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.)

BRIEF OF APPELLEE/CROSS-APPELLANT

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1) Whether the post-conviction court acted within its broad discretion in re-opening the post-conviction proceeding to consider Syed's ineffective-assistance claim based on his counsel's failure to cross-examine the State's witness on the unreliability of incoming cell phone data, when this Court's remand order directed the court to "conduct any further proceedings it deems appropriate."

2) Whether the post-conviction court correctly found that Syed had not waived his claim regarding trial counsel's failure to challenge the reliability of the cell phone location data.

3) Whether the post-conviction court correctly concluded 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.

4) Whether the post-conviction court erred in concluding that—despite finding Syed's trial counsel rendered ineffective assistance in failing to investigate a potential alibi witness—counsel's deficient representation did not violate Syed's Sixth Amendment right because Syed was purportedly not "prejudiced."

SUMMARY OF ARGUMENT

After a five-day evidentiary hearing, the Circuit Court concluded in a thorough and well-reasoned decision that Adnan Syed's trial counsel was ineffective and that Syed's Sixth Amendment right to counsel was therefore violated. The proper remedy is a new trial. Despite the State's attempts to manufacture flaws in that decision, the State has failed to show that the Circuit Court abused its discretion or erred as a matter of law.

First, just as this Court instructed, the Circuit Court appropriately exercised its discretion on remand by reopening Syed's post-conviction proceedings and by conducting the further proceedings the Circuit Court deemed appropriate. In particular, the Circuit Court correctly found that the interests of justice supported reopening these

proceedings to consider (i) an ineffective-assistance claim based on trial counsel's failure to investigate a key alibi witness and (ii) *Brady* and ineffective-assistance claims based on trial counsel's failure to utilize a document that would have dismantled the State's cell-phone location evidence. Syed raised each of these claims in a timely manner, and the Circuit Court's consideration of them was well within its discretion.

Second, the Circuit Court properly found that Syed had not knowingly and intelligently waived his ineffective-assistance claim based on his trial counsel's failure to utilize a disclaimer on AT&T cellular phone records that warned that the evidence the State relied on at trial was unreliable. In doing so, the Circuit Court followed longstanding precedent, which has been repeatedly reaffirmed by courts and the Legislature alike, and rested its finding on un-rebutted evidence that Syed was previously unaware of this claim.

Third, the Circuit Court correctly found that Syed's trial counsel was ineffective for failing to use the AT&T disclaimer to attack the cell-tower evidence that the State used to chronicle Syed's whereabouts on the afternoon of the murder. No post-hoc dispute among experts today can absolve trial counsel's failure to even *ask* the State's expert at trial about the disclaimer during cross-examination. In any event, the Circuit Court found that the State's expert at the post-conviction hearing was not credible. The prejudice to Syed from trial counsel's error is clear: the State's expert from trial has sworn that, had he been aware of the disclaimer, he would have dramatically altered his testimony.

In the alternative, even if this Court were to conclude that a new trial is not warranted based on Syed's cell-tower claim, it should nonetheless affirm on the ground that trial counsel was ineffective for failing to investigate a key alibi witness, Asia McClain. The Circuit Court erred in finding that trial counsel's failure to even contact McClain—who would have testified that Syed was with her at precisely the time the State says the murder took place—was not prejudicial.

STATEMENT OF FACTS

Hae Min Lee, a student at Woodlawn High School in Baltimore County, disappeared on the afternoon of January 13, 1999. Nearly a month later, her body was found in Leakin Park in Baltimore City. T. 2/23/00. The cause of death was strangulation.

In late February 1999, after receiving an anonymous tip and speaking with Jay Wilds, a recent Woodlawn graduate and known drug dealer, police arrested 17-year-old Adnan Syed, a senior in Woodlawn's honors program. The State charged him with first-degree murder, second-degree murder, kidnapping, robbery, and false imprisonment. After an initial mistrial,[1] Syed's second trial began in January 2000. Syed was represented by Cristina Gutierrez, a Baltimore criminal defense lawyer. The Syed trial turned out to be among Gutierrez's last; she was disbarred in 2001.

A. The State's Case and Cell Phone Records

The State's case against Syed relied primarily on Wilds, whose inconsistent testimony the State sought to bolster using cell phone records. Through Wilds, the State

[1] The Circuit Court granted a mistrial when a juror overheard the judge, during a bench conference, refer to Syed's counsel as a "liar." T. 12/15/99 at 254-55.

cobbled together a timeline of Syed's purported movements the day Lee disappeared. Wilds testified that Syed drove him to the mall that morning to buy Wilds' girlfriend a birthday present. T. 2/4/00 at 123. After returning to Woodlawn for class, Syed lent Wilds his car and gave him his cell phone so Syed could call for a ride after school. *Id*. at 125-26. It was this cell phone that the State claims allowed it to track Wilds' and Syed's movements on January 13, 1999.

According to the State's theory, Syed left school with Lee shortly after classes ended at 2:15 p.m. and drove in her car to a Best Buy parking lot. T. 2/25/00 at 65-66. By 2:36 p.m., Syed had supposedly committed the murder and called Wilds to ask to be picked up from the Best Buy. T. 1/27/00 at 106. Wilds claimed he met Syed in the Best Buy parking lot, where Syed showed him Lee's body in the trunk of her car. T. 2/4/00 at 130-131. According to Wilds, the two took Lee's car to the Interstate 70 Park & Ride in Baltimore City. *Id*. at 132. Later that night, Wilds claimed, he and Syed buried Lee's body in Leakin Park. *Id*. at 148-50.

The State contended that two incoming calls to Syed's cell phone, at 7:09 p.m. and 7:16 p.m., confirmed that Syed was near Leakin Park at the time Wilds said they were. T. 1/27/00 at 109-110. Abe Waranowitz, an AT&T radio frequency engineer, testified as an expert for the State on using cell tower data to determine caller location. T. 2/8/00 at 97-98.

The State laid a two-part foundation for this critical evidence. First, Waranowitz testified about how cellular phones communicated with cellular towers and that the location of the tower could be used to map an area where the phone may have been at the

time of a call. *Id*. Second, the State introduced, and Waranowitz relied upon, State's Trial Exhibit 31, which was submitted to the jury. That exhibit consisted of excerpted pages of phone records from AT&T, Syed's cell provider. One of the pages, an excerpt from a "Subscriber Activity" report, listed each of the calls made to or from Syed's cell phone on the day of Lee's disappearance. Apx. 39. Among those listed were the 7:09 p.m. and 7:16 p.m. incoming calls, which the State contended placed Syed near Leakin Park. *Id*. That same page of the State's exhibit also listed the cellular tower sites engaged by each call. *Id*.

What the State *did not* include with Exhibit 31, however, was the one-page AT&T coversheet that accompanied Syed's phone records—the AT&T disclaimer. That coversheet instructed "How to read 'Subscriber Activity' Reports," and explicitly warned: "Outgoing calls only are reliable for location status. Any incoming calls will NOT be considered reliable information for location." Apx. 15 (emphasis in original).

Relying on Exhibit 31 (without the disclaimer), Waranowitz testified that, "if Exhibit 31 indicated that the two incoming calls at issue connected with cell site 'L689B,' then it was possible that the cell phone was located in Leakin Park when the phone received the incoming calls." App-161. Waranowitz never told the jury that, according to AT&T's own records, those *incoming* calls should "not be considered reliable information for location."

The State made the 7:06 and 7:19 p.m. calls a centerpiece of its case. During its opening, for instance, the State told the jury that, "on January 13th of 1999, somewhere about 7:09, 7:16," Syed's cell phone was with "the defendant, along with Jay Wilds, [] in Leakin Park." T. 1/27/00 at 96-97. The State reiterated the same in its closing. T. 2/25/00 at.

The jury found Syed guilty of first-degree murder, robbery, kidnapping, and false imprisonment. He was sentenced to life plus 30 years in prison.

B. Waranowitz Admits the AT&T Disclaimer Would Have Changed His Testimony.

Some 16 years later, after this Court remanded this case to the Circuit Court to allow Syed to move to reopen post-conviction proceedings, Syed learned for the first time about the AT&T disclaimer. *See* App-161. And when Syed's post-conviction counsel contacted Waranowitz, he learned that Waranowitz, too, had been unaware of it.

In an affidavit, Waranowitz explained that the prosecutor, Kevin Urick, showed him State's Exhibit 31 "just prior" to testifying at trial. As a radio frequency engineer,

Waranowitz did not work with "and had never seen" billing records like those contained in that exhibit. Waranowitz stated, unequivocally, that if he had been made aware of the "critical information" in the AT&T disclaimer, he would not have affirmed the State's theory about the possible location of Syed's cell phone at the time of the incoming calls until he first learned why AT&T had issued the disclaimer. Apx. 1.

C. Missing Alibi Evidence

Syed's representation suffered from another significant deficiency: the jury never heard the testimony of Asia McClain, a fellow Woodlawn student. McClain has sworn under penalty of perjury that she was with Syed in the Woodlawn Public Library adjacent to school between 2:20 and 2:40 p.m. on January 13, 1999—exactly when the State contends the murder took place. Apx. 9; Apx. 12.

