the files of trial counsel and her team. In the course of the original post-conviction hearing in 2010, the State requested, but was

On the issue of how to interpret the fax cover sheet, Syed and the State presented testimony from dueling cellphone experts, Gerald Grant and FBI Special Agent Chad Fitzgerald (who had last testified opposite one another in federal court in the Boston marathon bombing case). The experts offered conflicting views on whether a disclaimer found on a fax cover sheet was relevant to the evidence entered at Syed's trial and the conclusions presented to the jury. Both experts agreed, however, that even though Gutierrez was one of the first to confront this new form of forensic evidence, defense attorneys have continued to use the very same strategies and lines of cross examination in state and federal courtrooms across the country that Gutierrez pursued in 2000. Both experts were also unaware of any attorney in any case in the past 20 years who had used the line of attack that Syed today claims is constitutionally imperative.[8]

D. Post-Conviction Court's Decision

On June 30, 2016, the post-conviction court issued a memorandum opinion in support of its ruling. *See* Mem. Op. II. As it explains, the court declined Syed's request for relief regarding his counsel's failure to contact McClain; rejected Syed's assertion that the State had "violated his right to a fair trial and due process by failing to disclose a disclaimer related to the reliability of the cell tower location evidence, in violation of *Brady v. Maryland*"; but held that Syed was entitled to post-conviction relief on his claim that Gutierrez was ineffective when she failed to cross examine the State's expert regarding the reliability of cell tower location evidence. Mem. Op. II at 57 (June 30, 2016). The court

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denied, an opportunity to review the defense file. Prior to the February 2016 hearing, the State filed a consent motion, reiterating its earlier position that Syed had waived attorney-client privilege and adding that Syed had widely shared documents from his attorney's file. *See* Attachment 5. The Court granted the consent motion, and on January 15, 2016, defense counsel provided to the State what it represented was the complete electronic and paper files of Gutierrez and her team.

At the hearing, Syed initially objected to the admission of the "A" binder on the ground that it contained reorganized and selected portions of the full file, so the State then moved into evidence a compact disc with the entire file as provided by defense counsel a few weeks earlier.

[8] The State has not yet obtained transcripts of the February 2016 post-conviction hearing. Should this Court agree to grant the State's application for leave to appeal, the State will provide in its merits brief record citations for all assertions referenced in this Application.

found that the cellphone evidence that was the subject of Syed's supplemental filing had been disclosed by the State in pretrial discovery, *id.* at 34, and had been in the possession of trial counsel "at least since the time of trial." *Id.* at 30. Thus, Syed's *Brady* claim was at once invalid and waived, as Syed had a chance to raise the claim in prior proceedings but failed to do so. *Id.* at 57-58.

Nonetheless, the court credited Syed's Sixth Amendment challenge predicated on the same cell site evidence, finding that this claim, unlike the *Brady* claim, had not been waived, and that Syed satisfied both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984): deficient performance and prejudice. Mem. Op. II at 37 (June 30, 2016). In reaching its decision, the post-conviction court first considered the threshold obstacle of waiver and concluded that "[a]lthough [Syed] had not raised this issue in a prior proceeding," this particular claim, framed as ineffective assistance of counsel, had not been waived on the theory that the "intelligent and knowing" waiver standard of Section 7-106 of the UPPA applied. According to the court, because *inter alia* Syed did not even have a high school diploma, he was not in a position to intelligently and knowingly waive an ineffective counsel claim that would have required him to understand "the intricacies of cellular network design and the legal ramifications of trial counsel's failure to challenge the evidence." *Id.* at 36, 58; *see also id.* at 34-37. Next, with respect to the first step of *Strickland*, the court concluded that Gutierrez's performance was defective "when she failed to pay close attention to detail while reviewing the documents obtained through pre-trial discovery and when she failed to cross-examine the State's cell tower expert regarding the disclaimer" — a disclaimer that, according to the court, "directly contradicted" "[t]he State's theory of relying on incoming calls to determine the general location of [Syed's] cell phone." *Id.* at 40, 42-43, 46. Finally, the court ruled that counsel's failure to challenge Waranowitz on the reliability of incoming calls based on information in the fax cover sheet prejudiced Syed because that attack on cross examination "could have undermined the foundation of the State's case," and as a result "there is a substantial possibility that the result of the trial was fundamentally unreliable." *Id.* at 50, 56.

On July 21, 2016, the State notified the post-conviction court and defense counsel of its intent to file an application for leave to appeal and requested, pursuant to Section 7-109(b) of the Criminal Procedure Article, a stay of the court's order granting post-conviction relief. See Attachment 6.

III. Factual Background

A. The Evidence at Trial

For consistency and ease of reference, the State directs this Court to the "Statement of Facts" in its opening brief. See Attachment 7 at 2-10. An introduction to that factual recitation outlined the overwhelming evidence of guilt presented by the prosecution:

> [T]he State's case included, *inter alia*, the testimony of Wilds who helped Syed bury the victim and later led police to the victim's car; witnesses who spoke of Syed's possessive behavior toward Lee, his ploy to get a ride from Lee after school on the day she disappeared, and his presence with Wilds that afternoon and evening; toll records and tower location data corresponding to Syed's cell phone, which corroborated the testimony of Wilds and other witnesses, and placed Syed at Leakin Park that night a short distance from where Lee's corpse was unearthed; a map page to Leakin Park, ripped from a map book with Syed's palm print on the back cover, both left in Lee's abandoned car; the diary of Hae Min Lee recounting the decline of her relationship with Syed and the bloom of her love for Cliendinst; a letter seized from Syed's bedroom, written by Lee imploring Syed to respect her wishes and move on, with the ominous words "I'm going to kill" written in a separate script on the back side of the note; as well as Syed's peculiar conduct after the murder and his incongruous statements to police.

Appellee's Brief at 3 (citations omitted).

B. Evidence Concerning Syed's Cellphone Records

Because this Application for Leave to Appeal centers on the issue of whether Syed's trial counsel deficiently challenged the State's cellphone evidence, the State herein provides details concerning the discovery, defense engagement, trial presentation, and post-conviction testimony related to the cellphone evidence adduced by the prosecution.[9]

[9] Documents related to this section (III.B.), which were entered into the post-conviction record during the February 2016 hearing, are collectively included as Attachment 8.

1. Pretrial Disclosure of Cellphone Evidence

The State communicated to Gutierrez its intent to introduce Syed's cellular telephone records as business records on September 3, 1999, stating that the records "are available for inspection upon reasonable request." (A-0023; A-0272). Later that month, the State advised that it expected "to have a witness from AT&T Wireless" but that the company "[had] not named its documents representative." (A-0278). On October 8, 1999, the State disclosed its intent to call Abe Waranowitz as an expert witness, (A-0051; A-0279), and in a separate disclosure the same day provided defense counsel with a summary of an oral report from Waranowitz, (A-280).

Gutierrez's correspondence concerning the cellphone-related materials after the State's disclosures verifies her receipt of and detailed engagement with this body of evidence. For example, on October 20, 1999 (less than two weeks after the State's initial disclosures of Waranowitz), Gutierrez sent to the State a 3-page single-spaced letter noting deficits in the State's production and requesting additional information including, for example, "complete definitions of terms in Mr. Waranowitz's statement as reported in your disclosure, including the terms 'triggers', 'edges', 'cell sites', 'signal strengths', 'fluctuations' and 'mound'." (A-0064-0066). The letter also indicates that Gutierrez's team had been in direct contact with AT&T Wireless, stating that, "[a]fter expending much time and energy," the defense was able to contact Waranowitz's supervisor; Gutierrez also complained that she had not received materials to which she believed she was entitled. Two days later, on October 22, 1999, Gutierrez again wrote to prosecutors requesting an opportunity to view "all evidence collected in connection with this case." (A-0071). An internal defense memorandum dated October 28, 1999, (A-0208), as well as further correspondence in November 1999, (A-0077, A-0086, A-0088, A-0089), from Gutierrez to the State confirm that she and members of her team met with police and

prosecutors on multiple occasions, including no less than two visits to the evidence control unit along with a meeting on October 28, 1999, when Gutierrez had an opportunity to review the State's file.[10]

Also contained in Gutierrez's file is a 4-page table, dated November 2, 1999, compiling and commenting on records of Syed's cellphone use on January 13, 1999; each page is marked "Attorney/Client Privilege & Work Product." The document, which lists call times, dialed numbers, possible names associated with each number, call duration, cell site codes and corresponding locations, synthesizes information from Syed's cellphone records and the State's disclosure relating to Waranowitz's oral statement, demonstrating that Gutierrez and her team were actively scrutinizing this evidence. (A-0403-0406).

