IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2016

No. 1396

STATE OF MARYLAND

Appellant/Cross-Appellee

v.

ADNAN SYED

Appellee/Cross-Appellant

Appeal from the Circuit Court for
Baltimore City, Maryland
(The Honorable Martin P. Welch, Sr., Judge)

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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BRIEF AND APPENDIX OF APPELLANT

STATEMENT OF THE CASE

In February 2000, in the Circuit Court for Baltimore City, Appellee Adnan Syed was charged and convicted by a jury of first-degree murder, robbery, kidnapping, and false imprisonment, for which he was sentenced in June 2000 to life in prison, plus 30 years. After exhausting his direct appeals in 2003, Syed timely filed for post-conviction relief in 2010. The Honorable Judge Martin Welch denied relief on December 30, 2013.

In January 2014, Syed sought leave to appeal that denial, which he supplemented in January 2015. Pursuant to a limited remand authorized by this Court in May 2015, Syed successfully filed a motion (June 2015), followed by a supplement (August 2015), to reopen post-conviction proceedings. After hearings in February 2016, the post-conviction court issued a written opinion on June 30, 2016, granting in part and denying in part Syed's petitions for relief.

In August 2016, the State filed for leave to appeal, Syed filed a conditional application to cross appeal, and the State followed with a conditional application for a limited remand. On January 18, 2017, this Court granted the parties' applications for leave to appeal and cross appeal, referred the application for a limited remand to the panel, issued a briefing schedule, and set oral argument for June 2017.

QUESTIONS PRESENTED

(1) Whether the post-conviction court abused its discretion in re-opening the post-conviction proceeding to consider Syed's claim that his trial counsel's failure to challenge the reliability of the cell phone location data evidence, based on the cell phone provider's "disclaimer" about the unreliability of incoming calls for location purposes, violated Syed's Sixth Amendment right to the effective assistance of counsel.

(2) Whether the post-conviction court erred in finding that Syed had not waived his claim regarding trial counsel's failure to challenge the reliability of the cell phone location data for incoming calls by failing to raise it earlier.

(3) Whether the post-conviction court erred in finding that Syed's trial counsel's failure to challenge the State's cell phone location data evidence, based on the cell phone provider's "disclaimer," violated Syed's Sixth Amendment right to the effective assistance of counsel.

SUMMARY OF ARGUMENT

After this Court authorized a limited remand, Syed filed a motion to reopen post-conviction proceedings on the basis of a new affidavit by a putative alibi witness named Asia McClain. Two months 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 before the trial. This successive petition asserted for the first time that this disclaimer should have been exploited by Syed's counsel, Cristina Gutierrez, as part of her challenge of the State's cellphone evidence. A post-conviction petition containing this attack was seemingly not approved by this Court and was filed more than five years after the statutory limitations period expired.

Notwithstanding sharp disagreement among experts about the relevance of a disclaimer from fax cover sheets, the post-conviction court ruled that Gutierrez was constitutionally inadequate for failing to contest the State's cellphone evidence based upon this disputed disclaimer. This decision disregards rules that bar untimely, successive petitions containing claims that previously could have been raised. It also fundamentally rewrites the constitutional guarantees of the Sixth Amendment.

First, the post-conviction court abused its discretion by interpreting a limited remand order as authority to permit Syed to present an untimely, unrelated claim in proceedings meant to address issues arising from the newly-available affidavit of McClain. This decision is incompatible with the scope of the remand order, the statutory

requirement of "extraordinary cause" for claims filed more than ten years after sentencing, and the "interests of justice." It was therefore an abuse of discretion.

Second, the post-conviction court failed to apply settled principles of waiver firmly contained among the requirements of the Uniform Post-Conviction Procedure Act ("UPPA"), Md. Code Ann., Crim. Proc. §§ 7-101 *et seq.* (2016). 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 in question.

Third, this Court should also 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. The post-conviction court's contrary ruling directly contravenes the Supreme Court's decision in *Maryland v. Kulbicki*, 136 S. Ct. 2 (2015). 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 was aware of any examples in the history of cellphone forensics of a defense attorney following Syed's proposed avenue of inquiry. Moreover, Syed suffered no prejudice since the prosecution presented to a jury of his peers "overwhelming evidence" of him murdering and burying his ex-girlfriend, Hae Min Lee. *See* App-126 ("Brief of Amici Curiae of State's Attorneys") ("Syed was convicted... based on crushing evidence of his guilt. Indeed, the evidence put before the jury in this case is stronger than what is routinely presented against criminal defendants who are tried and rightly convicted and whose convictions are affirmed all the time.").