This was not some late-breaking attestation. McClain twice wrote to Syed while he was awaiting trial, stating that she remembered speaking with him in the library on that date and at that time. Apx. 4; Apx. 6. McClain's letters stated that McClain's boyfriend and his best friend both remembered seeing Syed in the library, too, and noted that Syed's presence in the library may have been captured by the library's surveillance system. Apx. 4. In her letters, McClain provided multiple contact numbers, in addition to a street address, and stated that she was trying to meet with Syed's lawyer. *Id.*; Apx. 6.

Syed sent these letters to his counsel and asked her to contact McClain. That was nearly five months prior to trial—as shown in notes obtained from her case file. Apx. 16; Apx. 17. Gutierrez never contacted McClain. Apx. 9; Apx. 12.

D. Post-Conviction Filings

Syed filed a petition for post-conviction relief in June 2010, and a supplement in June 2011. Syed raised as grounds for relief, *inter alia*, ineffective assistance of counsel based on trial counsel's failure to investigate McClain as a potential alibi witness.

The Circuit Court held an evidentiary hearing in October 2012. McClain did not testify. She later explained that the prosecutor who tried the case had convinced her that she should not participate in the post-conviction proceedings. *See* Apx. 12.[2] The Circuit Court denied relief.

Syed sought leave to appeal in January 2014, arguing that the Circuit Court erred in rejecting his ineffective-assistance claim. Syed later filed a supplement to that application, supported by a second affidavit from McClain confirming that she spoke with Syed around 2:30 p.m. on January 13, 1999, and that trial counsel never contacted her. *See id*.

This Court granted Syed's application and remanded the matter to the Circuit Court, "without affirmance or reversal," to allow Syed to file a motion to reopen the post-conviction proceedings in light of McClain's new affidavit and to "conduct any further proceedings it deems appropriate." App-151 at 3-4. On remand, as this Court instructed, Syed filed a motion to reopen in June 2015.

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[2] The Circuit Court found it unnecessary to address whether this constituted prosecutorial misconduct because McClain was subsequently afforded an opportunity to testify. App-161 at 12 n.10.

Shortly thereafter, Syed learned that incoming calls could not reliably be used as evidence of location and promptly supplemented his motion. The Circuit Court granted Syed's motion to reopen to address two issues: (i) ineffective assistance of counsel for failure to contact a potential alibi witness and (ii) claims related to the reliability of cell tower location evidence. *See* App-156.

E. Post-conviction Hearing

The Circuit Court held a five-day evidentiary hearing in February 2016. At the hearing, Syed presented his cellular tower expert, Gerald Grant, and the State presented its expert, Chad Fitzgerald. Grant was qualified as an expert in cellular phone forensics and cell site analysis. T. 2/4/16 at 182-85.

Grant testified that the phone records relied upon by the State in Exhibit 31 were excerpts from Syed's subscriber activity report—as demonstrated by the fact that the first page of that report contained the title "SUBSCRIBER ACTIVITY." *Id*. at 204-05.

App-336. Grant likewise testified that AT&T's disclaimer, titled "How to Read 'Subscriber Activity' Reports," specifically stated that "Any incoming calls will NOT be considered reliable information for location." Apx. 15. Thus, these records were subject to the AT&T disclaimer. App-161 at 51-52. Grant testified that, based on the AT&T

disclaimer, he would not have relied on the incoming calls in Syed's phone records to conclude that Syed was in Leakin Park on the night of January 13. T. 2/4/16 at 213-14.

The State's expert, Fitzgerald, denied that Syed's "SUBSCRIBER ACTIVITY" report, was a "subscriber activity report." App-161 at 51; T. 2/5/16 at 189-91. Fitzgerald also opined that the word "location" in the AT&T disclaimer meant something other than the location of the cellular tower (and phone). *Id*. at 189-96. Fitzgerald concluded that, overall—despite a few admitted inaccuracies—Waranowitz's testimony was accurate. *Id*. at 208. He reached this conclusion in spite of the fact that Waranowitz himself swore that he would not have testified as he did at trial had he been aware of the AT&T disclaimer.

At the same hearing, McClain testified that she was with Syed in the library at the time the State said Lee was murdered. *Id*. at 176-77.

F. The Post-conviction Court's Decision Granting New Trial

In June 2016, the Circuit Court vacated Syed's conviction and granted a new trial, finding trial counsel constitutionally ineffective for failing to challenge Waranowitz's testimony with the AT&T disclaimer. App-161 at 59. First, the Circuit Court found that Syed did not knowingly and intelligently waive his fundamental constitutional right to counsel. *Id*. at 34-35. Next, the court determined that trial counsel possessed the AT&T disclaimer and should have observed that the State's crucial theory about incoming phone calls "was directly contradicted by the disclaimer." *Id*. at 34 n.15, 43. "A reasonable attorney," the Circuit Court explained, "would have exposed the misleading nature of the State's theory by cross-examining Waranowitz." *Id*.

As to prejudice, the Circuit Court found that the unreliable cell phone location testimony was part of "the crux" of the State's case. *Id*. at 47. In addition, the court made a credibility determination, repudiating the testimony of the State's expert, Fitzgerald, and crediting that of Syed's expert, Grant. App-161 at 51, 52, 54, 55 n.23. Based on these findings and credibility rulings, the Circuit Court concluded that Syed was prejudiced by trial counsel's failure to utilize the AT&T disclaimer.

The Circuit Court next turned to Asia McClain, the alibi witness. It found trial counsel's performance deficient here as well because counsel "made *no effort* to contact" this critical alibi witness, which "fell below the standard of reasonable professional judgment." *Id*. at 22 (emphasis in original), 16.

The Circuit Court also concluded that McClain's testimony—which placed Syed in the library after school—could have undermined the State's theory that Syed murdered Lee at the Best Buy between 2:15 and 2:36 p.m. *Id*. at 24-25. But it nevertheless determined that, because McClain's testimony about the time of the *murder* would not have undermined the State's theory about the time of the *burial*, counsel's failure to contact McClain did not "undermine confidence in the outcome" of Syed's trial. *Id*. at 25-26.

Both parties sought and were granted leave to appeal.

STANDARDS OF REVIEW

"The court may reopen a post-conviction proceeding that was previously concluded if the court determines that the action is in the interests of justice." Md. Code Ann., Crim. P. § 7-104. When making this decision, the circuit court must exercise its

"discretion[,]" and, as the State concedes, State's Br. at 14, this Court "will only reverse a trial court's discretionary act if [it] find[s] that the court has abused its discretion." *Gray v. State*, 388 Md. 366, 383 (2005).

The question whether counsel was ineffective "is a mixed question of law and fact." *State v. Jones*, 138 Md. App. 178, 209 (2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 698 (1984)) (internal quotation marks omitted). Maryland appellate courts "will not disturb the factual findings of the post-conviction court unless they are clearly erroneous." *Id.* (quoting *Wilson v. State*, 363 Md. 333, 348 (2001)) (internal quotation marks omitted). Courts assessing constitutional challenges "'make their own independent analysis by reviewing the law and applying it to the facts of the case.'" *Id.* (quoting *Cirincione v. State*, 119 Md. App. 471, 485 (1998)).

ARGUMENT

I. This Court Should Affirm the Circuit Court's Decision to Grant Syed a New Trial Based on its Finding that Syed's Trial Counsel Was Ineffective for Failing to Challenge the State's Cell Phone Location Evidence.

A. The Circuit Court Properly Exercised its Discretion on Remand to Reopen the Post-conviction Proceedings.

The State concedes that the Circuit Court's decision to reopen the post-conviction proceedings on remand to take evidence relating to Syed's two cell tower claims is subject to abuse-of-discretion review. State's Br. at 14. Its contentions that the Circuit Court abused its broad discretion are meritless.

First, the State argues that the Remand Order authorized further proceedings only to the extent they somehow related to McClain's January 2015 affidavit. State's Br. at 15-

16. But the Remand Order was not so limited. In fact, it *twice* instructed the Circuit Court to conduct any proceedings that it deemed appropriate. The Remand Order directed the court to exercise "its discretion" to "conduct further proceedings it deems appropriate"; and it directed the Circuit Court to "re-transmit the record" to the Court of Special Appeals "after taking any action [the Circuit Court] deems appropriate[.]" App-151 at 4-5.

In the face of these broad directives, the State contends that the phrase "deems appropriate" does not mean what it says. To support its contention, the State points to a partial quotation from the Remand Order to the effect that the remand "would allow the parties to supplement the record 'with relevant documents and even testimony pertinent to the issues raised by this appeal.'" State's Br. at 16. There is a reason the State begins that partial quotation where it does. In the *unquoted* part of the same sentence, this Court made clear that the remand would permit supplementation on the issues raised by the appeal, "*among other things*[.]" App-151 at 4 (emphasis added).

