IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2016

No. 1396

STATE OF MARYLAND

Appellant/Cross-Appellee

v.

ADNAN SYED

Appellee/Cross-Appellant

Appeal from the Circuit Court for
Baltimore City, Maryland
(The Honorable Martin P. Welch, Sr., Judge)

REPLY BRIEF AND APPENDIX OF CROSS-APPELLEE

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STATEMENT OF THE CASE

The State adopts and incorporates by reference the Statement of the Case in its Brief of Appellant.

QUESTIONS PRESENTED

(1) Whether the post-conviction court abused its discretion in re-opening the post-conviction proceeding to consider Syed's claim that his trial counsel's failure to challenge the reliability of the cell phone location data evidence, based on the cell phone provider's "disclaimer" about the unreliability of incoming calls for location purposes, violated Syed's Sixth Amendment right to the effective assistance of counsel.

(2) Whether the post-conviction court erred in finding that Syed had not waived his claim regarding trial counsel's failure to challenge the reliability of the cell phone location data for incoming calls by failing to raise it earlier.

(3) Whether the post-conviction court erred in finding that Syed's trial counsel's failure to challenge the State's cell phone location data evidence, based on the cell phone provider's "disclaimer," violated Syed's Sixth Amendment right to the effective assistance of counsel.

(4) Whether the post-conviction court erred in finding that Syed's trial counsel's failure to investigate a potential alibi witness (Asia McClain) did not violate Syed's Sixth Amendment right to the effective assistance of counsel.

(5) Whether the post-conviction court incorrectly limited its prejudice analysis on the alibi witness issue to the effect of trial counsel's failure to investigate that witness, rather than consider prejudice based on the cumulative effect of that error in combination with all the attorney errors alleged in this consolidated appeal.

SUMMARY OF ARGUMENT

The State's submission herein contains the State's reply to the response of Appellee/Cross-Appellant Adnan Syed ("Syed") relating to the first three questions presented, as well as the State's response to Syed's cross-appeal on two additional questions. Because of the cross-appeals and unusual procedural posture of the case, a preview of the organization of the State's responsive pleading is briefly provided.

The State begins with a supplemental Statement of Facts, this time concerning the pretrial investigation and development of an alibi strategy by Syed's defense team. This relates to the subject of Syed's cross-appeal, but it provides substantial detail in an effort to address conspicuous gaps in the abbreviated fact section provided by Syed on this issue. *See* Brief of Appellee at 7.

The State then answers Syed's arguments regarding his Sixth Amendment cellphone claim, addressing (I) the post-conviction court's abuse of discretion in considering this claim, (II) its mistaken ruling that Syed had not waived the claim, and (III) its error in finding defective performance—but reserving, for ease of exposition, the issue of prejudice (which is taken up later in Part V). Part IV responds to Syed's cross-appeal, but again reserves discussion of prejudice for Part V. Part V addresses prejudice, reiterating the strength of the State's evidence notwithstanding the putative errors, and closing with why the court did not err in considering prejudice separately for each claim when Syed failed to preserve a claim of cumulative error either on appeal or remand.

With respect to Appellee's Sixth Amendment cellphone claim, Syed apparently would have this Court accept that any specific assertion of ineffective assistance of counsel that he and his attorneys have not yet conceived, discovered, or discussed is available, potentially even today, for litigation in the post-conviction context. No new evidence nor a change of law is needed. No evidence or serious allegation of mischief or misconduct by prosecutors or police must be presented. Nor is a reason why the claim could not have been introduced at earlier stages required, even when it is undisputed that the claim could have been raised at any time since the time of trial and where Syed was represented by able counsel for each prior filing.

The State respectfully submits that Syed's far-reaching position is a bridge too far. It is incompatible with the text, structure, and history of the UPPA; it goes beyond what the appellate courts of Maryland have ever allowed; and it is not a defensible reading of *Curtis v. State*, 284 Md. 132 (1978), a case decided nearly four decades ago, whose

authority for the specific point Syed seeks to assert has not been confirmed even once, and which has been followed by two legislative constrictions of the enabling statute.

Regarding Syed's McClain-alibi claim, the State respectfully submits that Gutierrez—an acclaimed, coveted defense lawyer whose meticulous preparation and strategic deliberations in this case are reflected in months of pretrial efforts, dozens of internal notes and memoranda, and vigorous challenges at trial—could have reasonably avoided Asia McClain as a witness for several interrelated reasons. First, Gutierrez could have rightly questioned the legitimacy of the letters from McClain, reasonably interpreting them as an offer to fabricate an alibi or as evidence of collusion between Syed and McClain. Second, Gutierrez could reasonably have preferred an alibi strategy that did not carry the risks of placing Syed at the public library, which was (a) inconsistent with what Syed had told police, (b) a conspicuous deviation from his usual routine, and (c) a promising solution to a gap in the prosecution's case that Gutierrez intended to exploit. Finally, where Syed's investigator (while working with Syed's original attorneys) actually looked into the public library as part of a preliminary alibi investigation that collapsed when an accessory to the murder cooperated against Syed, Gutierrez was not required to reexamine each leg of that abandoned alibi defense.

STATEMENT OF FACTS

Much of the factual background for this case was set forth in its prior pleadings to this Court. The State already excerpted those portions germane to Syed's McClain-alibi claim in its Conditional Application for Limited Remand, which the State herein incorporates by reference. *See* Conditional Application for Limited Remand at 8-10. To

complement these prior recitations, additional facts developed in the course of the remand—many from the defense file, which was provided to the State for the first time shortly before the February 2016 hearing—are herein summarized, particularly (a) parts of the investigation conducted by Syed's original attorneys even before Gutierrez was retained, (b) evidence suggesting a reasonable belief by Syed's counsel that McClain's offer to assist Syed was illegitimate, and (c) information available to Syed's defense team that rendered a narrow alibi breaking from Syed's routine unwarranted and unwise.

Syed's original defense team interviewed potential alibi witnesses starting the week Syed was arrested. At his original post-conviction hearing in 2012, Syed claimed he received two letters from McClain that week. He further testified that he immediately delivered those letters to his attorney, Cristina Gutierrez. But Syed was originally represented by two other attorneys, Douglas Colbert and Christopher Flohr, after his arrest on February 28, 1999, until at least mid-April 1999, when Gutierrez and her team assumed responsibility for his case.

Even before Gutierrez was involved, Syed's original defense team—after talking with Syed—began speaking with individuals who could account for his whereabouts on the day of the murder. That investigation commenced almost immediately after Syed was arrested. On Monday, March 1, 1999 (the day after Syed's arrest), Syed met with Colbert and Flohr for the first time. On March 2, 1999, a private investigator, Drew Davis, was retained. On March 3, 1999, after meeting with "Mr. Syed,"[1] Davis began to make

[1] Davis's time entry for March 3, 1999 indicates that he "met with attorneys and met Mr. Syed." The following day, on March 4, 1999, Davis's time entry indicates that he

contact with individuals who could potentially provide information about where and with whom Syed was on the day Hae Min Lee went missing. Within ten days of Syed's arrest, the original defense investigator had interviewed or tried to interview six individuals:

a) Steven Mills (interviewed March 3, 1999). As reported in his time entry for that day, Davis "drove the area of Woodlawn High and Leakin Park, Balt. Co. Library, Interviewed Wackenhut Off. Steven Mills, interviewed Coach Michael Sye." App-065. The State located Mills who testified at the hearing. He confirmed he worked as a security officer for Wackenhut, a private security firm, that he was employed by them in 1999, and that he was assigned to the Woodlawn Public Library both when Hae Min Lee went missing (January 1999) and when the billing summary indicates he was interviewed by Syed's private investigator (March 1999).

b) Coach Michael Sye (interviewed March 3, 1999). Wilds testified that Syed wanted to be dropped off at track practice because "he needed to be seen," (T. 2/4/00 at 142), and Syed told his attorneys "he remembers informing his coach that he had to lead prayers on Thursday." App-047. At trial, Coach Sye testified for Syed as part of the track practice alibi, but also corroborated Wilds' testimony in the process.

c) Nisha Tanna (interviewed March 8, 1999). According to detectives' notes, Tanna told police she remembered Syed getting a cellphone in mid-January, calling her a "day or two after he got cellphone," and "hand[ing] phone to Jay to talk to me." App-116–17. Tanna told Syed's brother the same thing. At trial, Tanna testified for the State, corroborating Syed's cellphone records and the testimony of Wilds.

d) Stephanie McPherson (interviewed March 10-11, 1999). During Davis' first interview with McPherson, she did not recall speaking to Syed, but, according to Davis's notes, told Davis that Wilds, her boyfriend, had firsthand knowledge of Lee's murder and had told her that Syed killed Lee. App-135–37. A second interview took place with McPherson on March 11, where Davis wrote: "McPherson advised PD Davis that she now remembers speaking to Jay and Adnan on January 13, 1999 between 4:15 and 5:30 p.m. She advised that she called Adnan on his cell phone and Jay was with him at the time." App-061.

