STATE OF MARYLAND	*	IN THE
Applicant	*	COURT OF SPECIAL APPEALS
v.	*	OF MARYLAND
ADNAN SYED	*	Application for Leave to Appeal
Respondent	*	No. 1396, September Term, 2016 (CC# 199103042)

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RESPONDENT ADNAN SYED'S RESPONSE TO
STATE'S CONDITIONAL APPLICATION FOR LIMITED REMAND

Adnan Syed, through undersigned counsel, and pursuant to Maryland Rule 8-204(d), hereby responds to the State's Conditional Application for Limited Remand.

In its Conditional Application, the State contends that if this Court grants Syed's Application for Leave to Cross-Appeal, the Court should then send this case back to the Circuit Court for further evidentiary proceedings so it can introduce the testimony of two witnesses whose testimony would supposedly undercut the credibility of Syed's alibi witness, Asia McClain. The State provides no legitimate reason why these two witnesses could not have testified at the five-day postconviction hearing the Circuit Court held earlier this year – proceedings at which the Circuit Court already heard testimony and received evidence related to the McClain alibi.

The State's latest filing only underscores how inappropriate this case is for discretionary review. All of the issues raised in the State's Conditional Application can and should be resolved at retrial. Rather than address each of the State's issues at this juncture, Syed files this brief response to raise a few specific points.

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First, what the State seeks to do now is precisely what it opposed when Syed sought a remand to the Circuit Court to introduce Asia McClain's testimony. Then, the State argued that McClain's testimony was not "new" evidence, and that any testimony from McClain was irrelevant to the ineffective assistance of counsel inquiry. Consolidated Resp. in Opp. to Pet.'s Mot. and Supp. to Reopen Post-Conviction Proceedings, at 25 (Sept. 24, 2015). Now, the State seeks to offer new testimony to impeach the testimony it believed to be irrelevant.

The State's justification for this late-breaking request? A vague contention that, since Syed received a remand, "the interests of justice, as well as fundamental fairness, dictate the State should be now afforded an equal opportunity to make the record complete." Cond. App. for Limited Remand, at 7-8. But the State *had* an opportunity to make the record complete – at the same five-day postconviction hearing during which Syed presented McClain's testimony. The State has offered no legitimate excuse for why it could not have presented this proffered testimony then.[1]

Moreover, McClain's testimony was central to the issues before the Court: she offered an alibi that accounted for Syed's whereabouts for the entire time period during which he supposedly committed the murder. By contrast, the State now seeks to introduce witnesses whose sole purpose is to impeach McClain's testimony – testimony the State had previously insisted was unnecessary to evaluate the merits of Syed's ineffective assistance of counsel claim. What the State seeks to do is no different than a defendant losing at trial and then requesting a new trial because he has now found a witness who would testify that the State's critical witness lied. It is too late for that.

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[1] This is in sharp contrast to Syed's prior request for a remand to introduce McClain's testimony. At that time, Syed had a good faith reason to believe that prosecutorial misconduct had prevented McClain from testifying in 2010 at Syed's hearing on his petition for

Second, there is no merit to the State's arguments about the supposed import of the witnesses' testimony. As an initial matter, the potential testimony of these two witnesses could not have factored into trial counsel's decision-making process because there is no evidence she was aware of their existence at the time of trial – the relevant point in time for the deficiency analysis. Moreover, the State simply rehashes the same tired conspiracy theories it advanced in earlier proceedings, listing all of the possible, hypothetical reasons why Syed's trial counsel "*could have* reasonably avoided Asia McClain as a witness[.]" Cond. App. for Limited Remand at 5 (emphasis added); *see also, e.g.*, *id.* (hypothesizing that "Gutierrez could reasonable [sic] have preferred . . ."); *id.* at 19 (same); *id.* at 22 (same). But none of these theories – or, as the Circuit Court called them when the State raised them the first time around, "hindsight sophistry," Slip Op. at 20 – overcomes the fact that trial counsel *never investigated* McClain and thus *could not* have made a strategic decision about whether to call her as a witness. Nothing in the State's Conditional Application impacts the Circuit Court's deficiency analysis. And with respect to the question of prejudice, even if this "new" evidence might have had some bearing on prejudice, it was never presented to the trial court.

