STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT
v.		
	*	FOR
ADNAN SYED,	*	BALTIMORE CITY
Defendant.	*	Case Nos. 199103042-46

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MOTION FOR RELEASE PENDING APPEAL

Adnan Syed, by undersigned counsel and pursuant to Md. Code Ann., Crim. Proc. § 7-109(b)(2), hereby moves this Honorable Court to order his pretrial release during the pendency of the State's appeal of the Order vacating his conviction and granting a new trial.

Syed has now served more than 17 years in prison based on an unconstitutional conviction for a crime he did not commit. He has no history of violence other than the State's allegations in this case, and if released he would pose no danger to the community. He is also not a flight risk; it makes no sense that he would run from the case he has spent more than half his life trying to disprove.

The State's evidence against Syed, meanwhile, has crumbled in the face of ongoing investigation. The State's cell tower evidence – the "crux" of its case – was discredited by Judge Martin P. Welch's opinion ordering a new trial. Jay Wilds, the State's star witness, is now an admitted perjurer who has had so many contacts with the police – including an arrest for allegedly strangling and threatening to kill his girlfriend – that his credibility is practically non-existent. And meanwhile, an alibi witness – found trustworthy by this Court – has testified under oath to reaffirm that she was with Syed at the time when the State claims the murder took place.

Under these unique circumstances, Syed, whose appeal could take years to resolve, respectfully asks that this Court fashion appropriate conditions of pretrial release.

BACKGROUND

Hae Min Lee, a student at Woodlawn High School in Baltimore County, went missing on the afternoon of January 13, 1999. Nearly a month later, her body was found partially buried in Leakin Park. The cause of death was strangulation. After receiving an anonymous tip and speaking with Jay Wilds, a recent graduate of Woodlawn High School and known drug dealer, police focused their investigation on 17-year-old Adnan Syed, a student at Woodlawn.

On the morning of February 28, 1999, police arrived at Syed's family home in Baltimore County and arrested him. Syed, an honors student who was just about to graduate from high school, was charged with first-degree murder, second-degree murder, kidnapping, robbery, and false imprisonment.

I. Syed's Initial Bail Hearings

Syed appeared before the District Court for his initial bail hearing on March 1, 1999. The hearing proceeded on a significant mistake of fact: the charging document incorrectly listed Syed's date of birth, thus leading the court to mistakenly conclude that Syed was an 18-year-old adult rather than a 17-year-old juvenile. Ex. 1 (Charging Document). Relying on this factual error, the court considered the charges as a "capital offense." They were not, of course, because juveniles were not eligible for the death penalty in Maryland. Placing substantial emphasis on the "capital" nature of the offense, the court ordered that Syed be held without bail. Ex. 2 (Letter of Syed's Attorney).

Syed sought review of the District Court's denial of bail and appeared before the Circuit Court on March 31, 1999. In addition to his record of no contacts with the criminal justice

system, Syed attended court that day backed by a legion of supporters: hundreds of members of the community showed up in person, and he had the signatures of some 600 individuals who had either written letters or signed a petition supporting his release. Members of the community were so confident in Syed that several of them offered their property as bail.

None of this mattered. The hearing focused less on Syed's clean record and community support and more on Syed's Pakistani roots – even though Syed was born in the United States and was a U.S. citizen. The State raised concerns about Syed's ethnic heritage based upon a private conversation the Assistant State's Attorney claimed to have had with Larry Marshall, a Senior Legal Advisor from the Department of Justice's Office of International Affairs. The State argued that there was a "pattern in the United States of America where young Pakistan males have been jilted, have committed murder and have fled to Pakistan and we have been unable to extradite them back." Ex. 3 at 19 (Bail Transcript). If released on bail, the State argued, Syed would escape to Pakistan.

The State went even further, claiming that "we have information from our investigation that [Syed] has an uncle in Pakistan and he's indicated he can make people disappear," and that it would be easy for Syed to obtain a passport from the Pakistani Embassy in New York City.[1] *Id.* at 19-20.

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[1] In fact, it would be nearly impossible for Syed – as a U.S. citizen – to obtain a Pakistani passport – reserved for Pakistani citizens – in New York City. In order for even a Pakistani citizen to obtain a new passport in New York City, he would need to provide: proof of residency within the consular jurisdiction; a valid National Identity Card for Overseas Pakistanis; and a previous Pakistani passport or police report indicating its loss. *See* http://pakistanconsulateny.org/index.php?section=consul_mrp_new.html. Syed, obviously, had – and has – none of those things.

While support from the community is normally an asset for a defendant seeking bail, the State turned this convention on its head, arguing that the many people present in the courtroom – some wearing traditional ethnic clothing – were a liability to Syed. The State claimed – without any evidence whatsoever – that "[Syed] is unique because he has limitless resources. He has the resources of his entire community here. Our investigation reveals that he can tap resources from Pakistan as well." *Id.* at 21. The Circuit Court did not permit Syed's defense counsel to respond to the ethnically charged arguments set forth by the State.

Approximately three weeks after Syed was denied bail, the State was forced to explain that it had "misconstrued" the conversation with Marshall, the DOJ official, which formed the centerpiece of its flight-risk argument. In actuality, Marshall had read the transcript of the proceedings and, in response, contacted the State to deny many of the statements attributed to him, including the statement that there was a "pattern of young students who had been jilted, committed murder, and fled to Pakistan." Ex. 4 (Letter to Judge David Mitchell). But the damage had been done, and Syed has been locked up ever since.

II. Syed's Trial and Conviction

After Syed's first trial ended in a mistrial,[2] Syed's second trial began in January 2000 before the Honorable Wanda K. Heard. 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 for misappropriating client funds.

