IN THE CIRCUIT COURT
FOR BALTIMORE CITY, MARYLAND

ADNAN SYED, Petitioner,	*	
v.	*	Petition No. 10432 Original Case Nos. 199103042-46
STATE OF MARYLAND, Respondent	*	

* * * * *

REPLY TO STATE'S CONSOLIDATED RESPONSE IN OPPOSITION TO MOTION AND SUPPLEMENT TO RE-OPEN POST-CONVICTION PROCEEDINGS

Petitioner Adnan Syed, by and through counsel, C. Justin Brown, Brown & Nieto, LLC, hereby replies to the State's Consolidated Response in Opposition to Petitioner's Motion and Supplement to Re-Open Post-Conviction Proceedings.

SUMMARY OF ARGUMENT

This memorandum addresses two issues raised in the State's Opposition. First, Syed answers the State's contention that this Court, following the Court of Special Appeals' Remand Order, should not hear more evidence about the alibi issue at the heart of Syed's original petition for post-conviction relief. Specifically, Syed explains why some evidence from the original post-conviction hearing may have been misconstrued, and why it is in the interest of justice that this Court hear new evidence that proves that Syed's trial counsel provided ineffective assistance of counsel by neither contacting, investigating, nor calling as an alibi witness Asia McClain.

Second, Syed moves this Court to re-open the post-conviction proceedings because it is now apparent that the State committed a *Brady* violation by failing to disclose exculpatory phone records, and by introducing cell tower location evidence at trial when it knew, or should have known, that such evidence was unreliable and misleading. Not only did the State mislead the Jury about this evidence, but it misled its own cell phone expert prior to trial, and, most recently, in its filing just two weeks ago, it yet again mischaracterized the same flawed evidence in its submission to this Court. The prejudice resulting from this conduct by the State merits a new trial, and it is in the interest of justice that the Court consider this issue now.

LEGAL ARGUMENT

a. Consistent with the Remand Order, Syed should be afforded the opportunity to introduce alibi witness evidence at a new hearing.

This Court should re-open Syed's post-conviction proceeding and allow the introduction of more evidence about the alibi issue because (1) to do so would be consistent with the Court of Special Appeals' Remand Order; and (2) Syed is now able to present relevant evidence, including the testimony of Asia McClain, that can only help this Court reach a fair outcome.

1. The Remand Order

The State argues in its Opposition that, essentially, the Court of Special Appeals does not want the Circuit Court to re-open the post-conviction proceeding. This argument, however, ignores the overriding tenor of the Remand Order, which seeks to build a better record by, among other things, allowing the testimony of Asia McClain.

The Remand Order cites to the Maryland rule "authorizing the Court to remand a case on appeal to the lower court when justice will be served by permitting further proceedings." Md. Rule 8-604(a)(5) & (d). The Court of Special Appeals goes on to explain that the remand will, among other things, "afford the parties the opportunity to supplement the record with relevant documents and even testimony pertinent to the issues raised by this appeal." Remand Order at 4. The Remand Order means what it says. If the Court of Special Appeals did not think there existed a need for further evidentiary proceedings, it would not have taken the extraordinary measure of remanding to the Circuit Court in the first place.

2. The relevance of Asia McClain's testimony

The State has repeatedly argued that Syed could not prevail on the alibi issue because he failed to produce Asia McClain at the post-conviction hearing. This was referred to no fewer than four times in the State's brief to the Court of Special Appeals. *See* Opp., Ex. 5, Appellee's Brief, at 16, 23, 24 and 19 ("In addition, because Syed did not produce McClain at the post-conviction hearing, Syed failed, both as a matter of law and on the facts of this case, to establish prejudice.").

Now, once the remand has been granted, and Syed potentially has the opportunity to put Asia McClain on the witness stand, the State pivots and makes the opposite argument: that the testimony of Asia McClain has no relevance to the alibi issue and should not be allowed into a courtroom. Now, rather than afford the Court the opportunity to consider this pertinent information, and produce a complete record for

appellate review – as the Court of Special Appeals seemed to request in its Remand Order – the State would prefer to proceed with an incomplete factual record.

