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
APPLICANT'S APPLICATION FOR LEAVE TO APPEAL

Adnan Syed, through undersigned counsel, and pursuant to Maryland Rule 8-204(d), responds in opposition to the State's Application for Leave to Appeal.

Syed has spent more than 17 years in prison based on an unconstitutional conviction. The Circuit Court, in a thorough and well-reasoned opinion, has granted him a new trial. Now, the State has launched a potentially lengthy challenge to the Circuit Court's ruling, seeking this Court's discretionary review.

But this Court reserves discretionary review for those rare cases that present legal issues of broad import. The State's Application for Leave to Appeal presents no such issue. Instead, the State seeks to re-litigate narrow legal and factual issues considered and decided by the Circuit Court after a full hearing – for instance, (1) whether this Court's non-dispositive remand order permitted the Circuit Court to hear the "particular claim" it now appeals; (2) whether Syed's counsel was or was not ineffective; and (3) whether counsel's failure to cross-examine a State witness on a critical piece of evidence was prejudicial. This is not the stuff of discretionary review; it is just a request for an appellate "do-over" after the Circuit Court already heard, weighed, assessed, and decided this ineffective assistance claim.

This Court should deny the State's Application for Leave to Appeal.

Statement of the Case & 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 partially buried in Leakin Park in Baltimore City. Trial Tr. at 4, Feb. 23, 2000. The cause of death was strangulation.

In late February 1999, after receiving an anonymous tip and speaking with Jay Wilds, a recent graduate of Woodlawn 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 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.

A. The State's Case and Cell Phone Records

The State's case against Syed relied primarily on the evolving and inconsistent testimony of one witness, Jay Wilds, whose testimony the State sought to bolster using cell phone records. Through Wilds' testimony, the State presented a timeline of Syed's purported movements on the day Lee disappeared. Wilds testified that Syed drove him to the mall that morning to buy Wilds' girlfriend a birthday present. Trial Tr. at 123, Feb. 4, 2000. After returning to Woodlawn High School for class, Syed lent Wilds his car to continue shopping, and gave him his cell phone so

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[1] The Circuit Court granted a mistrial in the first trial when a juror overheard the judge, during a bench conference, refer to Syed's counsel as a "liar." Trial Tr. at 254-255, Dec. 15, 1999.

[2] *Available at* http://mdcourts.gov/publications/annualreport/reports/2015/fy2015statisticalabstract.pdf (last visited Sept. 14, 2016).

[3] The State generally fares no better on discretionary review than a private litigant. Unlike in the federal postconviction context — where state and federal government entities are entitled to an immediate appeal, *see* Fed. R. App. P. 22(b)(3) — Maryland law makes clear that leave to

Syed could call for a ride after school. Trial Tr. at 125-126, Feb. 4, 2000. It was this cell phone that the State attempted to track to show Wilds' and Syed's movements on January 13, 1999.

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 a Best Buy parking lot. Trial Tr. at 65-66, Feb. 25, 2000. By 2:36 p.m., Syed had allegedly committed the murder and called Wilds from the Best Buy parking lot to ask to be picked up. Trial Tr. at 106, Jan. 27, 2000.

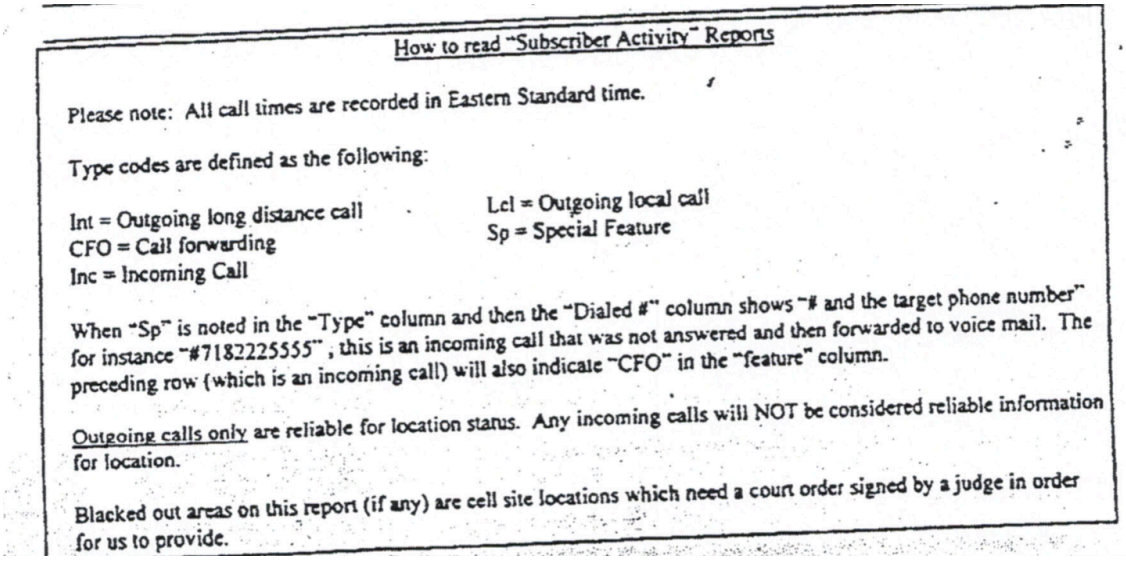
Wilds claimed that, after the murder occurred, he met Syed in the Best Buy parking lot, where Syed showed him Lee's body in the trunk of her car. Trial Tr. at 130-131, Feb. 4, 2000. According to Wilds, the two then took Lee's car to the Interstate 70 Park & Ride in Baltimore City, *id.* at 132, and then went to buy some marijuana, *id.* at 134. 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 in the area of Leakin Park at this time. Trial Tr. at 109-110, Jan. 27, 2000. The State presented Abe Waranowitz, an AT&T radio frequency engineer, who testified as an expert on using cell tower location data to determine the location of a particular cell phone at a particular time. *See* Trial Tr. at 97-98, Feb. 8, 2000.

The State laid a two-part foundation for the cellular phone evidence. First, Waranowitz testified 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. *See* Trial Tr. at 97-98, Feb. 8, 2000. 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 from various phone records from AT&T, Syed's cell provider at the time. One of the pages, an excerpt from a "Subscriber Activity" report, listed each of the calls

that were made to or from Syed's cell phone on January 13, 1999, the day of Lee's disappearance. Ex. 1 at 4 (State's Trial Exhibit 31). Among the incoming calls listed were those most important to the State's case—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.* The State also introduced other exhibits at trial, which gave the geographic coverage area for the relevant cellular tower sites – purportedly allowing the Jury to determine approximately where Syed's cell phone was located when it was engaged in each call.

What the State did not include with Exhibit 31, however, was the one-page AT&T fax coversheet that accompanied Syed's phone records ("AT&T disclaimer"). That coversheet contained instructions for "How to read 'Subscriber Activity' Reports," and an explicit warning: "Outgoing calls only are reliable for location status. Any incoming calls will NOT be considered reliable information for location." Ex. 2 (AT&T disclaimer) (emphasis in original).



How to read "Subscriber Activity" Reports

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

Type codes are defined as the following:

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

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

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

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

Relying on Exhibit 31, Waranowitz nonetheless presented the State's theory to the Jury, testifying 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." *Syed v. Maryland*, No. 199103042-046, Slip Op. at 42 (Md. Cir. Ct. Baltimore City June 30, 2016) (hereinafter "Slip Op."). He never told the Jury that, according to AT&T's own disclaimer, those two calls were not reliable evidence of the location of Syed's cell phone.

Claiming that these two incoming cell phone calls tied Syed to the location where Lee's body was found, the State made them a centerpiece of its case. During closing argument, for example, the prosecutor told the Jury that the supposed connection between the 7:09 and 7:16 incoming calls and a cellular tower covering Leakin Park was "reasonable circumstantial evidence" that Syed was in Leakin Park when the body was buried. *See* Trial Tr. at 125, Feb. 25, 2000.

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 Was Not Shown the AT&T Disclaimer and Admits it Would Have Changed His Testimony.