This Court could have provided "directions" that the remand focus solely on the McClain affidavit. Md. Rule 8-204(f)(4); *see e.g.*, *Booth v. State*, 346 Md. 246, 247 (1997) (remanding for consideration of "the *Brady* material issue dealt with in Part III at pages 15-17" of the circuit court's opinion). But it did not. Instead, it expressly contemplated that the Circuit Court might address other issues. That is what happened. The Circuit Court reasonably interpreted its discretion as including Syed's cell tower claims, which arose for the first time on remand. *See United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001) (limited remands typically do not restrict "issues arising for the

first time on remand"); *Baltimore Cty. v. Baltimore Cty. Fraternal Order of Police*, 220 Md. App. 596, 662 (2014) (addressing issues that "arose for the first time after the remand" because they had not previously been decided on appeal), *aff'd*, 449 Md. 713 (2016).

Second, the State argues that the Circuit Court abused its discretion in reopening post-conviction proceedings to hear Syed's cell tower claims. A circuit court may grant a motion to reopen if it "determines that the action is in the interests of justice." Md. Code Ann., Crim. P. § 7-104. This section "requires the court to exercise discretion[,]" so only an abuse of that discretion warrants reversal. *Gray*, 388 Md. at 382-83. This standard is deferential: "a ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling." *Dehn v. Edgecombe*, 384 Md. 606, 628 (2005) (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994)). Rather, to be reversed for abuse of discretion, the ruling must be "beyond the fringe of what that court deems minimally acceptable." *Id.*

Moreover, the "interests of justice" standard for reopening post-conviction proceedings "has been interpreted to include a wide array of possibilities." *Gray*, 388 Md. at 382 n.7 (citations omitted). The Circuit Court concluded that the interests of justice would be served by reopening Syed's post-conviction proceeding not only to consider McClain's affidavit, but also to consider two potentially meritorious cell tower claims. App-156. And the Circuit Court even explained its reasoning in a five-page opinion, though it was not required to do so. *See Gray*, 388 Md. at 374.

The State nonetheless argues that the Circuit Court abused its discretion because the interests justifying the reopening the post-conviction proceedings were not identical to those at issue in three cases referenced in a footnote in *Gray*. *See* State's Br. at 20 (citing *Gray*, 388 Md. at 382 n.7). But an interests-of-justice finding does not have to fit some previously prescribed template. That is why *Gray* cited those three cases by way of "example," explaining that courts retain "discretion to decide when 'the interests of justice' require re-opening." 388 Md. at 382 n.7. If any further authority for the Circuit Court's exercise of its discretion were required, Maryland law provides it: appellate courts in this state have recognized as sufficient the very issues the Circuit Court relied upon as justifying reopening the post-conviction proceedings. *See e.g.*, *Booth*, 346 Md. at 247 (remanding for circuit court "to consider th[e *Brady*] issue on its merits."); *Matthews v. State*, 187 Md. App. 496, 513 (2009) (recognizing, when discussing the deficient performance of trial counsel, that "the circuit court is not precluded from reopening the post-conviction proceeding to consider appellant's claim of ineffective assistance"), *vacated on other grounds*, 415 Md. 286 (2010). Conversely, the State has cited no case in which a decision to reopen a post-conviction proceeding was overturned on appeal.

Undaunted, the State suggests that the only bases for granting a motion to reopen are claims that could not have been raised during the post-conviction proceeding. State's Br.at 20. But the State's proposed rule is simply a repackaged version of its waiver argument—itself a fact-dependent inquiry that bars previously unheard claims only if (i) those claims have been "intelligently and knowingly" waived and (ii) no "special circumstances exist." Md. Code Ann., Crim. P. § 7-106(b). Here, as explained below, the

Circuit Court properly found that Syed had not knowingly and intelligently waived the cell-tower claim that was premised on ineffective assistance of counsel. *See infra* at 18-25.

Third, the State contends that Syed's cell-tower claims were untimely and were part of an impermissible, second post-conviction petition. State's Br. at 17-19. The first deadline the State points to is this Court's. The May 18, 2015 Remand Order directed Syed to file a motion to reopen the post-conviction proceedings "within 45 days[.]" App-151 at 5. Syed timely filed his motion on June 30, 2015. To be sure, his cell tower claims were raised in a subsequent filing in August 2015, but that filing merely supplemented the prior motion. And even if it could be treated as a second motion to reopen, the supplement should not be considered untimely (especially where the Circuit Court did not do so in the first instance); motions to reopen are not subject to a deadline. *See Gray*, 388 Md. at 380 n.6; Md. Code Ann., Crim. P. § 7-104.

The State also asserts that Syed's cell-tower claims were raised after the expiration of the 10-year period prescribed by the Uniform Post-conviction Procedure Act (UPPA). But that period applies only to petitions for post-conviction relief. Md. Code Ann., Crim. P. § 7-103(b). Motions to reopen are not subject to a deadline. Similarly, the State argues that these claims are actually part of a second post-conviction petition, which, absent "extraordinary cause," is not permitted. *Id*. at § 7-103(a). The pending appeals, however, arise from Syed's motion to reopen and a supplement thereto filed under § 7-104. "[U]nlike § 7-103, § 7-104 does not prohibit a person from filing more than one petition to reopen." *Gray*, 388 Md. at 380.

At bottom, the State's arguments require this Court to ignore the caption on, the provision invoked by, and the context surrounding Syed's supplement and, instead, to re-characterize it as a second post-conviction petition. The State cites no case in which this has occurred. In fact, the case law is inconsistent with the State's arguments. *See id*. at 371-72 (analyzing filing as request to reopen under § 7-104 even though it contained ineffective-assistance claim that was not part of original post-conviction petition). In any event, the State is essentially arguing waiver—an argument the Circuit Court properly rejected. *See infra* at 18-25.

In the alternative, if Syed's supplement is to be reclassified as something other than a second motion to reopen, it should be treated as an amendment to his original petition. Under the UPPA, "an allegation of error" is not considered to be "finally litigated" until "an appellate court of the State decides on the merits of the allegation . . . on any consideration of an application for leave[.]" Md. Code Ann., Crim. P. § 7-106(a)(1)(ii). Syed sought leave to appeal in January 2014. This Court granted his application before remanding "*without affirmance or reversal*[.]" App-151 at 4 (emphasis added). Because this Court has not ruled on the merits of the appeal, Syed's petition can still be amended. And amendments to timely post-conviction petitions are not subject to the 10-year period and should be "freely allowed to do substantial justice." Maryland Rule 4-402(c); *see also Poole v. State*, 203 Md. App. 1, 9 (2012).[3] As a result, the Circuit

[3] Nor did *Poole* limit "substantial justice" to situations where the petitioner was not represented by counsel until after filing his post-conviction petition, as the State suggests (State's Br. at 17 n.1). Instead, *Poole* affirmed a broader principle applicable here: "the right to effective assistance of counsel necessarily includes the right to add non-frivolous

Court's decision to hear Syed's cell tower claims can also be affirmed on the alternative ground that it properly granted him leave to amend his post-conviction petition to include claims of which he was not previously aware.

B. The Circuit Court Correctly Found that Syed Had Not Intelligently and Knowingly Waived his Ineffective-Assistance Claim.

In *Curtis v. State*, 284 Md. 132 (1978), the Court of Appeals held that a claim of ineffective assistance of counsel implicates the "fundamental right" to counsel and therefore cannot be waived without the petitioner's intelligent and knowing consent. The Circuit Court properly concluded that Syed did not intelligently and knowingly waive his ineffective-assistance claim based on trial counsel's failure to cross-examine the State's expert with a critical document impugning his cell-tower testimony, because Syed was not aware of the document or its significance until after this Court's remand. App-161 at 34-37. This finding suffices to rebut any presumption of intelligent and knowing waiver.

1. The Post-Conviction Statute Requires Intelligent and Knowing Waiver of a Claim of Ineffective Assistance of Counsel.

The Maryland Post-Conviction Procedure Act provides that a petitioner can only waive an allegation of error "when a petitioner could have but intelligently and knowingly failed to make the allegation" in a prior proceeding. Md. Code Ann., Crim. Proc., § 7-106(b). The Court of Appeals interpreted the scope of this statutory waiver provision in *Curtis*, finding that the legislature intended to incorporate the common-law waiver standard, which only requires intelligent and knowing waiver of certain

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issues developed by counsel, which were not included in the original petition." *Id*. at 9 (citations omitted).

fundamental constitutional rights. *Id*. at 148, 150 n.7. In post-conviction proceedings, therefore, the statute requires intelligent and knowing waiver "with respect to errors which deprived a petitioner of fundamental constitutional rights." *McElroy v. State*, 329 Md. 136, 140 (1993).

The right to counsel is a "prime example" of a fundamental constitutional right. *Schneckloth v. Bustamonte*, 412 U.S. 218, 237-38 (1973); *see also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). "For without that right, a wholly innocent accused faces the real and substantial danger that simply because of his lack of legal expertise he may be convicted." *Schneckloth*, 412 U.S. at 237-38. Maryland courts have recognized the right to counsel guarantees "more than the mere presence of someone who happens to possess a law degree. . . . The right to counsel is the right to effective assistance of counsel." *Cirincione v. State*, 119 Md. App. 471, 484 (1998) (internal citations omitted). A claim of ineffective assistance of counsel, therefore, is a claim that the fundamental right to counsel has not been fulfilled.