The State's case against Syed relied primarily on the story of one witness – Jay Wilds – and cell phone records. Through Wilds' testimony, the State presented a timeline of Syed's

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[2] The jury had already heard the testimony of Jay Wilds before the court declared a mistrial (based on a juror overhearing the judge refer to defense counsel at the bench as a "liar"), and the jury was strongly leaning towards an acquittal. Ex. 5 (Colbert Aff.).

purported movements on the day the victim disappeared. Wilds testified that Syed drove him to the mall that morning to buy Wilds' girlfriend a birthday present. After returning to Woodlawn High School for class, Syed lent Wilds his car to continue shopping, and gave him his cell phone so that Syed could call for a ride after school.

According to the State's theory, Syed left school with the victim shortly after classes ended at 2:15 p.m. and drove in her car to the parking lot of a Best Buy. By 2:36 p.m., having allegedly committed the murder, Syed called Wilds from the Best Buy parking lot to be picked up. According to the State, therefore, the murder occurred sometime between 2:15 p.m. and 2:36 p.m. The State repeatedly emphasized this segment of its timeline to the jury.

Wilds' story continued. He claimed that, after the murder occurred, he met Syed in the Best Buy parking lot, where Syed showed him the victim's body in the trunk of her car. According to Wilds, the two then took the victim's car to the Interstate 70 Park & Ride in Baltimore City, and then went to buy some marijuana. Later that night, Wilds claimed, he and Syed buried the victim's body in Leakin Park. 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 in the area of Leakin Park at this time.

The jury found Syed guilty. He was sentenced to life plus 30 years in prison.

III. Circuit Court Vacates Syed's Conviction and Orders a New Trial

Syed's sentence stood for 17 years, until June 30, 2016, when Judge Welch vacated the conviction and ordered a new trial. He found Syed's trial counsel was constitutionally ineffective for failing to cross-examine the State's cellular tower expert about a disclaimer provided by AT&T with the phone records that were used against Syed at trial. The disclaimer stated that certain cell phone calls – including the incoming calls that purportedly put Syed in Leakin Park

where the body was buried – were "unreliable" for the purpose of determining location. In other words, AT&T had warned against using the records in the exact manner the State had used them.

After acknowledging that the cell phone records played a critical role in obtaining Syed's conviction, the Circuit Court found that the AT&T disclaimer was significant and that, had it been properly raised by defense counsel, the State's expert witness would not have testified as he did about the reliability of the phone records. This, in turn, would have materially impacted the case in Syed's favor.

The Circuit Court also considered defense counsel's failure to contact, much less call as a witness at trial, alibi witness Asia McClain, who testified in the post-conviction proceedings that she had been with Syed in a library at the same time as the State theorized the murder took place. Although the Circuit Court found defense counsel to be unreasonably deficient for failing to investigate McClain, the Circuit Court did not find that the error was sufficiently prejudicial to independently merit a new trial – for the reason that the cell tower evidence was the "crux" of the State's case. Regardless, should a retrial occur, McClain's testimony would call into serious question the timeline upon which the State has premised its case.

On August 1, 2016, the State filed an Application for Leave to Appeal, and the Circuit Court granted a stay of its post-conviction ruling. The Application for Leave to Appeal and other related filings are currently pending before the Court of Special Appeals.

LEGAL BACKGROUND

The Circuit Court is statutorily authorized to grant pretrial release to Syed while the appeal is pending. Maryland's Uniform Post Conviction Procedure Act provides that "[i]f the Attorney General or a State's Attorney states an intention to file an application for an appeal under this section, the [circuit] court may: (i) stay the order; and (ii) set bail for the petitioner."

Md. Code Ann., Crim. Proc. § 7-109(b)(2). Likewise, the procedural rules governing an order from a post-conviction court explicitly provide that release in these circumstances is permitted. Section 4-407(b) provides that "[if] the order is in favor of the petitioner, the court may provide for rearraignment, retrial, *custody, bail, discharge*, correction of sentence, or other matters that may be necessary and proper." Md. Rule 4-407(b) (emphasis added). Here, the post-conviction court granted a retrial as permitted under this rule, but did not address issues related to custody, bail, and discharge.

Because Syed's conviction has been vacated and a new trial ordered, Syed is currently entitled to release under the same statutes as any newly charged defendant appearing before the Circuit Court.[3] Despite the seriousness of the pending charges, "[a] defendant charged with a crime punishable by life imprisonment may be released on bail or other conditions of release before conviction." Md. Code Ann., Crim. Proc. § 5-102. Because Syed is charged with a crime punishable by life imprisonment, only a judge, as opposed to a commissioner, may grant him release "before verdict or pending a new trial, if a new trial has been ordered[.]" Md. Rule 4-216(d).

In determining whether a defendant should be released pending trial, the court is required to determine whether "all requirements imposed by law have been satisfied and that one or more conditions of release will reasonably ensure (1) the appearance of the defendant as required and (2) the safety of the alleged victim, another person, and the community." *Id.* In making this determination, the Circuit Court is required to consider the following factors:

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[3] The Supreme Court of Rhode Island, for example, held that a convicted defendant was entitled to release on bail when his conviction was vacated. *Clarke v. Moran*, 451 A.2d 577 (1982). That court reasoned that because petitioner's conviction had been vacated, he stood "in the same position as any other person awaiting trial upon an indictment[.]" *Id.* at 577.

- the defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;

- the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community, and length of residence in this State;

- the danger of the defendant to the alleged victim, another person, the community, or to himself;

- the nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction;

- the recommendations of an agency that conducts pretrial release investigations, the State's Attorney, and the defendant's attorney;

- any other factor bearing on the risk of a willful failure to appear and the safety of the alleged victim, another person, or the community, including all prior convictions and any prior adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult.