Some 16 years later, after this Court had remanded this case to the Circuit Court to allow Syed to file a motion to reopen postconviction proceedings, Syed first learned about AT&T's warning that incoming cell phone calls "will NOT be considered reliable information" about location. Ex. 2 (AT&T disclaimer); *see* Slip Op. at 36. Syed was not the only person from the original trial who had been unaware of the AT&T disclaimer. When Syed's postconviction counsel contacted Waranowitz to ask about the AT&T disclaimer, Waranowitz responded, remarkably, that he had never been shown the AT&T fax coversheet that contained the warning, either. *See* Ex. 3 (Waranowitz's Oct. 5, 2015 Affidavit).

In an affidavit dated October 5, 2015, 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 or legal records like those contained in that exhibit. In his affidavit, Waranowitz stated, unequivocally, that if he had been made aware of the "critical information" – *i.e.* the AT&T disclaimer – he would not have testified the way he did. More specifically, he would not have affirmed the State's theory regarding 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. Ex. 3 (Waranowitz's Oct. 5, 2015 Affidavit).

C. Post-Conviction Filings

Upon learning that incoming calls could not reliably be used as evidence of location, Syed expeditiously supplemented his Motion to Reopen Postconviction Proceedings. To explain why he could not have raised the issue before, Syed presented alternative theories: either trial counsel had been on notice of the AT&T disclaimer and was constitutionally ineffective for failing to understand it and use it to challenge Waranowitz's testimony, or the State had failed to turn over the fax coversheet containing the disclaimer to trial counsel, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Regardless of which type of error occurred, Syed was deprived of a fair trial because unreliable evidence had been presented against him, and it played a central role in his conviction. At the very least, the AT&T disclaimer and Waranowitz's statements about it "undermined confidence in the outcome" of the proceedings. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

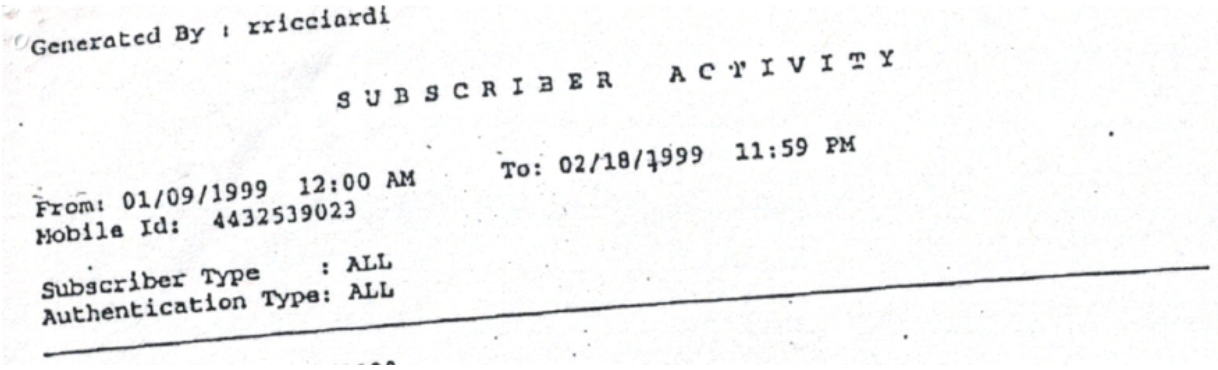
The Circuit Court granted Syed's Motion to Reopen Post-Conviction Proceedings in November 2015. The court limited the scope of the reopened proceedings to two issues:

(1) ineffective assistance of counsel for failure to contact a potential alibi witness and (2) claims related to the reliability of cell tower location evidence.

D. Postconviction Hearing

The Circuit Court held a five-day evidentiary hearing beginning February 3, 2016. At the reopened postconviction hearing, Syed presented his cellular tower expert, Jerry Grant, and the State presented its expert, FBI Agent Chad Fitzgerald. Grant was admitted as an expert in the areas of digital forensics and cell site analysis who had previously testified in high profile cases all around the country. In his work, he told the court, he frequently reviewed and analyzed cell phone records, and, when doing so, always attempted to read the instructions provided by the service provider.

In this particular case, Grant found it significant that AT&T had issued an instruction, titled "How to Read 'Subscriber Activity' Reports," stating that "Outgoing calls only are reliable for location status. Any incoming calls will NOT be considered reliable information for location." Ex. 2 (AT&T disclaimer) (emphasis in original). 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."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SUBSCRIBER ACTIVITY

From: 01/09/1999 12:00 AM To: 02/18/1999 11:59 PM
Mobile Id: 4432539023

Subscriber Type : ALL
Authentication Type: ALL

Ex. 4 at 25 (Syed's Subscriber Activity Report). Thus, these records were subject to the instructions in the AT&T disclaimer regarding how to read them.

Grant did not claim to know why AT&T considered location information related to its incoming calls to be unreliable, but he testified that, based on the warning contained in the AT&T disclaimer, he would not conclude from the incoming calls in Syed's phone records that Syed had been in Leakin Park the night of January 13, 1999.

The State's expert, Fitzgerald, gave different testimony. First, he denied that Syed's phone records, which were titled "SUBSCRIBER ACTIVITY," were actually a "subscriber activity report" of the type referenced in the AT&T disclaimer. Slip Op. at 51. Then, Fitzgerald went on to testify that the word "location" in the AT&T disclaimer meant something other than the location of the cellular tower (and phone). Fitzgerald concluded that, overall – despite a few admitted inaccuracies – Waranowitz's testimony was accurate. What is more, Fitzgerald also said that he would have testified as to the reliability of using the 7:09 p.m. and 7:16 p.m. incoming calls to determine location status. He reached these conclusions in spite of the plain language of the AT&T disclaimer and despite the fact that Waranowitz himself would not have so testified had he been shown the AT&T disclaimer.

E. The Postconviction Court's Decision Granting New Trial

In a June 2016 Opinion, the Circuit Court vacated Syed's conviction and granted him a new trial, finding that trial counsel was constitutionally ineffective for failing to use the fax coversheet to rebut the State's expert. Slip Op. at 59.

As an initial matter, the Circuit Court found that Syed had not waived the issue because the right to effective assistance of counsel was fundamental, and it therefore could only be waived knowingly and intelligently. *See* Slip Op. at 34-35. The Circuit Court found that Syed

himself had not been made aware of the cell tower issue until around August 2015. *Id*. at 36. And because he had not known about the factual basis for this claim, Syed could not have raised it at an earlier proceeding. Nor could he have intelligently and knowingly waived it. *Id*. at 36-37.

Next, the Circuit Court turned its attention to the deficiency prong of *Strickland*. As a factual matter, the Circuit Court found that it was undisputed that trial counsel had been in possession of the AT&T disclaimer – and therefore she was on notice that incoming calls were not reliable for location status. *Id*. at 34 n.15. Based on the facts of this specific case, the Circuit Court then found that a reasonable attorney would have observed that the State's theory about incoming phone calls "was directly contradicted by the disclaimer." *Id*. at 43. "A reasonable attorney," the Circuit Court said, "would have exposed the misleading nature of the State's theory by cross-examining Waranowitz." *Id*. The failure to do so could not be considered a reasonable strategic decision. *Id*.

When considering the prejudice prong of *Strickland*, the Circuit Court again focused on the facts specific to this case. The court found that the incoming calls introduced to establish Syed's location at the time of the burial were part of "the crux" of the State's case. *Id*. at 47. This was reflected in the State's opening statement, case in chief, and closing arguments, in all of which the State hammered away at the purportedly incriminating effect of the incoming phone calls. *Id*. at 47-48. Further undermining confidence in the outcome of the trial, the State's case was fortified by the testimony of Waranowitz – an "impressive" expert – who unknowingly advanced the State's "misleading" theory. *Id*. at 50, 43.

Finally, the Circuit Court, in no uncertain terms, repudiated the testimony of the State's expert witness, Fitzgerald. The court made the following findings of fact:

- Despite the testimony of Fitzgerald, the pertinent phone records included in Exhibit 31 were excerpts of a subscriber activity report, as that report's title clearly indicated.

- Despite the testimony of Fitzgerald, the AT&T disclaimer titled "How to read 'Subscriber Activity' Reports applied to Syed's phone records in Exhibit 31.

- Despite the testimony of Fitzgerald, the term "location" in the AT&T disclaimer referred to cell site location.

- And, despite the testimony of Fitzgerald, there existed clear evidence that the use of incoming cell phone calls to determine location status was problematic.

