

**IN THE CIRCUIT COURT  
FOR BALTIMORE CITY, MARYLAND**

ADNAN SYED,  
Petitioner,

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v.

Petition No. 10432

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Original Case Nos. 199103042-46

STATE OF MARYLAND,  
Respondent

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**SUPPLEMENT TO MOTION TO RE-OPEN  
POST-CONVICTION PROCEEDINGS**

Petitioner Adnan Syed, by and through counsel, C. Justin Brown, hereby supplements his Motion to Re-Open Post-Conviction Proceedings to include proof that the cell tower evidence used against him was unreliable and should have been excluded from trial. Pursuant to Md. Code, Crim. Pro., § 7-104, it is in the interest of justice that the Court consider this proof, and issues associated with it.

The information Syed presents here is based on the State's contention – at trial, at the post-conviction hearing and on appeal – that cellular tower evidence, specifically two incoming phone calls, put Syed at the site where the victim was buried on the evening of her disappearance. The State has held this up as being its most reliable evidence against Syed.

It is now known, however, that when AT&T provided the cellular tower data to the State, AT&T explicitly warned the State that: “Outgoing calls only are reliable for location status. Any incoming calls will NOT be considered reliable information for location.” Ex. 1 (Feb. 22, 1999, fax sent from Rose Ricciardi of AT&T to Det. Bill Ritz

of Baltimore City Police Department) (emphasis in original). Despite this unambiguous warning, the State presented at trial evidence of incoming calls to determine location and used this to convict Syed. The State then relied on this supposed proof in arguments to the Post-Conviction Court, T. 10/25/12 at 115–16,<sup>1</sup> and to the Court of Special Appeals, Brief of Appellee at 8–9.<sup>2</sup>

It is in the interest of justice that Syed be able to challenge this evidence because it is inextricably linked to the timeline Syed establishes with his alibi defense. If the State has argued that alibi evidence is undermined by the cell tower evidence, as it has, then Syed must be able to attack the cell tower evidence.

In addition, the State’s misuse of cell tower location, and trial counsel’s failure to do anything about it, amounts to separate claims of ineffective assistance of counsel, prosecutorial misconduct, and a denial of Syed’s due process – claims that Syed raises with this filing.<sup>3</sup>

It would be a miscarriage of justice, furthermore, to allow Syed’s conviction to stand when this evidence was used to obtain the conviction.

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<sup>1</sup> Citations to the trial or post-conviction transcript are referred to as “T.”, followed by the date of the testimony and the page number.

<sup>2</sup> All of the appellate filings in this case are posted on the Court of Special Appeals’ website at: <http://mdcourts.gov/media/index.html>.

<sup>3</sup> To the extent that the State may argue waiver or other procedural bar, Syed reserves the right to supplement in response thereto.

## I. PROCEDURAL BACKGROUND

Syed's case has taken a circuitous route through the Maryland courts. His first trial, in 1999, ended in a mistrial after a juror overheard the trial judge refer to defense counsel, Cristina Gutierrez, as a liar. He was convicted after the second trial, and sentenced on June 26, 2000, to life plus 30 years in prison.

Syed appealed to the Court of Special Appeals, but his conviction was affirmed. He filed a timely post-conviction petition in 2010, and hearings were conducted at the Circuit Court in 2012.

The original Post-Conviction Petition centered on an alibi witness named Asia McClain. Syed presented evidence that McClain remembered being with Syed in a public library at the time when, according to the State, the murder took place. Syed also established that this information was conveyed to Gutierrez – as proven by references to McClain found in Gutierrez' notes. Finally, Syed established that McClain was willing to testify at trial in Syed's defense, but that nobody from the defense team ever contacted her to hear her story. For reasons that did not become evident until later, McClain did not testify at the post-conviction hearing.

On December 30, 2013, the Circuit Court issued an opinion denying the post-conviction petition. In essence, the Circuit Court concluded that Gutierrez had made a calculated, strategic choice to not call McClain as an alibi witness.

Syed filed an Application for Leave to Appeal the denial of the post-conviction ("ALA"). He supplemented the ALA when new information emerged showing why McClain never testified at the post-conviction hearing: McClain stated that, among other

things, the State prosecutor, Kevin Urick, spoke to her on the phone before the hearing and discouraged her from participating.<sup>4</sup>

The Court of Special Appeals granted the ALA on February 6, 2015, and ordered formal briefing in anticipation of oral arguments. After Syed and the State each filed opening briefs, however, the Court of Special Appeals issued an Order remanding the case to the Circuit Court, so that Syed could file a motion to re-open post-conviction proceedings related to the issues raised on appeal.

