ADNAN SYED,	*	**IN THE**
	*	
Petitioner,	*	**CIRCUIT COURT**
	*	
v.	*	**FOR**
	*	
STATE OF MARYLAND,	*	**BALTIMORE CITY**
	*	
Respondent.	*	**CASE NOs. 199103042-046**
	*	
	*	**PETITION NO. 10432**

* * * \

Leave to Appeal on February 6, 2015. On May 18, 2015, the Maryland Court of Special Appeals issued an order remanding this matter, without affirmance or reversal, to the Circuit Court for Baltimore City. The Maryland Court of Special Appeals remanded the matter to afford Petitioner the opportunity to file a request to re-open the previously concluded post-conviction proceedings and supplement the record in light of the potential alibi witness's January 13, 2015 affidavit. May 18, 2015 Remand Order, at 4. Although the subject of the Remand Order is limited to the alibi issue, the Maryland Court of Special Appeals gave the Court the discretion to "conduct any further proceedings it deem[ed] appropriate" in the event the Court granted Petitioner's request to re-open the previously concluded post-conviction proceedings.[2] *Id.*

Pursuant to the Remand Order and Crim. Proc. § 7-104, Petitioner filed a Motion to Re-Open Post-Conviction Proceedings on June 30, 2015. On August 24, 2015, Petitioner filed a Supplement to the Motion to Re-Open Post-Conviction Proceedings requesting the Court to consider an additional allegation concerning the reliability of cell tower location evidence that the State used at trial. The State of Maryland (hereinafter "State") filed a Consolidated Response in Opposition to Petitioner's Motion and Supplement to Re-Open Post-Conviction Proceedings on September 23, 2015. Petitioner filed a Reply to the State's Consolidated Response on October 13, 2015.

The Court issued the Statement of Reasons and Order of the Court on November 6, 2015, granting Petitioner's Motion to Re-Open Post-Conviction Proceedings. The Order limited the scope of the re-opened post-conviction proceedings to the following matters: 1) trial counsel's alleged failure to contact a potential alibi witness, Asia McClain (hereinafter

---

[2] Given that the subject of the remand is limited to the alibi issue, Petitioner's allegation regarding trial counsel's alleged failure to pursue a plea deal is currently pending before the Maryland Court of Special Appeals.

"McClain"); and 2) the reliability of the cell tower location evidence. The Court held a five-day hearing from February 3, 2016, through February 9, 2016. Petitioner presented the following issues to the Court:

I. Whether trial counsel's alleged failure to contact McClain as a potential alibi witness violated Petitioner's Sixth Amendment right to effective assistance of counsel?

II. Whether the State withheld potentially exculpatory evidence related to the reliability of cell tower location evidence in violation of the disclosure requirements under *Brady*?

III. Whether trial counsel's alleged failure to challenge the reliability of the cell tower location evidence violated Petitioner's Sixth Amendment right to effective assistance of counsel?

STATEMENT OF THE CASE

Hae Min Lee (hereinafter "victim"), a gifted and talented student at Woodlawn High School in Baltimore County, disappeared during the afternoon of January 13, 1999. On February 9, 1999, the victim's body was found partially buried in a shallow grave located in Leakin Park near the 4400 block of North Franklintown Road in Baltimore City. The medical examiner determined that the cause of the victim's death was strangulation.

Following an anonymous tip, Baltimore City police arrested Petitioner, who was also a student at Woodlawn High School, on February 28, 1999. The State charged Petitioner with first-degree murder, second-degree murder, kidnapping, robbery, and false imprisonment. A grand jury issued an indictment on April 13, 1999. Petitioner was arraigned in the Circuit Court for Baltimore City before Judge David B. Mitchell on June 3, 1999.

Petitioner's first trial began on December 9, 1999, before Judge William D. Quarles, Jr., and concluded in a mistrial on December 15, 1999. Petitioner's second trial lasted from January 7, 2000, through February 25, 2000, before Judge Wanda K. Heard. At both trials, M. Christina

Gutierrez, Esq., (hereinafter "trial counsel") represented Petitioner, and Assistant State's Attorneys Kevin Urick, Esq., and Kathleen C. Murphy, Esq., represented the State.

At trial, the State argued that Petitioner killed the victim out of jealousy and rage over the victim's new romantic relationship with another individual. The State presented a timeline through the testimony of Jay Wilds (hereinafter "Wilds"), who testified as to the following:

On the morning of January 13, 1999, Wilds received a phone call from Petitioner offering to drive Wilds to the mall, so Wilds could purchase a birthday present for his girlfriend. After shopping for approximately an hour and fifteen minutes, Petitioner and Wilds left the mall for Woodlawn High School because Petitioner had to return to school before the end of lunch period. When Petitioner returned to school, he left his vehicle and cell phone with Wilds and told Wilds that he would call later that day to request a ride. Wilds testified that he then drove to the residence of Jennifer Pusateri (hereinafter "Pusateri") and waited at her residence for Petitioner's call until approximately 3:45 p.m.

Sometime during the afternoon of January 13, 1999, Petitioner called Wilds from a payphone in the Best Buy parking lot to request a ride. When Wilds arrived at the Best Buy parking lot, Petitioner opened the trunk of the victim's vehicle, revealing the victim's lifeless body. Petitioner told Wilds that he had strangled the victim. Petitioner left the Best Buy parking lot in the victim's vehicle, and Wilds followed him in Petitioner's vehicle. Petitioner abandoned the victim and her vehicle in the Interstate 70 Park & Ride located at the end of Security Boulevard and Cooks Lane in Baltimore City. Petitioner and Wilds left the Interstate 70 Park & Ride in Petitioner's vehicle to go buy some marijuana.

After purchasing marijuana, Petitioner asked Wilds to drop him off at Woodlawn High School for track practice, where he could be seen by others. Wilds dropped Petitioner off, and when Petitioner called Wilds approximately thirty minutes later to request a ride, Wilds picked up Petitioner from track practice and then drove to Kristi Vincent's (hereinafter "Vincent") residence located at the 2700 block of Gateway Terrace in Baltimore City. Petitioner's cell phone received two incoming calls after arriving at Vincent's residence at approximately 6:00 p.m. The first call came from the victim's family who called to ask if Petitioner knew of the victim's whereabouts. Petitioner responded that they should contact the victim's new boyfriend, suggesting that she may be with him. The second call came from a police officer, who also asked about the victim's whereabouts.

After speaking with the police officer, Petitioner told Wilds that they had to leave Vincent's residence and dispose of the victim's body. Petitioner and Wilds drove back to the Interstate 70 Park & Ride to pick up the victim and her vehicle. After obtaining shovels from Wilds's residence, they drove to Leakin Park, where they dug a shallow grave to bury the victim's body. Wilds testified that Petitioner received two incoming calls while burying the victim's body in Leakin Park, both at approximately 7:00 p.m. After burying the victim's body, Petitioner and Wilds abandoned the victim's vehicle behind some apartment buildings and then drove east on Route 40 in Petitioner's vehicle. Petitioner and Wilds traveled to a dumpster behind Westview Mall, where they disposed of the victim's belongings and the shovels that they had used to dig the grave.

At trial, the State presented Petitioner's cell phone records and the expert testimony of Abraham Waranowitz (hereinafter "Waranowitz") as circumstantial evidence to corroborate

Wilds's testimony. Petitioner's cell phone records indicated that the cell phone made an outgoing call to the Wilds residence on January 13, 1999 at 10:45 a.m., which Wilds testified was the call to offer him a ride to the mall. According to the cell phone records, the cell phone also received an incoming call at 2:36 p.m., which the State argued was the call that Petitioner made to request a ride from Wilds after strangling the victim in the Best Buy parking lot.

The State relied on Petitioner's cell phone records to place Petitioner with his phone after the murder took place. The cell phone records reflected an outgoing call made to the residence of Nisha Tanna (hereinafter "Tanna") at approximately 3:32 p.m. Petitioner called Tanna after leaving the Interstate 70 Park & Ride and placed Wilds on the phone, so Tanna could speak to Wilds.[3] Waranowitz then identified a 5:14 p.m. call made to Petitioner's voicemail, suggesting that Petitioner had his cell phone during this time and called to check his voicemail.[4]

Relying on Waranowitz's expert testimony and Petitioner's cell phone records, the State provided circumstantial evidence as to the possible location of Petitioner's cell phone during the evening of January 13, 1999. As noted, *supra*, Wilds testified that Petitioner received incoming calls from the victim's family and a police officer shortly before leaving Vincent's residence to dispose of the victim's body. The cell phone records indicated that Petitioner's cell phone received an incoming call at 6:07 p.m. that connected with cell site "L655A." The cell phone records also reflected two other incoming calls at 6:09 p.m. and 6:24 p.m., both of which connected with cell site "L608C." Waranowitz testified that the functioning of the AT&T

---

[3] At trial, Tanna testified that while she may have spoken to Petitioner and Wilds during the 3:32 p.m. phone call, she also testified on cross-examination that she could have spoken to Petitioner and Wilds on any other day between meeting Petitioner at a New Year's Eve Party on December 31, 1998 and January 13, 1999.

[4] Waranowitz was incorrect when he identified the 5:14 p.m. call as a call to check Petitioner's voicemail. The 5:14 p.m. call actually was a "missed" or unanswered call that was forwarded to Petitioner's voicemail. The implications of this error will be addressed, *infra*.

network, as reflected by the cell phone records, would be consistent with testimony that an AT&T wireless subscriber received two or three incoming calls at the 2700 block of Gateway Terrace – the location of Vincent's residence. Waranowitz's testimony essentially confirmed that if the cell phone records showed an incoming call that connected with either cell sites "L655A" or "L608C," then the cell phone could possibly be located at Vincent's residence when the cell phone received the incoming calls.

The State then identified two crucial calls on Petitioner's cell phone records. According to Wilds's testimony, Petitioner received two incoming calls at approximately 7:00 p.m. while burying the victim's body in Leakin Park. The cell phone records revealed that Petitioner's cell phone received two incoming calls at 7:09 p.m. and 7:16 p.m. that connected with cell site "L689B," which Waranowitz identified as the cell site that provided coverage to an area that encompassed Leakin Park. Waranowitz testified that the functioning of the AT&T wireless network, as indicated in the cell phone records, would be consistent with testimony that an AT&T wireless subscriber received two incoming calls in Leakin Park. In other words, if the cell phone records showed two incoming calls that connected with cell site "L689B," then the cell phone could possibly be located in Leakin Park when the cell phone received the two incoming calls.

Trial counsel engaged in a three prong strategy at trial: (1) to prove that Petitioner and the victim ended their relationship amicably due to outside pressures and remained friends after the breakup, thereby challenging the State's suggested motive; (2) to show that the police hastily focused their investigation on Petitioner and thus, failed to pursue evidence that would have proven Petitioner's innocence; and (3) to undermine Wilds's version of the events by

establishing Petitioner's habit of attending track practice after school and then reciting taraweeh prayers at the mosque during the month of Ramadan.[5]

At the conclusion of trial, Petitioner was convicted of first-degree murder, kidnapping, robbery, and false imprisonment. On June 6, 2000, Petitioner appeared before Judge Wanda K. Heard for sentencing, and the Court sentenced Petitioner to life in prison for first-degree murder, thirty (30) years for kidnapping to run consecutive with the life sentence for first degree murder, and ten (10) years for robbery to run concurrent with the thirty (30) years sentence for kidnapping. Petitioner, through his attorney at sentencing, Charles H. Dorsey. Jr., Esq., filed a Motion for Modification of Sentence on July 28, 2000. Judge Wanda K. Heard denied Petitioner's motion on August 2, 2000.

Petitioner filed a timely appeal to the Maryland Court of Special Appeals. Warren A. Brown, Esq., and Nancy S. Forster, Esq., represented Petitioner. On appeal, Petitioner raised the following issues: (1) whether the State committed prosecutorial misconduct, violated *Brady*, and violated Petitioner's Due Process rights when the State, (a) suppressed favorable and material evidence of an oral side agreement with the State's key witness, and (b) when the State introduced false and misleading evidence; (2) whether the trial court committed reversible error in prohibiting Petitioner from presenting evidence to the jury; (3) whether the trial court erred in admitting hearsay in the form of a letter written by the victim to Petitioner, which was highly prejudicial; and (4) whether the trial court erred in permitting the introduction of the victim's

---

[5] Taraweeh prayers are evening prayers conducted during Ramadan, the ninth month of the Islamic calendar. During Ramadan, Muslims engage in a month long period of fasting during the day and praying at night to honor the revelation of the Quran to the Prophet Muhammad. Taraweeh prayers are conducted by reciting from the Quran. *See generally Ramadan*, The British Broadcasting Corporation, http://www.bbc.co.uk/religion /religions/islam /practices/ramadan_1.shtml (last updated Jul. 5, 2011).

diary. The Maryland Court of Special Appeals denied Petitioner's appeal on March 19, 2003. On June 25, 2003, the Maryland Court of Appeals denied the petition for certiorari.

