STATE OF MARYLAND	*	**IN THE**
v.	*	**CIRCUIT COURT**
ADNAN SYED	*	**FOR BALTIMORE CITY**
	*	**Case Nos. 199103042, 043, 044, 045, 046**

* * * * * * * * * * * *

MOTION TO VACATE JUDGMENT

NOW COME, Marilyn J. Mosby, State's Attorney for Baltimore City, and Becky Feldman, Assistant State's Attorney, and hereby move this Honorable Court, pursuant to the Md. Code Ann., Crim. Proc. §8-301.1, to vacate the judgment of conviction, and say the following:

1. INTRODUCTION

After a nearly year-long investigation by the State and defense, who is represented by Erica J. Suter of the Office of the Public Defender & the University of Baltimore's Innocence Project, the parties have uncovered *Brady* violations and new information, all concerning the possible involvement of two alternative suspects. Additionally, the parties have identified significant reliability issues regarding the most critical pieces of evidence at trial.

Investigative efforts are ongoing. The State will continue to utilize all available resources to investigate this case and bring a suspect or suspects to justice. To be clear, the State is not asserting at this time that Defendant is innocent. However, for all the reasons set forth below, the State no longer has confidence in the integrity of the conviction. The State further contends that it is in the interests of justice and fairness that these convictions be vacated and that Defendant, at a minimum, be afforded a new trial at this time.

The Defense is aware that should this motion be granted, the State's decision to proceed with a new trial or ultimately enter a *nolle prosequi* to the charges is contingent upon the results of the ongoing investigative efforts.[1] The State will be requesting that

[1] Md. Rule 4-333 provides that "within 30 days after the court enters an order vacating a judgment of conviction or probation before judgment as to any count, the State's Attorney shall either enter a *nolle prosequi* of the vacated count or take other appropriate action as to that count." Additionally, the Committee Note on Md. Rule 4-333 states: "The Committee was advised that, in most cases, **though**

Defendant be released on his own recognizance pending the investigation, should this Court grant the instant motion.

2. STATUS OF DNA TESTING

In 2018, the Baltimore City Police Lab tested various items for DNA through an agreement between the Office of the Attorney General and Defendant's previous counsel. The testing yielded mostly inconclusive DNA results or no DNA results. [2]

On March 10, 2022, the State and defense filed *a Joint Petition for Post Conviction DNA Testing* of the victim's clothing. Specifically, the parties sought to have an independent lab test the clothing for touch DNA, which procedures were unavailable at the time of trial.[3] The items being tested in 2022 were not previously tested in 2018, with the exception of the victim's fingernails.

After consultation with DNA experts, the parties tested the items believed to most likely yield results for touch DNA. Those items were: fingernails, fingernail clippers, pubic hairs, underwear, bra, and shirt. The rape kit was also tested for the presence of DNA.

Trace-level male DNA was detected on the victim's right fingernail swabs, the right fingernail clippers swabs, and the victim's shirt swabs. The swabs from the right fingernail and shirt were then analyzed with a genotyping kit that targets male Y-chromosome STR DNA. However, no useful typing results were obtained from this analysis. Another shirt swab and the right hand fingernail clippers were not analyzed because it was determined the amount of male DNA was so minimal it would not likely produce any results.

Only female DNA was recovered from: pubic hairs, left hand fingernail swab, left hand fingernail clippers swabs, anal swabs, vaginal swabs, bra swabs, and underwear swabs.[4] The remaining items are currently being reviewed for further testing.

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perhaps not in all, if the conviction or PBJ is vacated, the State would then *nol pros* the charging document." (Emphasis added.) Report available here: https://mdcourts.gov/sites/default/files/rules/reports/201streport_0.pdf.

[2] In 2018, the BPD Lab tested: 1) left fingernail clippings; 2) right fingernail clippings; 3) swab from bottle cap located at Leakin Park; 4) swab from mouth of bottle located at Leakin Park; 5) swab from white metal necklace; 6) swab from yellow metal necklace; 7) blood sample from back of shirt #1; 8) blood sample from back of shirt #2; 9) blood sample from back of shirt #3; 10) swab from condom wrapper found at Leakin Park; 11) swabs from longer wire found at burial site; 12) swabs from shorter wire found at burial site (***Exhibit 1*** – 2018 DNA Test Results).

[3] ***Exhibit 2*** – Joint Petition for Post Conviction DNA Testing.

[4] Forensics Analytical Crime Lab provided the latest results in a report dated August 18, 2022. Since the investigation is ongoing, the State will not disclose the report at this time. However, the conclusions of the last round of testing have been fully disclosed above.

3. FACTS OF THE CASE

The facts of this case have been exhaustively detailed in prior court opinions, *State v. Syed*, 236 Md. App. 1983 (2018)[5] and *State v. Syed*, 463 Md. 60 (2019).[6]

For the purposes of this motion, the most pertinent facts are as follows: the victim, 18-year-old Hae Min Lee, was last seen at Woodlawn High School on January 13, 1999 around 2:15 – 2:30 PM. Weeks later, on February 9, 1999, her body was discovered buried in Leakin Park. The cause of death was manual strangulation.

The investigation turned to the victim's ex-boyfriend, Adnan Syed ("Defendant") as the suspect. The State's theory was that the relationship was on-again-off-again, and in December, 1998, Ms. Lee started a new relationship, angering Defendant. The main pieces of evidence implicating Defendant was the testimony of the cooperating co-defendant, Jay Wilds ("Wilds"), who testified basically to the following: Defendant said he was going to kill the victim, Defendant admitted to strangling the victim, Defendant showed Wilds the body in the trunk of her car, and Wilds helped Defendant bury the body in Leakin Park. Wilds also directed police to the victim's car on February 28th in the area of the 300 block of Edgewood Avenue in Baltimore City.