Syed filed his Motion to Re-Open Post-Conviction on June 30, 2015. As of August 12, 2015, the State had not responded to Syed's Motion. The Court then contacted the State and inquired whether it wished to respond; the State said it did. The Court gave the State until September 8, 2015, to do so.

Syed now seeks to introduce at a re-opened post-conviction proceeding evidence and issues related to the cellular tower evidence, which was used at trial, at the original post-conviction proceeding, and in appellate filings. Syed is filing this Motion in good faith and as soon as possible following the very recent discovery and vetting of this cellular tower information.

## **II. RELEVANT FACTS**

Syed is currently serving a life sentence for the murder of Hae Min Lee, a Woodlawn High School student who went missing on January 13, 1999.

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<sup>4</sup> McClain also stated that Urick testified falsely at the post-conviction hearing when he claimed McClain told him she had written an alibi affidavit only because she was pressured by Syed's family.

The State obtained a conviction against Syed in large part based on two types of evidence. First, the State relied on the testimony of Jay Wilds, a cooperating witness and drug dealer who told multiple inconsistent versions of events, and who later admitted publically that he had made up parts of his trial testimony against Syed. Wilds claimed that, although he did not witness the murder, he was with Syed on the evening of January 13, 1999, when Syed allegedly buried Lee's body in Leakin Park.

The State also relied upon cellular tower evidence – a nascent technology at the time – to corroborate Wilds' story and to try to track Syed's cellular phone on the day and night in question. The most critical element of this evidence was testimony by the State's expert, Abraham Waranowitz, that Syed's phone was close to Leakin Park when it received calls at 7:09 p.m. and 7:16 p.m. The State argued forcefully, at multiple stages of the proceedings, that this corroborated Wilds' story and put Syed at the site where the body was eventually discovered.

In closing arguments at trial, for example, the State argued:

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, [cell tower] 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.

T. 2/25/00 at 125.

Again, at the post-conviction hearing, the State touted the value of the cell tower location evidence and argued that, even if Syed could establish the Asia McClain alibi, "[i]t 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 this case.” T. 10/25/12 at 115.

Essentially, the State was arguing that, even if Gutierrez rendered deficient performance under *Strickland v. Washington* by not contacting the alibi witness, Syed could not prove that this prejudiced his defense. Why? Because the State still had cell tower evidence.

The evidence Syed now presents to the Court, however, shows that the cell tower evidence was misleading and it should have never been admitted at trial. *See* Ex. 2 (Grant Affidavit). It was presented to the Jury and to multiple courts as the pillar of the State’s case. Meanwhile, AT&T, the telephone company responsible for the cellular network, had explicitly written to the State prior to trial and explained that the information was “NOT to be considered reliable information for location.” Ex. 1.

Despite being aware of this information – or at least having constructive knowledge of it – the State introduced the evidence at trial and later held it up as being its strongest evidence.

Gutierrez, meanwhile, had received the information, but failed to act on it in any way. She failed to hire an expert to interpret it; she failed to exclude it through a *Frye-Reed* hearing; she failed to cross examine the State’s expert about it; and she failed to present the evidence to the Jury. There is no imaginable way this could have been a strategic choice.

It was human error.

### **III. LEGAL ARGUMENT**

It is in the interest of justice that the Court allow Syed to present factual information, expert testimony and claims related to cellular tower evidence in a re-

opened post-conviction proceeding. It makes eminent sense to consider the issue now, in relation to the alibi issue, rather than force Syed to re-raise the issue in a successive motion to re-open post-conviction, should he be unsuccessful in this effort.

The Maryland Code sets forth a concise standard for the re-opening of a post-conviction proceeding: “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, Crim. Pro., § 7-104. There is no time limit restricting when a petitioner may file a motion to re-open post-conviction proceedings.

It is in the interest of justice that this Court seek the truth and consider all relevant evidence in determining whether Adnan Syed spends the rest of his life in prison. While finality of convictions is a legitimate concern for the Court, it is not a greater concern than the search for truth.

***a. Procedural reasons for allowing the cellular tower issue***

Although Syed is presenting this issue late in the proceedings,<sup>5</sup> it is an issue significant enough that the Court should hear it before rendering a ruling.