Petitioner filed a Petition for Post-Conviction Relief, which was received on May 28, 2010,[6] alleging ineffective assistance of trial counsel, ineffective assistance of counsel at sentencing, Charles H. Dorsey, Jr., Esq., and ineffective assistance of appellate counsel, Warren A. Brown, Esq. On June 27, 2011, Petitioner filed a Supplement to the Petition for Post-Conviction Relief. After multiple postponements,[7] the Court held the first post-conviction hearing on October 11, 2012, and October 25, 2012. At the hearing, C. Justin Brown, Esq., represented Petitioner and Kathleen C. Murphy, Esq., represented the State.[8] On January 6, 2014, the Court issued a Memorandum Opinion denying the Petition for Post-Conviction Relief.

Pursuant to the Remand Order and Crim. Proc. § 7-104, Petitioner filed a Motion to Re-Open Post-Conviction Proceedings on June 30, 2015. On August 24, 2015, Petitioner filed a Supplement to the Motion to Re-Open Post-Conviction Proceedings. The Court granted Petitioner's Motion to Re-Open Post-Conviction Proceedings on November 6, 2015, for the limited consideration of: 1) trial counsel's alleged failure to contact McClain as a potential alibi witness; and 2) the reliability of the cell tower location evidence. The Court held the second

---

[6] The Certificate of Service attached to the Petition for Post-Conviction Relief has the date of service as June 28, 2010, which would be more than ten (10) years after the date of sentencing (June 6, 2000). Under Crim. Proc. § 7-103, a petition for post-conviction relief must be filed within ten (10) years of the date of sentencing. The Court can reasonably conclude, however, that the date listed on the Certificate of Service is incorrect because the petition was received on May 28, 2010.

[7] The post-conviction hearing was scheduled and postponed seven times before the hearing took place. The previously scheduled dates were: December 20, 2010, August 8, 2011, October 20, 2011, February 6, 2012, March 6, 2012, July 26, 2012, and August 9, 2012. Petitioner requested a majority of these postponements in his attempt to produce McClain, an out-of-state witness, for the October 2012 post-conviction hearing.

[8] On September 29, 2011, Petitioner moved to disqualify Assistant State's Attorney Kathleen C. Murphy, Esq., as counsel for the State. The motion alleged that Ms. Murphy must be disqualified pursuant to Rule 3.7 of the Maryland Rules of Professional Conduct, which forbids an attorney from acting as counsel and witness in the same proceeding. Petitioner argued that he intended to call Ms. Murphy as a witness during the post-conviction hearing. Following a hearing on February 6, 2012, the Court denied Petitioner's Motion to Disqualify Counsel on February 13, 2012.

post-conviction hearing from February 3, 2016, to February 9, 2016. At the February 2016 hearing, C. Justin Brown, Esq., and Christopher C. Nieto, Esq., represented Petitioner, and Deputy Attorney General, Thiruvendran Vignarajah, Esq., Deputy Counsel for Civil Rights, Tiffany Harvey, Esq., Assistant Attorney General, Charlton T. Howard, Esq., and Staff Attorney, Matthew Krimski, Esq., represented the State. All other pertinent facts will be discussed in the Court's analysis of Petitioner's allegations.

DISCUSSION

I. Ineffective Assistance of Counsel – The Alibi

Petitioner alleges that trial counsel rendered ineffective assistance when she failed to contact McClain and investigate her as a potential alibi witness. The Court engages in a two-prong inquiry to evaluate whether counsel's representation deprived the accused of his or her Sixth Amendment right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). First, a petitioner must "identify the acts or omissions that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690. Second, counsel's deficient performance "must be prejudicial to the defense" to warrant relief. *Id.* at 691.

Petitioner argues that trial counsel provided deficient performance because her failure to contact and investigate McClain as a potential alibi witness fell below the standard of reasonable professional judgment. The standard of reviewing counsel's performance for deficiency is an objective one made in light of prevailing professional norms. *Redman v. State*, 363 Md. 298, 310 (2001). Judicial scrutiny of counsel's performance is highly deferential and it is presumed that counsel has rendered effective assistance. *State v. Thomas*, 325 Md. 160, 171 (1992). The Court must also resist the temptation of hindsight and instead must evaluate counsel's performance

from his or her perspective at the time of the alleged act or omission. *Strickland*, 466 U.S. at 689-90.

According to eyewitness testimony, the victim was last seen leaving school to pick up her cousins at approximately 2:15 p.m. on January 13, 1999. The victim's cousins, however, notified her family at approximately 3:00 p.m. that the victim did not show up to give them a ride. Wilds testified that Petitioner called him to request a ride from the Best Buy parking lot sometime during the afternoon of January 13, 1999. When Wilds arrived at the parking lot, Petitioner opened the trunk of the victim's vehicle and revealed the victim's body to Wilds. The State corroborated Wilds testimony with Petitioner's cell phone records. In particular, the State alleged that Petitioner made the 2:36 p.m. incoming call to request a ride from the Best Buy parking lot.[9] Based on the testimony and evidence presented at trial, the State established that the victim died

---

[9] The record reflects that Wilds's testimony is inconsistent with the State's adopted timeline that Petitioner called Wilds at 2:36 p.m. According to Wilds, he did not receive the call from Petitioner until he had left Pusateri's residence at 3:45 p.m. At the February 2016 post-conviction hearing, the State suggested a new timeline that would have allowed Petitioner to commit the murder after 2:45 p.m. and then call Wilds at 3:15 p.m. instead of 2:36 p.m., which would negate the relevance of the potential alibi. The trial record is clear, however, that the State committed to the 2:15 p.m. – 2:45 p.m. window as the timeframe of the murder and the 2:36 p.m. call as the call from the Best Buy parking lot. During opening arguments, for instance, the State asserted that at "[a]bout 2:35, 2:36, Jay Wilds received a call on the cell phone from [Petitioner] saying, 'Hey, come meet me at the Best Buy.'" Trial Tr., at 106, Jan. 27, 2000.

The State also elicited testimony during the trial that is incongruent with the State's newly adopted timeline. Wilds testified on direct examination that he called Pusateri at 3:21 p.m. to go buy some marijuana after abandoning the victim's body and her vehicle at the Interstate 70 Park & Ride. Accordingly, the State's new timeline would create a six-minute window between the 3:15 p.m. call from Petitioner and the 3:21 p.m. call to Pusateri. Within this six-minute window, Wilds had to complete a seven-minute drive to the Best Buy on Security Boulevard from Craigmount Street, where he claimed he was located when he received Petitioner's call. Wilds then had to make a stop at the Best Buy parking lot, where Petitioner showed him the body in the victim's vehicle. Then, both parties had to take another seven-minute drive to the Interstate 70 Park & Ride to abandon the victim's body and her vehicle. It would be highly unlikely that Wilds could have completed this sequence of events within a six-minute window under the State's new timeline.

The State contended during closing arguments that "[the victim] was dead 20 to 25 minutes from when she left school" at 2:15 p.m. Trial Tr., at 54, Feb. 25, 2000. The State also urged the jury to consider the 2:36 p.m. incoming call on Petitioner's cell phone records, and asserted once again that "[a]t 2:36 p.m. [Petitioner] call[ed] Jay Wilds, come get me at Best Buy." *Id.* at 66. Based on the facts and arguments reflected in the record, the Court finds that the State committed to the 2:36 p.m. timeline and thus, the Court will not accept the newly established timeline.

twenty to twenty-five minutes after school had ended, sometime between 2:35 p.m. and 2:40 p.m. on January 13, 1999.

Prior to trial, Petitioner gave trial counsel two letters from McClain. The letters indicated that she saw Petitioner at a different location during the 2:35 p.m. to 2:40 p.m. window when the victim was allegedly murdered. In the first letter, dated March 1, 1999, McClain wrote that she remembered talking to Petitioner at the Woodlawn Public Library during the afternoon of January 13, 1999, and offered to account for some of his "unaccounted lost time (2:15 – 8:00; Jan. 13)." Petitioner's Exhibit PC2-4. McClain also typed a second letter, dated March 2, 1999, affirming that she remembered talking to Petitioner at the library during the afternoon of January 13, 1999. Petitioner's Exhibit PC2-5.

The notes found in trial counsel's file further indicate that Petitioner informed trial counsel that McClain was a potential alibi witness. According to notes dated July 13, 1999, Petitioner informed trial counsel's law clerk that McClain saw Petitioner at the Woodlawn Public Library at around 3:00 p.m. on January 13, 1999. Petitioner's Exhibit PC2-2. Trial counsel also noted that "[McClain] and her boyfriend saw [Petitioner] in library" from around 2:15 p.m. to 2:45 p.m. Petitioner's Exhibit PC2-13.

Although trial counsel had notice of the potential alibi witness, neither she nor her staff ever contacted McClain. After the conclusion of the trial, McClain signed an affidavit on March 25, 2000, stating that she spoke with Petitioner at the library sometime between 2:20 p.m. and 2:40 p.m. on January 13, 1999, and that no attorney had ever contacted her.[10] Petitioner's Exhibit

---

[10] At the October 2012 post-conviction hearing, Kevin Urick, Esq., testified that McClain signed the March 25, 2000 affidavit due to pressure from Petitioner's family based on his impression from a telephone conversation with McClain. McClain refuted that assertion in her January 13, 2015 affidavit and during her testimony at the February 2016 post-conviction hearing. Furthermore, Petitioner alleges that Mr. Urick misrepresented McClain's position at

PC2-6. Almost fifteen years later, McClain signed a second affidavit, dated January 13, 2015, affirming that she saw Petitioner at the library around 2:30 p.m. and that no one from Petitioner's defense team had ever contacted her. Petitioner's Exhibit PC2-7.

Petitioner contends that trial counsel rendered deficient performance when she failed to contact and investigate McClain as a potential alibi witness. The Supreme Court of the United States has defined the standard for reviewing the strategic judgments made to support the adequacy of an investigation:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

Wiggins v. Smith, 539 U.S. 510, 521-22 (2003) (citing *Strickland*, 466 U.S. at 690-91). The Court previously held that trial counsel made a strategic decision not to investigate McClain's potential alibi and thus, trial counsel did not render deficient performance. *See* January 6, 2014 Memorandum Opinion at 10-12. In light of the expanded record and the legal arguments presented at the February 2016 post-conviction hearing, however, the Court here finds that trial counsel's failure to investigate McClain as a potential alibi witness fell below the standard of reasonable professional judgment.

The Court's analysis of counsel's duty to investigate a potential alibi witness begins with *In re Parris W.*, 363 Md. 717 (2000). In *Parris*, the juvenile court found the juvenile to be

---

the October 2012 post-conviction hearing and committed misconduct by dissuading McClain from testifying. It is unnecessary for the Court to make findings as to the merits of Petitioner's allegation regarding potential misconduct because McClain was afforded the opportunity to appear and testify at the February 2016 post-conviction hearing as to the facts of the alibi.

delinquent of assault and trespass that, according to the victim, occurred during the afternoon of April 27, 1999. *Id.* at 720. The juvenile notified counsel that his father could provide a potential alibi; the father would have testified that he took his son to work the entire day and then brought him over to a friend's apartment during the afternoon that the assault occurred. *Id.* at 722-23. Counsel subpoenaed a number of witnesses who could have corroborated the alibi, but counsel inadvertently issued the subpoenas for the wrong date without checking the computer for the correct date. *Id.* at 721-722. The Maryland Court of Appeals held that counsel rendered deficient performance when she failed to issue subpoenas with the correct date for uninterested witnesses that could have corroborated the alibi defense, which ultimately prejudiced the juvenile's defense. *Id.* at 727-30.

Although the issue in the present matter does not involve counsel's failure to subpoena alibi witnesses for the correct date, the Maryland Court of Appeals in *Parris* cited favorably a number of cases, which ruled that counsel's failure to investigate a potential alibi witness is inconsistent with the exercise of reasonable professional judgment. *Id.* at 730-36; *see Griffin v. Warden, Md. Corr. Adjustment Center*, 970 F.2d 1355, 1358-59 (4th Cir. 1992) (finding that counsel's performance was clearly deficient when counsel failed, due to unpardonable neglect, to contact, interview, and present the testimony of a potential alibi witness); *see also Montgomery v. Petersen,* 846 F.2d 407, 413-14 (7th Cir. 1988) (ruling that counsel rendered deficient performance when counsel failed to investigate the potential alibi witness); *Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991) (holding that counsel's performance fell below the standard of reasonable professional judgment when counsel failed to investigate an alibi witness and request

a continuance for further investigation). The Court finds these cases to be instructive in the present matter.