The other main piece of evidence came from the Defendant's cell phone records. According to Wilds, the Defendant lent him his cell phone and vehicle that day. The cell phone was in Wilds' possession at the time of the murder. Wilds and Defendant were together at the time of the burial, around 7:00 PM. The State relied upon billing records showing the phone was connected on incoming calls to cell towers placing Defendant's phone in the vicinity of Leakin Park around 7:00 PM. The State's contention was Wilds' testimony coupled with the cell phone records tied the Defendant to the victim's burial site in Leakin Park.

Wilds pled guilty to Accessory After the Fact (Case No. 299250001) on September 7, 1999. He testified against Defendant in February, 2000. He was sentenced on July 6, 2000 to 5 years, all suspended, with 2 years of probation.

4. PROCEDURAL HISTORY

On February 25, 2000, a jury found Defendant guilty of the following offenses: first-degree murder, kidnapping, robbery, and false imprisonment (J. Wanda K. Heard, presiding). Judge Heard imposed a total sentence of Life plus 30 years.

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[5] The Court of Special Appeals' 2018 decision can be located at: mdcourts.gov/data/opinions/cosa/2018/2519s13.pdf.

[6] The Court of Appeals' 2019 decision can be located at: mdcourts.gov/data/opinions/coa/2019/24a18.pdf.

In an unreported opinion, the Court of Special Appeals affirmed his conviction on March 19, 2003. *Syed v. State*, No. 923, Sept. Term 2000.

On May 28, 2010, Defendant filed a petition for post-conviction relief, Petition No. 10432, which he supplemented on June 27, 2010. In that petition, Defendant raised 9 allegations of ineffective assistance of trial, sentencing and appellate counsel. The post-conviction court issued an order and memorandum on December 30, 2013 denying all claims.

Defendant filed an application for leave to appeal, specifically raising the issue of trial counsel's failure to interview or investigate Asia McClain as a potential alibi witness and failure to pursue a plea deal. After noting this application, Defendant supplemented his application and requested that the Court of Special Appeals remand the case for the post-conviction court to consider an affidavit from Ms. McClain. The request was granted and on May 18, 2015, the Court of Special Appeals issued a limited remand in which it afforded Defendant "the opportunity to file such a request to re-open the post-conviction proceedings" in the Circuit Court.

Upon remand, Defendant filed a request for the Circuit Court to consider a new and independent basis for his claim of ineffective assistance of counsel, as well as a purported *Brady* violation, concerning the cell tower location evidence. The post conviction court granted the request to reopen his post-conviction proceedings to review both of the aforementioned issues.

On June 30, 2016, the post-conviction court denied relief on the issue of counsel's failure to investigate Ms. McClain as an alibi witness. Regarding trial counsel's failure to challenge the cell tower location evidence, the post-conviction court reasoned that trial counsel's failure to challenge the cell tower information was in fact deficient and that this deficiency prejudiced the Defendant. As a result, the post-conviction court vacated the convictions and granted Defendant a new trial (*See Memorandum Opinion II*, dated June 30, 2016).

The State appealed, and on March 29, 2018, the Court of Special Appeals held that the failure of trial counsel to call Ms. McClain as an alibi witness warranted a new trial; however, the Court reversed the post-conviction court's holding on the cell phone tower evidence on the basis that that the issue was not properly raised in the first post-conviction -- therefore, it was waived. *See Syed v. State,* 236 Md. App. 183 (2018).

On March 8, 2019, the Court of Appeals reversed the Court of Special Appeals and held that Ms. McClain's testimony did not warrant a new trial. The Court, however, agreed with the Court of Special Appeals that the cell phone tower issue was waived. *State v. Syed,* 463 Md. 60 (2019).

Defendant timely filed a Petition for Writ of Certiorari in the Supreme Court of the United States. The Petition was denied on November 25, 2019. *Syed v. Maryland*, 140 S. Ct. 562 (2019).

5. LEGAL REQUIREMENTS

A. Use of the State's Motion to Vacate

In 2019, the Maryland Legislature passed HB874[7] & SB0676[8] to allow the State to file a motion to vacate a conviction. This bill went into effect on October 1, 2019. The immediate effect of that bill allowed the State to vacate convictions in which the conviction relied heavily on testimony from a member of the corrupt Gun Trace Task Force.[9]

The statute also allows broad application to any conviction, in which new evidence has called into question the integrity of the conviction or there has been newly-discovered evidence that creates a substantial or significant probability the result would have been different.

Most recently, this office filed a Motion to Vacate in the case of *State v. Paul Madison* (Case No. 191060002), in which the Defendant was convicted of second-degree murder. After a re-review of the case, the State filed a Motion to Vacate on the basis that: 1) Defendant's conviction was based on the uncorroborated testimony of a witness, who was also a jailhouse informant, who was promised benefit for an unrelated charge; 2) the informant testified that she did not receive benefit, which turned out to be untrue; 3) *Brady* violations discovered in the State's trial file; 4) two alternative suspects were developed that were not disclosed to the defense; and 5) a new witness who advised the State of new evidence regarding the details of the murder. The State asserted in the motion that "it no longer has confidence in the integrity of the conviction and asserts that the interests of justice and fairness justify vacating the conviction."

This Honorable Court granted the motion on December 21, 2021 and Mr. Madison was released from incarceration.[10]

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[7] Available here: https://mgaleg.maryland.gov/2019RS/Chapters_noln/CH_702_hb0874e.pdf.