Recognizing this longstanding precedent, the Court of Appeals in *Curtis* held that the statutory "intelligently and knowingly" standard applies to a claim of ineffective assistance of trial counsel. *Curtis*, 284 Md. at 150 (citing *Johnson*, 304 U.S. 458). As the Court of Appeals explained, the Legislature intended to incorporate the common-law approach expressed in *Johnson* and its progeny, and there is no circumstance in which that approach requiring intelligent and knowing waiver is warranted more than where the fundamental right to counsel is at stake. "It is settled that a criminal defendant cannot be

precluded from having this issue considered because of his mere failure to raise the issue previously." *Id*.

The State suggests that subsequent amendments to the Maryland Post-Conviction Procedure Act undermine *Curtis*. *See* State's Br.at 24. To the contrary; these amendments show that the Legislature has had multiple occasions to amend the waiver provision at issue in *Curtis*, but has declined to do so. *See* App-77 at 31 n.18 (conceding that the waiver provision quoted in *Curtis* "is identical in pertinent part to the waiver language in the current form of the UPPA, Crim. Proc. § 7-106(b)."). Because "[t]he General Assembly is presumed to be aware of [the Court of Appeals'] interpretation of its enactments," this Court must therefore infer that the Legislature has acquiesced in *Curtis*'s interpretation. *Stachowski v. State*, 416 Md. 275, 291 (2010). Further, the Court of Special Appeals in *Curtis* expressed a similar concern that requiring intelligent and knowing waiver of an ineffective assistance of counsel claim would undermine "the finality aimed at by the Uniformed Post Conviction Petition Act[UPPA]." *See Curtis v. State*, 37 Md. App. 459, 468 (1978). In reversing the Court of Special Appeals, however, the Court of Appeals found that concern insufficient to find that the Legislature intended to exclude a claim of ineffective assistance of counsel from the statutory waiver standard.

The State also suggests that the Court of Appeals' statutory interpretation in *Curtis* was wrong, because unlike waiver of fundamental rights in other contexts, waiver of an ineffective assistance claim in post-conviction proceedings may not be accompanied by an in-court colloquy. *See* State's Br. at 25-26. But the use of a colloquy does not define whether a right is sufficiently fundamental to require intelligent and knowing waiver. It is

merely one means by which a court can determine whether a right already recognized as fundamental has been waived. Another is to examine the circumstances and record evidence, as the Circuit Court did here. The State's concern that without a colloquy a petitioner can merely "claim" that he became aware of an ineffective-assistance of counsel claim at any point is therefore unfounded. *See* State's Br. at 24.

Also absent from the State's brief is any citation to any decision calling into question *Curtis*' holdings—and undersigned counsel is aware of no such case. Maryland courts have repeatedly reaffirmed *Curtis* and recognized that the right to counsel is sufficiently fundamental to fall within the scope of the statutory waiver provision. In *State v. Adams*, 406 Md. 240 (2008), for example, the petitioner failed to raise an ineffective-assistance claim on direct appeal. *See* 406 Md. at 253 n.8 (listing eight claims raised on direct appeal). Following *Curtis*, however, the Court of Appeals held that [u]nlike most of his other post-conviction claims, [petitioner's claim of ineffective assistance of counsel] has not been waived by inaction in the prior proceedings." *Id.* at 292. Other courts have similarly recognized *Curtis*'s continued vitality. *See, e.g.*, *State v. Smith*, 443 Md. 572, 604 (2015) ("We have not departed from [*Curtis*'s] construction of the waiver scheme in the post-conviction statute."); *Oken v. State*, 343 Md. 256, 271-272 (1996) (comparing right at issue to holding in *Curtis* that right to "effective assistance of counsel" requires intelligent and knowing waiver).

Curtis remains binding precedent, and the Circuit Court properly applied it here.

2. *Curtis* Cannot Be Distinguished on its Facts.

The State's attempts to distinguish *Curtis* on its facts are similarly unavailing. *See* State Br. at 22-25. The relevant holding in *Curtis*—that the statutory waiver provision applies to ineffective-assistance claims—did not depend on the facts of that case. Rather, *Curtis*'s holding rested on its findings that the legislature intended to incorporate the waiver standard from existing case law, which required intelligent and knowing waiver of claims affecting the fundamental right to counsel. This rule applies regardless of the circumstances giving rise to the ineffective assistance of counsel claim. The scope and meaning of the statutory waiver standard does not change from case to case.

In any event, the facts here are not materially distinguishable from *Curtis*. The State suggests that the ineffective-assistance claim in *Curtis* was somehow different because it was combined with claims of ineffective assistance of appellate and post-conviction counsel. *See* State's Br. at 23. The holding in *Curtis*, however, did not depend on those alternative claims. The Court of Appeals held specifically that "the constitutional adequacy of *trial counsel's* representation is governed by the *Johnson v. Zerbst* standard of 'intelligent and knowing' waiver." *Curtis*, 284 Md. at 150 (emphasis added). And once a right is found to be sufficiently fundamental, the intelligent and knowing waiver standard applies regardless of other circumstances. *See Robinson v. State*, 410 Md. 91, 107-08 (2009) (right to counsel is "absolute and can only be foregone by the defendant's affirmative 'intelligent and knowing' waiver"). Just as counsel's reasonable trial strategy is not sufficient to waive the right to counsel in the first instance,

counsel's tactical reasons not to raise an ineffective-assistance claim in a post-conviction proceeding does not eliminate the need for a petitioner's intelligent and knowing waiver.

Nor do Syed's prior ineffective-assistance claims materially distinguish this case from *Curtis*. The State seems to argue that Syed's ineffective-assistance claim based on the cell tower evidence should be barred because he raised other ineffective- assistance claims in 2010. *See* State's Br. at 23-24. That is wrong. It is axiomatic that petitioners can raise multiple, separate ineffective assistance of counsel claims. *Cf. Pole v. Randolph*, 570 F.3d 922 at 934-39 (7th Cir. 2009) (ineffective-assistance claim premised on one set of facts does not "exhaust" an ineffective-assistance claim premised on another); *Wood v. Ryan*, 693 F.3d 1104, 1120 (9th Cir. 2012) ("[A] general allegation of ineffective assistance of counsel is not sufficient to [satisfy the exhaustion requirement for] separate specific instances of ineffective assistance."). Syed's ineffective-assistance claim based on cell-tower evidence raises a new issue separate from any prior ineffective-assistance claim; the issue was not finally litigated; and it could not have been waived absent Syed's intelligent and knowing waiver.[4]

3. The Circuit Court Correctly Found the Record Evidence Sufficient to Rebut the Presumption of Intelligent and Knowing Waiver.

The circuit court's determination that Syed did not intelligently and knowingly waive his ineffective-assistance claim is a finding of fact that cannot be disturbed absent

[4] If the Court treats Syed's current ineffective-assistance claim as effectively the same claim raised in his original post-conviction petition, then there is no waiver issue at all. Syed properly raised the claim in the original proceeding, which has now been reopened. He may therefore assert it again here.

clear error. *Holmes v. State*, 401 Md. 429, 472 (2007). Although Syed bears the burden to rebut a presumption of intelligent and knowing waiver, this burden is met here. *See State v. Smith*, 443 Md. 572, 606 (2015) (observing that "the burden to rebut the presumption of waiver" does "not require much by way of evidence").

Syed did not know about the unreliability of using incoming cell phone calls as evidence of location. The Circuit Court found that Syed first learned about this issue "shortly before August 24, 2015"—the date he filed the Supplement to Motion to Re-Open Post-Conviction Proceedings. App-161 at 36. Syed "was never advised that trial counsel may have been ineffective for her alleged failure to challenge the State's cell tower expert at trial with the disclaimer in prior proceedings." *Id*. The Circuit Court thus properly concluded that Syed had adequately rebutted the presumption that he intelligently and knowingly waived his claim of ineffective assistance of counsel related to the State's cell tower evidence.

The State is simply wrong that the record did not support the Circuit Court's conclusion. *See* State's Br. at 27. Syed had explained that he was previously unaware of this claim and "raised the cell tower issue [in the August 24, 2015 supplement] immediately upon its discovery." *See, e.g.*, Apx. 18. That assertion was corroborated by an affidavit from the State's original cell phone expert, Waranowitz, declaring that he first conveyed the potential implications of the AT&T disclaimer to Syed's post-conviction counsel in September 2015, *see* Apx. 1, and Syed's testimony at a prior post-conviction hearing that trial counsel "didn't really go into detail [with him] about any

aspects of [cellular telephone evidence]." T. 10/25/12 at 12. The State did not—and cannot—identify any record evidence contradicting Syed's explanation.

The State's attempts to distinguish *Curtis* by pointing to differences between Syed's education and involvement in his case and that of the petitioner in *Curtis* are likewise meritless. Although the Court of Appeals in *Curtis* relied in part on education and mental capacity to assess waiver, *see McElroy*, 329 Md. at 147-48, these are merely *some* of the factors that courts must consider. *See Curtis*, 284 Md. at 143 (finding courts must look to the "particular facts and circumstances surrounding that case, *including* the background, experience, and conduct of the accused." (quoting *Johnson*, 304 U.S. at 464) (emphasis added)); *see also* App-161 at 35 (identifying other factors as described in *McElroy*, 329 Md. at 147-48). Even if Syed had a greater *capacity* to understand than the petitioner in *Curtis*, the Circuit Court's finding of no waiver still stands on the separate and dispositive ground that Syed simply did not *know* about his claim, and therefore could not have knowingly waived it. *See* App-161 at 36; *see also Wyche*, 53 Md. App. at 406 (explaining that the record must "expressly reflect[] that the defendant had a basic understanding of the right which was relinquished or abandoned").