In *Grooms*, a jury convicted the defendant of selling stolen Native American artifacts; the sale took place between 5:00 and 5:30 p.m. on May 15, 1984. 923 F.2d at 89. On the day of the trial, the defendant informed counsel that he spent May 15, 1984, waiting for mechanics to replace the transmission on his pickup truck, and the mechanics did not complete the repairs until late in the evening, well after the events of the crime. *Id.* The defendant provided counsel with a cancelled check dated May 15, 1984, made payable for the truck repairs and a work order dated May 14, 1984, made out to the defendant. *Id.* at 89-90. Trial counsel did not contact the mechanics to investigate the potential alibi because he assumed that the court would have precluded the evidence of an alibi due to lack of an alibi notice. *Id.* at 90.

The United States Court of Appeals for the Eighth Circuit noted that "[o]nce a defendant identifies a potential alibi witness, it is unreasonable not to make some effort to contact [the witness] to ascertain whether their testimony would aid the defense." *Id.* The Court ultimately held that counsel's "failure to check the bona fides of the documents [the defendant] presented by contacting [the mechanics] or to advise the court of his predicament and request a continuance was unreasonable under the circumstances of this case." *Id.*

The present matter before the Court shares similar circumstances to those found in *Grooms*. Similar to *Grooms*, Petitioner informed counsel of a potential alibi defense that could have placed him in the Woodlawn Public Library from about 2:15 p.m. to 2:45 pm on January 13, 1999. Petitioner also produced two letters from McClain, who had written that she remembered talking to Petitioner at the library after school ended on January 13, 1999. Trial

counsel, however, failed to make any effort to contact McClain and investigate the bona fides of the March 1, 1999 and March 2, 1999 letters, or ascertain whether McClain's testimony would aid Petitioner's defense. In *Grooms*, the Court held that trial counsel should have attempted to investigate the alibi despite learning about the potential alibi on the day of the trial. *Id.* at 91. Trial counsel in the present case learned about the potential alibi witness on July 13, 1999, nearly five months prior to trial, and thus, she had ample time and opportunity to investigate the potential alibi. Under these circumstances, the Court is persuaded that trial counsel's failure to contact and investigate McClain as a potential alibi witness fell below the standard of reasonable professional judgment.

The State insists, however, that trial counsel made a strategic decision not to investigate McClain because the potential alibi was in fact a scheme manufactured by Petitioner to secure a false alibi. The State posits this theory on two grounds. First, the State directs the Court's attention to the level of detail contained in McClain's March 2, 1999 letter, written just two days after Petitioner's arrest; the State argues that the level of detail in the letter would have caused a reasonable attorney to doubt the bona fides of the potential alibi. For instance, the State questions how McClain, a seventeen-year-old high school student at the time, could have obtained Petitioner's booking number (#992005477), which is found in the heading of McClain's March 2, 1999 letter. The State also calls into doubt how McClain could have known so much about the details of the murder, such as how the police took three weeks to find the victim's car, how Petitioner could have followed the victim in his car and killed her, the exact location of the victim's "shallow grave" in Leakin Park, the cause of the victim's death, and the "fibers" on her body. Based on the alleged in-depth knowledge found in the letter, the State concludes that a

reasonable attorney would have wondered whether a third party, namely Petitioner, or someone acting on his behalf, supplied McClain with the information.

Second, the State argues that the notes detailing a detective's interview with Ju'uan Gordon (hereinafter "Gordon") could have led a reasonable attorney to conclude that McClain's letters were a ruse to secure a false alibi for Petitioner. The detective who investigated the case interviewed Gordon, a friend of Petitioner, on April 20, 1999. State's Exhibit 1B-0133. According to the notes, Gordon stated the following:

> [Petitioner] wrote a letter to a girl to
> type up with his address on it
> But she got it wrong
> 101 East Eager Street
> Asia? 12th grade
> [Gordon] got one, Justin Ager got one

Id. The State asserts that the notes of Gordon's interview strongly suggests that Petitioner wrote the March 2, 1999 letter for McClain to "type up" as part of a scheme to secure a false alibi. Therefore, the State concludes that trial counsel made a strategic decision not to investigate a false alibi.

Although the State presents quite a compelling theory, the Court must adhere to the legal standard governing claims of ineffective assistance of counsel by evaluating trial counsel's performance without engaging in the "exercise of retrospective sophistry." *Griffin*, 970 F.2d at 1358. In *Griffin*, trial counsel failed to contact and investigate a list of alibi witnesses that could have accounted for the defendant's whereabouts during a robbery. *Id.* at 1356. Trial counsel explained that he did not contact any witnesses because he expected the defendant to take a plea. *Id.* Despite counsel's admission, the state court found that counsel made a cogent tactical decision not to investigate a potential alibi witness because a security guard identified the

witness as one of the robbers and thus, if the alibi witness were an accomplice to the robbery, calling the witness would have hurt the defendant's case. The United States Court of Appeals for the Fourth Circuit rejected the state court's reasoning as "thoroughly disingenuous" because counsel never spoke to the potential alibi witness or made a strategic decision not to call the witness. *Id.* at 1358. In finding that counsel rendered deficient performance, the Court explained that "[t]olerance of tactical miscalculation is one thing; fabrication of tactical excuse is quite another." *Id.* at 1359 (citing *Kimmelman v. Morrison*, 477 U.S. 365, 386-87 (1986) (cautioning against the use of hindsight to supply a reason for counsel's decision)).

In the case at hand, adopting the State's theory that Petitioner fabricated the alibi based on McClain's March 2, 1999 letter and the detective's interview notes of Gordon would require the Court to retroactively supply reasoning that is contrary to the facts and the law. The State argues that the in-depth knowledge of the case in McClain's March 2, 1999 letter is proof that either Petitioner or his agent provided the information to McClain. In order to reach the State's conclusion, however, the Court would have to assume that it was highly unlikely that McClain could have obtained the information from other sources, which is an assumption that is contrary to the facts. The details of the victim's death, including when the victim was last seen, the location of her car, and the location of the "shallow grave" in Leakin Park have been publicly available since February 12, 1999, approximately two weeks before McClain wrote her letter. Petitioner's Exhibit PC2-42. The details of Petitioner's location after his arrest and the cause of the victim's death were also public knowledge prior to when McClain wrote her letter. Petitioner's Exhibit PC2-43.

The State's theory would also invite the Court to entertain speculations about strategic decisions that counsel made in determining to forgo investigating the potential alibi witness. The State argues that it is highly questionable that a seventeen-year-old high school student could have obtained Petitioner's booking number just two days after his arrest, suggesting that Petitioner or his agent provided McClain with the booking number and other information found in the March 2, 1999 letter. While the State's speculation is plausible, the State is essentially asking the Court to favor one conjecture and ignore other equally plausible speculations. Perhaps out of a desire to write to Petitioner, McClain asked her friends and teachers about how she could contact Petitioner while he was incarcerated. Another possibility is that McClain could have asked Petitioner's family about how she could write to Petitioner when she visited his house on the night of March 1, 1999. *See* Petitioner's Exhibit PC2-4.

Similarly, the State's reliance on the detective's interview notes of Gordon would require the Court to review counsel's performance with the distortions of hindsight and unwarranted speculations. According to the interview notes, Petitioner wrote a letter to a girl named Asia to "type up," but she wrote the wrong address – "101 E. Eager Street." Based on the sentence fragments of an extensive interview, the State concludes that Petitioner wrote the March 2, 1999 letter for McClain to "type up," revealing Petitioner's scheme to secure a false alibi. In order to adopt the State's theory, the Court would have to assume that the "Asia" referenced by Gordon is McClain as opposed to another individual who shares the same name. The notes are unclear as to the identity of this "letter"; Gordon could be referencing the March 2, 1999 letter or another letter altogether. With respect to the "wrong address," the Court is left to speculate whether "101 East Eager Street" is the correct or wrong address given the lack of context in the notes.

The State's theory regarding the March 2, 1999 letter and the detective's interview notes of Gordon would require the Court to engage in the kind of hindsight sophistry that *Kimmelman* and *Griffin* cautioned against when evaluating counsel's performance. As adopting the State's theory would require the Court to retroactively supply key assumptions and speculations, the Court rejects the State's invitation to indulge in such hindsight sophistry, given that it is contrary to the legal framework set forth under *Strickland.*

The Court also rejects the notion that trial counsel could have relied upon the interview notes with Gordon to make a strategic decision not to investigate the potential alibi witness. *Lawrence v. Armontrout*, 900 F.2d 127 (8th Cir. 1990), is illuminating on this point. There, the defendant was found guilty of committing a murder that occurred at a time when the defendant's girlfriend and several other witnesses could have accounted for the defendant's location. *Id.* at 128-29. Trial counsel elected not to investigate the potential alibi witnesses partly because the defendant's girlfriend had informed trial counsel that she could not locate one of the witnesses and the other witness refused to testify. *Id.* at 129. The United States Court of Appeals for the Eighth Circuit ruled that counsel's decision not to investigate the potential alibi witnesses fell below the standard of reasonable professional judgment. *Id.* at 129-30. The Court explained that counsel owed a greater duty than merely accepting the hearsay statements of others without independent verification when the life of an individual is at stake. *Id.* Here, the State asserts that trial counsel's reliance on the hearsay statements in Gordon's interview, without any independent verification, was perfectly acceptable, even though the life and liberty interests of a seventeen-year-old were at stake. The Court must disagree. Although the constitutional standard

of evaluating counsel's performance is highly deferential, the Sixth Amendment guarantee of effective assistance of counsel carries significantly more weight than a rubber stamp.

The State also argues that trial counsel made a strategic decision against investigating McClain because the potential alibi would have been inconsistent with Petitioner's own stated alibi that he remained on the high school campus from 2:15 p.m. to 3:30 p.m. At the February 2016 post-conviction hearing, however, Petitioner presented evidence showing the close proximity between the school campus of Woodlawn High School and Woodlawn Public Library. Petitioner's Exhibit PC2-39. As such, the potential alibi and Petitioner's own stated alibi placed Petitioner in the general vicinity of the school campus, albeit with a minor inconsistency. The Court finds that this minor inconsistency does not justify counsel's failure to investigate the potential alibi witness.

The State suggests that trial counsel did not need to personally contact McClain in order to ascertain whether the potential alibi could have aided Petitioner's defense. At the October 2012 post-conviction hearing, Petitioner testified that he was "fairly certain" that he went to use the computers at the Woodlawn Public Library to check his email account. According to the law clerk notes found in trial counsel's file, trial counsel obtained the login information for Petitioner's email account. Therefore, the State concludes that "by simply entering in the login information and password scribbled on the law clerk's notes, [trial counsel] could have swiftly evaluated the potential alibi by determining whether [Petitioner's] email account had activity during the relevant timeframe." State's Consolidated Response, September 23, 2015, at 27, n.3.

The Court finds that the State's argument is misplaced. When users log in to their email accounts, they can conduct an array of activities, such as reading recently received emails,

drafting correspondences, and deleting old messages. Account holders may log in, check to see if any new messages had been received, and then log out of the account without ever conducting any traceable activity, such as drafting and sending emails. Under this scenario, the lack of traceable activity found on the email account does not necessarily mean that the user did not check the account during a specific timeframe. As such, trial counsel could not have evaluated the potential alibi simply by signing in to Petitioner's email account.

The State also theorizes that because trial counsel generated a list of eighty alibi witnesses, the Court can reasonably conclude that trial counsel conducted "some inspection" of the potential alibi.[11] The pertinent question is not whether trial counsel conducted "some inspection," but whether trial counsel conducted the type of reasonable investigation that is required under the prevailing standard of reasonable professional judgment. *Strickland*, 466 U.S. at 690-91. As the Court has explained, reasonable professional judgment under the facts of the present case required trial counsel to contact the potential alibi witness and investigate whether her testimony would aid Petitioner's defense. The facts in the present matter are clear; trial counsel made *no effort* to contact McClain in order to investigate the alibi and thus, trial counsel's omission fell below the standard of reasonable professional judgment.