It would be patently unfair to allow the State to do this. On one hand, the State is arguing to the Court of Special Appeals that Syed's claim fails because he did not produce McClain's testimony for the post-conviction Court. On the other hand, the State is arguing to the post-conviction Court that Syed should be precluded from presenting McClain as a witness because she has nothing relevant to offer. The State is trying to have its cake and eat it too.

The State puts forth no case law to support this novel theory of exclusion – probably because there is none. Other courts, however, have rejected this same type of argument. These courts have sought to produce a full factual record, and in many cases the courts have gone to great lengths to allow alibi witnesses to testify. In *State v. Porter*, 216 N.J. 343 (2013), for example, the Supreme Court of New Jersey found that the trial court committed reversible error when it declined to hear the testimony of an alibi witness, and instead, without a hearing, rejected the ineffective assistance of counsel claim on the performance prong of *Strickland*. *See also, Bruce v. United States*, 256 F.3d 592, 599 (7th Cir. 2001) (remanding for evidentiary hearing to allow alibi evidence); *Lawrence v. Armentrout*, 900 F.2d 127, 131 (8th Cir. 1990) (remanding for hearing to allow alibi evidence); *Commonwealth v. Jennings*, 489 Pa. 578, 580 (1980) (same).

The Court has an interest in getting to the truth of this matter. It is hard to imagine why the Court, when ruling on an alibi issue, would not want to hear from the alibi witness. This is particularly so when McClain has alleged that she was improperly

dissuaded from testifying at the original post-conviction hearing by the State's prosecutor.

Not only is Syed prepared to produce McClain at a hearing, but he is prepared to present additional evidence that will be valuable to the Court in assessing the issue. This additional evidence goes directly to the grounds upon which the Court denied the post-conviction petition in the first place – and the grounds upon which the State now argues that the post-conviction should not be re-opened. The Court should hear this evidence.

First, the State has persistently argued that an alibi notice filed by Gutierrez is proof that Gutierrez vetted Asia McClain and made a strategic decision not to contact her or call her as a witness. The State hypothesizes that "Gutierrez' team assiduously developed 80 alibi witnesses that would conform to the account provided by Syed to police. To demand that a skilled and seasoned trial attorney like Christina (sic) Gutierrez abandon – or risk compromising – one alibi strategy to chase after another is inconsistent with the constitutional guarantee of effective counsel." Opp. at 27, n.3.

The problem with this argument – and what Syed can now prove – is that Gutierrez' alibi notice means something very different than what the State claims. As William Kanwisher, Gutierrez' former associate, explains, there are three likely conclusions one can draw from the alibi notice. Ex. 1 (Kanwisher Affidavit). First, the fact that Gutierrez filed a notice does not mean she would have felt bound by the alibi – or locked into one timeline. An aggressive attorney like Gutierrez would not have hesitated to change her theory as she conducted more investigation into the case. Second, according to Kanwisher, it is probable that Gutierrez' lengthy alibi list was partially a red

herring to cause confusion and force the State to investigate possible alibi witnesses. And third, as Kanwisher states, the notice also appears to have been an effort by Gutierrez to keep her options open – by listing as many names as possible. Kanwisher concludes that it would be wrong to claim the alibi letter as proof that Gutierrez strategically chose not to contact or call as a witness Asia McClain. *Id.*

Another matter Syed can clarify at a re-opened post-conviction hearing is the assertion by the State that, somehow, McClain's version of events was inconsistent with Syed's version of events. [1] The State's assertion seems to be premised upon two misunderstandings.