See Md. Rule 4-216(e)(1).

The Court of Appeals has instructed that "[a]n individual's 'interest in liberty' is of a 'fundamental nature,' and at liberty's core is the right to be free from arbitrary confinement by bodily restraint." *Wheeler v. State*, 160 Md. App. 566, 575 (2005) (internal citations omitted). As such, "[l]iberty is the norm, and detention prior to trial . . . is the carefully limited exception." *Id.* at 579. In order to restrict such a fundamental liberty pursuant to Md. Rule 4-216, the court must find "by clear and convincing evidence that no condition or combination of conditions of pretrial release can reasonably protect against the danger that the defendant presents to an identifiable potential victim and/or to the community." *Id.* at 574.

ARGUMENT

I. Syed Poses No Danger to the Community or Any Identifiable Potential Victim.

Putting aside the pending charges – of which Syed is presumed to be innocent – there exist no indicia that Syed, if released, would pose a danger to the community or any identifiable victim.

a. Syed Has No History of Violence.

Prior to the time of his arrest, Syed had no history of violence. He was an honor roll student at Woodlawn High School who was well liked by his peers. He played varsity sports, was active in his community, and had no prior contacts with the police. Ex. 6 (School Records). He had been accepted for college at UMBC and University of Maryland. Ex. 7 (Acceptance Letters). The worst thing anyone could have said about him was that he occasionally smoked marijuana.

Syed's institutional record is consistent with his pre-arrest record. He was locked up as a 17-year-old and has spent the past 17 years in maximum security adult prisons. While many young people who are sentenced to life have a tumultuous transition period – in light of the traumatic psychological effect this would have on any juvenile – Syed has done well to stay out of trouble and to adjust successfully to his environment. Prisons are among the most violent places in our society, yet Syed has not been cited for a single violent act in 17 years in that environment.

In prison, Syed has occupied his time by working. This is reflected in his Department of Corrections records, which describe him as an "excellent" worker who "requires minimal supervision." The records note that Syed is "always very respectful to staff," he never misses work, and he "volunteers for all lock downs and any other jobs that he can help out with." Ex. 8

(DOC Work Records). And although education and program options are extremely limited at maximum security level institutions, Syed has taken advantage of the opportunities available to him, ranging from classwork to self-help courses. Ex. 9 (DOC Certificates).

His one significant infraction over his 17 years behind bars was non-violent – in 2009 he was cited for possession of a cellular phone. He has never been cited for a fight, nor any act of violence. He has not been charged with any type of insubordination related to correctional officers. He is well liked and even respected in the prison by inmates and staff alike.

b. Syed Enjoys Strong Community Support.

The risk that Syed could harm anyone else – already minimal – is reduced even further because Syed has extensive support from the community and from his family. This support system makes it extremely unlikely that, if he were released while awaiting trial, he would cause harm to another person.

Completely absent from Syed's record are circumstances that typically cause courts concern regarding pretrial release. Syed has no history of failing under supervision – and in fact his institutional record reflects the opposite. His lack of a criminal record demonstrates that, notwithstanding the current charges, he has no propensity for violence.

Furthermore, it would be disingenuous to suggest that there is any real probability that Syed would try to harm or intimidate a witness – when, because of the media attention this case has attracted, the whole world is watching him. And because Syed has financial support from his friends and family, there is no need or reason for him to undertake any criminal activity as a means to support himself. With the help of his extensive support system, Syed will be placed in a

safe environment with adequate supervision. Because of his record and the unique circumstances of this case, Syed is no danger to the community.[4]

II. Syed Poses No Risk of Flight.

a. Syed Has a Strong Personal Incentive to Prove His Innocence.

Syed has been waiting 17 years to get back into court to prove his innocence. With that moment within his grasp, there is no reason to think he would now abscond from justice and risk everything he has accomplished to date.

Since the time of his arrest – as a 17-year-old high school student with a spotless record – Syed has maintained his innocence. He has done this through very trying times: through his conviction before the Circuit Court, through the psychological devastation of being sentenced to life in prison, through the denial of his direct appeal and post-conviction petition.

But in recent years, Syed has begun to receive favorable outcomes in court. Against significant odds, the Court of Special Appeals granted his application for leave to appeal. Then, the appellate court granted his request for remand. The case moved to the Circuit Court, which granted his motion to reopen post-conviction proceedings. Finally, Judge Welch vacated his conviction and ordered a new trial. Syed now wants nothing more than to have that new trial, and nothing would run more contrary to that desire than fleeing justice.

Syed is also an unlikely flight risk because of his strong ties to the community. Throughout the ups and downs of this case, Syed has maintained close relationships with his family and friends. These are the people who have remained by his side through the most

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[4] Even if credence is given to the State's unsupported theory of the case, Syed still presents no risk to the community. The State portrayed Syed as a scorned ex-boyfriend who sought to inflict harm on one person alone. There was no evidence presented that Syed is an otherwise violent person.

difficult times, even when he was considered a convicted murderer. They made the three-hour drives to Cumberland, Maryland, where he has been incarcerated; they made sure he has had money in his commissary; they provided him with the emotional support that has allowed him to survive in the Department of Corrections. All of these people live in Maryland and Syed has no interest in abandoning them by fleeing from justice.

Syed's supporters are so confident in him that several are willing to pledge their real property to ensure that he will not flee and that he will abide by all terms of pretrial release. Several friends and family members have come forward and are willing to offer to the Court property bail with a total value of approximately $1 million.[5] Not only are these individuals willing to post their property in support of Syed, but they are willing to monitor Syed and report to the Court any violations of the terms of his pretrial release.