First, as a matter of judicial economy, the Court should consider this issue now. If it does not, and if Syed’s conviction is not vacated on the alibi issue, Syed would have to raise the issue in a successive motion to re-open post-conviction proceedings. Not only could this lead to another separate proceeding, but it could lead to another appeal. It is in

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<sup>5</sup> Upon becoming aware of this issue, counsel has moved expeditiously to verify the merits of the issue with a cellular tower expert, and to file this supplement as soon as possible.

the interest of all parties to resolve this matter – and get to the heart of the problem – once and for all. Now is the time to do so.

Second, and most importantly, the cell tower arguments presented here relate to the alibi issue, and for that reason they should be considered in concert with the alibi issue. As the Court is well aware, the alibi issue is a *Strickland* claim, meaning Syed has the burden to prove deficient performance and prejudice.

Proof of prejudice, as the State has pointed out in its arguments and filings, requires an inquiry into the strength of the State’s case. The State has constantly argued that its case is strong enough that, even if Gutierrez had presented the alibi witness, the trial still would have resulted in a guilty verdict. This was argued at the post-conviction hearing and in the State’s brief filed in the Court of Special Appeals.

At the post-conviction hearing, for example, the State argued that: “Even if the Defendant had managed to account for some alibi at that particular point in time, there’s been no showings to what affect that would have in light of the other evidence. It wouldn’t explain why he’s in Leakin Park with Jay Wilds at 7:00 on the night that Hae Min Lee is murdered. That is the strength of the State’s evidence in this case.” T.

10/25/12 at 115.

In its appellate brief, moreover, the State argues – for the first time – that Syed’s alibi issue fails because the State could have relied on a different timeline, which would have rendered Asia McClain’s testimony less potent. In its brief the State argues that the murder could have taken place around a 3:15 p.m. phone call on January 13, 1999, rather



than around a 2:36 p.m. phone call (which was argued at trial). Brief of Appellee at 31–32, n.9.

Now that the State is presenting this argument to the Court of Special Appeals, the nature and reliability of these calls is highly relevant. The 3:15 p.m. call was an incoming call that activated a cell tower site near where the State argues the murder took place (the Best Buy parking lot). If the State is now using these phone records to defend against the Asia McClain alibi, the records, and their reliability, is squarely in play and should be considered by this Court.

The calls are also relevant on a more global level. In the proceeding now before this Court, the credibility of Asia McClain is pitted against the credibility of Jay Wilds. The State argues, time and time again, that Jay Wilds’ story is corroborated by the cellular tower evidence. That, the State argues, gives credence to otherwise inconsistent cooperator testimony put forth by Wilds. It follows that, if Syed is to be given a fair chance to prove that Asia McClain is more credible than Jay Wilds, Syed must be allowed to attack the corroboration that props up Wilds’ testimony.

Lest there be any doubt about the interrelatedness of these issues, the State’s lead trial attorney, Kevin Urick, has offered his assessment. In his comments to “The Intercept,” Urick stated the following:

*Question:* Do you have any doubts about the outcome of the trial?

*Kevin Urick:* No. The reason is: once you understood the cellphone records—that killed any alibi defense that Syed had. I think when you take that in conjunction with Jay’s testimony, it became a very strong case.

Urick went on to describe how he would have cross-examined Syed, if given the opportunity:

*Kevin Urick:* And my very last question would be: What is your explanation for why you either received or made a call from Leakin Park the evening that Hae Min Lee disappeared, the very park that her body was found in five weeks later? I think that was the stumbling block for the defense. They have no explanation for that.

Ex. 3, Natasha Vargas-Cooper & Ken Silverstein, *Exclusive: Prosecutor in 'Serial' Case Goes on the Record*, THE INTERCEPT, (Jan. 7, 2015),

<https://firstlook.org/theintercept/2015/01/07/prosecutor-serial-case-goes-record/>.

Considering the interrelatedness of issues now before the Court, especially under the *Strickland* prejudice prong, and the interests of judicial fairness and economy, the cellular tower evidence and related issues should be considered by this Court at a reopened post-conviction proceeding.

***b. Substantive reasons for hearing additional cellular tower evidence***

The information Syed sets forth in this Motion is material to the integrity of the case – and it helps prove Syed’s claim of innocence. If Gutierrez had been aware of the document from AT&T – which was turned over to her in discovery – and if she had acted upon it, it is almost certain that the State would have been precluded from introducing at trial cell tower location evidence based on incoming telephone calls. Without this evidence, and other questionable cell tower evidence, the State’s case would have been severely weakened and there is a reasonable probability that Syed would not have been convicted.

Location evidence generated by the incoming phone calls would not have been admissible because it would not have met the *Frye-Reed* standard, which requires general acceptance of reliability in the relevant scientific community. *Reed v. State*, 283 Md. 374, 382 (1978) (adopting standard from *Frye v United States*, 293 F. 1013 (D.C. Cir. 1923)).