Based on its factual findings, the Circuit Court applied the law and found that Syed's trial counsel was constitutionally ineffective for failing to challenge the testimony of the State's cell tower expert using the disclaimer on the AT&T fax coversheet. The Circuit Court vacated Syed's conviction and ordered a new trial.

The State filed an Application for Leave to Appeal on August 1, 2016.

Standard of Review

"[T]he Court of Special Appeals must exercise its discretion to determine whether or not to grant an [application for leave to appeal]." *Grayson v. State*, 354 Md. 1, 15 (1999); *see also* Md. Rule 8-204(f). Leave to appeal is rarely granted. In the last fiscal year for which data is available, this Court denied 92.6% of applications for leave to appeal. *See* Court Operations Dep't for the Md. Judiciary, *Annual Statistical Abstract FY 2015*, at COSA-4.[2] This overwhelming percentage of denials is no mere product of a small sample; parties submitted 148

[2] *Available at* http://mdcourts.gov/publications/annualreport/reports/2015/fy2015statisticalabstract.pdf (last visited Sept. 14, 2016).

applications in 2015, and 137 of them were denied. *Id.* And the data is similar for fiscal years 2013 and 2014. *Id.*[3]

Because grants of applications for leave to appeal are rare, they are reserved for those cases that present legal issues of potentially broad import. *See, e.g.*, *Blanks v. State*, 228 Md. App. 335, 338 (2016) (granting leave to appeal whether Sixth Amendment right to confront witnesses applies in probation revocation hearing); *McNeil v. Warden of Md. House of Corr.*, 233 Md. 602, 603 (1963) (granting leave to appeal whether a defendant is entitled to the assistance of counsel in municipal court). The State's Application does not remotely qualify for inclusion in that rare category.[4]

"The court may reopen a postconviction 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 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).

A determination of whether counsel was ineffective "is a mixed question of law and fact." *State v. Jones*, 138 Md. App. 178, 209 (2001) (quoting *Strickland*, 466 U.S. at 698)

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[3] The State generally fares no better on discretionary review than a private litigant. Unlike in the federal postconviction context — where state and federal government entities are entitled to an immediate appeal, *see* Fed. R. App. P. 22(b)(3) — Maryland law makes clear that leave to appeal from a postconviction order is required of all parties, "including the Attorney General and a State's Attorney[.]" Md. Code Ann., Crim. P. § 7-109(a).

[4] Syed has filed a Conditional Application for Leave to Cross-Appeal. And unlike the State's submission, Syed's application *does* put forward a question of both great significance and potentially broad import: whether, upon finding that a counsel's failure to investigate an alibi witness was *deficient*, a trial court nonetheless may determine that counsel's deficiency was not *prejudicial. See* Syed's Conditional Appl. for Leave to Cross-Appeal at 10-18 (Aug. 11, 2016). In any event, the State does not oppose this Court reviewing at least one of the issues raised in Syed's Conditional Application for Leave to Cross Appeal. *See* State's Conditional Appl. for Limited Remand at 2 n.3 (Aug. 22, 2016).

(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)). On questions of whether a constitutional right has been violated, courts "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. The Circuit Court Properly Exercised its Discretion on Remand to Reopen the Postconviction Proceedings.

The State's first complaint in its Application for Leave to Appeal is that the Circuit Court exceeded the scope of this Court's Remand Order in reopening the postconviction proceedings to take evidence relating to Syed's cell tower claim. Setting aside the threshold question of whether this type of argument is at all suitable for discretionary review, the State must put forward a strong contention that the experienced Circuit Court judge assigned to this case on remand abused his discretion in reopening Syed's postconviction proceedings. The Circuit Court did no such thing.

The Remand Order instructed the Circuit Court to allow Syed to move to reopen the postconviction proceedings to address McClain's January 2015 affidavit. Ex. 10 (Order at 4, *Syed v. Maryland*, No. 2519 (Md. Ct. Spec. App. May 18, 2015) (hereinafter "Remand Order")). The Remand Order also instructed the Circuit Court to exercise "its discretion" to "conduct further proceedings it deems appropriate." *Id*. This Court reiterated the Circuit Court's latitude on remand on the very next page, directing the Circuit Court to "re-transmit the record" to the Court of Special Appeals "after taking any action [the Circuit Court] deems appropriate[.]" *Id.* at 5.

Against these broad directives, the State argues that the phrase "deems appropriate" does not in fact mean what it says. According to the State, to be "appropriate," any and all further proceedings before the Circuit Court must somehow relate to McClain's January 2015 affidavit. *See* Appl. for Leave to Appeal at 26-27, *State v. Syed*, No. 199103042-46 (Md. Cir. Ct. Baltimore City Aug. 1, 2016) (hereinafter "State's ALA"). But this Court did not confine the scope of the remand to that single purpose; it gave the Circuit Court the latitude to take "any action" it deemed appropriate on remand. The Remand Order also referenced Section 7-104 of the Criminal Procedure Article of the Maryland Code, confirming that the scope of the remand should be coextensive with the Circuit Court's authority to reopen postconviction proceedings under that section.[5] Ex. 10 at 4 (Remand Order).

The State seeks to buttress its argument with a partial quotation from the Remand Order to the effect that the remand "would give the parties a chance to supplement the record 'with relevant documents and even testimony pertinent to the issues raised by this appeal.'" State's ALA at 26 (quoting Ex. 10 at 4 (Remand Order). But the State's partial quotation omitted something important; in an unquoted part of the same sentence, this Court made clear that the remand was to allow for supplementation on issues raised by the appeal, "*among other things*[.]" Ex. 10 at 4 (Remand Order) (emphasis added). This Court could have provided explicit "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 solely 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, if the Circuit Court found that to be warranted. That is what happened.

[5] The Circuit Court's exercise of discretion under that section is discussed *infra* pp. 14-18.

At the very least, the Remand Order is ambiguous as to the scope of the remand. This Court should decline to review the Circuit Court's reasonable interpretation of a non-dispositive order that is specific to this case, especially now that the Circuit Court has conducted extensive fact finding proceedings.[6]

Separate from its argument that the Circuit Court exceeded the scope of its authority on remand, the State contends that the Circuit Court abused its discretion in reopening the postconviction proceedings. "The court may reopen a postconviction 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. This section "requires the court to exercise discretion[,]" and only an abuse of that discretion warrants reversal. *Gray*, 388 Md. at 382-383. This standard is a deferential one: "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)). To be reversed for abuse of discretion, the ruling at issue must have been "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id.*

In addition to the deferential standard of the review, the standard for reopening postconviction proceedings — *i.e.* when a circuit court determines that it would be in the

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[6] Equally misguided is the State's contention, which it relegated to a footnote, that Syed's cell-tower claims were untimely. *See* State's ALA at 27 n.15; *see also Solberg v. Majerle Management*, 388 Md. 281, 295 (2005) (declining to address argument presented only in a footnote). This Court directed Syed to file a motion to reopen the postconviction proceedings "within 45 days of the date of this Order[.]" Ex. 10 at 5 (Remand Order). Syed complied. He made an additional filing on August 24, 2015, but that filing was a "supplement" to the prior motion. Even if it could be treated as a second motion to reopen, moreover, the supplement should not be considered untimely (especially where the Circuit Court in the first instance did not consider it untimely). Motions to reopen are not subject to a deadline. *See Gray*, 388 Md. at 380 & n.6; Md. Code Ann., Crim. P. § 7-104.