Syed's unlikeliness to flee is further demonstrated by the logistical challenges he would face if he attempted to run. He has not been out of a prison in 17 years so the outside world would be foreign to him. He does not have a passport. Making flight even more improbable, he has become a recognizable person by virtue of the publicity associated with his case. If anything, he is concerned that people would gawk at him if he were to walk around in public.

b. Even If Convicted, Maryland Law Provides a Strong Structural Incentive for Syed to Appear at Court Proceedings.

Finally, Syed's service of 17 years on his now-vacated conviction further diminishes any incentive he might otherwise have to flee if he were granted bail. This is because even if he were to be convicted upon retrial and given the same sentence of life plus 30 years, his accretion of diminution credits during the time of his current incarceration means that he would become

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[5] Upon request counsel will present the Court with documentation related to these individuals and the property they are willing to post as bond.

eligible for parole and work release in less than eight years. It would make no sense for Syed to risk sacrificing that eligibility by failing to appear for trial for what – even in the worst case scenario – could amount to just a few more years of prison time on his original sentence of life plus 30 years.

Under Maryland law, a juvenile offender serving a life sentence generally becomes eligible for parole and other programs such as work release after 15 years of time served, minus the application of diminution credits.[6] *See* Md. Code, Corr. Servs. Art. § 7-301(d)(1). A juvenile offender sentenced to a determinate term must serve half of his sentence before he is eligible for parole and work release. *Id.* § 7-301(c)(1) (parole eligibility calculation for sentences involving "violent crimes"). When sentences are imposed consecutively (as Syed's sentences on his murder and kidnapping convictions were here), the time periods for parole eligibility are added together. *See* COMAR 12.08.01.17(8)(b). This means that Syed would have been required to

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[6] Although parole has been granted sparingly to offenders sentenced to life imprisonment in recent years, the Maryland Parole Commission recently announced that it planned to hold hearings within the next year for nearly 300 inmates who were sentenced to life for crimes they committed as juveniles. *See* Alison Knezevich, *Maryland Parole Commission Says It Will Hold Hearings for Hundreds of Juveniles Lifers*, The Baltimore Sun, Oct. 14, 2016, *available at*: http://www.baltimoresun.com/news/maryland/crime/bs-md-parole-commission-juveniles-20161014-story.html. Accordingly, parole is likely to be a meaningful possibility for Syed by the time he becomes eligible.

The Department of Safety and Public Correctional Services has also recently implemented changes to its work release program that, for the first time, made juvenile offenders sentenced to life in prison eligible "for reduction below medium or minimum security status when recommended by the Maryland Parole Commission for outside testing or work release." Md. Dep't of Pub. Safety & Corr. Servs., Exec. Dir. No. OPS.100.0004, June 2, 2016, *available at*: http://itcd.dpscs.state.md.us/PIA/ShowFile.aspx?fileID=1215; *see also* Alison Knezevich, *Md. Juvenile Lifers Could Be Considered for Minimum Security, Work-Release Programs in Policy Shift*, The Baltimore Sun, June 27, 2016, *available at*: http://www.baltimoresun.com/news/maryland/crime/bs-md-juvenile-lifer-work-release-20160626-story.html.

serve 15 years minus any diminution credits on his life sentence, followed by 15 years on his consecutive kidnapping sentence, before becoming eligible for parole and work release.

Syed was arrested on March 1, 1999 and has been credited with time served since that date. On October 1, 2009, after serving 10 years and seven months, he had accrued sufficient diminution credits to reach the 15 years required for parole eligibility on his life sentence. Had his conviction not been vacated, he would have been eligible for parole on October 1, 2024, after serving the 15 years required for parole eligibility on his consecutive kidnapping sentence. Were he to be convicted and given the same sentence following retrial, Syed would have less than eight years remaining on his sentence before he became eligible for parole and work release. Under these circumstances, Syed is unlikely to jeopardize this potentially favorable remaining prison term by violating the terms of his release on bail.

For all of these reasons, Syed is not a flight risk.

III. The State's Case Against Syed is Weak.

In determining whether Syed should remain detained pending his re-trial, the Court must also consider "the nature and circumstances of the offense charged" and "the nature of the evidence against the defendant." *See* Md. Rule 4-216(e).

From the outset, the State's case was built on a foundation of questionable evidence. Absent at trial were many significant pieces of evidence that one would expect to see in a case like this. For example, the State theorized that Syed left the crowded school with the victim after classes were finished for the day, but not a single person saw them leaving together. The State theorized that the murder – and the subsequent transfer of the victim from the front seat to the trunk – took place in the middle of the day in a busy Best Buy parking lot, but not a single witness saw either act. And the State further theorized that Syed buried the victim in the woods,

yet no dirt or other trace evidence was recovered linking Syed's car or the victim's car to the burial scene.

With an absence of such evidence, the State's case was built upon two evidentiary pillars: the highly questionable testimony of Jay Wilds, and cell phone records intended to corroborate that testimony. Both were necessary to obtain a conviction. As the lead prosecutor at trial explained in an interview with *The Intercept*: "Jay [Wild]'s testimony by itself, would that have been proof beyond a reasonable doubt? . . . Probably not. Cellphone evidence by itself? Probably not." But, he said, when you put together cellphone records and Wilds' testimony, "they corroborate and feed off each other – it's a very strong evidentiary case."[7]

Now, as the State considers whether to retry Syed, it does so with both of these evidentiary pillars substantially compromised, if not discredited altogether. At the same time, Syed has developed new evidence – which this Court must consider – that even further erodes the strength of the State's case.

a. The Cell Phone Evidence Used by the State Has Been Discredited.

