IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2000

NO. 923

ADNAN SYED,
Appellant
v.
STATE OF MARYLAND,
Appellee

APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY
(HONORABLE WANDA KEYES HEARD, PRESIDING)

BRIEF OF APPELLANT

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APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY
(HONORABLE WANDA KEYES HEARD, PRESIDING)

BRIEF OF APPELLANT

I. STATEMENT OF THE CASE

On February 25, 2000, Appellant was convicted by a jury in Baltimore City, the Honorable Wanda Keyes Heard presiding, of the following offenses: first degree murder, robbery, kidnapping and false imprisonment.[1] On June 6, 2000, Judge Heard sentenced Appellant as follows: life imprisonment for first degree murder; 30 years imprisonment for kidnapping, consecutive to the life sentence; 10 years imprisonment for robbery concurrent to 30 years for kidnapping and consecutive to the life imprisonment sentence; and the trial court merged the false imprisonment with the kidnapping count.

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[1]A first trial ended in a mistrial on December 15, 1999 after the jury overheard a different trial judge at a bench conference refer to defense counsel as a "liar." (12/15/99-253)

II. QUESTIONS PRESENTED

A. Whether the State Committed Prosecutorial Misconduct, Violated Brady and Violated Appellant's Due Process Rights When it Suppressed Favorable Material Evidence of an Oral Side Agreement with its Key Witness, and When it Introduced False and Misleading Evidence, and the Trial Court Committed Reversible Error In Prohibiting Appellant from Presenting this Evidence to the Jury?

1. Whether the State suppressed favorable material evidence and introduced and elicited false and misleading testimony relating to the plea agreement with its key witness in violation of Brady?

2. Whether the State's actions constituted prosecutorial misconduct?

3. Whether the trial court committed reversible error in prohibiting Appellant from calling Benaroya and recalling Wilds as a witness?

4. Whether the trial court committed reversible error in restricting the cross-examination of Wilds?

5. Whether the trial court committed reversible error in denying Appellant's motion to strike the testimony of Wilds?

6. Whether the trial court committed reversible error in precluding Appellant from calling Ms. Julian as a witness?

7. Whether the trial court committed reversible error in denying Appellant's motion to disclose documents and information from the State?

8. Whether the trial court committed reversible error in denying Appellant's motion to question Mr. Urick out of the presence of the jury?

B. Whether the Trial Court Erred in Admitting Hearsay in the Form of a Letter from the Victim to Appellant, Which Is Highly Prejudicial?

C. Whether the Trial Court Erred in Permitting the Introduction of the Victim's 62-page Diary, Which Constituted Irrelevant Highly Prejudicial Hearsay?

III. STATEMENT OF FACTS

Appellant was convicted of killing his close friend and former girlfriend Hae Min Lee on or about January 13, 1999. Appellant and Hae were seniors at Woodlawn High School in Baltimore County. They were both in the gifted and talented program there and had both been accepted to colleges. (1/28/00-238) [2] At trial, there was considerable testimony relating

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[2]References to the Transcript are as follows:

Date	Proceedings
7/9/99	Motion To Disqualify Defense Counsel Prior to First Trial
7/23/99	Ruling on Motion to Disqualify Defense Counsel
12/15/99	First Trial - Mistrial
1/21/00	Motions, Voir Dire Second Trial
1/24/00	Trial on the Merits, Second Trial
1/27/00	"
1/28/00	"
1/31/00	"
2/1/00	"
2/2/00	"
2/3/00	"
2/4/00	"
2/8/00	"
2/9/00	"
2/10/00	"
2/11/00	"
2/14/00	"
2/15/00	"
2/16/00	"
2/17/00	"
2/21/00	"
2/22/00	"
2/23/00	"
2/24/00	"
2/25/00	" and Verdict

to the religious differences between Hae and Appellant, and the difficulties posed by these differences in dating each other. Appellant is a Muslim, and dating is forbidden. Hae was a Christian, and ultimately, their religious differences led the pair to end their relationship. (1/28/00-141) Friends testified that both Hae and Appellant were sad about the breakup, but not bitter or angry. (1/28/00-224) Yaser Ali, Appellant's best friend, testified that Appellant told him that the relationship was over because it was too hard to hide it from his family, and that the breakup was a mutual decision. (2/3/00-88) Ali also testified that Appellant wanted to remain friends with Hae after the break up, and that Appellant had interests in other girls as of December, 1998. (2/3/00-117-123) At the beginning of January, 1999, Hae began dating Don Cliendienst, whom she met while working part time at Lens Crafters. (1/28/00-64-69)

Hae was last seen alive on January 13, 1999 at school around 2:30 p.m. Her family filed a missing persons report when she failed to pick up her cousin at school as she regularly did. (1/13/00-5) She was supposed to pick up her 6 year-old cousin at 3:00 or 3:15 p.m. that day. (1/28/00-25) Inez Butler Hendricks, a teacher and athletic trainer at Woodlawn High School and Hae's friend, testified that she saw Hae at 2:15-2:30 p.m. on January 13. Hae told her she was in a hurry to pick up her cousin from school, but that it was not far and she would be back soon. Hendricks told her to hurry because Hae had to be back by 5:00 p.m. to ride the wrestling team bus to an away match for which Hae was to keep score. (2/4/00-

19-20) When Hae did not return by 5:00 p.m., Hendricks took Hae's place as scorer. (2/4/00-21) She testified that Appellant was on the track team, and practice begins by 3:30 p.m. (2/4/00-17)

Appellant was questioned by police on January 25, 1999 about Hae's disappearance. He told the police that he and Hae used to date. He said that on January 13, 1999, a Wednesday, he had class with Hae from 12:50 to 2:15 p.m. Appellant said he went to track practice that afternoon. He did not see Hae the next two days at school, Thursday and Friday, because the school was closed for inclement weather. (1/31/00-25)

Hae's body was found in Leakin Park on February 9, 1999 by a man named Alonso Sellers. (1/31/00-27) He testified that he saw the body in Leakin Park when he went to find a private spot to urinate. Unbeknownst to the jury, Alonso Sellers had been previously convicted of indecent exposure. Sellers testified that he left his house and was driving to work when he had to pull his car over to urinate in the park. The park was only a few blocks away from his house. (2/23/00-9) The body was 127 feet from the road and was difficult to see. (1/31/00-101) The body was not even visible to Dr. Rodriguez, a member of the recovery team who went to exhume the body. (1/28/00-182) Dr. Rodriguez testified that the body was well hidden, and the average person would not be able to see it. (1/28/00-182)

The Medical Examiner testified that Hae had been strangled, but was unable to testify as to when she had been killed. (2/2/00-66) Hairs found on Hae's body were compared to Appellant and did not match Appellant's hair. (2/1/00-116) Those hairs were not compared

to anyone else. (2/1/00-116) Fibers found on Hae's body were compared to fibers from Appellant's clothing, and no match was made. (2/1/00-123) Likewise, Appellant's clothing was examined and compared to fibers from Hae's clothing, and no match was found. (2/1/00-123) Appellant's coat was examined and nothing of evidentiary value was found. (2/1/00-165) Soil from Appellant's boots which were seized from his house were compared to soil samples from the burial site and no match was found. (2/1/00-165) Appellant was ruled out from having been the source of a stain on a shirt in Hae's car. (2/2/00-28)

Don Cliendinst testified that he dated Hae after she and Appellant broke up, from January 1, 1999 until her disappearance on January 13, 1999. (2/1/00-71) On one occasion between January 1 and 13, he saw Appellant at the Lens Crafter store where both Don and Hae worked. Appellant came out to the store to inspect Hae's car because it was not running properly. Both Don and Appellant concluded that the car was not safe for Hae to drive home. Don said that Appellant, who knew Hae and Don were dating, was not hostile to him. Appellant drove Hae home that night. (2/1/00-76-86) Appellant's fingerprints were found in Hae's car after she disappeared. Appellant admitted he had been in Hae's car before on numerous occasions. (2/1/00-39) Inez Butler Hendricks testified that after Hae's body was found, Appellant told her that his last memories of Hae were not good, that they had a fight about Hae going to the prom with Appellant. (2/4/00-26)

Jay Wilds was the chief prosecution witness, who testified as follows. He was one grade older than Hae and Appellant. Wilds dated Stephanie McPherson, who was

Appellant's close friend. (2/4/00-115) Wilds said Appellant was an acquaintance of his, and he gave Wilds a ride in his car one time. Even though Appellant was the prom king and Stephanie was the prom queen, Wilds said he was not jealous of Appellant's relationship with Stephanie. (2/14/00-66) On January 12, 1999, which was Wilds' birthday, Appellant called him at 10:00 p.m. He asked Wilds what he was doing the next day. Wilds said "nothing," and that was the end of the conversation. (2/4/00-119) The next morning, January 13, 1999, which happened to be Stephanie's birthday, Appellant called Wilds at 10:45 a.m. Wilds told Appellant he needed to go to the mall to get Stephanie a gift, and Appellant said he would take him. He and Appellant went to Security Square Mall, shopped for about one and a half hours, and Appellant said he needed to go back to school. (2/4/00-125) On the way to school, Appellant talked about his relationship with Hae, and said it was not going well. Wilds testified that Appellant seemed hurt rather than angry. (2/4/00-125) Wilds then testified that Appellant said Hae made him mad and said, "I am going to kill that bitch." (2/4/00-126) Appellant told Wilds he could drop Appellant off at school and take Appellant's car as long as he picked Appellant up later. Appellant gave Wilds Appellant's cell phone so that he could call Wilds when he was ready to be picked up.

Cell phone records for Appellant's cell phone showed that at 12:07 p.m., Wilds called the home of his friend Jen Pusiteri. Wilds went to her home and played video games with Jen's brother Mark for about 30 minutes. Jen was not home. Wilds then left with Mark to go back to the mall. (2/4/00-127-130) Wilds testified that he and Mark returned to Mark's

house and Jen was there. Later, Wilds went to his friend Jeff's house, but he was not at home. Appellant allegedly called Wilds to come pick him up at Best Buy. (2/4/130) Wilds testified that he saw Appellant standing near a payphone outside of Best Buy wearing red gloves. Appellant allegedly directed Wilds to park near a gray Sentra. Wilds testified that Appellant asked him if he was ready for this, and then opened the trunk of the Sentra to reveal Hae's body. (2/4/00-131) Wilds said that Appellant got in Hae's car and told Wilds to follow in Appellant's car. They allegedly drove to a Park and Ride on Interstate 70. Wilds said he got into the passenger side of Hae's car. Wilds called Jen at 3:21 p.m. to see if his friend Patrick was home so he could buy marijuana, but he was not. Wilds said Appellant called a young lady in Silver Spring and made small talk, and that Appellant received a call from someone speaking Arabic, possibly his mother. (2/4/00-134-40, 143)

Wilds said Appellant told him, "it's done." Wilds said Appellant said it kind of hurt him but not really, because when someone treats him like that they deserve to die. Appellant allegedly said, "how can you treat someone like that that you are supposed to love." He allegedly then said, "all knowing is Allah." (2/4/00-142) Then Appellant allegedly said he needed to get back to track practice because he needed to be seen. As he got out of the car at school, Appellant allegedly said "motherfuckers think they are hard, I killed someone with my bare hands." (2/4/00-142) Wilds testified that Appellant told him that he thought Hae was trying to say something like apologize to him and that she kicked off the turn signal in the car. Appellant allegedly said he was afraid Hae would scratch him in the face. (2/4/00-

142-43)

After dropping Appellant off at school, Wilds testified that he went to Kristi Vincent's house, smoked some marijuana, and debated about what to do. Kristi and her boyfriend were there. (2/4/00-144) About 30 minutes later, Appellant called and Wilds went to school to get him. They went back to Vincent's and Appellant allegedly fell asleep on the floor after smoking some marijuana. Appellant got a call from Hae's parents asking if he had seen Hae and he said no, and suggested they ask her new boyfriend. (2/4/00-145) Appellant then received a call from the police asking where Hae was and he said he did not know. Wilds said he left Vincent's with Appellant.

According to Wilds' testimony, Appellant drove Wilds home and said, "you have got to help me get rid of Hae." (2/4/00-147) Wilds feared that Appellant would use his knowledge of Wilds' drug dealing against him and agreed to help. (2/4/00-147) Wilds got two shovels form his house and put them in Appellant's car. They drove to pick up Hae's car, and Appellant got in Hae's car. Wilds followed Appellant around for 45 minutes, and they ended up in Leakin Park (2/4/00-148).

Wilds said he was supposed to meet Jen at 7:00 p.m., so he paged her at 7:00 p.m. from Leakin Park. While Wilds and Appellant were digging, Jen called the cell phone, returning Wilds' page. Appellant allegedly answered and told Jen they were busy and hung up. Wilds said after they dug for a while, Appellant asked Wilds to help him get Hae out of the car, but Wilds refused. (2/4/00-152) Allegedly, while Appellant took Hae's body to the

shallow grave and put dirt on her to cover her, he received another call. He spoke part in Arabic and part in English. (2/4/00-153) Wilds testified that after burying Hae, they left and parked Hae's car near some apartments. According to Wilds, Appellant said, "it kind of makes me feel better and it kind of doesn't." (2/4/00-156) He said they went to Value City and threw away some of Hae's belongings and some other evidence in a dumpster. Wilds paged Jen again. Appellant allegedly drove Wilds home and Wilds changed his clothes and put them in a bag. Jen came to pick up Wilds at his home and took him to Super Fresh where he threw the shovels and his bag of clothes away in a dumpster. (2/4/00-158) Wilds told Jen that he wanted her "to be the one person to know that I didn't kill Hae." (2/4/00-158)

Wilds was questioned three times by the police, the first time was on February 28, 1999. (2/10/00-14) On that date, the police questioned him for two hours, and then turned a tape recorder on and questioned him for two more hours. He said the police confronted him with things Jennifer Pusiteri had told them earlier when she was questioned by police. Wilds said that he told Jennifer what happened on January 13. Wilds said he asked the police to turn off the recorder, which they did, and he asked for an attorney. The police asked him why he needed one, and turned on the recorder to continue the questioning. (2/10/00-49)

Wilds acknowledged that he lied to the police. (2/4/00-221) The first time Wilds spoke to the police, he said he was not involved in killing or burying Hae. (2/4/00-229) He said he lied to the police about the location of Hae's car. (2/10-66) He told the police that

he saw Hae's body in a truck, not in the trunk of Hae's Sentra. (2/10/00-76) He also told police he walked to the mall on January 13. He said his only contact with Appellant on January 13 was at 2:00 p.m. when Appellant called him and asked for directions to a shop in East Baltimore. Wilds told the police different stories about where Jennifer picked him up on January 13.

On March 15, 1999, Wilds gave a second statement to the police. (2/10/00-83) During this questioning, Wilds told police that Appellant said on January 12 that "he was going to kill that bitch," and then later said it was four days before January 12. (2/10/00-187)

On April 13, 1999, Wilds gave a third statement to police. He told police that Appellant killed Hae in Patapsco State Park, and that Appellant paid him to help. (2/14/00-115) Wilds eventually took the police to where the body was buried and to where Hae's car was located.