[8] Available here: https://mgaleg.maryland.gov/2019RS/bills/sb/sb0676t.pdf

[9] *See e.g.* Baltimore Sun, *State's Attorney Mosby will ask courts to toss nearly 800 cases tainted by rogue Gun Trace Task Force cops*, September 5, 2019 (available here: https://www.baltimoresun.com/news/crime/bs-md-ci-cr-gun-trace-task-force-cases-vacated-20190905-57fohmkwj5hkln45uhlpnmd5fu-story.html)

[10] *See e.g.* Press Release, Office of the State's Attorney, December 21, 2021 (available here: https://www.stattorney.org/media-center/press-releases/2447-baltimore-man-has-murder-conviction-vacated-after-30-years-in-prison) and Oxygen True Crime, *Judge Vacates Sentence for Baltimore Man*

B. Legal Standard to Vacate a Judgment of Conviction

The State can move to vacate a conviction, pursuant to Md. Code Ann., Crim. Proc. §8-301.1, on the ground that either:

(1) (A)(1)(i) There is newly discovered evidence that:

(1) Could not have been discovered by due diligence in time to move for a new trial under Maryland Rule 4-331(c); and

(2) Creates a substantial or significant probability that the result would have been different; or

(1) (A)(1)(ii) **The State's Attorney received new information after the entry of a probation before judgment or judgment of conviction that calls into question the integrity of the conviction**; and

(2) **The interest of justice and fairness justifies vacating the probation before judgment or conviction. (Emphasis added.)**

Although there is evidence in this case that would substantiate proceeding under various legal vehicles,[11] based on the entirety of the information set forth below, the State will rely on provision (A)(1)(ii). Based on the cumulative effect[12] of all of the issues below involving new information and *Brady* violations, the State no longer has confidence in the integrity of the conviction. Additionally, the State asserts that the interests of justice and fairness dictate that the convictions be vacated and that Defendant be afforded a new trial at this time.

C. Notification to Defendant

Pursuant to Criminal Procedure Article §8-301.1(c)(1), Defendant, Inmate No. 293-908, Patuxent Institution, 7555 Waterloo Rd., Jessup, MD 20794, was advised of the filing

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Who Spent 30 Years in Prison for 1990 Murder, December 22, 2021 (available here: https://www.oxygen.com/crime-news/paul-madison-baltimore-murder-conviction-overturned).

[11] Newly-discovered evidence and *Brady* violations can be raised in a Writ of Actual Innocence (Crim. Proc. §8-301) or under the first prong of the motion to vacate statute (Crim. Proc. §8-301.1); *Brady* violations and issues of ineffective assistance of counsel can be raised in a motion under the Post Conviction Procedure Act (Crim. Proc. §§7-101, et seq.).

[12] The cumulative effect doctrine is when one deficiency or error, in and of itself, would not warrant relief. When the deficiencies or errors are viewed in their entirety, however, relief is warranted. *See e.g. Bowers v. State*, 320 Md. 416, 436 (1990). This doctrine has been applied in multiple post-conviction contexts, such as ineffective assistance of counsel (*Id.*); newly-discovered evidence (*Faulkner v. State*, 468 Md. 418, 465 (2020)); *Brady* violations (*Kyles v. Whitley*, 514 U.S. 419 (1995); and on appeal (*Donaldson v. State*, 416 Md. 467, 497 (2010) (improper closing arguments).

of this motion. All documents were sent electronically to counsel for the Defendant, Erica J. Suter.

D. Request for Hearing

Pursuant to Criminal Procedure Article §8-301.1(b)(4), the State requests a hearing in this matter.

6. 2021-2022 INVESTIGATION – TWO SUSPECTS HAVE BEEN DEVELOPED

The parties have developed evidence regarding the possible involvement of two alternative suspects. References to these two suspects will be mentioned throughout this motion as "one of the suspects." The two suspects may be involved individually or may be involved together. These suspects were known persons at the time of the investigation of the case and not properly ruled out, as set forth below. In the State's reinvestigation of this matter, new information was learned about these individuals that suggest motive and/or propensity to commit this crime. However, in order to protect the integrity of the on-going investigation, the names of the suspects, which suspect in particular, and the specific details of the information obtained will not be provided at this time.

A. *Brady* Violation: It was Reported to the State that One of the Suspects had Threatened to Kill the Victim and Provided Motives for that Threat

The State located a document in the State's trial file, which provided details about one of the suspects. A person provided information to the State that one of the suspects had a motive to kill the victim, and that suspect had threatened to kill the victim in the presence of another individual. The suspect said that "he would make her [Ms. Lee] disappear. He would kill her."

The State also located a separate document in the State's trial file, in which a different person relayed information that can be viewed as a motive for that same suspect to harm the victim.

This information about the threat and motives to harm could have provided a basis for the defense to present and/or bolster a plausible alternative theory of the case at trial. Due to the on-going investigation, further details of this information will not be provided at this time.

This information was not contained in the defense's file, nor was it included in any of the various discovery pleadings the State produced each time it disclosed new information to the defense.

Md. Rule 4-263 details the State's discovery obligations in circuit court criminal cases. Md. Rule 4-263(a) requires that State's Attorney disclose, without request, "[a]ny material or information tending to negate or mitigate the guilt or punishment of the defendant as to the offense charged." Additionally, Md. Rule 19-303.8(d) "Special Duties of a Prosecutor" provides that a prosecutor shall "make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense..." Further, the duty to disclose applies to disclosures postconviction. *Attorney Grievance Commission of Maryland v. Cassilly*, 476 Md. 309, 370-84 (2021).

To prevail on a *Brady* claim, Defendant must plead and prove that:

> (1) the prosecution suppressed evidence;
>
> (2) the evidence was favorable to the defendant, either as to guilt or punishment; and
>
> (3) evidence was material to the issue of guilt or punishment.

