STATE OF MARYLAND	*	IN THE
Applicant	*	CIRCUIT COURT
v.	*	FOR
ADNAN SYED	*	BALTIMORE CITY
Respondent	*	CASE NOs. 199103042-46
	*	PETITION NO. 10432

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

STATE'S CONSOLIDATED REPLY

The State of Maryland, by its attorneys, Brian E. Frosh, Attorney General of Maryland, and Thiruvendran Vignarajah, Deputy Attorney General, respectfully files this consolidated reply to Respondent Adnan Syed's application to cross appeal and pleadings in which he objects to the State's request that the post-conviction court's decision granting relief be reviewed on appeal and to the State's conditional request for a limited remand to complete the record with previously unavailable evidence. At this application stage of the proceedings, the State refers this Court to, and rests primarily on, its prior detailed pleadings. The State herein endeavors only to clarify a few matters, with the intent to fully address Syed's mischaracterization of the facts, law, and lower court opinion should this Court, as the State requests, grant its application for leave to appeal.

I.

With regard to the twice-denied claim that Syed's counsel was ineffective for failing to pursue Asia McClain as part of Syed's alibi defense, should this Court grant Syed's conditional application to cross appeal that portion of the ruling, the State firmly renews its position that, for the reasons set forth in its conditional application for a limited remand, it would be in the interests of justice to supplement and complete the record with direct, previously unavailable evidence of Syed's purported alibi witness talking about lying to protect Syed.

Syed seeks to distinguish the State's request from his own prior demand, claiming that the State's witnesses could theoretically have been presented at the February hearing — even though the State's affiants were unknown to the State back then, unlike McClain who had been known to Syed's post-trial attorneys since soon after his conviction years ago. Syed also emphasizes that included in his request for a remand was a "good faith" — though ultimately unsupported and meritless — accusation of prosecutorial misconduct. *See* Response to State's Conditional Application for Limited Remand at 2 n.1 ("*At that time*, Syed had a good faith reason to believe that prosecutorial misconduct had prevented McClain from testifying in 2010 at Syed's hearing. . . ." (emphasis added)). The State has already explained why the differences between Syed's previous request (based solely upon McClain's affidavit) and the State's present one (premised upon two credible affidavits containing no evidence of ulterior motives) support a limited remand at this time. *See* State's Conditional Application for Limited Remand at 8 (hereinafter "Cond. App. for Limited Remand"). The State stresses here simply that the witnesses first came forward — without any solicitation from the State — after the post-conviction court's ruling, and that Syed's apparent view that a factually baseless but "good faith" assertion of misconduct is alone enough to earn a remand would, if accepted, engender troubling incentives and encourage bald allegations of prosecutorial wrongdoing.

As to why the affiants' statements would properly reinforce the post-conviction court's decision to deny relief, the State has exhaustively explained how, consistent with the rule of contemporary assessment, "these witnesses substantially reinforce each of the State's defenses of [Cristina] Gutierrez's performance." Cond. App. for Limited Remand at 6.[1] It should also be emphasized that Syed does not dispute that those witnesses would bear on prejudice (an analysis that

[1] Given that Syed argued at the February post-conviction hearing that he should be permitted to present evidence from after Gutierrez made the tactical decisions he now challenges — and given that the post-conviction court altered its assessment of counsel's performance after hearing from McClain, even though it already had, prior to its original denial of Syed's claim, all the information available to Gutierrez in 1999 — it is curious that Syed now invokes the rule of contemporaneous assessment.

is not limited to Gutierrez's perspective at the time); instead, Syed simply falls back to his main argument that those witnesses could have been, but were not, presented at the hearing in February 2016. *See* Response to State's Cond. App. for Limited Remand at 3 ("And with respect to the question of prejudice, even if this 'new' evidence might have had some bearing on prejudice, it was never presented to the trial court."). Thus, particularly because a limited remand could help dispose of the McClain-alibi claim as a matter of law under *Nix v. Whiteside*, 475 U.S. 157 (1986), and *Lockhart v. Fretwell*, 506 U.S. 364 (1993), the State persists in its request for an opportunity to augment the record with, at a minimum, the witnesses' affidavits.