"met and interviewed Adnan." It is unclear whether the March 3, 1999 meeting was with Adnan Syed or with his father, Syed Rahmen, who is sometimes referred to as Mr. Syed in the defense file.

e) Yasser Ali (interviewed March 10, 1999). At trial, the State called Ali to testify. He was able to confirm that his phone number corresponded to two outgoing calls on Syed's cellphone records for January 13, 1999 (6:59 p.m. and 10:02 p.m.), but had no specific recollection of either. (T. 2/3/00 at 79-82).

f) Jay Wilds (attempted interviews on March 10, 1999 and September 3, 1999). According to the billing summary, Davis also went to Wilds' place of employment on March 10. There is no indication whether Davis made contact with Wilds on that day, but a later note from Syed suggested that Wilds declined to speak to Davis on a subsequent visit. App-060, 065.

Gutierrez was not retained by Syed until early April 1999. Syed's mosque screened candidates and conducted interviews of three attorneys, before deciding that Gutierrez was the best choice. (T. 10/11/12 at 84-85, 98-99). Gutierrez was so coveted in fact that Syed fervently opposed the State's motion to remove her as his attorney in July 1999. The State had requested disqualification on the ground that she already represented two grand jury witnesses, who might testify against Syed at trial. (T. 7/9/99). Another attorney, Michael Millemann, represented Syed for the sole purpose of these disqualification proceedings. He filed a response to the State's motion in which he vigorously advocated for Syed's right to retain Gutierrez: "As the prosecutor in this case knows full well, Defense Counsel in this case will provide zealous and independent representation to Defendant. Indeed, *this* is what the State fears. It has filed its Motion to deny, not protect Defendant's right to zealous and independent representation." Def's Response to State's Mot. to Disqualify, at 4.

Consistent with an impassioned written plea from Syed himself, later that month, the court denied the State's motion and granted Syed his counsel of choice: Cristina Gutierrez. (*See* T. 7/23/99). Gutierrez and her team spoke several times with Syed's

original defense team, and Davis stayed on to assist Gutierrez as an investigator all the way through trial. (T. 10/25/12 at 8-32); App-062–64.

Gutierrez's decisions concerning an alibi defense were both informed and limited by facts she discovered while representing Syed—information from her own investigation, notes from the investigation of her predecessors, and evidence provided by the State in discovery.

To narrow the timeframe for which the defense had to establish an alibi, Gutierrez sent to the State a written discovery demand: "15. All information regarding when alleged victim was killed. Defendant can't possibly mount a defense or determine if an alibi disclosure is needed without being on notice of the alleged time of death." App-126–30. This was Gutierrez's initial correspondence with the State (July 7, 1999) after she had survived the State's motion to disqualify.

On July 8, 1999, the State responded, "15. To the best of the State's information, the victim was murdered the afternoon of the day she was reported missing, shortly after she would have left school for the day, January 13, 1999. If further investigation narrows the time down, the State will provide that more specific time to the defense." The State did not provide anything more prior to trial.

During the course of her pretrial investigation, Gutierrez also learned information that was inconsistent with Syed speaking with McClain at the Woodlawn Public Library on the afternoon of January 13. In Syed's own accounts of that day—to police and his own attorneys—at no time did Syed mention being at the public library, before or after his memory was "fortified" by McClain's letter. (T. 10/25/12, 26-28). For example, an

internal memorandum summarizing an August 21, 1999, interview stated that Syed "believes he attended track practice on that day because he remembers informing his coach that he had to lead prayers on Thursday." App-047. At the bottom of this memo is a note indicating that Syed also provided "a handwritten account of his recollection of his whereabouts on Jan 13." The accompanying handwritten page appears to be Syed's description of his day with a number of details of what happened in certain classes, when he left to drop off his car to Wilds, where and with whom he had left his cellphone, what time he returned, and even a reference to remembering that he arrived a few minutes late to his last class "cause it took some time in the guidance office." App-048. After school ended at 2:15 p.m., however, the rest of the page, like Syed's memory as to what he did next, is blank. *Id.*

Based on conversations with Syed in preparing for trial, Syed's defense also learned that Syed and Lee frequented the Best Buy parking lot, the very place where Syed had been accused of murdering Lee sometime between school and track practice. According to another memorandum in the defense file addressed to Gutierrez, on the topic of where Syed and Hae Min Lee had been intimate, Syed reported: "They also frequented the *Best Buy parking lot* next to Security Square Mall (this was their designated spot when school started)." App-131–34 (emphasis in original). He told his defense team that "[o]n average they saw one another 4,5,6 times a week and . . . [s]ince Hae was responsible for picking up her niece after school, they would have sex in the Best Buy parking lot close to the school after school," and that Hae would then "leave to get her niece." App-131–34.

The location of Syed's and Lee's afterschool meetings was not a secret outside the defense team including individuals with whom detectives had spoken. For example, Ju'uan Gordon—described by Syed's brother, according to an internal defense memo, as Syed's "best friend outside of the muslim community," (App-046)—told police that Syed and Lee frequented the Best Buy parking lot. App-114–15, 123–25.

Also in Gutierrez's possession were numerous pieces of information that raised concerns that Syed and McClain had communicated beyond the two letters McClain purported to have written and mailed to Syed within 48 hours of his arrest. Several items in particular—including some documents the State only saw after gaining access to Gutierrez's file two weeks before the February 2016 hearing, along with information that came out during the course of the remand—contain troubling indicia of possible coordination or collusion. For ease of explication and consistency, the State incorporates the summary of the facts set forth in its Conditional Application for Limited Remand.[2]

For Gutierrez, the development of an alibi defense was no afterthought but a significant and explicit aspect of the many avenues of defense her defense team explored and pursued. In fact, on a detailed defense team task list, (App-53–58)—which includes an "urgent" entry about making a "*determination* regarding alibi" and contains handwritten notes that refer to school, track practice, and the mosque. App-056, emphasis added). On the same task list, within a section of "maps" corresponding to locations of interest is an entry for the Woodlawn Library separate from maps for the high school and

[2] Of additional note, contained in an undated handwritten note from Syed's original defense attorneys is the following statement: "Letter to Rhamens [*sic*]—Talk to people to get information not to relay private or protected information." App-111.

the track field. App-056–58. The defense's efforts ultimately generated an alibi notice that listed 80 witnesses and covered Syed's whereabouts from the time he left school until much later in the evening. Memoranda from the defense file confirm that, between the time the alibi notice was provided to the State and the commencement of trial, Gutierrez and her team obtained phone numbers, made contact, and spoke to a number of these witnesses. *See, e.g.*, App-139–46. As the State pointed out in its opening brief last year:

> Gutierrez also pursued an alibi defense at trial, through subtle cross-examination of witnesses presented by the State, by substantiating a reliable routine that Syed followed every day, i.e., attendance at school followed by track practice followed by services at the mosque, and by calling to testify for a specific alibi Syed's father . . . who asserted that on the evening of Lee's disappearance he went to the mosque with his son at approximately 7:30 p.m. . . . Importantly, the trial court agreed to give an alibi instruction to the jury, thus finding that an alibi defense had been generated by the facts established by Gutierrez at trial. . . . calling Coach Sye as well as Syed's father, Mr. Rhamen. [*sic*]

Brief of Appellee at 12-13 (May 6, 2015) (citations omitted).

STANDARD OF REVIEW

This Court reviews a post-conviction court's decision regarding whether to reopen a post-conviction proceeding for abuse of discretion. *State v. Adams-Bey*, 449 Md. 690, 702 (2016). The post-conviction court's "resolution of questions of law," however, is reviewed by this Court "without deference." *State v. Sanmartin Prado*, 448 Md. 664, 679 (2016). Regarding ineffective assistance of counsel claims, this Court reviews the post-conviction court's factual findings for clear error, but must "make an independent analysis to determine the ultimate mixed question of law and fact, namely . . . the reasonableness of counsel's conduct and the prejudice, if any." *Id.*

ARGUMENT

APPELLANT'S REPLY

The court erred in even considering Syed's cellphone claim and misapplied the Sixth Amendment in granting relief. Syed now asks this Court to approve a decision by the post-conviction court that defied both reason and its authority. The court disregarded the context and text of the order allowing a limited remand, ignored the procedural restrictions put in place precisely to avoid the piecemeal litigation embodied by Syed's serial petitions, and significantly expanded and contorted the Sixth Amendment. Each of the answers given by Syed in his latest response is unconvincing. They misstate governing precedent, they overlook key facts and features of relevant cases, and they unabashedly ask that this case become the exception that swallows the rule.