Brady v. Maryland, 373 U.S. 83 (1963); *Giglio v. U.S.*, 405 U.S. 150 (1972); *Campbell v. Reed*, 594 F.2d 4 (4th Cir. 1979). Evidence is material if there is a reasonable probability – sufficient to undermine the confidence in the outcome – that had the evidence been disclosed, the result of the proceeding would have been different. *U.S. v. Bagley*, 473 U.S. 667 (1985).

The failure to turn over information regarding an alternative suspect can constitute a reversable *Brady* violation. *See, e.g., Kyles v. Whitley*, 514 U.S. 419 (1995) (defendant's *Brady* rights violated when the government did not disclose evidence pointing to an alternative suspect); *Bloodsworth v. State*, 307 Md. 164, 175-76 (1986) (withholding from the defense a police report which mentioned a potential additional suspect was a *Brady* violation); *Faulkner v. State*, 468 Md. 418, 468 (2020) ("strong alternate perpetrator evidence can be very powerful in the defense of a person accused of a crime where the primary issue in dispute is identity.")(citing *Harrington*, 659 N.W.2d at 524-25 (explaining that "Harrington's attorney could have used [the alternate suspect] as the centerpiece of a consistent theme that the State was prosecuting the wrong person," and concluding that this alternate perpetrator evidence might well have led to reasonable doubt in the jury's mind that Harrington was the murderer, despite a purported accomplice's testimony that Harrington had a shotgun and was attempting to steal a car at the dealership where the murder took place)).

The State avers that considering the totality of evidence now available, the information about an alternative suspect would have been helpful to the defense because it would have helped substantiate an alternative suspect defense that was consistent with the defense's strategy at trial.

Additionally, the evidence against Defendant was not overwhelming and was largely circumstantial. Therefore, evidence such as an alternative suspect tends to carry more weight in this analysis. The Court of Special Appeals summarized the concerns:

> "The State's case was weakest when it came to the time it theorized that Syed killed Hae. As the post-conviction court highlighted in its opinion, Wilds's own testimony conflicted with the State's timeline of the murder. Moreover, there was no video surveillance outside the Best Buy parking lot placing Hae and Syed together at the Best Buy parking lot during the afternoon of the murder; no eyewitness testimony placing Syed and Hae together leaving school or at the Best Buy parking lot; no eyewitness testimony, video surveillance, or confession of the actual murder; no forensic evidence linking Syed to the act of strangling Hae or putting Hae's body in the trunk of her car; and no records from the Best Buy pay phone documenting a phone call to Syed's cell phone. In short, at trial the State adduced no direct evidence of the exact time that Hae was killed, the location where she was killed, the acts of the killer immediately before and after Hae was strangled, and of course, the identity of the person who killed Hae." *Syed*, 236 Md. App. at. 153.

Accordingly, it is the State's position that the alternative suspect information above – which contained an actual threat and plausible motive -- was material. Had this information been disclosed,[13] defense counsel would have had a duty to investigate and it could have enhanced the alternative suspect defense.

B. <u>New Evidence: The Location of the Victim's Car was Located Directly Behind the House of One of the Suspect's Family Members</u>.

Ms. Lee's car was found parked in a grassy lot behind the 300 block of Edgewood Avenue in Baltimore City. Through investigation of property records and other media, it has been determined:

- The location was known to one of the Suspects;
- A person related to the family owned a house on the 300 block of Edgewood Road for many years; and
- That person lived at that location in 1999.

The State uncovered this information during an investigation in 2022. This information was not available to the Defendant in his trial in 2000, and the State believes

[13] If this information was indeed provided to defense, then minimally, the failure to utilize this evidence would constitute ineffective assistance of trial counsel.

it would have provided persuasive support substantiating the defense that another person was responsible for the victim's death.

C. New Information: One of the Suspects, Without Provocation or Excuse, Attacked a Woman in Her Vehicle

The Defense located formally-documented evidence unavailable at the time of the trial, that one of the suspects had, without provocation or excuse, attacked a woman unknown to him while she was in her vehicle. The suspect was convicted of this offense.

This information was not available at the time of trial and occurred after the trial. However, the State finds the information relevant and worthy of further investigation now that it accessing the possible involvement of this suspect.

In order to protect the on-going investigation, the parties are not able to reveal specifics at this time.

D. New Information: One of the Suspects Engaged in Serial Rape and Sexual Assault

The State and defense have obtained credible information that one of the suspects had engaged in multiple instances of rape and sexual assault of compromised or vulnerable victims in a systematic, deliberate and premeditated way. The suspect was convicted of this offense.

This information was not available at the time of trial and occurred after the trial. However, the State finds the information relevant and worthy of further investigation now that it accessing the possible involvement of this suspect.

In order to protect the on-going investigation, the parties are not able to reveal specifics at this time. However, the State finds the information credible.

E. New Information: One of the Suspects Engaged in Violence Against a Woman Known to Him

The Defense located formally-documented evidence of allegations that one of the suspects had engaged in aggressive and/or violent acts toward a woman known to him and forcibly confined her. It was also alleged that this suspect made threats against the life of this person.

These events happened prior to the trial in this case, and this information was known to the State. Given the circumstances of the victim's death, this evidence would have been consequential to the defense's theory of the case.

In order to protect the on-going investigation, the parties are not able to reveal specifics at this time.

F. New Information: One of the Suspects was Improperly Cleared as a Suspect

The police initially developed one of the suspects and administered a standard polygraph test. The results were that deception was indicated regarding his involvement in the crime. The suspect claimed he was distracted, so the police allowed him to come back another day and take a 2nd test.