In holding that trial counsel rendered deficient performance by failing to contact McClain to investigate the alibi, the Court is not imposing an undue burden upon trial counsel. The Court is cognizant of the limited time and resources that defense attorneys may have in preparing for

---

[11] According to the State, trial counsel made a strategic decision not to investigate the alibi based on information she obtained from investigating the witnesses listed on the alibi notice. The Court is perplexed by the State's position. Apparently, trial counsel obtained information about the merits of the alibi by interviewing witnesses who had no relation to McClain's potential alibi. Although the alibi notice specified that these witnesses could "testify to as to [Petitioner's] regular attendance at school, track practice, and the mosque[,]" the alibi notice does not specify which witness, if any, could have accounted for Petitioner's regular routine in between school and track practice. Petitioner's Exhibit PC2-11. The Court is once again left to speculate what information trial counsel might have learned from these witnesses that would have deterred trial counsel from contacting McClain.

trial. In the present case, however, trial counsel had nearly five months before trial to contact McClain after learning about the potential alibi as early as July 13, 1999. Trial counsel did not have to spend extensive resources to contact the potential alibi witness because McClain's March 1, 1999 letter provided the phone numbers through which she could have been contacted. Petitioner's Exhibit PC2-4. Trial counsel could have simply picked up the telephone, made a local telephone call, and ascertained whether McClain's testimony would aid Petitioner's defense. If trial counsel had reservations about the bona fides of the letters as the State suggests, trial counsel could have spoken to McClain about these concerns instead of rejecting the potential alibi outright. *See Montgomery*, 846 F.2d at 412 (7th Cir. 1988) (ruling that counsel's failure to investigate potential alibi witness because counsel "simply didn't believe" the defendant fell below the standard of reasonable professional judgment); *see also United States v. Debango*, 780 F.2d 81, 85 (D.C. Cir. 1986) (concluding that the failure to investigate a potentially corroborating witnesses "can hardly be considered a tactical decision").[12]

In order to prevail on an ineffective assistance of counsel claim, however, Petitioner must prove that trial counsel's failure to investigate McClain as a potential alibi witness prejudiced his defense. Under the prejudice prong, a petitioner must show "a reasonable probability" that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland* 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In *Oken v. State*, 343 Md. 256, 284 (1996), the Maryland Court of Appeals explained that a petitioner must establish a "substantial possibility" that the result of

[12] Petitioner's assertions regarding trial counsel's matters before the Maryland Attorney Grievance Commission and health status have no bearing on the Court's findings. Petitioner also presented the expert testimony of David B. Irwin, Esq., who testified as to the prevailing professional norms of the duty to contact a potential alibi witness. The Court took Mr. Irwin's testimony into consideration with the limitations specified during the hearing in reaching its findings.

the proceeding would have been different, but for counsel's unprofessional errors. The Court's analysis "should not focus solely on an outcome determination, but whether the result of the proceeding was fundamentally unfair or unreliable." *Id.* (internal citations and quotations omitted).

At the February 2016 post-conviction hearing, McClain affirmed her statements in her letters to the Petitioner and the affidavits; she testified that she saw Petitioner at the Woodlawn Public Library on January 13, 1999 at about 2:15 p.m. and spoke to him for about twenty minutes before leaving with her boyfriend. Petitioner argues that had counsel contacted McClain to investigate her as a potential alibi witness, her testimony could have placed Petitioner at the library during the time of the murder. Therefore, Petitioner concludes there is a substantial possibility that, but for counsel's deficient performance, the result of the trial would have been different.

The Court finds that trial counsel's failure to investigate McClain's alibi did not prejudice the defense because the crux of the State's case did not rest on the time of the murder. In fact, the State presented a relatively weak theory as to the time of the murder because the State relied upon inconsistent facts to support its theory. At trial, the State sought to implicate Petitioner in the murder by advancing the theory that Petitioner had strangled the victim to death by the time he called Wilds at 2:36 p.m. to request a ride from the Best Buy parking lot. To prove this theory, the State relied upon: 1) Wilds's testimony that Petitioner called him to request a ride from the Best Buy parking lot, where he saw the victim's body in the trunk of her car; and 2) Petitioner's cell phone records, which showed that his cell phone received an incoming call at

2:36 p.m. Upon reviewing the record, however, Wilds's testimony diverged from the cell phone records that the State used to identify the call at issue:

> [STATE]: And did there come a time when you left [Pusateri's residence]?
>
> [WILDS]: Yes.
>
> [STATE]: And where did you go when you left?
>
> [WILDS]: **Well, in [Petitioner's] last phone call, he was like I need you to come get me at like 3:45 or something like that he told me, and I was like all right, cool. I waited until then and there was no phone call, so I was going to my friend Jeff's house.**
>
> [STATE]: **And on your way there, what if anything happened?**
>
> [WILDS]: **Jeff wasn't home. As I was leaving his street, I received a phone call. It was Adnan. He asked me to come and get him at Best Buy.**

Trial Tr., at 130, Feb. 4, 2000 (emphasis added).

Had trial counsel investigated the potential alibi witness, she could have undermined a theory premised upon inconsistent facts. The potential alibi witness, however, would not have undermined the crux of the State's case: that Petitioner buried the victim's body in Leakin Park at approximately 7:00 p.m. on January 13, 1999. The Leakin Park burial marked the convergence point between Wilds's testimony and Petitioner's cell phone records. According to Wilds, Petitioner received two incoming calls while burying the victim's body in Leakin Park at about 7:00 p.m. The State corroborated Wilds testimony with Petitioner's cell phone records, which showed that his cell phone received two incoming calls at 7:09 p.m. and 7:16 p.m. The cell phone records also reflected that the two incoming calls connected with cell site "L689B," which the State's cell tower expert identified as the cell site that provided coverage to an area that encompassed Leakin Park.

Together, Wilds's testimony and Petitioner's cell phone records created the nexus between Petitioner and the murder. Even if trial counsel had contacted McClain to investigate the potential alibi, McClain's testimony would not have been able to sever this crucial link. Therefore, the Court finds that Petitioner failed to establish a substantial possibility that, but for trial counsel's deficient performance, the result of the trial would have been different. Accordingly, the Court shall deny post-conviction relief with respect to Petitioner's claim that trial counsel rendered ineffective assistance by failing to investigate McClain as a potential alibi witness.

II. *Brady* – Reliability of Cell Tower Location Evidence

Petitioner alleges that the State failed to disclose potentially exculpatory evidence related to the reliability of cell tower location evidence and thus, the State violated its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), as well as Petitioner's right to a fair trial. The State responds that Petitioner waived his right to challenge the reliability of cell tower location evidence because he failed to raise the issue in a prior proceeding. The Maryland Uniform Post-Conviction Procedure Act provides that an allegation of error is waived when a petitioner could have made, but intelligently and knowingly failed to make, the allegation before trial, at trial, on direct appeal, in an application for leave to appeal a conviction based on a guilty plea, in a habeas corpus or coram nobis proceeding, in a prior petition for post-conviction relief, or in any other proceeding that a petitioner began. Crim. Proc. § 7-106(b)(1)(i). Where a petitioner could have made an allegation of error at a prior proceeding but failed to do so, the petitioner bears the burden of overcoming the "rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation of error." Crim. Proc. § 7-106(b)(2).

Maryland appellate courts have extensively explored the issue of waiver. *See State v. Gutierrez*, 153 Md. App. 462, 470-75 (2003); *McElroy v. State*, 329 Md. 136, 145-49 (1993); *State v. Thornton*, 73 Md. App. 247, 259-66 (1987); *Wyche v. State*, 53 Md. App. 403, 405-09 (1983); *State v. Magwood*, 290 Md. 615, 624-29 (1981); *Curtis v. State*, 284 Md. 132, 133 (1978). The plain text of the Maryland Uniform Post-Conviction Procedure Act provides that in order for Petitioner to waive an issue, he must "intelligently and knowingly" effect the waiver. Crim. Proc. § 7-106(b)(1)(i). The standard of proof, however, differs depending on whether the issue being raised relates to a fundamental or non-fundamental right.

Fundamental rights are "basic rights of a constitutional origin, whether federal or state, that have been guaranteed to a criminal defendant in order to preserve a fair trial and the reliability of the truth-determining process." *Wyche*, 53 Md. App. at 406. A fundamental right can only be waived if Petitioner "intelligently and knowingly" effected the waiver. *Id.* "A non-fundamental right will be deemed waived by a showing that Petitioner had the opportunity to raise the issue in a prior proceeding but failed to do so." *Gutierrez*, 153 Md. App. at 471.

Therefore, the Court must first determine whether the alleged *Brady* violation relates to a fundamental or non-fundamental right. In *Brady*, the Supreme Court of the United States held that suppression of favorable and material evidence by the State amounts to denial of defendant's right to due process. 373 U.S. at 87. In so holding, the Supreme Court of the United States recognized that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* A *Brady* violation relates to the right to a fair trial. The right to a fair trial is rooted in the

Sixth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, both of which form the foundation of our criminal justice system.

The application of the "intelligent and knowing" standard, however, does not necessarily apply to an asserted right originating from a constitutional guarantee. *See Wyche*, 53 Md. App. at 406. Thus far, Maryland appellate courts have only identified a limited number of fundamental rights that require a showing of an "intelligent and knowing" waiver. *See Davis v. State*, 285 Md. 19, 33-34 (1979) (noting that the "knowing and intelligent" standard applies to the Sixth Amendment right to effective assistance of counsel, the right to a jury trial, a guilty plea, the Fifth Amendment self-incrimination privilege, and the double jeopardy clause). Maryland appellate courts have not explicitly identified the underlying basis of a *Brady* claim as a fundamental right.

Conyers v. State, 367 Md. 571 (2002), is instructive in determining whether an allegation of a *Brady* violation relates to a fundamental or non-fundamental right. In *Conyers*, the defendant alleged that the State violated *Brady* when the prosecution failed to disclose impeachment evidence of a witness who testified that the defendant confessed to his involvement in the crime. *Id.* at 583-84. In analyzing whether the defendant waived his right to raise the *Brady* allegation, the Maryland Court of Appeals used language suggesting that a *Brady* claim relates to a non-fundamental right. The Maryland Court of Appeals explained that the post-conviction statute presupposes that "*an opportunity to raise the challenge* existed at the time of the lower court proceeding." *Id.* at 595 (emphasis added). The Court then cited to a number of cases that addressed waiver of non-fundamental rights. *Id.* at 595-96; *see also Hunt v. State*, 345 Md. 122, 142-46 (1997) (concluding that the intelligent and knowing standard does not apply to a waiver

of the petitioner's right to voir dire of prospective jurors); *Oken v. State*, 343 Md. 256, 269-272 (1996) (holding that a waiver of the right to "reverse-*Witherspoon*" questions on voir dire is not controlled by the "intelligent and knowing" standard); *Walker v. State*, 343 Md. 629, 647 (1996) (noting that a failure to object to a jury instruction does not require a showing of an intelligent and knowing waiver). The Court also noted that "if a right alleged to have been violated is a non-fundamental right, waiver will be found if it is determined that the *possibility* existed for the petitioner to have raised the allegation in a prior proceeding, but he did not do so[.]" *Conyers*, 367 Md. at 596 (citing *Wyche*, 53 Md. App. at 407) (internal quotations omitted; emphasis in original). Based on the Maryland Court of Appeals' treatment of the *Brady* issue in *Conyers*, the Court shall review the potential waiver of Petitioner's *Brady* allegation in the context of a non-fundamental right by determining whether Petitioner had a prior opportunity to raise the issue, but failed to do so.

Conyers is particularly instructive in evaluating the merits of the alleged waiver of Petitioner's *Brady* claim. In *Conyers*, the defendant contended that the State failed to disclose evidence that could have impeached the witness who testified that the defendant provided a jailhouse confession. 367 Md. at 583-84. The State argued that the defendant waived his *Brady* allegation because he failed to raise the issue at trial or on direct appeal. *Id.* at 57-88. As noted, *supra*, the Maryland Court of Appeals analyzed the merits of the waiver argument by determining whether the opportunity existed for the defendant to raise the issue in the lower court proceeding. The Maryland Court of Appeals determined that the factual basis of the *Brady* claim did not become known to the petitioner until the detective inadvertently disclosed the impeachment evidence at the post-conviction hearing. *Id.* at 596. The Maryland Court of Appeals

held that the opportunity to raise the issue did not exist in a lower court proceeding because the defendant did not have the impeachment evidence to raise his *Brady* claim. *Id.* As such, the Maryland Court of Appeals held that the defendant did not waive the right to raise the *Brady* allegation. *Id.* Under the principles set forth in *Conyers*, Petitioner bears the burden of proving that he did not have the opportunity to raise the *Brady* allegation in a prior proceeding.