STATEMENT OF FACTS

For consistency and ease of reference, the State adopts and incorporates its factual and procedural recitations from its application for leave to appeal and prior brief to this Court, including a summary of the post-conviction court's decision under review. *See* App-82–102, App-44–59, App-87–88. Since this appeal centers on whether Syed's counsel adequately prepared and challenged the State's cellphone evidence, certain excerpts concerning discovery, defense preparations, trial, and post-conviction testimony related to cellphone evidence are reiterated below.

A. 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." App-233, App-240. 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." App-241. On October 8, 1999, the State disclosed its intent to call Abe Waranowitz as an expert witness, App-224, App-242, and in a separate disclosure the same day provided defense counsel with a summary of an oral report from Waranowitz, App-243.

Gutierrez's subsequent correspondence concerning these materials 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'." App-225–27. 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." App-228. An internal defense memorandum dated October 28, 1999, App-234, as well as further correspondence in November 1999, App-229–32, 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.

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. App-244–47.

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." App-248. During the second trial, after Gutierrez claimed she had not received certain cellphone-related materials, Waranowitz relayed to the Court through the prosecutor that he had provided cellphone-related materials directly to Gutierrez by fax and FedEx. (T. 2/9/00 at 4-5).

B. Presentation and challenge of cellphone evidence at trial

As the State summarized in detail in its application for leave to appeal, at 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. *See* App-92–97 (recounting the various probative ways in which cellphone records were presented at trial separate from location data). 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, reinforce the testimony of the State's witnesses and the prosecution's theory of what happened when and why." App-14.

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. *See* App-97–99 (describing in detail six features of Gutierrez's challenge of Waranowitz). 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).

C. Conflicting expert interpretations at post-conviction hearing

The question that was the subject of expert dispute at the post-conviction hearing is whether the term "location" in the technical legend on AT&T fax cover sheets referenced 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. The State's expert witness, Special Agent Chad Fitzgerald (FBI), testified that the term "location" referred to data in the "Location1" column, which contained what he identified as "switch" data, *i.e.*, a broad regional designation for an area like Washington-Baltimore. Syed's expert insisted that "location" referred to the individual cell tower codes in the "cell site" column on the condensed report. The diagrams on the following page reflect their divergent views.

State's Expert's Interpretation

How to read "Subscriber Activity" Reports

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

Type codes are defined as the following:

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

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

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

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

SUBSCRIBER ACTIVITY

Subscriber Number: 4632539C23 Printed: Wed Feb 17 1999 11:08:12 AM

	Auth	MtoM	Call Date	Call Time	Type	Cov	Dial#/Local	Duration	EndOfCall	ICell	ICell	Location1	TripType	Feature
1	Y		02/16/1999	08:54:43 PM	Inc	H		00:00:00:06	08:54:49 PM	[redacted]	[redacted]	DC 4196Washington2-B		
2	Y		02/16/1999	08:54:43 PM	Sp	H	#4432539C23	00:00:00:06	08:54:49 PM			DC 4196Washington2-B		CFO
3	Y		02/16/1999	07:17:24 PM	Inc	H		00:00:00:06	07:17:30 PM			DC 4196Washington2-B		
4	Y		02/16/1999	07:17:24 PM	Sp	H	#4432539C23	00:00:00:06	07:17:30 PM			DC 4196Washington2-B		CFO
5	Y		02/16/1999	02:46:32 PM	Lcl	H	410-788-8495	00:00:00:40	02:47:12 PM			DC 4196Washington2-B		

Syed's Expert's Interpretation

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

	Dialed No.	Call Time HH:MM:SC	Call Duration HR:MM:SC	Cell Site
	[redacted]	11:27:13 PM	00:00:02	L698C
1	4109229704	11:07:30 PM	00:10:44	L651C
2	4109229704	11:05:07 PM	00:00:16	L651C
3	3018030657	09:41:35 PM	00:03:18	L651C
4	4109229704	09:32:36 PM	00:00:28	RLTN2
5	[redacted]	[redacted]	[redacted]	[redacted]

To explain his position, Agent Fitzgerald explained that he performed cell tower 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 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 cell tower 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 cellphone 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.

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)."

STANDARD OF REVIEW

This Court reviews a post-conviction court's decision regarding whether to reopen a post-conviction proceeding for abuse of discretion. *State v. Adams-Bey*, 449 Md. 690, 702 (2016). The post-conviction court's "resolution of questions of law," however, is reviewed by this Court "without deference." *State v. Sanmartin Prado*, 448 Md. 664, 679 (2016). Regarding ineffective assistance of counsel claims, this Court reviews the post-conviction court's factual findings for clear error, but must "make an independent

analysis to determine the ultimate mixed question of law and fact, namely... the reasonableness of counsel's conduct and the prejudice, if any." *Id.*

ARGUMENT

I. THE POST-CONVICTION COURT ABUSED ITS DISCRETION WHEN IT REOPENED PROCEEDINGS TO CONSIDER A NOVEL, UNTIMELY CLAIM BEYOND THE PERMISSIBLE SCOPE OF THE REMAND

On September 23, 2015, the State objected, *inter alia*, to Syed's request to insert an uninvited, untimely, and unrelated cellphone 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.