Should this Court decide, however, that the present record is adequate to ensure that justice is served and decline the State's request, the State does not oppose Syed's application to resubmit for appellate review the original alibi-related claim that this Court already granted leave to appeal. The State has noted its objection, however, to Syed's request to append a "cumulative error" claim that is not fit for appellate review. *See* Cond. App. for Limited Remand at notes 3 & 14. As the State has previously explained:

> Syed's conditional application for leave to cross appeal (filed August 11, 2016) asks this Court to consider <u>two</u> issues on appeal. The first question presented is the McClain-alibi claim that Syed raised in 2010, that the post-conviction court denied in 2013, that Syed sought and was granted leave to appeal in 2014, and that, after opening briefs were submitted, this Court remanded to the post-conviction court in 2015. Although the State maintains that this claim lacks merit, it does not, given the circuitous procedural history of this issue . . . oppose Syed's application to resubmit this first question to this Court for review.
>
> But the second question presented is a "cumulative error" claim that Syed unsuccessfully asserted in his original post-conviction petition in 2010, citing in fact 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). 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) (enumerating specific issues it would consider on remand and expressly stating that it "finds no need to revisit other issues raised in the previously concluded post-conviction proceedings that are still pending before the Court of Special Appeals"). The court's order granting in part and denying in part Syed's petition also makes no

> reference to any allegation of cumulative error. *See* Mem. Op. II. Appellate courts ordinarily do not review a claim of error that has not been decided by a lower court. Md. Rule 8-131(a).
>
> Under these circumstances, where Syed elected not to include that 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 to use the limited remand previously authorized by this Court to resurrect a claim he already asserted and then abandoned. *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) ("[T]he Supreme Court pointed out that the strategic selection of which appellate issues to raise and which to ignore is one entrusted to the strategic judgment of appellate counsel." (citing *Jones v. Barnes*, 463 U.S. 745, 752-53 (1983))). *Cf. also Holmes v. State*, 401 Md. 429, 466-67 (2007) (finding that petitioner could not revive a claim in a coram nobis petition after failing to raise the claim in an application for leave to appeal).
>
> If requested, the State is prepared to provide further briefing . . . on why Syed's application should be denied with regard to a cumulative error claim (*i.e.*, the second question presented), a catch-all claim that is difficult to confine. Otherwise, while not opposing Syed's application for leave to appeal on the first question, the State defers to this Court's judgment on whether further review of a claim that has now been twice considered and twice denied is warranted.

Cond. App. for Limited Remand at note 3.

Syed's only substantive answer to this is that an allegation of cumulative error is "not a new claim," but "simply an additional argument" for why the post-conviction court erred in denying Syed relief. *See* Response to Cond. App. for Limited Remand at 5. Courts have not countenanced this kind of artful pleading with respect to cumulative error. *See, e.g.*, *Collins v. Pennsylvania Dep't of Corrections*, 742 F.3d 528, 542 (2014) (citing numerous cases and holding that cumulative error is a "standalone claim" that must be presented separately to be preserved for federal habeas review: "We thus do not agree with Collins's assertion that cumulative error is only a method of conducting prejudice review. The cumulative error doctrine allows a petitioner to present a standalone claim. . . . Here, the Pennsylvania Supreme Court reviewed each alleged underlying error and rejected each on its merits, *but it was not presented with a separate claim of cumulative error.*" (emphasis added)). Moreover, Syed himself asserted cumulative error as a separate claim in his original post-conviction petition, only to abandon

it in order to concentrate on two specific claims when he applied for leave to appeal the first time. *Compare* Post-Conviction Petition at 13, 19 (Jun. 28, 2010) (asserting "2. Failure to Investigate Asia McClain" as the second of nine claims of error, and then alleging "9. Cumulative Ineffective Assistance of Counsel" as the last of the nine claims of error), *with* Syed's Application for Leave to Appeal at 1 (Jan. 14, 2014) (seeking leave only to appeal two issues, the alleged failure to pursue a putative alibi witness and the alleged failure to pursue a plea deal). For these reasons, the State respectfully submits that Syed's conditional application with respect to a cumulative-error claim should be denied since this claim has not been preserved and is otherwise manifestly unsuitable for appellate review at this time.

II.

With respect to the post-conviction court's decision that Syed was deprived of effective assistance of counsel because of a failure to use a fax cover sheet to challenge the State's cellphone evidence, the State vigorously reaffirms its position that, for the reasons set forth in detail in its application for leave to appeal, this Court should review and ultimately reverse that erroneous ruling. Again, for present purposes, the State only addresses a few points.