"interests of justice" to do so — is a flexible one that "has been interpreted to include a wide array of possibilities." *Gray*, 388 Md. at 382 n.7 (citations omitted). As the State observes, "interests of justice" has not been defined in this context. *See* State's ALA at 27. This Court has, however, analogized to motions for a new trial, a context in which that phrase also appears. *See Gray v. State*, 158 Md. App. 635, 646 n.3 (2004). The only limit on that analogy is that a circuit court's discretion to reopen postconviction proceedings should "be somewhat circumscribed by the statutory constraints of the [Uniform Postconviction Procedure Act ("UPPA")] and the type of claims to which it affords a remedy." *Id.*

In this case, the Circuit Court concluded that the interests of justice would be served by reopening Syed's postconviction proceeding not only to consider McClain's affidavit, but also to consider two potentially meritorious cell tower claims, which implicated issues of ineffective assistance of trial counsel and violation of the prosecution's *Brady* obligations. Ex. 11 (Statement of Reasons and Order of the Court at 3-4, *Syed v. State*, No. 199103042-046 (Md. Cir. Ct. Baltimore City Nov. 6, 2015) (hereinafter "Order Granting Motion to Reopen"). These are eminently reasonable grounds for reopening a postconviction proceeding. *See e.g. Booth*, 346 Md. at 247 (remanding "the circuit court's denial of the motion to reopen the post conviction proceeding . . . to consider th[e *Brady*] issue on its merits."); *Matthews v. State*, 187 Md. App. 496, 513 (2009) (recognizing, when discussing the allegedly 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). The Circuit Court also provided additional grounds, drawn from the context of motions for a new trial, that can justify reopening a postconviction proceeding, including a "verdict that 'was contrary to the evidence; newly discovered evidence; accident and surprise; . . . fraud or

misconduct of the prosecution." Ex. 11 at 2 (Order Granting Motion to Reopen (quoting *Love v. State*, 95 Md. App. 420, 427 (1993))). And the Circuit Court explained its reasoning in a five-page opinion, even though it was not required to do so. *Cf. Gray*, 388 Md. at 374 (affirming denial of reopening where the extent of the circuit court's substantive analysis was that the motion was "not in the interest of justice").

The State nonetheless argues that the Circuit Court abused its discretion by supposedly running afoul of two provisions of the UPPA: Sections 7-103(a) and 7-106(b) of the Criminal Procedure Article of the Maryland Code. *See* State's ALA at 28.[7] As the State explains, Section 7-103(a) limits petitioners to one petition for postconviction relief. Syed, however, filed only one such petition, in June 2010. The State's ALA arises, not from a second petition, but from Syed's *motion to reopen* his postconviction proceedings under Section 7-104 and a supplement to that motion. And the Court of Appeals has explained that, "unlike § 7–103, § 7–104 does not prohibit a person from filing more than one petition to reopen." *Gray*, 388 Md. at 380. By granting Syed's motion to reopen, the Circuit Court did not impermissibly allow Syed a second petition for postconviction review.[8]

Second, the State contends that the Circuit Court's decision to reopen the postconviction proceedings violated the UPPA's waiver provision, Md. Code Ann., Crim. P. § 7-106(b). But

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[7] The State also faults the Circuit Court because the interests of justice that it concluded support Syed's motion to reopen are not identical to those at issue in three cases referenced in a footnote in *Gray*. *See* State's ALA at 29 (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 the Court of Appeals in *Gray* cited those three cases by way of "example," explaining that circuit courts retain "discretion to decide when 'the interests of justice' require re-opening." 388 Md. at 382 n.7.

[8] To the extent the State is arguing that because the cell-tower claims were not part of Syed's 2010 petition the motion to reopen should be treated as a second petition, *see* State's ALA at 28, the State is essentially arguing waiver, which is addressed immediately below and in the next section of this Response.

that provision is not a categorical bar against claims that were not previously raised in a petition for postconviction relief. It applies to previously unheard claims only if (i) those claims have been "intelligently and knowingly" waived and (ii) no "special circumstances exist." *Id.* 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 Section II.

The State also contends that the Circuit Court erred by taking evidence at the 2016 postconviction hearing before ruling on whether the cell-tower claims were waived. According to the State, if a petitioner briefing a motion to reopen does not make "a prima facie showing" as to why waiver should not apply to a particular claim, "it is an abuse of discretion for the circuit court to reopen the proceeding on that claim." State's ALA at 29. In support of this proclamation, however, the State does not cite to even a single case, which is not surprising; we have found none, either. Moreover, the State's absolutist position is illogical. "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Given the fact-dependent nature of the inquiry, circuit courts are properly entrusted with deciding when they need additional facts before determining whether a claim was "knowingly and intelligently" waived. Here, the Circuit Court's decision to conduct a hearing on this issue was appropriate, especially considering that it already had concluded that a hearing was warranted to explore the McClain affidavit.

This Court should decline to review the Circuit Court's discretionary and well-reasoned decision that the interests of justice in this particular case supported granting Syed's motion to reopen the postconviction proceedings on the McClain alibi claim and cell-tower claims.

II. The Circuit Court Correctly Found that Syed had Not Knowingly and Intelligently Waived his Claim of Ineffective Assistance of Counsel Related to the Cell Tower Location Evidence.

The State claims that the Circuit Court "failed to apply settled principles of waiver to the circumstances of this case." State's ALA at 5. Again, the State's tight focus on the "circumstances of this case" shows how inappropriate this fact-bound question is as a vehicle for this Court's discretionary review. But in any event, the Circuit Court followed longstanding precedent interpreting the statutory provision governing waiver in postconviction proceedings. *See Curtis v.* State, 284 Md. 132 (1978). In *Curtis*, which Maryland courts have repeatedly reaffirmed, the Court of Appeals held that a claim of ineffective assistance of counsel is a "fundamental right" that cannot be waived without the intelligent and knowing consent of the defendant. *Id.* at 149-150.

Applying this standard to the facts here, the Circuit Court properly concluded that Syed did not intelligently and knowingly waive his claim of ineffective assistance of counsel based on trial counsel's failure to cross-examine the State's expert with a critical document impugning his cell-tower testimony. Slip Op. at 34-37. Syed was not aware of the document or its significance until after the last postconviction proceeding. Slip Op. at 36. This finding by the Circuit Court is more than sufficient to rebut the presumption of intelligent and knowing waiver.

A. Claims of Ineffective Assistance of Counsel are Subject to the "Intelligently and Knowingly" Waiver Standard.

Maryland courts apply a two-tier waiver rule that is part statutory and part common law. The background common-law rule is that, as to most rights, the failure of a petitioner or a

petitioner's counsel to raise a claim of error at a prior opportunity is in most circumstances sufficient to find that petitioner has waived the claim. *See McElroy v. State*, 329 Md. 136, 139-140 (Md. 1993). But in certain circumstances, the Legislature has instructed 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. P. § 7-106(b).

The Court of Appeals interpreted the scope of this statutory waiver provision in *Curtis v. State*, 284 Md. 132. There, the Court held that Section 7-106(b) incorporated the common-law standard of waiver: the provision applies a heightened waiver standard "only in those situations where the courts have required an 'intelligent and knowing'" waiver. *Id.* at 148, 150 n.7. Following that common-law approach, the statute requires intelligent and knowing waiver only "with respect to errors which deprived a petitioner of fundamental constitutional rights." *McElroy*, 329 Md. at 140.

"*Johnson v. Zerbst* . . . is generally regarded as the cornerstone regarding waiver of certain constitutional rights." *Curtis*, 285 Md. at 142-143 (citing *Johnson*, 304 U.S. 458 (1938)). In *Johnson*, the Supreme Court held that the Sixth Amendment right to counsel was a "fundamental constitutional right" that can only be waived through "an intelligent relinquishment or abandonment of a known right or privilege." *Id.* at 464. Indeed, as the Supreme Court later explained, the right to counsel is "a prime example" of rights that require intelligent and knowing waiver. *Schneckloth v. Bustamonte*, 412 U.S. 218, 237-238 (1973). "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." *Id.; see also Maryland v. Shatzer*, 559 U.S. 98, 103-104 (2010) (reiterating that waiver of the right to counsel must be "knowing, intelligent, and voluntary").

By rooting its analysis in this venerable Supreme Court precedent, the Court of Appeals in *Curtis* was on firm ground. *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 v. Zerbst*, and there is no circumstance where that approach requiring intelligent and knowing waiver is warranted more than in claims of ineffective assistance of counsel. *Id.*

The State agrees that the statutory "intelligent and knowing" standard applies to the Sixth Amendment right to counsel. *See* State's ALA at 31. Yet despite *Curtis*, the State simultaneously resists application of the heightened waiver standard to an ineffective assistance of counsel claim. *Id.* at 32. The State cannot have it both ways. Where a petitioner claims ineffective assistance of counsel, the petitioner is claiming that his constitutional right to counsel was not fulfilled; the right to counsel contemplates the right to *competent* counsel. *See McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("The [Sixth Amendment] right to counsel is the right to effective assistance of counsel."); *see also Strickland*, 466 U.S. at 686. The State provides no basis — and there is none — for imposing different standards on the waiver of the same fundamental right, depending on when the waiver supposedly occurred. Whether at trial or during a postconviction proceeding, waiver of the Sixth Amendment right to counsel must be intelligent and knowing.