The Court finds that Petitioner waived his right to raise the *Brady* allegation because he had the opportunity to make his claim in a prior proceeding. Petitioner's *Brady* claim is premised on two grounds. First, Petitioner argues that when the State presented his cell phone records at trial, the prosecution omitted a fax cover sheet that contained a set of instructions on how to read a "subscriber activity report" and a disclaimer about the unreliability of using incoming calls for location. Petitioner's Exhibit PC2-16. Second, Petitioner argues that the State presented his cell phone records without the subject page identifying the cell phone records as an excerpt of a subscriber activity report.[13] Petitioner's Exhibit PC2-15.

Although the State omitted these documents when the prosecution introduced Petitioner's cell phone records into evidence, Petitioner had the opportunity to challenge the alleged *Brady* violation in a prior proceeding. Whereas the defendant in *Conyers* did not know about the impeachment evidence until the post-conviction hearing, in the instant matter, trial counsel possessed the disclaimer and the subject page, as both of these documents were found in her file. As trial counsel had both documents in her possession at least since the time of trial, Petitioner had the factual basis and the opportunity to raise the issue at trial, on direct appeal, in his first post-conviction petition, and in the application for leave to appeal. Petitioner's failure to act upon

[13] The significance of these documents will be discussed in greater detail, *infra*.

these opportunities to raise the issue in a prior proceeding amounts to waiver of the *Brady* allegation.

Even if the Court were to consider the merits of Petitioner's *Brady* argument, the Court would conclude that the State did not commit a *Brady* violation. Petitioner alleges that the State committed a *Brady* violation by suppressing evidence that undermined the reliability of the cell tower evidence. The Supreme Court explained in *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

In order to establish a *Brady* violation, Petitioner must show that: 1) the prosecution suppressed the evidence at issue; 2) the suppressed evidence is favorable to the defense because it is either exculpatory, provides a basis for impeaching a witness, or offers grounds for mitigating a sentence; and 3) the evidence is material. *United States v. Bagley*, 473 U.S. 667, 674-78 (1985). When determining whether the evidence is material, the Court applies the "reasonable probability" test, which the Supreme Court adopted from *Strickland*. The suppressed evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682.

Petitioner's *Brady* allegation is premised on how the State used Petitioner's cell phone records to corroborate Wilds's testimony. At trial, Wilds testified that Petitioner disposed of the victim's body in Leakin Park at approximately 7:00 p.m. on January 13, 1999. According to Wilds, Petitioner received two incoming calls during the time of the burial. The State presented

Petitioner's cell phone records (hereinafter "Exhibit 31") as circumstantial evidence to corroborate Wilds's testimony by identifying two incoming calls that occurred at 7:09 p.m. and 7:16 p.m. Both of these calls connected with cell site "L689B." Waranowitz, the State's cell tower expert, testified that cell site "L689B" serviced the coverage area that encompassed the Leakin Park burial site. Based on the evidence and testimony presented, the State urged the jury to make a reasonable inference that Petitioner's cell phone was possibly located in Leakin Park during the time of the burial.

According to Petitioner, the State violated *Brady* when the prosecution presented Exhibit 31 without the subject page identifying the exhibit as a "subscriber activity report" and the disclaimer about the unreliability of using incoming calls for location information.[14] Petitioner argues that the disclaimer and the subject page are favorable evidence that he could have used to question the reliability of the cell tower evidence that the State used to approximate Petitioner's cell phone during the time of the burial. As such, there is a substantial possibility that had the State presented Exhibit 31 with both of these documents, Petitioner could have undermined a key pillar of the State's case, and thus, the result of the trial would have been different.

Assuming, *arguendo*, that the documents are favorable and material evidence, the Court does not find merit to Petitioner's argument. Petitioner has failed to establish that the State suppressed the evidence at issue. As a guiding principle, the Supreme Court did not intend for the *Brady* rule "to displace the adversary system as the primary means by which truth is

---

[14] Petitioner initially moved the Court to consider his *Brady* allegation on the omission of the disclaimer and the subject page. *See* Petitioner's Reply to the State's Consolidated Response, October 13, 2015, at 8-20. Accordingly, the Court re-opened the post-conviction proceedings to address the narrow scope of Petitioner's *Brady* allegation. *See* Statement of Reasons and Order of the Court, November 6, 2015. During the February 2016 post-conviction hearing, however, Petitioner expanded upon his argument and alleged that the State also violated *Brady* when the prosecution disclosed a truncated copy of Petitioner's cell phone records. Petitioner's Exhibit PC2-40. The Court re-opened the post-conviction proceeding on limited grounds and thus, the Court will not consider arguments that are beyond the scope of the Court's Order.

discovered." *Bagley*, 473 U.S. at 675. "The *Brady* rule does not relieve the defense from the obligation to investigate the case and prepare for trial." *Ware v. State*, 348 Md. 19, 39 (1997). The prosecution cannot be said to have suppressed evidence when the information was available to the defense through a "reasonable and diligent investigation." *Id.*

The United States Court of Appeals for the Fourth Circuit's decision in *Barnes v. Thompson*, 58 F.3d 971 (4th Cir. 1995), is illuminating. In *Barnes*, the defendant and his accomplice robbed a supermarket, and the defendant shot and killed two victims during the course of the robbery. *Id.* at 973. After investigating the crime scene, the police retrieved a gun belonging to one of the victims beneath or near the victim's body. *Id.* A jury found the defendant guilty of capital murder, and the trial court sentenced the defendant to death. *Id.* The defendant filed for a writ of habeas corpus claiming that the State's failure to disclose the exact location of the gun violated *Brady* because the defendant could have shown that he killed the armed victim in an act of self-defense. *Id.*

The United States Court of Appeals for the Fourth Circuit ruled that although the State did not disclose the exact location of the gun, the defense could have discovered the information through a reasonable and diligent investigation. *Id.* at 976-77. The defendant knew that the State had retrieved the gun at the scene of robbery because a detective revealed this information when he testified during a preliminary hearing. *Id.* at 976. At the trial of the accomplice, the police officers also testified that they had recovered a gun beneath or near the victim's body. *Id.* at 976-77. The United States Court of Appeals for the Fourth Circuit rejected the *Brady* challenge because the defendant could have conducted a reasonable and diligent investigation to ascertain

the location of the gun by either interviewing the police officers or reviewing the transcripts of the accomplice's trial. *Id.* at 977.

In the present matter, the facts that would have allowed Petitioner to discover the omission of the documents were readily available to Petitioner. The disclaimer and the subject page were found in trial counsel's file, and the State disclosed these documents as part of pre-trial discovery and conveyed its intention to introduce these records at trial.[15] State's Exhibit 1A-0023. As he had access and advance notice that the State intended to introduce these records into evidence, Petitioner had the facts and the opportunity to conduct a reasonable and diligent investigation to uncover the State's omission. Therefore, the Court shall deny relief with respect to Petitioner's *Brady* allegation.

III. Ineffective Assistance of Counsel – Reliability of Cell Tower Location Evidence

Petitioner claims that trial counsel rendered ineffective assistance of counsel when she failed to use the disclaimer to cross-examine Waranowitz, the State's cell tower expert, about the reliability of the cell tower location evidence. The State responds that similar to Petitioner's *Brady* claim, he waived his right to challenge trial counsel's representation because he failed to raise the issue in a prior proceeding. The Court finds, however, that although Petitioner failed to raise the issue in a prior proceeding, he did not "intelligently and knowingly" effect the waiver.

As the Court has explained, *supra*, the standard of proof for finding that a waiver occurred differs depending on whether the allegation of error relates to a fundamental or non-fundamental right. Whereas the right underlying Petitioner's *Brady* claim is a non-fundamental

---

[15] Throughout the pleading stage and the February 2016 post-conviction hearing, Petitioner conceded that trial counsel possessed the disclaimer in her file. The entirety of Petitioner's cell phone records were also found in trial counsel's file. State's Exhibit 1A-0394 – 0511. Petitioner could have cross-referenced Exhibit 31, an excerpt of Petitioner's cell phone records, with the entire record to discover the omission of the subject page.

right, Maryland appellate courts have identified the Sixth Amendment right to effective assistance of counsel as a fundamental right in the context of waiver. *See Davis*, 285 Md. at 33-34; *see also Wyche*, 53 Md. App. at 406. In order to waive a fundamental right, a petitioner must "intelligently and knowingly" effect the waiver. *Gutierrez*, 153 Md. at 471-72. An intelligent and knowing waiver is an "intentional relinquishment of a known right or privilege." *Thornton*, 73 Md. App. at 253. Therefore, waiver may be found when the record "expressly reflects" that a petitioner had a basic understanding of the nature of the right and that he or she agreed to waive the claim at issue. *Wyche*, 53 Md. App. at 403. The post-conviction statute places the burden on Petitioner to rebut the presumption that he "intelligently and knowingly" waived his claim that trial counsel rendered ineffective assistance of counsel. Crim. Proc. § 7-106(b)(2).

In *McElroy v. State*, 329 Md. 136, 147-48 (1993), the Maryland Court of Appeals identified the kind of evidence that must be offered to rebut the presumption that a petitioner intelligently and knowingly effected a waiver. First, the issue must not have been raised by the petitioner in a prior proceeding. *Id.* Second, the petitioner must never have been advised by counsel that the petitioner should have raised the issue of ineffective assistance of counsel in the initial petition for post-conviction relief. *Id.* Third, the petitioner must never have been advised that trial counsel may have been ineffective for failing to pursue certain actions underlying the ineffective assistance of counsel claim at issue. *Id.* Finally, the Court must take into consideration the petitioner's education level and mental capacity to intelligently and knowingly waive the allegation. *Id.*

Here, the Court finds that Petitioner has met the burden to rebut the presumption that he intelligently and knowingly waived his right to seek relief based on trial counsel's alleged failure

to challenge the reliability of the cell tower evidence. Although Petitioner alleged that trial counsel may have been ineffective on other grounds in his initial petition, he has never alleged that trial counsel rendered ineffective assistance for her alleged failure to challenge the State's cell tower expert with the disclaimer. More importantly, Petitioner was never advised that trial counsel may have been ineffective for her alleged failure to challenge the State's cell tower expert at trial with the disclaimer in prior proceedings. In fact, Petitioner's counsel for the post-conviction proceedings did not advise Petitioner about the issue until shortly before August 24, 2015, when counsel consulted with a cell tower expert about the potential ramifications of the disclaimer.[16] *See Curtis*, 284 Md. at 142-50 (holding that the Maryland General Assembly did not intend to bind the petitioner to his or her lawyer's action or inaction under the waiver statute; instead, the pertinent question is whether the petitioner intelligently and knowingly effected the waiver). Since Petitioner did not know about the potential implications of trial counsel's failure to challenge the cell tower evidence, he could not have knowingly waived his right to raise the allegation.

The record also shows that at Petitioner never completed his high school education. *See* Disposition Tr., at 11, Jun. 6, 2000. Requiring a layman who lacks a complete high school education to understand the intricacies of cellular network design and the legal ramifications of trial counsel's failures to challenge the evidence would be inconsistent with the spirit of the Sixth Amendment. As Justice Alexander George Sutherland explained:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left

[16] Counsel also did not fully advise Petitioner of the factual basis of his ineffective assistance of counsel allegation until sometime after September 29, 2015, when Waranowitz, the State's cell tower expert at trial, informed counsel that he never saw the disclaimer at issue. *See* Petitioner's Exhibit PC2-20.

> without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell v. Alabama, 287 U.S. 45, 69 (1932). In accordance with the fundamental nature of the Sixth Amendment, the Court finds that Petitioner did not intelligently and knowingly waive his right to challenge trial counsel's alleged failure to confront the State's cell tower expert with the disclaimer.

Accordingly, the Court shall consider the merits of the allegation that trial counsel rendered ineffective assistance when she failed to cross-examine the State's cell tower expert about the reliability of the cell tower evidence.[17] To prevail on an ineffective assistance of counsel claim, a petitioner must satisfy the two-prong test established in *Strickland v. Washington*. 466 U.S. 668, 690-91 (1984). First, a petitioner must show that counsel rendered deficient performance. *Id.* at 690. Second, a petitioner must also establish that counsel's deficient performance prejudiced his or her defense. *Id.* at 691.