In addition to the records provided by the State, Gutierrez apparently had also separately obtained Syed's cellphone billing records, (A-0460-A-0478), and her file contained a handwritten list of the dialed numbers appearing on Syed's billing records, along with what appears to be a manual tabulation of how many times each number was called and, in some instances, a name associated with that number, (A-0479-A-0486). For example, the name "Hae" is listed next to "410-602-5244" with a tally of three calls in the far right column. (A-0479). There is also indication in the defense file that Gutierrez's private detective (Drew Davis) had, independent of the State, contacted AT&T and was told that he could obtain with a subpoena "information as to which cellular phone tower Mr. Syed's cell phone was in during several calls that were placed on the requested dates." (A-0437). Finally, in the middle of the second trial,[11] after Gutierrez claimed she had not received certain cellphone-related

[10] Providing the defense an opportunity to review the prosecution's file was consistent with the State's policy at the time, which was expressly stated to defense counsel on page 2 of the State's initial disclosure, which was filed on July 1, 1999. *See* Attachment 9.

[11] A mistrial was declared before Waranowitz testified at the first trial. There was, however, testimony concerning the phone records before the mistrial, and Gutierrez remained focused on this evidence even after the first trial ended and before the second one commenced. On January 13, 2000, for example, Gutierrez requested from the State a copy of "a chart depicting cellular phone records for January 13, 1999 . . . as marked by the witnesses" in the first trial. (A-0112).

materials, Waranowitz relayed to the Court through the prosecutor that he had provided cellphone-related materials directly to Gutierrez by fax and FedEx; the prosecutor said:

> What [Waranowitz] handed me is first of all, a Federal Express receipt or air bill rather which is his sender's copy for the — when he mailed the large overlay map to Ms. Gutierrez. That was mailed on October 8, 1999. The second thing is a copy of a fax that he sent to Ms. Gutierrez on December 7th, it's a nine page fax. Page one is his resume, page two are a list of seven cell sites with the site name, addresses, the latitude and longitude for those sites. Page three are the error call report from that date. Page four is a copy of what we entered as State's . . . Forty-five. The next one is a copy of State's 44 and then there's four pages of cell sites along with their frequency plan which is technical data relating to the cell sites. So, Ms. Gutierrez not only had an opportunity to observe and copy this stuff in our office, she actually had the materials faxed to her.

(T. 2/9/00 at 4-5).[12]

2. Presentation of Cellphone Evidence at Trial

During trial, a number of witnesses told the jury about calls to and from Syed on the day of the murder, emphasizing different facets of Syed's cellphone records — which yielded information about the (1) time, (2) duration, (3) sequence, (4) dialed numbers, and (5) cell site location associated with calls appearing on Syed's cellphone records for January 13, 1999. Prior to any testimony concerning Syed's cellphone records, the prosecution entered those records into evidence, by stipulation, as certified business records, State's Exhibit 31, and produced an enlargement of the records that itself would later be admitted into evidence once an empty column was completed as witnesses identified numbers with which they were familiar, State's Exhibit 34. *See* Attachment 11.

The role of the witnesses with respect to the cellphone records varied. For example, two witnesses — Yasser Ali and Crystal Myers — simply verified they had spoken with Syed on the night of the murder, and confirmed their numbers on Exhibit 34. Both were close friends of Syed, and their testimony, corroborated by the cellphone records, refuted the possibility that the cellphone was in someone else's possession at the time of their calls. For her part, Myers told the jury she had left a

[12] A copy of the airbill confirming the FedEx from Waranowitz to Gutierrez on October 8, 1999, was left in the Court file and is included as Attachment 10.

message on Syed's cellphone on January 13, 1999, when she first learned Hae Min Lee was missing, and that she and Syed eventually spoke, she believed twice that night, "sometime after nine o'clock." (T. 1/28/00 at 210-212). She identified her home phone number on Exhibit 34 on two entries (9:03 p.m. and 9:10 p.m.), which the prosecutor then labeled "Myers residence." (T. 1/28/00 at 211). Ali, who described Syed as his best friend, also confirmed his number on two entries that night (6:59 p.m. and 10:02 p.m.), but had no specific recollection of either call. (T. 2/3/00 at 79-81).

Two other witnesses — Nisha Tanna and Kristi Vincent — placed Syed and Wilds together on the day of the murder, and their testimony is similarly corroborated by Syed's cellphone records (as well as by the trial testimony of Wilds). Tanna remembered receiving a call from Syed, who after saying hello placed "his friend Jay on the line." (T. 1/28/00 at 189-190). She testified that she resided in Silver Spring and confirmed that her home phone number (marked "Tanna residence" by the prosecutor on Exhibit 34) corresponded to three entries on January 13, 1999 (3:32 p.m., 9:01 p.m., and 9:57 p.m.). (T. 1/28/00 at 185-189). Vincent explained to the jury that Syed and Wilds came to her home that evening and were watching television around 6 p.m. when she recalled Syed receiving a call on his cellphone and then leaving with Wilds. (T. 2/16/00 at 209, 213-215). Consistent with this testimony, Syed's cellphone records listed three incoming calls between 6:00 p.m. and 6:30 p.m. on January 13, 1999. State's Exhibit 34.

With respect to Syed's cellphone, Wilds stated that he received a call from Syed the night of January 12, 1999, and then another the morning of January 13, 1999. (T. 2/4/00 at 119, 122). He confirmed his home phone number on which he received these calls, and the cellphone records reflect calls to Wilds at 9:18 p.m. on January 12th, State's Exhibit 31, as well as an entry on Exhibit 34 ("Wild's residence") at 10:45 a.m. on the morning of January 13th. (T. 2/4/00 at 112).

Wilds also testified about a series of calls he and Syed made and received on the day of Hae Min Lee's murder. He explained that after Syed gave him his car and cellphone that morning, Wilds

called his friend, Jennifer Pusateri, and spent time with her that afternoon (T. 2/4/00 at 130); consistent with that testimony, Syed's cellphone records reflect calls to the "Pusateri residence" at 12:07 p.m. and 12:41 p.m. State's Exhibit 34. Wilds also told the jury that during the time he was in possession of Syed's cellphone that afternoon, he received calls from Syed, one telling him to pick him up "at like 3:45 or something like that," and then a later call directing Wilds to "come and get him from Best Buy." (T. 2/4/00 at 130); Syed's cellphone records provide corroboration for this testimony insofar as there are entries of incoming calls that afternoon at 12:43 p.m., 2:36 p.m., and 3:15 p.m.[13]

In addition, Wilds provided testimony about a number of calls they made and received after he had collected Syed and been shown the victim's body in the trunk of her car. He reported, for example, that he made calls to Pusateri and Patrick Furlow, identifying their numbers as well as the home number of another friend, Phil Mendez. (T. 2/4/00 at 137-140). Wilds also told the jury about a call Syed made to "a young lady . . . in Silver Spring" where, after Syed spoke to her, Wilds got on the phone and said, "hello, my name is Jay." (T. 2/4/00 at 136).

Wilds testified that later that evening, while he and Syed were at the apartment of his friend, Kristi Vincent, he remembered Syed receiving two calls, one from Lee's family and another from a police officer, both asking Syed about his missing ex-girlfriend. (T. 2/4/00 at 145). Wilds said they left the apartment as Syed was on the second of those calls. (T. 2/4/00 at 145).

Wilds also told the jury that, afterwards, he called Pusateri's pager because he was going to be late for their plan to meet up at 7 p.m. (T. 2/4/00 at 149). According to Wilds, it was while he and

[13] To be sure, in the context of the voluminous evidence presented at Syed's trial, there are no doubt gaps and discrepancies that are amplified, or at least remain unresolved, by Syed's cellphone records. As the State said in its opening brief to this Court, "witnesses sometimes presented testimony that did not fit neatly into the State's timeline." Appellee's Brief at 25. This summary of cellphone-related evidence does not purport to identify or resolve these tensions; it is meant to illustrate the varied ways in which Syed's cellphone evidence was used by the State, which included references to cell tower locations that is the subject of the State's request to appeal, but was hardly limited to that facet of the records.

Syed were in Leakin Park digging a grave for the victim that Pusateri apparently called back; Syed answered and told her that Wilds was busy and hung up the phone. (T. 2/4/00 at 151). Wilds added that Syed received a second call around the same time and heard Syed alternate between English and what he believed was Arabic. (T. 2/4/00 at 152-153). Consistent with Wilds' recollection, Syed's cellphone records list a call to Pusateri's pager number at 7:00 p.m., followed by two incoming calls at 7:09 p.m. and 7:16 p.m. State's Exhibit 34. Also consistent with Syed's phone records is Wilds' testimony that he called Pusateri's pager again after they left Leakin Park and before he went home. (T. 2/4/00 at 155-156). The subsequent entries on Syed's cellphone records that evening — outgoing calls to Nisha Tanna, Krista Myers, and Yasser Ali — all correspond to friends of Syed's.