I. SYED'S LOGIC REMOVES ALL LIMITS ON LIMITED REMANDS

The remand in this case was inspired by a single, specific event: the unforeseen arrival of an affidavit by Asia McClain. This Court's order authorizing a limited remand provided that the purpose of the remand was tethered to McClain. Syed's reasoning in his response removes all limits on the scope of the limited remand—from those expressly contemplated by the order itself to those fixed by statute, which a remand order, no matter how it is written, could not override.

First, Syed contends that when this Court instructed the post-conviction court to conduct further proceedings, it intended thereby to grant the court *carte blanche* authority to hear any claim—new or old—that it deemed in the interests of justice, including (1) claims that Syed could have raised in prior proceedings and (2) claims totally

unrelated to the *raison d'etre* for the Court's limited remand, *viz.*, the previously unavailable testimony from McClain. Syed attaches talismanic significance to the phrases "deems appropriate" and "among other things," suggesting that these magic words convert what this Court expressly described as a limited remand into a general one. This position does not withstand scrutiny. Syed accuses the State of selectively quoting the Court's limited remand order, but in fact it is Syed who advances an argument divorced from the broader language and context of this Court's limited remand order. Syed's position also contravenes Maryland's jurisprudence on the character and purpose of limited remands.

Maryland Rule 8-604(d) governs the remand of a case. It provides: "If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court." Maryland Rule 8-604(d)(1). The Rule also controls the scope and manner of proceedings on remand:

> In the order remanding a case, the appellate court *shall state the purpose for the remand.* The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action *in accordance with the opinion and order of the appellate court.*

Id. (emphasis added).

Consistent with this Rule, and after an extensive discussion of the significance of the new McClain evidence, this Court granted a limited remand (emphasis added):

> The purpose of the stay and the remand is to provide Syed with the opportunity to file with the circuit court a request, pursuant to § 7-104 of the Criminal Procedure Article of the Md. Code, to re-open the

> previously concluded post-conviction proceeding *in light of Ms. McClain's January 13, 2015, affidavit, which has not heretofore been reviewed or considered by the circuit court.* Moreover, *because the affidavit was not presented to the circuit court during Syed's post-conviction proceedings, as it did not then exist, it is not a part of the record* and, therefore, this Court may not properly consider it in addressing the merits of this appeal. This remand, among other things, will afford the parties the opportunity to supplement the record with relevant documents and even testimony *pertinent to the issues raised by this appeal.*
>
> We shall, therefore, remand the case to the circuit court, without affirmance or reversal, *to afford Syed the opportunity to file such a request* to re-open the post-conviction proceedings. In the event that the circuit court grants a request to re-open the post-conviction proceedings, the circuit court may, in its discretion, conduct any further proceedings it deems appropriate.

The purpose of the remand order was to give Syed a chance to file a motion to reopen "in light of" McClain's 2015 affidavit. Certainly, the post-conviction court had latitude as to what proceedings to hold—written submissions alone, proffers by counsel, hearings with witnesses, affidavits and argument only, etc. If additional witnesses were to come forward to corroborate or impeach McClain's alibi for Syed, such evidence could also reasonably be viewed perhaps as falling within the sound discretion of the post-conviction court to evaluate. This Court's remand order cannot, however, reasonably be construed as an open invitation to litigate unpreserved issues altogether unconnected to McClain and the issue of an alibi. *See, e.g., United States v. Husband*, 312 F.3d 247, 251-52 (7th Cir. 2002) ("The court may explicitly remand certain issues exclusive of all others; but the same result may also be accomplished implicitly…'[T]he scope of the remand is determined not by formula, but by inference from the opinion as a whole.'… For example '[i]f the opinion identifies a discrete, particular error that can be corrected

on remand without the need for a redetermination of other issues, the district court is limited to correcting that error.'" (internal citations omitted)).

Syed seeks to exempt from ordinary procedural rules and the defined scope of the order issues "arising for the first time on remand." But *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001) and *Baltimore County v. Baltimore County Fraternal Order of Police*, 220 Md. App. 596, 662 (2014), *aff'd*, 449 Md. 713 (2016), lend no succor to Syed's position. First, that a limited remand typically does not restrict "issues arising for the first time on remand" is a trivial, if not tautological, point, for any issue "arising for the first time" must nonetheless fall within the proper scope of the remand order and must comport with governing statutes and procedural rules. Also, Syed's cellphone claim arose for the first time after remand only because Syed raised it for the first time after remand, not because of new evidence or a recent appellate decision. Moreover, on the very same page of *Morris* cited by Syed, the Seventh Circuit explained that "parties cannot use the accident of remand as an opportunity to reopen waived issues," which is precisely what Syed seeks to do here. 259 F.3d 894, 898 (citing *United States v. Jackson*, 186 F.3d 836, 838 (7th Cir.1999) (citations omitted)).

Ironically, both *Morris* and *Baltimore County* implicate a legal principle that actually favors the State here, *viz.*, the law of the case doctrine. Like Maryland Rule 8-604(d), this doctrine is a rule of appellate procedure designed to prevent piecemeal litigation. In the seminal Maryland case on this issue, the Court of Appeals explained:

> It is the well-established law of this state that litigants cannot try their cases piecemeal. They cannot prosecute successive appeals in a case that raises the same questions that have been previously decided by this Court in a

> former appeal of that same case; *and, furthermore, they cannot, on the subsequent appeal of the same case raise any question that could have been presented in the previous appeal on the then state of the record, as it existed in the court of original jurisdiction.* If this were not so, any party to a suit could institute as many successive appeals as the fiction of his imagination could produce new reasons to assign as to why his side of the case should prevail, and the litigation would never terminate. Once this Court has ruled upon a question properly presented on an appeal, *or, if the ruling be contrary to a question that could have been raised and argued in that appeal on the then state of the record*, as aforesaid, such a ruling becomes the 'law of the case' and is binding on the litigants and courts alike, unless changed or modified after reargument, and neither the questions decided nor the ones that could have been raised and decided are available to be raised in a subsequent appeal.

Fid.-Balt. Nat'l Bank & Trust Co. v. John Hancock Mut. Life Ins. Co., 217 Md. 367, 371-72 (1958) (emphasis added); *see also Baltimore Cnty.*, 220 Md. App. at 658-59 ("As the Court of Appeals made plain in [*John Hancock*]…'neither the questions decided [by the appellate courts] *nor the ones that could have been raised and decided* are available to be raised in a subsequent appeal.'" (emphasis in *Baltimore Cnty.*)).

In short, Syed attempts to do precisely what Maryland Rule 8-604(d) and the law of the case doctrine preclude, attempting to assert a claim that exceeds the scope of this Court's limited remand and that could have been raised and decided in a prior proceeding. If an appellate court endorsed Syed's view, remanded cases would be limited only by the creativity and imagination of counsel. *See John Hancock*, 217 Md. at 372 ("If this were not so, any party to a suit could institute as many successive appeals as the fiction of his imagination could produce new reasons to assign as to why his side of the case should prevail, and the litigation would never terminate.").

Second, Syed caricatures the State's position by pretending that it argues that an interests of justice finding must fall within a "prescribed template." Brief of Appellee at 15. The State agrees that the cases referenced in a footnote in *Gray* were examples and not an exhaustive list. *Gray v. State*, 158 Md. App. 635, 648 (2004). They are illustrations, however, that are emblematic and representative of the underlying principle that cases should be reopened only when, for instance, new evidence, a development in the law, or misconduct justifies reopening a post-conviction proceeding. The point, however, is that the "interests of justice" standard must operate as a *standard*. Yet if, as Syed contends, the "interests of justice" standard is satisfied whenever his attorneys can conjure a "potentially meritorious" claim based on a decades-old record, despite there being no new evidence, no change in the law, no misconduct, and no other special circumstances, then the "interests of justice" standard amounts to no standard at all.