Petitioner argues that trial counsel's performance fell below the standard of reasonable professional judgment when she failed to use the disclaimer to confront the State's expert about the reliability of the cell tower evidence. When reviewing counsel's performance for deficiency,

---

[17] In Petitioner's Supplement to Re-Open Post-Conviction Proceedings, Petitioner advanced a general argument that trial counsel's failure to "act" on the disclaimer amounted to ineffective assistance of counsel. Petitioner argued that trial counsel should have cross-examined the State's expert about the disclaimer or filed a motion *in limine* to exclude Exhibit 31 through a *Frye-Reed* hearing. In the November 6, 2015 Statement of Reasons and Order of the Court, the Court limited the scope of the issue that would be under consideration: whether trial counsel rendered ineffective assistance for her alleged failure to cross-examine the State's cell tower expert. Although Petitioner attempted to make additional arguments regarding the cell tower evidence at the February 2016 post-conviction hearing, the Court will not consider issues that are outside the scope of the issues specified in the Court's Order.

the Court presumes that counsel "rendered adequate assistance and made all significant decisions in exercise of reasonable professional judgment." *Bowers v. State*, 320 Md. 416, 421 (1996). Deficient performance may be found, however, if Petitioner establishes that counsel's performance "fell below an objective standard of reasonableness." *Harris v. State*, 303 Md. 685, 697 (1985). Most importantly, the Court must refrain from succumbing to the temptation of hindsight; instead, counsel's performance must be evaluated at the time of his or her conduct. *Strickland*, 466 U.S. at 690.

At trial, the State relied upon two incoming calls to corroborate Wilds's testimony that Petitioner had buried the victim's body in Leakin Park at approximately 7:00 p.m. on January 13, 1999. The State specifically identified two incoming calls at 7:09 p.m. and 7:16 p.m. on Exhibit 31 that connected with cell site "L689B," which provided cellular network coverage to an area that encompassed Leakin Park. In addition to Wilds's testimony and Exhibit 31, the State relied upon radio frequency engineer Waranowitz, who testified as an expert in wireless cellular phone network design and functioning in the greater Baltimore area.

Prior to trial, Waranowitz had conducted a test to determine which cell site would provide the strongest signal when a call is originated at a certain location. Waranowitz conducted the test by making a call at a location provided by the State and then recording which cell site provided the strongest signal for the call. The State asked Waranowitz to conduct an origination test at the burial site, which elicited the following testimony at trial:

> [STATE]: If I may approach the Clerk at this time, I need State's Exhibit 9. It's one of the big photo arrays. I'm now showing you what's been marked for identification or in evidence as State's Exhibit 9. I would like you to look at the top left photograph and then the others as well. Can you identify the location?

[WARANOWITZ]: This was the location I was taken to where I was told a body was buried.

[STATE]: Already designated on this map by B. You've had a chance to look at the map and see that?

[WARANOWITZ]: Yes.

[STATE]: **When you got to that site and you can hand the exhibit back to the Clerk at this time, what test did you perform?**

[WARANOWITZ]: **I originated a phone call.**

[STATE]: **And what cell site did you find that that site went through?**

[WARANOWITZ]: **L689B.**

[STATE]: **I would like if you look at lines 10 and 11 on the State's Exhibit 34,**[18] **you've got cell site 689, L689B, address 2122 Windsor Park Lane. Is that the same cell site that a phone call initiated there went through?**

[WARANOWITZ]: **Yes.**
* * *
[STATE]: **Now, if there were testimony that two people in Leakin Park at the burial site and that two incoming calls were received on a cell phone, they're an AT&T subscriber cell phone there, cell phone records with two calls that were – went through that particular cell site location [L689B], would be – that functioning of the AT&T network be consistent with the testimony.**

[DEFENSE]: Objection.

[COURT]: You may only answer only as it relates to an Erickson piece of equipment.[19]

[WARANOWITZ]: **Yes.**

Trial Tr., at 97-100, Feb. 8, 2000 (emphasis added). The testimony revealed that when Waranowitz conducted the origination test at the burial site, he recorded that the test call

---

[18] State's trial Exhibit 34 is a copy of Exhibit 31, Petitioner's cell phone records, with an additional column of addresses designated by the State.

[19] The Court had initially limited Waranowitz's testimony to Erickson equipment because Waranowitz received his training and conducted the test using an Erickson phone, instead of a Nokia 6160 phone that Petitioner had used on January 13, 1999. However, the trial court would later qualify Waranowitz as an expert in Nokia 6160 phones because he had conducted other tests with that phone model. Waranowitz testified that the Nokia 6160 would perform about the same as the Erickson model.

connected with cell site "L689B." At trial, Waranowitz affirmed that his test results matched the same "L689B" cell site identified in Exhibit 31 for the 7:09 p.m. and 7:16 p.m. incoming calls. Waranowitz then testified that if Exhibit 31 showed two incoming calls connected with cell site "L689B," then the cell phone could have possibly been located in Leakin Park when the phone received the incoming calls.

According to Petitioner, Exhibit 31 is an excerpt of a much larger set of documents, and the subject page of these documents is titled: "SUBSCRIBER ACTIVITY." Petitioner's Exhibit PC2-15. Trial counsel also possessed an AT&T fax coversheet that she obtained during pretrial disclosure, and the fax cover sheet contained a set of instructions labeled, "How to read 'Subscriber Activity' Report." Petitioner's Exhibit PC2-16. The set of instructions also included a disclaimer which specified that:

> Outgoing calls only are reliable for location status. **Any incoming calls will NOT be reliable information for location.**

Id. (emphasis added). Petitioner contends that a reasonable attorney would have cross-examined Waranowitz about the disclaimer and undermined the State's reliance on the 7:09 p.m. and 7:16 p.m. incoming calls to approximate the general location of Petitioner's cell phone during the time of the burial.

The Court finds that trial counsel rendered deficient performance when she failed to properly cross-examine Waranowitz about the disclaimer. The Maryland Court of Appeals has recognized that the failure to conduct an adequate cross-examination may be grounds for finding deficient performance. *See Bowers*, 320 Md. at 436-37; *see also People v. Lee*, 185 Ill.App.3d 420, 438 (1989) (holding that counsel's cross-examination of the State's most crucial witness fell below the standard of reasonable professional judgment); *People v. Trait*, 527 N.Y.S.2d 920, 921

(1988) (finding that counsel's "excessive and purposeless" cross-examination deprived the accused of the right to effective assistance of counsel).

The United States Court of Appeals for the Eighth Circuit's decision in *Driscoll v. Delo*, 71 F.3d 701 (8th Cir. 1995), is instructive. In *Driscoll*, the defendant was convicted of murdering a correctional officer during a prison disturbance. *Id.* at 704. At trial, the State presented the testimony of a serological expert, who conducted a series of blood trace examinations on a homemade knife that belonged to the defendant. *Id.* at 707. According to the State's expert, the examinations revealed that the blood trace found on the homemade knife matched the blood type "A" of another officer, but the examination could not find the victim's blood type "O" on the knife. *Id.* The State advanced the theory that the victim's blood was actually present on the knife, but the presence of an additional blood type "masked" the victim's "O" blood. *Id.* The laboratory report indicated, however, that another test had been conducted showing that no blood type "O" had been masked on the knife, which conclusively disproved the State's argument. *Id.* at 707-08. Although the State had disclosed the report of the test results to defense counsel, he failed to cross-examine the State's serology expert about the test results that would have undermined the State's theory of the case. *Id.* at 708.

The United States Court of Appeals for the Eighth Circuit evaluated counsel's performance in light of the circumstances of the case. In particular, the United States Court of Appeals for the Eighth Circuit noted that the defendant was confronted with a possible death sentence if convicted of the capital murder charge. *Id.* at 709. Given the stakes of the case, whether the blood traces on the defendant's knife matched the blood type of the victim "constituted an issue of utmost importance." *Id.* A reasonable attorney under these circumstances

would have carefully reviewed the blood test reports, and exposed the weakness of the State's case on cross-examination if the State advanced a theory that was inconsistent with the test results. *Id.* As such, the United States Court of Appeals for the Eighth Circuit held that "defense counsel's failures to prepare for the introduction of the serology evidence, to subject the state's theories to the rigors of adversarial testing, and to prevent the jury from retiring with an inaccurate impression that the victim's blood might have been present on the defendant's knife fall short of reasonableness under the prevailing professional norms." *Id.*

The circumstances in the present case are strikingly similar to those found in *Driscoll*. Here, the State charged Petitioner with first-degree murder and if convicted, Petitioner faced a lifetime of confinement. Whether Petitioner's cell phone records revealed an incriminating link between Petitioner and the murder was an issue of crucial importance. Under these circumstances, a reasonable attorney would have carefully reviewed the documents disclosed as part of pre-trial discovery, including the set of instructions and disclaimer provided by AT&T on how to correctly interpret the cell phone records. If the State advanced a theory that contradicted the instructions or disclaimer, a reasonable attorney would have undermined the State's theory through adequate cross-examination.

As the Court noted, *supra*, the State's theory relied upon the two incoming calls at 7:09 p.m. and 7:16 p.m. to approximate the general location of Petitioner's cell phone during the time of the burial. The State advanced its theory through the expert opinion of Waranowitz, who testified that if Exhibit 31 indicated that the two incoming calls at issue connected with cell site "L689B," then it was possible that the cell phone was located in Leakin Park when the phone received the incoming calls. The State's theory of relying on incoming calls to determine the

general location of Petitioner's cell phone, however, was directly contradicted by the disclaimer, which specified that "any incoming calls will NOT be considered reliable information for location." Petitioner's Exhibit PC2-16.

Upon reviewing the contents of Exhibit 31 and the disclaimer, a reasonable attorney would have noticed that the only information pertinent to location in Exhibit 31 was the cell site column. Therefore, the disclaimer raised the possibility that Exhibit 31 may not reliably have reflected the corresponding cell site of an incoming call. If the cell sites contained in Exhibit 31 were not reliable with respect to incoming calls, then it was not certain whether cell site "L689B" could be relied upon for location with respect to the two incoming calls at 7:09 p.m. and 7:16 p.m. Despite this uncertainty, the State asked Waranowitz to compare his test results and draw an inference as to the possible location of Petitioner's cell phone using the cell site information for the incoming calls at 7:09 p.m. and 7:16 p.m.

A reasonable attorney would have exposed the misleading nature of the State's theory by cross-examining Waranowitz. The record reflects, however, that trial counsel failed to cross-examine Waranowitz about the disclaimer.[20] Even under the highly deferential standard of *Strickland*, the failure to cross-examine the State's expert witness regarding evidence that contradicted the State's theory of the case can hardly be considered a strategic decision made within the range of reasonable professional judgment. *See Washington v. Murray*, 952 F.2d 1472, 1476 (4th Cir. 1991) (noting that counsel's performance would have fallen below the standard of

[20] Trial counsel cross-examined Waranowitz on several topics. Trial counsel asked Waranowitz whether he ensured the testing conditions were similar to the circumstances present on January 13, 1999, such as by testing under similar weather conditions, using the same brand of cell phone, and dialing the same set of numbers. Waranowitz responded that he did not match any conditions when he conducted the origination test at the burial site because in most cases, cell site "L689B" is the only cell site with the strongest signal to reach the burial site. Moreover, Waranowitz also testified that the Erickson and Nokia brand phones performed almost exactly the same. With respect to Exhibit 31, trial counsel cross-examined Waranowitz about the call times and durations, but she failed to explore the disclaimer in any way.

reasonable professional judgment if counsel failed to present available evidence that would have questioned the defendant's involvement in the crime). As in *Driscoll*, Petitioner's trial counsel committed a similar error by failing to use readily accessible information to expose the weakness of the State's theory through adequate cross-examination of the State's expert witness.

The State argues, however, that requiring trial counsel to cross-examine Waranowitz regarding "a fax cover sheet" would be at odds with the highly deferential standard of *Strickland*, which the Supreme Court recently reaffirmed in *Maryland v. Kulbicki*,136 S.Ct. 2 (2015) (*per curiam*). As a preliminary matter, the issue before the Court is whether trial counsel failed to cross-examine the State's cell tower expert about the *contents* of the fax cover sheet, namely the set of instructions and disclaimer that provided guidance on how to properly interpret Exhibit 31. With respect to the State's reliance on *Kulbicki*, the Court finds that the facts of the present case are significantly different from those found in *Kulbicki.*

In *Kulbicki*, the defendant alleged that trial counsel rendered ineffective assistance when he failed to cross-examine the State's ballistic expert about a report, which failed to explain the causes of the overlapping chemical compositions of bullets produced from different sources. 136 S.Ct. at 3. The Maryland Court of Appeals held that trial counsel rendered deficient performance when he failed to discover this methodological flaw that would eventually lead to the demise of Comparative Ballistic Lead Analysis evidence and cross-examine the State's expert about the report that was authored by the expert a few years prior to trial. *Id.* at 3-4. The Supreme Court of the United States reversed the decision of the Maryland Court of Appeals and held that trial counsel did not perform deficiently by failing to "pok[e] methodological holes in a then-uncontroversial mode of ballistic analysis." *Id.* at 4. In so holding, the Supreme Court of the

United State doubted whether a diligent search would have uncovered the report at issue given that "in an era of card catalogues, not a worldwide web, what efforts would counsel have had to expend to find the compilation [that included the report]?" *Id.* As the Supreme Court of the United States explained, the highly deferential standard of *Strickland* does not require attorneys to go "looking for a needle in a haystack." *Id.* at 4-5 (citing *Rompilla v. Beard*, 545 U.S. 374, 389 (2005)).