App-47. The post-conviction court's decision to allow Syed to raise in an untimely filing a new ineffective assistance of counsel claim that had no connection to Asia McClain, but rather was premised upon fax cover sheets contained in the original file of Syed's trial counsel, was not just error — it was an abuse of discretion in flagrant violation of the governing statute.

A. The post-conviction court misconstrued the permissible scope of this Court's "limited remand" order.

When this Court took the rare step of authorizing a "limited remand" to provide Syed the opportunity to file a motion to reopen, it was predicated upon the unusual

circumstance that a supposed alibi witness had sworn an affidavit insinuating that a prosecutor had discouraged her from participating in the original post-conviction proceedings. App-221. The order explicitly stated that the "purpose of the stay and the remand" was to provide Syed an opportunity to file a motion to reopen "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. Focusing solely on McClain's affidavit, the order explained that the Court could not "properly consider it" since the affidavit "was not presented" during the original proceedings "as it did not then exist." *Id.* The remand would allow the parties to supplement the record "with relevant documents and even testimony pertinent to the issues *raised by this appeal*." *Id.* (emphasis added).

The order's further direction that the post-conviction court, if it granted Syed's motion to reopen, could "in its discretion, conduct any further proceedings it deems appropriate," cannot be divorced from this context. *Id.* To be sure, this Court is well positioned to know what it intended when it directed a limited remand and, consequently, whether the post-conviction court misconstrued what was contemplated and authorized as part of that remand. The State respectfully submits that the plain and natural reading of the order gave the post-conviction court considerable discretion to conduct a full range of proceedings, so long as they were related to Asia McClain and the issue of Syed's alibi defense. To include claims, however, about fax cover sheets and cellphone location data abused that discretion.

B. The post-conviction court improperly interpreted the remand order to cover unrelated claims that amounted to untimely successive petitions.

Treating the remand order's instruction to allow a motion to reopen based upon McClain's latest affidavit as extending to an untimely, unconnected successive petition was also an abuse of discretion. This Court's order could not reasonably be interpreted as blanket authorization to entertain novel, unrelated claims filed outside the deadlines fixed by the order as well as by statute, nor could this Court legally suspend or alter the applicable constraints imposed by the UPPA.

In this Court's order of May 18, 2015, it invited Syed to file a motion to reopen within 45 days, which Syed accomplished on June 30, 2015. The post-conviction court gave the State until September 8, 2015, to respond; before the State filed its response, on August 24, 2015, Syed submitted a "supplement" to his motion to reopen, raising his cellphone claim for the first time. This was nearly two months after the deadline fixed by this Court and more than five years after the ten-year statutory window had expired.[1] Despite the extraordinary lateness and novel substance of this filing, the post-conviction court treated it essentially as a motion to reopen governed by this Court's order, ignoring

[1] In *Poole v. State*, 203 Md. App. 1 (2012), the Court of Special Appeals held that a supplemental petition filed after the 10-year limitations period was not time-barred based on Md. Code Ann., Crim. Proc. 4-402(c) (2016), which states that amendments to petitions, like the one Syed filed in June 2010, shall be "freely allowed in order to do substantial justice". *See id.* at 9. That Rule, by its terms, applies to petitions that have not yet been resolved. Indeed, central to this Court's holding was the premise that effective assistance of counsel entails the right of counsel to add colorable amendments to an initial petition filed *pro se* due to time or resource constraints. *See id.* at 11-13. Also, the policy of avoiding "unnecessarily complex and unfair results" does not apply here, as Syed has been continuously represented by competent post-conviction counsel when filing both his motion to reopen and supplement thereto.

the deadlines set by this Court and the state legislature and applying the wrong standard in evaluating whether to consider Syed's new and belated claim. This too was error.

When the UPPA was originally enacted in 1958, it imposed substantive limits on collateral litigation (*e.g.*, waiver provisions), but did not restrict when or how many post-conviction petitions could be filed. *See Arrington v. State*, 411 Md. 524, 548 (2009). That changed in 1986 when the General Assembly amended the law to bar the filing of more than two petitions for relief. *See Gray v. State*, 158 Md. App. 635, 645 (2004). Then again, effective October 1, 1995, the General Assembly:

- Reduced the number of petitions from two to one and authorized courts to reopen post-conviction proceedings when it is "in the interests of justice," 1995 Md. Laws 1482; *and*
- Imposed, for the first time, a ten-year statute of limitations for post-conviction petitions, absent "extraordinary cause." 1995 Md. Laws, 2091-92.