Third, Syed contends that because he styled his novel, unrelated claim as a "motion to reopen"—or, alternatively, because it could have been styled as a "supplement" to his motion to reopen—he should be allowed to circumvent the applicable 10-year limitations period imposed by UPPA and by this Court's imposition of a specific 45-day deadline for the motion to reopen approved by this Court. This argument elevates form over substance, and it is a stratagem the Court of Appeals has considered and rejected in *Arrington v. State*, 411 Md. 524 (2009), a case squarely on point.[3] *See id.* at 545 ("We decide today...that a petitioner may not assert, in a

[3] Other state appellate decisions are in accordance with Arrington. *See, e.g., Comm. v. Sepulveda*, 144 A.3d 1270, 1279 (Pa. 2016) ("[I]n the absence of permission from this

postconviction proceeding reopened under the authority of CP Section 8-201, claims that could have been, but were not, raised in the original postconviction proceeding, other than claims based on the results of the postconviction DNA testing.").

Specifically, Syed asserts that "the 10-year period prescribed by UPPA...applies only to petitions for post-conviction relief," that "[m]otions to reopen are not subject to a deadline," and that the State loses because its "arguments require this Court to ignore the caption on his complaint" and to "re-characterize it as a second post-conviction petition." Brief of Appellee/Cross-Appellant at 16-17. Here, he echoes the petitioner in *Arrington*, who argued unsuccessfully that "[t]he [postconviction] [c]ourt erred because it misunderstood the difference between a second successive petition and a proceeding that is reopened. Once a postconviction proceeding is reopened, its status is that of an initial postconviction petition. In other words, it is as if the postconviction proceeding was never closed." *Id.* at 545, 547. After registering the "initial appeal" of this argument, *id.* at 547, the Court of Appeals rejected it. To do so, it examined, *inter alia*, the context of the overall statutory scheme, history, and purpose, as well as the waiver doctrine. *See id.* at 544-56. *Arrington* applies with equal force here.

Indeed, the General Assembly cannot have intended to incentivize every inmate to file a post-conviction petition before the 10-year period expires, even if he has no

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Court, a PCRA petitioner is not entitled to raise new claims following our remand for further PCRA proceedings."); *Duarte v. State*, 381 P.3d 608, 2012 WL 2191648, at *2 (Nev. 2012) ("[T]he issues raised by [the petitioner] in his supplemental petition are beyond the scope of the limited remand and do not relate back to the original petition."); *McGowan v. Bell*, 2006 WL 3831332, at *3 (Tenn. Crim. App. Dec. 21, 2006) ("The new claims, set out in the amended petition, were outside the remand instructions from this court and, thus, not properly before the habeas corpus court.").

colorable claim, merely to preserve the right to reopen under an "interests of justice" standard. Yet that is precisely the implication entailed by Syed's argument. Syed's construction of the UPPA is inconsistent with the statutory framework, case law, legislative history, and common sense.

II. SYED'S LATEST CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS LONG AGO WAIVED

In his defense of the post-conviction court's decision, Syed insists that ineffective counsel claims trigger the heightened waiver standard applicable to fundamental rights. He further reasons that the only precedent for this—*Curtis v. State*—remains relevant even though it has not once since been used to support the claim Syed now makes. Moreover, he argues that legislative inaction confirms its modern vitality. These responses are without merit.

Syed's first mistake is he conflates two distinct concepts—the right to be represented by counsel and the right to effective assistance of counsel—and on that basis extends the "intelligent and knowing" waiver standard to ineffective assistance claims.[4] To do so, Syed first cites to *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) to support the undisputed proposition that "[t]he right to counsel is a 'prime example' of a fundamental constitutional right." Brief of Appellee at 19. From there, Syed reasons that because the constitutional guarantee of effective assistance of counsel is derived from the

[4] Confirming the key distinction between the right to be represented by counsel and effective assistance is the difference between how putative violations are analyzed. In *United States v. Cronic*, 466 U.S. 648, 659 n. 25, 692 (1984), the Supreme Court established that prejudice is assumed where counsel is absent altogether, whereas actual prejudice must be shown to succeed on a claim of ineffective assistance of counsel.

fundamental right to be represented by counsel, the standard for waiving a post-conviction claim for ineffective assistance of counsel is the same as the standard for waiving representation all together.[5] This reasoning has found no support whatsoever in any case since *Curtis*.

Syed claims that other courts have "repeatedly reaffirmed" *Curtis*. But, it is revealing that none of the three cases Syed cites to validate the enduring relevance of *Curtis* actually consider the application of the "intelligent and knowing" standard to the waiver of ineffective assistance claims. *See* Brief of Appellee at 21. The principal case cited by Syed for this misguided proposition is *State v. Adams*, 406 Md. 240 (2008) (*overruled on other grounds*). *See* Brief of Appellant at 21. However, in finding that Adams did not waive an ineffective assistance claim, the court did not discuss the "intelligent and knowing" standard at all. *Adams*, 406 Md. at 292, 254. Nevertheless, Syed reasons that, because Adams was allowed to raise an ineffective assistance of counsel claim in a post-conviction proceeding, having failed to do so on direct appeal, Syed is similarly entitled to raise an ineffective assistance claim in a subsequent post-conviction proceeding, having failed to do so in his original petition. The difference, of course, is that a litigant is not required—in fact under Maryland law is generally not permitted—to raise ineffective assistance on direct appeal. *See Mosley v. State*, 378 Md. 548, 566 (2003) ("The rare instances in which we have permitted direct review are

[5] Also evidence of Syed's mistake is his consistent reference to cases that address right to counsel rather than ineffective assistance. *See, e.g.*, Brief of Appellee at 22, quoting dicta from *Robinson v. State*, 410 Md. 91 (2009), a case concerning the right to counsel, not ineffective assistance of counsel

instructive, because they indicate our willingness to entertain such claims on direct review only when the facts in the trial record sufficiently illuminate the basis for the claim of ineffectiveness of counsel."). So, there is nothing noteworthy about a court authorizing a petitioner to raise ineffective assistance for the first time in his original post-conviction petition even where it was not litigated on direct appeal.

The other two cases cited by Syed are also inapposite. Neither *State v. Smith*, 443 Md. 572 (2015), nor *Oken v. State*, 343 Md. 256 (1996) involved waiver of an ineffective assistance claim. *Smith* simply did not consider an ineffective assistance of counsel claim. *See* 443 Md. 572, at 584 n.4, 608 ("Smith raised several claims in the Petition, including that Suissa had provided ineffective assistance of counsel in misadvising Smith concerning how her guilty plea would affect her immigration status.... The court's ruling on that claim is not before us."). Additionally, *Smith* recognized that "[t]he intelligent and knowing waiver standard in Section 645A (c)" applies only to situations that require a litany with the defendant."

Additionally, Syed invokes legislative inaction to support his view that *Curtis* stands for the proposition that ineffective assistance claims can only be waived knowingly and intelligently. Thus, he argues that because the legislature has not expressly disavowed the rule that Syed erroneously reads into *Curtis*, it has tacitly endorsed it. For reasons set forth in the State's opening brief, the State respectfully submits that *Curtis* has never applied outside the context of total abandonment of counsel. But, to address Syed's specific response concerning the legislature, if there were a case in which a litigant had sought to use *Curtis* to impose the intelligent and knowing

standard to the waiver of an ineffective assistance claim, as Syed now does for the first time in 40 years, legislative inaction could be relevant. However, the State is not aware of such a case. Thus, no significance should be attributed to the legislature's failure to close a door that no petitioner, until now, has tried to open.

A. Courts have Rightly and Repeatedly Focused on the Need for an "On the Record" Colloquy as a Prerequisite to Applying the "Intelligent and Knowing" Standard

Without support, Syed contends that "the use of a colloquy does not define whether a right is sufficiently fundamental to require intelligent and knowing waiver. It is merely one means by which a court can determine whether a right already recognized as fundamental has been waived." However, Syed has not and cannot diminish the importance of this colloquy. In *Schneckloth*, the Supreme Court elaborated on the situations where the *Johnson v. Zerbst*, 304 U.S. 458 (1938), requirement of an "intelligent and knowing" waiver could properly be applied:

> Hence, and hardly surprisingly in view of the facts of *Johnson* itself, the standard of a knowing and intelligent waiver has most often been applied to test the validity of a waiver of counsel, either at trial, or upon a guilty plea. And the Court has also applied the *Johnson* criteria to assess the effectiveness of a waiver of other trial rights such as the right to confrontation, to a jury trial, and to a speedy trial, and the right to be free from twice being placed in jeopardy. Guilty pleas have been carefully scrutinized to determine whether the accused knew and understood all the rights to which he would be entitled at trial, and that he had intentionally chosen to forgo them. And the Court has evaluated the knowing and intelligent nature of the waiver of trial rights in trial-type situations, such as the waiver of the privilege against compulsory self-incrimination before an administrative agency or a congressional committee, or the waiver of counsel in a juvenile proceeding.