The Court's decision in this case does not require trial counsel to provide representation that is "close to perfect advocacy"; the Court is simply adhering to the standard of "reasonable competence" that is guaranteed by the Sixth Amendment right to effective assistance of counsel. *Id.* at 5 (citing *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (*per curiam*) (internal quotations omitted)). In the case *sub judice*, the Court is not concluding that trial counsel should have predicted the eventual downfall of a non-controversial mode of scientific evidence.[21] The Court is simply stating that reasonable competence required Petitioner's trial counsel to pay close attention to detail while conducting document review.[22] Moreover, trial counsel did not have to expend an unreasonable amount of resources or go look for a "needle in a haystack." *Id.* at 4-5. The metaphorical needle at issue – the disclaimer about the unreliability of incoming calls – was disclosed to trial counsel as part of pre-trial discovery. As such, the concerns that the Supreme Court of the United States expressed in *Kulbicki* are not present in the instant case.

---

[21] Trial counsel did not have to be clairvoyant to predict that the State would rely upon Petitioner's cell phone records; the State disclosed its intention to introduce Petitioner's cell phone records prior to trial. State's Exhibit 1A-0023. The record also reflects that trial counsel had some notice of the State's intention to introduce Petitioner's cell phone records into evidence because she had stipulated to its introduction prior to trial.

[22] A reasonable attorney would have noticed that Exhibit 31 is an excerpt of a larger set of phone records, because the top of the very first page of these phone records clearly specified "SUBSCRIBER ACTIVITY." Petitioner's Exhibit PC2-15. The title of the phone records ought to have alerted trial counsel to the set of instructions and the disclaimer about "How to read 'Subscriber Activity' Report," which she had obtained as part of pre-trial discovery. Petitioner's Exhibit PC2-16. Trial counsel simply had to use two fundamental skill-sets that are essential to reasonably competent lawyers: reading comprehension and attention to detail.

As the Court has explained, *supra*, a reasonable attorney under these circumstances would have carefully reviewed the documents disclosed through pre-trial discovery, and have been prepared to "subject the State's theories to the rigors of adversarial testing." *Driscoll*, 71 F.3d at 709. Instead, trial counsel failed to confront the State's cell tower expert with the disclaimer, and thereby allowed the jury to deliberate with the misleading impression that the State used reliable information to approximate the general location of Petitioner's cell phone during the time of the burial. Reasonable professional judgment requires attorneys to review discovery materials and challenge an attempt by the State to present a misleading theory to the jury. In light of these circumstances, the Court finds that trial counsel's performance fell below the standard of reasonable professional judgment when she failed to pay close attention to detail while reviewing the documents obtained through pre-trial discovery and when she failed to cross-examine the State's cell tower expert regarding the disclaimer about the unreliability of using incoming calls to determine location.

In addition to establishing deficient performance, Petitioner must also demonstrate that trial counsel's unprofessional errors prejudiced his defense. *Strickland*, 466 U.S. at 691. Prejudice exists if there is a "reasonable probability" that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* As the Maryland Court of Appeals explained in *Oken*, a petitioner must show a "substantial possibility" that the result of the proceeding would have been different, but for counsel's unprofessional errors. 343 Md. at 284. Citing *Strickland*, the Maryland Court of Appeals noted that when

analyzing prejudice, the focus should be on "whether the result of the proceeding was fundamentally unfair or unreliable." *Id.*

Petitioner argues that trial counsel's failure to cross-examine Waranowitz regarding the disclaimer prejudiced his defense. Petitioner claims that had trial counsel confronted Waranowitz about the unreliability of using incoming calls to determine location, there is a substantial possibility that the results of the trial would have been different.

At trial, the State advanced the theory that Petitioner strangled the victim in the Best Buy parking lot sometime between 2:15 p.m. and 2:45 p.m. and then disposed of the victim's body in Leakin Park later that night at approximately 7:00 p.m. As the Court has noted *supra*, the evidence presented by the State to establish the general location of Petitioner's cell phone during the time of the burial was the crux of the State's case. The record reflects that the State relied upon the evidence related to the burial event throughout the trial. In the State's opening statement, for instance, the prosecution presented the connection between the burial site and Petitioner's cell phone as the jury's first impression of the case:

> [STATE]: At this time I get to let you know in advance what the evidence you're going to hear is. **Well, you're going to find out that on January 13th, 1999, somewhere about 7:09, 7:16, one [Pusateri] was calling a friend of hers by the name of [Wilds]. The number that she dialed was 443-253-9023. That's the defendant's cell phone number.** She was dialing that number because she got a voicemail – a message left on her phone from [Wilds] that was somewhat garbled. It was somewhere around in here. She got this call. She –
>
> (Pause)
>
> [STATE]: Actually the seven o' clock call, a message left for her. It was garbled. She didn't understand it. She called back to find out what's going on. Well the phone was answered. **One of these calls, 7:09, 7:16, was her calling this number. The phone was answered. The defendant in this case answered the phone. She said, 'This is [Pusateri] I am calling for [Wilds].' The defendant said, '[Wilds] can't come to the phone right now, we're busy,' and hung up. At that moment, the defendant, along**

> **with [Wilds], was in Leakin Park. The defendant was burying the body of one Hae Min Lee.**

Trial Tr., at 96, Jan. 27, 2000 (emphasis added). A jury's first impression of a case plays a significant role in the jury's ultimate verdict. As the Maryland Court of Appeals explained in *Arrington v. State*, 411 Md. 524, 555 (2009), since "opening statements are the first characterization of the case heard by the jury and often presented in artful form, [the courts] do not underestimate the ultimate impact of these statements on the jury's verdict."

The State also emphasized the connection between the burial and Petitioner's cell phone records during closing arguments:

> [STATE]: At this point in time [Wilds] knows he's not going to meet [Pusateri] as they had previously arranged. So at 7:00 he pages [Pusateri]. He leaves that confusing message that she tells you about. [Wilds] and the Defendant go to Leakin Park – time. **And the next phone call, calls 10 and 11, are crucial. [Wilds] tells you that as they're entering the park, preparing to bury the body of [the victim], [Pusateri] returns that call . . . that call ladies and gentlemen, at 7:09 or 7:16 p.m., occurred in the cell phone area covered by Leakin Park. That call is consistent with everything the witnesses told you.**

Trial Tr., at 70, Feb. 25, 2000 (emphasis added). During the State's rebuttal, the prosecution once again urged the jury to consider the 7:09 p.m. and 7:16 p.m. incoming calls and to draw inferences as to the possible location of Petitioner's cell phone during the time of the burial:

> [STATE]: The Defense tells you well, they can't place you specifically within any place by this. **Absolutely true, but look at 7:09 and 7:16, 689B, which is the Leakin Park coverage area. There's a witness who says they were in Leakin Park. If the cell coverage area comes back as that that includes Leakin Park, that is reasonable circumstantial evidence that you can use to say they were in Leakin Park.**

Id. at 125 (emphasis added). The record shows that the cell tower evidence reflected in Petitioner's cell phone records during the time of the burial served a central role in the State's theory of the case.

Scientific evidence, such as the cell tower evidence contained in Petitioner's cell phone records, plays a significant role in a jury's decision-making process. In *Reed v. State*, 283 Md. 374, 375 (1978), the Maryland Court of Appeals addressed the issue of whether testimony based on spectrograms, commonly described as "voiceprints," was admissible as evidence of voice identification. The Maryland Court of Appeals recognized the potential dangers of scientific evidence in the truth-determining process:

> *Frye* was deliberately intended to interpose a substantial obstacle to the unrestrained admission of evidence based upon new scientific principles. . . . Several reasons founded in logic and common sense support a posture of judicial caution in this area. **Lay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials.** We have acknowledged the existence of a . . . misleading aura of certainty which often envelops a new scientific process, obscuring its currently experimental nature. As stated in *Addison*, supra, in the course of rejecting the admissibility of voiceprint testimony, **scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury**[.]

Id. at 386 (citing *People v. Kelly*, 17 Cal. 3d 24, 32 (1976) (internal quotations omitted; emphasis added)). More recently, the Maryland Court of Appeals continued to express similar concerns when reviewing the validity and reliability of Comparative Ballistic Lead Analysis evidence. *See Clemons v. State*, 392 Md. 339, 347 n.6 (2006); *see also Kulbicki v. State*, 440 Md. 33, 55 (2014) (noting the "significance jurors afford to forensic evidence in assessing a defendant's guilt or innocence"), *reconsideration denied* (Oct. 21, 2014), *cert. granted, judgment rev'd*, 136 S. Ct. 2 (2015).

These same concerns are also present in this case. At trial, the State presented the expert testimony of Waranowitz, a radio frequency engineer who designed, maintained, and provided troubleshooting services for the AT&T wireless cellular network in the greater Baltimore area. Given Waranowitz's impressive credentials, the jury likely gave considerable weight to his testimony regarding the potential location of Petitioner's cell phone during the time of the burial.

As such, the record reflects that the cell sites of the incoming calls during the time of the burial and Waranowitz's testimony served as the foundation of the State's case. Trial counsel could have undermined the foundation of the State's case had she cross-examined Waranowitz regarding the unreliability of using incoming calls for determining location. Therefore, the Court finds that there is a substantial possibility that, but for trial counsel's unprofessional error in failing to confront the State's cell tower expert with the disclaimer, the result of the trial would have been different.

The State argues, however, that even if trial counsel had cross-examined Waranowitz about the disclaimer, the result of the trial would have remained the same because the set of instructions and the disclaimer do not apply to Exhibit 31. To support its theory, the State presented the expert testimony of FBI Special Agent Chad Fitzgerald (hereinafter "Agent Fitzgerald"). Agent Fitzgerald testified that the set of instructions and disclaimer only apply to subscriber activity reports. According to Agent Fitzgerald, Exhibit 31 is not a subscriber activity report because Exhibit 31 does not have the "type codes" or the "blacked out areas" that are identified in the fax cover sheet:

> Type codes are defined as the following:
>
> Inl = Outgoing Long distance call
> Lel = Outgoing local call
> CFO = Call forwarding
> Sp = Special Feature
> Inc = Incoming Call
>
> * * *
>
> Blacked out areas on this report (if any) are cell site locations which need a court order signed by a judge in order for [AT&T] to provide.

Petitioner's Exhibit PC2-16. The State argues that because Exhibit 31 is not a subscriber activity report, but "call detail records," the disclaimer regarding the unreliability of using incoming call

information for location does not apply. Instead, the State claims that the set of instructions and disclaimer only apply to the redacted version of Petitioner's cell phone records because the redacted records contain the "type codes" and "blacked out areas" that are characteristic of a subscriber activity report. State's Exhibit 1A-0442 – 0459.

The Court is perplexed by Agent Fitzgerald's interpretation that Exhibit 31 are "call detail records," and not a subscriber activity report, because the Agent's interpretation is contrary to the text of Petitioner's cell phone records. Exhibit 31 is an excerpt of a much larger set of phone records, and subject page for the set of phone records is clearly titled "SUBSCRIBER ACTIVITY." Petitioner's Exhibit PC2-15. Agent Fitzgerald apparently finds the title of the subject page to be irrelevant in his analysis. Instead, what really matters to the Agent is that subscriber activity reports must contain "type codes" and "blacked out areas." The plain text of the instructions, however, specified that "[b]lacked out areas on this report (*if any*) are cell site locations which need a court order signed by a judge in order for [AT&T] to provide." Petitioner's Exhibit PC2-16 (emphasis added). The conditional phrase of "if any" suggests that some subscriber activity reports may not contain "blacked out areas."