Detective MacGillivary testified as follows. On February 9, 1999, he responded as the primary detective to Leakin Park, where Hae's body was recovered. (2/17/00-153) Based upon information contained in Hae's missing person report, he obtained Appellant's cell phone records. On February 26, 1999, he went to Jennifer Pusiteri's house and asked her to come to the police station to talk. (2/17/00-156) Jennifer came to the station that night and gave a statement. She said that she heard that Hae had been strangled, although that information had not yet been publicly released. (2/17/00-314)

Contrary to Wilds' testimony, MacGillivary said at no time did Wilds request a lawyer, because if he had, all questioning would have ceased. (2/18/00-128-129) MacGillivary denied that Wilds first took him to the wrong location before showing police where the car was. He also said that Wilds told him that Appellant showed him Hae's body in the trunk on Franklintown Road, contrary to Wilds' testimony that it happened at the Best Buy. (2/18/00-151) MacGillivary interviewed Wilds a second time on March 15, 1999, with Appellant's cell phone records, and noticed that Wilds' statement did not match up to the records. Once confronted with the cell phone records, Wilds "remembered things a lot better." (2/17/00-158) Wilds gave yet a third statement on April 13, 1999, and admitted that he lied on the two previous occasions to cover up the fact that he bought and sold marijuana. (2/18/00-166) On cross-examination, MacGillivary testified that Alonso Sellers was considered to be a suspect. (2/17/00-225)

On February 26, 1999, after speaking with Jennifer, MacGillivary went to Appellant's home and Appellant gave a statement. Appellant said he had a relationship with Hae, and had been in her car before, but not on January 13, 1999. (2/17/00-264) Appellant said he did not remember what happened on January 13, 1999. (2/17/00-271) A police report of this statement was not written until September 14, 1999. On February 27, 1999, Appellant was questioned at school and at the police station and gave statements denying his involvement.

Jennifer Pusiteri testified as follows. On January 13, 1999, Wilds came over to her house in a tan car to hang out with her and her brother. Wilds was acting different, not

relaxed, and had a cell phone which was unusual. (2/15/00-185) Wilds said he was waiting for a call. At 3:00-3:30 p.m., Wilds left her house. After 4:30 p.m., Jennifer called her friend Kristi's house and Wilds was there. Wilds and Jennifer had plans to go to Kristi's house together that evening. She called the cell phone later and someone answered the phone and said, "Jay will call you back when he is ready for you to come and get him, he is busy." (2/15/00-189) The voice on the cell phone was an older male, deep, not like a kid, and it was not Wilds. (2/16/00-169) Between 8:00-8:15 p.m., Jennifer got a message from Wilds to pick him up at Westview Mall in 15 minutes, so she left and picked him up in front of Value City. (2/15/00-190-192) Appellant was with him, driving, and said hello to Jennifer. Wilds got in her car and said, "I have to tell you something, but you can't tell anyone." He said Appellant strangled Hae in the Best Buy parking lot. Wilds saw her body in the trunk. He said Appellant used Wilds' shovels to bury her and Wilds wanted to make sure there were no fingerprints on them. (2/15/00-194-196)

Jennifer testified Wilds told her he wanted to go check on Stephanie to make sure she was okay. They went to Stephanie's house between 8:30-9:00 p.m. The next day Jennifer took Wilds to F&M drugstore to get rid of clothing and boots in a dumpster. (2/15/00-196-198)

Kristi Vinson testified as follows. On January 13, 1999, at 5:00-5:15 p.m., she arrived home, and her boyfriend Jeff Johnson was there. Wilds and Appellant arrived later, and were acting "shady." (2/16/00-217) She had never met Appellant before. They all watched

television at about 6:00 p.m. Appellant was lying on some pillows on her floor when he asked, "how do you get rid of a high?" (2/16/00-210) Appellant got a call on his cell phone and said, "they're going to come and talk to me, what should I say, what should I do?" (2/16/00-213) Then Appellant and Wilds left. (2/16/00-214) Wilds returned hours later with Jennifer, but Appellant was not with them.

Debbie Warren testified as follows. She was a close friend of Hae's. Appellant and Hae were boyfriend and girlfriend, but broke up and got back together two or three times. She said that the last time they broke up because Hae felt that Appellant was being overprotective of her. Hae began to date "Donnie" and Appellant knew about it. Appellant told Debbie he thought Hae and Donnie were having sex while Appellant and Hae were still dating, but Debbie told Appellant that it was not true. (2/16/00-298-302) The last time Debbie saw Hae on January 13 was in gym class, and Hae was happy and rushing to go somewhere at 3:00 p.m. Debbie could not remember where Hae was going, but she told police on January 28, 1999 that Hae said she was going to the mall with Don. (2/16/00-306, 2/17/00-70)

On cross-examination, Debbie stated that she was friends with Stephanie, and Stephanie confided to Debbie that she was interested in Appellant. At the prom in 1998, when Appellant was voted prom king and Stephanie was prom queen, they danced. Appellant, however, left Stephanie during the dance and went to get Hae to finish the dance with him. (2/17/00-30-34) Hae broke up with Appellant two or three times because she did

not want Appellant to have to choose between her and his religion, and Hae's parents did not want her to date Appellant either. (2/17/00-48) Appellant was not mad when Hae broke up with him on these occasions. In fact, even after the final breakup in December 1998, Hae and Appellant exchanged holiday gifts. (2/17/00-57) When Appellant found out Hae was dating Don, he said he accepted it and would try to move on. (2/17/00-59)

Abraham Waranowitz testified as an expert in AT&T network design as to Erickson cell phone equipment. Waranowitz testified that a cell phone activates a cell site which has three sides. Each side points to a unique direction. Using exhibits which showed the number of the cell tower activated by the cell phone when a call was made or received, Waranowitz testified as to the location of the cell tower, and testified as to which of the three sides was activated. Waranowitz testified that his tests revealed that the cell sites that were activated were consistent with cell phone calls being made and received from Kristi Vincent's house and the burial site in Leakin Park. (2/8/00-98-115)

On cross-examination, Waranowitz admitted that he could have used Appellant's actual phone for the tests but did not. He could not remember when the tests were done, only that he performed them somewhere between September and December. He verbally gave his results to the State over the phone. (2/9/00-49-96) He admitted that the tests cannot tell where the call was made or where the cell phone was within the wide cell site. He admitted that some calls could trigger as many as three different cell sites. (2/9/00-142-172)

The State rested its case and Appellant called Rebecca Walker, a close friend of both

Appellant and Hae, who testified that even after Appellant and Hae broke up, they still cared for each other and were still friends. (2/23/00-142) She also testified that Appellant was not possessive about Hae, and he was extremely upset by her disappearance. (2/23/00-160, 175)

Syed Rahman, Appellant's father, testified that Appellant had been in the top 5% of his class academically since eighth grade. Appellant led prayers at the family's place of worship, which is a high honor. Mr. Rahman testified that although his religion does not permit Appellant to date girls, Appellant was simply encouraged to do the right thing, and not to date girls. (2/23/00-285-291) On January 13, 1999, Appellant attended religious services with his father from 7:30 p.m. to 10:30 p.m. (2/24/00-6)

Andrew Davis, Appellant's investigator, testified that Hae's bank records showed that on January 13, 1999, she made a purchase of $1.71 at Crown gas station at Harford Road and Northern Parkway, which is far from Woodlawn. (2/24/00-106)

Saad Chaudry, Appellant's close friend, testified that Appellant obtained the cell phone in order to call girls. He also explained that the cell phone was programmed with phone numbers of Appellant's friends such that the numbers could automatically be dialed. (2/24/00-145) He said that after Hae and Appellant broke up, Appellant was "laid back" about it, and showed interest in other girls. (2/24/00-126)

Bettye Stuckey, Appellant's guidance counselor, testified that Appellant was a bright, enthusiastic and delightful student. He was admitted to college at the University of Maryland and the University of Maryland at Baltimore County. (2/24/00-203)

Other facts will be discussed as necessary, infra.

IV. ARGUMENT

A. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT, VIOLATED BRADY AND VIOLATED APPELLANT'S DUE PROCESS RIGHTS WHEN IT SUPPRESSED FAVORABLE MATERIAL EVIDENCE OF AN ORAL SIDE AGREEMENT WITH ITS KEY WITNESS, AND WHEN IT INTRODUCED FALSE AND MISLEADING EVIDENCE, AND THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PROHIBITING APPELLANT FROM PRESENTING THIS EVIDENCE TO THE JURY.

Summary of Argument

The prosecutor suppressed favorable material evidence relating to the plea agreement with its key witness, Jay Wilds. The prosecutor also introduced false and misleading evidence. The suppressed evidence included the fact that there was a separate oral agreement with Jay Wilds which permitted Wilds to withdraw from the plea agreement at any time, which fact was not included in the written plea agreement furnished to Appellant and introduced by the State at trial. In addition, the State hid the fact that it provided Wilds with a free private attorney, who recommended that Wilds sign the plea agreement. The State waited to charge Wilds with a crime until after he accepted the services of the free private attorney selected by the State so that Wilds would be ineligible to obtain a public defender. Wilds earlier sought to obtain the services of a public defender, but was told he could not receive a public defender until after he was charged with a crime.

This and other evidence was suppressed by the State, and was discovered by Appellant's trial counsel during and after Wilds' highly damaging testimony against

Appellant. When Appellant attempted to learn all of the facts surrounding the plea agreement, the State objected and the trial court made numerous evidentiary rulings preventing Appellant from presenting all of the terms of the plea agreement and the full circumstances surrounding the plea agreement to the jury (see infra). The State's conduct amounted to prosecutorial misconduct, violated Brady,[3] violated Appellant's rights to due process of law, and the trial court's rulings constituted reversible error.

The standard for determining whether the State violated Brady is whether the prosecutor suppressed favorable material evidence. Conyers v. State, ___ Md. ___, ___ A.2d ___ (No. 26. Sept. Term 2001) (filed February 5, 2002). The standard for determining prosecutorial misconduct is whether the misconduct actually prejudiced the defendant and whether the prosecution acted intentionally to prejudice the defendant. Clark v. State, 364 Md. 611, 774 A.2d 1136 (2001). A trial court's evidentiary rulings are reviewed for abuse of discretion. Fontaine v. State, 134 Md. App. 275, 287-88, 759 A.2d 1136, cert. denied, 362 Md. 188 (2000).

1. The State suppressed favorable material evidence and introduced and elicited false and misleading testimony relating to the plea agreement with its key witness in violation of Brady.

a) Facts

Jay Wilds, the chief prosecution witness, testified on direct examination that he signed

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[3] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

a plea agreement and pled guilty on September 7, 1999[4] to being an accessory after the fact with regard to the death of Hae Min Lee. (2/4/00-162) Wilds testified that as long as he told the truth, the State agreed that his sentence would be capped at two years. (2/4/00-163) The State offered the written plea agreement into evidence. (State's Exhibit 35, App. 1-4) (2/4/00-162, App. 5) The prosecutor asked Wilds, "[a]nd that's the plea agreement you entered into when you pled guilty to accessory in this murder? A. Yes." (2/4/00-162-63, App. 5-6) The written agreement provided that if Wilds failed to complete the terms of the agreement, the State will recommend a sentence of five years incarceration. (Exhibit 35, page 2 #2(d)) The agreement also expressly provided that "[Wilds] shall not be permitted to withdraw a guilty plea tendered pursuant to this Agreement under any circumstances." (Exhibit 35 at page 3, #5) The Agreement also provides "[t]here are no other agreements, promises or understandings between [Wilds] and the State. This Agreement can only be amended in a writing signed by all the parties." (Exhibit 35, Paragraph 9 page 3)

After the State rested its case, a few days from the end of a nearly six-week trial, Appellant discovered the existence of an oral side agreement between the State and Wilds, that was not turned over by the State in discovery and was fortuitously discovered by Appellant during trial. This side agreement provided that Wilds could withdraw from the plea agreement at any time, contrary to the written plea agreement and contrary to the

[4]Appellant's first trial was scheduled to begin on October 13, 1999.

assertions of the prosecutor.[5] This discovery unfolded out of the presence of the jury, as follows:

> [BY DEFENSE COUNSEL]: [Ms. Benaroya, Wilds' attorney] would have said, but -- couldn't go any further and cut off questioning of her, that -- she may [sic - made]-- with Mr. Urick [the prosecutor] on the 7th [of September, 1999], in the presence of her client and that she made sure [her] client understood that one of the benefits that's not reflected in the typewritten plea agreement and would not be reflected on the record was an agreement that would allow Mr. Wilds to withdraw his plea at a time later than the 7th, and she would have testified that's what she told me in the presence of my law clerk, that her concern and insistence on that being a benefit of the bargain because she felt that . . . . since it was so unusual that his lawyer be provided by the prosecutor that he had an absolute right, after reflection, to withdraw the plea.

(2/22/00-63-64, App. 7-8) There is reference to this questioning of Benaroya occurring out of the presence of the jury and under oath (2/23/00-238), but it is not part of the record. Apparently, the trial court was present when Ms. Benaroya told this to Appellant's counsel, and agreed that defense counsel's recitation of Benaroya's testimony was accurate:[6]

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[5]The prosecutor told the trial court in a bench conference:

> It was made clear to him that he was entering a guilty plea, that it would be a binding plea. . . It was made clear to him that those procedures were binding, that they could be done without his presence, in his absence. . . . .

(2/4/00-203)

[6]At the close of the previous trial day's testimony, February 18, 2000 (February 21, 2000 was a holiday), the trial court stated: "I still need to speak to her [Benaroya] myself . . . "which may shed light on when this questioning of Benaroya took place. (2/18//00-202)

> THE COURT: She did say it. . . . . She said it. She said that she was -- it was her understanding that the Defendant Wilds, her client, could withdraw his plea.
>
> [BY DEFENSE COUNSEL]: Right. At any time.
>
> THE COURT: That's what she said.

(2/22/00-71) Mr. Urick, the prosecutor, denied that this was part of the plea. (2/22/00-66)

Appellant argued to the trial court at a bench conference why this information was important and relevant to present to the jury :

> As to that issue . . . I believe we're absolutely entitled to get in all the benefits of the bargain that were extended to Mr. Wilds, whether or not Mr. Wilds testifies truthfully as to what they are.
>
> Now, the fact finder has a right to consider all of the benefits of the bargain in assessing whether or not the bargains have anything to do with influencing his testimony or what the bargain is or what extent he may be beholding [sic] to him when he made the bargain, both what's written and what's not written, and it's up to the jury to decide whether Mr. Wilds is telling the truth and to decide as to all thing, including what Mr. Wilds' perception of the bargain -- or his lawyer says that was part of the bargain, it was made in front of him, and that goes directly to impeach him. And that's certainly not attorney/client privilege, made in the presence of and in the earshot of Mr. Urick.
>
> Since the bargain that the jury knows about makes Mr. Urick the arbiter of truth, the issue of whether or not there's a side deal that Mr. Wilds may not want to admit to because if, in fact, it's true it makes him out to be a liar as to that issue, as to what the bargain was . . . .

(2/22/00-65)

When Appellant requested permission to introduce evidence of the side agreement through the testimony of Benaroya and by recalling Wilds, who had finished testifying before

Appellant learned of the side agreement, the trial court ruled that Appellant could not call Benaroya or recall Wilds to testify in front of the jury: "I believe that calling [Benaroya] would not be appropriate and it would just take us off on a needless presentation of evidence. And I would find that the credibility of Mr. Wilds has been exhausted." (2/22/00-74, App. 9) Similarly, the trial court denied Appellant's previous motion to question Mr. Urick as a witness out of the presence of the jury to determine the circumstances surrounding the plea negotiations. (2/11/00-23, App. 10) The trial court also denied Appellant's previous motion to strike all of Wilds testimony because the State failed to disclose all of the circumstances surrounding the plea negotiations.(2/15/00-34, App. 11) The evidentiary rulings will be dealt with separately, infra.

In addition to the side oral agreement, the State suppressed other evidence. On cross-examination of Wilds by Appellant, over objections from the State, it was disclosed for the first time that the State had provided Wilds with a *free private attorney:*

> [BY DEFENSE COUNSEL]: Incidentally, at what point did your lawyer come about after the 13th of April?
>
> [BY THE STATE]: Objection.
>
> THE COURT: Sustained.
>
> [BY DEFENSE COUNSEL]: Did anyone help provide you a lawyer?
>
> [BY THE STATE]: Objection.
>
> THE COURT: Overruled.
>
> MR. WILDS: Yes, ma'am.