412 U.S. at 237-38 (internal citations omitted). This colloquy is the common feature among examples where the "intelligent and knowing" standard is properly applied. *Id.*

Syed's claim that the State does not cite "to any decision calling into question *Curtis*'s holdings" studiously ignores the repeated statements by the Court of Appeals stressing the importance that *Curtis* be limited to situations involving on-the-record colloquies. The State directed this Court to *four such cases* discussing limiting the reach of *Curtis*, but Syed engaged with none of these discussions in his Brief of Appellee. These cases stressed how the "intelligent and knowing" standard should only be applied to "situations which require a litany with the defendant," *Holmes v. State*, 401 Md. 429, 457-58 (2007) (*superseded by statute on other grounds*), so that there will be record evidence "so as to be available for appellate review." *Martinez v. State*, 309 Md. 124, 133 n.8 (1987) (quoting *Countess v. State*, 286 Md. 444, 454 (1979)); *see also In re Blessen H.*, 392 Md. 684, 699-700 (2006). Syed has ignored these cases and entirely failed to address the significance of on-the-record colloquies in the waiver analysis.

B. The Standard Applied in *Curtis* Must be Narrowly Applied to Restrict the Limitless Availability of Claims in Post-Conviction Proceedings

Syed fails to reconcile the legislative history of the UPPA following *Curtis*. The reduction in the number of allowable petitions for post-conviction relief to two in 1986 and then to one in 1995 explains why *Curtis* has never been invoked to justify reviewing an unpreserved claim of ineffective assistance of counsel. This legislative narrowing reinforces the aspiration of finality in post-conviction proceedings and was meant to forestall the "chaotic" results *Curtis* feared. 284 Md. at 149.

Curtis itself explicitly limited its application of the "intelligent and knowing" standard to "only in those circumstances where the waiver concept of *Johnson v. Zerbst* and *Fay v. Noia* was applicable. Other situations are beyond the scope of subsection (c)." 284 Md. at 149. The Court of Appeals viewed this potential undermining of finality as a serious concern, devoting substantial discussion to its admonition against an over-application of the standard:

> *If, in defining "waiver" for purposes of the Post Conviction Procedure Act, the General Assembly intended to make subsection (c), with its "intelligent and knowing" definition, applicable every time counsel made a tactical decision or a procedural default occurred, the result could be chaotic.* For example, under such an interpretation of the statute, for a criminal defendant to be bound by his lawyer's actions, the lawyer would have to interrupt a trial repeatedly and go through countless litanies with his client. One of the basic principles of statutory construction is that a statute should not be construed to lead to an unreasonable or illogical result. It is hardly conceivable that the Legislature, in adopting s 645A(c), could have intended to use the word "waiver" in its broadest sense, thereby requiring that the "intelligent and knowing" standard apply every time an issue was not raised before.

Id. (emphasis added) (internal citations omitted).

Applying the heightened waiver standard only to circumstances where an on the record colloquy takes place ensures that an unreasonable and illogical result does not occur. If ineffective assistance claims are entitled to the knowing and intelligent waiver standard, then a criminal defendant could have as many bites at the apple as he had the appetite and imagination to take. That is precisely the unreasonable scenario Syed encourages and that the postconviction court's decision invites.

In the 1970s when *Curtis* was decided, ineffective assistance of counsel claims could be filed an unlimited number of times. Under the modern statutory landscape,

however, applying the intelligent and knowing standard to ineffective counsel claims would reopen floodgates that have twice been closed by the legislature and allow every criminal conviction to be reopened based upon an assertion of ineffective assistance coupled with a claim that the attorney and client did not discuss the alleged error. For this Court suddenly to imbue *Curtis* with the power to revive a fully unpreserved claim would engender precisely the "chaotic" result feared by *Curtis*. 284 Md. at 149.

III. GUTIERREZ'S CHALLENGE TO THE STATE'S CELLPHONE EVIDENCE MORE THAN SATISFIED THE SIXTH AMENDMENT

Syed does not dispute that neither party has located an example where another attorney or expert has pursued or proposed the novel attack that Syed now claims is constitutionally required. Nor has Syed, in attempting to satisfy his burden, given a reason why no such example has surfaced. No one has asserted, for instance, that AT&T cellphones were rare at the time, or that the reason why certain calls were supposedly unreliable has receded or been resolved. Syed has not suggested that the unreliability issue was specific or unique to his particular handset or brand of phone (nor could Syed plausibly claim this, given that the disclaimer he emphasizes sits at the bottom of boilerplate fax cover sheets that accompanied all transmissions, no matter the recipient, no matter the content).

Indeed, the degree of novelty of Syed's proposed attack on incoming calls is reflected in the fact that none of Syed's attorneys suggested or spotted this issue until now, even though the relevant materials have been indisputably in their custody since the

time of trial. Moreover, Syed has only presented one expert some 15 years after trial to support his interpretation.

Despite all this, Syed asserts that Gutierrez was ineffective by claiming that counsel overlooked an "unambiguous" warning about the reliability of some calls. Brief of Appellee at 26. The problem is that Syed has to oversimplify a technical issue where experts vigorously disagree to suggest that the warning was "unambiguous."

After all, the disclaimer was about the reliability of "location" data. There was a column titled "location," and if Syed were simply asserting that defense counsel should use a disclaimer about "location" data to challenge testimony about data from the "location" column, Syed could conceivably claim that the warning was clear. But a crucial, additional step is needed. Syed believes Gutierrez should have challenged data in a different column that was titled "cell site" on the assumption that this data too, not just the data in the "location" column of a highly technical report, was subject to the same warning. To cross that particular bridge, *i.e.*, to substantiate that specific assumption, Syed found one expert some 15 years after the fact. But without that expert contribution, one cannot cross the bridge. Back in 1999, no one had ever claimed that the warning about a subset of "location" data applied to anything besides what was found in the column with the corresponding title, "location." Thus, the controversy arose only once an expert came forward, supplied the necessary assumption, and crossed that key inferential bridge. That is exactly what *Kulbicki v. State*, 440 Md. 33 (2014), precludes as a basis for ineffective assistance of counsel claims. *Id.* (holding that counsel is not required to anticipate doubts whose seeds are planted but will not grow into general

consensus for years to come and thus, "[c]ounsel did not perform deficiently by dedicating their time and focus to elements of the defense that did not involve poking methodological holes in a then-uncontroversial mode of ballistics analysis").

A simple analogy perhaps illustrates the point. Imagine there were information about weather in a report that had a warning about "temperature" data, where the disclaimer stated that "temperature" data was reliable for daytime but not nighttime readings. Now assume there are two columns on a technical report, one titled "temperature" and another titled "probability of snowfall." While the disclaimer may clearly apply to the values in the temperature column, it does not constitute an "unambiguous warning" with respect to the "probability of snowfall," even though there may be correlation or overlap between the data in those two columns, especially if different meters are used to collect the data that appears in those columns. In the analogy, "temperature" is to "location" what "probability of snowfall" is to "cell site"; and different meters as the basis for temperature and snowfall readings is the same as the switches and towers that supply different data for "location" and "cell site" columns, respectively. An expert might come forward and establish that the disclaimer applies not only to the temperature values but also to snowfall readings, but another expert might come forward and disagree. And where there is such a disagreement, Syed cannot assert that there is an unequivocal warning, nor is he permitted after *Kulbicki* to conclude that it was constitutional error not to cross examine the expert on that basis.

A. The Post-Conviction Court Did Not Apply the Presumption of Reasonableness to Which Gutierrez's Performance was Entitled

The post-conviction court erred in failing to apply *Strickland*'s presumption of reasonableness, 466 U.S. at 689, and Syed entirely fails to address this presumption in his Brief of Appellee. This presumption is particularly strong in the context of cross-examination. *See Henry v. State*, 772 S.E.2d 678, 682 (Ga. 2015) ("[D]ecisions about what questions to ask on cross-examination are quintessential trial strategy. . . and will rarely constitute ineffective assistance of counsel.").

Gutierrez's representation is starkly different from the cases Syed cites as supposedly comparable examples of ineffective performance. If anything, the cases cited by Syed demonstrate the extreme deficiencies in performance necessary before a court finds that the presumption of reasonableness has been overcome.