The State consulted an expert who reviewed both polygraph tests and the results. According to Donald J. Krapohl of the Capital Center for Credibility Assessment:

> "Modern polygraph techniques, including the one used in [the suspect's examination], have built-in safeguards against a range of potential contaminations of the test data. **In the case of a distracted examinee, test results would tend to be shifted toward the direction of Inconclusive rather than toward Deception or Truthfulness**. Therefore, the testing examiner's suggestion that distraction played a part in the test results of Deception Indicated would not be consistent with either prevailing evidence or theory. It would not be normal practice to base a recommendation for a retest under the circumstances described in the polygraph report." **(Emphasis added)**.

Even more concerning is that the police then improperly cleared the suspect after applying a 2nd test, which was a test that should never have been used to determine deception or truthfulness. The 2nd test was a "Peak of Tension" (P.O.T.) test. Regarding this test, Mr. Krapohl determined that a Peak of Tension test should not be used to disconfirm a deception test. He concluded:

> "No schools in the US teach the P.O.T. as a primary technique. Its validity is not well established. Moreover, it has no scoring system but relies instead on subjective interpretations of overall trends in the polygraph tracings (e.g., the blood pressure continues to climb across the entire test until the presentation of the guilty item, after which the pressure shows a downward trend). **This reviewer is not aware of any US school that would support a polygraph result of Deception Indicated or No Deception Indicated when a P.O.T. was employed as a stand-alone test. The test results reported in the [ ] session were No Deception Indicated. As such, it places the examiner's conclusion firmly outside of standard polygraph practices**." **(Emphasis added)**.

In conclusion, Mr. Krapohl found, "Within the limits of the information available, the reviewer would not support the testing examiner's assertion that the first test results

were influenced by the examinee's distraction, nor that a decision of No Deception Indicated can be defended in the second examination." (***Exhibit 3***, Mr. Krapohl's Curriculum Vitae).[14]

The police relayed to the prosecution that this suspect passed the 2nd test with "flying colors." However, Mr. Krapohl's affidavit strongly calls the veracity of that conclusion into question, inasmuch as the second test was neither supported by the professional or academic communities nor methodologically sound in its application. There was no further investigation of this suspect after the 2nd test.

7. THE RELIABILITY OF THE EVIDENCE AT TRIAL

The State contends that the *Brady* violations alone would substantiate the granting of a new trial. The new evidence regarding the possible involvement of alternative suspects also gives the State great concern.

But considering the seriousness of this case and the importance of holding the right suspect accountable, the State also extensively reviewed the evidence presented at the first trial and notes several additional concerns below to demonstrate why it no longer has faith in the integrity of the conviction.

A. The State Cannot Rely on the Incoming Call Evidence Based on the Post-Conviction Court's Findings

The State relied on billing location information, provided by AT&T, to account for the whereabouts of Defendant's cell phone on January 13th (***Exhibit 4*** – call records). This information was critical to the State's case because it corroborated some of Jay Wilds' testimony regarding their whereabouts throughout the day.

However, the notice on the records specifically advised that the billing locations for incoming calls "would not be considered reliable information for location." Despite this notice, the State used the billing location for incoming calls for exactly that purpose – to prove that Defendant was in a particular area at a particular time. Most critical to the State's case were the incoming calls allegedly received in the Leakin Park area at 7:09 PM and 7:16 PM. Moreover, 11 of the 34 calls billed on January 13th were incoming calls.

[14] At this time, the State will not disclose the entirety of report in order to protect information regarding the suspect. However, the relevant findings regarding both exams, as well as the conclusions, have been fully disclosed above.

Defense counsel, M. Cristina Gutierrez,[15] seemingly did not realize the importance of this information, or did not see it at all, and therefore, did not cross-examine the State's cell phone tower expert regarding this limitation. The post-conviction court found that the notice was in her trial file, so it did not constitute a *Brady* violation.[16]

Additionally, the State's expert, Abraham Waranowitz ("Waranowitz"), subsequently expressed concern over his testimony on the incoming call location status. In a signed affidavit, Waranowitz stated that the State did not show him the notice language, and had he seen it before his testimony, he would not have testified that the location evidence was accurate (***Exhibit 5*** – Waranowitz affidavit, dated 10/5/2015). He later supplemented that Affidavit in 2016 stating that he interpreted AT&T's legend to most likely apply to both PC2-15 and Exhibit B pp. 0360-0378, and location status to apply to cell tower locations (***Exhibit 6***, Waranowitz' 2nd Affidavit, dated 2/8/2016). If his assessment regarding the legend was true, that would mean that the incoming calls were reliably attached to that specific cell phone tower.

This issue was raised in Defendant's Supplemental Post Conviction Petition. The Honorable Martin Welch, in Memorandum Opinion II, made several findings regarding the testimony of the State's expert and the testimony of the Defense's expert. The State's expert testified that the legend applied only to subscriber activity reports and would not apply to call detail records. The post-conviction court found that the instructions did apply to the records and the witness "abandoned his initial position."[17]

The witness also testified that the term "location" meant the location of the "switch" identified by the "Location1" column and surmised that the legend meant the information was not reliable for determining the location of the switch. The post-conviction court concluded that the witness "contradicted his own testimony" that the term "location" referred to the switch location and not the cell site.[18]

In its ruling, the post-conviction court found that the trial counsel rendered deficient performance when she failed to properly cross-examine Waranowitz about the disclaimer.[19] The Court also found that a reasonable attorney "would have exposed the misleading nature of the State's theory by cross-examining Waranowitz" and that this failure can "hardly be considered a strategic decision."[20]

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[15] Ms. Gutierrez was disbarred by consent in 2001 (*see e.g.* Baltimore Sun, *Lawyer Gutierrez agrees to disbarment*, June 2, 2001 (available here https://www.baltimoresun.com/news/bs-xpm-2001-06-02-0106020237-story.html) and passed away in 2004.

[16] Memorandum Opinion II, p. 34.

[17] Memorandum Opinion II, p. 52.

[18] Memorandum Opinion II, p. 53-54.