Q Who?

A Mr. Urick.

Q Mr. Urick ***the prosecutor in this case*** helped provide you a lawyer?

A Yes, ma'am.

Q And was that before or after you got notice that you would be charged by him?

[BY THE STATE]: Objection.

THE COURT: Overruled.

MR. WILDS: Before, ma'am.

[BY DEFENSE COUNSEL]: Did you meet your lawyer before the day you signed [the plea agreement]?

MR. WILDS: No, ma'am.

* * *

Q . . . . Now, you didn't have to pay for your lawyer, did you?

[BY THE STATE]: Objection.

THE COURT: Sustained.

(2/10/00-155-56, 159, App. 12-13) (Emphasis supplied)[7] Wilds testified in the jury's presence that when Mr. Urick introduced the lawyer, Ms. Benaroya, to him, Mr. Urick stated that she was "a very good lawyer." (2/15/00-60)

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[7]Later, Wilds testified that he considered a free private attorney to be a benefit, because he could not afford private counsel. (2/15/00-127)

As Appellant delved into the circumstances surrounding the State providing the chief prosecution witness with a free private attorney, it became clear that the State attempted to and did improperly influence the witness to retain the attorney that the State chose, whom the State believed would recommend that Wilds sign the plea agreement. The State, knowing that Wilds could not obtain the advice of a public defender until he was actually charged, refrained from charging Wilds until after he met with and retained the services of Ms. Benaroya. (2/10/00-156) Wilds testified out of the presence of the jury that he had attempted to get a public defender prior to September 7, but was told by the Office of the public defender that he could not get an attorney until he was charged. (2/11/00-213) Wilds was charged on September 7, 1999, after he was introduced to the free private attorney. (2/1/00-182) Wilds met with Ms. Benaroya, agreed to accept her as his attorney, and negotiated and signed the plea agreement. Immediately after signing the agreement, Wilds was taken to a "guilty plea" hearing.

The State failed to disclose other favorable evidence as well. On cross-examination by Appellant, Wilds, over objections from the State, disclosed for the first time that no statement of facts was read at his "guilty plea" proceeding. (2/4/00-193-94) Thus, there was no factual basis for the plea as required by Maryland Rule 4-242, and no finding of guilt could have been made. The plea therefore was not binding, and Wilds or the State could withdraw it at any time, contrary to what the jury was told and contrary to the terms of the written plea agreement. As defense counsel further attempted to find out exactly what

transpired with Jay Wilds, the guilty plea and the free private attorney, it became apparent, even to the trial court, that the State was trying to hide the true nature of the "guilty plea" proceedings:

> (Jury not present)
>
> THE COURT: . . . It would appear to the Court that every effort was made to hide the existence of Mr. Wilds['] plea or attempted [sic] to plead because this [Wilds' court file] says guilty verdict held sub curia. Which means what you did was everything except for have the Court find the Defendant guilty. He held the issue of whether or not the Defendant was guilty sub curia pending the State providing a statement of facts. It appears the only reason why one would do that, in my mind is so that there would be no record of a guilty plea because if there's no guilty finding [then] he hasn't been found guilty. . . .
>
> The other thing that I find interesting is that as Counsel has pointed out, I've never seen a file like this before. . . . . It appears very, very odd and unusual and I can see why Ms. Gutierrez [defense counsel] would start to wonder.

(2/11/00-122-23) The trial court noted that the State was misrepresenting to the trial court, defense counsel, and the jury that Mr. Wilds pled guilty, when, in fact, it was not a guilty plea: "Well, what was difficult Mr. Urick, the other day when we asked, I know I asked whether or not Mr. Wilds pled guilty, you said he pled guilty. . . . But the verdict wasn't entered. I mean to say, to lead the Court to believe that the verdict was entered is not true. . . . the reason [that defense] Counsel has been asking over and over, how could there be a guilty plea with no statement of facts. It's very simple, is that no guilty verdict was entered, that's how you kept the statement of facts out." (2/11/00-126-27)

The State hid still more evidence. During proceedings outside the presence of the jury it was learned that Judge McCurdy, the Judge who heard the "guilty plea" or "attempted

guilty plea," had an *ex parte* hearing with Wilds and his attorney, Ms. Benaroya, after the guilty plea hearing. (2/11/00-128) This "post-plea" hearing was held at the request of the State, which waived its right to be present at the hearing. In the face of direct questioning from the trial court, the State hid the fact that sometime after the September 7, 1999 "guilty plea" hearing, Jay Wilds became disenchanted with his attorney, questioned whether that attorney was given to him by the State solely for the purpose of advising him to sign the plea agreement, questioned whether the attorney was loyal to him or to the State, and thought about withdrawing his plea. (2/11/00-150, 160, 168, 171) Wilds called Judge McCurdy to inform him of his doubts and problems. Wilds also called the prosecutor and informed the State of his situation. (2/11/00-204-06)

The trial court repeatedly asked the State specifically whether it knew if something happened after the plea to necessitate the post-plea hearing, and the State at least three times answered falsely that it did not. The State knew that Wilds called Judge McCurdy to inform him of these problems, because Wilds also called the State and informed it of the problems. (2/11/00-204-06) It is clear that the prosecutor deliberately failed to tell the trial court why the hearing was necessary:

> (Jury not present)
>
> [BY THE STATE]: When we asked Judge McCurdy to advise him of his right to Counsel due to review of that to make sure he understood it and that he was in fact, his assistance of counsel.
>
> THE COURT: And when did that happen?

[BY THE STATE]: It happened sometime in September. I did not . . . Ms. Benaroya [Wilds' attorney] showed up with him that day, he was given the option, you know, explained. In abundance of caution we asked Judge McCurdy to do an in camera review to make sure that he understood his right to counsel, that he was making his election of his counsel. Judge McCurdy did a review of that with him.

* * *

[BY DEFENSE COUNSEL]: . . . Having taken the beginnings of the plea or if you believe Mr. Urick's version, well he thought that was a guilty plea ***then what reason would exist to ask the Judge to review the voluntariness or the adequacy of the satisfaction with the lawyer***.

THE COURT: Good question.

[BY DEFENSE COUNSEL]: Something had to happen.

THE COURT: Did something happen post plea[?]

Mr. URICK: ***We were just discussing all possibilities***. We thought in abundance of caution we should.

THE COURT: What does that mean? Did something happen post plea?

MR. URICK. Post plea. ***No***, it was debating around our office how we were proceeding.

THE COURT: Post plea?

MR. URICK: ***Yeah***.

THE COURT: On what? If he's pled guilty. The only thing his disposition you need to have a conversation with the witness as to whether or not he's going to withdraw his plea, is that what happened?

MR. URICK: ***No***, we wanted Judge McCurdy to -- do that we had made sure there was an independent judicial advisement of his right to counsel, that he understood that he was exercising it. We thought --

THE COURT: That's post plea. I'm asking after the plea. Okay. Let me get the scenario right because I'm getting confused.

* * *

And you asked [Judge McCurdy] to set up the hearing?

MR. URICK: Yes.

* * *

THE COURT: You're suggesting that a Judge would have ex parte communications with a Defendant and his attorney without the presence of the State?

MR. URICK: It was with our permission. We waived our presence.

(2/11/00-128-134)(emphasis suppled) It was not until after this exchange that Wilds testified out of the presence of the jury that the trial court and defense counsel learned that the reason for the hearing was that Wilds had second thoughts about the loyalties of the attorney provided by the State and was having doubts about his guilty plea. (2/11/00-205)

By waiving its right to be present, the State ensured the fact that an informal, off-the-record hearing in the Judge's chambers would be held.[8] The fact that the State waived its right to be present at the post-plea hearing in which its key witness in a murder prosecution could decide to withdraw his plea demonstrates the lengths to which it was willing to go to hide the fact that it provided the benefit of a free private attorney to its chief prosecution witness, and to hide its knowledge of the fact that Wilds was unhappy with that free private

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[8]Although Wilds testified out of the presence of the jury that he believed the *ex parte* hearing was on the record, no record or evidence of the hearing could be found. (2/22/00-63)

State-provided attorney.

In sum, the State failed to disclose the following information to Appellant:[9] the side agreement permitting Wilds to withdraw at any time from the plea agreement without court approval; Wilds never entered a binding and completed guilty plea because the State intentionally did not enter into evidence at that hearing a statement of facts in support of the plea; the State knowingly allowed Wilds to testify falsely that he entered a guilty plea; the State obtained and provided for Wilds a free private attorney; Wilds was not charged with a crime until just after he agreed to be represented by the free private attorney, so that Wilds would not be eligible to obtain a public defender who may not have recommended that he sign the plea agreement; Wilds became disenchanted with his free private attorney jeopardizing the "guilty plea"; the State arranged for Judge McCurdy to have an *ex parte* hearing with Wilds and his attorney, the record of which could not be found (2/22/00-63), where the Judge addressed Wilds' concerns.[10] Based upon these actions, Appellant moved

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[9]It should be noted that the State, prior to trial, moved for a Protective Order to withhold discovery of all statements made by Jay Wilds. (R. 144-147) Appellant requested pretrial "all information about Jay Wilds" including his statements. (R. 509-525) The trial court denied the State's Motion and ordered them to turn over such materials. (R. 540-544)

[10]It is interesting to note that when Wilds was sentenced after Appellant's trial, in addition to noting that Wilds had fulfilled his plea agreement, Mr. Urick made an additional recommendation for leniency based upon Mr. Urick's belief that Wilds showed remorse for his actions. Based upon this recommendation, the Judge gave Wilds a suspended sentence, instead of the two years imprisonment called for by the plea agreement which was admitted before the jury at Appellant's trial. State v. Wilds, 299250001 (July 6, 2000). Obviously, had Appellant known of this additional recommendation, he would have used it to further impeach Wilds' credibility by arguing

at trial to strike Wilds' testimony, but the trial court denied the motion. (2/15/00-34) See infra. The State's actions in the present case violate Brady.

b) The Law

Just this month, the Court of Appeals decided Conyers v. State, ___ Md. ___, ___ A.2d ___ (No. 26. Sept. Term 2001) (filed February 5, 2002). In Conyers, the Court of Appeals reversed two murder convictions and a death sentence because the prosecution withheld from the defense the fact that a key prosecution witness, Charles Johnson, asked for reduction in his sentence on his pending charges before he would sign a statement he had given to police inculpating Conyers. The State did disclose prior to trial that the plea agreement required Johnson to plead guilty to a misdemeanor charge of conspiracy to commit robbery and the State would recommend a sentence of one to six years imprisonment, whereas Johnson faced a total of 244 years before he cut a deal. The plea agreement required that Johnson testify truthfully against Conyers, and was introduced as evidence at trial.

On direct examination at trial, the prosecutor asked Johnson whether he requested any favors in exchange for the information he gave to police, and Johnson replied in the negative. The police officer who took Johnson's statement, Detective Marll, testified in response to the prosecutor's questions at trial that at no time did Johnson ever ask for a favor in exchange

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Wilds would have additional motive to testify since he was getting no jail time versus two years of jail time.

for giving the information. At the post conviction hearing, Marll testified in response to Conyers' question that Johnson refused to sign the statement unless he had a commitment for a plea bargain. The State argued to the Court of Appeals that the trial testimony of Johnson and Marll was technically accurate, because Johnson had given the information before he asked for a favor, and requested the favor in exchange for his testimony at Conyers' trial. The Court of Appeals disagreed, and held that the State exhibited a "lack of candor" and used a "deceptive approach." Slip op. at 32-33.

In determining whether there was a violation of Brady, the Court noted the appropriate standard:

> "(1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense--either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness--and (3) that the suppressed evidence is material."

Slip op. at 25 (quoting Wilson v. State, 363 Md. 333, 345-46, 768 A.2d 675 (2001)). The Court held that the State suppressed the information regarding Johnson's refusal to sign the statement until he got a favor. Id. at 33-34. The Court further held that the information was favorable to Conyers because it would have:

> strengthened Petitioner's assertion that Johnson had fabricated Petitioner's alleged confession in an effort to garner a benefit on outstanding charges. . . . Defense counsel was entitled to explore and argue from all of the pertinent evidence as to Johnson's bias and credibility. Suppression of this evidence deprived the jurors of a full opportunity to evaluate the credibility of Johnson's testimony, and Detective Marll's corroborating testimony, and deprived Petitioner of potentially valuable impeachment evidence. . . .
>
> Similar to Wilson, the value of the suppressed information as impeachment

> evidence was confirmed by the State's efforts to conceal it from Petitioner. . . . The State's conduct continued in its closing arguments at trial and sentencing, in which it extolled Johnson's credibility as a witness, knowing its own sins of omission.

Id. at 38-39. The Court held the evidence was favorable even though Johnson was fully cross-examined as to the plea agreement, and defense counsel vigorously argued to the jury that Johnson's motive in testifying was to gain a benefit for himself. Vigorous cross-examination:

> does not necessarily vitiate any error caused by the State's failure to disclose this impeachment evidence. Ware v. State, 363 Md. at 351, 768 A.2d at 684 (stating that cross-examination of a witness regarding inducement "to testify does not substitute for adequate disclosure"); Boone, 541 F.2d at 451 (noting that "[n]o matter how good defense counsel's argument may have been, it was apparent to the jury that it rested upon conjecture - a conjecture which the prosecution disputed."). See also, Martin v. State, ___ Ala. Crim App. ___, 2001 Ala. Crim. App. Lexis 298, 21 (2001) (likening defendant to a "fighter with one hand tied behind his back -- the fact that he was able to land a few punches in cross-examination with one fist did not make the match a fair one.").

Id. at 39.

In discussing materiality, the Court first noted that the standard where the State knowingly uses perjured testimony is whether there is any reasonable likelihood that the false testimony affected the jury. Id. at 40 (citing Napue v. People of Ill., 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959)). The materiality standard pursuant to United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985) and Brady where the State fails to turn over exculpatory evidence is whether:

> "there is a reasonable probability that, had the evidence been disclosed to the

> defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481.

Wilson, 363 Md. at 347; see also Conyers at 41. The Conyers Court further stated that a reasonable probability is "'a substantial possibility that . . . the result of the trial would have been different.'" Id. (citation omitted).

Based upon the Bagley/Brady standard, the Court in Conyers held that the suppression of the evidence "relating to Johnson's complete negotiations for a benefit" was material, and that, had the evidence been disclosed, "there was a substantial possibility that the result would have been different." Slip op. at 43. The Court noted that Johnson was a key witness in establishing that Conyers was a principal in the murder, which was a prerequisite for the application of the death penalty. In addition, the Court held that to prove materiality, it was not necessary to prove the evidence was insufficient to sustain the conviction absent the testimony of the key witness. The Conyers Court held that even though there was sufficient evidence other than Johnson's testimony on the issue of principalship, the "taint" from the withheld evidence "so undermines confidence in the convictions" that a new trial is warranted. Id. at 45. Finally, the Court noted that the

> importance of Johnson's credibility was evidenced by the State's efforts to argue his credibility in its last words to the jury. See Wilson, 363 Md. at 355, 768 A.2d at 687 (recognizing that "the 'likely damage' of the State's suppression of evidence in this case 'is best understood by taking the word of the prosecutor ... during closing argument.' ") (quoting Ware, 348 Md. at 53, 702 A.2d at 715 (citations omitted)).

Id. at 46.

Likewise, the Court of Appeals in Wilson reversed two robbery deadly weapon convictions based on the State's failure to disclose evidence relating to plea agreements with two key prosecution witnesses.