The State's broad policy concerns – of preserving counsel's discretion to make tactical decisions and not disrupting the criminal justice system – do not change this settled standard. *See* State's ALA at 32. Those concerns are implicated in any ineffective-assistance scenario. And if a right is sufficiently fundamental, these policy concerns are irrelevant; the statutory standard applies. *See Robinson v. State*, 410 Md. 91, 107-108 (2009) (contrasting fundamental jury-trial

right with "the right to a public trial[, which] is subject to the balance of competing concerns"). The fundamental right to effective assistance of counsel thus requires intelligent and knowing waiver by the petitioner himself.

At bottom, *Curtis* remains binding precedent from the Court of Appeals, which the Circuit Court properly applied in this case. The State's bald assertion that Maryland courts have not applied the "intelligently and knowingly" waiver standard to a claim of ineffective assistance of counsel since *Curtis* is incorrect. In *State v. Adams*, 406 Md. 240 (2008), for example, the petitioner failed to raise an ineffective assistance of counsel claim on appeal. *See* 406 Md. at 253 n.8 (listing claims raised on appeal). Recognizing that a heightened waiver standard applies, however, the Court of Appeals held that "[u]nlike most of his other post-conviction claims," the petitioner's claim of ineffective assistance of counsel "has not been waived by inaction in the prior proceedings." *Id.* at 292. Numerous other decisions have reaffirmed *Curtis* and recognized that the right to counsel is sufficiently fundamental to fall within the scope of the statutory waiver provision. *See, e.g.*, *State v. Smith*, 443 Md. 572, 605 (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).[9]

[9] *See also State v. Rose*, 345 Md. 238, 244 (1997) (stating that this interpretation of the statute in *Curtis* "has been reaffirmed on numerous occasions" and citing cases); *Robinson*, 410 Md. at 107 (noting that the right to counsel is "absolute and can only be foregone by the defendant's 'intelligent and knowing' waiver"); *Davis v. State*, 285 Md. 19, 33-34 (1979) (noting that the "intelligent and knowing" standard has been held to apply to the waiver of the right to counsel); *Wyche*, 53 Md. App. at 406 ("In *Curtis*, the Court of Appeals held that the right to effective assistance of counsel at a criminal trial is a fundamental right and that an allegation of error charging violation of that right may not be waived unless it is found that the petitioner intelligently and knowingly effected such a waiver.").

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

The relevant holding in *Curtis* — that the statutory waiver provision applies to ineffective assistance of counsel claims — did not depend on the facts of that case. The Court of Appeals' holding rests on its findings that the Legislature intended to incorporate the waiver standard from existing case law and that this case law requires 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. Accordingly, there is no basis for applying a more lenient waiver standard to any *particular* claim of ineffective assistance of counsel. The scope and meaning of the waiver standard does not change from case to case.

In any case, the facts here are not materially distinguishable from those in *Curtis*. The State emphasizes that in *Curtis* the petitioner had not previously raised any ineffective assistance of counsel claim. State's ALA at 33. The State suggests that this was the reason that the Court of Appeals applied a heightened waiver standard in *Curtis*: if not, "no court would have ever considered Curtis's allegation that his trial counsel was ineffective." State's ALA at 33. But that argument will always hold in a waiver case. Syed has not previously raised a claim that trial counsel was ineffective for failure to rebut the State's cell-tower expert using a critical document in trial counsel's possession — the AT&T disclaimer page. If the Circuit Court had found that this claim was waived, then no court would have ever considered this claim.

Ineffective assistance of counsel based on trial counsel's failure to properly cross-examine the State's expert is separate and distinct from the ineffective assistance of counsel claims that Syed has previously raised. *See Pole v. Randolph*, 570 F.3d 922, 934-935 (7th Cir. 2009) (analyzing ineffective assistance of counsel claims separately for purposes of exhaustion in federal habeas review). The reasonableness of trial counsel's decision not to use the AT&T

disclaimer page to counter the State's expert, for example, is an entirely separate question from the reasonableness of trial counsel's failure to pursue a plea offer, or a different attorney's failure on appeal to reassert objections to the scope of an expert's testimony made at trial — both of which Syed raised in his first postconviction petition. *See* Pet. for Post-Conviction Relief at 11-19 (May 28, 2010). For purposes of waiver and finality, therefore, these claims of ineffective assistance of counsel must be analyzed separately.

The authority cited by the State actually supports this proposition. In *Pole*, 570 F.3d at 934-939, a federal appellate court analyzed multiple ineffective assistance of counsel claims separately for purposes of the federal habeas exhaustion requirement. *See* 28 U.S.C. § 2254 (requiring habeas petitioner to have presented each claim through one complete round of state-court review). The court reaffirmed the rule that the failure to present a particular factual basis for an ineffective assistance of counsel claim in state court results in foreclosure of that claim on habeas review — even if the petitioner had presented an alternative ineffective counsel claim premised on other facts. *Pole*, 570 F.3d at 935; *see also Wood v. Ryan*, 693 F.3d 1104, 1120 (9th Cir. 2012) ("[A] general allegation of ineffective assistance of counsel is not sufficient to [satisfy exhaustion requirement for] separate specific instances of ineffective assistance.").[10] This federal rule in the context of exhaustion — a concept similar to waiver — further proves that ineffective assistance of counsel claims with different factual predicates must be analyzed separately.

But even if this Court adopts the State's theory, the Circuit Court's decision to reach the merits of Syed's cell-tower claim was still proper because the State's theory contradicts itself. In

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[10] The State's quotation of *Pole* is misleading. *See* State ALA at 34. Although the Seventh Circuit stated that "ineffective assistance of counsel is a single ground for relief," it did so to explain why courts consider the prejudice of "the overall deficient performance, rather than a specific failing." *Pole*, 570 F.3d at 934 (quoting *Peoples v. United States*, 403 F.3d 844, 848 (7th Cir. 2005)). The Seventh Circuit never suggested that courts treat ineffective assistance of counsel as a single ground for relief for purposes of waiver or exhaustion.

his 2010 postconviction petition, Syed argued, for example, that trial counsel was ineffective for failing to investigate Asia McClain as an alibi witness — an issue that the State does not contend has been waived. *See* Pet. for Post-Conviction Relief at 13 (June 6, 2010). If the alibi and cell tower issues are merely different "species" of the same "repackaged" claim, State's ALA at 33-34, there can be no waiver because Syed previously raised that claim in his 2010 postconviction petition. *See* Md. Code Ann., Crim. Proc. § 7-106(b) (defining waiver as "when a petitioner could have made but intelligently and knowingly *failed to make* the allegation"). The Circuit Court has now reopened that single ineffective-assistance claim because it was "in the interests of justice" to do so. Md. Code Ann., Crim. P. § 7-104. Thus, even under the State's own theory, the Circuit Court properly reevaluated the merits of Syed's ineffective assistance of counsel claim in light of newly discovered evidence.

C. The Circuit Court Correctly Found that the Evidence was Sufficient to Rebut the Presumption of Intelligent and Knowing Waiver.

The statutory waiver standard applicable here requires that Syed himself must have "intelligently and knowingly" relinquished his ineffective assistance of counsel claim. *See* Md. Code Ann., Crim. P. § 7-106(b). Counsel's failure to raise the claim is not enough. *Curtis*, 284 Md. at 139 ("The test for 'waiver' which the Legislature contemplated was clearly the 'intelligent and knowing' failure to raise, not the failure of counsel or an unknowing petitioner to raise an issue."). Accordingly, to conclude that a claim implicating a fundamental right has been waived, courts must find that:

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

Wyche v. State, 53 Md. App. 403, 406 (1983).

Although the petitioner bears the burden to rebut a presumption of intelligent and knowing waiver, this burden is easily met here. "The very nature of the rights subject to the 'intelligent and knowing' waiver standard of the post-conviction statute mandates that the burden to rebut the presumption of waiver not require much by way of evidence. . . ." *State v. Smith*, 443 Md. 572, 606 (2015). Indeed, in a recent case the Court of Appeals found that "the record itself," which showed that petitioner was not advised of a claim until after the last postconviction proceeding, "offer[ed] the necessary rebuttal to the presumption that [petitioner] knew of and intelligently relinquished the right to raise her present claim earlier in a post-conviction proceeding." *Id.* at 609.