[19] Memorandum Opinion II, p. 40.

[20] Memorandum Opinion II, p. 43.

The post-conviction court found that this failure satisfied the second prong of the ineffective assistance of counsel analysis. The court wrote, "trial counsel failed to confront the State's cell tower expert with the disclaimer, and thereby allowed the jury to deliberate with the misleading impression that the State used reliable information to approximate the general location of Defendant's cell phone during the time of the burial."[21] The jury likely gave considerable weight to Waranowitz's testimony,[22] and the incoming calls during the time of the burial "served as a foundation of the State's case."[23] Accordingly, the court found that but for trial counsel's error, the result of the trial would was fundamentally unreliable.[24] The court further stated, "Although the Court's ultimate finding does not depend solely on Waranowitz's affidavit, the affidavit casts an additional fog of uncertainty that shakes the Court's confidence in the outcome of the trial."[25]

The post-conviction court granted Defendant a new trial on this allegation, however, the Court of Special Appeals overturned the decision finding that the issue was waived because Defendant did not previously raise this issue in his first post-conviction petition. *Syed v. State*, 236 Md. App. 183, 240 (2018). The Court of Appeals upheld this ruling on waiver. *State v. Syed*, 463 Md. 60, 103-104 (2019). [26]

Based on the post-convictions court's lengthy assessment of the issue and its findings, the State's confidence in the reliability of the incoming calls is also shaken.

Accordingly, in an effort to obtain more information regarding the actual reliability of the incoming calls, the parties consulted with the defense's expert, Gerald Grant, who is a Digital Forensics Investigator with expertise in Computer Forensics, Mobile Forensics and Historical Cell Site Analysis. Mr. Grant explained the following regarding incoming and outgoing calls:

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[21] Memorandum Opinion II, p. 46.
[22] Memorandum Opinion II, p. 49.
[23] Memorandum Opinion II, p. 50.
[24] Memorandum Opinion II, p. 50, 55.
[25] Memorandum Opinion II, p. 56, fn 24.
[26] The defense could, at any time, file a Motion to Reopen Post Conviction Proceedings on the basis that post-conviction counsel was ineffective for not properly raising the cell phone tower issue. Crim. Proc. §7-104 provides: "[t]he court may reopen a post-conviction proceeding that was previously concluded if the court determines that the action is in the interests of justice." Some reasons for reopening include: a change made in the law that should be applied retroactively or **ineffective assistance of post conviction**, appellate, or trial counsel. *See e.g. Oken v. State*, 367 Md. 191, 195 (2001); *Harris v. State*, 160 Md. App. 78 (2004); *Stovall v. State*, 144 Md. App. 711 (2002). The right to counsel means the right to the effective assistance of counsel with respect to proceedings under the Post Conviction Procedure Act. See e.g. *State v. Flansburg*, 345 Md. 694, 703 (1997), cited in *Stovall v. State*, 144 Md. App. 711, 721-722 (2002); see also *Harris v. State*,160 Md. App. 78, 98 (2004).

> "When a mobile device makes an outgoing call, the device itself choses the tower/sector to utilize based on the cleanest, clearest, strongest, signal at that time. Once an outgoing call is in session, the cellular network system controls what tower/sector the device uses or gets transferred to (hand-off). An incoming call to a mobile device may have the communication signal sent to multiple towers in an area to notify the device of the call. In other words, the network cannot guarantee at the time of the incoming call that it knows exactly what tower/sector the device is listening on.
>
> Based on the cellular technology at the time of the incident in this case, I am aware that AT&T utilized a communication technique called TDMA (Time Division Multiple Access). This communication protocol allowed a mobile device to operate in "sleep mode" to conserve on batteries. Based on how a mobile device was located on an incoming call, a function like this could be one of the reasons a disclaimer was necessary. For example, it is possible that an incoming call could be recorded at the last registered tower/sector and not the current one when the signal is sent across multiple towers within an area."

See ***Exhibit 7***, Grant Affidavit; ***Exhibit 8***, Grant Curriculum Vitae.

The State proffers it has consulted 2 additional non-trial expert witnesses whose expertise include advising the Government on the development, set up, and operation of cellular networks and the operational use of the Global System for Mobile Communications ("GSM") to track and locate cell phones.[27]

After reviewing the cell phone documents in this case, these experts each individually called the reliability of the State's testimony at trial into question because the information regarding the tower and sector associated with the cell phone of an incoming call cannot be conclusively ascertained with the information that was adduced at trial. Both experts substantiated Grant's conclusion that incoming calls could plausibly be associated with a tower and sector that was not most proximate to the location of the phone at the time of the incoming call. One of the experts explained, "doing surveys from the ground we could always see 3 – 5 towers, sometimes more. Any tower could service the call. [It] doesn't have to be the closest or strongest signal but enough power for errors to be overcome with the coding [gain afforded by the network]." It was therefore overly prejudicial to allow evidence of this sort at trial.

Upon review of the totality of information now at the State's disposal, the State does not believe the incoming call location evidence is reliable. The assessment must

[27] Due to confidentiality reasons, information about the experts will not be disclosed.

therefore turn to whether the testimony of the co-defendant, Jay Wilds, in and of itself, restores confidence in the State's case against Defendant.