The Court held that, although the witnesses testified as to their plea agreements, the actual agreements were more favorable than the witnesses described to the jury. The Court specifically held that: "The failure to disclose ***evidence relating to any understanding or agreement*** with a key witness as to a future prosecution, in particular, violates due process, because such evidence is relevant to witness's credibility." Id. (Emphasis supplied).[11]

c) Analysis

Here, as in Conyers and Wilson, the evidence relating to the plea agreement was suppressed as it was not disclosed to Appellant prior to trial. Since the evidence of the side agreement was the term of a plea agreement between the State and its chief witness, and the

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[11]In Wilson, the Court examined additional factors in determining whether the suppressed evidence was material:

> the specificity of the defendant's request for disclosure of materials; the closeness of the case against the defendant and the cumulative weight of the other independent evidence of guilt; the centrality of the particular witness to the State's case; the significance of the inducement to testify; whether and to what extent the witness's credibility is already in question; and the prosecutorial emphasis on the witness's credibility in closing arguments.

363 Md. at 352 (citations omitted).

other evidence related to the plea agreement, the evidence was favorable to Appellant. Conyers, Slip op. at 38; Wilson, 363 Md. at 351. Even the trial court found, as a matter of fact, that providing the attorney was a benefit. (2/11/00-55)[12] While the jury learned through Appellant's cross-examination of Wilds that the State provided him a free private attorney, it was not informed whether the State paid his attorney. (2/15/00-68, App. 14) This fact is relevant to the nature of the benefit provided by the State. Even the State conceded it would be a benefit if the State paid the attorney. (2/11/00-56)

Moreover, the jury never learned that the procedures used by the State in providing an attorney are rare, and in fact no one including the Public Defender's Office was aware that this had ever occurred in any other case. The trial court did not permit Appellant to elicit these facts. (2/23/00-239, 246 App. 15, 19) See infra. Also, the trial court refused to permit Appellant to inquire what changes were requested by Wilds to the plea agreement during plea negotiations. (2/15/00-75, App. 16) The jury also never learned that the State withheld the charges so that Wilds would not qualify for a public defender until after he agreed to be represented by Benaroya. This evidence could have been used to impeach Wilds, to show the pressure exerted on Wilds to sign the agreement and testify against Appellant and prevent him from backing out of his agreement. This is relevant to Wilds' bias, motive to testify, and

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[12]The trial court instructed the jury that"[i]f you find that Jay Wilds' lawyer was provided with the assistance of the State at no cost, this was a benefit that Mr. Wilds received as part of his bargain with the State. You may consider this in the same way as you may consider the plea agreement itself as to what, of any, pressure existed on Mr. Wilds when he testified in this case." (2/25/00-36)

credibility. In any event, vigorous cross-examination as to inducement to testify does not substitute for full disclosure. Conyers at 39, Ware, 363 Md. at 351. Thus, the evidence was favorable to Appellant as a matter of law since it relates to the impeachment of the chief prosecution witness. See Conyers, at 38; Wilson, 363 Md. at 346.

In addition, here, as in Conyers, that the evidence was favorable to Appellant is evidenced by the State's efforts to conceal it. The State's efforts to conceal the evidence went far beyond the efforts of the State in Conyers that amounted to several carefully-crafted questions. See Conyers at 38. Here, the State engaged in a pattern of deception including permitting Wilds to testify falsely that he had completed a binding guilty plea, and repeatedly denying to the trial court in the face of direct questions its knowledge that the reason for the *ex parte* post-plea hearing was that Wilds was having doubts about proceeding further. Moreover, the State repeatedly objected during cross-examination of Wilds, and moved *in limine* to preclude Appellant from asking Wilds questions about how he obtained his attorney. (2/11/00-54) The State also opposed Appellant's requests to call Benaroya and recall Wilds to testify for the jury.

It is necessary to determine whether the Napue or the Bagley/Brady standard for materiality applies in the present case. Based upon the fact that the prosecutor knowingly entered the incomplete plea agreement into evidence, without the side agreement, failed to elicit the existence of the side agreement from Wilds, and stated on the record to the trial

court that there was no side agreement, the stricter Napue standard of materiality applies.[13] The Napue standard is whether there is any reasonable likelihood that the false testimony affected the jury. Conyers, Slip op. at 40 (citing Napue v. People of Ill., 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) (reversible error for prosecutor to fail to correct false testimony by its witness that he received no promises of leniency in exchange for his testimony); see also Wilson, 363 Md. at 346. Had the jury known that Wilds could have withdrawn from the plea agreement at any time, the jury may well have discredited Wilds' testimony. The jury may have believed that Wilds would have an additional incentive to make his testimony more pleasing to the State if he could get out of the agreement, and then the State would not recharge him. See Wilson, 363 Md. at 347. Thus, the side agreement in the present case was directly related to the jury's assessment of Wilds' credibility. Since Wilds was the key prosecution witness upon which the State's entire case rested, the failure to disclose the side agreement and other impeachment evidence creates a reasonable likelihood that the suppression affected the jury.

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[13] In Wilson, 363 Md. at 351, the Court noted:

> In addition, the Massachusetts Supreme Judicial Court recently held that any time that, " 'through misfeasance or nonfeasance by the prosecutor, false testimony is introduced concerning an arrangement between the witness and the prosecutor, a strict standard of materiality is applied. A conviction will be set aside if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." ' " Commonwealth v. Hill, 432 Mass. 704, 739 N.E.2d 670, 679 (2000) (quoting Commonwealth v. Gilday, 382 Mass. 166, 415 N.E.2d 797, 803 (1980)).

In the alternative, should this Court find that the Bagley/Brady standard of materiality is appropriate, that is, that there is a reasonable likelihood or substantial possibility that had the evidence of the side agreement and other impeachment evidence been disclosed, the result of the proceeding would have been different, Appellant demonstrates materiality under that standard as well. In the present case, all of the evidence withheld was material.[14] The side agreement was material because, had the jury heard about it, it may have found that Wilds testimony was not credible. It may have determined that Wilds could have been influenced to make his testimony even more incriminating against Appellant with the thought that if the State liked his testimony, he could withdraw his plea, withdraw from the agreement and not be subjected to any criminal charges.[15] The suppression of the provision of the free attorney and the delayed charges to make Wilds ineligible for a public defender was material because it was evidence of the State's influence over Wilds and its desperation

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[14] "[M]ateriality is assessed by considering all of the suppressed evidence collectively." Wilson, 363 Md. at 347.

[15] The Wilson Court held:

> The fact that [the witness] was not aware of the exact terms of the plea agreement only increases the significance, for purposes of assessing credibility, of his expectation of favorable treatment.... [A] tentative promise of leniency might be interpreted by a witness as contingent upon the nature of his testimony. Thus, there would be a greater incentive for the witness to try to make his testimony pleasing to the prosecutor. That a witness may curry favor with a prosecutor by his testimony was demonstrated when the prosecutor renegotiated a more favorable plea agreement with [the witness] after [the defendant] was convicted.

363 Md. at 350 (citations omitted).

to have Wilds sign the agreement. Had the jury known of all of the circumstances surrounding the provision of the attorney, it may well have determined that the State's desperation showed its knowledge of its own weak case. Suppression of evidence of the non-binding nature of the "guilty plea" hearing was material because the jury did not know that as a result, the guilty plea was not binding and Wilds would not be bound by the plea agreement.[16] As stated above, if Wilds is not bound by the plea or the agreement, Wilds could have been influenced to make his testimony even more incriminating against Appellant.

The State's closing argument to the jury is additional evidence of materiality in the present case, as it was in Convers. The State in which it repeatedly argued Wilds' credibility. The State argued: "You don't have to like Jay Wilds or like what he did to know that he's telling the truth." (2/25/00-58) "You know he knows what happened." (2/25/00-58) "Jay Wilds was sincere. . . . He was honest with you." (2/25/00-60) "That makes sense with what Jay Wilds is telling you." (2/25/00-67) "Now, the Defense told you it's fantastic that Jay Wilds could look in the trunk of a car for 10 seconds and see taupe stockings and identify Hey Lee. No, it's not." (2/25/00-127)

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[16]While it is true that the jury was eventually instructed by the trial court that Wilds did not yet enter a completed guilty plea because a statement of facts was not provided at the hearing on September 7, 1999, (2/25/00-35), the jury never learned that the legal effect of the failure to have a guilty verdict entered meant that Wilds could withdraw his guilty plea at any time. Regardless of the Maryland Rules, the jury still believed that the plea agreement was in full force because it was unaware of the side agreement.

There was a reasonable likelihood or substantial possibility that absent the suppression of the side agreement and other impeachment evidence, the result would have been different. As in Conyers, the nature of Wilds' testimony and his importance to the case rendered the suppressed evidence material, by the State's own admission: "[l]et's talk about Jay Wilds because, clearly, this case hinges on his testimony." (2/25/00-57) In addition, Wilds' credibility was in serious doubt. It was not contested that Wilds had lied in every pretrial statement he gave to the police. (2/11/00-205) Further impeachment by Appellant could have caused the jury to completely disregard his testimony, which would have resulted in the acquittal of Appellant. As such, the suppression of the evidence in the present case was material, constituted a violation of Brady, and Appellant's rights to due process under the 14th Amendment and Article 24 of the Maryland Declaration of Rights. Appellant's convictions must therefore be reversed. See Wilson, 363 Md. at 341-42 ("The failure to disclose evidence relating to any understanding or agreement with a key witness as to a future prosecution, in particular, violates due process, because such evidence is relevant to witness's credibility.").[17] Thus, the evidence withheld was material and violated Brady.

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[17] The trial court found that the State did not err in suppressing evidence that it provided Wilds with a free private attorney on the grounds that "the State honestly and in good faith did not perceive it as a benefit." (2/11/00-56, App. 17) The trial court was clearly erroneous in that the good faith of the prosecutor is irrelevant in a Brady determination. See Wilson, 363 Md. at 345-46 ("the suppression by the prosecution of evidence . . . violates due process . . . irrespective of the good faith or bad faith of the prosecution.") (citation omitted).

2. The State's actions constituted prosecutorial misconduct.

a) Facts

The State suppressed material favorable evidence, presented false and incomplete testimony, misrepresented to the trial court and the jury that Wilds entered a completed guilty plea, and obstructed Appellant's attempts to obtain information independently from the State. The State was not truthful with the trial court when it was directly questioned regarding the reason for the post-plea hearing. This lack of candor was in furtherance of the State suppressing evidence regarding the plea agreement with its key witness.

b) The Law

The standard for proving prosecutorial misconduct is whether the prosecutor acted in bad faith, to gain a tactical advantage, and caused actual prejudice to the defendant. See Clark v. State, 364 Md. 611, 774 A.2d 1136 (2001) (preindictment delay); see also McNeil v. State, 112 Md. App. 434, 685 A.2d 839 (1996) (prosecutorial misconduct can arise from failure to provide exculpatory evidence); Arizona v. Youngblood, 488 U.S. 51, 57, 109 S.Ct. 333, 337 (1988) (destruction of potentially exculpatory evidence); United States v. Lovasco, 431 U.S. 783, 790, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (1977) (preindictment delay); United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) (preindictment delay).

c) Analysis

In the present case, the bad faith of the prosecutor was evident when he knowingly

introduced into evidence a plea agreement he knew to be materially incomplete, and failed to elicit testimony regarding the side agreement from Wilds. The prosecution in bad faith objected to Benaroya testifying in front of the jury, because then the jury would know that the prosecutor had not been honest with the jury. The bad faith of the prosecution is most evident when viewed along with the suppression of the circumstances surrounding the plea agreement. The pattern of suppression of evidence and misleading statements of the prosecutor can only lead to the conclusion that the actions were intentional, and meant to cause harm to Appellant's ability to fully and effectively impeach the main witness against him. The acts of the State caused actual prejudice, in that Appellant was unable to effectively cross-examine Wilds as to all of the terms of the plea agreement, including that he could withdraw from it at any time without a judicial finding that it would be in the interest of justice. See Maryland Rule 4-242. Moreover, Appellant was actually prejudiced because the jury did not hear all the terms of the plea agreement, or know that Wilds could withdraw his plea of guilty at any time. All of the suppressed evidence was exculpatory, in that it would have negatively effected Wilds' credibility. As such, the jury could not fully and adequately judge Wilds' credibility. Had the jury had all of the impeachment evidence, it may well have concluded that Wilds was not to be believed. As the State's case hinged on Wilds' testimony, Appellant's convictions must be reversed on the grounds of prosecutorial misconduct.

3. The trial court committed reversible error in prohibiting Appellant from calling Benaroya and recalling Wilds as a witness.

a) Facts

The trial court ruled that Appellant could not call Benaroya as a witness or recall Wilds as a witness to elicit evidence that the State had an oral side agreement with Wilds which provided that Wilds could withdraw his plea at any time. The trial court ruled that Appellant could not call Benaroya or recall Wilds: "I believe that calling [Benaroya] would not be appropriate and it would just take us off on a needless presentation of evidence. And I would find that the credibility of Mr. Wilds has been exhausted." (2/22/00-74, App. 9)

b) The Law

In Marshall v. State, 346 Md. 186, 695 A.2d 184 (1997), the Court of Appeals held that the trial court committed reversible error in limiting the defendant's cross examination of a witness as to terms of his plea agreement with the State. The Court held that the defendant was entitled to present evidence of terms of a plea agreement, which is relevant to the jury's determination of the witness' credibility, bias, and motive to testify falsely. Id. at 197.

c) Analysis

The trial court committed reversible error in failing to permit Appellant to call Benaroya as a witness or recall Wilds to testify as to the existence of a side oral agreement, The side agreement was a term of the plea agreement. (2/22/00-64, App. 8) Thus, the trial

court erred in ruling that Appellant could not introduce this testimony.

4. The trial court committed reversible error in restricting the cross-examination of Wilds.

a) Facts

The trial court erroneously restricted Appellant's cross examination of Jay Wilds on issues relating to the plea and other issues. First, Wilds' plea agreement, introduced by the State, provides that Wilds "represents that he/she has fully and truthfully responded to all question put to [him] by law enforcement during all prior interviews. (Exhibit 35, page 1 para. 1a) If Wilds lied in any prior interview, "the State is immediately released from any obligation under this agreement." Id. Appellant twice attempted to question Wilds about the effect that his admitted previous lies in prior statements to police had on the plea agreement. On each occasion, the trial court sustained the State's objections to these questions. (2/10/00-157, 2/15/00-79, App. 13, 18) In addition, the trial court sustained objections to Appellant's attempts to learn what changes Wilds sought to the plea agreement during plea negotiations. (2/15/00-75, App. 16) Also, Appellant asked Wilds whether he knew if anyone paid his attorney any money. An objection to this question was sustained by the trial court. (2/15/00-68, App. 14)

b) The Law

In Marshall v. State, 346 Md. 186, 695 A.2d 184 (1997), the Court of Appeals held that the defendant's Sixth Amendment rights and rights pursuant to Article 21 of the

Maryland Declaration of Rights were violated when the trial court refused to permit the defendant to cross-examine a witness as to a condition of his plea agreement. The Court in Marshall noted:

> The Confrontation Clause of the Sixth Amendment guarantees an accused in a criminal proceeding the right "to be confronted with the witnesses against him." Delaware v. Van Arsdall, 475 U.S. 673, 678, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674, 683 (1986). This right means more than simply confronting the witness physically. Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347, 353 (1974). This same right is guaranteed to a criminal defendant by Article 21 of the Maryland Declaration of Rights. Simmons v. State, 333 Md. 547, 555-56, 636 A.2d 463, 467, cert. denied, 513 U.S. 815, 115 S.Ct. 70, 130 L.Ed.2d 26 (1994). The constitutional right of confrontation includes the right to cross-examine a witness about matters which affect the witness's bias, interest or motive to testify falsely. Ebb, 341 Md. at 587, 671 A.2d at 978. An attack on the witness's credibility "is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." Davis, 415 U.S. at 316, 94 S.Ct. at 1110, 39 L.Ed.2d at 354.