The State's cell phone evidence was critical to its case. It served one overriding purpose: it purportedly confirmed Jay Wilds' story that he and Syed buried the victim's body in Leakin Park around 7:00 p.m. on January 13, 1999.[8] The State attempted to prove this point by introducing evidence that Syed received phone calls at 7:09 p.m. and 7:16 p.m. that night, and

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[7] *See* N. Vargas-Cooper & K. Silverstein, "Exclusive: Prosecutor in 'Serial' Case Goes on the Record," *The Intercept* (Jan. 7, 2015)), *available at* https://theintercept.com/2015/01/07/prosecutor-serial-case-goes-record/.

[8] The cell phone evidence from that time became especially important to the State's case given Wilds' constantly changing story about the burial. For example, he first said he refused to help Syed with the burial. Ex. 19 at 18 (Interview Tr., Feb. 28, 1999). Then, at trial, Wilds testified that he *did* help dig the hole. Ex. 38 at 149 (Trial Tr., Feb. 15, 2000).

that both calls pinged a cellular tower covering Leakin Park. Ex. 10 at 71 (Trial Tr. Feb. 25, 2000). This evidence – as Judge Welch stated in his post-conviction opinion – was "the crux" of the State's case. Ex. 11 at 47 (Slip Op.).

What we now know, however, is that the State's use of cell tower records to place Syed in Leakin Park was based on faulty, unreliable evidence. AT&T, the cellular service provider, had explicitly warned in a fax coversheet that incoming phone calls – the same type of calls that supposedly put Syed at the burial site – were not to be considered reliable for purposes of determining location. Even though this warning was attached to the cell phone records provided to the State (through the police), the warning was withheld from the cell phone records submitted to the jury and even kept from the State's own cell phone expert, Abraham Waranowitz.

Waranowitz, an AT&T radio frequency engineer, testified at trial about how cellular phones communicated with cellular towers, and that the location of the cellular tower could be used to map an area where the cell phone may have been at the time of a particular call. Ex. 12 at 100-102 (Trial Tr., Feb. 8, 2000). The State introduced, and Waranowitz relied upon, State's Trial Exhibit 31, which was submitted to the jury. Among the incoming calls listed on the exhibit were the two critical calls ostensibly supporting the State's theory – the incoming calls at 7:09 p.m. and 7:16 p.m. Ex. 13 at 4 (State's Trial Ex. 31).

The State, however, elected not to include with Exhibit 31 the one-page AT&T fax coversheet containing the warning about the unreliability of incoming calls. Specifically, the omitted coversheet stated: "Outgoing calls only are reliable for location status. Any incoming calls will NOT be considered reliable information for location." Ex. 14 (AT&T Disclaimer) (emphasis in original). Not only was this warning not provided to the jury, but it was not provided to Waranowitz prior to his testimony. It was not until late 2015 that Waranowitz was

shown the AT&T fax coversheet. Upon seeing it, Waranowitz stated that, if he had seen this "critical information" prior to trial, he would not have testified the way he did about the incoming phone calls. Ex. 15 at ¶¶ 7-8 (Waranowitz Aff., Oct. 5, 2015).

The Circuit Court granted Syed a new trial based on counsel's failure to cross-examine Waranowitz on this AT&T disclaimer (which had been provided to defense counsel). The court found that the incoming calls introduced to establish Syed's location at the time of the burial "served as the foundation of State's case," and that a reasonable attorney would have observed that the State's theory about incoming phone calls "was directly contradicted by the disclaimer." Ex. 11 at 43, 50 (Slip Op.). "A reasonable attorney," the Circuit Court said, "would have exposed the misleading nature of the State's theory by cross-examining Waranowitz." *Id.* at 43. In what should be a compelling passage in determining whether Syed should be released pending his re-trial, the Circuit Court explained:

> [T]he record reflects that the cell sites of the incoming calls during the time of the burial and Waranowitz's testimony served as the foundation of the State's case. Trial counsel could have undermined the foundation of the State's case had she cross-examined Waranowitz regarding the unreliability of using incoming calls for determining location. Therefore, the Court finds that there is a substantial possibility that, but for trial counsel's unprofessional error in failing to confront the State's cell tower expert with the disclaimer, *the result of the trial would have been different*.

Id. at 50 (emphasis added).

Based on Judge Welch's ruling, and the AT&T coversheet itself, it is likely that, if the State elects to proceed with a re-trial, it would do so without the ability to argue that the 7:09 and

7:16 phone calls were received in or around Leakin Park.[9] Under these circumstances, the State's case at re-trial will be a weak one, and that weakness factors heavily in favor of pre-trial release.

b. The State's Key Witness is Unreliable and Has an Extensive Criminal History, Including Allegations of Violence Against Women.

At its heart, the State's case is dependent on the testimony of Jay Wilds. It has to be, because the only link between Syed and the murder is Wilds' claim that Syed showed him the body, confessed to strangling the victim, and that they together buried the body. In other words, any hope the State has of obtaining a conviction rests on the shoulders of Wilds. As described below, Wilds will be subject to substantial impeachment at trial.

1. Jay Wilds Never Told a Consistent Version of Events and Recently Disavowed Key Portions of His Prior Testimony.

Wilds was interviewed on numerous occasions before trial, and he never told a consistent version of the events that unfolded on January 13, 1999. The State knew this before it put him on the stand as its key witness. In opening statements, the prosecutor was forced to explain that "[y]ou're going to hear that Jay Wilds has given several statements. And you're going to hear between the first statement and the second statement, he changed certain things." Ex. 16 at 111 (Trial Tr., Jan. 27, 2000). And his story continued to develop even as he testified under oath at trial. There are literally dozens of instances in which Wilds' story changed from his first interview through his testimony at the second trial.