First, the State has argued that the McClain alibi would have contradicted an account by State's witness Det. Joseph O'Shea, who gave a vague description of an encounter he had with Syed on January 25, 1999. The State has argued that "Syed told O'Shea that he was at school all day and stayed until track practice began." Opp. Ex. 5, Appellee's brief, at 21. (citing to T. 1/31/00 at 5-14, 25-39). But that misconstrues O'Shea's testimony. What he actually said was the following: "[Syed] said he was in class with her that day from – I believe it was 12:50 p.m. till 2:15 p.m. He did not see her after school because he had gone to track practice, and basically, that school was closed

[1] The Court also adopted this conclusion in its Opinion denying the Post-Conviction Petition. Without elaborating, the Court stated that Syed "remained on the school campus from 2:15 p.m. to 3:30 p.m." and that this was at odds with McClain's letters mailed to Syed the day after he was arrested. Post-Conviction Opinion at 12.

the rest of that week – would have been Thursday and Friday, due to bad weather." T. 1/31/00 at 26.[2]

The other possible source of this misunderstanding comes from Gutierrez' alibi letter, written two months before the first trial, which stated that Syed "remained at the high school until the beginning of his track practice." Aside from the arguments described above as to why this letter would not have locked Gutierrez into an alibi timeline, it is also important to note that Woodlawn students at the time considered the adjacent public library to be an extension of the high school. One former student from Syed's class explains that "if a student said he had been 'at the high school,' this could have meant he was at the physical school campus, at the adjacent public library, or both." Ex. 2 (Remmers Affidavit). Thus, it would be incorrect to conclude from Gutierrez' letter that Syed had not gone to the public library prior to track practice. Contrary to what the State argues, this single line in a pretrial alibi notice is not sufficient to reach the conclusion that Gutierrez made a strategic decision to not pick up the phone and call alibi witness Asia McClain.[3]

Finally, and most importantly, the Court would benefit by hearing the live testimony of McClain. McClain could testify that (1) she was with Syed in the library on January 13, 1999, (2) that she conveyed this information to Syed and his family, (3) that she wrote two letters to Syed about this, (4) that nobody from Gutierrez' legal team ever

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[2] "T." is a reference to the transcript, followed by the date and page number.
[3] It is noteworthy that Gutierrez was put on notice of Asia McClain at least by July 13, 1999, as indicated by the notes in her file. The alibi notice was dated October 4, 1999.

contacted her to vet her story, and (5) that she would have testified in court if she had been asked to do so.

McClain could also refute the testimony of State prosecutor Kevin Urick, who testified at the post-conviction hearing that he had spoken with McClain and she had told him that she had only written her alibi affidavit "because she was getting pressure from the [Syed] family. And she basically wrote it to please them and get them off her back." T. 10/11/12 at 30. McClain has categorically denied this account of events, and both she and Syed deserve an opportunity to set the record straight.

Considering the nature of this litigation, and the Remand Order from the Court of Special Appeals, it would be in the interest of justice that Syed be allowed to put on his alibi witness and related evidence. This would serve the goal that all parties in this case should share: the goal to find the truth.

b. The State committed a* Brady *violation and prosecutorial misconduct when it improperly introduced Exhibit 31 regarding cell tower evidence.

1. Background

In the Supplement to his Motion to Re-Open Post-Conviction Proceedings, Syed made two requests of the Court: first, that he be able to raise an issue relating to the State's use of cell tower evidence at trial; second, and in the alternative, that he at least be allowed to introduce evidence to refute the State's cell tower evidence, so that he may establish the importance of the alibi evidence in the context of the State's overall case.

Syed raised the cell tower issue immediately upon its discovery, and vetted it with his cell tower expert, Jerry Grant. In essence, the issue was based upon a disclaimer

found on a fax cover sheet from AT&T to the Baltimore City police. The disclaimer stated that "Outgoing calls only are reliable for location status. Any incoming calls will NOT be considered reliable information for location." Ex. 3 (emphases in original). Syed's concern, of course, was that the State had done precisely what AT&T said it could not reliably do: it used incoming calls to prove location status of Syed's phone. In fact, the State has repeatedly described this as its very best evidence against Syed.

In its Opposition the State addressed four aspects of the AT&T disclaimer. First, the State correctly pointed out that the disclaimer appeared to apply only to "Subscriber Activity" Reports. Opp. at 33. Second, the State revealed – for the first time – that "all documents transmitted by fax from AT&T in this case had similar fax cover sheets" containing the disclaimer. Opp. at 32 n.5. Third, the State argued – albeit incorrectly – that State's trial Exhibit 31, which was relied on by the State's cellular phone expert, was not a "Subscriber Activity" report. Finally, the State took the position that it would have been "foolish" or "disingenuous" for Syed to have raised this issue previously based on a "generic fax cover sheet that applied to a separate report." Opp. at 34.