C. The Circuit Court Correctly Found That Trial Counsel Was Deficient.

The Circuit Court found—after a five-day evidentiary hearing—that trial counsel's failure to attempt to rebut the State's cell site evidence rendered her performance constitutionally deficient. That court's detailed findings of fact on this issue are entitled to deference unless they were clearly erroneous. *Holmes*, 401 Md. at 472. They were not.

1. The AT&T Disclaimer is Unambiguous About the Reliability of Cell Site Location Information.

The AT&T disclaimer accompanying Syed's phone records means what it says: "Outgoing calls only are reliable for location status. Any incoming calls will NOT be considered reliable information for location." Apx. 15 (emphasis in original). After hearing from experts on both sides, weighing their credibility, and reviewing documentation, the Circuit Court found: 1) trial counsel was on notice of the AT&T disclaimer; 2) the disclaimer applied to subscriber activity reports; 3) the documents assembled by the State in Exhibit 31 were part of a subscriber activity report; and 4) the use of the word "location" in the AT&T disclaimer was a reference to cell tower location (which can be used to estimate a cell phone's location, just as the State did at trial).

2. The Circuit Court Correctly Concluded That Trial Counsel's Performance Fell Below a Reasonable Standard of Professional Judgment.

The Circuit Court correctly concluded that trial counsel was deficient for failing to use the critical AT&T disclaimer to rebut the State's expert. App-161 at 37-46. Under *Strickland*, counsel's performance is deemed deficient if her representation falls below an "objective standard of reasonableness[.]" *Strickland v. Washington*, 466 U.S. 668, 669, 702 (1984). Trial counsel's performance fell below that standard.

As the Circuit Court correctly found, the cell site information was critical to the State's case. App-161 at 45 n.21, 55-56. To rebut this highly prejudicial (and unreliable) evidence, all trial counsel had to do was review the materials she was given by the State and cross-examine a key witness about those materials. *See Bowers v. State*, 320 Md. 416

(1990); *see also Elmore v. Ozmint*, 661 F.3d 783, 851, 854 (4th Cir. 2011), *as amended* (Dec. 12, 2012) (merely accepting State's evidence as provided constitutes "gross failure of [a] trial lawyer[]").

She did not do so. In possession of critical exculpatory information—namely, that the cell site location data on which the State's case depended were not reliable—she either failed to review or failed to understand the import of such information. As the Circuit Court found, whatever the basis for trial counsel's failure, it rendered her performance constitutionally deficient. *See Driscoll v. Delo*, 71 F.3d 701, 709 (8th Cir. 1995) ("[A]ny reasonable attorney . . . would study the state's laboratory report with sufficient care so that if the prosecution advanced a theory at trial that was at odds with the []evidence, the defense would be in a position to expose it on cross-examination"); *Williams v. Washington*, 59 F.3d 673, 680 (7th Cir. 1995) (attorney "rather clearly has a duty to familiarize himself with discovery materials"; failure to do so is not "objectively reasonable"); *Washington v. Murray*, 4 F.3d 1285, 1288-89 (4th Cir. 1999) (failure to investigate deficient where counsel did not understand potential significance of evidence).

The State does not address the case upon which the Circuit Court primarily relied for its finding that counsel's performance was deficient. *See Driscoll*, 71 F.3d at 709. In that case, the Eighth Circuit's finding of deficiency necessarily anticipated that competent trial counsel would draw inferences from evidence produced in discovery in order to perform reasonably. *See id*. Here, even less was required of trial counsel; far from

requiring *inferences* not readily available on the page, she need only have *read the documents* produced in discovery.

Nor can counsel's failure to effectively counter the cell site evidence be chalked up to strategy. There can be no strategy in not reviewing discovery materials provided by the state. *Williams*, 59 F.3d at 680 (noting that the Court could not "imagine a plausible excuse for a decision not to read discovery materials voluntarily provided by the State"); *Sims v. Livesay*, 970 F.2d 1575, 1580-81 (6th Cir. 1992) (finding "no strategy . . . only negligence" in failure to investigate key evidence). And there similarly can be no strategy in failing to cross-examine the State's expert at trial with a disclaimer utterly critical to the expert's testimony— and to the State's case.[5] *See* App-161 at 43-44; *see also*, *e.g.*, *Steinkuehler v. Meschner*, 176 F.3d 441 (8th Cir. 1999) (failure to cross-examine critical state witness with readily available information constituted deficient performance); *Berryman v. Morton*, 100 F.3d 1089, 1098 (3d Cir. 1996) (failure to cross-examine using prior inconsistent statements was deficient performance); *Nixon v. Newsome*, 888 F.2d 112, 115 (11th Cir. 1989) (trial counsel's representation was deficient for failing to confront a witness with readily available evidence). No conceivable consequence of using the AT&T disclaimer could have been more prejudicial than what actually occurred— allowing the cell tower evidence, which formed the foundation of the State's case, *see* App-161 at 47, to enter the record without using the AT&T disclaimer to challenge the

[5] The State's reliance on the Georgia court's opinion in *Henry v. State*, 772 S.E.2d 678 (Ga. 2015), is misplaced. While a trial counsel's failure to ask *particular questions* on cross-examination may generally fall within the realm of acceptable "strategy," that is not the issue here. Syed's ineffective assistance claim was based on trial counsel's total failure to investigate the evidence that formed the crux of the State's case.

reliability of using incoming calls to establish location. The State has identified no strategic *downside* to questioning the expert on the disclaimer, and undersigned counsel can think of none. *See Griffin v. Warden*, 970 F.2d 1355, 1358 (4th Cir. 1992) ("courts should not conjure up tactical decisions an attorney could have made, but plainly did not."). To the contrary, trial counsel had everything to gain by questioning the State's expert with the AT&T disclaimer. She did not do so, and the Circuit Court correctly found that her performance was deficient.

3. The State's Attempts to Excuse Trial Counsel's Performance are Meritless.

Despite the AT&T disclaimer's clear language and import, the State attempts to excuse trial counsel's failure to use it with three arguments: 1) a *post-hoc* dispute of experts as to the meaning of the AT&T disclaimer; 2) trial counsel pursued other cross-examination avenues with respect to the cell phone evidence; and 3) cross-examining the State's expert on the reliability of using incoming calls to establish cell phone location was not constitutionally required of trial counsel. All of these arguments are meritless.

First, the State attempts to cast doubt on the plain meaning of the AT&T disclaimer—and by extension trial counsel's deficiency in failing to inquire about it—by pointing to a perceived dispute among the experts. The State maintains that this supposed dispute means that trial counsel could not have been defective for failing to cross-examine the State's expert on the AT&T disclaimer. But the State cites no authority for its theory that a battle of the experts over the *significance* of a document mitigates an attorney's failure even to *cross-examine* the adverse expert on the document.

Regardless, the State's argument is misguided. To begin with, it relies on after-the-fact rationalization. At the time of trial, defense counsel could not have known whether a battle of the experts would materialize because she failed to even *ask* the State's expert about the AT&T disclaimer, much less challenge his testimony by offering her own expert. In fact, if trial counsel had questioned the State's expert using the AT&T disclaimer, the record evidence suggests not that a battle of experts would have ensued, but that the State's expert would have altered his testimony to potentially align with the testimony of Syed's expert. *See* Apx. 1.

Moreover, even if a dispute among the experts at the 2016 post-conviction proceeding could somehow have justified trial counsel's prior failings, no such dispute arose here. Instead, the State attempts to manufacture a dispute by ignoring the Circuit Court's credibility determinations with regard to the State's expert at the post-conviction hearing, Agent Chad Fitzgerald. Like findings of fact, credibility determinations cannot be disturbed without a finding of clear error. *State v. Latham*, 182 Md. App. 597, 613 (2008). Here, the Circuit Court appropriately took issue with the substance and credibility of Fitzgerald's testimony—on which the State relied as gospel for its argument that the AT&T disclaimer did not apply to Exhibit 31 and that Syed's proposed cross-examination was "novel." For example, the Circuit Court was:

> perplexed by Agent Fitzgerald's interpretation that Exhibit 31 are "call detail records," and not a subscriber activity report, because the Agent's interpretation is contrary to the text of Petitioner's cell phone records. [] Agent Fitzgerald apparently finds the title of the subject page to be irrelevant in his analysis.