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[9] In the post-conviction proceedings, the State attempted to minimize the significance of the AT&T disclaimer by calling FBI Special Agent Chad Fitzgerald to testify that the AT&T disclaimer did not apply to the State's Exhibit 31. Judge Welch found Agent Fitzgerald's testimony to be unpersuasive, stating that it was "contrary to the text of [Syed's] cell phone records" and that he "contradicted his own testimony." Ex. 11 at 51 (Slip Op.). The Court also noted that Agent Fitzgerald testified, consistent with the language of the disclaimer, "that the cell site information reflected in the un-redacted subscriber activity report may not be reliable." *Id.* at 54.

In order to add some veneer of credibility to the unreliable and contradictory story provided by Wilds, the State *needed* the certainty of the cell phone records.[10] At a re-trial in this case, the State will be hard-pressed to use the cell phone records in the same manner, and Wilds' lack of credibility will be exposed. But the State will undoubtedly argue here, as it often does, that it is common for cooperators to change their story over time. And that may well have truth on occasion. But the facts here are anything but common: even the most fundamental, core aspects of Wilds' story vacillated, shifted, and changed over time.[11] For purposes of this motion, however, this Court need not review every inconsistency to have significant concern about the truthfulness of the State's key witness.[12] That is true because in December 2014, in an interview

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[10] In closing argument, for instance, the State argued:

> What we wanted to know with those tests were, for example, if 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.

Ex. 10 at 63 (Trial Tr., Feb. 25, 2000).

[11] As but a single example, Wilds told three different stories as to how and when he disposed of the clothes he was wearing during the burial. In his initial interview with police, he said he discarded the clothes in the trash at his house. Ex. 19 at 21-22 (Interview Tr., Feb. 28, 1999). Two weeks later, Wilds told police that he threw away his clothes at F&M on the night of the murder and threw out his boots at his house the following day. Ex. 18 at 41-42 (Interview Tr., Mar. 15, 1999). At trial, Wilds testified that he placed his clothes in a plastic bag and threw them out on the night of the murder at a Super Fresh. Ex. 17 at 158 (Trial Tr., Feb. 4, 2000).

[12] There are other reasons to be concerned about the arrangement between the State and its key witness. The State did not charge Wilds until September 7, 1999, just over one month before Syed's first trial was scheduled to begin. On the same date, the State arranged a free private defense attorney for Wilds and Wilds signed a plea agreement. Ex. 20 at 155-156 (Trial Tr., Feb. 10, 2000). Wilds appeared in court that very day with the plea agreement, but he did not actually plead guilty. Instead, the guilty plea was held *sub curia*, a very unusual procedural step. Ex. 21 at 122-123 (Trial Tr., Feb. 11, 2000). At trial, Judge Wanda Heard even commented that it looked like the deal had been done in a way to disguise its existence from the defense. *Id.* On July 6, 2000, Wilds was sentenced to a five-year suspended sentence and two years' probation. Ex. 22

with Wilds published in *The Intercept*, Wilds essentially admitted to lying under oath at trial, thus casting a pall of uncertainty over whether the State's conviction of Syed was tarnished by perjured testimony.[13]

When Wilds testified under oath before the jury, he claimed that Syed told him he was going to kill the victim on the morning of January 13, 1999. Ex. 17 at 125-126 (Trial Tr., Feb. 4, 2000). Previously, when Wilds met with law enforcement on March 15, 1999, he claimed that Syed told him he was going to kill the victim on three or four occasions before January 13, 1999, including the evening of January 12, 1999 and the morning of January 13, 1999. Ex. 18 at 44-45 (Interview Tr., Mar. 15, 1999). *But when he was interviewed in December 2014?* His story was that he "didn't know that he planned to murder her that day. I didn't think he was going to go kill her . . . So I go to pick him up, and when I get there he says, 'Oh s--t, I did it.' I say, 'Did what?' He says, 'I killed Hae.'"

When Wilds testified under oath to the jury about what must have been the harrowing experience of seeing the victim's body on January 13, 1999, he claimed that he first saw the body in the trunk of a car outside of a Best Buy. Ex. 17 at 130-131 (Trial Tr., Feb. 4, 2000). Previously, on February 28, 1999, Wilds remembered that Syed first showed him the victim's body in the trunk of a car "off of Edmondson Avenue at a strip." Ex.19 at 7 (Interview Tr., Feb.

(Wilds Docket Sheet). So, ultimately, he did not serve a single day in jail for his alleged complicity.

[13] *See* Natasha Vargas-Cooper, "Exclusive: Jay, Key Witness from 'Serial' Tell His Story for First Time, Part 1," The Intercept (December 29, 2014), *available at* https://theintercept.com/2014/12/29/exclusive-interview-jay-wilds-star-witness-adnan-syed-serial-case-pt-1/, and "Jay Speaks Part 2: 'Hae was Dead Before She Got to My House. Anything That Makes Adnan Innocent Doesn't Involve Me," The Intercept (December 30, 2014), *available at* https://theintercept.com/2014/12/30/exclusive-jay-part-2/.

28, 1999). *But when he was interviewed in December 2014?* His story was that he "saw her body later, in front of my grandmother's house where I was living."

When Wilds testified under oath to the jury about when the victim's body was buried, he claimed – consistent with the now discredited cell phone records – that Syed buried the victim at approximately 7:00 pm. Ex. 17 at 151 (Trial Tr., Feb. 4, 2000). *But when he was interviewed in December 2014?* His story was that Syed buried the victim "closer to midnight."