Statements by other witnesses about calls to Syed further reinforce the veracity of specific details supplied by Wilds to the jury. In fact, for example, the first witness to discuss Syed's phone records was the victim's brother, Young Lee, who told the jury that, after he first contacted police around 6 p.m., he found what proved to be Syed's number in his sister's diary and called him the evening Hae disappeared. (T. 1/28/00 at 27-28).[14] Officer Scott Adcock also testified that he received Syed's cellphone number from the victim's brother, called Syed "between the times of 6:00 o'clock and 6:30 in the evening" on January 13, 1999, and that the conversation lasted three to four minutes. (T. 1/31/00 at 7-9). Officer Adcock testified that an entry on Exhibit 34 referring to an incoming call at 6:24 p.m. that was four minutes and fifteen seconds long was consistent with the call he made to Syed. Gutierrez nonetheless successfully objected to the prosecution's request to designate that call "Police Officer Adcock?" (T. 1/31/00 at 9, 11). The calls to Syed about which Lee and Officer Adcock testified corroborated Wilds' testimony that he overheard Syed receive calls from Hae's family

[14] On Exhibit 34, Lee identified his family's home number — which the prosecutor then labeled "Lee residence" — a number Syed often called and had called several times the night before Hae Min Lee went missing but never again. (T. 1/28/00 at 29).

and a police officer while they were at Vincent's apartment, which in turn was corroborated by entries of three incoming calls between 6:00 p.m. and 6:30 p.m. that evening.

Like other witnesses, Pusateri's testimony at trial also corroborated significant facets of the State's case and, in turn, was corroborated by the time, sequence, and dialed numbers listed on Syed's cellphone records. Pusateri told the jury that Wilds had a cellphone with him, which was unusual, when he came to her home on the afternoon of January 13, 1999. (T. 2/15/00 at 186-187). She and Wilds had planned to meet later, but after Wilds left she received a confusing message on her pager from Wilds. (T. 2/15/00 at 187-188). The first outgoing call to Pusateri's pager is a 7:00 p.m. entry on Syed's records. State's Exhibit 34. She further testified that, when she returned the call, having retrieved the number from caller ID, a person answered the phone and said Jay was busy and would call her back. (T. 2/15/00 at 188-190). According to Pusateri, she later received another page from Wilds asking her to pick him up at the Westview Mall, where she saw him exit a car driven by Syed. (T. 2/15/00 at 191-194). Pusateri stated that, once she and Wilds were in her car, he confided with her that Syed had killed Hae Min Lee, that he had seen the victim's body in the trunk of a car, and that he needed to wipe fingerprints from the shovels. (T. 2/15/00 at 195-196). Pusateri added that Wilds no longer had a phone after he left Syed. (T. 2/15/00 at 196-197). As this Court noted in its recitation of the facts in its decision affirming Syed's conviction on direct appeal, "Jennifer Pusiteri's [sic] testimony essentially corroborated Wilds' version of the events that transpired on January 13." *Syed v. State*, No. 923, slip op. at at 5 n.3 (March 19, 2003).

In sum, as the State said in its opening brief, "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 also summarized in its opening brief the testimony of the prosecution's cellphone expert at Syed's trial:

> 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).

Appellee's Brief at 9.

3. Gutierrez's Challenge of State's Cellphone Evidence

Consistent with her focused attention on the cellphone evidence in advance of trial, Gutierrez also vigorously challenged the State's expert witness with a bevy of objections and requests for limiting instructions during direct examination, followed by a broad-gauged attack on cross. Six features of Gutierrez's handling of Waranowitz are illustrative. First, just as she had complained in preparation for trial of insufficient disclosure of cellphone-related materials, she raised and renewed her objections at trial, stating that the prosecution had not adequately disclosed Waranowitz's qualifications, tests, and opinions. (T. 2/8/00 at 12-14). She later lodged a continuing objection after lengthy argument on whether she had received maps prepared by Waranowitz. (T. 2/8/00 at 82). Second, Gutierrez prompted Waranowitz to acknowledge that actual cell site coverage falls short of ideals and that the network is flawed based upon his handling of customer complaints him adjusting tower locations to optimize performance. (T. 2/9/00 at 45-53, 80-82).

Third, she repeatedly questioned the nature, basis, and scope of the witness's expertise, noting that there was no precedent for recognizing forensic expertise in this nascent field: "There's been no establishment there is such an expertise or is such a field as cell phone wireless much less that this witness is a reputed expert." (T. 2/8/00 at 11, 40). Pressed by Gutierrez and the trial judge, the State narrowed the scope of the witness's expertise to the AT&T network in the Baltimore region, to which

Gutierrez renewed her objection after additional voir dire. (T. 2/8/00 at 31). As Syed noted in his original post-conviction petition when he accused Warren Brown, his appellate counsel, of ineffective assistance of counsel, Gutierrez ultimately succeeded in limiting the scope of Waranowitz's expertise to testimony about equipment with which he had personal experience, *i.e.*, AT&T towers and Erickson phones, and she noted a continuing objection on the ground that his testimony exceeded the scope of that expertise. (T. 2/9/00, 31-32); Petition for Post-Conviction Relief at 19 (May 28, 2010).

Fourth, she undermined the expert's conclusions, noting he had conducted his tests using a different kind of cellphone than Syed's, which began with a motion in limine to preclude testimony about Syed's cellphone and forced the prosecution to lay additional foundation. (T. 2/8/00 at 35-38). Fifth, Gutierrez compelled the State's expert to admit the limits of cell site records and his tests insofar as they could not indicate where a cellphone actually was, only what tower a call would have triggered if placed from within an area or from a location on the day the test was performed. (T. 2/9/00 at 142, 145-146, 150-151). Waranowitz also conceded he could not tell who physically possessed a phone from cellphone billing records. (T. 2/9/00 at 185).

Finally, Gutierrez bombarded Waranowitz on cross with questions about the differences between the circumstances under which he performed his tests and those that existed when Syed used his cellphone on January 13, 1999, compelling the State's expert to acknowledge using a different phone than Syed's, under different seasonal and weather conditions, at different times on different days, and in a different order than Syed's records indicated. (T. 2/9/00 at 94-96, 119, 138, 148). Waranowitz also conceded on cross that Nokia and Erickson phones perform somewhat differently and that he had not tested or even seen Syed's actual phone. (T. 2/9/00 at 93-96, 143-144, 148).

Gutierrez's approach throughout the expert's testimony, on direct and cross examination, reflected serious and thorough engagement with a novel forensic field. She told the court on the second day of Waranowitz's testimony that she had gone back and reviewed the tape of direct

examination before beginning her cross. (T. 2/9/00 at 14). And, at one point, she advised the court that she would need more time than she originally anticipated, saying, "[i]t's just because of this witness I know that I'm not rushing it." (T. 2/9/00 at 105).

3. Conflicting Expert Interpretations at Post-Conviction Hearing

With respect to Syed's claim that Gutierrez should have used the disclaimer on the AT&T fax cover sheets to cross examine the prosecution's expert more effectively, Syed and the State each called a cellphone expert to provide their assessment and interpretation of the meaning and significance of the disclaimer. Syed also entered a second affidavit executed by Waranowitz on February 8, 2016. Exhibit PC2-66. Little consensus emerged.

The State's expert witness, Special Agent Chad Fitzgerald (FBI), explained that he performed celltower analyses in 1999, that he was previously familiar with both kinds of reports, that he had consulted prior to the hearing with other experts and with AT&T employees who worked in the field in 1999 to confirm his interpretation of the legend, and that his conclusion was that the disclaimer applied only to "switch" information in the "Location1" column and not to cell site data. To support his expert assessment, Agent Fitzgerald noted that contained in the legend on the fax cover sheet were references to a "Type" column, a "feature" column, specified type codes (*e.g.*, "CFO," "Inc," "Lcl," "Sp"), and "blacked out areas," all of which are present on the full report that includes the relevant "Location1" column, and none of which appear on the condensed report that shows cell sites, but not the location or switch information to which disclaimer solely applies. The federal agent also supplied the underlying technical reasons for why switch information is not always reliable, even today, for incoming calls, distinguishing that information from cell site codes. Agent Fitzgerald stated that he had never heard of a defense attorney, at any time in any court, cross examine a cellphone expert using the line of attack that Syed proposed. Conversely, he indicated that the objections and criticisms Gutierrez raised in 1999 were still in circulation today.