The statute itself therefore distinguishes between moving to reopen a previously closed post-conviction proceeding, which is permitted when it is in the interests of justice, and seeking to file a claim more than ten years after sentencing, which demands extraordinary cause. This Court could not, by virtue of a remand order, erase or extend the statutory deadline or unilaterally convert the "extraordinary cause" requirement into an "interests of justice" condition for novel claims filed long after the UPPA's limitations period expired. Yet, this is precisely how the post-conviction court interpreted the remand order, ignoring the Court's 45-day deadline and the statute's ten-year deadline and replacing the "extraordinary cause" requirement for a novel claim raised for the first

time 15 years after Syed was sentenced with the "interests of justice" standard applicable to reopening previously-filed petitions. That interpretation, if believed to be an exercise of the latitude granted by the remand order, was an abuse of discretion and, in any event, is incompatible with the text, context, and history of the UPPA. *See Lockshin v. Semsker*, 412 Md. 257, 274-76 (2010) (requiring courts to examine "the context of the statutory scheme" and "the purpose, aim, or policy of the Legislature in enacting the statute").

C. The post-conviction court misapplied the 'interests of justice' standard when it reopened proceedings without identifying a reason why the claim could not have been raised before.

The post-conviction court abused its discretion when, in the "interests of justice," it reopened proceedings to consider an unpreserved claim where there was no new evidence, no change in law, no connection to the reason for the remand, and no excuse for why the claim was not raised earlier when, indisputably, it could have been. Thus, even if, *arguendo*, this Court forgives the untimely petition and concludes that it falls within the intended scope of the remand, it was still an abuse of discretion to conclude that reopening proceedings under these circumstances was "in the interests of justice."

Maryland's courts have imposed few limits on what qualifies as in the "interests of justice," but limits remain. In *Gray v. State*, while acknowledging that the term has not been defined, this Court stated:

> 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 [UPPA] and the types of claims to which it affords a remedy."

158 Md. App. at 646 n.3 (2004).

The post-conviction court defended its decision by citing the Court of Appeals in *Gray v. State*, 388 Md. 366 (2005), concluding that *Gray* stood 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." App-159. But, in fact, the grounds for reopening identified as examples in *Gray* were limited to "ineffective assistance of *postconviction* counsel or a change made in the law that should be applied retroactively." 388 Md. at 382 n.7 (emphasis added). Those illustrations have in common that the claim in question could not have been successfully raised in the earlier post-conviction proceeding. So, it could have qualified as "in the interests of justice" to reopen closed proceedings to give the petitioner a chance to litigate claims that could not have previously succeeded. This understanding of what could conceivably satisfy the "interests of justice" standard also comports with the Court of Appeals' explanation in *Gray* that "the purpose of the postconviction legislation as revealed by its development over time—that is, to lessen the burden on the courts created by endless postconviction proceedings." *Id.* at 378. In this respect, there is a crucial difference between claims of ineffective *post-conviction* counsel, which obviously cannot be raised in the original petition, and ineffective *trial* counsel, which obviously can.[2]

[2] It should be noted that while Syed has not sought to justify his belated petition based upon "a change made in the law that could be applied retroactively," he referenced a then-fairly-new Court of Appeals case in his supplement to bolster his ineffective assistance claim. *See* Pet'r's Supp. to Mot. to Re-Open Post-Conviction Proceedings at 12 (Aug. 24, 2015). But by the time the post-conviction court granted Syed's motion to reopen (on November 6, 2015), the case he cited, *Kulbicki v. State*, 440 Md. 33 (2014),

By entertaining an untimely, unrelated claim during the reopened proceedings, the post-conviction court misconstrued this Court's limited remand order, violated a statutory deadline, and misunderstood the purpose and prior illustrations of the "interests of justice" standard as explained by the Court of Appeals. Accordingly, this Court should reverse the grant of a new trial because the post-conviction court abused its discretion by allowing a claim to proceed in plain violation of the text and spirit of the governing statute. *Cf. Love v. State*, 95 Md. App. 420, 423 (1993) ("Every conceivable wrong occurring in the course of a criminal trial does not necessarily give rise to a corresponding remedy. *A fortiori*, it does not always trigger the particular remedy invoked by the defendant who has arguably suffered the wrong. The Motion for New Trial is one of the post-trial remedies. It is by no means, however, a never-failing panacea, available whenever and however outraged justice may beckon. It is designed to correct some, but not all, flaws that may have marred a trial. It is limited, moreover, by rigid filing deadlines and other formal constraints.").