In the wake of these disclosures and clarifications, it is now apparent that the State committed a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and that the violation was not discoverable until the recent filing of the State's Opposition.[4] Not only would it have been nearly impossible for Syed to have raised the issue before the State's recent disclosures, but, in the words of the State, it would have been "foolish" or "disingenuous." Opp. at 34.

[4] This fact resolves any waiver arguments the State may make.

The *Brady* violation arises out of State's trial Exhibit 31 (attached as Ex. 4). That exhibit is an excerpt of a Subscriber Activity report. However, the exhibit omits the page that shows it is part of a Subscriber Activity report. It also omits the fax cover sheet that the State now concedes came with each fax transmitted by AT&T, and which disclaims the reliability of incoming calls in determining a cell phone's location. The missing parts of the exhibit, when considered in tandem, are undoubtedly exculpatory: if raised at trial, the omitted documents almost surely would have led to the exclusion of incoming call location evidence. The failure to disclose the documents was also prejudicial: if the evidence had been suppressed, the State would have lost its self-described best evidence against Syed. *See Brady*, 373 U.S. at 87 (violation caused by (1) the withholding of exculpatory evidence and (2) prejudice).

This *Brady* violation is grounds for a new trial. Syed urges this Court to consider this matter now, as it goes directly to the interest of justice. *See* Md. Code, Crim. Pro., § 7-104 (setting standard for re-opening a post-conviction as "in the interest of justice.").

2. Facts

The story of the State's cell tower evidence is complicated – but important. To begin with, the State relied heavily upon cell tower evidence to prove its case. This proof was founded on the premise that, if the State could determine the cellular tower to which a phone call connected, it could approximate the physical location of the phone at the

time the call was made.[5] As the State has argued time and time again, the cell tower evidence was critical to corroborate the testimony of Jay Wilds, their cooperating witness.[6]

Kevin Urick, the State's lead prosecutor, explicitly made this point in an interview he gave earlier this year with the online publication *The Intercept*:

> "Jay'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."

Natasha Vargas-Cooper & Ken Silverstein, *Exclusive: Prosecutor in 'Serial' Case Goes on the Record*, THE INTERCEPT, (Jan. 7, 2015) (Motion to Re-Open, Ex. 9).

At the heart of the State's cell tower evidence is the State's contention that cell records placed Syed at Leakin Park, the site where the victim's body was found, the evening she went missing. The State argued this at trial, on direct appeal, during the post-conviction proceedings, and in the appeal of the denial of the post-conviction. 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

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[5] Although the evidence was at times presented this way by the State, it would be more accurate to say that cell tower location could be used to determine whether it was *possible* that a phone had been located at a particular site when a call was placed.

[6] It was necessary for the State to corroborate Wilds' testimony because his story was serially inconsistent, changing before, during, and after trial.

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.

It is precisely these phone calls – allegedly putting Syed at the burial site – that are now known to have been unreliable for determining the location of the phone. As Syed described in his Supplement to Motion to Re-Open Post-Conviction proceeding, AT&T, the telephone company that built and operated the cellular system on which the calls were made, had warned the Baltimore City Police, on multiple occasions, that "Outgoing calls only are reliable for location status. Any incoming calls will NOT be considered reliable information for location." Ex. 3 (emphases in original). The calls that supposedly put Syed in Leakin Park that evening were incoming calls. Despite AT&T's warnings, however, the State introduced this very evidence at trial, and heralded it as its most unassailable proof.

Even more concerning, the State either concealed, or was willfully blind to, the impropriety of this evidence. The State continues to deny it to this day – and insists that the documents mean something other than what they say.