In addition, Agent Fitzgerald testified that he had reviewed Syed's cellphone records and the testimony Waranowitz gave at trial and was in a position to verify, based on his independent review and own expertise, that — with one exception involving Waranowitz's interpretation of a call to voicemail — the analysis by the State's expert was sound and accurate and that Waranowitz's conclusions with respect to which cell towers were triggered by Syed's cellphone on January 13, 1999, were correct. Moreover, because Waranowitz's tests and testimony were based on cell site information on the condensed report (and not data from the "Location1" column of the full activity report), Agent Fitzgerald stated that his independent verification of the accuracy and integrity of the expert's analysis and conclusions was not affected at all by the inapplicable disclaimer.

Syed's witness, Gerald Grant, who has also been previously qualified as an expert in other cases, was not engaged in celltower analyses in 1999 and had not spoken to anyone, besides Abe Waranowitz, about the proper interpretation of the AT&T disclaimer at issue. Grant opined that because Exhibit 31 (*i.e.*, the three pages of Syed's cellphone records for January 12-14, 1999, admitted by stipulation as a certified business record), qualified as a "subscriber activity report," the disclaimer about the reliability of location information undermined the accuracy of Waranowitz's testimony about incoming calls. Grant reached this conclusion by focusing on the presence of the term "subscriber activity" on the last page of records provided by AT&T. He reasoned that, because the cell site codes on Exhibit 31, if coupled with the cell site index supplied by AT&T, could yield location information, the warning about location status on the fax cover sheet applied to the records relied upon by the State at trial. He told the post-conviction court that he would not ignore that warning, that he would seek additional information, and that relying on cell site codes would be an "error" if presented "without explanation."

Grant confirmed the sequence of transmissions back and forth between police and AT&T and agreed that, although various sets of records were faxed, each transmission from AT&T bore the

same boilerplate cover sheet. He also agreed that Exhibit 31 did not contain many of the columns and markers referenced in the instructions and legend contained on the fax cover sheet. In addition, Grant acknowledged that, outside his conversations with Waranowitz, he did not consult before testifying with any experts or employees from AT&T, even though Waranowitz advised him that he was unfamiliar with billing records. Grant specifically conceded he did not solicit an explanation for the cautionary language from anyone who worked at AT&T now or in 1999, and that he himself was not engaged in cellphone forensics or cell site analysis at the time the records in question were developed, used, and interpreted. Finally, Grant stated he could not cite for counsel or the court an example of where any defense attorney had ever pursued a line of attack based upon the kind of disclaimer found on the fax cover sheet from AT&T.

Also before the post-conviction court were two affidavits by Waranowitz. He stated in his October 5, 2015, affidavit that he viewed Exhibit 31 for the first time just before he testified in Syed's trial. "Since this appeared to have ordinary AT&T cell site data on it, I accepted it as it was presented." He also said that as an RF engineer "he had never seen AT&T Wireless billing or legal documents before" and that if he had known that it was AT&T Wireless's legal policy for incoming calls to not be considered reliable information in determining cell phone location information, he would have inquired further within his organization and attempted to learn why this disclaimer was issued. He also added that Urick had not told him that in relation to Exhibit 31, AT&T had previously issued a disclaimer that outgoing calls only are reliable for location status and any incoming calls would not be considered reliable for information for location. Finally, he stated he would not have affirmed the interpretation of a phone's possible geographical location until he could ascertain the reason and details for the disclaimer. Exhibit PC2-19.

Waranowitz provided a second affidavit in the middle of the recent proceedings. While he reaffirmed his first affidavit, he added that, after reviewing the full subscriber activity report as well as

Exhibit 31, he found "the fax cover sheet legend ambiguous, specifically the definition of 'location and which incoming calls are reliable." He added: "However, I interpret this legend to most likely apply to both PC2-15 [the condensed report] and Exhibit B pp. 0360-0378 [the full subscriber activity report], and I interpret 'location status' to most likely apply to cell tower locations (which can be used to estimate a cell phone's location)." Exhibit PC2-66.

IV. Argument

A. Abuse of Discretion to Reopen

The post-conviction court abused its discretion by reopening Syed's post-conviction proceeding to allow Syed to raise an argument made for the first time in his untimely supplemental filing—that his trial counsel was ineffective for failing to act on a supposed vulnerability contained in a disclaimer on the fax cover sheets supplied by AT&T in this case. In allowing the post-conviction proceedings to be reopened on this additional theory, the circuit court exceeded the scope of this Court's narrow remand order and violated the "interests of justice" standard as that statutory requirement has been interpreted by Maryland case law.

When this Court authorized a limited remand to provide Syed the opportunity to file a motion to reopen, it was based on the unusual circumstance that a witness, whom Syed alleged provided him an alibi, had sworn an affidavit stating not only that she recalled seeing Syed on the afternoon of the murder, but that she had been unavailable at the post-conviction proceeding due to alleged misconduct by a state prosecutor. Order at 2 (May 18, 2015). The order issued by this Court explained that Syed could file a motion to reopen the post-conviction proceeding "in light of Ms. McClain's January 13, 2015, affidavit, which has not heretofore been reviewed or considered by the circuit court." *Id.* at 4. The remand would give the parties a chance to supplement the record "with relevant documents and even testimony pertinent to the issues *raised by this appeal*." *Id.* (emphasis added).

The order's subsequent direction that the circuit court, if it granted Syed's motion to reopen, could "in its discretion, conduct any further proceedings it deems appropriate," must be interpreted in light of these circumstances. *See* Order at 4 (May 18, 2015). Granting the circuit court the authority to "conduct any further proceedings it deems appropriate" was not an invitation to reopen the post-conviction proceeding altogether. Rather, it provided the circuit court an opportunity to conduct whatever proceedings would be appropriate to consider evidence related to McClain's affidavit, which had not yet been made part of the record. *See id.* at 4. By misinterpreting the order of the Court of Special Appeals to allow the reopening of the post-conviction proceeding on a fully independent claim that had never before been raised in any prior proceeding, the circuit court abused the discretion assigned to it by the Court of Special Appeals.[15]

Further, it was an abuse of discretion for the circuit court to conclude that reopening the post-conviction proceeding to allow Syed to raise this new issue was "in the interests of justice." The circuit court's interpretation of that language is overly broad and out-of-step with the decisions of the Maryland appellate courts interpreting the UPPA. As the Court of Special Appeals explained in *Gray v. State*, 158 Md. App. 635 (2004), though the phrase "in the interests of justice" as used in Crim. Proc. § 7-104 has not been defined, it cannot be interpreted, as the post-conviction court did here, to align precisely with the discretion of circuit courts in granting a motion for new trial, the grounds for which are "virtually open-ended." *Id.* at 646 n.3 (internal quotation marks omitted). Rather, "[i]n the context of reopening a postconviction proceeding, whatever latitude that may be assigned to the exercise of

[15] In addition, the circuit court abused its discretion by reopening the post-conviction proceeding on a ground that was untimely filed. The order of the Court of Special Appeals directed Syed to file his motion to reopen within 45 days of the order. Order at 5 (May 18, 2015). Syed filed a motion to reopen on June 30, 2015, which argued only that Syed's trial counsel was ineffective for failing to investigate and present McClain as an alibi witness. Syed's novel claim regarding the significance of the boilerplate language in the AT&T fax cover sheets did not appear until a supplement to his motion to reopen, filed on August 24, 2015. As Syed sought to introduce this new claim in a proceeding limited and directed by order of the Court of Special Appeals, his failure to comply with the time limits set forth in that order should have been fatal to his claim.

judicial discretion 'in the interests of justice' would be somewhat circumscribed by the statutory constraints of the UPPA and the types of claims to which it affords a remedy." *Id.*

In other words, the language of § 7-104 allowing the reopening of a post-conviction proceeding if it is "in the interests of justice" must be interpreted in the context of the other provisions of the UPPA, provisions that permit a petitioner to file only one petition for post-conviction relief,[16] Crim Proc. § 7-103(a), and "important waiver provisions," *Arrington v. State*, 411 Md. 524, 548 (2009), which require that any claim that could have been raised by the petitioner at a prior proceeding, but was not raised, is presumed to have been waived. Crim. Proc. § 7-106(b)(2). These provisions serve the purpose of "achiev[ing] finality in the criminal adjudicative process, without unduly interfering with a defendant's right to fully present his case before a court." *Arrington*, 411 Md. at 548. When read in concert with these provisions, § 7-104's statement that a post-conviction proceeding may be reopened "in the interests of justice" cannot be transformed into a backdoor through which a petitioner is given unlimited bites at the apple. But that is just the regime that the post-conviction court created in this case.