346 Md. at 192, 695 A.2d at 187. In addition, the Court stated the trial court:

> has no discretion to limit cross-examination to such an extent as to deprive the accused of a fair trial. See State v. Cox, 298 Md. 173, 183, 468 A.2d 319, 324 (1983). In assessing whether the trial court has abused its discretion in the limitation of cross-examination of a State's witness, the test is whether the jury was already in possession of sufficient information to make a discriminating appraisal of the particular witness's possible motives for testifying falsely in favor of the government.

346 Md. at 194, 695 A.2d at 188. The Court held:

> Turning to the case at hand, we conclude that the trial judge erred in limiting the cross-examination of Edwards. Petitioner was prohibited from asking the witness any questions about the terms of his plea agreement, and although the trial judge said defense counsel could ask about motive, the offer was, in reality, a hollow gesture. Where a witness has a "deal" with the State, the jury

> is entitled to know the terms of the agreement and to assess whether the "deal" would reasonably tend to indicate that his testimony has been influenced by bias or motive to testify falsely.

346 Md. at 197, 695 A.2d at 189 (footnote omitted). The Court held that the error was not harmless beyond a reasonable doubt:

> The jurors were entitled to hear this evidence to enable them to make an informed judgment as to what weight, if any, to place on the testimony of Edwards, the State's only eyewitness linking Petitioner to the murder. Inasmuch as we conclude that defense counsel was denied the opportunity to cross-examine Edwards, a key prosecution witness, about the condition of Edwards's plea agreement that he testify at Petitioner's trial, and that agreement was not otherwise made known to the jury, we conclude that the jury lacked the opportunity to properly assess Edwards's testimonial motivation or potential bias. The issue of Edwards's credibility was crucial to the jury's determination of Petitioner's guilt. Because the jury was not provided with sufficient information to make a discriminating appraisal of Edwards's possible motives for testifying falsely or coloring his testimony in favor of the State, we cannot say that the trial court's error was harmless beyond a reasonable doubt.

346 Md. at 198, 695 A.2d at 190 (footnote omitted).

c) Analysis

In the present case, the trial court's failure to permit Appellant to ask Wilds about his plea agreement, specifically, about the effect of his previous lies on the agreement, and about what terms he wanted to change during negotiations violated Appellant's Sixth Amendment right and rights under Article 21 to confront and cross-examine witnesses against him. This evidence was relevant to Wilds' testimonial motivation and credibility. As such, the trial court erred, and the error was not harmless beyond a reasonable doubt. As in Marshall, Wilds was the chief prosecution witness. Impeachment of Wilds was the central mission of

the defense. Thus, Appellant is entitled to reversal of his convictions. See Marshall, 346 Md. at 197; Conyers, Slip op. at 41.

5. The trial court committed reversible error in denying Appellant's motion to strike the testimony of Wilds.

a) Facts

Appellant moved to strike the testimony of Jay Wilds as one of many remedies it requested in light of the State's actions discussed above. The trial court erroneously denied this motion. (2/15/00-34, App. 11)

b) The Law

In Taliaferro v. State, 295 Md. 376, 390-91, 456 A.2d 29, 37, cert. denied, 461 U.S. 948, 103 S.Ct. 2114, 77 L.Ed.2d 1307 (1983), the Court approved the trial court's refusal to let the defendant's alibi witness testify where the name of the witness was not disclosed to the State until last day of trial. In University of Maryland Medical Systems Corp. v. Malory, ___ Md. App. ___, ___ A.2d ___ (No. 1883, Sept. Term, 2000) (Filed Oct. 31, 2001) (2001 WL 1335643) WL at 11, in a civil context, the Court upheld the trial court's striking of testimony where party hid evidence in discovery: "This remedy is supported by the holding in Bartholomee, that 'the injury inherent in failure to make discovery is unfair surprise. It would seem that the only effective cure for this disease is preclusion of the material withheld.' Id."

c) Analysis

In light of the fact that the State hid exculpatory evidence relating to the plea agreement with its chief prosecution witness, the motion should have been granted. See Taliaferro, 295 Md. at 390-91, 456 A.2d at 37; University of Maryland Medical Systems Corp. WL at 11.

6. The trial court committed reversible error in precluding Appellant from calling Ms. Julian as a witness.

a) Facts

The trial court erroneously ruled that Appellant could not present testimony from Ms. Julian, a member of the Office of the Public Defender, who would have testified that the actions of the State in the present case in procuring a free private attorney for a witness was so rare that she had never even heard of it before. (2/23/00-239, 246, App. 15, 19)

b) The Law

In Marshall v. State, 346 Md. 186, 695 A.2d 184 (1997), the Court of Appeals held that the trial court committed reversible error in limiting the defendant's cross examination of a witness as to terms of his plea agreement with the State, and that the defendant was entitled to present evidence of terms of a plea agreement, which is relevant to the jury's determination of the witness' credibility, bias, and motive to testify falsely. In Conyers, the Court held that evidence of the complete negotiations and circumstances of the plea

agreement are material. Slip op. at 41.

c) Analysis

The trial court erred in restricting Appellant's case. Appellant has the right to put all of the facts and circumstances surrounding the plea before the jury. Marshall, 346 Md. at 197; Conyers, Slip op. at 41. The jury never heard how unusual it was for the State to act in such a manner. Had the jury heard this testimony, it may well have concluded that Wilds' testimony was too coerced by the State to be believed. As such, the trial court committed reversible error.

7. The trial court committed reversible error in denying Appellant's motion to disclose documents and information from the State.

a) Facts

The trial court erroneously ruled that Appellant was not entitled to obtain documents and information from the State regarding communications between Mr. Urick and Wilds' attorney Ms. Benaroya. (2/11/00-41-47, App. 20-21) That request was erroneously denied on the ground that such a disclosure would violate Wilds' right to have privileged communications with his attorney. Appellant, however, sought only communications and information involving the State. (2/11/00-41-42)

b) The Law

In E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc., 351 Md. 396, 416, 718 A.2d

1129 (1998), the Court held : "for a communication to be confidential, it is essential that it not be intended for disclosure to third persons. . . . 'if a client communicates information to his attorney with the understanding that the information will be revealed to others, that information ... will not enjoy the privilege.' United States v. (Under Seal), 748 F.2d at 875. See also [Trupp v. Wolff, 24 Md. App. 588, 609, 335 A.2d 178, 184 (1975)](holding that for the attorney-client privilege to apply, the subject of communication must be confidential and not made in the presence of a third person.)."

c) Analysis

This information was not privileged as it involved a third party. Thus, the trial court committed reversible error. See E.I. du Pont de Nemours & Co., 351 Md. at 416.

8. The trial court committed reversible error in denying Appellant's motion to question Mr. Urick out of the presence of the jury.

a) Facts

The trial court denied Appellant's request to question Mr. Urick under oath out of the presence of the jury as to the fact surrounding the plea agreement, but particularly as to his communications with Ms. Benaroya and his efforts to obtain her as an attorney for Wilds. (2/11/00-23, App. 10) The trial court based its ruling on its finding that the same information could be obtained by Appellant questioning Ms. Benaroya and Wilds. Later, however, the trial court ruled that Appellant could not call Ms. Benaroya as a witness in front of the jury.

(2/22/00-74, App. 9)

b) The Law

As stated above, in Marshall v. State, 346 Md. 186, 695 A.2d 184 (1997), the Court of Appeals held that the trial court committed reversible error in limiting the defendant's cross examination of a witness as to terms of his plea agreement with the State, and that the defendant was entitled to present evidence of terms of a plea agreement, which is relevant to the jury's determination of the witness' credibility, bias, and motive to testify falsely.

c) Analysis

Given the fact that the prosecution suppressed evidence relating to the plea agreement, and admitted it provided a free attorney to its chief witness, Appellant was entitled to question Mr. Urick. Since the trial court denied Appellant's request to obtain the information from other sources, the ruling regarding Mr. Urick constituted reversible error. See Marshall, 346 Md. at 197.

B. THE TRIAL COURT ERRED IN ADMITTING HEARSAY IN THE FORM OF A LETTER FROM THE VICTIM TO APPELLANT, WHICH IS HIGHLY PREJUDICIAL.

1. Standard of Review

The standard of reviewing a trial court's ruling on the admission of evidence is whether the trial court erred in admitting the evidence. Banks v. State, 92 Md. App. 422,

438, 608 A.2d 1249 (1992). The appellate court must then decide whether the error was harmless beyond a reasonable doubt. Id.

2. Argument

At trial, the State introduced a letter from Hae to Appellant, on the back of which Appellant and one of his classmates, Aisha Pittman, allegedly exchanged notes during a high school class. (State's Exhibit 38, App. 22-23) The letter constituted inadmissible hearsay which did not fall under any exception to the hearsay rule. In it, Hae told Appellant of her feelings about the break up, and about her perceptions and opinions as to Appellant's feelings about the break up.

> . . . . I'm really getting annoyed that this situation is going the way it is. . . . Your life is NOT going to end. You'll move on and I'll move on. But, apparently, you don't respect my decision. . . . I NEVER wanted to end this like this, so hostile and cold. . . . Hate me if you will. But you should remember that I could never hate you.

During trial, the State offered the letter, as Exhibit 38, to be moved into evidence:

> [BY THE STATE]: Your Honor, I would ask that State's Exhibit 38 be moved at this time?
>
> THE COURT: Any objection?
>
> [BY DEFENSE COUNSEL]: I would object.
>
> THE COURT: For the record, I note your objection.
>
> I ask that you indicate a time frame, and, if you are able to do that through this witness, the exhibit will be admitted.
>
> (Witness states letter was written sometime early in November as were

comments on the back)

* * *

THE COURT: Very Well. It'll be admitted over objection.

[BY THE STATE]: Thank you, Your Honor. Your Honor, I would ask to publish this letter to the jurors by was of Ms. Pittman reading first the front side and then the back side?

THE COURT: Any objection? I know you have objection to the --

[BY DEFENSE COUNSEL]: Only to the --

THE COURT: I understand you have an objection --

[BY DEFENSE COUNSEL]: to the document.

THE COURT: That's preserved. Do you have any objection to the process of her reading it as opposed to passing it along the jurors and having them read it?

[BY DEFENSE COUNSEL]: I do. I'd prefer the jurors read it.

THE COURT: I'm gonna allow the witnesses to read the exhibit. . . . .

(1/28/00-243-45, App. 24-26)

Maryland Rule 5-801 provides:

> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
> (b) Declarant. A "declarant" is a person who makes a statement.
> (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Rule 5-802 provides: "Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." The hearsay letter of the

victim allegedly written over two months before her disappearance does not fall under any exception to the hearsay rule. The letter cannot fall under the state of mind exception found in Maryland Rule 5-803(b) (3), which provides as follows:

> (3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), **offered to prove the declarant's then existing condition or the declarant's future action**, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(Emphasis supplied). This exception is inapplicable for several reasons. First, the declarant speaks not only of her state of mind, but her opinion of Appellant's state of mind. Even if the letter contained only Hae's state of mind, the letter would be inadmissible because Hae's state of mind is not relevant to prove any fact at issue.

> "Statements offered, not to prove the truth of the matters asserted therein, but as circumstantial evidence that the declarant had ... a particular state of mind, when that ... state of mind is relevant, are nonhearsay." McLain, § 801.10 at 282-83 (citations omitted) (emphasis added). Here, even if the statements were not being offered for their truth, but rather as evidence of McDonald's state of mind, i.e., fear of appellant, this would not resolve the issue of their admissibility because evidence must also be both relevant and not unduly prejudicial.

Banks v. State, 92 Md. App. 422, 434, 608 A.2d 1249 (1992).

Further, although Appellant's state of mind is relevant, Hae's statements about Appellant's state of mind are inadmissible and do not satisfy the exception. The exception permits statements by the declarant about the declarant's state of mind, but not statements

by the declarant about someone other than the declarant's state of mind. See Maryland Rule 5-803(b)(3).

The introduction of the letter to Appellant was not harmless beyond a reasonable doubt. The letter referred to Hae's opinion that Appellant was cold, hostile and hateful. These statements were highly prejudicial, especially where Hae portrayed herself as being sympathetic and loving. No juror could rationally and reasonably decide the issues in the case without extreme sympathy for the victim and malice toward Appellant after reading that letter. As such, it cannot be said that the erroneous introduction of the letter was harmless beyond a reasonable doubt. See Banks, 92 Md. App. at 438.

C. THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF THE VICTIM'S 62-PAGE DIARY, WHICH CONSTITUTED IRRELEVANT HIGHLY PREJUDICIAL HEARSAY.

1. Standard of Review

The standard of reviewing a trial court's ruling on the admission of evidence is whether the trial court erred in admitting the evidence. Banks v. State, 92 Md. App. 422, 438, 608 A.2d 1249 (1992). The appellate court must then decide whether the error was harmless beyond a reasonable doubt. Id. In determining whether there was plain error, the appellate court must decide whether the error was material to the rights of the defendant, such that the defendant was deprived of a fair trial. Moye v. State, 139 Md. App. 538, 776 A.2d 120, cert. granted, 366 Md. 274 (2001).

2. Argument

At trial, the State introduced the 62-page diary of the victim in its entirety. (State's Exhibit 2, 1/28/00-32, App. 27) Although Appellant did not object at that point, Appellant objected numerous times when the State asked a witness to read several pages of the diary:

> Q If I may, I'll ask you to read for the jurors the entry under May 14, 1998?
>
> [BY DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> A I think I'll try the one week recess Deb suggested. I hope forth and went out with Iesha [sic], Deb and Sean in Sean's new car. It is so fly with those tinted windows. . . . I couldn't be with my baby because he had to go to D.C. for his religious stuff. That's what I need to figure out. Do I dare to pull him away from his religion? Ms. Savic [sic] was all up in my face about it. She said stuff like well Adnan used to be so religious and strict last year but this year he is so loose, like I changed him. Actually, I did and I don't want to pull him away from who he is. I think I need time to organize these things but I do not know that -- but I do know one thing. I love him and he loves me. Nothing will change that. I'll try the recess week and see what happens. I'll probably kill myself if I lose him but I'll go crazy with things complicating. I wish he'll [sic] call back soon.
>
> * * *
>
> Q I ask you to read the entry under May 15th?
>
> [BY DEFENSE COUNSEL]: Again objection.
>
> THE COURT: Overruled.
>
> A I did it. Me and Adnan are officially on recess week or time out. I don't know what's going to happen to us. Although I'm in love with him, I don't know about him. He actually suggests that what we have is like, not love. I heard the doubt in his voice. Although he couldn't pick up mine, I felt the

same way. I like him. No, I love him. It's just all the things that stand in the middle, his religion and Muslim customs all are in the way. It irks me to know that I am against his religion. He called me a devil a few times. I knew he was only joking, but it's somewhat true. I hate that. It's like making him choose between me and his religion.

The second thing is the possessiveness. Independence rather. I'm a very independent person. I rarely rely on my parents. Although I love him it's not like I need him. I know I'll do just fine without him. I need time for myself and my friends other than him. How dare he get mad at me for planning to hang out with Iesha [sic].

The third thing is the mind play. I've matured out of my jealosy shit. I don't get jealous over trying to get him jealous as a fool -- him trying to get me jealous is [sic] a fool because I'll definitely lose him -- me. I prefer a straight relationship that doesn't get in people mixed up just because he wanted to play mind games.