At the center of this issue is State's Exhibit 31 (attached as Ex. 4). This exhibit was arguably the State's most important piece of evidence introduced at trial. It is partially a printout of phone records that list the cellular tower sites that were activated by each call that went through Syed's phone. The State relied on this exhibit to argue that Syed's phone pinged a cell tower near Leakin Park when it received calls at 7:09 p.m. and 7:16 p.m. on January 13, 1999.

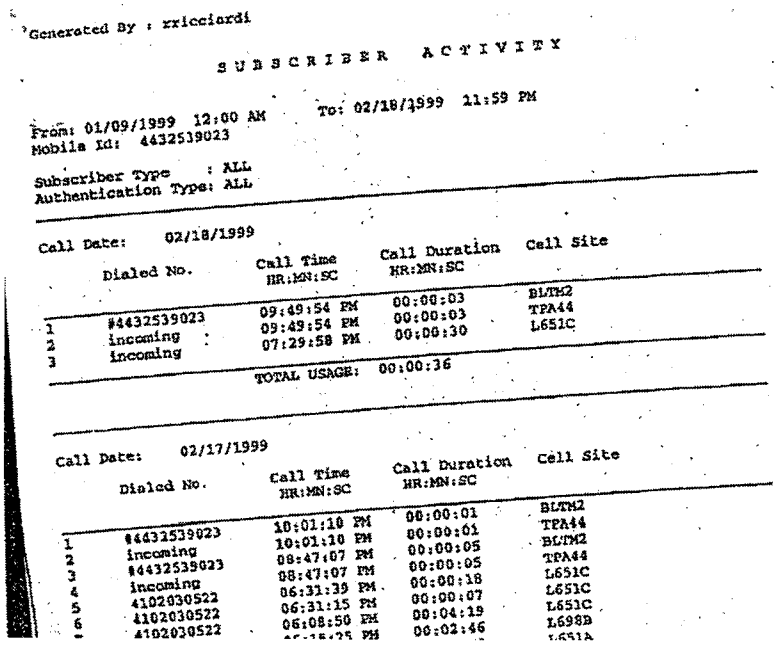
As the State points out in its Opposition Brief, the exhibit carried additional significance because it was "relied upon by the State's expert, who himself was employed by AT&T as a radio frequency engineer." Opp. at 33.

The State goes to great lengths in its Opposition to argue that the disclaimer about incoming calls – and their lack of reliability – does not apply to Exhibit 31 because the disclaimer only applies to Subscriber Activity reports. According to the State: "the cellphone records relied upon by the State's experts and entered into evidence at trial were not Subscriber Activity reports." Opp. at 33 (emphasis in original). The State then calls the application of the disclaimer to the documents it used at trial "flatly erroneous," and adds "the 'Subscriber Activity' reports were neither identified as exhibits nor admitted into evidence." *Id.*

The problem with this argument is that it is simply not true. The exhibit is made up of three parts. The first part is the one-page "verification of authenticity" from AT&T. Syed takes no issue with this. The second part is a one-page excerpt from an AT&T fax sent from AT&T to Det. Williams Ritz, which is attached to the State's Opposition as "State's Attachment 4." The third part – the most important part – is a three-page excerpt from a *different* AT&T phone record. The way that the State presented this document at trial – and the way the State presents it now – omits most of the actual document from which the third part was pulled. (It also omits the document from which the second part was pulled).

The full document from which the three-page excerpt was pulled is attached as Exhibit 5. It is a 24-page document that was faxed from AT&T to the police on Feb. 22,

1999.[7] It contains each of Syed's calls from Jan. 9, 1999 to Feb. 18, 1999. And, despite what the State has asserted – repeatedly – the last page of the document is unambiguously marked "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

Call Date: 02/18/1999

	Dialed No.	Call Time HR:MN:SC	Call Duration HR:MN:SC	Cell Site
1	#4432539023	09:49:54 PM	00:00:03	BLTH2
2	incoming	09:49:54 PM	00:00:03	TPA44
3	incoming	07:29:58 PM	00:00:30	L651C