In his supplement to his motion to reopen, Syed raised, for the first time, arguments regarding his trial counsel's treatment of cell site evidence that he characterized as "separate claims of ineffective assistance of counsel, prosecutorial misconduct, and a denial of Syed's due process." Pet'r's Supp. to Mot. to Re-Open Post-Conviction Proceedings at 2 (Aug. 24, 2015). The circuit court reopened the proceeding, in part, to allow Syed to argue ineffective assistance of trial counsel for her alleged failure to cross-examine the State's cellphone expert. Mem. Op. II at 37 n.17 (June 30, 2016). As discussed in greater detail in Part IV.B. below, this argument was waived; Syed presented no evidence in any of

[16] When the UPPA was enacted in 1958, it allowed a petitioner to file an unlimited number of post-conviction petitions. *Arrington*, 411 Md. at 548. In the intervening years, the General Assembly reduced that number from unlimited to two, and then from two to one, with an opportunity to reopen. *Id.*; *Gray*, 158 Md. App. at 645-46.

his briefing on his motion to reopen to rebut the UPPA's presumption that he "intelligently and knowingly" failed to raise this claim in a prior proceeding, although he conceded that the documentary evidence needed to raise the claim had been available to him and his counsel since the time of trial. *See* Pet'r's Supp. to Mot. to Re-Open Post-Conviction Proceedings at 10 (Aug. 24, 2015). If a petitioner filing a motion to reopen does not (and cannot) make at least a prima facie showing of an answer to rebut the UPPA's presumption of waiver of a claim not previously raised, it is an abuse of discretion for the circuit court to reopen the proceeding on that claim.

Moreover, the specific reasons given by the circuit court as the basis for its decision to reopen on this novel claim have not found purchase with the Court of Appeals. The circuit court defended its decision to reopen with citation to the Court of Appeals' decision in *Gray v. State*, 388 Md. 366 (2005), but that case does not, as the circuit court concluded, stand for the proposition that "claims of ineffective assistance of counsel and potential prosecutorial misconduct during trial, . . . are grounds for reopening the post-conviction proceedings under Maryland law." Statement of Reasons and Order of the Court at 4 (Nov. 6, 2015). Rather, the grounds for reopening offered as examples in *Gray* were limited to "ineffective assistance of *postconviction* counsel" or "a change made in the law that could be applied retroactively." 388 Md. at 382 n.7 (emphasis added). It is not surprising that the Court of Appeals referenced ineffective assistance of *post-conviction* counsel as a ground for reopening given that ineffective assistance of trial counsel typically could be raised in an initial post-conviction proceeding, as it was in this case.[17] Indeed, any alleged failure of trial counsel, such as, in this case, the failure to explore a particular strand of cross-examination, could later be framed by a petitioner as "ineffective

[17] Syed has not alleged ineffective assistance of post-conviction counsel. Nor has he argued "a change made in the law that could be applied retroactively" to his post-conviction proceeding. While he did make an argument based on new Court of Appeals case law in his supplement to his motion to reopen to bolster his ineffective assistance claim, the case he cited, *Kulbicki v. State*, 440 Md. 33 (2014), was subsequently summarily reversed by a per curiam opinion of the Supreme Court. *See Maryland v. Kulbicki*, 577 U.S. ___ (2015), 136 S. Ct. 2 (2015).

assistance of counsel" of a constitutional dimension. The UPPA entrusts post-conviction courts to act as gatekeepers to ensure that such claims that were previously available to a petitioner do not serve as opportunities to continuously reopen a post-conviction proceeding. In this case, the circuit court's decision to reopen the post-conviction proceeding to allow Syed to raise a new claim based on a sub-species of ineffective assistance of trial counsel – a claim that could have been presented but was not in his previously concluded post-conviction proceeding – was an abuse of discretion.

B. Ineffective Assistance of Counsel Argument Has Been Waived

In concluding, *sua sponte*, that Syed did not waive his right to claim that his trial counsel was ineffective for failing to use the fax cover sheet disclaimer to cross examine the State's cellphone expert about the reliability of the cell site evidence, the post-conviction court seized on a novel solution to Syed's waiver problem. The record is clear that Syed never raised this species of ineffective assistance of counsel in any of his multiple prior proceedings, Mem. Op. II at 34 (June 30, 2016), though he had legal representation every step of the way. Yet rather than respond to the State's argument that he had, accordingly, waived this claim by failing to raise it, Syed relied exclusively on his allegation that the State committed a *Brady* violation with regard to the cell tower evidence, a violation which, he argued, excused his failure to raise the issue in prior proceedings and "resolve[d] any waiver arguments the State may make." Pet'r's Reply to State's Consolidated Resp. at 9 n.4 (Oct. 13, 2015). This was the full extent of Syed's argument on waiver. At no point did he assert, brief, or argue that he had not "intelligently and knowingly failed" to raise the issue previously—despite acknowledging that the fax cover sheet at issue had been turned over to his trial counsel in discovery, Pet'r's Supp. to Mot. to Re-Open Post-Conviction Proceedings at 10 (Aug. 24, 2015); and at no point did Syed offer any evidence to rebut the presumption of § 7-106 that he had, indeed, "intelligently and knowingly" failed to raise the argument. Md. Code Ann., Crim. Proc. § 7-106(b)(2).

Despite Syed's failure to brief this issue and put forward evidence to rebut the statutory presumption of waiver, the post-conviction court *sua sponte* found that Syed "met the burden to rebut the presumption that he intelligently and knowingly waived" the issue, and proceeded to consider the merits of Syed's ineffective assistance of counsel claim. *See* Mem. Op. II at 34-37. This was error for at least three reasons. First, the standard for "intelligent and knowing" waiver articulated by the Court of Appeals in *Curtis v. State*, 284 Md. 132 (1978), has never been applied to an ineffective assistance of counsel claim since *Curtis* was decided. Second, even if it were proper to continue to apply *Curtis*'s holding to an ineffective assistance of counsel claim, Syed's claim is readily distinguishable from the claim in *Curtis*, and application of the *Curtis* standard should have led the post-conviction court to the conclusion that Syed's claim was waived. Finally, even if Syed's claim were the kind of claim that required "intelligent and knowing" waiver, Syed has offered no evidence to rebut the statutory presumption that he "intelligently and knowingly failed" to raise the claim in a prior proceeding.

1. *Curtis v. State* Has Been Limited to Its Facts

In *Curtis*, the Court of Appeals explored the concept of "waiver" in what was then the Maryland Post Conviction Procedure Act[18] and concluded that the General Assembly intended that the standard for waiver articulated in therein would be applicable "only in those situations where the courts have required an 'intelligent and knowing' standard." *Curtis*, 284 Md. at 148. In other words, it would apply only to claims encompassing "that narrow band of rights that courts have traditionally required an individual knowingly and intelligently relinquish or abandon in order to waive the right or claim." *State v. Rose*, 345 Md. 238, 244-45 (1997) (internal quotation marks omitted). These include the Sixth Amendment right to counsel, rights surrendered by a guilty plea, and the right to trial by jury, *McElroy v. State*, 329 Md. 136, 140 n.1 (1993), *i.e.*, situations which require a colloquy with the

[18] The language regarding waiver in the Maryland Post Conviction Procedure Act, Art. 27, s 645A(c), as quoted in *Curtis*, 284 Md. at 138, is identical in pertinent part to the waiver language in the current form of the UPPA, Crim. Proc. § 7-106(b).

defendant in open court. *Holmes v. State*, 401 Md. 429, 457-58 & n.11 (2007) (*superseded by statute on other grounds*). "Other situations," the Court of Appeals has explained, "are beyond the scope" of the Act's waiver provision, and their waiver is "governed by case law or any pertinent statutes or rules." *Curtis*, 284 Md. at 149-50. "Tactical decisions, when made by an authorized competent attorney, . . . will normally bind a criminal defendant." *Id.* at 150. If the UPPA were interpreted otherwise, to require an "intelligent and knowing" waiver by the defendant himself every time counsel made a tactical decision, "the result could be chaotic." *Id.* at 149. Under such an interpretation of the statute, for a criminal defendant to be bound by his lawyer's actions, "the lawyer would have to interrupt a trial repeatedly and go through countless litanies with his client." *Id.*; *see also Rose*, 345 Md. at 249-50.