Here, Syed did not know about the reliability 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. Slip Op. 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.* Based on these findings, the Circuit Court properly concluded that Syed rebutted the presumption that he intelligently and knowingly waived his claim of ineffective assistance of counsel based on trial counsel's failure to adequately challenge the State's expert on this issue.

The State simply is wrong that the record did not support the Circuit Court's conclusion. *See* State's ALA at 35-36. In an October 2015 memorandum in support of his Motion to Re-Open Post-Conviction Proceedings, for example, Syed 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." Reply to the State's Consolidated Resp. in Opp'n to the Mot. and Supp. to

Re-Open the Post-Conviction Proceedings at 8 (Oct. 13, 2015); *see also* Supp. to Mot. to Re-Open Post-Conviction Proceedings at 7 n.5 (Aug. 24, 2015). And at the 2016 postconviction proceeding, Syed submitted evidence corroborating this assertion — an affidavit from the State's expert Waranowitz declaring that he first conveyed the potential implications of the AT&T disclaimer to Syed's postconviction counsel on September 29, 2015. *See* Ex. 3 (Waranowitz's Oct. 5, 2015 Affidavit). Syed's recent discovery of the claim also is consistent with his testimony at a prior postconviction hearing that his trial counsel "didn't really go into detail [with him] about any aspects of [cellular telephone evidence]." Postconviction Tr. at 12, Oct. 25, 2012. The State did not—indeed, cannot—identify any record evidence that contradicts Syed's explanation. The Circuit Court thus was on firm ground in concluding that Syed "did not know about the potential implications of trial counsel's failure to challenge the cell tower evidence" and thus "could not have knowingly waived his right to raise the allegation." Slip Op. at 36; *see 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").

In its attempts to put distance between this case and *Curtis*, the State also points to differences between Syed's education and background and that of the petitioner in *Curtis*. *See* State's ALA at 36-37. Those differences are immaterial. Although the Court of Appeals in *Curtis* relied in part on the education and mental capacity of the defendant to assess waiver, *see McElroy*, 329 Md. at 147-148, these are merely *some* of the factors that courts may consider, all of which collectively serve as a backstop to ensure that the appearance of intelligent and knowing waiver is reliable, *see Curtis*, 284 Md. at 143 ("The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon 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)). Other factors — such as (i) whether Syed was advised, prior to 2015, that trial counsel may have been ineffective in failing to investigate and rebut the cell tower evidence and (ii) whether he was advised, prior to 2015, that he should raise this claim, Slip Op. at 35 (citing *McElroy*, 329 Md. at 147-148) — support the Circuit Court's findings on waiver. Moreover, the ultimate question is whether Syed *understood and nonetheless relinquished* his ineffective-assistance claim related to the cell tower issue. *Wyche*, 53 Md. App. at 406. Accordingly, even if Syed had a greater *capacity* to understand than the petitioner in *Curtis*, *see* State's ALA at 36-37, 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.

The State complains that the intelligent and knowing standard should not apply in postconviction proceedings because often there will not be an in-court colloquy by which to determine the defendant's understanding of counsel's actions. State's ALA at 37-38. As an initial matter, a policy concern of far greater weight justifies this heightened standard: preventing individuals from unknowingly waiving their most fundamental rights. And in any event, if there is any policy force to the State's complaint, that is an issue for the Legislature to address, not this Court. By statute, the intelligent and knowing standard is currently required where, as here, a criminal defendant's fundamental right to counsel is at stake. *See* Md. Code Ann., Crim. P. § 706(b)(1)(i). The Circuit Court properly applied this standard to Syed's claim of ineffective assistance of counsel and found, based on undisputed record evidence, that he did not intelligently and knowingly waive it.

III. The Circuit Court Correctly Found That Trial Counsel Was Deficient for Failing to Understand the AT&T Disclaimer and Use it to Challenge the State's Expert.

The State urges this Court to engage in a fact-intensive inquiry to reverse the Circuit Court's holding that trial counsel's performance was deficient under *Strickland*. In doing so, the State necessarily must contend that the detailed findings of fact made by the Circuit Court with regards to the AT&T disclaimer were clearly erroneous. *Holmes*, 401 Md. at 472; *Hunt v. State*, 345 Md. 122, 166 (1997). They were not.

After a five-day evidentiary hearing, the Circuit Court issued a thorough opinion meticulously supported by reasonable factual findings supported by the record evidence. Indeed, the State has pointed to no evidence that the Circuit Court failed to consider when reaching these findings of fact. This Court should decline the invitation to reengage in a complicated factual inquiry on discretionary review.

But even if this Court were to grant review to consider the facts anew, the AT&T disclaimer is clear on its face; counsel was deficient for failing to seize on this critical evidence; and the State's arguments to the contrary are without merit.

A. The AT&T Disclaimer Is Unambiguous About the Reliability of Cell Site Location Information.

The AT&T disclaimer contained in the fax coversheet that accompanied 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. Ex. 2 (AT&T disclaimer) (emphasis in original). On this factual issue the Circuit Court heard from experts on both sides, observed their testimony, reviewed the critical documentation in the record, and made its own factual findings. The Circuit Court squarely rejected the factual gymnastics attempted by the State and sided with the reasoned interpretation advanced by Syed.

As described above, *supra* pp. 9-10, the Circuit Court made the following findings of fact: 1) trial counsel was on notice of the AT&T disclaimer; 2) the disclaimer applied to subscriber activity reports; 3) the amalgamated 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 had its common meaning – it 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).

B. 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 patently deficient for failing to utilize the critical AT&T disclaimer to rebut the State's expert. Slip Op. at 37-46. Under *Strickland*, counsel's performance is deemed deficient if his or her representation falls below an "objective standard of reasonableness[.]" *United States v. Strickland*, 466 U.S. 668, 669, 702 (1984). Trial counsel's performance did not satisfy that standard.

As the Circuit Court correctly found, the "cell site information . . . played a significant role in the State's case and the jury's decision making process." Slip. Op. at 55-56. The State made the importance of this information clear both prior to trial and in its opening statement. Slip. Op. at 45 n.21; *see also infra* at Section IV(A). To rebut this highly prejudicial (and unreliable) evidence, all trial counsel would have had to have done 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) (finding failure to evaluate pertinent evidence and instead 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 technology on which the State's case depended was not reliable – she either did not

review or did not understand the import of such information. As the Circuit Court held, either failing is inexcusable under *Strickland*. *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 advance 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) ("An 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) (attorney's failure to investigate evidence constituted deficient performance where, as here, counsel did not understand the potential significance of the evidence).

The State does not address the case upon which the Circuit Court primarily relied for its finding that counsel's failure to review discovery evidence and use it at trial was an objectively unreasonable performance. *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.

The State also dismisses the importance of the remaining cases cited by the Circuit Court, *see* Slip Op. at 40-41, maintaining that it was the "'the cumulative effect of numerous errors' on the part of trial counsel [that] deprived the petitioner of effective assistance of counsel" in those cases and by noting that two of the cases are from outside of the state of Maryland. State's ALA at 41 n.20. As an initial matter, the State does not cite a single Maryland case *in support* of its position. *See id.* at 41-43. Moreover, the State's criticism of at least two of those cases —

Bowers v. State, 320 Md. 416 (1990) and *People v. Lee,* 185 Ill. App. 3d 420 (1989) — misinterprets them. In *Bowers*, the failure to cross-examine a key witness as to the existence of another suspect was not an "alternative ground," but instead lay at the heart of the Court's finding of deficient performance. *Compare* 320 Md. at 428 (finding that the failure to put on exculpatory evidence along with the failure to cross-examine "at a minimum" violated *Strickland*) *with id.* at 431-436 (detailing "alternative ground[s]" including the failure to put on an opening statement or defense, failure to investigate forensic evidence, and failure to cross-examine a police officer). Likewise, in *Lee*, the court explicitly found that "the errors in cross-examination of Mr. Ellis alone . . . would certainly suggest the need for reversal." 185 Ill. App. at 446. But even if those cases did rely upon cumulative errors by trial counsel to find deficient performance, it is of no consequence. Those are exactly the circumstances here. The Circuit Court found that trial counsel was deficient for both failing to seize upon the AT&T disclaimer and failing to investigate a critical alibi witness, Asia McClain. Slip. Op. at 40, 22.