First, Syed contends that the State's application fails to raise "legal issues of broad import." Response to State's Application for Leave to Appeal at 1. This is flatly incorrect. For one thing, the scope of a defense attorney's obligations regarding challenges to expert testimony is directly impacted by whether the post-conviction court misunderstood *Maryland v. Kulbicki*, 136 S.Ct. 2 (2015), in accepting Syed's argument that his attorney was constitutionally inadequate for failing to cross examine an expert based on language from a fax cover sheet that is the subject of conflicting interpretations. For another, the post-conviction court's unheralded maneuver to clear the hurdle of waiver constitutes a fundamental evisceration of longstanding waiver principles for all Sixth Amendment ineffective assistance of counsel claims. Syed's latest reply confirms this, adopting the post-conviction court's startling position that any new theory or specific assertion of ineffective assistance of counsel cannot

be treated as waived unless there is an "intelligent and knowing waiver by the petitioner *himself*." Response to State's Application for Leave to Appeal at 21 (emphasis added). Originally, not even Syed made this argument to overcome waiver, relying instead on an allegation of a *Brady* violation that was rejected by the court. So, either the post-conviction court has, without the benefit of briefing or argument by either side, misconstrued and dramatically expanded the meaning of *Curtis v. State*, 284 Md. 132 (1978), or it has opened a monumental hole in the law of waiver that deserves prompt appellate clarification. Put simply, both the procedural and substantive dimensions of the court's flawed decision have far-reaching implications and warrant review by this Court.

Syed also objects to appellate review by defending the decision itself. But to accomplish this, Syed mischaracterizes and overstates the significance of celltower evidence (which certainly was *part* of the State's evidence and arguments, but was hardly the crux of the State's case),[2] ignores the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland v. Washington*, 466 U.S. 668, 689 (1984), and unabashedly shifts the burden to the State. For example, Syed claims the State "places undue emphasis" on the consensus between the dueling experts that neither has "previously heard of challenges to the reliability of using incoming calls to locate cellphones." Response to State's Application for Leave to Appeal at 36. Even though the line of attack that Syed claims is constitutionally imperative has no known precedent — and even though neither expert is aware of a single other attorney who has attacked cellphone evidence based upon the supposed unreliability of incoming calls — Syed nevertheless insists that failing to launch this attack falls outside the "wide range of reasonable professional assistance." To justify this position, Syed notes that the State failed to present evidence of "how often [the AT&T] disclaimer was used in other

[2] In order to bolster his claim that the celltower evidence was the heart of the State's case, Syed has repeatedly framed his recitation of the facts accordingly. But, one illustration of the relevant and corroborative — but overall modest — role of the celltower evidence is that *this* Court, when it summarized the facts of this case on direct appeal, did not even mention the celltower-location evidence in recounting the strength of the State's case. *See Syed v. State*, No. 923, slip op. at 3-7.

cases," failed to produce evidence "that cell phone companies other than AT&T used the same disclaimer," and "did not present evidence regarding how long, before and after Syed's trial, AT&T continued to use the disclaimer." Response to State's App. for Leave to Appeal at 36. But this is not the State's burden. The State established that the boilerplate fax cover sheet accompanied all the documents sent from AT&T to the detectives in this case. To suggest that the reason why the experts know of no other example where an attorney pursued this attack is because the case of Adnan Syed is the only one where this boilerplate disclaimer was issued defies common sense. But it is Syed's burden to prove that the disclaimer in this case is not a unicorn and that his attorney was constitutionally delinquent in failing to seize it. And the State respectfully submits that Syed cannot have satisfied this burden when his own expert does not know of an attorney in any case who has attempted the proposed line of attack — and where Syed candidly admits that his expert witness cannot explain why his interpretation would make sense: "Grant did not claim to know why AT&T considered location information related to its incoming calls to be unreliable. . . ." *Id.* at 8.

WHEREFORE, for the reasons set forth above as well as in the State's previous pleadings, the State respectfully requests that this Court grant its application for leave to appeal to review and ultimately reverse the post-conviction court's grant of relief, and order a limited remand to complete the record, should this Court grant Syed's conditional application for cross appeal.

Respectfully Submitted,

BRIAN E. FROSH
ATTORNEY GENERAL

Thiruvendran Vignarajah
Deputy Attorney General
Office of the Attorney General
200 Saint Paul Place
Baltimore, MD 21202

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing State's Consolidated Reply was, this 3rd day of October 2016, sent by first-class mail, postage prepaid to:

C. Justin Brown
Brown & Nieto, LLC
231 East Baltimore Street, Suite 1102
Baltimore, Maryland 21202

Cate E. Stetson
Kathryn M. Ali
James W. Clayton
W. David Maxwell
Hogan Lovells US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004

_____
Thiruvendran Vignarajah
Deputy Attorney General