Given the Court of Appeals' clear concern for the consequences of extending the UPPA's "intelligent and knowing" waiver standard, it is not surprising that the State has not found, after conducting a preliminary review, a single Maryland appellate case since *Curtis* that has applied that standard to an ineffective assistance of counsel claim. An attorney may have valid, tactical reasons for not objecting to particular jury instructions, exploring potential lines of cross examination, or calling potential witnesses. To require an "intelligent and knowing" waiver by the defendant in order to bind him to each such strategic decision by counsel would make the criminal justice system unworkable. Moreover, it "would allow defense attorneys to remain silent in the fact of the most egregious and obvious . . . errors at trial. Any resulting conviction would always be vulnerable to challenge because of the absence of an 'intelligent and knowing' waiver by the defendant himself." *Cf. Rose*, 345 Md. at 250 (holding that "intelligent and knowing" waiver standard did not apply to counsel's failure to object to inaccurate reasonable doubt instruction). *Curtis*'s unique application of the "intelligent and knowing" waiver standard to an ineffective assistance of counsel claim should not be revived.

2. Even if *Curtis* Applies, Syed's Case is Distinguishable

Even if the holding of *Curtis* survives after decades of disuse and two revisions of the statute further winnowing the availability of successive petitions for post-conviction relief, it was clear error for the post-conviction court to apply it in this case. The right to effective assistance of counsel articulated in *Curtis* is readily distinguishable from the right ascribed to Syed in the post-conviction court's second Memorandum Opinion.

In *Curtis*, the petitioner raised the issue of ineffective assistance of counsel for the first time in his second petition for post-conviction relief; his direct appeal and his first petition had made no such argument. *Curtis*, 284 Md. at 135. In his second petition, Curtis alleged that his counsel at trial, on direct appeal, *and* in his first post-conviction proceeding were ineffective. His allegation that his first post-conviction attorney was inadequate was grounded upon that attorney's failure at the first post-conviction proceeding to raise the issue of trial counsel's ineffectiveness. *Id.* at 134-35. In other words, if the Court of Appeals had concluded that Curtis was precluded from having his ineffective assistance claim considered because of his mere failure to raise the issue previously and not applied the "intelligent and knowing" waiver standard, no court would have ever considered Curtis's allegation that his trial counsel was ineffective.

The same cannot be said of Syed, who, while represented by his current counsel, Justin Brown, filed a petition for post-conviction relief on May 28, 2010, and a supplement on June 27, 2011, which together alleged ineffective assistance of Syed's trial counsel, direct appeal counsel, and appellate counsel on ten separate grounds. *See* Pet. for Post-Conviction Relief at 11-19 (May 28, 2010); Supp. to Pet. for Post-Conviction Relief at 2-3 (June 27, 2011). Among these was the alleged failure of appellate counsel to raise objections made by trial counsel to the testimony of the State's cellphone expert, Abe Waranowitz. *Id.* at 19. These species of ineffective assistance were considered and rejected by the post-conviction court in its first Memorandum Opinion denying Syed's Petition for

Post-Conviction Relief. *See* Mem. Op (Dec. 30, 2013). It was, thus, clear error for the post-conviction court to find that Syed's repackaged claim of ineffective assistance of counsel, asserted for the first time in his Supplement to Motion to Re-Open, had not been waived. Syed had the opportunity to raise ineffective assistance of counsel claims in prior proceedings, and he did so, with the aid of counsel, and had those claims adjudicated by the Circuit Court. It cannot be that an "intelligent and knowing" relinquishment by Syed himself is required to effect a waiver of an alternative strand of ineffective assistance that he and his counsel did not raise previously. As this Court has reasoned, "If an allegation concerning a fundamental right has been made and considered at a prior proceeding, a petitioner may not again raise that same allegation in a subsequent post conviction petition by assigning new reasons as to why the right had been violated, unless the court finds that those new reasons could not have been presented in the prior proceeding." *Wyche v. State*, 53 Md. App. 403, 407 & n.2 (1983); *cf. Pole v. Randolph*, 570 F.3d 922, 934-35 (7th Cir. 2009) ("[I]neffective assistance of counsel is a single ground for relief . . . . Thus, if a petitioner fails to assert in the state courts a particular factual basis for the claim of ineffective assistance, that particular factual basis may be considered defaulted." (internal quotation marks omitted)).

Perhaps this is why Syed chose to advance an ultimately meritless *Brady* claim as his sole response to the State's waiver argument: he argued that because of the State's alleged *Brady* violation, it would have been "nearly impossible" for Syed to have raised the issue regarding the fax cover sheet disclaimer in a prior proceeding. Pet'r's Reply to State's Consolidated Resp. at 9 (Oct. 13, 2015). Indeed, when considering a newly-raised *Brady* claim in the post-conviction context, the Court of Appeals has reasoned that a petitioner "cannot waive what [he] could not reasonably know" and refused to find waiver where the record made clear that the factual predicate underlying the petitioner's *Brady* claims did not arise until the post-conviction hearing, at which point the petitioner property raised the issue. *Conyers v. State*, 367 Md. 571, 595-96 (2002). In Syed's case, however, Syed conceded,

and the post-conviction court correctly concluded, that the factual predicate underlying Syed's *Brady* claim was available to him and his counsel since at least the time of trial. *See* Pet'r's Supp. to Mot. to Re-Open Post-Conviction Proceedings at 10 (Aug. 24, 2015) (fax cover sheet "turned over to [Gutierrez] in discovery"), ("Gutierrez had the AT&T fax in her file"); Mem. Op. II at 34 (June 30, 2016) ("The disclaimer and the subject page were found in trial counsel's file, and the State disclosed these documents as part of pre-trial discovery and conveyed its intention to use these records at trial.").

In finding that Syed had the "factual basis and the opportunity" to make his *Brady* claim at trial, on direct appeal, in his first post-conviction petition, and in the application for leave to appeal, the post-conviction court correctly concluded that Syed's "failure to act upon these opportunities to raise the issue in a prior proceeding" constituted waiver. Mem. Op. II at 30-31 (June 30, 2016). The court erred when it did not reach the same conclusion regarding Syed's novel allegations of ineffective assistance that arose from the same factual predicate.

3. Syed Did Not Rebut the Presumption That He "Intelligently and Knowingly Failed" to Raise His Ineffective Assistance Claim

Even if it were not error for the post-conviction court to apply an "intelligent and knowing" waiver standard *sua sponte* to Syed's ineffective assistance of counsel claim, it was clearly error for the court to conclude that Syed satisfied the standard and did not waive his claim. The UPPA provides that "[w]hen a petitioner could have made an allegation of error at a [prior] proceeding . . . but did not make an allegation of error, there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation." Crim. Proc. § 7-106(b)(2). "The burden is on the petitioner to rebut the presumption." *State v. Gutierrez*, 153 Md. App. 462, 475 (2003). Syed failed to meet this burden, and it was error for the post-conviction court to conclude otherwise.

As discussed above, Syed conceded, and the post-conviction court found, that he had available to him in his prior proceedings the documents that, according to the post-conviction court, trial counsel was ineffective in failing to use as a basis for cross examination of the State's cellphone expert.

Given that Syed "could have made an allegation of error" with regard to this evidence at a prior proceeding, the UPPA provides that he has waived the argument unless he can rebut the presumption that he "intelligently and knowingly failed" to raise it. Crim. Proc. § 7-106(b)(2). Syed put forward no evidence to rebut the presumption in any of his pleadings filed in connection with his Motion to Re-Open, and that failure alone should have led the post-conviction court to conclude that the argument had been waived. *See McElroy*, 329 Md. at 146-49 (petitioner's argument waived where he "made no effort to rebut the presumption" of waiver "by failing to raise that issue in an application for leave to appeal" and offering no evidence to rebut the presumption at the post-conviction hearing); *cf. Curtis*, 284 Md. at 151 (argument not waived where petitioner had proffered facts, accepted as true by post-conviction court, to rebut presumption of waiver).

But even if it were not error for the post-conviction court to supply Syed with evidence to rebut the presumption of intelligent and knowing waiver, when he had put forward none himself, the evidence offered by the court would not be sufficient to rebut the presumption under the standard articulated by the Court of Appeals. In *Curtis*, the Court of Appeals found persuasive that the petitioner was "a layman with a seventh grade education and an I.Q. of 72 (borderline range of intelligence." 284 Md. at 136. Further, evidence had been introduced at the petitioner's trial that the petitioner was "a chronic alcoholic who had suffered some brain damage as a result of extended drinking for nineteen (19) years." *Id.* Curtis proffered, and the Court of Appeals accepted, that he "relied entirely on his court-appointed counsel at trial, on direct appeal . . . and in his first post-conviction case," and he was never advised by those counsel that he should have raised the issue of ineffective assistance of counsel in his first post-conviction petition. *Id.* at 135-36. Syed, by comparison, is a very different kind of defendant.