The State cannot credibly rely on Syed's previous conviction to argue that it has a strong case now. Quite the contrary is true. Its cell phone evidence has been discredited. And on absolutely core facts – whether Syed told Wilds he was going to commit the murder, the location where Wilds first saw the victim, the timing of the alleged burial – the State's key witness is on record as completely disavowing his sworn testimony. Under these circumstances, the nature of the evidence in this case tilts decidedly in favor of releasing Syed before another jury has the unenviable task of sorting through the inconsistencies in the brand-new story that Wilds will inevitably tell.

2. Jay Wilds Has Had Extensive Interactions with Law Enforcement in the Intervening Years.

Wilds' credibility – and even his viability as a State's witness – is further undermined by his record since the time when he testified against Syed. Since then, Wilds has been arrested, convicted, or investigated by police more than 20 times. This history paints the picture of a troubled man who cannot abide by the law. It also paints the picture of a man who has difficulty respecting and even telling the truth to law enforcement officers. But most pointedly, Wilds – the only individual to have confessed to being complicit in the events surrounding the victim's death by strangulation – has an ominous history of being charged for incidents of rage and violence

against women, including at least one incident in which he was arrested for violently strangling a female companion in a furious outburst.

Wilds is currently on probation in California for carrying a loaded Mossberg shotgun in his pickup truck (which he was driving on an expired registration). Ex. 23 (Incident Report, Dec. 7, 2015). After being pulled over, the officer asked Wilds if the weapon was loaded and he responded that it was not. It turned out that it was. *Id.* Although the weapon was registered to Wilds, it is unclear how, as a convicted felon in the state of Maryland, he was allowed to register the weapon in California. It is also unclear why he was not charged as a felon in possession of a firearm.

The following are *just some of* Wilds' contacts with police:

- On September 13, 2000, Wilds was pulled over for driving on expired license plates, and was later found to be in possession of marijuana. He was on probation at the time. He initially gave a false name, "Anthony Wilds," and he later admitted he had lied to police about this. In court in Baltimore County, Wilds' attorney incorrectly told the judge he did not have a criminal record (when actually he had a felony conviction for accessory after the fact, and he had been represented by the same attorney in that case). He received probation before judgment. Ex. 24 (Arrest Report, Sept. 13, 2000; Plea Tr., Nov. 9, 2001).

- On April 2, 2003, police responded to a report that shots were fired from a white Chevy Corsica. The car was located and Wilds was the driver. As Wilds was removed from the car the police found marijuana. Wilds pleaded guilty to marijuana possession. Ex. 25 (Incident Report, Apr. 2, 2003).

- On July 22, 2006, Wilds was charged with second-degree assault after a girlfriend, "Girlfriend 1,"[14] reported that he had "beaten her with his hands." Injuries were photographed, but the charges were eventually dropped. Ex. 26 (Arrest Report, July 22, 2006).

- On April 6, 2007, after getting into a disagreement with somebody named "Will," Wilds was stabbed repeatedly, suffering injuries to his head and both hands. Wilds was transported to Shock Trauma. Ex. 27 (Incident Report, Apr. 6, 2007).

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[14] Victims' names are not being used (or are redacted) for purposes of this filing.

- On April 9, 2009, Wilds was arrested for allegedly assaulting Girlfriend 1, who claimed Wilds "hit me in my eyes" after he had been drinking. When police arrived at his residence, Wilds had barricaded himself inside, according to the statement of probable cause. After police kicked the door in, Wilds refused to show his hands, so police pepper sprayed him prior to cuffing him. While taking him to the police transport van, Wilds "kicked and assault[ed]" one officer, causing the police to tase him. Wilds then body slammed and kicked another officer before he was subdued and put in leg irons. Ex. 28 (Incident Report, Apr. 9, 2009).

- On June 19, 2009, police approached Wilds at an apartment complex and allegedly found him to be in possession of six orange ziplock bags of what appeared to be marijuana. Wilds told police "Come on… I got some weed man! I'm a pot head," according to the report. Ex. 29 (Arrest Report, June 19, 2009).

- On September 2, 2009, and October 12, 2009, respectively, domestic complaints were initiated related to apparent verbal altercations between Wilds and a second girlfriend, "Girlfriend 2." Ex. 30 (Incident Report, Sept. 2, 2009); Ex. 31 (Incident Report, Oct. 12, 2009).

- On November 8, 2009, Girlfriend 2 reported a domestic assault related to a dispute over $250. She told police that she had taken Wilds' car keys in an attempt to get the money he owed her, and he had punched her in the ribs until she relinquished the keys. She then attempted to call 911 – and, according to the report, Wilds strangled her to prevent her from screaming. Ex. 32 (Arrest Report, Nov. 8, 2009).

- Reached at her home in October of 2016 by undersigned counsel, Girlfriend 2 confirmed that Wilds had strangled her with both hands and stated that she was only able to escape by scratching her way out of his grasp. She explained that Wilds was jealous "because he could not have her" and that made him violent. He had physically assaulted her on multiple occasions, she said.

- On November 29, 2010, police were called to the residence of Girlfriend 1 on a report of a domestic altercation, but no charges were pursued. Ex. 33 (Incident Report, Nov. 29, 2010).

- On December 7, 2015, Wilds was arrested in Los Angeles County and charged with possession of a loaded shotgun. He was also held on an outstanding warrant from San Bernardino County, California. Wilds pleaded nolo contendere and was given three years probation. Ex. 23 (Arrest Report, Dec. 7, 2015).

These incidents tell a story about the type of person the State would rely on to prove its case in a retrial. His credibility marred by an extensive criminal record, including disturbing allegations of violence against women, Wilds would certainly be vulnerable to cross-examination, and it is questionable whether any jury would believe his uncorroborated testimony.

c. The Timeline of the State's Theory of the Case is Not Forensically and Pathologically Possible.