II. SYED'S LATEST CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS LONG AGO WAIVED

The record is clear that Syed has never asserted that Gutierrez was ineffective for failing to use a "disclaimer" to challenge the State's cellphone evidence in any proceeding prior to 2015, despite being represented by eminent counsel at every stage. Syed offered no justification for this waiver except to allege a *Brady* violation, which

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had been summarily reversed by the U.S. Supreme Court. *See Maryland v. Kulbicki*, 577 U.S. ___ (2015), 136 S. Ct. 2 (2015) (decided October 5, 2015).

Syed claimed would "resolve[] any waiver arguments the State may make." Pet'r's Reply to State's Consolidated Resp. at 9 n.4 (Oct. 13, 2015). Moreover, at no point has Syed offered any evidence to rebut the presumption that he had, indeed, "intelligently and knowingly" failed to raise the argument. Md. Code Ann., Crim. Proc. § 7-106(b)(2). In concluding, *sua sponte*, that Syed did not waive this claim, the post-conviction court invented a novel but misguided solution to Syed's procedural problem: *Curtis v. State*, 284 Md. 132 (1978). App-194.

A. Syed's case is fundamentally different from *Curtis v. State*.

Curtis considered a defendant, convicted at trial and denied relief in his first post-conviction petition, who filed a second post-conviction petition raising for the first time ineffective assistance of counsel. *See* 284 Md. at 134. At each of these stages — trial, initial post-conviction petition, and second post-conviction petition — Curtis had different legal representation, and he claimed ineffective assistance by all prior counsel. *See id.* The Court of Appeals considered *Johnson v. Zerbst*, 304 U.S. 458 (1938), where the Supreme Court held that a waiver of the right to *any counsel at all* had to be intelligent and knowing, and extended that principle to Curtis's claim of ineffective counsel. *See* 284 Md. at 143-44, 150. Even if the holding of *Curtis* survives after nearly four 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.

First, *Curtis* dealt with a total abandonment by counsel, as Curtis alleged failure of counsel "at the trial, on direct appeal, and at the first post conviction proceeding." 284 Md. at 134. This constituted a categorical failure of all counsel, placing Curtis in a similar position to Johnson, who lacked counsel altogether. *See Johnson*, 304 U.S. at 460. This also renders *Curtis* distinguishable from the present case because Curtis (unlike Syed) had alleged, *inter alia*, ineffective assistance by post-conviction counsel. *See* 284 Md. at 134. By contrast, Syed was ably represented at trial, at sentencing, on direct appeal, and at post-conviction, raising multiple objections in his motion for a new trial, on direct appeal, and in his initial post-conviction petition. *See* Pet. for Post-Conviction Relief at 10-20 (Mar. 28, 2010) (recounting Syed's numerous claims, which included a post-conviction claim concerning cell tower testimony).

Second, the post-conviction court in *Curtis* accepted as true the fact that "[t]he issue of ineffective assistance of counsel . . . has never been raised by petitioner in any prior court case." 284 Md. at 135. While no ineffective counsel claims had been raised by Curtis, Syed lodged nine separate claims of his Sixth Amendment right to effective counsel in his initial post-conviction petition. *See* Pet. for Post-Conviction Relief at 10-20 (Mar. 28, 2010). Conspicuously absent was a claim concerning the fax cover sheets, distinguishing Syed from Curtis. *See Wyche v. State*, 53 Md. App. 403, 407 n.2 (1983) ("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."); *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.").

Third, *Curtis* was decided when an unlimited number of post-conviction petitions could be filed, and *Curtis* itself dealt with a second such filing. *See* 284 Md. at 134. Since then, the General Assembly has pursued a deliberate legislative strategy of limiting the availability of post-conviction relief by restricting the number of such petitions to two in 1986 and then to one in 1995. *See Gray v. State*, 158 Md. App. 635, 645-46 (2004). In the face of this deliberate narrowing by the General Assembly, reviving *Curtis*'s pre-amendment language would gut these amendments by returning our post-conviction jurisprudence to effectively allow for unlimited petitions. As there is no on-the-record colloquy with a defendant at or after trial concerning his lawyer's decisions, a defendant could claim he only became aware of a potential ineffective counsel claim at any subsequent point. The post-conviction court's rendering of *Curtis* undermines the legislative intent of the post-*Curtis* amendments and creates precisely the "chaotic" results feared by *Curtis*. 284 Md. at 149.

Fourth, Curtis "relied entirely" on his counsel as "a layman with a seventh grade education and an I.Q. of 72" and "a chronic alcoholic who had suffered some brain damage as a result of extended drinking for nineteen (19) years." *Id.* at 136. By comparison, Syed was a high school honor student when he was arrested for the murder

of Hae Min Lee. *See* Pet. for Post-Conviction Relief at 3 (Mar. 28, 2010). Moreover, unlike Curtis, Syed evidently did not rely solely 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* (T. 10/25/12 at 4-5; T. 10/25/12 at 33-34, 38-39; T. 10/25/12 at 33). 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. *See* Pet. for Post-Conviction Relief (May 28, 2010), Ex. 7. Furthermore, Gutierrez's defense file contains numerous memoranda that reflect active and regular participation by Syed in preparing for trial. *See* App-233–37, 239; (T. 6/6/00 at 3-5).