B. New Information that Kristina Vinson's Version of Events was Incorrect

The testimony of Kristina Vinson ("Vinson") was used to corroborate Jay Wilds' version of events.[28] She testified that on the afternoon of January 13th (the date of the murder), she got home around 5:00 – 5:15 PM.[29] Wilds and Defendant came to her home around 6 PM.[30] Defendant got an incoming call on his cell phone and quickly left.[31] She remembered that date because she had an all-day conference.[32]

At the first trial, Vinson testified that it was not until her interview with police on March 9th that she had to recall the date in which Wilds and Defendant came to her home.[33] During that interview, she told police she had gotten home around 4:30 – 5:00 PM.[34]

In the HBO 2019 Documentary, *The Case Against Adnan Syed*, Ms. Vinson was presented with a copy of her winter schedule at UMBC, which reflected that she had an evening class scheduled for January 13th. The class met a total of 3 times and Ms. Vinson indicated that she would not have missed a class. This new evidence tends to show that Ms. Vinson was incorrect about her recollection that Wilds and Defendant visited her on January 13th – thus calling into question that portion of Wilds' testimony – which is that he and Defendant went to her home on January 13th.

C. The State Cannot Rely on Jay Wilds' Testimony, Alone

Relying on Jay Wilds' testimony, in and of itself, is a concern for the State. Indeed, the original prosecutor in the case shared the same concern – "Jay's testimony by itself, would that have been proof beyond a reasonable doubt? Probably not. Cellphone evidence by itself? Probably not."[35]

Detective MacGillivary confirmed that Wilds' statements to police had a lot of inconsistencies and regarded them as lies.[36] He testified that the cell site information did not correspond with Wilds' story that he initially told police, so when presented with that

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[29] Transcript of 2nd Trial, 2/16/2000, p. 207. (At the first trial, Vinson testified she returned home between 5:30 – 6:00 PM (Transcript of 1st Trial, 12/14/1999, p. 128)).

[30] Transcript of 2nd Trial, 2/16/2000, p. 217.

[31] *Id.*, pp. 212-213

[32] *Id.*, pp. 207, 216, 286.

[33] Transcript of 1st Trial, 12/14/1999, p. 143.

[34] *Id.*, p. 145.

[35] The Intercept, *Prosecutor in 'Serial' Case Goes on the Record*, January 7, 2015 (available at: https://theintercept.com/2015/01/07/prosecutor-serial-case-goes-record/).

[36] Transcript of 2nd Trial, 2/18/2000, pp. 132-133, 166.

cell records during the next interview, "He started to recall things a little better" and they took a 2nd statement.[37]

It was also during this 2nd interview that Wilds allegedly told police about the location of the victim's car.[38] The Detective stated on the recording that Wilds gave them the information of where the car was located before they turned the recorder back on when they were flipping the tape over.[39] Wilds otherwise did not request that the recorder be turned off and he was not refusing to talk.[40]

Police interviewed Wilds again on March 15, 2022 to "clear up discrepancies" and recorded the interview. They interviewed him for a fourth time on April 13th, but did not record the interview or take notes.[41]

The State has considered all of the various statements to police (that were recorded) the trial testimony at both trials, and Wilds' subsequent statements to various media outlets. For the purposes of this motion, the State will highlight the most concerning discrepancies.

The post-conviction court detailed several instances of discrepancies between Wilds' testimony, the cell records and/or the State's timeline.[42] For example, the State's theory is that the victim was killed some time after school and Defendant called Wilds to pick him up at the Best Buy at 2:36 PM. However, Wilds testified that Defendant did not call him until after 3:45 PM[43] altering the State's timeline significantly.

Additionally, Wilds gave 2 different accounts to the police about where he saw the victim's body, and gave a 3rd account to media. At his 2/28/1999 interview with police, he told them that he saw the body in the trunk on Edmondson Avenue.[44] During the 3/15/1999 interview, he told police it was at the Best Buy.[45] He said he lied about the Edmondson location because he did not want to be associated with the Best Buy location – where the murder occurred.[46] Wilds then claimed in a 2014 interview that he saw the body at his grandmother's house, but thinks he told police he saw body in front of Cathy's house.[47] Even more bizarre, Wilds' claimed that he picked up Defendant at the Best Buy,

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[37] Transcript of 2nd Trial, 2/18/2000, pp. 157-158; 163.
[38] *See* ***Exhibit 9*** -- Wilds' Statement, February 28, 1999, p. 26.
[39] *Id.*
[40] Transcript of 2nd Trial, 2/18/2000, p. 162.
[41] *Id.*, p. 161.
[42] See Memorandum Opinion II, FN 9 and pp. 24-25.
[43] Transcript of 2nd Trial, 2/4/2000, p. 130.
[44] *Exhibit 9*, p. 7.
[45] See ***Exhibit 10*** -- Wilds' Statement, March 15, 1999, p. 14.
[46] *Id.*, p. 58.
[47] The Intercept, *Exclusive: Jay, Key Witness from 'Serial' Tells his Story for First Time, Part I*, December 29, 2014 (available here: https://theintercept.com/2014/12/29/exclusive-interview-jay-wilds-star-witness-

but that the victim and the car stayed at Best Buy until later that evening. At some point, Defendant gets into his car and then comes back in a different car with the body in the trunk.[48]

For all of the reasons stated above, without reliable corroboration, the State cannot rely on Wilds' testimony *alone* at this time. [49]

8. DETECTIVE WILLIAM RITZ'S PAST MISCONDUCT

The two homicide detectives who investigated this case were Detective William Ritz and Detective Greg MacGillivary.

The State does not make any claims at this time regarding the integrity of the police investigation. However, in the interests of transparency, the State is obligated to note for the court and to the defense Detective Ritz's misconduct in another case, *State v. Malcolm Bryant*, which resulted in an exoneration in 2016. Malcolm Bryant was wrongfully convicted of murder in 1999 and served 17 years before his exoneration.