Third, remanding this case at this juncture would be inefficient. The Circuit Court granted Syed the appropriate remedy: a new trial, with capable counsel. This renders the State's request for a remand unnecessary. At a new trial, Syed and the State will have the opportunity to present all of their evidence and arguments, including any rebuttal and impeachment witnesses. The State does not dispute this; notably absent from its lengthy brief is any explanation of how a fair trial would prejudice its ability to present its case. In contrast, the limited remand the State proposes is a half-measure that allows the State to offer its belated testimony, while Syed remains in prison based on an unconstitutional, vacated conviction.

At bottom, remanding this case for the sole purpose of entering impeachment testimony is not in "the interest of justice and fundamental fairness," but rather is an obstructionist tactic by the State, seeking to mire the appeals process in a battle of "he said, she said," and delay the new trial granted to Syed. The State's proposed approach has no logical endpoint. Indeed, if the State were now permitted to introduce its proffered testimony, justice would presumably then require that Syed be permitted to introduce testimony from his own new witnesses to rehabilitate McClain's credibility. And in fact, Syed already has an affidavit from such a witness, who was with McClain around the time she learned of Syed's arrest.[2] *See* Exhibit 1 (Affidavit) ¶¶ 6-8. According to the Affiant, McClain told him about seeing Syed in the library the afternoon when Lee went missing, and discussed with him what she should do with this information. *Id.* ¶¶ 8-9, 11-12. It was the Affiant, in fact, who drove McClain to Syed's parents' house to tell them she had seen their son in the library on the day in question. *Id.* ¶¶ 9-10. No doubt, if Syed were to propose calling his Affiant as a witness, the State would scour Woodlawn High School graduates until it found someone to testify that the Affiant, too, was lying.

The Circuit Court already determined that Syed is entitled to a new trial. That is a far more appropriate remedy, for both parties, than an endless cycle of remands.

Fourth, the Court should reject the State's contention that Syed somehow improperly raised a new "claim" in his Conditional Application for Leave to Cross-Appeal. In that filing, Syed argued that the Circuit Court should have assessed the prejudice from trial counsel's errors cumulatively, as opposed to individually. The State now contends that this "claim" was not before the Circuit Court and therefore inappropriate for appeal. State's Conditional Application for Limited Remand at 2 n.3. Not so.

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[2] For privacy purposes, Syed refers to this witness here as "Affiant," rather than by name. Undersigned counsel has the original, unredacted affidavit from Affiant, which identifies him by name, which they can provide to the Court if the Court so requests.

As an initial matter, this Court does not have to address the State's argument, which is relegated to a footnote. *Solberg v. Majerle Management*, 388 Md. 281, 295 (2005). In any event the State has misunderstood the nature of Syed's proposed cross-appeal. Syed has not raised a new cumulative error "claim" in which he argues that trial counsel committed numerous errors, which, only collectively, constituted deficient performance. Instead, Syed has simply argued that where, as here, a petitioner asserts multiple deficiencies by counsel, a court should "rule[] on all alleged deficiencies in trial performance and then . . . the cumulative prejudicial effect of all of the performance deficiencies[.]" *Schmitt v. State*, 140 Md. App. 1, 18 (2001); *see also Strickland v. Washington*, 466 U.S. 668, 696 (1984) ("taking due account of the effect of [counsel's] errors . . . a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."). This is not a new claim. Rather, it is simply an additional argument about why the Circuit Court erred in concluding that trial counsel's failure to investigate McClain as an alibi witness was deficient but not prejudicial.

Conclusion

For all of the foregoing reasons, this Court should deny the State's Conditional Application for Limited Remand. Syed should have the new trial he was granted by the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of September, 2016, a copy of the foregoing was mailed first class to:

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