B. The 'intelligent and knowing' standard applied in *Curtis v. State* has never been applied outside of *Curtis*'s precise facts.

In *Curtis*, the Court of Appeals explored the concept of "waiver" in what was then the Maryland Post Conviction Procedure Act[3] and concluded that the General Assembly intended that the "intelligent and knowing" standard for waiver articulated therein would be applicable "only in those circumstances where the waiver concept of *Johnson v.*

[3] The language regarding waiver in the Maryland Post Conviction Procedure Act, Art. 27, § 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).

Zerbst" applied. 284 Md. at 149.[4] It would therefore 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, 245 (1997). In particular, these include the Sixth Amendment right to counsel, rights surrendered by a guilty plea, and the right to trial by jury. *See McElroy v. State*, 329 Md. 136, 140 n.1 (1993). Importantly, these are all situations that require a colloquy with the defendant in open court, where the defendant demonstrates the reasoning behind his waiver. *See Holmes v. State*, 401 Md. 429, 457-58, 458 n.11 (2007) (*superseded by statute on other grounds*).

In *Holmes*, the Court of Appeals directly considered the reach of *Curtis* and stated that "we held [in *Curtis*] that the intelligent and knowing waiver standard in Section 645A(c) was applicable only 'in those circumstances where the waiver concept of *Johnson v. Zerbst* and *Fay v. Noia* [is] applicable,' i.e., ***situations which require a litany with the defendant***." *Id.* at 457-58 (second alteration in original) (emphasis added). The Court of Appeals has also recognized the importance of this on-the-record litany in discussing *Johnson v. Zerbst*, wherein the Supreme Court found that a waiver of *having any legal representation at all* had to be "intelligent and knowing." This colloquy must be on-the-record "so as to be available for appellate review." *Martinez v. State*, 309 Md.

[4] *Johnson v. Zerbst*, 304 U.S. 458 (1938), is the seminal case requiring an intelligent waiver of the right to counsel, wherein the Supreme Court applied this high standard to a criminal defendant who was tried, convicted, and sentenced without the assistance of any legal counsel at all, not merely ineffective counsel. *Id.* at 460.

124, 133 n.8 (1987) (quoting *Countess v. State*, 286 Md. 444, 454 (1979)); *see also In re Blessen H.*, 392 Md. 684, 699-700 (2006).

C. Syed did not rebut the presumption that he "intelligently and knowingly failed" to raise his ineffective assistance of counsel 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 devoid of any on-the-record substantiation, it was 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." Md. Code Ann., 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 satisfy this burden — in fact, he has never even tried to meet this burden — and it was error for the post-conviction court to conclude otherwise.

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

III. GUTIERREZ'S CHALLENGE TO THE STATE'S CELLPHONE EVIDENCE MORE THAN SATISFIED THE SIXTH AMENDMENT

The record is replete with evidence that Gutierrez meticulously prepared, carefully developed, and skillfully executed a vigorous challenge to the State's cellphone evidence. Her strategy did not rely, however, on a disclaimer found on boilerplate fax cover sheets whose significance remains a bona fide subject of expert debate. In order to reach the startling conclusion that this was constitutional error, the post-conviction court had to commit several errors of its own.

First, the post-conviction court drew false, superficial distinctions between the present case and the U.S. Supreme Court's recent, controlling decision in *Maryland v. Kulbicki*, whose surface and substantive parallels to this case are unmistakable. Next, with respect to the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), the court simply failed to acknowledge, let alone account for, the candid disagreement among experts in this case. Third, the post-conviction court disregarded the presumption of reasonableness to which Gutierrez's performance was entitled. Finally, it contrived prejudice only by overstating the role of cellphone evidence for incoming calls — which the judge admitted only for corroboration — and by understating the overwhelming evidence marshaled against Syed at trial.

A. Finding a Sixth Amendment violation in this case contradicts the Supreme Court's *per curiam* decision in *Maryland v. Kulbicki.*

The post-conviction court erred in declining to follow the Court's clear-throated decision in *Kulbicki*. There, during the 1995 murder prosecution of James Kulbicki, the

State presented expert testimony about Comparative Bullet Lead Analysis ("CBLA"), a form of ballistics evidence that had "fallen out of favor" by 2006 when Kulbicki first claimed his attorneys were ineffective for failing to challenge CBLA's legitimacy. *Maryland v. Kulbicki*, 136 S. Ct. 2, 3 (2015). Kulbicki supplemented his petition for post-conviction relief after Maryland's highest court "held for the first time that CBLA evidence was not generally accepted by the scientific community and was therefore inadmissible." *Id.* (citing *Clemons v. State*, 392 Md. 339, 391 (2006)). In *Kulbicki*, the federal agent who testified as an expert for the prosecution had written a report four years before Kulbicki's trial that contained a finding that could have been used to undermine his testimony concerning the reliability of CBLA evidence. The Court of Appeals granted Kulbicki a new trial on the grounds that his attorney's failure to locate the expert's prior report and deploy one of its findings to challenge CBLA on cross-examination was deficient performance. In a *per curiam* decision issued without oral argument, the Supreme Court summarily reversed.