TOTAL USAGE: 00:00:36

Call Date: 02/17/1999

	Dialed No.	Call Time HR:MN:SC	Call Duration HR:MN:SC	Cell Site
1	#4432539023	10:01:10 PM	00:00:01	BLTM2
2	incoming	10:01:10 PM	00:00:01	TPA44
3	#4432539023	08:47:07 PM	00:00:05	BLTM2
4	incoming	08:47:07 PM	00:00:05	TPA44
5	4102030522	06:31:39 PM	00:00:18	L651C
6	4102030522	06:31:15 PM	00:00:07	L651C
	4102030522	06:08:50 PM	00:04:19	L651C
			00:02:46	L698B
				L651A

For whatever reason, the State omitted this subject page in its trial exhibit, and it did not mention the omission in its Opposition. Rather, the State pulled pages 1-3 of the document, packaged them together with a page from a different report and an authentication from AT&T, and introduced it as State's Exhibit 31.

By presenting the exhibit as it did, the State failed to include the critical page of the report that identifies what kind of document it is: a subscriber activity report. This is important because the disclaimer – which the State also left out of the exhibit – only applies to subscriber activity reports. By omitting these two critical documents – the disclaimer and the title page of the document – the State made it nearly impossible for

[7] The pages of the document, as taken from Gutierrez' file and as presented here in Ex. 5, are arranged in reverse order – *i.e.* the last page should be the first.

anyone to discover that the evidence was, in AT&T's own words, "not reliable information for location." Once that was accomplished, the State introduced it into evidence for that very purpose – to provide information for location.

Not only did the state mislead the Jury with Exhibit 31, but it misled its own cellular phone expert, Abraham Waranowitz. According to Waranowitz, State prosecutor Kevin Urick presented him with the exhibit, or a page from the exhibit, in the courthouse just prior to taking the witness stand. The document, as presented to Waranowitz, did not have the first page labeled "Subscriber Activity," and it did not include the warning that, with regard to subscriber activity reports, "Any incoming calls will NOT be considered reliable information for location."

Waranowitz, who was first contacted by undersigned counsel on September 29, 2015, now states that, had he known of this "critical" information, it would have affected his testimony and he "would not have affirmed the interpretation of a phone's possible geographical location until I could ascertain the reasons and details for the disclaimer." Ex. 6 (Waranowitz Affidavit).

Rather than attempt to get to the truth of the matter, the State – through the Office of the Attorney General – now attempts to do just the opposite. First, the State argues that the disclaimer on the fax cover sheet means something other than what it says. The State writes: "The legend also explains that the information contained in the 'location' column on a Subscriber Activity report will not be reliable for incoming calls." This statement, however, is not true. The disclaimer does not mention a "location column." Rather, the disclaimer speaks of "location status" – meaning the location of the cellular phone about

which the report is providing data. According to Syed's cellular phone expert, Jerry Grant, the use of the phrase "location status" means the physical location of the subscriber's cellular phone. *See* Ex. 7 (Grant Affidavit).

Second, as described above, the State has taken the incorrect position that the excerpt in Exhibit 31 is not a Subscriber Activity report. It took this position, apparently, without consulting an expert, without reviewing the original documents (which it controls), and without upholding its duty to seek the truth. Rather, it appears, the State was merely trying to gain an advantage in connection with the instant motion. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one").

3. Legal Analysis

The State's use of unreliable cell tower evidence at trial – and the omission of the documents described above – is cognizable on post-conviction as a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Alternatively, if the Court were to find that trial counsel was made aware of this information, counsel's failure to act on the information would amount to a violation of *Strickland v. Washington,* 466 U.S. 668 (1984). Whatever the case, the AT&T disclaimer, and the subsequent use of incoming calls to prove location, amount to a violation of Syed's constitutional rights.[8]

[8] *Brady* and *Strickland* are similar in that they both require a showing of materiality or prejudice. Courts have interpreted those standards to be the same.

In *Brady v. Maryland*, the Supreme Court held that a prosecutor's suppression of favorable evidence, regardless of the prosecutor's good or bad faith, is a violation of a defendant's constitutional rights. According to *Bagley v. United States*, 473 U.S. 667 (1985), the undisclosed evidence must only be such that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. The Court relied upon *Strickland v. Washington* to define "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." 466 U.S. 668, 694 (1984).