For example, in *Williams v. Washington*, 59 F.3d 673 (7th Cir. 1995), the trial attorney "did not call any witnesses or produce any evidence." *Id.* at 676. He "also failed to take any significant action either before or after trial. He did not move to discover any of the State's evidence. He did not file any pretrial motions." *Id.* In *Driscoll v. Delo*, 71 F.3d 701 (8th Cir. 1995), the district court:

> determined that Driscoll received ineffective assistance of counsel because his trial counsel (1) did not adequately prepare for the introduction of blood identification evidence at trial and failed to adequately cross-examine the state's serology expert on the crucial issue of blood identification testing methodology, (2) failed to adequately cross-examine a state eyewitness regarding prior inconsistent statements, (3) failed to object to repeated statements by the prosecutor to the jury that minimized the jury's sense of responsibility in recommending a sentence of death, and (4) did not request a jury instruction on the lesser-included offense of second degree felony murder.

Id. at 704. Even the allegations of poor performance in this case are far different than those cited by Syed.

B. Gutierrez's Representation Far Exceeded the Standards Articulated in Other Cases Where Defective Performance Has been Found

In spite of Gutierrez's vigorous attack on the State's evidence, Syed describes this as a "total failure to investigate the evidence that formed the crux of the State's case." Brief of Appellee at 28 n. 5. The reasonableness of trial counsel's preparation is "entitled to deference," *United States v. Berkowitz*, 927 F.2d 1376, 1382 (7th Cir. 1991), and Gutierrez's preparation far exceeded this requirement. Her team prepared a comprehensive compilation and analysis of records of Syed's cellphone use on January 13, 1999, listing times, dialed numbers, possible names associated with each number, call duration, cell site codes, and corresponding locations. This document also integrated information from Syed's cellphone records and the State's disclosure relating to Waranowitz's oral statement, demonstrating that Gutierrez and her team were actively scrutinizing this evidence. Brief of Appellant App-244–47. Gutierrez lodged a continuing objection after lengthy argument on whether she had received maps prepared by Waranowitz. (T. 2/8/00 at 82). She also prompted Waranowitz to acknowledge that actual cell site coverage falls short of ideals and that the network is flawed based upon his handling of customer complaints and his adjusting tower locations to optimize performance. (T. 2/9/00 at 45-53, 80-82).[6] Gutierrez bombarded Waranowitz on cross

[6] While Syed points out that a limiting instruction was not given as offered by the court, Brief of Appellee at 37-38, the prosecution did not discuss in closing arguments the issues regarding which the limiting instruction would have been given. (T. 2/25/00 at 47-

with questions about differences between the circumstances under which he performed his tests and those that existed when Syed used his cellphone on January 13, 1999, compelling the State's expert to acknowledge using a different phone than Syed's, under different seasonal and weather conditions, at different times on different days, and in a different order than Syed's records indicated. (T. 2/9/00 at 94-96, 119, 138, 148). Waranowitz also conceded on cross that Nokia and Erickson phones perform somewhat differently and that he had not tested or even seen Syed's actual phone. (T. 2/9/00 at 93-96, 143-144, 148).

Gutierrez separately obtained Syed's cellphone billing records, Brief of Appellant App-249–67, and her file contained a handwritten list of the dialed numbers appearing on Syed's billing records, along with what appears to be a manual tabulation of how many times each number was called and, in some instances, a name associated with that number, *id.* at App-268–75. Additionally, Gutierrez's private investigator had, independent of the State, contacted AT&T and was told he could obtain with a subpoena "information as to which cellular phone tower Mr. Syed's cell phone was in during several calls that were placed on the requested dates." *Id.* at App-248. Given all Gutierrez did to fully and vigorously examine the cellphone evidence, Syed cannot now credibly seek to override the presumption that her preparation was reasonable.

85, 116-32) ("The most important thing for you to remember about Jay Wilds' testimony is that it does not stand alone. It is corroborated, it is supported by what the witnesses say, by what the physical evidence says, and by what those cell phone records say."). Thus, Gutierrez's objections seemingly succeeded in prompting the prosecution to themselves limit their argument about the cellphone evidence, obviating the need for a limiting instruction from the judge.

In addition to *Williams* and *Driscoll*, discussed *supra* Part III.A, Syed also cites to *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Brief of Appellee at 32. In that case, the trial record:

> clearly reveals that Morrison's attorney failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bedsheet into evidence. Counsel was unapprised of the search and seizure because he had conducted no pretrial discovery.

Id. at 385. Gutierrez, by contrast, compiled voluminous records through discovery, witness interview, and the use of private investigators. (T. 10/25/12 at 8-32).

CROSS APPELLEE'S RESPONSE

IV. GUTIERREZ WAS FAR FROM INEFFECTIVE WITH RESPECT TO DEVELOPING AN ALIBI DEFENSE

It is easy to see how a seasoned attorney would read McClain's letters, starting with the letter dated March 1, 1999, as a thinly disguised offer to manufacture a false alibi. In that letter, conspicuously devoid of details, McClain wrote, "I hope that you're not guilty and I hope to death that you have nothing to do with it. If so I will try my best to help you account for some of your unwitnessed, unaccountable lost time (2:15 - 8:00; Jan 13th)." App-40–41. In its original decision, the post-conviction court reached exactly that conclusion:

> In the first letter, sent on March 1, 1999, Ms. McClain recounted that she saw Petitioner in the public library on January 13, 1999, but did not state the exact time during which the encounter took place. The only indication of Ms. McClain's potential to be an alibi witness for Petitioner is in Ms. McClain's offer to "account for some of [Petitioner's] un-witnessed, unaccountable lost time (2:15 - 8:00; Jan 13th)." . . . To require counsel to interpret such *vague language* as evidence of a concrete alibi would hold counsel to a much higher standard than is required by

> *Strickland.* In addition, trial counsel could have *reasonably concluded that Ms. McClain was offering to lie in order to help Petitioner avoid conviction.*

Memorandum Op. I at 11-12 (emphasis added). If a reasonable judge, upon inspecting the letter, could reach this conclusion, so too could any reasonable defense attorney.

Cristina Gutierrez is deceased. So is her lead investigator. But several others—including Syed's original attorneys who represented him when the McClain letters were supposedly sent and received—could have been called to share their recollection for what they did to develop an alibi and why neither McClain nor the public library was incorporated into the alibi defense at trial. To find defective performance in this circumstance was error by the court. This Court can, of course, affirm the denial of relief on prejudice grounds alone—as the lower court did—but correction of the post-conviction court's error with respect to defective performance would also be warranted in the circumstances of this case.

The record before the post-conviction court is now clear that within a week of his arrest, Syed's original attorneys had in fact preliminarily investigated Syed's presence at the Woodlawn Public Library. The constitutional guarantee of effective representation did not require Gutierrez to later revisit this facet of Syed's purported alibi by further pursuing McClain, particularly once Syed's planned line of defense—that he and Wilds were together that afternoon and evening—was compromised by Wilds' cooperation with the State. The individuals to whom Syed first directed his investigator were seemingly part of Syed's original alibi defense, but without Wilds on their side, those witnesses

proved more helpful to the State as corroborative of Wilds' testimony than components of Syed's alibi.

Even after remand, Syed still has not presented a coherent account of when and how information was given to Gutierrez. Syed first insisted he received McClain's letters "within the first week of being arrested" and "immediately" gave them to Gutierrez. (T. 10/25/12 at 28, 31). But two other attorneys represented Syed at that time, *see id.* App-065, there is nothing in the memos of those original attorneys that reference McClain, App-066–110, and Gutierrez did not become Syed's attorney until six weeks after his arrest, *see id.* App-062. The trouble is Syed was not represented by Gutierrez during that timeframe.

Syed now appears to concede that fact, brushing over when counsel learned of McClain and emphasizing a defense note dated in July 1999 rather than the now curious testimony of Syed and McClain, who jointly maintain that both of McClain's letters were composed, mailed, received by Syed, and delivered to Gutierrez the very first week Syed was arrested. Now, Syed's conditional application, as well as his cross-appeal, state that Gutierrez received the information five months before trial, *i.e.*, in July, not in March soon after Syed's arrest. *See* Conditional Application for Leave to Cross Appeal at 4, 9. This is no small detail. The difficulty in specifying what was known when and by whom betrays why second-guessing judgments by trial counsel is a treacherous endeavor discouraged by the courts.

Contained in the record before the post-conviction court were numerous red flags that would have justified avoiding McClain and the Woodlawn Public Library as part of

an alibi defense. But it was not the State's burden in the post-conviction context to establish the significance of those risks; it was Syed's burden to prove that risks manifest in the record were required to be assumed. This Syed could not accomplish, for pursuit of an alibi that placed Syed at the library immediately after school carried no less than three potentially lethal risks for Syed's defense.