The fourth thing is nothing. Because I do love him. It's just all of the shitty things that are messing with my mind. I'm just too confused. If I don't take the time to set things straight, the whole thing will blow up . . . in my head making me mad and do something I'll regret forever. That's why I need the time out. I just hope I don't lose him because of this. I love him. When I hold him, I want it to be forever. I feel secure and comfy with him. I think he expected more of a spontaneous combustion. That's not going to happen all of the time. Our relationship burns lightly at first and then it eventually calms down. We started strong but now we settle in a boring but secure and loving relationship. I don't know what he wants. All I want is him to hold on to, to cuddle up to, kiss when I feel empty inside. Maybe I'm not supposed to be loved but supposed to love and I thought that I had found another keeper and maybe I have. Hopefully, we'll go through this and come out much stronger -- with a much stronger foundation. I love him. I can live without him but I love him and want him with me. Please Adnan be patient with me, love.

(2/16/00-304-307, App. 28) In addition, the trial court previously ruled that hearsay of the victim is admissible:

(Out of the presence of the jury)

THE COURT: I'm gonna allow the State to inquire as to the relationship that this witness was aware based on conversations that she had directly with the defendant or directly with the victim in a period of time preceding the murder. . . .

[BY THE STATE]: I'm sorry. Did you say she can't say anything the victim told her? THE COURT: She can tell you-- she can say what the victim said, she can say what the defendant said as to their relationship. But beyond that --

[BY DEFENSE COUNSEL]: At any time prior to her disappearance?

THE COURT: The period of time on or about, as you've indicated, October, November, December in 1998. However, I will not allow anything other than what conversations she had with the witness, victim or the defendant. Other than that, not a we knew, what we all knew, what we all heard. That will not be permitted. . . .

[BY THE STATE]: Thank you.

[BY DEFENSE COUNSEL]: We would note an objection.

THE COURT: All right.

(1/28/00-136-37, App.) Further, the issue of the diary was clearly before the court prior to trial when the State filed a Motion for Admission of Excerpts of Victim's Diary. (R. 560-576,) Thus, the trial court had before it the issue of the diary, and the issue of the admissibility of the diary is preserved for appellate review.

The diary itself is inadmissible hearsay which was highly prejudicial to Appellant. It contained opinions of the victim extremely adverse to Appellant, it contained multiple levels of hearsay, and inadmissible bad acts of Appellant. The diary is inadmissible hearsay which does not fall under any exception to the hearsay rule. Banks v. State, 92 Md. App. 422, 434,

608 A.2d 1249 (1992).

In Banks, the trial court admitted the victim's statements that he feared the defendant, that he and the defendant had been arguing, and that the defendant had been violent toward him. The State contended on appeal that the statements were not hearsay, because they were offered to prove the victim's state of mind. The Court of Special Appeals rejected this argument, and agreed with the defendant that the statements constituted inadmissible hearsay:

> A recurring problem arises in connection with the admissibility of accusatory statements made before the act by the victims of homicide. If the statement is merely an expression of fear, i.e. "I am afraid of D," no hearsay problem is involved since the statement falls within the hearsay exception for statements of mental or emotional condition. This does not, however, resolve the question of admissibility. Since nothing indicates that the victim's emotional state is in issue in the case, the purpose of the offer of the statement must be to suggest the additional step of inferring some further fact from the existence of the emotional state. The obvious inference from the existence of fear is that some conduct of D, probably mistreatment or threats, occurred to cause the fear. The possibility of overpersuasion, the prejudicial character of the evidence, and the relative weakness and speculative nature of the inference, all argue against admissibility as a matter of relevance. Even if one is willing to allow the evidence of fear standing alone, however, the fact is that such cases seem to occur but rarely. In life, the situation assumes the form either of a statement by the victim that D has threatened him, from which fear may be inferred, or perhaps more likely a statement of fear because D has threatened him. In either event, the cases have generally excluded the evidence. Not only does the evidence possess the weaknesses suggested above for expressions of fear standing alone, but in addition it seems unlikely that juries can resist using the evidence for forbidden purpose in the presence of specific disclosure of misconduct of D.. . .
>
> Here, McDonald's state of mind as a victim was irrelevant to the commission of the crime. (It was only appellant's state of mind that was relevant.) Further, any probative value of the statements as to the victim's state

> of mind would be outweighed by the extremely prejudicial nature of the evidence. Accordingly, the trial court erred in admitting the disputed testimony. See Buckeye Powder Co. v. DuPont Powder Co., 248 U.S. 55, 65, 39 S.Ct. 38, 40, 63 L.Ed. 123 (1918) (where state of mind testimony is sought to be used in an attempt to demonstrate the truth of the underlying facts rather than solely to show state of mind, evidence must be excluded); United States v. Day, 591 F.2d 861, 881 (D.C.Cir.1979) (testimony of threats made by defendant to victim excluded on grounds of "hearsay problems and questions of relevancy and prejudice"); United States v. Brown, 490 F.2d 758, 763 n. 10 (D.C.Cir.1973) (where state of mind testimony is sought to be used in an attempt to demonstrate the truth of the underlying facts rather than solely to show state of mind, evidence must be excluded); Commonwealth v. DelValle, 351 Mass. 489, 221 N.E.2d 922, 924 (1966) (testimony of threats made by defendant against victim inadmissible to rebut suicidal state of mind where introduced in State's case-in-chief and there was no evidence from the defense of victim's suicidal tendencies).

92 Md. App. at 434-36. The Court held that the error warranted reversal even where the defendant admitted to police that she killed the victim. 92 Md. App. at 427, 439.

In the present case, the diary entries reflect in great detail Hae's feelings for Appellant, and how she was in love with Appellant, her own fear of being apart from him, and her anguish over the fact that dating is against Appellant's religious beliefs. Aside from causing the jury to have extremely sympathetic emotions for Hae, her state of mind has nothing whatsoever to do with whether or not Appellant killed her.

The State, in its Motion, argues that Hae's state of mind is relevant "because an understanding of the defendant and victim's relationship is vital to a showing of motive, malice and premeditation." (R. 562) The State further argues that because the diary refers to the religious beliefs of Appellant and that Hae believed the relationship with Appellant would end because of these beliefs the diary is relevant and admissible. Id.

The State's argument is flawed. First, the fact that Appellant and Hae broke up because of religious difficulties was not contested at trial. Second, the fact that Hae had been seeing another young man before her death was not contested at trial. Whether Appellant became enraged by these circumstances, as the State argues, and killed Hae was the issue to be determined by the jury. Hae's mental state has nothing to do with Appellant's mental state. **Hae's feelings** about the religious difficulties caused by their dating and Hae's feelings about the breakup are not relevant, and in fact are highly prejudicial. As the Court in Banks stated, "McDonald's state of mind as a victim was irrelevant to the commission of the crime. (It was only appellant's state of mind that was relevant.)." 92 Md. App. at 435.[18]

In its Motion, the State argues that the diary is admissible as a then existing mental, emotional or physical condition pursuant to Maryland Rule 5-803(b)(3)(1). It also contends that the victim's state of mind is relevant and admissible. Both of these contentions are erroneous.

Maryland Rule 5-803(b) provides an exception to the hearsay rule for statements

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[18]Distinguish Case v. State, 118 Md. App. 279, 284, 702 A.2d 777, 779 (1997): "In this case, the victim's state of mind was of significant consequence to the issue of whether she had invited appellant into her home and had voluntarily positioned herself close enough to him that she would become the victim of an accidental shooting. To determine whether the victim's death was a homicide or an accident, the jurors were entitled to know that, after appellant moved out of the victim's residence, she expressed her fear of him, changed the locks, installed motion sensor lights, and made adjustments to the windows so they could not be opened. Maryland Rule 5-401."

"offered to prove the declarant's then existing condition or the declarant's future action. . . ." As stated above, the victim's state of mind is not relevant in this case. Moreover, the diary was not admitted to prove Hae's state of mind, but rather to inflame the passions of the jury with passages such as: "I'll probably kill myself if I lose him. . . ." As such, the diary constitutes rank inadmissible hearsay.

The error was not harmless beyond a reasonable doubt. The diary contains highly prejudicial hearsay about Hae's feelings, her love of her family, what other people said to her about her relationship with Appellant, and a plethora of other inflammatory material. The only possible impact this diary could have had on the jury was to cause a great deal of sympathy for Hae and engender prejudice against Appellant. Since there was no limiting instruction, the jury was invited to use each and every sentence of the 62-page diary as substantive evidence. Even where the evidence in a case is "very strong," the appellate court must reverse unless it can say beyond a reasonable doubt that the error "in no way" influenced the verdict. Richardson v. State 324 Md. 611, 624, 598 A.2d 180 (1991). In the present case, the entire case against Appellant "hinged" on one witness, Jay Wilds. The evidence is far from strong. The diary was overwhelmingly prejudicial to Appellant such that its admission denied him a fair trial. Appellant has the right under the due process clause of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights to be tried by a jury that is not afflicted with prejudice against him. Further, the introduction of hearsay evidence denied him the right to confront and cross-examine witnesses against him. Thus,

the error in admitting the diary was not harmless beyond a reasonable doubt.

In the alternative, if this Court finds that all or part of the issue was not preserved, the admission of the diary and reading excerpts constitute plain error. The appellate courts have "independent discretion" to excuse the failure of a party to preserve an issue for appellate review. Moosavi v. State, 355 Md. 651, 661 736 A.2d 285 (1999); Moye v. State, 139 Md. App. 538, 776 A.2d 120 (2001). See also Maryland Rule 8-131. Appellate courts will consider unpreserved errors where the issue is "compelling, extraordinary, exceptional, or fundamental to assure the defendant a fair trial." Moye v. State, 139 Md. App. 538, 776 A.2d 120 (2001). As stated above, the introduction of the diary and reading excerpts of the diary deprived Appellant of his fundamental rights to a fair trial and to confront and cross-examine witnesses against him. As such, Appellant is entitled to a new trial. See Cluster v. Cole, 21 Md. App. 242, 249, 319 A.2d 320, 324 (1974) (recognizing as plain error and reversible error the admission of hearsay).

V. CONCLUSION

For the foregoing reasons, Appellant requests that the judgments of the court below be reversed, and that his convictions be reversed.[19]

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[19]Pursuant to Maryland Rule 8-504(a)(8), this brief has been printed with proportionally spaced type Times New Roman 13 point.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of February, 2002, two copies of the foregoing Brief of Appellant were mailed first class, postage pre-paid, to Office of the Attorney General, 200 St. Paul Place, Baltimore, Maryland 21202.

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PERTINENT AUTHORITIES

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article 21, Md. Decl. Rights

That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

Article 24, Md. Decl. Rights. Due process.

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

MARYLAND RULE 4-242. PLEAS

(a) Permitted Pleas. A defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere. In addition to any of these pleas, the defendant may enter a plea of not criminally responsible by reason of insanity.
(b) Method of Pleading.
(1) Manner. A defendant may plead not guilty personally or by counsel on the record in open court or in writing. A defendant may plead guilty or nolo contendere personally on the record in open court, except that a corporate defendant may plead guilty or nolo contendere by counsel or a corporate officer. A defendant may enter a plea of not criminally responsible by reason of insanity personally or by counsel and the plea shall be in writing.

(2) Time in the District Court. In District Court the defendant shall initially plead at or before the time the action is called for trial.

(3) Time in Circuit Court. In circuit court the defendant shall initially plead within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213 (c). If a motion, demand for particulars, or other paper is filed that requires a ruling by the court or compliance by a party before the defendant pleads, the time for pleading shall be extended, without special order, to 15 days after the ruling by the court or the compliance by a party. A plea of not criminally responsible by reason of insanity shall be entered at the time the defendant initially pleads, unless good cause is shown.

(4) Failure or Refusal to Plead. If the defendant fails or refuses to plead as required by this section, the clerk or the court shall enter a plea of not guilty.

(c) Plea of Guilty. The court may accept a plea of guilty only after it determines, upon an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea. In addition, before accepting the plea, the court shall comply with section (e) of this Rule. The court may accept the plea of guilty even though the defendant does not admit guilt. Upon refusal to accept a plea of guilty, the court shall enter a plea of not guilty.

(d) Plea of Nolo Contendere. A defendant may plead nolo contendere only with the consent of court. The court may require the defendant or counsel to provide information it deems necessary to enable it to determine whether or not it will consent. The court may accept the plea only after it determines, upon an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, that the defendant is pleading voluntarily with understanding of the nature of the charge and the consequences of the plea. In addition, before accepting the plea, the court shall comply with section (e) of this Rule. Following the acceptance of a plea of nolo contendere, the court shall proceed to disposition as on a plea of guilty, but without finding a verdict of guilty. If the court refuses to accept a plea of nolo contendere, it shall call upon the defendant to plead anew.

(e) Collateral Consequences of a Plea of Guilty or Nolo Contendere. Before the court accepts a plea of guilty or nolo contendere, the court, the State's Attorney, the attorney for the defendant, or any combination thereof shall

advise the defendant (1) that by entering the plea, if the defendant is not a United States citizen, the defendant may face additional consequences of deportation, detention, or ineligibility for citizenship and (2) that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequences of the plea. The omission of advice concerning the collateral consequences of a plea does not itself mandate that the plea be declared invalid.

(f) Plea to a Degree. A defendant may plead not guilty to one degree and plead guilty to another degree of an offense which, by law, may be divided into degrees.

(g) Withdrawal of Plea. At any time before sentencing, the court may permit a defendant to withdraw a plea of guilty or nolo contendere when the withdrawal serves the interest of justice. After the imposition of sentence, on motion of a defendant filed within ten days, the court may set aside the judgment and permit the defendant to withdraw a plea of guilty or nolo contendere if the defendant establishes that the provisions of section (c) or (d) of this Rule were not complied with or there was a violation of a plea agreement entered into pursuant to Rule 4-243. The court shall hold a hearing on any timely motion to withdraw a plea of guilty or nolo contendere.

MARYLAND RULE 5-801. DEFINITIONS

The following definitions apply under this Chapter:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

MARYLAND RULE 5-802. HEARSAY RULE

Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible.

MARYLAND RULE 5-803. HEARSAY EXCEPTIONS: UNAVAILABILITY OF DECLARANT NOT REQUIRED

The following are not excluded by the hearsay rule, even though the declarant

is available as a witness:

(a) Statement by Party-Opponent. A statement that is offered against a party and is:

(1) The party's own statement, in either an individual or representative capacity;

(2) A statement of which the party has manifested an adoption or belief in its truth;

(3) A statement by a person authorized by the party to make a statement concerning the subject;

(4) A statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment; or

(5) A statement by a coconspirator of the party during the course and in furtherance of the conspiracy.

(b) Other Exceptions.

(1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

(5) Recorded Recollection. See Rule 5-802.1(e) for recorded recollection.

(6) Records of Regularly Conducted Business Activity. A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in

the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of Entry in Records Kept in Accordance with Subsection (b)(6). Unless the circumstances indicate a lack of trustworthiness, evidence that a diligent search disclosed that a matter is not included in the memoranda, reports, records, or data compilations kept in accordance with subsection (b)(6), when offered to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind about which a memorandum, report, record, or data compilation was regularly made and preserved.

(8) Public Records and Reports.

(A) Except as otherwise provided in this paragraph, a memorandum, report, record, statement, or data compilation made by a public agency setting forth

(i) the activities of the agency;

(ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report; or

(iii) in civil actions and when offered against the State in criminal actions, factual findings resulting from an investigation made pursuant to authority granted by law.

(B) A record offered pursuant to paragraph (A) may be excluded if the source of information or the method or circumstance of the preparation of the record indicate that the record or the information in the record lacks trustworthiness.

(C) A record of matters observed by a law enforcement person is not admissible under this paragraph when offered against an accused in a criminal action.