Counsel's failure to effectively counter the cell site evidence was not — and could not have been — based on a strategic decision. 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. *See* Slip Op. at 43-44; *see also e.g.*, *Steinkuehler v. Meschner*, 176 F.3d 441 (8th Cir. 1999) (finding that 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) (finding that failure to cross-examine using inconsistent statements from a prior trial constituted deficient performance); *Nixon v. Newsome*, 888 F.2d 112, 115 (11th Cir. 1989) (determining trial counsel's representation 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* Slip Op. at 47, to enter the record without using the AT&T disclaimer to challenge the 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. 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 this failure renders her performance deficient.

C. The State's Attempts to Excuse Trial Counsel's Failure to Seize Upon the AT&T Disclaimer are Without Merit.

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 necessarily suggests that trial counsel was not deficient in failing even to question the State's expert about it in the first place; 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. Again, none of these arguments suggests a significant legal issue ripe for discretionary review — to the contrary, all of these arguments demonstrate the parochial nature of the State's approach here. And in any event, each of the State's excuses is flawed.

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 avers that such an expert dispute, should a credible one exist, necessarily means that trial counsel could not have been defective for failing to cross-examine the State's expert on the AT&T disclaimer. The State cites no authority for its categorical theory that a battle of the experts over the *significance* of a document mitigates a constitutionally ineffective failure even to *cross-examine* the adverse expert on the document, and undersigned counsel is aware of none. State's ALA at 40.

Regardless, the State's argument is misguided. As an initial matter, it relies on after-the-fact rationalization that could not have played a part in trial counsel's decision-making. 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 the 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* Ex. 3 (Waranowitz's Oct. 5, 2015 Affidavit).

Moreover, even if a dispute among the experts at the 2016 postconviction 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 postconviction hearing, Agent Fitzgerald. Like findings of fact, the credibility determinations made by a postconviction court cannot be disturbed without a finding of clear error. *State v. Latham*, 182 Md. App. 597, 613 (2008). This

Court should afford such deference to the Circuit Court's findings regarding Fitzgerald, on whose testimony the State relied heavily in its Application for Leave to Appeal. State's ALA at 23-24, 39. The State relied on Fitzgerald's testimony as gospel for its proposition that the AT&T disclaimer did not apply to Exhibit 31, as well as to argue that Syed's proposed cross-examination was "novel," while trial counsel's actual cross-examination was "exceptional." *Id*. at 23, 43. Yet the Circuit Court appropriately took issue with the substance and credibility of Fitzgerald's testimony on several key issues points. 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.

Slip. Op. at 51. 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.[11] 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*

[11] *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").

from trial and, on the other, an expert whose testimony the Circuit Court heard and explicitly rejected. *See* Slip Op. at 51-52.

Tellingly, the State's Application for Leave to Appeal is silent as to the Circuit Court's findings related to Fitzgerald; instead the State suggests that Fitzgerald's opinions contrast with those of Syed's expert, Gerald Grant, and the State's expert from trial, Abe Waranowitz. 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.

Second, the State attempts to excuse trial counsel's errors by pointing to *other* avenues of cross-examination that trial counsel did pursue. Yet the Supreme Court has explained that "in some instances even an isolated error can support an ineffective-assistance claim if it is sufficiently egregious and prejudicial." *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* Slip Op. at 37, 46. Trial counsel completely ignored a document that, by its plain terms and as the Circuit Court found, significantly undercut testimony critical to the State's case.

Third, the State suggests that cross-examining an expert witness with a document that explicitly states that the data underpinning the expert's analysis were "NOT [] reliable" is a "novel line of questioning." State's ALA at 43. Cross-examining an expert with a document that 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* Slip Op. 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 State places undue emphasis on Fitzgerald's and Grant's testimony below that they had not previously heard of challenges to the reliability of using incoming calls to locate cell phones. But this argument, too, is a red herring. First, the State did not present evidence during the 2016 postconviction hearing as to 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). In fact, the State did not present evidence regarding how long, before and after Syed's trial, AT&T continued to use the disclaimer. Indeed, there is no evidence in the record 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 has had the opportunity.

Second, even if the AT&T disclaimer was available in another case, defense counsel would only have needed to use it if the prosecution improperly relied upon the data for the location of incoming calls. In this case, such a situation arose only because the State asked its expert at trial to testify without providing all of the information relevant to his testimony. *See* Ex. 3 (Waranowitz's Oct. 5, 2015 Affidavit) (confirming that the State did not tell him about or call to his attention to the AT&T disclaimer before he testified at trial). One would hope that is a rare occurrence. This Court should reject the State's invitation to excuse trial counsel's failures based on the unknown usage rate of a disclaimer in other cases that may not even exist.

Trial counsel failed to investigate and/or understand a standard one-page disclaimer, written in plain English, and to cross-examine the State's expert regarding the clear import of its terms. Those failures constitute deficient performance.

IV. 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 has 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* Slip Op. 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) ("A proper analysis of prejudice . . . should not focus solely on an outcome determination, but should consider whether the result of the proceeding was fundamentally unfair or unreliable.") (quoting *Oken*, 343 Md. at 284).

The State does not contend that the Circuit Court applied the wrong legal standard. Indeed, it cites no legal authority at all in arguing that trial counsel's failure to expose the misleading nature of the State's theory was not prejudicial. Instead, and yet again, the State simply asks this Court to re-evaluate the fact-based determinations that the Circuit Court already made about the credibility (or lack thereof) of certain witnesses and testimony.

A. The Location of the Incoming Calls Was the Self-Described Strength of the State's Case.

At every stage of this case, the State has emphasized the significance of two incoming calls that supposedly place Syed with Wilds at Leakin Park around 7:00 p.m. on the night of January 13th, when Lee's body was supposedly being 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. Prosecutor Urick told the jury:

> At this time 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.

Trial Tr. at 96-97, Jan. 27, 2000. The State continued with greater specificity about Waranowitz's expected testimony:

> And you're going to see a map from the AT and T Wireless records showing . . . that that cell site is the cell site that covers Leakin Park, that those two calls at 7:09 and 7:16 . . . covers Leakin Park and not much else.

Id. at 109-110.

> And you're going to see how the cell phone records corroborate that activity.

Id. at 111.

As the Circuit Court explained, "[a] jury's first impression of a case plays a significant role in the jury's ultimate verdict." Slip Op. 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 did not stop there. Not only did it highlight the incoming calls with Waranowitz and other witnesses in its opening and throughout its case, but it focused extensively on this evidence in *closing* argument. As the Court of Appeals explained in the *Brady v. Maryland* context, materiality "is best understood by taking the word of the prosecutor . . . during closing argument." *Ware v. State*, 348 Md. 19, 53 (1997) (citing *Kyles v. Whitley*, 514 U.S. 419, 445 (1995)). Taking the prosecutors' own words at face value, the cell site testimony about the incoming calls was "crucial" to the State's case, a point that it repeatedly underscored:

> 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.

Trial Tr. at 63, Feb. 25, 2000.

> 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).

> That call, ladies and gentlemen, at 7:09 or 7:16 p.m., occurred in the cell phone area covered by Leakin Park.

Id. at 71.

> 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 ended, 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 postconviction hearing, the State argued that its case was "extremely strong" precisely *because of* the cell phone evidence:

> Once we received the cell phone information, talked with the representative from AT&T, who could tell us what it referred to, we were aware that it was powerful. That you could actually place someone in a geographical area for a specific time and you could do it over the course of several hours. That proved to be, I think, the *predominant evidence in this case*.

Postconviction Tr.at 24-25, Oct. 11, 2012 (emphasis added). The State doubled down on these statements at a subsequent postconviction 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." Postconviction Tr. at 115, Oct. 25, 2012 (emphasis added). And in January 2015, Kevin Urick, the State's lead prosecutor, gave an interview with *The Intercept* again underscoring the critical nature of the cell phone evidence:

> "Jay [Wild]'s testimony by itself, would that have been proof beyond a reasonable doubt?" Urick asked rhetorically. "Probably not. Cellphone evidence by itself? Probably not." But, he said, when you put together cellphone records and Jay's testimony, "they corroborate and feed off each other – it's a very strong evidentiary case."