First, the alibi proposed by McClain threatened to suggest that Syed had lied to police and had gone to the public library, a place no one had ever associated with Syed. There are a number of problems with the alibi proposed by McClain, especially compared to the alibi strategy Gutierrez adopted based on habit and routine—Syed stayed at Woodlawn High School until track practice after which he attended prayers at his mosque. This alibi conformed with what Syed had already told police. Conversely, pursuing the alibi proposed by McClain—that she and Syed spoke to one another at the public library that afternoon—risked producing another inconsistency with what Syed had told police (as well as his defense team) which could have been exploited at trial to undermine Syed's credibility. Specifically, according to detectives' interview notes, two high school employees, Virginia Madison and Cheryl Metzger, advised police that Syed was a "regular" at the high school library, that he went there "frequently," that he and the victim would visit there "often," and that the school library had computers with internet access. App-120–21, 122. Conversely, Gutierrez had no evidence—from Syed or anyone else (except McClain)—that Syed had ever visited the public library to check email or for any other purpose. Chasing an uncertain alibi witness that carried these potentially catastrophic risks is not an investment or tactic required by the Constitution.

Cf. David M. Epstein, *Advance Notice of Alibi*, 55 J. Crim. L. 29, 31 (March 1964) (observing that an alibi refuted in open court is worse than having no defense at all).

Second, the library alibi ran the risk of placing Syed at the public library with the victim at critical junctures. A review of Gutierrez's notes and her approach at trial also indicated that she identified and sought to exploit a weakness in the prosecution's case—it was unclear how Syed got into Lee's car the day she was killed. Two of its witnesses had told police that they had seen Hae Min Lee by herself soon after school on the day she went missing. According to notes from an interview in late March 1999, Inez Butler, a school employee, told police she saw the victim at around 2:30 p.m. App-118–19. Debbie Warren, a fellow student, also told Baltimore County police that she saw the victim at around 3:00 p.m. "by herself" and that "she was inside the school near the gym." App-113.

Gutierrez's notes confirmed she thought these facts created a wrinkle for the prosecution. Directly above where Gutierrez had written "Debbie Warren saw Hae at 3:00 pm," she wrote: "How did Adnan get in Hae's car." App-112 (emphasis in original). Thus, placing Syed at or near the public library, where students were regularly picked up and where Hae Min Lee could have picked up Syed, resolves a flaw Gutierrez intended to exploit.[7] Gutierrez and her team were also keenly aware of the difference between the school library and the public library and had learned special information from

[7] By the time of his second trial, Syed himself apparently perceived this same problem in the prosecution's case. App-051–52 ("Jay allegedly met him at the Best Buy parking lot around 3:30. *So how did Adnan get into her car or have Hae meet him*, kill Hae, pick her up drag her from the car to the trunk (how could he lift her??) between 2:15 and 3:30 with noone [sic] seeing him." (emphasis added)).

discovery and their own investigation that made an alibi centered on a visit to the public library—a deviation from Syed's usual routine at the very time when Syed and his victim were known to retreat to the location where he is accused of killing her—highly impracticable and dangerous. The post-conviction court pointed out that "the alibi notice does not specify which witness, if any, could have accounted for Petitioner's regular routine in between school and track practice." Memorandum Op. II at 22. The Defendant himself, however, had told Gutierrez's team what he often did during this time period. In this regard, Syed himself had "accounted for [his] regular routine in between school and track practice." Memorandum Op. II at 22.[8] And, if the jury learned about where Syed normally went between school and track practice, leaving the school would not place him at the public library—it would place him with the victim in the very location he was accused of killing her. Syed has provided no argument, no facts, and no law to explain why assuming such a risk was constitutionally required.

Third, pursuing the Asia McClain alibi exposes Syed to the risk of being accused of colluding with a witness to falsify an alibi. The State submitted that, with the knowledge and documents available to Gutierrez when she eventually became Syed's lawyer in April 1999, she could easily have detected in the letters—in particular in the

[8] Another internal defense memo from an interview between Syed's trials suggests that Syed himself connected the alleged location of the murder with the place he and Hae Min Lee would have sex: "Jay allegedly met him at the Best Buy parking lot around 3:30. So how did Adnan get into her car or have Hae meet him, kill Hae, pick her up drag her from the car to the trunk (how could he lift her??) between 2:15 and 3:30 with noone [sic] seeing him. *Where in the Best Buy parking lot did this allegedly take place?? If Jay said it occurred on the side where they would have sex*, Adnan would not then walk all the way to the phone booth (it is a long walk and Adnan does not like walking)." App-051–52 (emphasis added).

March 2nd letter (*see* App-042–44)—clear warning signs that would have prompted this experienced criminal attorney to fear that her client was coordinating, either directly or indirectly, with McClain to falsify an alibi. *Cf. State v. Lloyd*, 48 Md. App. 535, 541 (1981) (recognizing that it is improper for defense counsel to call alibi witnesses when the attorney knows or is convinced that these witnesses will offer perjured testimony).

In light of the constellation of facts described above, the State suggested that McClain's letters could have raised daunting difficulties for Gutierrez as she developed a defense strategy for a high school student charged with murdering his ex-girlfriend. In its assessment of the State's theory that Syed relayed information to McClain to "'type up' as part of a scheme to secure a false alibi," the post-conviction court said that "the State presents quite a compelling theory." Memorandum Op. II at 17; *see* App-138. The court proceeded, however, to conclude that, "[w]hile the State's speculation is plausible, the State is essentially asking the Court to favor one conjecture and ignore other equally plausible speculations." *Id.* at 19. Respectfully, the State submits that the post-conviction court improperly assigned the burden to the State, and not Syed, in reaching that conclusion. If the State's "compelling theory" is one among several "equally plausible speculations," then Syed has not met *his* burden of demonstrating that his lawyer's actions and inaction—which enjoy a "strong presumption" of reasonableness—were constitutionally defective. *See Strickland*, 466 U.S. at 689.

The State does not have to prove the probability or magnitude of these risks. Syed has to prove that these risks were worth taking; that they were constitutionally imperative. This is a burden Syed cannot meet, especially because a general, waterfront

alibi based upon routine was available to Syed and had significant advantages. Because a precise time of death was not identified by the State leading up to trial, Gutierrez had to establish an alibi that would account for Syed's whereabouts for an extended period of time after school on January 13. The alibi strategy Gutierrez adopted, according to which Syed stayed at Woodlawn High School until track practice after which he attended prayers at his mosque, had two added advantages: it was consistent with Syed's daily routine and it covered a broader range of time, which was important since prosecutors could not narrow time of death even after Gutierrez inquired. As a general matter, an alibi by routine is as powerful as it is difficult to build. Syed provided the rare opportunity of a defendant who was a legitimate candidate for such an alibi. Why? Because he was a high school student who had a fixed routine followed by daily sports practice followed by daily religious observance, where numerous adults could attest to his daily attendance.

V. SYED CANNOT ESTABLISH PREJUDICE IN THIS CASE

Prejudice simply cannot be shown in a case with the quality and kind of overwhelming evidence of guilt presented at Syed's trial:

Motive

- Both in conversations with friends and in her diary, Lee described Syed as possessive, jealous, and overprotective. (T. 2/17/00 at 136-37; State's Exhibit 2).
- In her diary, Lee wrote that she felt compelled to keep her growing interest in Clinedinst a secret from Syed, concerned he would never forgive her. (State's Exhibit 2).

- During the week of the murder, Lee's relationship with Clinedinst became both sexually intimate and public at school. (*See* T. 1/28/00 at 239; T. 2/1/00 at 88; T. 2/4/00 at 12). Lee was strangled to death twelve days after her first date with Clinedinst. (*See* T. 2/1/00 at 72).

- Jay Wilds testified that Syed told him he intended "to kill that bitch," referring to Hae Min Lee, because of how Lee was treating him. (T. 1/28/00 at 185; T. 2/4/00 at 125-26; T. 2/18/00 at 186).

- Police recovered from Mr. Syed's bedroom a breakup note from Lee to Syed, on which Syed had written "I'm going to kill." (T. 1/28/00 at 247-55; State's Exhibit 38).

Preparation

- Syed activated a brand new cellphone the day before Lee was killed. That night, Syed called her three times from the new phone—as well as Wilds. (T. 1/27/00 at 130). His first call the next morning was also to Wilds. *Id.*

- Syed left school to give his car and cellphone to his accomplice, Wilds, instructing him to await his call. (T. 2/4/00 at 125-26).

- Syed was overheard asking Hae Min Lee for a ride after school, falsely claiming he needed a ride to get his car. (T. 1/28/00 at 209; T. 1/31/00 at 8).

Accomplice Testimony

- Wilds testified that Syed showed him Lee's dead body after Syed strangled her, and that Wilds assisted Syed in digging a grave, burying Lee's body, and disposing of the shovels. (T. 2/4/00 at 115-64).