(D) This paragraph does not supersede specific statutory provisions regarding the admissibility of particular public records.

(9) Records of Vital Statistics. Except as otherwise provided by statute, records or data compilations of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law. (inadmissibility of certain information when paternity is contested) and § 5-311 (admissibility of medical examiner's reports).

(10) Absence of Public Record or Entry. Unless the circumstances indicate a lack of trustworthiness, evidence in the form of testimony or a certification in accordance with Rule 5-902 that a diligent search has failed to disclose a

record, report, statement, or data compilation made by a public agency, or an entry therein, when offered to prove the absence of such a record or entry or the nonoccurrence or nonexistence of a matter about which a record was regularly made and preserved by the public agency.

(11) Records of Religious Organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like.

(14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and a statute authorizes the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document or the circumstances otherwise indicate lack of trustworthiness.

(16) Statements in Ancient Documents. Statements in a document in existence twenty years or more, the authenticity of which is established, unless the circumstances indicate lack of trustworthiness.

(17) Market Reports and Published Compilations. Market quotations, tabulations, lists, directories, and other published compilations, generally used and reasonably relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in a published treatise, periodical, or

pamphlet on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation Concerning Personal or Family History. Reputation, prior to the controversy before the court, among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, or other similar fact of personal or family history.

(20) Reputation Concerning Boundaries or General History.

(A) Reputation in a community, prior to the controversy before the court, as to boundaries of, interests in, or customs affecting lands in the community.

(B) Reputation as to events of general history important to the community, state, or nation where the historical events occurred.

(21) Reputation as to Character. Reputation of a person's character among associates or in the community.

(22) [Vacant]. There is no subsection 22.

(23) Judgment as to Personal, Family, or General History, or Boundaries. Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the matter would be provable by evidence of reputation under subsections (19) or (20).

(24) Other Exceptions. Under exceptional circumstances, the following are not excluded by the hearsay rule, even though the declarant is available as a witness: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

MARYLAND RULE 8-131. SCOPE OF REVIEW

(a) Generally. The issues of jurisdiction of the trial court over the

subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(b) In Court of Appeals--Additional Limitations.

(1) Prior Appellate Decision. Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.

(2) No Prior Appellate Decision. Except as otherwise provided in Rule 8-304(c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals will consider those issues that would have been cognizable by the Court of Special Appeals.

(c) Action Tried Without a Jury. When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses. .

(d) Interlocutory Order. On an appeal from a final judgment, an interlocutory order previously entered in the action is open to review by the Court unless an appeal has previously been taken from that order and decided on the merits by the Court.

(e) Order Denying Motion to Dismiss. An order denying a motion to dismiss for failure to state a claim upon which relief can be granted is reviewable only on appeal from the judgment.

MARYLAND RULE 8-504. CONTENTS OF BRIEF

(a) Contents. A brief shall comply with the requirements of Rule 8-112 and include the following items in the order listed:

(1) A table of contents and a table of citations of cases, constitutional provisions, statutes, ordinances, rules, and regulations, with cases alphabetically arranged. When a reported Maryland case is cited, the citation shall include a reference to the official Report.

(2) A brief statement of the case, indicating the nature of the case, the course of the proceedings, and the disposition in the lower court, except that the appellee's brief shall not contain a statement of the case unless the appellee disagrees with the statement in the appellant's brief.

(3) A statement of the questions presented, separately numbered, indicating the legal propositions involved and the questions of fact at issue expressed in the terms and circumstances of the case without unnecessary detail.

(4) A clear concise statement of the facts material to a determination of the questions presented, except that the appellee's brief shall contain a statement of only those additional facts necessary to correct or amplify the statement in the appellant's brief. Reference shall be made to the pages of the record extract supporting the assertions. If pursuant to these rules or by leave of court a record extract is not filed, reference shall be made to the pages of the record or to the transcript of testimony as contained in the record.

(5) Argument in support of the party's position.

(6) A short conclusion stating the precise relief sought.

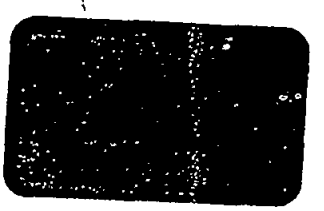
(7) The citation and verbatim text of all pertinent constitutional provisions, statutes, ordinances, rules, and regulations except that the appellee's brief shall contain only those not included in the appellant's brief.

(8) If the brief is prepared with proportionally spaced type, the font used and the type size in points shall be stated on the last page.

(b) Appendix. The appellant shall reproduce, as an appendix to the brief, the pertinent part of every ruling, opinion, or jury instruction of each lower court that deals with points raised by the appellant on appeal. If the appellee believes that the part reproduced by the appellant is inadequate, the appellee shall reproduce, as an appendix to the appellee's brief, any additional part of the instructions or opinion believed necessary by the appellee.

(c) Effect of Noncompliance. For noncompliance with this Rule, the appellate court may dismiss the appeal or make any other appropriate order with respect to the case, including an order that an improperly prepared brief be reproduced at the expense of the attorney for the party for whom the brief was filed.

APPENDIX



STATE OF MARYLAND V. Jay Wilds

CASE NUMBER: CC#998B05801

AGREEMENT

This Agreement contains the terms and conditions that have been reached between the Office of the State's Attorney for Baltimore City, referred to in this Agreement as the "State," and the Defendant in the above-captioned case, referred to in this Agreement as the "Defendant."

The terms of this Agreement are as follows:

1. The Defendant agrees to cooperate with the State on the following terms and conditions:

a. The Defendant represents that he/she has fully and truthfully responded to all questions put to Defendant by law enforcement authorities during all prior interviews. If at any point it becomes evident the Defendant has not been truthful concerning his involvement in this incident, the State is immediately released from any obligation under this agreement, the agreement becomes null and void, and the State is free to bring any charge against the Defendant supported by the evidence. The Defendant shall continue to cooperate fully with the State by providing full, complete and candid information concerning the murder of Hae Min Lee of which Defendant has knowledge.

b. The Defendant shall cooperate completely with the State and any other Law Enforcement Authorities designated by the State, including Federal Authorities in any matter as to which Defendant's cooperation may be relevant. Defendant shall comply with any and all reasonable instructions from such authorities with respect to the specific assistance that Defendant shall provide.

c. The Defendant shall testify fully and truthfully before a State or Federal Grand Jury and at all trials or other proceedings in which Defendant's testimony may be relevant.

d. The Defendant agrees to make himself available as needed for any court hearings and or trials where his testimony is needed. He shall be responsible for seeing the State has the means to contact him. Further, the State will request a warrant for the Defendant's arrest if he is in violation of this paragraph.

App. 1

3. Nothing in this Agreement shall be construed to protect the Defendant from prosecution for perjury, false statement, obstruction of justice or any other crime. This Agreement does not protect Defendant in any way from any prosecution for offenses which occur after the execution of this Agreement or for any crimes that may have occurred prior to this Agreement and are not a part of this Agreement as enumerated above.

4. If the Defendant compromises these investigations intentionally or through gross negligence, if Defendant is not completely candid and truthfully in the performance of this Agreement, if Defendant flees, attempts to flee, or fails to appear for Defendant's sentencing, the State and the Court will be completely released from any obligations under this Agreement and the State may recommend and the Court may impose the maximum penalties for each and every offense to which the Defendant has tendered a guilty plea pursuant to this Agreement. This includes the State's invocation of the minimum mandatory years.

5. The Defendant shall not be permitted to withdraw a guilty plea tendered pursuant to this Agreement under any circumstances.

6. The Defendant understands that this Agreement is as it appears and that it is a very harsh Agreement. The State makes no representation that this Agreement will be easy for the Defendant to complete.

7. The Defendant agrees not to ever disclose the terms of this Agreement or the existence of this Agreement to anyone except the Defendant's attorney if the Defendant has acquired legal counsel. In addition, the Defendant agrees not to disclose the names or other identify of any law enforcement authorities who are a party to or otherwise involved in the performance of this Agreement.

8. The State reserves the right to require the Defendant to perform specific acts in regard to the investigation and targeting or specific individuals or organizations. The State may require the Defendant to sign an Addendum to this Agreement that identifies those specific acts.

9. There are no other agreements, promises or understandings between the Defendant and the State. This Agreement can only be amended in a writing signed by all the parties.

10. The Defendant expressly waives any right to a preliminary hearing or indictment by a Grand Jury.

h. The Defendant will tender a guilty plea to:

One count of Accessory After the Fact to the Murder of Hae Min Lee

and the Defendant expresses that Defendant fully understands the maximum penalties and fines for each and every charge as stated.

2. In consideration for the complete fulfillment by the Defendant of each any every term and condition of this Agreement, the State agrees to do the following:

a. At the time the Defendant executes this Agreement and tenders a guilty pleas as stated above, the State will recommend to the Court that disposition be set at a future date, specifically: at a date after all trials where defendant's testimony will be needed.

b. When the Defendant appears before the Court for sentencing for the offense(s) to which Defendant has pled guilty, the State will bring to the court's attention and the Court will consider:

i. the nature and extent of Defendant's cooperation;

ii. all other relevant information regarding the Defendant's background, character, and conduct, including the conduct that is subject of the various counts of the above-captioned indictments(s);

iii. any failure by Defendant to fulfill any or all of Defendant's obligations pursuant to this Agreement.

c. At Defendant's sentencing, the State will make a recommendation regarding the sentence Defendant shall receive based upon the extent of Defendant's cooperation pursuant to this Agreement. If the Defendant completes all of the terms and conditions stated in this Agreement to the satisfaction of the State, the State will recommend a sentence as follows: Five years to the Department of Correction with all but two years suspended, with three years supervised probation, said recommendation to serve as a cap.

d. If the Defendant fails to complete each and every obligation under this Agreement, the State will recommend a sentence as follows: Five years to the Department of Corrections.

e. Whether or not the Defendant has completely fulfilled all of the obligations stated in this Agreement shall be determined by the Court at the time of Defendant's sentencing.

AH

Assistant State's Attorney for Baltimore City Narcotics Unit — Date: 9/1/99

I have read this Agreement carefully and reviewed every part of it with my attorney. If I do not have an attorney, I expressly state that I understand this Agreement and enter into this Agreement freely and voluntarily without any duress or coercion by anyone whatsoever.

Defendant — Date: 9-4-99

I am the attorney for the Defendant. I have carefully reviewed very part of this Agreement with the Defendant. To my knowledge the Defendant's decision to enter into this Agreement is an informed and voluntary one.

Attorney for the Defendant — Date: 9/3/99

A Because he could harm her.

(Brief pause.)

(State's Exhibit No. 35 was marked for purposes of identification.)

MR. URICK: If I may approach the witness at this time, I'm going to show him what has been marked for identification as State's Exhibit 35.

THE COURT: Yes, you may.

BY MR. URICK:

Q Take a few moments and look at that, if you would, please, and examine each page.

A Okay.

THE COURT: One moment.

(Brief pause.)

THE COURT: You may continue.

BY MR. URICK:

Q Have you had a chance to examine the exhibit?

A Yes.

Q Can you identify that exhibit?

A Yes.

Q What is that exhibit?

A It's the agreement I signed.

Q And that's the plea agreement you entered into when you pled guilty to accessory in this murder?

A Yes.

Q And what is your understanding of how your honesty affects this agreement?

A Well, if I tell any kind of lie, it voids it and it's no good. It's a truth agreement, and that's about it, a cap. As long as I tell the truth, I can only get a certain amount of years.

MR. URICK: I would offer, as State's Exhibit 35, the witness' plea agreement.

THE COURT: Any objection?

MS. GUTIERREZ: No.

THE COURT: Let it be admitted.

(State's Exhibit No. 35, previously marked for identification, was received in evidence.)

MR. URICK: May I have the court's indulgence for just a moment?

THE COURT: Yes, you may.

(Brief pause.)

BY MR. URICK:

Q If you would, please, look at that exhibit again. Do you see line seventeen?

A Yes.

Q Do you recognize that number?

presume. That's not even what I'm interested in. He acknowledges that at the hearing that he asked Judge McCurdy, and he may have a -- took place because of his request, but on the table was the ability of Jay Wilds to withdraw the plea.

When I spoke to Judge McCurdy in the presence of Ms. Murphy, he doesn't recall such a hearing and doesn't believe it would have occurred, believes he would have remembered if it had occurred. And if there had been anything, it would have occurred before the plea, you know, on the issue of counsel. But there's no other recollection. Judge McCurdy's office staff has already reviewed all his records, and I tell you, as an officer of the Court, that there is no record entry in the calendar, in any papers of Judge McCurdy's -- papers. And of course, as the Court's already aware, the court file reflects no such proceeding, either on or off the record -- the court file was handled by Judge McCurdy at any juncture following the September 7.

Mr. Bennett-Royo would have said, but -- couldn't go any further and cut off the questioning of her, that -- she may -- with Mr. Urick on the 7th, in the presence of her client, and that she made sure client understood that one of the benefits that's not reflected in the typewritten plea agreement and would not be reflected on the record was

an agreement that would allow Mr. Wilds to withdraw his plea at a time later than the 7th, and she would have testified that's what she told me in the presence of my law clerk, that her concern and insistence on that being a benefit of the bargain was because she felt that there -- that this guy, meaning Mr. Syed, might feel that, in fact, she was just brought in to represent Mr. -- interests and that since it was so unusual that his lawyer be provided by the prosecutor that he had the absolute right, after reflection, to withdraw the plea.

As to that issue, and that's the first issue, I believe we're absolutely entitled to get in all the benefits of the bargain that were extended to Mr. Wilds, whether or not Mr. Wilds testifies truthfully as to what they are.

Now, the fact finder has a right to consider all of the benefits of the bargain in assessing whether or not the bargains have anything to do with influencing his testimony or what that bargain is or what extent he may be beholding to him when he made the bargain, both what's written and what's not written, and it's up to the jury to decide whether Mr. Wilds is telling the truth and to decide as to all things, including what Mr. Wilds' perception is of the bargain or -- his lawyer says that was part of the bargain, it was made in front of him, and that goes

MS. GUTIERREZ: No, Judge. I have my first witness --

THE COURT: The State's reiterating its position --

MS. GUTIERREZ: But I would have to make arrangements to get Mr. Wilds in again.

MR. URICK: We're reiterating our opposition to any such proceeding taking place in front of the jury.

THE COURT: As I indicated previously, I believe that calling Ms. Bennett-Royo would not be appropriate and it would just take us off on a needless presentation of evidence. And I would find that the credibility of Mr. Wilds has been exhausted. The ability to cross-examine him and bring out those things that might have affected his testimony and his credibility was done, and I believe that clearly it was what was in the mind of the Defendant at the time that he -- the Defendant meaning Wilds -- entered into this agreement, and he testified as to that. He's not a lawyer, he doesn't know what the Rules of Maryland provide that even with a guilty plea and even if he signed something, that a judge could allow him to withdraw his plea under circumstances where the Court determined it would be appropriate. Whether he knew that or not, whether or not that's something that affected his testimony, clearly did not come out as something that was within his

lawyer. Judge, it's a fraud. Perpetrating that fraud and trying to clean it up doesn't take it back to the beginning.

THE COURT: I don't want you to have to compete with what's going on outside.

MS. GUTIERREZ: Judge, it may well be since this is the first week of that proceeding and if that proceeding before Judge McCurdy then it would be readily available on video and I'll ask the Judge to go back because I will bet that there may not be anything on that record that Judge McCurdy was made aware enough to trigger that he even understood that that witness may not have retained his own lawyer. That the arrangements for the lawyer came through a prosecutor for his witness. You can look at that, but whatever it shows it doesn't alter the fundamental issue that the lawyer was gotten by this lawyer. Whether he satisfied or not whatever he says, that goes to his credibility, that's part of the argument.