Ex. 5 at 6-7 (N. Vargas-Cooper & K. Silverstein, *Exclusive: Prosecutor in 'Serial' Case Goes on the Record*, The Intercept (Jan. 7, 2015)). The State's case relied heavily upon the cell phone location evidence — which the State openly acknowledged before, during, and after Syed's trial. Where counsel's deficiency relates to a central issue in the case, the potential for prejudice is exacerbated. *See Coleman*, 434 Md. at 344 (finding that counsel's deficient performance in not objecting to approximately thirty references to a defendant's post-*Miranda* silence was

prejudicial where the defendant's "credibility was an essential factor for his defense"); *see also Banks v. Dretke*, 540 U.S. 668, 700-701 (2004) (finding prejudice, in the context of a *Brady* claim, where the withheld information related to the credibility of a witness who was "the centerpiece of [the] prosecution's penalty-phase case").

B. The State Needed to Rely on the Location Evidence of the Incoming Calls to Bolster Witnesses' Unreliable and Contradictory Testimony.

The State's dependence on the cell phone location evidence is understandable, given the unreliable and contradictory statements of its primary fact witness. Wilds was the State's star witness despite his admitted history of dishonesty. He testified that he lied to police officers about Lee's murder on multiple occasions. He testified that he lied during his February 28, 1999, and March 15, 1999, interviews with Detectives McGillivray and Ritz. *See, e.g.*, Trial Tr. at 126-128, Feb. 10, 2000; Trial Tr. at 101, Feb. 11, 2000. He even took the police on a wild goose chase, showing them the location where he allegedly saw Lee's body, another lie. *See* Trial Tr. at 69, Feb. 10, 2000. 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* Trial Tr. at 94, Feb. 11, 2000. And he further admitted to hiding evidence from the police. *See id.* at 91-92. Wilds even acknowledged that the police questioned inconsistencies in his stories. *See, e.g.*, Trial Tr. at 82, Feb. 10, 2000; Trial Tr., at 32, Feb. 15, 2000; *see also* Trial Tr. at 166, Feb. 18, 2000 (testimony of Detective McGillivray that Wilds' inconsistencies were "lies").

The State understood full well that Wilds was not credible and that it needed evidence to corroborate his story. In his opening statement, Urick explained, "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." Trial Tr. at 102, Jan. 27, 2000. "You'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." *Id.* at 111. "Changed certain things" is an understatement.

In its Application for Leave to Appeal, the State attempts to minimize the significance of Wilds' testimony, claiming that the Circuit Court "gave insufficient weight to the complementary testimony of Jennifer Pusateri." State's ALA at 44. Pusateri told the jury that she called Syed's number in response to a page from Wilds and the individual who answered stated that Wilds was "busy" and would call her back. *Id.* But this testimony has little meaning without the location of the incoming calls. Pusateri's testimony does not confirm who answered the phone, where the individuals were located, or what they were doing. All she alleged was that she heard an unidentified male claim that Wilds was "busy." Trial Tr. at 189, Feb. 15, 2000; Trial Tr. at 169, Feb. 16, 2000. Moreover, Pusateri, too, has credibility issues. Pusateri, too, lied during her first statement to the police. *See, e.g.,* Trial Tr. at 202, Feb. 15, 2000; Trial Tr. at 44, Feb. 16, 2000. Wilds himself also testified that "[t]he lies that she was telling were clouding the truth." Trial Tr. at 144, Feb. 15, 2000. In other words, two of the State's primary fact witnesses are admitted liars. This hardly is reliable evidence, and it is no wonder that the State felt the need to rely so heavily on the cell phone location evidence.

C. Waranowitz's Testimony Influenced the Jury and Would Have Been Different Had He Known About the AT&T Disclaimer.

Waranowitz testified as an expert witness regarding "the network design and functioning of AT&T wireless communication and Erickson equipment." Trial Tr. at 38, Feb. 8, 2000. 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* Slip Op. at 49 (citing several Maryland Court of Appeals cases regarding the potential dangers of scientific evidence in the truth-determining process). 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 himself has admitted that he had not seen the cover sheet when he was asked to testify at Syed's trial. In fact, he only saw the State's Exhibit 31 while in the courthouse waiting to testify. *See* Ex. 3 (Waranowitz's Oct. 5, 2015Affidavit). Since then, Waranowitz has admitted that "had [he] been made aware of this disclaimer, it would have affected [his] testimony." Ex. 3 (Waranowitz's Oct. 5, 2015 Affidavit). Under these circumstances, trial counsel's failure to present Waranowitz with language in the AT&T disclaimer that directly contradicts the State's theory certainly "undermine[s] confidence in the outcome" of Syed's trial. *Strickland*, 466 U.S. at 694.

D. 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, significantly undermines the State's prized cell phone location evidence, creating a substantial possibility that the result of the trial was fundamentally unreliable. Slip Op. at 56. But the prejudice Syed experienced due to his trial counsel's deficient performance was greater still.

When addressing whether a counsel's deficient performance caused prejudice to a defendant, courts must consider "the totality of circumstances or cumulative effect of all errors." *Schmitt v. State*, 140 Md. App. 1, 19 (2001) (citing *Strickland*, 466 U.S. at 695-696). In addition to its findings regarding the AT&T disclaimer, the Circuit Court held that trial counsel rendered deficient performance by making no effort to contact McClain, a potential alibi witness who repeatedly asserted — in two letters, in two affidavits, and in her postconviction testimony — that had she been called as a witness at trial, she would have testified that she was with Syed in

the public library at the very time the murder supposedly took place. *See* Slip Op. at 22; Ex. 6 (McClain's Mar. 1, 1999 letter to Syed); Ex. 7 (McClain's Mar. 2, 1999 letter to Syed); Ex. 8 (McClain's Mar. 25, 2000 Affidavit); Ex. 9 (McClain's Jan. 13, 2015 Affidavit).

As described in Syed's Conditional Application for Leave to Cross Appeal, the consequence of trial counsel's failure to contact McClain was that Syed was prevented from presenting an alibi defense from an unbiased witness who could have accounted for Syed's whereabouts during the entire time period when the murder supposedly occurred. *See* Syed's Conditional Appl. for Leave to Cross Appeal at 10-11 (citations omitted). The State's theory regarding the murder itself already was "relatively weak." Slip. Op. at 24. But rather than confront this weakness directly, Syed was forced to rely on evidence of his custom and habit on days like the day of Lee's disappearance. *See* Syed's Conditional Appl. for Leave to Cross Appeal at 12.

Had she been called, McClain would have made clear that the State's timeline for the murder was impossible. According to the Circuit Court, the only reason that trial counsel's failure to call McClain did not, on its own, prejudice Syed's defense is that it did not affect the State's timeline for the burial. Slip Op. at 25-26. Yet, that part of the State's case also rests on a discredited foundation: cell tower data from incoming calls, which the AT&T disclaimer and the expert that the Circuit Court found to be credible explained are not reliable evidence of location. When the consequences of trial counsel's multiple errors are considered together, it is clear that they prevented Syed from undermining the State's entire theory of the case. This constitutes prejudice.

V. It is in the Interests of Justice to Deny the State's Application.

In addition to all of the reasons set forth above, the State's Application for Leave to Appeal should be denied for yet another: the interests of justice demand it. Syed has served more than 17 years in prison based on a conviction that the Circuit Court found was constitutionally defective. The appropriate remedy? A new trial, with capable counsel. But Syed's opportunity to rebut the State's case against him is now threatened with extended delay. The State filed an Application for Leave to Appeal not to address any novel or wide-ranging legal issue, but to introduce heavily factual arguments about the subscriber activity reports that already have been assessed by the Circuit Court. If this Court grants the State's Application, Syed will remain in prison on a vacated conviction while his case is needlessly processed through the appellate system — a process that could take several years. On the other hand, the new trial that Syed sought — and that the Circuit Court granted — *also* would provide the State with the opportunity it seeks. If the Court denies the State's Application, both parties can address the State's factual arguments at a fair trial.

When a defendant files an application for leave to appeal from a postconviction order, he is grasping at one of his last chances for justice. And this Court's role in that context is, in part, to serve as a backstop, ensuring that a person's liberty is not wrongfully removed. When the *State* files an application for leave to appeal, the considerations are very different. If the State wishes to present the nuanced factual arguments it makes in its lengthy Application, it can retry the case, just as the Circuit Court ordered.

Conclusion

For all the foregoing reasons, this Court should deny the State's Application for Leave to Appeal.

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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