Agent Fitzgerald also contradicted his own testimony. Agent Fitzgerald testified that he agreed with most of Waranowitz's analysis, but he discovered that Waranowitz made an error in interpreting Exhibit 31. The erroneous interpretation at issue involved lines 18 and 19 of Exhibit 31:

	Dialed No.	Call Time
18	#4432539023	5:14:07 PM
19	incoming	5:14:07 PM

Petitioner's Exhibit PC2-15. At trial, Waranowitz testified that the two lines showed that the customer had dialed his voicemail. However, Agent Fitzgerald explained that lines 18 and 19 represent an incoming call that was not answered and then forwarded to voicemail. According to Agent Fitzgerald, he was able to interpret correctly lines 18 and 19 because where the "Dialed No." column shows "#4432539023," that symbolizes an incoming call that was not answered and then forwarded to voicemail. Agent Fitzgerald's testimony directly mirrors the set of instructions for how to read subscriber activity reports:

> When 'Sp' is noted in the 'Type' column and then **the 'Dialed #' column shows '# and the target number' for instance '#7182225555', this is an incoming call that was not answered and then forwarded to voicemail.** The preceding row (which is an incoming call) will also indicate 'CFO' in the 'feature' column.

Petitioner's Exhibit PC2-16 (emphasis added). In other words, contrary to Agent Fitzgerald's claim that the set of instructions and the disclaimer do not apply to Exhibit 31, the instructions do apply to Exhibit 31. When confronted with this inconsistency in his testimony, Agent Fitzgerald abandoned his initial position and identified Exhibit 31 as *a* subscriber activity report, but not *the* subscriber activity report that is specified in the set of instructions.

Contrary to Agent Fitzgerald's testimony, the set of instructions does not distinguish between different types of subscriber activity reports. Instead, the title of the instructions merely specified "How to read 'Subscriber Activity' Reports." Petitioner's Exhibit PC2-16. Moreover, the Court does not accept the State's argument that is based solely on semantics. The Court finds that Exhibit 31 is an excerpt of a subscriber activity report based on the subject page titled "SUBSCRIBER ACTIVITY," and that the set of instructions is applicable to Exhibit 31.

Agent Fitzgerald also testified that even if Exhibit 31 was a subscriber activity report, the term "location" referenced in the disclaimer does not refer to cell site location. Instead, the term

"location" means the location of the "switch" that is identified by the "Location1" column in the redacted version of the subscriber activity report. State's Exhibit 1A-0459. According to the Agent, incoming calls are not reliable information for determining the location of the switch because of the call forwarding feature. Agent Fitzgerald explained that when a cell phone receives an incoming call while the phone is turned off, the call is automatically forwarded to the user's voicemail. When the cell phone is turned off, the phone does not connect to a nearby cell site to forward the call. Instead, the cell phone's pre-assigned switch handles the call forwarding mechanic, which is then recorded in the redacted subscriber activity report. Given that the location of the pre-assigned switch may be miles away from the switch that is closest to the cell phone, Agent Fitzgerald concluded that incoming calls are not reliable for the location of the switch.

However, Petitioner identifies a series of questionable incoming calls in the un-redacted subscriber activity report, the source of Exhibit 31, which shows that the term location may also refer to the location of the cell site. The un-redacted subscriber activity report showed that Petitioner's cell phone made an outgoing call at 10:58 p.m. on January 16, 1999. Petitioner's Exhibit PC2-15. The outgoing call connected with cell site "L651C," which is the cell site that provided coverage to an area that encompassed Petitioner's residence at Johnnycake Road, Baltimore County. About thirty minutes later on that same day, the subscriber activity report showed that Petitioner's cell phone received an incoming call at approximately 11:25 p.m., and the call was forwarded to Petitioner's voicemail. The incoming call at 11:25 p.m. connected with cell site "D125C," which provided coverage to an area near Connecticut Avenue in Washington, D.C. Petitioner argues that it is highly unlikely that he could have made a phone call near his

house at 10:58 p.m. and then received an incoming call that connected with a cell site in Washington, D.C. approximately twenty seven minutes later at 11:25 p.m. Petitioner contends that the cell site location that is reflected in the un-redacted subscriber activity report is unreliable because it is highly unlikely that he could have traveled to Washington, D.C from Baltimore City within twenty seven minutes. Therefore, the Petitioner claims that the term "location" in the disclaimer refers to the location of the cell sites.

When Agent Fitzgerald attempted to provide an explanation for this discrepancy, he affirmed that the cell site information reflected in the un-redacted subscriber activity report may not be reliable. According to Agent Fitzgerald, the discrepancy that Petitioner identified is a phenomenon that occurs when a cell phone receives an incoming call along the Metrorail that services the Maryland, Washington, D.C, and Virginia communities. When a cell phone receives an incoming call along the metro system, the subscriber activity report records the cell phone connecting to the central equipment instead of the cell site or antenna that is closest to the phone. Given this metro system phenomenon, the State argues that it is entirely possible that the 11:25 p.m. incoming call connected with a cell site in the Glenmont metro station in Silver Spring, Maryland, which is just a thirty-minute drive from Baltimore City.

Regardless of whether Petitioner could have driven from Baltimore City to Silver Spring within a twenty-seven minute window, Agent Fitzgerald's explanation of the metro phenomenon contradicted his own testimony that the term "location" refers to the switch and not the cell site. The Agent initially testified that incoming calls are not reliable for determining the location of the switch due to the call forwarding feature, and thus, the term "location" means the location of the switch and not cell site location. Agent Fitzgerald proceeded to explain, however, that when a

call is made or received in the metro transit system, the actual cell site or antenna that the phone connected with is not recorded in the subscriber activity report. Instead, the subscriber activity report would show the phone connecting to the central equipment regardless of the distance between the phone and the central equipment. In other words, contrary to the Agent's initial position that location refers to the location of the switch and not the cell site, the Agent informs the Court that we cannot rely on cell site "D125C" to determine the actual cell site or antenna that the cell phone connected with when it received the incoming call. As such, the Court finds that the term "location" specified in the disclaimer refers to cell site location and thus, the disclaimer applies to Exhibit 31.[23]

Finally, the State argues that the outcome of the trial would have remained the same because there is "overwhelming evidence" that Petitioner murdered the victim. The State's argument, however, does not address the pertinent question under the prejudice prong of *Strickland*. As the Maryland Court of Appeals explained in *Oken*, the "proper analysis of prejudice . . . should not focus solely on an outcome determination, but should consider whether the result of the proceeding was fundamentally unfair or unreliable." 343 Md. at 285 (citing *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)). Thus, the issue is not whether Petitioner would have obtained a "not guilty" verdict had trial counsel cross-examined Waranowitz about the disclaimer. Instead, the pertinent question is whether the result of the trial was "fundamentally unfair or unreliable", but for trial counsel's unprofessional errors. *Id.*

The Court finds that trial counsel's deficient performance in failing to confront the State's cell tower expert regarding the disclaimer created a substantial possibility that the result of the trial was fundamentally unreliable. As the Court has explained, the cell site information

[23] The Court's finding is also supported by the testimony of Gerald R. Grant, Jr., Petitioner's cell tower expert.

for the 7:09 p.m. and 7:16 p.m. incoming calls played a significant role in the State's case and the jury's decision-making process. The disclaimer casts a fog of uncertainty over Exhibit 31 and thus, but for trial counsel's failure to cross-examine Waranowitz about the disclaimer, there is a substantial possibility that the result of the trial was fundamentally unreliable.[24] In view of the foregoing, the Court finds that Petitioner successfully established the deficient performance prong and the prejudice prong under *Strickland*. Accordingly, the Court shall grant post-conviction relief with respect to Petitioner's allegation that trial counsel rendered ineffective assistance when she failed to cross-examine the State's cell tower expert regarding the disclaimer.

CONCLUSION

The present proceedings resulted from a tragedy that occurred approximately seventeen years ago – the death of Hae Min Lee.[25] A jury unanimously convicted Petitioner of first-degree murder, kidnapping, and robbery. Petitioner received a life sentence for first-degree murder, thirty years for robbery to run consecutively with the life sentence, and a concurrent ten-year sentence for robbery. Petitioner comes before the Court requesting relief pursuant to the Maryland Uniform Post-Conviction Procedure Act, which grants Petitioner the legal right to seek

---

[24] Waranowitz submitted an affidavit on October 5, 2015, and stated:

> "If I had been aware of this disclaimer, it would have affected my testimony. I would not have affirmed the interpretation of a phone's possible geographical location until I could ascertain the reasons and details for the disclaimer."

Petitioner's Exhibit PC2-20. Although the Court's ultimate finding does not depend solely on Waranowitz's affidavit, the affidavit casts an additional fog of uncertainty that shakes the Court's confidence in the outcome of the trial.

[25] Hae Min Lee was a gifted and talented student who was loved by her family and friends. The loss suffered by her family is most appropriately reflected in a Korean proverb: when a parent dies, you bury the parent in the earth, when a child dies, you bury the child in your heart. *See* Disposition Tr., at 8, Jun. 6, 2000.

relief if "the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of the State [of Maryland]." Crim. Proc. § 7-102(a)(1).

Petitioner alleges that he is entitled to receive post-conviction relief on three grounds: (1) that his trial counsel's failure to contact a potential alibi witness amounted to ineffective assistance of counsel in violation of his Sixth Amendment rights; (2) that the State violated his right to a fair trial and due process by failing to disclose a disclaimer related to the reliability of the cell tower location evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (3) that his trial counsel rendered ineffective assistance in violation of his Sixth Amendment rights when she failed to cross-examine the State's expert regarding the unreliability of the cell tower location evidence. The Court finds that Petitioner's arguments on the first two issues lack sufficient merit but concludes that he is entitled to post-conviction relief on the third issue.

On the issue of ineffective assistance concerning trial counsel's failure to contact the potential alibi witness, the Court finds that trial counsel's performance fell below the standard of reasonable professional judgment. Nonetheless, the Court finds that trial counsel's unprofessional errors did not prejudice Petitioner's defense because the potential alibi witness could not account for the cell tower location evidence that placed Petitioner's cell phone in the general geographical area of the burial site. Thus, the Court finds that Petitioner is not entitled to post-conviction relief despite the deficient performance rendered by trial counsel.

Regarding the State's failure to disclose the disclaimer about the reliability of cell tower location evidence, the Court finds that this allegation fails on two grounds. First, as a procedural matter, Petitioner waived his right to raise the *Brady* allegation because he had an opportunity to make the allegation in prior proceedings, but he failed to do so. Second, even if the Court were to

consider the merits of Petitioner's argument, his *Brady* claim would still fail because the allegedly suppressed evidence could have been discovered through a reasonable and diligent investigation of the materials disclosed to trial counsel as part of pre-trial discovery.

Finally, the Court agreed with Petitioner's claim that he was entitled to post-conviction relief because trial counsel rendered ineffective assistance when she failed to cross-examine the State's expert regarding the unreliability of cell tower location evidence. Although Petitioner had not raised this issue in a prior proceeding, the Court considered the merits of Petitioner's claim because he did not intelligently and knowingly waive his right to raise the issue. The Court finds that trial counsel's performance fell below the standard of reasonable professional judgment when she failed to cross-examine the State's cell tower expert regarding a disclaimer obtained as part of pre-trial discovery, which specified that "[a]ny incoming calls will NOT be considered reliable for location." The Court also finds that trial counsel's unprofessional error prejudiced Petitioner's defense because there is a substantial possibility that the result of the proceeding would have been different but for trial counsel's failure to cross-examine the State's cell tower witness about the disclaimer.

This case represents a unique juncture between the criminal justice system and a phenomenally strong public interest created by modern media. Throughout the proceedings, the parties made repeated efforts to direct the Court's attention to the *Serial* podcast, a twelve-part episodic internet audio program that explored the substantive and procedural issues of this case from trial through the present post-conviction proceedings.[26] *Serial* has attracted millions of active listeners worldwide and inspired many, through social media, to support or advocate

[26] In reaching its factual findings and legal conclusions, the Court did not listen to the *Serial* podcast because the audio program is not a part of the evidentiary record.

against Petitioner's request for post-conviction relief. Regardless of the public interest surrounding this case, the Court used its best efforts to address the merits of Petitioner's petition for post-conviction relief like it would in any other case that comes before the Court; unfettered by sympathy, prejudice, or public opinion.

Accordingly, based on the reasons stated above, the Court finds that Petitioner is entitled to post-conviction relief because trial counsel rendered ineffective assistance when she failed to cross-examine the State's expert regarding the reliability of cell tower location evidence. Therefore, it is this 30th of June, 2016, the Petition for Post-Conviction Relief is hereby **GRANTED**; Petitioner's convictions in the above-captioned case are **VACATED**; and Petitioner's request for a new trial is hereby **GRANTED.**

Judge Martin P. Welch
Judge's Signature appears on the original document