The State's case has another gaping hole: the forensic and pathological findings on autopsy, when combined with the positioning of the victim's body in Leakin Park, make it completely implausible for the murder to have occurred on the State's timeline.

The State used Syed's cell phone records to bookend the two primary markers in the timeline of its case. On one end of the timeline is 2:36 p.m. According to the State, Syed left school with the victim shortly after classes ended at 2:15 p.m. and drove in her car to the parking lot of a Best Buy. By 2:36 p.m., Syed had allegedly committed the murder and called Wilds from the Best Buy parking lot. Ex. 16 at 106, (Trial Tr., Jan. 27, 2000).[15] As Judge Welch observed, the State is firmly on the record and indeed "committed to" the murder occurring between 2:15 and 2:36 p.m. on January 13, 1999. Ex. 11 at 11, n.9 (Slip Op.).

At the other end of the timeline is approximately 7:00 p.m. It was then, according to the State, that the victim's body was buried by Syed and/or (depending on which story he tells) Wilds. Specifically, the State contends that incoming calls to Syed's phone at 7:09 p.m. and 7:16 p.m. placed both Syed and Wilds in Leakin Park at those times. Although there now is no

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[15] At a re-trial, the State will have to contend with the testimony of McClain, a fellow Woodlawn student, who has stated under oath that she was with Syed on the afternoon of January 13, 1999, during the precise time the State alleged that the murder occurred. *See* Ex. 34 (McClain Aff., Mar. 25, 2000), Ex. 35 (McClain Aff., Jan. 13, 2015).

reliable corroboration of Wilds' story that Syed was in Leakin Park around 7:00 p.m., the State likewise committed to that at Syed's trial. Ex. 10 at 70-71 (Trial Tr., Feb. 25, 2000). Thus, the State's case against Syed is built on an unequivocal timeline of the murder occurring between 2:15 and 2:36 p.m. and the burial of the victim's body in Leakin Park sometime around 7:00 p.m., a span of, at most, a little over five hours.

As explained by the Deputy Chief Medical Examiner for Wayne County, Michigan (Detroit), Dr. Leigh Hlavaty, it is not medically possible for the events to have unfolded as the State says they did. Dr. Hlavaty is a board-certified forensic and anatomic pathologist who has performed more than 700 autopsies and been qualified to testify as an expert (usually for the prosecution) on more than 400 occasions. Her affidavit is attached as Exhibit 37.

Both the post-mortem examination by the Medical Examiner and the photographs of the disinterment of the victim show that she was buried on her right side. Ex. 36 at 2 (Autopsy Report). The uncontested post-mortem report and testimony of the Medical Examiner offered by the State at trial demonstrate that lividity was fully fixed on the anterior, or front, of the victim's body. This finding is consistent with the post-mortem and disinterment photographs. Lividity is a red-purple discoloration of the skin that occurs following death, caused by the settling of blood in the lowest area of the body. Ex. 37 at ¶ 16 (Hlavaty Aff.). A lividity pattern generally starts to become "fixed" within two to four hours following death and typically becomes fully fixed by eight to 12 hours after death. *Id.* at ¶ 17. Once it becomes fully fixed, its pattern will not shift or resettle, even if the body is moved into a new body position after that time. *Id.* Consequently, in order for the victim to have had the fixed frontal lividity as the State showed at trial, it would have had to have laid in a face-down position from approximately two to four hours following her death until *at least eight to twelve hours following her death*, and possibly longer in colder

than temperate conditions. *Id.* at ¶ 29. It also means the victim was not buried on the right side until at least eight hours after death. *Id.* at ¶ 36.

These findings are at complete odds with the State's timeline of Syed supposedly committing a murder between 2:15 p.m. and 2:36 p.m. and burying the victim's body in Leakin Park around 7:00 p.m., or even before 10:15 p.m. for that matter. It also lends further support to the cell phone evidence introduced at trial being misinterpreted and the testimony of Wilds being false.

IV. Syed Has Engaged an Experienced Social Worker to Develop a Pre-Trial Release Plan and to Monitor Compliance.

Although Syed is as well-adjusted and emotionally stable as any similarly situated person, he acknowledges that it can sometimes be difficult for long-term inmates to adjust to life outside of prison. In recognition of this, Syed has retained Rebecca Bowman-Rivas, a social worker experienced in these types of transitions. Bowman-Rivas has been working to understand Syed's community support system and help him prepare for the possibility of his release. She has also vetted possible locations where Syed could reside if he were released pending his re-trial. If the Court were to fashion appropriate conditions of release, Bowman-Rivas would continue to work with Syed to ensure that his transition runs as smoothly as possible. Syed anticipates that he will call Bowman-Rivas as a witness at the hearing on this Motion.

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CONCLUSION

Syed respectfully requests that the Court conduct a hearing on this Motion with the defendant present and with ample time for the presentation of at least one witness. And, for all the reasons described above, Syed requests that this Court set reasonable bail and order his release pending disposition of the State's appeal and the new trial.

Respectfully Submitted,

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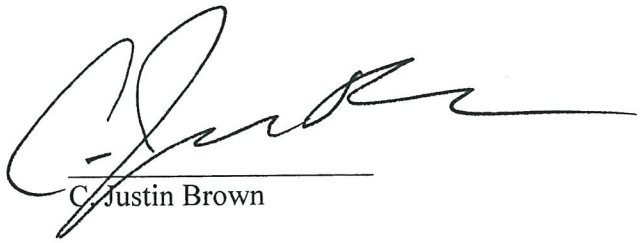
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of October, 2016, a copy of the foregoing was mailed to the following:

Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202



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