- Wilds led police to Lee's car, which had been missing since the day of the murder. (T. 2/4/00 at 115-64).

Corroboration

- Three separate witnesses, Kristi Vincent, Jennifer Pusateri, and Nisha Tanna, put Syed and Wilds together at three different locations at three separate times after school on the night of the murder, each corroborating Wilds's testimony. (*See* T. 2/16/00 at 209-215, 225-33; T. 2/4/00 at 144; T. 2/4/00 at 149-151; *id.* at 136-37; T. 1/28/00 at 189-90).

- Pusateri also met Syed and Wilds at a parking lot on the night of the murder, and Wilds told Pusateri that Syed had strangled Lee that night. Pusateri first told this to police with her mother and attorney present. The

fact that Lee had been strangled was not publicly known at the time. (T. 2/15/00 at 191-96; T. 2/17/00 at 314-15).

Forensics

- Syed's palm print was found on the back cover of a map book with the Leakin Park page ripped out, which was found inside Lee's car. (T. 1/31/00 at 58-60; T. 2/1/00 at 24-29).

- An anonymous caller told police to look at Syed and to talk to Syed's friend, Yasser Ali, because, according to the caller, Syed had discussed with Ali what Syed would do with Lee's car if Syed should ever harm her. (T. 2/24/00 at 58-60).

- Syed called Ali two times the night of the murder from the cellphone Syed first activated the day before the murder. (*Id.* at 60; State's Exhibit 34; T. 2/3/00 at 79-83).

Deviations in Syed's Story

- Syed originally confirmed to police that he had asked Lee for a ride after school on the day of the murder (T. 1/31/00 at 8), but then changed his story two weeks later when he spoke to a different officer and said he never needed or asked for a ride from Lee because he drove his own car to school. (T. 1/31/00 at 27).

- Syed also originally told police that he went to track practice after last seeing Lee during the final class period of the day, then switched his story, telling a different detective a month later that he had no memory at all of the day his ex-girlfriend vanished. (T. 1/31/00 at 25-26).

- Prior to Lee's disappearance, even after their break-up, Syed and Lee spoke multiple times a day. After Lee's disappearance, Syed never once tried to contact her to find out where she was or if she was okay. (T. 10.25.12 at 57-59; State's Exhibit 34).

That is the evidence without any of the cellphone data that is the subject of Syed's challenge. This not only confirms that time of death was hardly a key fact of the State's case; it also makes clear that, even if all the location data—corresponding to incoming and outgoing calls—was absent, it is unreasonable to conclude that a jury would have

returned a different verdict. Thus, in light of the State's unimpeached evidence, neither alleged error can form the basis—alone or together—of prejudice warranting a new trial.

With respect to Syed's cellphone claim, in addition to the State's earlier arguments about the damage to the State's cellphone evidence from Gutierrez's cross-examination, *see supra* Part III, Syed and the post-conviction court neglect the many other ways that Syed's phone records, fully separate from cell site information, yielded critical corroboration of the State's witnesses. The testimony of the witnesses confirmed one another—and were reinforced by the time, duration, sequence, and dialed numbers listed on Syed's cellphone records—fully separate from Waranowitz's testimony concerning which cell sites were accessed when he conducted test calls from certain locations of significance. Hence, witness testimony also reinforced the reliability of the call records, even if Gutierrez had succeeded in casting some doubt on the integrity of some calls.

With respect to Syed's McClain-alibi claim, in addition to the arguments set forth in its original brief to this Court last year, the State emphasizes one additional point in light of the post-conviction's decision after remand. On whether Syed and McClain had coordinated and colluded, the post-conviction court acknowledged that the State "present[ed] quite a compelling theory," but ultimately determined that there were "equally plausible" (and more innocent) explanations. Memorandum Op. II at 17-19. If factual inferences are in equipoise on the threshold question of whether the evidence at issue was false or not, because the burden is on Syed, prejudice cannot be established as a matter of law. *See Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (finding as a matter of law attorney's failure to present false testimony "cannot establish the prejudice required for

relief under the second strand of the *Strickland* inquiry."); *Lockhart v. Fretwell*, 506 U.S. 364 (1993). This is true even where the false testimony had the potential to significantly aid the defendant. *See Williams v. Taylor*, 529 U.S. 362, 391–92 (2000) ("Even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury") (citing *Nix*, 475 U.S. at 175-76).

A. Syed's Cumulative Error Claim Fails

The second question raised by Syed's cross-appeal was whether the post-conviction court incorrectly limited its prejudice analysis. Whether aggregated or not, the impact of Syed's two alleged errors is insufficient to establish prejudice: "twenty times nothing is still nothing." *Gilliam v. State*, 331 Md. 651, 686 (1993); *see Mendes v. State*, 146 Md. App. 23, 53 (2002). This Court need not reach the merits of this claim because Syed has waived it. In a sleight-of-hand apparently meant to glide over this obstacle, Syed artfully folded his cumulative error analysis into his discussion of prejudice. Nevertheless, because this Court separately listed this issue as a separate question presented, the State briefly addresses it.

Syed's cumulative error claim is the same one that he raised unsuccessfully in his original post-conviction in 2010, citing the same precedent he cites now, *Bowers v. State*, 320 Md. 416, 436 (1990). *Compare* Post-Conviction Petition at 19 (Jun. 28, 2010), *with* Conditional Application for Leave to Cross Appeal at 16-18 (Aug. 11, 2016). Where Syed elected not to include this claim among those he sought leave to appeal in 2014, *see* Syed's Application for Leave to Appeal (Jan. 27, 2014), this Court should not permit him

again to abuse the limited remand authorized by this Court to resurrect a claim he has already asserted and then abandoned.

Syed's counsel's decision to abandon his cumulative error claim (and a litany of others) should come as no surprise; it was an exercise of effective appellate advocacy. *See Smith v. Murray*, 477 U.S. 527, 536 (1986) ("[W]innowing out weaker arguments on appeal and focusing on those more likely to prevail...is the hallmark of effective appellate advocacy.") (citations and internal quotation marks omitted); *State v. Gross*, 134 Md. App. 528, 556 (2000).

The conclusion that Syed waived his cumulative error claim, moreover, is consonant with the decisions of numerous federal courts that have held that a cumulative error argument is a standalone claim subject to exhaustion and procedural default. *See Nickleson v. Stephens*, 803 F.3d 748, 753-54 (5th Cir. 2015) (cumulative error claim must be exhausted); *Collins v. Secretary of Pennsylvania Dept. of Corrections*, 742 F.3d 528, 541-42 (3d Cir. 2014) (similar); *Wooten v. Kirkland*, 540 F.3d 1019, 1026 (9th Cir. 2008) (similar); *Jimenez v. Walker*, 458 F.3d 130, 149 (2d Cir. 2006) (similar); *Keith v. Mitchell*, 455 F.3d 662, 679, (6th Cir. 2006) (similar); *Gonzales v. McKune*, 279 F.3d 922, 925 (10th Cir. 2002) (similar).

When the post-conviction court agreed to reopen this matter, it did not list Syed's cumulative error claim as an issue it would reconsider. *See* Statement of Reasons and Order of the Court at 4-5 (Nov. 6, 2015). Appellate courts ordinarily do not review a claim of error that has not been decided by a lower court, Maryland Rule 8-131(a), and there is no reason to apply an exception to that rule here. *See supra* Part I.

CONCLUSION

WHEREFORE, for the reasons set forth above, the State respectfully requests that this Court reverse the post-conviction court's decision granting Syed post-conviction relief, reinstate Syed's convictions, and deny Syed's request for a new trial.

Respectfully submitted,

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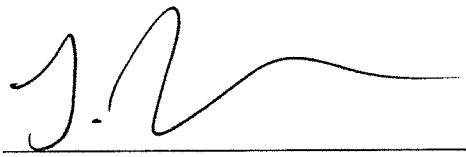
CERTIFICATION OF WORD COUNT AND COMPLIANCE

This Reply Brief of Cross-Appellee contains 12,969 words, excluding the parts of the brief exempted from the word count by Maryland Rule 8-503.

Pursuant to Maryland Rules 8-112(c) and 8-504(a)(9), I hereby certify that this Reply Brief and Appendix of Cross-Appellee was prepared in Times New Roman proportionally spaced 13-point font with double spacing between the lines.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of April, 2017, a copy of this Reply Brief of Cross-Appellee was mailed, first-class, postage prepaid, to C. Justin Brown, Esquire, Law Office of C. Justin Brown, 231 East Baltimore Street, Suite 1102, Baltimore, Maryland 21202.



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