A *Frye-Reed* hearing here would have been a one-sided affair. If AT&T, the architect and operator of the cell tower network, did not think incoming calls were “reliable information for location,” Ex. 1, it is unfathomable that a Baltimore City Circuit Court judge would have allowed an expert opinion under *Frye-Reed* based on this method.<sup>6</sup>

Not only was the location method flawed with regard to incoming phone calls, but the State misused the cell tower information in other ways. For example, the State argued that a 5:14 p.m. incoming call was proof that Syed checked his voicemail at that time. T. 1/27/00 at 108; T. 2/25/00 at 67. This was potentially harmful to the defense because Syed ordinarily would have been at track practice at this time. However, the fax from AT&T, Ex. 1, coupled with another phone record provided to the defense, Ex. 4, shows that this call was in fact an incoming call in which the caller was leaving a voice message on Syed’s phone. Thus, the call certainly could have occurred while Syed was at track practice (and presumably was not holding his phone).

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<sup>6</sup> The ability of experts to use cell tower data to track phones has changed just as technology has changed. While in 1999 AT&T considered the use of incoming calls to be unreliable, *see* Ex. 1, today’s technology may have changed to the point where it is less unreliable.

These factual and analytic errors are so egregious that, if properly raised at trial by Gutierrez, much of, if not all of, the cellular evidence would have been rendered inadmissible.

The issue Syed raises here with cellular tower evidence related to incoming phone calls is similar to the issue raised in *Kulbicki v. State*, 440 Md. 33 (2014).<sup>7</sup> The *Kulbicki* court found that trial counsel was constitutionally ineffective for not investigating and challenging the State's scientific evidence regarding comparative bullet lead analysis. *Id.* at 56. Specifically, the Court found that counsel was ineffective for not cross-examining the State's expert with a report he had authored a few years before his trial testimony – even though the science at issue was generally accepted at the time and would not be debunked until years later. *Id.* at 52–53; *see also Roberts v. Howton*, 13 F. Supp. 3d 1077, 1098 (D. Or. 2014) (finding ineffective assistance of counsel and reversing conviction when trial counsel failed to “adequately investigate or hire an expert to evaluate the cell tower evidence”).

The ineffective assistance of counsel claim presented here is far more persuasive than the claim in *Kulbicki*. As described above, Gutierrez had the AT&T fax in her file, and the document showed that the use of incoming cellular calls to determine location was unreliable. She simply failed to act on it.

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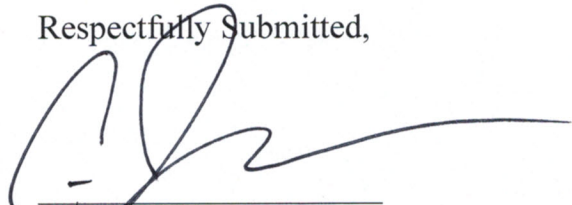
<sup>7</sup> *Kulbicki*'s ineffective assistance of counsel claim morphed over a 16-year period. The precise contours of the claim were not defined until the topic arose at oral arguments and the Court of Appeals *sua sponte* reframed and resuscitated the issue. *Id.* at 40.

#### IV. CONCLUSION

For the reasons explained above, Syed respectfully requests that this Court re-open his post-conviction proceeding and allow him to raise not only the Asia McClain issue, but also information and issues related to cell tower location evidence.

In addition, Syed requests that he be allowed to supplement this filing with other relevant materials, if and when they become available. This is reasonable in consideration of the fact that counsel is filing this Motion in an expedited fashion to bring it to the Court's attention as soon as possible.

Respectfully Submitted,



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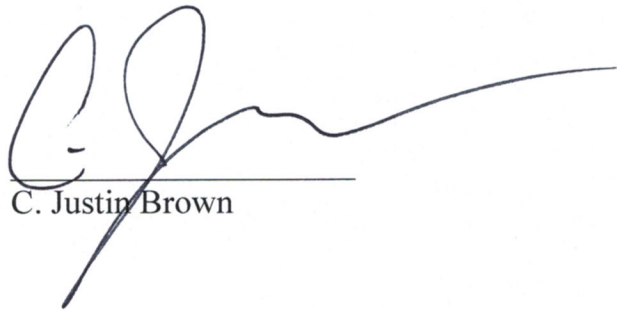
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 24th day of August, 2015, a copy of the foregoing was provided to the following:

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