Kulbicki's central holding is that counsel is not required to anticipate doubts whose seeds are planted but will not grow into general consensus for years to come. Thus, "[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." *Id.* at 4. The Court added, "[t]hat is especially the case here, since there is no reason to believe that a diligent search would even have discovered the supposedly crucial report." *Id.*

The post-conviction court sought to distinguish *Kulbicki* on this last ground, suggesting that it would have been difficult "in an era of card catalogues" for Kulbicki's counsel to locate the agent's report, whereas Syed's counsel only needed "to pay close attention to detail while conducting document review." App-205. This supposed distinction fails even gentle scrutiny. For one thing, the post-conviction court's characterization of the simplicity of Gutierrez's job resembles how the Supreme Court described the Court of Appeals' view — which it reversed — that "any good attorney should have spotted this methodological flaw." *Kulbicki*, 136 S. Ct. at 3. For another, it was plainly not as easy as the post-conviction court believed to locate and appreciate the putative significance of the disclaimer on the fax cover sheet given (1) that its relevance, even today, remains contested among cellphone experts, and (2) that it appears to have eluded all of Syed's distinguished post-trial attorneys until some 15 years later.

Rarely in the law does a binding case provide such clear, controlling precedent. Every case is a snowflake. Advocates can find differences between any two. But to distinguish *Kulbicki* is more an indulgence in artful sophistry than a sincere effort to be faithful to the Supreme Court's guidance.

B. The post-conviction court erred in finding deficient performance without a showing of consensus among experts at the time of trial supporting the challenge proposed by Syed in hindsight.

Where experts disagree about the validity of an attack on forensic evidence, the Sixth Amendment's guarantee of effective representation does not compel a trial attorney to adopt a strategy that rests on an unsettled foundation. Indeed, in *Kulbicki*, the Court

held that even where consensus later emerged concerning forensic evidence that was no longer "generally accepted by the scientific community," it was not constitutionally deficient for counsel to fail to attack the evidence at a time when that consensus had not yet formed. Hence, the broader teaching of *Kulbicki* is that a meritorious claim of ineffective counsel concerning purportedly unreliable forensic evidence should be predicated upon general, contemporaneous consensus among experts. That consensus does not exist today, and it certainly did not exist at the time of Syed's trial.

Under *Kulbicki*, to require counsel to pioneer a novel criticism — even one that would eventually gain currency and prove meritorious — asks for more than the Constitution demands. History teaches us that the reliability of scientific evidence will wax and wane with time. What may be an obvious criticism in hindsight may be difficult to discern or unwise to attempt when the scientific community has not yet converged in approval or disapproval. In this case, even in hindsight, venerable experts steadfastly disagree whether the challenge proposed by Syed is valid. A single court's *post hoc* skepticism is no substitute for the "scientific community" no longer "generally accept[ing]" a body of forensic evidence — the latter is the necessary predicate for a Sixth Amendment violation; the former is precisely the kind of judgment post-conviction courts are discouraged from making. See *Kulbicki*, 136 S. Ct. at 3; *see also Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

C. The post-conviction court's appraisal of Gutierrez failed to apply the presumption of reasonableness to which her performance was entitled.

In declaring Gutierrez's performance deficient, the post-conviction court also erred in failing to apply *Strickland*'s presumption of reasonableness. 466 U.S. at 689. This presumption is particularly strong in the context of cross-examination. *See 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.").

That presumption is well warranted in this case. As detailed in prior pleadings, Gutierrez vigorously challenged the State's expert, relying on six identifiable lines of attack. App-97–99. Significantly, Gutierrez's strategies did not discriminate between incoming and outgoing calls, thereby threatening the entirety of the State's cellphone location data. Thus, failing to challenge the reliability of location data only for incoming calls cannot displace *Strickland*'s presumption of reasonableness where Gutierrez sought to undermine all the cellphone records, for *both* incoming and outgoing calls.

Nor can Syed rebut the presumption with regard to Gutierrez's preparation of the cellphone evidence. Courts have questioned "how much preparation is enough," and concluded that the answer is "a matter of professional judgment" but 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 counsel rendered ineffective assistance by failing to examine documents where, like here, "there are indications in the record that [counsel] spent considerable time reviewing records and preparing for trial").