Far from having only "a seventh grade education and an I.Q. of 72," Syed was a senior in high school and an honors students when he was arrested for the murder of Hae Min Lee. Moreover,

unlike Curtis, Syed evidently did not rely entirely on his trial counsel to develop and execute a trial strategy. He brought specific strategic points to the attention of his trial counsel, some of which she adopted; exchanged numerous memos with his attorneys; and complained at sentencing about his counsel's failure to make an argument that he wanted to advance. *See, e.g.*, (T. 2/9/00 at 207). Ultimately, Syed discharged Ms. Gutierrez on the grounds that she had not scheduled mitigating witnesses for sentencing or amended his motion for new trial, which Syed "ha[d] repeatedly asked" her to do. Pet. for Post-Conviction Relief (May 28, 2010), Ex. 7. Evidence in the record establishes that Syed was an intelligent, thoughtful participant in his defense and had the opportunity to shape the strategy of his counsel.

The post-conviction court appears to have concluded on the basis that Syed "never completed his high school education" that he lacked the ability to intelligently and knowingly waive the claim that his trial counsel was ineffective for failing to use the fax cover sheet to cross examine the State's cellphone expert. Certainly, that conclusion is inconsistent with the holding of *Curtis*, but, more importantly, it is based on an unworkable exercise that demonstrates why *Curtis* should be limited to its facts. It is nearly impossible for a court to assess whether a defendant himself has knowingly and intelligently waived a right when the right is not one of "that narrow band of rights" that requires a colloquy on the record to effect waiver. *See Rose*, 345 Md. at 244-45, 249-50. This Court has reasoned that the requirement of "intelligent and knowing" waiver may be found to be satisfied when:

> 1. The record expressly reflects that the defendant had a basic understanding of the nature of the right which was relinquished or abandoned; and
>
> 2. The record expressly reflects acknowledgement that the relinquishment or abandonment of that right was made or agreed to by the defendant.

Wyche, 53 Md. App. at 406.

When the error asserted by a petitioner in post-conviction is his prior counsel's failure to pursue or not pursue a particular line of argument or questioning, there will have been no colloquy

with the defendant at trial to assess his "basic understanding" of the ramifications of counsel's choice. For a post-conviction court to retroactively probe the intellectual capacity of the petitioner as a substitute for such evidence is folly. What's more, allowing a post-conviction court to undertake such a probe to establish a defendant's "intelligent and knowing" waiver of what was, in effect, a strategic decision by counsel, would invite petitioners to frame any argument that they had failed to raise in a prior proceeding as "ineffective assistance of counsel" with the goal that it will lead the post-conviction court to impose the higher "intelligent and knowing" standard.

C. Failure to Challenge Cellphone Evidence Based on Disclaimer Not Defective

The post-conviction court's conclusion that Gutierrez was ineffective for failing to cross examine a cellphone expert on the basis of information contained in a fax cover sheet is contrary to settled law, a dramatic expansion of the obligations of trial counsel, and a troubling invitation to second guess the careful preparation and tactical decisions of a seasoned defense attorney. There are three principal reasons why the Court of Special Appeals should review, and ultimately reverse, the post-conviction court's conclusion that there was defective performance. First, it is not constitutionally defective to fail to cross examine a cellphone expert based upon a disclaimer on a fax cover sheet when expert witnesses cannot agree, even fifteen years later, on the interpretation of the disclaimer, what it's referring to, or its basic significance. Second, courts have long held that the trial tactics and strategies deployed by seasoned counsel are entitled to a presumption of reasonableness, and the vigorous cross-examination of the State's cellphone expert deployed by Gutierrez is certainly entitled to that presumption. Finally, the line of attack which Syed argues is constitutionally imperative has never been deployed by a defense attorney in any criminal prosecution since Syed's trial, and, to the contrary, the methods of attack deployed by Gutierrez have been used repeatedly by defense attorneys since that time; it could not have been deficient for Gutierrez to fail to employ a line of questioning that was unprecedented at the time of trial and remains untried over fifteen years later.

1. The Relevance of the Disclaimer Is Unsettled and the Subject of Expert Dispute

Gutierrez's failure to cross examine the State's cellphone expert regarding a disclaimer on the fax cover sheet cannot be deficient performance where questions about the reliability of the evidence presented by the State did not exist until long after the conclusion of the trial, and experts today disagree on the threshold relevance of the disclaimer language to which Syed points.

Judge Welch states that the disclaimer, on its face, calls the evidence into question, but that is based upon an interpretation of the disclaimer that itself is not accepted by the expert community. Syed did not marshal any evidence of doubts surrounding incoming calls raised in the literature of the time; he presents no analysts, experts, or even an employee at the phone company who had formed the opinion in 1999 that incoming calls could not be trusted with respect to cell site data. He points solely to language on a fax cover sheet that accompanied every document transmitted by AT&T at the time. Syed's expert, Gerald Grant, puts forward an interpretation of the disclaimer that applies it to cell site data that was presented at trial, but that interpretation had nowhere been published nor tested nor even proposed at the time of trial, and Syed has failed to produce a witness who worked with cell phone records from AT&T at that time or who consulted with AT&T technicians or analysts to understand what that disclaimer meant.

The State's expert, FBI Special Agent Chad Fitzgerald, maintained that the disclaimer does not refer to the call detail record that was submitted as evidence, nor does the cautionary instruction refer to the cell site data upon which the expert testimony was premised. After speaking with representatives from AT&T and after discussing his interpretation with other experts in the field at a recent conference, Special Agent Fitzgerald confirmed that the disclaimer about the reliability of location status refers to switch data found in the column titled "Location1" and that this has nothing to do with the reliability of cell site data. Finally, a third expert, Abe Waranowitz, the State's cell phone expert at trial, stated in a supplemental affidavit dated February 8, 2016, that after viewing the full fax

cover sheet legend, he found the document ambiguous specifically with respect to location and which incoming calls are reliable. Exhibit PC2-66. Where experts disagree about the interpretation of an underlying premise, it can hardly be declared constitutionally defective to adopt a cross examination strategy that incorporates one approach, but not the other.

Indeed, the cell site evidence at issue has not been called into question except by Syed's expert. Unlike in *Kulbicki v. State*, 440 Md. 33 (2014), *cert. granted, judgment rev'd*, 136 S. Ct. 2 (2015), in which the Court of Appeals held that trial counsel was ineffective for failing to question the legitimacy of testimony presented by a State expert in a forensic field that was debunked years after trial,[19] the assumption that Syed seeks to challenge has not been disavowed by the relevant expert community post-trial. In *Kulbicki*, the Court of Appeals faced a situation where the forensic method that was used in the original trial subsequently had been disavowed and was no longer "accepted by the scientific community." 440 Md. at 36-37. The Supreme Court summarily reversed the Court of Appeals' decision in *Kulbicki*, concluding that "[c]ounsel did not perform deficiently by dedicating their time and focus to elements of the defense that did not involve poking methodological holes in a then-uncontroversial mode of ballistics analysis." *Maryland v. Kulbicki*, 136 S. Ct. 2, 4 (2015). Here, where there continues to be expert disagreement about the relevance of the evidence championed by Syed, and where Syed has presented no evidence that any expert at the time of trial raised a question regarding the reliability of the cell site evidence, it is even more imperative that counsel not be required

[19] In *Kulbicki*, the expert who testified for the prosecution had arguably raised a concern about the forensic methodology at issue in a report he had previously co-authored. *See Kulbicki*, 440 Md. at 40, 49. The dissent in the Court of Appeals' decision in *Kulbicki*, even as it defends trial counsel's performance, acknowledges that, "There is no question that, as developments subsequent to Mr. Kulbicki's trial revealed, some inferences that had been drawn by FBI examiners from lead compositional analysis were seriously flawed." 440 Md. at 65. Even that has not been established here, as a respected expert witness reexamined the analysis presented at Syed's trial and concluded that, with respect to the tower locations ascribed to specific calls by Syed on the day of Hae Min Lee's murder, the testimony and conclusions were valid, accurate, and reliable.

to "go looking for a needle in a haystack, even when they have reason to doubt there is any needle there," to avoid a finding of deficient performance. *Id.* at 4-5 (internal quotation marks omitted).