The *Brady* rule and its progeny are "based on the requirement of due process." *Bagley*, 473 U.S. at 675. Rather than undermine the adversary system, *Brady* "ensure[s] that a miscarriage of justice does not occur." *Id.* Similarly, rather than requiring that the prosecutor "deliver his entire file to defense counsel," the rule only requires that the State "disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Id.*

The onus of discovery does not fall on the defendant; disclosure of exculpatory evidence rests squarely with the State. The Supreme Court has "several times underscored the special role played by the American prosecutor in the search for truth in criminal trials. Courts, litigants, and juries properly anticipate that obligations [to refrain from improper methods to secure a conviction] ... plainly rest[ing] upon the prosecuting attorney, will be faithfully observed. Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Banks v. Dretke*, 540 U.S. 668, 696, (2004) (internal cites and quotations omitted).

Regarding the second prong of the *Brady* analysis, in *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court noted the following:

> a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). *Bagley's* touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial.

Id. at 434 (internal quotations and citations omitted). *See also Ware v. State*, 348 Md. 19, (1997) (Court of Appeals establishing analytical framework for addressing *Brady* claims and vacating defendant's conviction and death sentence where the State failed to disclose favorable treatment given to a State witness); *Bloodsworth v. State*, 307 Md. 164 (1986).

In Syed's case, there are two components to the exculpatory evidence that was never turned over to the defense. First, State's Exhibit 31 was an excerpt that omitted most of the actual document from which it was pulled. Although the entire document, a Subscriber Activity report, was turned over to Gutierrez (as it was found in her file), the omission of the cover page in the State's exhibit made it extremely difficult to understand the source of the excerpt. This point is underscored by the State's own failure to understand even to this day the original source of the documents contained in Exhibit 31 – as proven by the State's repeated assertions that it was not a Subscriber Activity report.

The second component of the exculpatory evidence is the missing fax cover sheet. The State concedes that all documents received from AT&T came with fax coversheets that contained the incoming calls disclaimer. Yet the document upon which Exhibit 31 was based, as found in Gutierrez' file, did not include that coversheet. *See* Ex. 5. Although Gutierrez may have received that AT&T coversheet with other telephone records, she did not receive it with the records that were partially admitted into evidence and relied upon at trial. This piece of the puzzle was not discoverable until the State filed its Opposition on September 23, 2015.

The failure to turn over this evidence was prejudicial to Syed. If Syed's trial attorney had been aware that Exhibit 31 was drawn from the AT&T Subscriber Activity report, and she had been aware of AT&T's disclaimer that incoming calls were unreliable for location status, she could have filed a motion to suppress location evidence generated by incoming calls.

Location evidence generated by the incoming phone calls would have been inadmissible because it would have run afoul of 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)). If AT&T, the architect and operator of the cell tower network, did not think incoming calls were "reliable information for location," it is highly likely that a Baltimore City Circuit Court judge would have excluded an expert opinion under *Frye-Reed* based on this method.

In addition, it is probable that, if the State had presented this evidence to its own expert, Abraham Waranowitz, he would not have testified the way he did, and he would not have affirmed the reliability of Exhibit 31 with regard to incoming calls.

As described fully above, location evidence related to incoming calls was the self-described strength of the State's case. Without this evidence, the State's case was substantially weaker, and there is a reasonable probability that the outcome of the trial would have been different. The fact that this evidence – the State's strongest evidence – was improperly admitted into evidence "undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

CONCLUSION

For the reasons explained above, Syed respectfully requests that this Court re-open his post-conviction proceeding. Syed requests first that he be allowed to call as a witness Asia McClain, and present other evidence relevant to the alibi issue now before the Court of Special Appeals. Syed also requests that this Court re-open the post-conviction proceeding so he may raise the *Brady* claim described above, or, at the very least, that he be allowed to present evidence demonstrating that the State misused cell tower evidence at trial. It is in the interest of justice that the Court grant these requests.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of October, 2015, a copy of the foregoing was mailed to the following:

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C. Justin Brown