Here, Gutierrez carefully prepared and focused on the cellphone evidence. Her team prepared a comprehensive compilation and analysis of records of Syed's cellphone use on January 13, 1999, listing times, dialed numbers, possible names associated with each number, call duration, cell site codes and corresponding locations. This document also integrated 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. App-244–47. Gutierrez separately obtained Syed's cellphone billing records, App-249–67, 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, App-268–75. Additionally, Gutierrez's private investigator had, independent of the State, contacted AT&T and was told 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." App-248. Given all Gutierrez did to fully and vigorously examine the cellphone evidence, Syed cannot now credibly seek to override the presumption that her preparation was reasonable.

Finally, the constitutional adequacy of Gutierrez's challenge of the State's cellphone evidence is confirmed by the post-conviction testimony of both the State's and Syed's cellphone experts. Agent Fitzgerald and Mr. Grant have testified in numerous proceedings as experts in cellphone analysis, last appearing opposite one another during the trial of the Boston Marathon bomber. (T. 2/4/16, 172; T. 2/5/16, 171-74). Both

testified to having seen many proceedings in the 17 years since Syed's trial in which counsel challenged the reliability of tests for cellphone location data just as Gutierrez had: by concentrating on variables like weather, type of phone, and limitations on the precision of tower data to locate the specific location of a phone. (T. 2/5/16, 203-05; T. 2/4/16, 266-74).

Conversely, Fitzgerald testified he had never heard of a case in which defense counsel challenged the reliability of cellphone location data only for incoming calls based on a disclaimer from the cellphone provider. (T. 2/5/16, 205-08). Neither had Grant. (T. 2/4/16, 265-66). Under these circumstances, Syed cannot argue that Gutierrez's performance was deficient just because she did not seize on a disputed disclaimer, a tactic that would have only called into question incoming calls, not outgoing ones. Rather, the record is clear that Gutierrez was engaged and engrossed with the cellphone evidence and more than discharged her responsibility to provide effective assistance of counsel in challenging this piece of the State's case.

D. The post-conviction court erred in finding prejudice.

In order to demonstrate prejudice, Syed must demonstrate a "substantial possibility" that "the result of the proceeding was fundamentally unfair or unreliable." *Oken v. State*, 343 Md. 256, 284 (1996). Prejudice cannot be established where location data for incoming calls were only one corroborative component of the State's cellphone evidence, which in turn was only one part of the insurmountable evidence of Syed's guilt.

It should be emphasized at the outset that, based on a motion by Gutierrez, (T. 2/9/00 at 14-17), the trial court awarded Syed a limiting instruction, directing the jury to consider the cellphone evidence only as corroborative. (*Id.* at 21-22). The post-conviction court also ignores the many other ways that Syed's phone records yielded critical corroboration of the State's witnesses without relying on location data at all. In fact, the time, duration, sequence, and dialed numbers listed on Syed's cellphone records — fully separate from Waranowitz's testimony concerning location data — reinforced the veracity of witness testimony. Indeed, consistency between the records and witness accounts showed that the phone was operating normally and helped establish whether Syed or Wilds was in possession of the phone at various times that day. The cellphone records also showed that Syed made repeated calls to Lee late the night before the murder and made no phone calls to her at any point after the police told Syed that Lee was missing. (*See* T. 10/25/12 at 57-59). Based on these records alone, the jury could corroborate and rely upon the testimony of the State's witnesses about who called Syed and Wilds, when they called them, and for how long — all without regard for cellphone location data. *See generally* App-92–97.

Additionally, no prejudice can be shown from Gutierrez's failure to pursue a particular line of cross-examination in light of the enormous evidence establishing Syed's guilt fully apart from the cellphone evidence. *See generally* App-123–124 (setting forth a bulleted list of key evidence at trial compiled by twenty-one Maryland State's Attorneys in an amicus filing).

Standing in the shadow cast by this mountain of inculpatory evidence, Syed cannot credibly claim that any lack of cross-examination of Waranowitz about the contents of the fax cover sheet created a "substantial possibility" that the jury's verdict "was fundamentally unfair or unreliable." *See Oken*, 343 Md. at 284. With or without corroborative cellphone data, the overwhelming evidence shows the jury's verdict was fair, reliable, and correct.

CONCLUSION

WHEREFORE, for the reasons set forth above, the State respectfully requests that this Court reverse the post-conviction court's decision granting Syed post-conviction relief, reinstate Syed's convictions, and deny Syed's request for a new trial.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE

This Brief of Appellant contains 9,077 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

Pursuant to Maryland Rules 8-112(c) and 8-504(a)(9), I hereby certify that this Brief of Appellant was prepared in Times New Roman proportionally spaced 13-point font with double spacing between the lines.