2. Gutierrez's Vigorous Cross-Examination Was Not Defective Simply Because It Did Not Also Pursue An Additional, Weaker Angle

Courts have long held that the trial tactics and strategies deployed by seasoned counsel are entitled to a presumption of reasonableness. *See Smith v. State*, 782 S.E.2d 269, 276 (Ga. 2016) ("The scope and content of cross-examination are grounded in trial tactics and strategy and thus will rarely constitute deficient performance."); *Henry v. State*, 772 S.E.2d 678, 682 (Ga. 2015) ("[d]ecisions about what questions to ask on cross-examination are quintessential trial strategy . . . and will rarely constitute ineffective assistance of counsel.").[20] Here, Gutierrez carefully prepared and focused on the cellphone

[20] The single Maryland case cited by the post-conviction court for the proposition that "the failure to conduct an adequate cross-examination may be grounds for finding deficient performance," *Bowers v. State*, 320 Md. 416 (1990), *see* Mem. Op. II at 40 (June 30, 2016), does not, in fact, support the court's conclusion. Rather, the Court of Appeals in *Bowers* found as "an alternative ground" for its decision to reverse the post-conviction court's denial of the petitioner's request for relief that "the cumulative effect of numerous errors" on the part of trial counsel deprived the petitioner of effective assistance of counsel. 320 Md. at 431. These included trial counsel's failure to make an opening statement, failure to put on any defense testimony, failure to impeach a witness with a prior inconsistent statement, failure to request an intent instruction based on the petitioner's use of alcohol and drugs at the time of the events in question, and failure to make more than a cursory closing argument. *Id.* at 433-37. As the Court of Appeals concluded, "We think the numerous lapses we have recounted are sufficient, taken all together, to show inadequate performance." *Id.* at 436.

Notably, the two out-of-state cases cited by the post-conviction court in support of the same proposition are themselves cited in *Bowers*, and the holding of each case is premised on "the cumulative effect" of multiple individual errors by counsel, not, as the post-conviction court suggests, on a single failure by counsel to conduct an adequate cross-examination. *Compare* Mem. Op. II at 40-41 (June 30, 2016), *with Bowers*, 320 Md. at 436-437:

> *See also People v. Lee*, 185 Ill. App. 3d 420 . . . (1989) (inexperienced trial counsel did not challenge competence of a witness, failed to investigate witness's criminal history, failed to impeach witness, to cross-examine him properly, and to give opening statement; representation found constitutionally inadequate) . . . ; *People v. Trait*, 139 A.D.2d 937 . . . (N.Y. App. Div. 1988) (defense counsel's "ineptly developed" opening statement, inadequate trial preparation, failure to appear in opposition to People's motion, "excessive and purposeless cross-examination," in addition to other factors, deprived defendant of constitutional right to effective assistance) . . . .

As discussed in Part II.A, Syed previously raised in his post-conviction petition an argument of cumulative error by trial and appellate counsel, and that argument was rejected by the circuit court.

evidence, communicated directly with the expert witness in advance of trial, and launched a broad-gauged attack on cross examination. In addition to carefully preparing the cellphone evidence from the moment it was disclosed, Gutierrez also, at trial, vigorously objected to the State's efforts to lay a foundation, appropriately argued for limitations on the scope of expert testimony, and systematically challenged no less than five different vulnerabilities in the cellphone expert's conclusions. Such a thorough cross examination cannot be constitutionally defective. In particular, where counsel pursues a line of attack, that if successful, promises to undermine and cast into doubt all of the data, rather than a subset of it, courts should not second guess or call ineffective that strategy on cross examination. *Cf. Smith*, 782 S.E.2d at 276 ("If Appellant's counsel had pressed Johnson at the second trial to elaborate on the basis for her identification of Appellant, her answer might have hurt Appellant rather than helping him as he speculates.")

Moreover, in the face of a vigorous cross examination by counsel, courts are reticent to conclude that more is required. "An attorney can almost always be second-guessed for not doing more. However, this is not the standard by which counsel's performance is to be evaluated under *Strickland*." *Taylor v. State*, 62 So. 3d 1101, 1110 (Fla. 2011); *see also id.* at 1111 (trial counsel's alleged failure to object with regard to DNA evidence, "especially when viewed in unison with the vigorous cross-examine of [State's DNA expert] was reasonable"). "The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient. It is almost always possible to imagine a more thorough job being done than was actually done." *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986). Even in this case, where the post-conviction court held that counsel was deficient in failing to "pay close attention to detail while conducting document review," Mem. Op. II at 45 & n.22 (June 30, 2016), courts have questioned "how much preparation is enough," and concluded that the answer to that question is "a matter of professional judgment" and that an attorney's judgment is "entitled to deference." *United States v. Berkowitz*, 927 F.2d 1376,

1382 (7th Cir. 1991) (rejecting appellant's claim that trial counsel rendered ineffective assistance by failing to "examine documents" where "there are indications in the record that [trial counsel] spent considerable time reviewing records and preparing for trial").

3. The Novel Line of Questioning Syed Insists Gutierrez Was Ineffective in Failing to Use Has Never Been Used In The Intervening Fifteen Years

Finally, although the experts disagreed about the relevance of the disclaimer – of whether the cautionary language applied to cell site data in Exhibit 31 or location information on the full subscriber activity report – both experts were asked at the hearing on the motion to reopen whether they were aware of anyone pursuing this attack on incoming calls at the time Syed was tried or at any point since, and neither knew of a single example. Absent any proof that there was a flaw with incoming calls with respect to cell site data, the fact that neither expert is aware of a single case in State or Federal court, in any prosecution over the last fifteen years, in which a similar attack on that data has been mounted should alone be enough that failing to pursue an unprecedented, novel strategy is not a constitutionally defective performance.

Conversely, the approach that Gutierrez did take – attacking the scope of Waranowitz's expertise, questioning the conditions surrounding the test drive, and exposing the limitations on the conclusions that could be drawn about the precise location of the person rather than the phone – those tactics on cross examination, which Gutierrez was pioneering in a cross examination of cell phone evidence that was being used in a criminal prosecution for the first time in Maryland and one of the first times nationwide, have been adopted, recycled, and used in numerous cases in the intervening years. The enduring use of the approach taken by Gutierrez is further proof that she conducted an exceptional cross examination and certainly not one that was constitutionally defective.

D. Gutierrez's Failure Would Not Have Been Prejudicial

The post-conviction court was wrong to conclude that the cell site testimony was the linchpin of the State's case. That faulty premise misunderstands the many other ways in which the cellphone

records were used, discounts the overwhelming evidence established by a combination of documentary evidence and witnesses — lay and expert, students and teachers, family and friends — and adopts an approach to prejudice that ignores how, in this case, interlocking evidence was mutually corroborative. It also ignores that the cell site expert testimony that the prosecution presented was limited, thanks in part to Gutierrez's relentless objections and demands for caution, to being offered as corroboration, *i.e.*, only to show that the cell site data was consistent with the testimony of others.

The post-conviction court neglects the many other ways that Syed's phone records, fully separate from cell site information, yielded critical corroboration of the State's witnesses. The testimony of the witnesses confirmed one another — and were reinforced by the time, duration, sequence, and dialed numbers listed on Syed's cellphone records — fully separate from Waranowitz's testimony concerning which cell sites were accessed when he conducted test calls from certain locations of significance. The call date, time, duration, sequence of calls all complemented the witnesses. Thus, the witness testimony also reinforced the reliability of the call records, even if Gutierrez had succeeded in casting some doubt on the integrity of some calls. Indeed, the consistency between the records and the witness accounts showed that the phone was operating as expected, and helped establish whether Wilds or Syed was in possession of the phone at various times that day.

To be sure, Waranowitz's testimony concerning cell site location data supplied a valuable layer of additional corroboration. Yet the cell site location testimony cannot be viewed in a vacuum. With respect to the two incoming calls at 7:09 and 7:16 p.m., deemed the "foundation" of the State's case, the post-conviction court focused solely on Wilds testimony, the call records, and the cell site location. Mem. Op. II at 48 (June 30, 2016). The court appears gave insufficient weight to the complementary testimony of Jennifer Pusateri, who told the jury how she called Syed's number in response to a page from Wilds, which is also confirmed by the Syed's records. She recounted how, as stated above, the person who answered stated that Wilds was "busy" and would call her back, an account entirely

consistent with Wilds' recollection of those critical calls. More importantly, the court failed to view those calls in conjunction with the testimony the State produced regarding all of the other calls that day. The significance of each individual call was minor given the overwhelming weight of the testimony and calls taken as a whole. Accordingly, the post-conviction court erred in reaching the conclusion that counsel's performance, assuming *arguendo* it was defective, was prejudicial.

WHEREFORE, in accordance with Section 7-109(b) of the Criminal Procedure Article of the Maryland Code and Maryland Rule 8-204, the State respectfully requests that this Court grant the Application for Leave to Appeal.

Respectfully Submitted,

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