App-161 at 51; App-336. The Circuit Court also explained that "Agent Fitzgerald contradicted his own testimony" on the material question of whether the instructions and disclaimer from AT&T apply to Exhibit 31. *Id*. In fact, when confronted with the inconsistencies in his testimony, Fitzgerald "abandoned his initial position" and conceded that Exhibit 31 was "*a* subscriber activity report," while continuing to maintain that it was "not *the* subscriber activity report" referenced in the AT&T disclaimer. *Id*. at 52. The Circuit Court rightly disregarded this tortured distinction, in addition to the other unconvincing explanations Fitzgerald offered in trying to rehabilitate a number of similar inconsistencies and discrepancies.[6] Thus, to the extent there is any dispute, it existed between, on the one hand, an expert credited by the Circuit Court and the *State's expert from trial* and, on the other, an expert whose testimony the Circuit Court heard and explicitly rejected. *See* App-161 at 51-52.

Tellingly, the State's brief is silent as to the Circuit Court's credibility findings related to Fitzgerald. But the findings and testimony of an expert who the trier of fact found to be non-credible cannot be used to create a legitimate dispute. And a forced, post-hoc "dispute" is not grounds to excuse trial counsel's failures to investigate and cross-examine at trial.

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[6] *See, e.g., id*. at 51 (finding that Fitzgerald again "contradicted his own testimony" when he purported to agree with Waranowitz's testimony, only to find an error in Waranowitz's interpretation of Exhibit 31, the central and most critical part of his testimony); *id*. at 54 (finding unpersuasive Fitzgerald's testimony that the "location" referred to in the AT&T disclaimer does not mean cell site location, and further that Fitzgerald's "explanation of the metro phenomenon contradicted his own testimony that the term 'location' refers to the switch and not the cell site").

Second, the State attempts to excuse trial counsel's errors by pointing to lines of cross-examination that trial counsel did pursue.[7] That is not the standard. A lawyer's performance can be deficient even if she mustered *some* attempt at cross-examination. *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986) (noting that "this Court has said that a single, serious error may support a claim of ineffective assistance of counsel"). Maryland courts have reached the same conclusion, explaining that "a single, serious error can support a claim of ineffective assistance of counsel." *In re Parris W.*, 363 Md. 717, 726 (2001). The Circuit Court concluded that that was the case here. *See* App-161 at 37, 46.

Third, the State attempts to cast the cross-examination that trial counsel failed to undertake as requiring some sort of deep understanding of a new scientific discipline, emphasizing Fitzgerald's and Grant's testimony that they had not previously heard of challenges to the reliability of using incoming calls to locate cell phones.[8] In service of this argument, the State relies heavily on *Maryland v. Kulbicki*, 136 S. Ct. 2 (2015), the central holding of which is that an attorney's performance is not deficient based on a

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[7] While the State heaps praise on Gutierrez's cross-examination of Waranowitz, the State fails to mention that Gutierrez's own copy of critical AT&T phone records was cropped, rendering the records impossible to interpret—something even Agent Fitzgerald reluctantly conceded. T. 2/8/16 at 41-55.

[8] The State has presented no evidence regarding how often this disclaimer was used in other cases at which Fitzgerald or Grant testified. Nor did the State present evidence that cell phone companies other than AT&T used the same disclaimer, either now or in 1999 (the year of Syed's subscriber activity report). Nor did the State present evidence regarding how long AT&T continued to use the disclaimer. Indeed, there is no evidence to suggest that the fax cover disclaimer was used by AT&T even one other time. Without evidence on these points, it is of no consequence whether some other defense counsel in some other case did or did not use the disclaimer to cross-examine an expert; there is nothing in the record to suggest that another defense counsel ever had the opportunity.

failure to attack an accepted, uncontroversial mode of scientific evidence that only later is called into question. *Id*. at 4.

This argument misses the point. First, Waranowitz's shift in opinion about the reliability of the cell site location data with respect to incoming calls has nothing to do with developments in the field of cell site location evidence. Second, cross-examining an expert with a contemporaneous document that expressly states the expert's conclusions are "NOT . . . reliable" is not a "novel" inquiry in the least. It is the routine practice of a reasonable attorney. *See* App-161 at 42 ("If the State advanced a theory that contradicted the instructions or disclaimer, a reasonable attorney would have undermined the State's theory through adequate cross-examination."). The situation in *Kulbicki* was that trial counsel failed to attack comparative bullet lead analysis that was widely *accepted* at the time of trial—not that trial counsel failed to read, understand, and pursue a disclaimer on a lead analysis report that said "this evidence is unreliable for bullet comparison," or its equivalent. The failure upon which the Circuit Court's deficiency holding was based was not that trial counsel failed to anticipate some novel change in forensics. It was that trial counsel utterly failed to investigate and/or understand a one-page disclaimer, written in plain English, and to cross-examine the State's expert regarding the clear import of its terms.

D. The Circuit Court Correctly Held that Trial Counsel's Failure to Rebut Waranowitz's Testimony with the AT&T Disclaimer Prejudiced Syed.

The Circuit Court properly found what the State has argued all along: the cell site testimony was the linchpin of the prosecution's case. The State needed the testimony of

its cell phone expert about the incoming calls to corroborate the testimony of Wilds—a witness whom even the State acknowledged had credibility issues.

The Circuit Court concluded that trial counsel's failure to review or understand the clear import of the cell site evidence, and to counter the State's cell phone expert, created a substantial possibility that the result of Syed's trial was fundamentally unreliable. *See* App-161 at 55. That suffices to demonstrate prejudice. *Strickland*, 466 U.S. at 964 (prejudice attaches when counsel's failures "undermine confidence in the outcome"); *Coleman v. State*, 434 Md. 320, 341 (2013) (prejudice analysis "should not focus solely on an outcome determination," but rather on whether result was unfair or unreliable). The State does not contend that the Circuit Court applied the wrong legal standard. Instead, it asks this Court to re-evaluate the Circuit Court's fact-based determinations about the credibility (or lack thereof) of certain witnesses. But even the State seems to acknowledge the weakness of its prejudice argument, devoting less than two pages of its brief to this issue. The Circuit Court merely held what the State made express during its entire case presentation: the cell phone location testimony was critical, and counsel's failure to attack it with the disclaimer that gutted its reliability was prejudicial.

1. The Location of Incoming Calls was the Crux of the State's Case.

At every stage of this case, the State has emphasized the significance of two incoming calls that supposedly placed Syed with Wilds at Leakin Park around 7:00 p.m. on the night Lee's body was supposedly buried. In fact, early in its opening statement—

even before ever mentioning the victim's name—the State featured the 7:09 p.m. and 7:16 p.m. phone calls, telling the jury:

> I get to let you know in advance what the evidence you're going to hear is. Well, you're going to find out that on January 13th of 1999, somewhere about 7:09, 7:16, one Jennifer Pusateri was calling a friend of hers by the name of Jay Wilds. . . . At that moment the defendant, along with Jay Wilds, was in Leakin Park.

T. 1/27/00 at 96-97; *see also id*. at 109-110 ("And you're going to see a map from the AT and T Wireless records showing . . . that that cell site . . .covers Leakin Park, that those two calls at 7:09 and 7:16 . . . covers Leakin Park and not much else."); *id*. at 111 ("And you're going to see how the cell phone records corroborate that activity.").

As the Circuit Court explained, "[a] jury's first impression of a case plays a significant role in the jury's ultimate verdict." App-161 at 48; *see also Arrington v. State*, 411 Md. 524, 555 (2009) ("Realizing that opening statements are the first characterization of the case heard by the jury and often presented in artful form, we do not underestimate the ultimate impact of these statements on the jury's verdict."); *Simmons v. State*, 208 Md. App. 677, 694 (2012), *aff'd*, 436 Md. 202 (2013) ("[O]pening statements can 'have major impacts on juries.'"). Here, the State relied on the incoming calls as its opening salvo, ensuring maximum impact on the jury.

The State also focused extensively on this evidence in its closing argument, to similar effect. *See Ware v. State*, 348 Md. 19, 53 (1997). The prosecution stated:

> [I]f Jay Wilds said that the Defendant answered his phone in Leakin Park, was that true? . . . Well, ladies and gentlemen, the cell phone records support what those witnesses say and the witnesses support what those cell phone records say. There's no way around it.

T. 2/25/00 at 63.

> Jay Wilds and the Defendant go to Leakin Park – time. And the next phone call, calls 10 and 11, are *crucial*.

Id. at 70 (emphasis added).

> The Defense tells you well, they can't place you specifically within any place by this. Absolutely true, but look at 7:09 and 7:16, 689B, which is the Leakin Park coverage area. There's a witness who says they were in Leakin Park. *If the cell coverage area comes back as that that includes Leakin Park, that is reasonable circumstantial evidence that you can use to say they were in Leakin Park*. You've got it two ways: through the cell phone records, through the witness testimony. The two mesh together. And notice again that cell phone is nowhere near the mosque . . . .

Id. at 125 (emphasis added).

Even after the trial, the State continued to stress the importance of the cell site evidence and its significance in corroborating Wilds' otherwise shaky testimony. At the October 11, 2012, post-conviction hearing, the State argued that its case was "extremely strong" *because of* the cell phone evidence. T. 10/11/12 at 24-25 (characterizing the cell phone evidence as "the predominant evidence in this case"). The State doubled down on these statements at a later post-conviction hearing, arguing that McClain's alibi testimony "wouldn't explain why he's in Leakin Park with Jay Wilds at 7:00 on the night that Hae Min Lee is murdered. That is *the strength of the State's evidence* in this case." T. 10/25/12 at 115 (emphasis added).