In the Bryant case, it was alleged in the complaint that Detective Ritz failed to disclose exculpatory and impeachment evidence and fabricated evidence. More specifically, it was alleged that Detective Ritz:

> "obtained a misidentification of Mr. Bryant from Tyeisha Powell, the single eyewitness presented at trial. Detective Ritz failed to disclose evidence about a second eyewitness whose account contradicted and undermined Tyeisha Powell's. He also failed to disclose incriminating evidence pointing to the likely true perpetrator, John Doe, including a witness statement incriminating Doe and undermining his denials of culpability, and a composite sketch that more closely resembled Doe than Mr. Bryant.
>
> Plaintiffs claim that when 'Detective Ritz met with [Ms. Powell] and another detective to create a composite sketch of the suspect, . . . Detective Ritz used direct or indirect suggestion to manipulate the composite sketch to make it more closely resemble the person he suspected, Malcolm Bryant.' Plaintiffs also claim 'Detective Ritz showed

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adnan-syed-serial-case-pt-1/_ and *Part II*, December 30, 2014 https://theintercept.com/2014/12/30/exclusive-jay-part-2/).

[48] *Id.*

[49] The testimony of Jennifer Pusateri seemingly corroborated parts of Wilds' testimony, but most of what she knew was told to her by Wilds. There was also a number of discrepancies. At this time, the State would simply note that when asked how she recalled that the events indeed occurred on January 13th, she responded – because the police told her the phone calls occurred on the 13th. In other words, she did not have an independent recollection of that date. (Police Statement of Jennifer Pusateri, p. 25). This testimony is not enough to restore the State's faith that these events indeed occurred as relayed by Wilds.

> Ms. Powell a suggestive photographic lineup consisting of six individuals, including Malcolm Bryant.'
>
> In addition to the alleged misconduct during Ms. Powell's interview, plaintiffs claim 'Detective Ritz never interviewed or conducted any follow-up investigation regarding any of the individuals with whom Mr. Bryant had spent the evening of November 20th,' who could have provided an alibi for him. Detective Ritz also allegedly failed to investigate other evidence of Bryant's whereabouts on the night of the murder. Additionally, plaintiffs allege Detective Ritz did not disclose to Mr. Bryant, Mr. Bryant's counsel, or the prosecutor some of the evidence he obtained that incriminated another suspect, and he did not conduct proper interviews about or of the suspect.
>
> Plaintiffs also allege the police received three 911 calls on the night of the murder, one of which was from a 'potential eyewitness' whose ;account of the crime . . . contradicted Ms. Powell's account.' Plaintiffs claim Detective Ritz did not investigate this potential witness's report and 'never disclosed the report of this second potential eyewitness' or the other 911 calls to Mr. Bryant, Mr. Bryant's counsel, or the prosecution. Plaintiffs also claim 'the Defendants never tested critical items of evidence obtained from the crime scene for DNA,' which would have exonerated Mr. Bryant.
>
> *See* Memorandum Opinion and Order (October 21, 2020), Bryant v. Balt. Police Dept., Case No. ELH-19-384 (available here: https://case-law.vlex.com/vid/bryant-v-balt-police-892401994). *See also,* Report of the Baltimore Event Review Team on State v. Malcolm Bryant, November 2018, Quattrone Center for the Fair Administration of Justice (available here: https://www.stattorney.org/images/data/BERT---Malcolm-Bryant-Report-FINAL-12-20-18.pdf

The estate of Malcolm Bryant sued the Baltimore Police Department, Detective William Ritz and forensic analyst Barry Verger in 2019 for the wrongful conviction. In 2022, Baltimore City's Board of Estimates approved an $8 million settlement to the Bryant estate.[50]

In a separate and unrelated case, the Court of Special Appeals overturned another murder conviction due to Detective Ritz's two-step interrogation technique, which was improperly used in a "calculated way" to undermine the defendant's Miranda warning. See *Cooper v. State*, 163 Md. App. 70 (2005).

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[50] The Daily Record, *Deceased Exoneree's Family Wins 8M Settlement with Baltimore Police*, January 5, 2022, (available at: https://thedailyrecord.com/2022/01/05/deceased-exonerees-family-wins-8m-settlement-with-baltimore-police/)

9. CONCLUSION

It is the policy of the State's Attorney for Baltimore City to prioritize justice, fairness and the integrity of the criminal justice system over the finality of convictions. Recent history has unfortunately revealed systemic issues in the arrests, investigations and prosecution of minorities in Baltimore. These concerns can plague the credibility of some past convictions, which occasionally necessitates looking at cases where newly-discovered or additional evidence suggests the wrong person has been convicted. In these rare cases, the State is morally compelled to take affirmative action where it has lost confidence in the integrity of a conviction.

The instant case is one such case where there is an abundance of issues that gives the State overwhelming cause for concern. The State's *Brady* violations robbed the Defendant of information that would have bolstered his investigation and argument that someone else was responsible for the victim's death. The impact of the *Brady* violations was amplified by the ineffective assistance of counsel throughout this case regarding the reliability of the cell phone evidence. Additionally, these concerns are highlighted by the new information regarding alternative suspects, and new evidence regarding the reliability of critical evidence at trial, has caused the State to lose confidence in the integrity of the conviction. The State further asserts that it is in the interests of justice and fairness that Defendant, at a minimum, be afforded a new trial at this time. The State also prays the Defendant be released on his own recognizance pending the continued investigation.

The State intends to continue, with all available resources, to fully and thoroughly reinvestigate this matter to ensure accountability and justice for the victim, Ms. Lee. However, the State submits that continued incarceration of the Defendant while the investigation of the case proceeds, considering all of the information above, would be a miscarriage of justice.

WHEREFORE, the State prays:

A. That this Honorable Court grant a hearing in the matter; and

B. That following a hearing, this Honorable Court pass an Order vacating the judgment in this case, and order a new trial; and

C. Grant any other relief as fundamental fairness may require.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 15, 2022, I emailed a copy of the foregoing motion to defense counsel, Erica Suter at esuter@ubalt.edu.

Becky K. Feldman