Nevertheless, the State argues that no amount of cross-examination of Waranowitz could have overcome the "mountain" of evidence against Syed. That is, no doubt, a favorite tactic of the State for overcoming a finding of prejudice. But while it may work in other cases, it cannot work here; the "mountain" was constructed on the faulty cell

tower evidence. It is settled law that where, as here, counsel's deficiency relates to a central issue in the case, the potential for prejudice is exacerbated.[9] *See Coleman*, 434 Md. at 344 (counsel's deficient performance in not objecting to approximately 30 references to a defendant's post-*Miranda* silence was prejudicial where defendant's "credibility was an essential factor for his defense"); *Banks v. Dretke*, 540 U.S. 668, 700-01 (2004) (finding *Brady* prejudice where withheld information related to credibility of witness who was "the centerpiece of [the] prosecution's [case]").

One more thing bears noting. The State contends that "[i]t should be emphasized [that] . . . the trial court awarded Syed a limiting instruction, directing the jury to consider the cellphone evidence only as corroborative." State's Br. at 35. While that statement may be technically true—the trial court did grant a motion "award[ing] Syed a limiting instruction"—the State misleads by omission. No such limiting instruction was ever

[9] The State's dependence on the cell phone location evidence was due in large part to the unreliable and contradictory statements of its primary fact witness. Wilds testified that he lied to police officers about Lee's murder on multiple occasions. *See, e.g.*, T. 2/10/00 at 126-128; T. 2/11/00 at 101. He took the police on a wild goose chase, showing them the location where he allegedly saw Lee's body, another lie. *See* T. 2/10/00 at 69. He admitted that he continued to lie about where he saw the victim's body until he was no longer concerned about the existence of video footage. *See* T. 2/11/00 at 94. And he admitted to hiding evidence from the police. *See id.* at 91-92. Wilds acknowledged that the police questioned inconsistencies in his stories. *See, e.g.*, T. 2/10/00 at 82; T. 2/15/00 at 32; *see also* T. 2/18/00 at 166 (testimony of Detective McGillivray that Wilds' inconsistencies were "lies"). And the State understood full well that Wilds was not credible. *See, e.g.*, T. 1/27/00 at 102 (explaining during opening statement: "The State has to take – take its witnesses where it finds them. We don't get to pick and choose . . . So you may not like Jay Wilds."). The cell site evidence purportedly provided that needed corroboration.

actually provided to the jury—and Syed's trial counsel never objected to the court's failure to give it. *See* T. 2/25/00 at 23-46.

2. Waranowitz's Testimony Would Have Been Different Had He Known About the AT&T Disclaimer.

Waranowitz testified as an expert regarding "the network design and functioning of AT&T wireless communication." T. 2/8/00 at 38. The Circuit Court correctly recognized that, as an expert presenting scientific evidence, Waranowitz had the power to significantly impact the jury's decision-making process. *See* App-161 at 49. As the Maryland Court of Appeals cautioned in 1978, "scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury[.]" *Reed v. State*, 283 Md. 374 (1978). So too today.

Had Waranowitz relied on full and accurate information, his influence with the jury might not have been concerning. But Waranowitz has admitted that he had not seen the cover sheet when he testified at trial, *see* Apx. 1, and that "had [he] been made aware of this disclaimer, it would have affected [his] testimony." *Id*. Without Waranowitz affirming the reliability of using incoming calls for location, the State would have had no way to introduce its assertion that the incoming call records proved Syed was present at Leakin Park the evening of January 13, 1999. Under these circumstances, trial counsel's failure to present Waranowitz with the AT&T disclaimer certainly "undermined confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694.

3. The Circuit Court's Conclusion is Bolstered by the Cumulative Effect of Trial Counsel's Errors.

The Circuit Court properly found that the AT&T disclaimer, on its own, rendered Syed's trial fundamentally unreliable. App-161 at 56. But, as discussed *infra* at 44-45, the prejudice to Syed resulting from his trial counsel's deficient performance was greater still when viewed cumulatively, as is required. *Schmitt v. State*, 140 Md. App. 1, 19 (2001) (citing *Strickland*, 466 U.S. at 695-96).

II. In Any Event, Syed Is Entitled to a New Trial Due to Trial Counsel's Ineffectiveness in Failing to Investigate the McClain Alibi

A. The Circuit Court Correctly Found that Trial Counsel's Failure to Investigate a Potential Alibi Witness Rendered Her Performance Deficient.

The Circuit Court correctly found that trial counsel's failure to investigate a possible alibi defense was deficient. Before trial, Syed received two letters from Asia McClain in which she provided her contact information and offered to assist with Syed's defense. *See* Apx. 4; Apx. 6. After receiving these letters, Syed asked trial counsel to follow up with McClain, and the defense file confirms that, nearly five months before Syed's first trial, trial counsel was aware that McClain would have testified that Syed was in the Woodlawn Public Library at the time of the murder. *See* Apx. 16; Apx. 2; Apx. 17. Yet, "trial counsel made *no effort* to contact McClain[.]" App-161 at 22 (emphasis in original). Under the circumstances, the Circuit Court appropriately concluded that "trial counsel's failure to contact and investigate McClain as a potential alibi witness fell below the standard of reasonable professional judgment." *Id*. at 16; *see also Grooms v. Solem*,

923 F.2d 88, 90 (8th Cir. 1991) ("Once a defendant identifies potential alibi witnesses, it is unreasonable not to make some effort to contact them to ascertain whether their testimony would aid the defense."); *Griffin*, 970 F.2d at 1358 (counsel's failure to contact, interview, or present the testimony of a potential alibi witness was deficient).

B. The Circuit Court's Prejudice Analysis Contravenes Settled Precedent.

1. The Circuit Court's Prejudice Analysis

Despite finding trial counsel deficient for failing to investigate the potential alibi, the Circuit Court concluded that this deficiency did not prejudice Syed. In reaching this rather remarkable conclusion, the Circuit Court acknowledged that McClain's testimony could have "undermined" the State's theory regarding the timing of Lee's murder, which was "relatively weak[]" and "premised upon inconsistent facts[.]" App-161 at 25.[10]

Yet, the Circuit Court disregarded the implications of this analysis, reasoning that "the crux of the State's case *did not rest on the time of the murder*" but, rather, on the time when Syed supposedly "buried the victim's body[.]" *Id*. at 25 (emphasis added). The Circuit Court found that McClain's testimony would not have undermined this "crucial link." *Id*. at 26. Accordingly, the Circuit Court concluded that Syed failed to establish

[10] At no point in its Opinion did the Circuit Court question the veracity of McClain's testimony. Perhaps recognizing this, the State applied for a limited remand for the purpose of introducing testimony from two impeachment witnesses who supposedly would undercut McClain's testimony. That application is pending before this Court. For the reasons explained in Syed's response, the State's application is inappropriate and baseless. In any event, the testimony of these witnesses could not have factored into trial counsel's "strategy" because there is no evidence she was aware of their existence at the time of trial.

that, but for trial counsel's deficient performance, the result of the trial likely would have been different. *Id*.

2. The Circuit Court's Analysis was Flawed in Several Respects.

a. Trial counsel's failure to investigate the alibi was prejudicial.

The prejudice flowing from trial counsel's failure to investigate McClain is sufficient to mandate a new trial. McClain was a disinterested witness whose testimony would have provided Syed an alibi for the entire period when, according to the State, the murder took place. *Compare* App-161 at 6 (noting that the State argued that a 2:36 phone call to Syed's phone "was the call that Petitioner made . . . after strangling the victim"), *with id*. at 11-12 (McClain "spoke with Petitioner at the library sometime between 2:20 p.m. and 2:40 p.m."). The Circuit Court did not cite to a *single case* in which a court has found that failure to present such testimony is not prejudicial. Nor are undersigned counsel aware of any such case. That dearth of support for the Circuit Court's prejudice analysis makes sense, given that prejudice attaches whenever counsel's failures "undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. It is not conceivable how—as a matter of law—trial counsel's failure to investigate an unbiased witness who would have provided an alibi for the *time of the murder* could have not undermined confidence in the outcome of Syed's trial.

Although courts generally do not presume prejudice under *Strickland* except in extreme circumstances, *see id* at 692 (citing *United States v. Cronic*, 466 U.S. 648, 658 (1984)), they come quite close to doing so in circumstances like these. Indeed, in

Grooms, 923 F.2d 88—on which the Circuit Court relied heavily, *see* App-161 at 14-16—the court held that prejudice based on counsel's failure to investigate an alibi witness "can be shown by demonstrating that the uncalled alibi witnesses would have testified if called at trial and that their testimony would have supported [the defendant's] alibi." 923 F.2d at 91. That test is plainly satisfied here. McClain repeatedly asserted—in two letters, two affidavits, and her post-conviction hearing testimony—that, had she been called as a witness at trial, she would have testified that she was with Syed in the library when the murder supposedly occurred.[11] *See* Apx. 4; Apx. 6; Apx. 9; Apx. 12.

But, as the Circuit Court acknowledged, "trial counsel made *no effort* to contact McClain." App-161 at 22 (emphasis in original). That failure resulted in the complete omission of an alibi defense at trial. In this way, trial counsel's failure to call McClain as a witness was *more* prejudicial than the situation in *Grooms* and other cases, where the uncalled witness would simply have corroborated an *existing* alibi defense. *See, e.g.*, *Clinkscale v. Carter*, 375 F.3d 430, 445 (6th Cir. 2004).

Trial counsel's failure to present an alibi defense was all the more damaging because such an alibi would have rebutted the State's "relatively weak" theory regarding the timing of the murder. App-161 at 24. The fragility of this theory means that it is "more likely to have been affected by errors" of trial counsel. *Strickland*, 466 U.S. at 696; *see also United States v. Agurs,* 427 U.S. 97, 113 (1976) ("[I]f the verdict is already of

[11] And had trial counsel contacted McClain, she also could have followed up regarding the additional information McClain provided, including two other alibi witnesses and, potentially, video surveillance.

questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.").

The Circuit Court's explanation for its conclusion that trial counsel's failure to investigate a potential alibi was deficient but not prejudicial was based on its view that the "crux" of the State's case was the burial of the victim's body, for which McClain's testimony would not have accounted. App-161 at 24-25. But the crux of a murder case is the murder. At trial, the State committed to a timeline under which the murder occurred between 2:15 p.m. and 2:45 p.m., and that timeline figured prominently in the State's case against Syed, including opening statement and closing argument. *See* T. 2/25/00 at 54 (arguing that the victim left school around 2:15 p.m. and "was dead in 20 to 25 minutes" later), *id*. at 66 (discussing the 2:36 p.m. call to Wilds and contending that the murder had occurred by 2:32 p.m.); Trial Tr. 106, Jan. 27, 2000 (arguing that the murder supposedly occurred between "2:15, 2:20" p.m. and "2:35, 2:36" p.m.).

Obviously—and as even the Circuit Court acknowledged—there is a reasonable probability that McClain's testimony could have undermined the State's theory as to the timing of the murder. App-161 at 25. That satisfies the *Strickland* prejudice inquiry. *See Griffin*, 970 F.2d at 1359 (prejudice requires a "reasonable probability" that the result would have been different, i.e. "a probability sufficient to undermine confidence in the outcome."). By redirecting the prejudice inquiry to focus on whether McClain's testimony would have disturbed the State's theory as to the victim's *burial*, the Circuit Court assumed the jury could (indeed, would) have disregarded the State's theory as to

the timing of the murder. That improperly substitutes the court's own judgment for that of the jurors and invades the province of the jury.

The Circuit Court's reorientation of the State's case also is illogical. It removes from the analysis the act supporting a murder charge—murder—in favor of Syed's allegedly incriminating behavior after the fact. Even accepting the theory that the burial was somehow the "crux" of the State's murder case, that evidence "suggests, at most" that Syed "may have been involved in events related to the murder *after* it occurred." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (emphasis in original). That is not enough to support a guilty verdict when the charge is murder. *See id.* (explaining that "[p]erhaps, on the basis of this evidence [from after the murder], Louisiana might have charged [the defendant] as an accessory after the fact[,]" but not "with capital murder").

In sum, trial counsel's failure to investigate McClain as a witness was sufficient to undermine confidence in the verdict. *See In re Parris W.*, 363 Md. 717, 729 (2001) (relevant inquiry is "whether there is a substantial possibility that [the absent witness'] testimony . . . would have been sufficient, in conjunction with the other evidence, to create a reasonable doubt as to Appellant's involvement"); *Raygoza v. Smith*, 474 F.3d 958, 965 (7th Cir. 2007) ("[A] trier of fact approaching this case with fresh eyes might choose to believe the eyewitnesses and reject the alibi defense, but this trier of fact never had the chance to do so. This undermines our confidence in the outcome of the proceedings.").

b. The Circuit Court erred by assessing the prejudice resulting from trial counsel's failure to investigate in isolation.

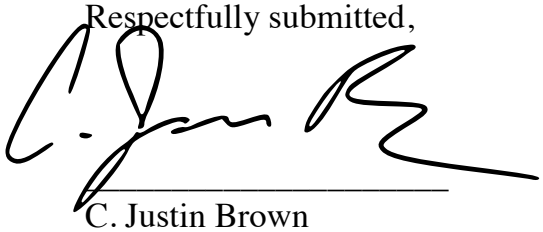
The Circuit Court separately erred by failing to consider the "cumulative effect of all errors" in its prejudice analysis. *Schmitt*, 140 Md. App. at 19. In this case, the Circuit Court's "approach was to consider each charge of deficient performance and consequent prejudice[.]" *Bowers v. State*, 320 Md. 416, 436 (1990). "That approach was incorrect." *Id*. What the Circuit Court should have done was "rule[] on all alleged deficiencies in trial performance and then [weigh] the cumulative prejudicial effect of all of [trial counsel's] performance deficiencies[.]" *Schmitt*, 140 Md. App. at 18.

The effect of each of trial counsel's errors was sufficient on its own to satisfy the second prong of *Strickland*. When assessed cumulatively, the prejudice to Syed is even clearer. Had trial counsel contacted her, McClain would have testified at trial, providing Syed with an alibi that foreclosed the State's theory as to the time of the murder. And if trial counsel had challenged Waranowitz's testimony about cell phone location evidence, he would not have testified in support of the State's theory that Syed was present at the burial site. In other words, trial counsel's deficiencies prevented her from undermining essentially the State's entire case, from the first start of the crime to the end. A new trial is warranted.

CONCLUSION

For the foregoing reasons, the Circuit Court's decision to grant Syed a new trial should be affirmed and its decision to deny relief on his ineffective assistance of counsel claim premised on the failure to investigate a potential alibi should be reversed.

Respectfully submitted,



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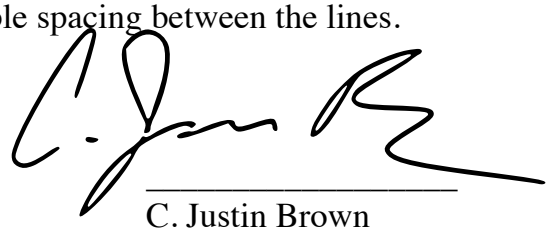
CERTIFICATION OF WORD COUNT AND COMPLIANCE

This Brief of Appellee/Cross-Appellant contains 12,561 words, excluding the parts of the brief exempted from the word count by Maryland Rule 8-503.

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



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PERTINENT PROVISIONS

Md. Code Ann., Crim. P. § 7-103(a)

(a) For each trial or sentence, a person may file only one petition for relief under this title.

Md. Code Ann., Crim. P. § 7-103(b)

(b)(1) Unless extraordinary cause is shown, in a case in which a sentence of death has not been imposed, a petition under this subtitle may not be filed more than 10 years after the sentence was imposed.

(2) In a case in which a sentence of death has been imposed, Subtitle 2 of this title governs the time of filing a petition.

Md. Code Ann., Crim. P. § 7-104

The court may reopen a post-conviction proceeding that was previously concluded if the court determines that the action is in the interests of justice.

Md. Code Ann., Crim. P. § 7-106(a)(1)(ii)

(a) For the purposes of this title, an allegation of error is finally litigated when:

(1) an appellate court of the State decides on the merits of the allegation:

(ii) on any consideration of an application for leave to appeal filed under § 7-109 of this subtitle

Md. Code Ann., Crim. P. § 7-106(b)

(b) (1) (i) Except as provided in subparagraph (ii) of this paragraph, an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation:

1. before trial;

2. at trial;

3. on direct appeal, whether or not the petitioner took an appeal;

4. in an application for leave to appeal a conviction based on a guilty plea;

5. in a habeas corpus or coram nobis proceeding began by the petitioner;

6. in a prior petition under this subtitle; or

7. in any other proceeding that the petitioner began.

(ii) 1. Failure to make an allegation of error shall be excused if special circumstances exist.

2. The petitioner has the burden of proving that special circumstances exist.

(2) When a petitioner could have made an allegation of error at a proceeding set forth in paragraph (1)(i) of this subsection but did not make an allegation of error, there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation.

Maryland Rule 4–402(c)

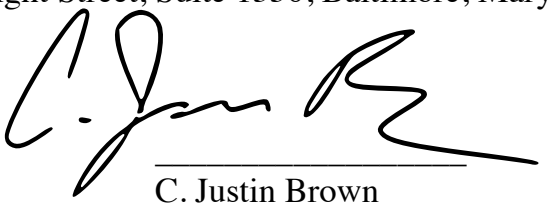
(c) Amendment. Amendment of the petition shall be freely allowed in order to do substantial justice.

Maryland Rule 8-204(f)(4)

(f) Disposition. On review of the application, any response, the record, and any additional information obtained pursuant to section (e) of this Rule, without the submission of briefs or the hearing of argument, the Court shall: . . . (4) grant the application and remand the judgment to the lower court with directions to that court.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2017, a copy of this Brief and Appendix of Appellee was mailed, first-class postage paid, to Thiruvendran Vignarajah, DLA Piper LLP (U.S.), 100 Light Street, Suite 1350, Baltimore, Maryland 21202.



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