Of course he's satisfied now, he got all the benefit, he's out to please the man who beholden him with an actual benefit. Lawyers aren't potted plants, they cost money. If one is indigent and entitled to a lawyer there's a way to do it. Prosecutors never get pick lawyers. It is critical to this case.

THE COURT: Thank you, Ms. Gutierrez. I would agree with you that normally prosecutors don't pick lawyers for Defense Counsel and I would also agree with you that the Court rarely picks attorneys for Defense Counsel, for Defendants. In fact, the Defendants absolutely have a right to pick counsel They have a right to pick substitute counsel, they have the right to excuse their counsel and say they'll represent themselves, but that right remains with them.

I find that there must be a compelling reason to call Mr. Urick as a witness in this case in order that you may be afforded the opportunity to challenge the credibility of Mr. Wilds with regard to any deal or benefit derived from the State through the presentation I'll call it, of an attorney for Mr. Wilds. I also find that first you made an argument, a rather compelling presentation of facts. When I say compelling I mean that you have available to you through your very argument to this Court those items in evidence to challenge the credibility of Mr. Wild's testimony with regard to anything Mr. Urick may have done to assist. The witness himself, Mr. Wilds provided you with that evidence and you readily used it in your argument to this Court. So I find that you

have that availability.

- Secondly, you have the availability of calling Ms. Benaroya who I feel would offer you an additional opportunity to present evidence to attack the credibility of Mr. Wilds. For that reason I do not find a compelling reason to call or allow you to call Mr. Urick as a witness in this case and with that, with regard to that motion your motion is denied. I do appreciate your argument however, and I will note your objection and make sure that your motion appears in the record and I'm sure that at the time you may want to reiterate or reargue this issue at another time, but I will also preserve the materials you've provided to me in the record so the record reflects that, but your motion is denied.

MS. GUTIERREZ: Thank you, Judge. I do have a couple other motions in light of that. First of all --

THE COURT: Well, before you go into any other motions let me deal with the motions in front of me and then you can add to that because I would like -- I think you need to know that there are a number of other things that you've asked for already and I would like to deal with those first before I take up something new. Second, I've been provided this morning

with notes from both detectives. Detective Ruiz.

MR URICK: Ritz.

THE COURT: Ritz.

MS GUTIERREZ: These are the notes of the two hours --

THE COURT: Yes, oh yes.

MS GUTIERREZ: We expected an affidavit.

THE COURT: Yes.

MS GUTIERREZ: That did not exist.

THE COURT: No affidavit, Ms. Gutierrez because I have notes and I have a second set of notes from, I assume they're Detective McGilvary.

MR. URICK: That's correct, Your Honor.

THE COURT: I don't know who is whose, all I know is that there is two sets of notes that appear to be in different handwriting. Perhaps Mr. --

MS. GUTIERREZ: Are they identified as to which?

THE COURT: No, they're not. I'm asking perhaps Counsel --

MR URICK: I believe the yellow is Detective McGilvary's.

THE COURT: McGilvary's is in the yellow

MS GUTIERREZ: And are they identified as to

didn't dare object to that question, they didn't object and it was only in response to that that he answered. It was pure for fortuity. And in light of having chosen to hide it and not reveal it to the defense, Judge that's the things that can be corrected and many of those things can even be corrected all the way up to the end of the trial.

There may be other relief that we ask Judge, but there is no correction for this unless this Court is prepared to allow us to go back and reopen to the jury armed with all the knowledge we should have had about the only witness that can make or break a case against Adnan Syed. That's the only remedy that can possibly make us whole. So, we would move to strike all of his testimony.

THE COURT: Very well. I'll hear from the State.

MR. URICK: Without going into the same detail I will elaborate my previous response. Ms. Gutierrez is arguing benefit in a situation that's not appropriate. Assistance of counsel is a fundamental right, it is not a benefit. The case law established that quite clearly.

Secondly, the assistance of counsel is effectuated through judicial review. I was not present for that

but it was my belief that that was on the record. I don't know, I wasn't there, I can't state that for certain. Judge McCurdy might be able to clarify that, I can't but it was my impression that that was on the record. Hence, there is no benefit here, this is a fundamental right and it was effectuated through judicial review that found as I previously mentioned we would oppose Ms. Gutierrez's motion.

THE COURT: Very well. Motion to strike the testimony of Mr. Wilds is denied. However, I'm going to allow Counsel in closing argument to argue the credibility of Mr. Wilds being effected by anything that Mr. Urick may have done in assisting him in getting counsel and that is anything that came out through Mr. Wilds's testimony of what he believed, not what may in fact have occurred, but what he believed happened. Because it's his belief that controls his credibility, what he testified to, why he testifies in the way he testifies, why he signed the agreement and why he testified in this case.

So, to the extent that he believes that there was some benefit and that anything Ms. Gutierrez has indicated so far effects his credibility then you may argue that in closing. Also to the extent you may choose to call another witness like Ms. Benaroya which

establishes even more, so any role that Mr. Urick had in obtaining that attorney, that particular attorney and again, I don't know what Ms. Benaroya is going to say but if you find there's even more evidence that will add to that -- the issue to the credibility of Mr. Wilds being related in that way you may argue that

But I do find that is a minor issue to the total weight of his credibility, that it is something to be raised, but it goes along with the aspects of the plea agreement which you went through in detail. Which also may be argued obviously to bring forth to the jury's attention the manner in which they should weigh heavily or not weigh heavily the testimony o Mr Wilds, so for that reason your motion to strike his testimony is denied, but you will be given latitude to argue that in closing and also to the extent it may come up through any other witnesses.

MS GUTIERREZ Well Judge, in light of what the Court said, if the Court recalls the cross examination on the plea agreement actually took place on Friday and I would ask and I appreciate the Court's indication that it's going to give me wide latitude. But because this was a surprise, a new knowledge in order to effectively take advantage of that I think we would have to go back to the plea agreement that I

pretty much had fully covered on Friday. That's what I covered, but of course, I had none of the information that I have now in regard to the lawyer issue and how that came about and so I would certainly be requesting that that wide latitude include my ability to go back to areas that clear have already covered but without this knowledge.

THE COURT: Ms. Gutierrez, I'm going to deny that request. My notes reflect that yesterday you spent just over an hour on the plea agreement in addition to -- in addition to the questions on Friday.

MS. GUTIERREZ But that was before I got the information.

THE COURT. Well, actually I think --

MS. GUTIERREZ The magic information came at ten after four.

THE COURT: The magic information actually came from the witness earlier on.

MS. GUTIERREZ: No, Judge.

THE COURT. He, himself said --

MS GUTIERREZ: Its ten after four --

THE COURT: All right.

MS GUTIERREZ: In which he says he got Mr Uricks' assistance in obtaining counsel

THE COURT: Ms. Gutierrez, I hear what you're

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Q You don't recall that?
A No, ma'am.
Q Will reviewing your transcript help refresh your recollection?
A Yes, ma'am.
Q Well, perhaps we can arrange that.
MR. URICK: Objection.
BY MS. GUTIERREZ:
Q So sir, you don't --
THE COURT: Sustained. Counsel, can we move on? The witness has answered the question. Your next question.
BY MS. GUTIERREZ:
Q Now on the 13th of April Mr. Wilds, you were again brought downtown, right?
MR. WILDS:
A Yes, ma'am.
Q And you were asked about these things by Detectives McGilvary and Witts, were you not?
A Yes, ma'am.
Q And they were still concerned about varying inconsistencies, were they not?
A Some, yes.
Q And they asked you a lot of questions, did they not?
A Yes, ma'am.

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Q And you were still free, were you not?
A Yes, ma'am.
Q And that occasion there was no tape recording, was there?
A I don't believe so.
Q Well once again, they took notes, did they not?
MR. URICK: Objection.
THE COURT: Overruled. Did they take notes?
MR. WILDS: No, ma'am.
BY MS. GUTIERREZ:
Q And once again, you didn't ask for help in getting a lawyer, did you?
MR. WILDS:
A No, ma'am.
Q And you didn't bring a lawyer with you?
A No, ma'am.
Q And the next time you spoke to anyone in law enforcement about these things was in September when you signed the plea agreement, is that correct?
A Yes, ma'am.
Q And you didn't have concessions with Mr. Urick and Ms Murphy 'til long after that, right?
A No, it was not long.
Q Pardon.
A It was not long.

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Q It was not long, but after that, right?
A Yes, ma'am.
Q Not before then, right?
A No, ma'am.
Q Now at the time you signed the plea agreement you already identified what's in evidence as State's Exhibit 35, sir?
A Yes, ma'am.
Q If you look at 1A by signing this plea agreement you represented that you had fully and truthfully responded to all questions put to the Defendant by law enforcement authorities during all prior interviews, did you not?
A Yes, ma'am.
Q And if you look down further in paragraph A in the second to last line in that paragraph it mentions that you shall continue to cooperate fully with the State by providing full, complete and candid information, does it not?
A Yes, ma'am.
Q And you signed on that, did you not?
A Yes, ma'am.
Q And Mr. Urick signed, did they not?
A Yes, ma'am
Q And your lawyer signed, did they not?
A Yes, ma'am
Q Incidentally, at what point did your lawyer come

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about after the 13th of April?
MR. URICK Objection.
THE COURT Sustained.
BY MS. GUTIERREZ
Q Did anyone help provide you a lawyer?
MR. URICK: Objection.
THE COURT. Overruled.
MR. WILDS Yes, ma'am.
BY MS. GUTIERREZ:
Q Who?
MR. WILDS
A Mr. Urick
Q Mr. Urick the prosecutor in this case helped provide you a lawyer?
A Yes, ma'am.
Q And that was before or after you got notice that you would be charged by him?
MR. URICK: Objection.
THE COURT Overruled.
MR. WILDS: Before, ma'am.
BY MS. GUTIERREZ:
Q Did you meet your lawyer before the day that you signed the agreement that you called the truth agreement?
MR. WILDS:
A No, ma'am

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Q And did Mr. Urick confront you or speak to you before you and he signed it about all the lies that you had already told the police?
A Me and Mr. Urick had a conversation.
Q Pardon.
A Me and Mr. Urick had a conversation.
Q Did he -- did that conversation include a discussion about the lies that you've already admitted that you had told the police?
A Yes, ma'am.
Q Yes. And were you forgiven for those lies?
A Forgiven?
Q Forgiven?
A You'll have to ask Mr. Urick that, I don't know.
Q Well sir, this is your plea agreement, is it not?
MR. URICK: Objection.
THE COURT: Sustained.
BY MS. GUTIERREZ.
Q This controls what will happen to you, does it not?
MR. URICK: Objection
THE COURT: Sustained
BY MS GUTIERREZ:
Q It has no impact on any punishment on Mr Urick, does it?
MR. URICK. Objection

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THE COURT: Sustained.
BY MS GUTIERREZ
Q You read it very carefully before signing it, did you not?
MR. WILDS:
A Yes, ma'am.
Q And you discussed it fully with the lawyer, the prosecutor got you, did you not?
A Yes, ma'am.
Q And sir, you understood that you were signing and affirming that you hadn't told them any lies, right?
A Pardon me? I had signed it affirming --
Q You were signing saying that you understood that you've been truthful for them, did you not?
MR. URICK: Objection.
THE COURT: Sustained.
BY MS. GUTIERREZ.
Q Sir, you read this before you signed it, did you not?
MR. URICK: Objection.
BY MS. GUTIERREZ.
Q And you understood that the truth part of the agreement wasn't just truth in the future --
MR. URICK: Objection.
Q Did you not?

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THE COURT: Sustained.
BY MS. GUTIERREZ:
Q Did your lawyer, the one provided by Mr. Urick, the prosecutor advise you to sign it?
MR. WILDS
A No.
Q No. Now, you didn't have to pay for your lawyer, did you?
MR. URICK: Objection.
THE COURT: Sustained.
BY MS GUTIERREZ:
Q When was it that you understood that Mr. Urick would be getting your lawyer?
MR. URICK: Objection.
THE COURT: I'm sorry. When was it that you understood --
MS GUTIERREZ That Mr. Urick would be getting your lawyer?
THE COURT Sustained. Ladies and gentlemen, as we proceed with the questioning by a show of hands does anyone need water in the jury box? All right Can we get some assistance? Mr. Deputy Church, would you assist? Thank you Is there heat coming from the back, behind you? Ladies and gentlemen, I don't know what has triggered the heat but we'll try to find out why. Maybe it's starting to drop outside

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Just indicate and as again I'll ask maintenance to see if they can't assist in -- if it's not one thing it's another. Deputy Church, if you could -- do you know where Ms Connelly is?
MS GUTIERREZ: Judge, can we take a short break?
THE COURT: We could.
MS GUTIERREZ. It's about four.
THE COURT. We're going to do, ladies and gentlemen, we're going to have Deputy Church just walk you back to the jury room across the hall, let you stretch your legs and get some air and I'm going to ask that maintenance come in the interim to see if they can adjust the radiators so -- they are directly behind you which is why the heat is emanating and you all are getting the heat before we do. But I can tell that you appear to be uncomfortable particularly in the back row so what we'll do it to try to get them in here. I'll make a call and we're going to take a brief recess.
During the recess Mr. Wilds, I must advise you that you should not discuss your testimony with anyone, the State or the Defense Your welcome to stay put in the courtroom if you'd like or you are also welcome to stretch your legs but stay put until the jury goes out. Ladies and gentlemen, I'm going to ask that you leave your note pads face down You may take your water cups with you if you want. Do not discuss the testimony that you've heard today or anything else. It's just a brief recess, we're just going to try to get the heat

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THE COURT: Sustained.
Q During the time when you were in that room, did you hire her as your lawyer?
MR. URICK: Objection.
THE COURT: Sustained.
Q Did you pay her a fee?
MR. URICK: Objection.
THE COURT: Sustained.
Q Do you know if anybody paid her a fee?
MR. URICK: Objection.
THE COURT: Sustained.
MR. URICK: Move to strike.
THE COURT: And it's stricken. Ladies and gentlemen, what this witness may have done with his lawyer is privileged. He's not required to divulge that. He has a privilege which he may invoke which has to do with the hiring of the lawyer, the conversations with that lawyer, and anything that happened between them is privileged. He's invoking that privilege as he indicated such to this Court.
Mr. Wilds, I'll reiterate, you do not have to divulge anything that you had in terms of conversation with your lawyer. If you choose to waive that privilege, you have an absolute right to do that but it is your right not to discuss anything

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you may have discussed with your lawyer, do you understand?
THE WITNESS: (Indicating.)
THE COURT: Is that a yes?
THE WITNESS: Yes, ma'am.
THE COURT: Very well. Your next question, Ms. Gutierrez.
MS. GUTIERREZ: Judge, we would note an objection to the Court's ruling and ask for --
THE COURT: That's quite all right.
MS. GUTIERREZ: -- a continual objection on all of the grounds we previously argued.
THE COURT: So noted for the record.
MS. GUTIERREZ: Thank you, Your Honor.
Q Now Mr., Wilds, there came a time after about an hour and half when you left that room together with this woman that had been introduced to you by Mr. Urick --
MR. URICK: Objection.
Q -- correct?
THE COURT: Overruled.
A Yes, ma'am.
Q And you went somewhere, did you not?
A Yes, ma'am.
Q And the place where you went was across the

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street to the other courthouse?
A No, not at first.
Q Not at first. You stopped somewhere else?
A Yes, ma'am.
Q And did you come in contact with Mr. Urick?
A Yes, ma'am.
Q And at that point did you and Ms. Benaroya and Mr. Urick have any discussions?
MR. URICK: Objection.
THE COURT: Yes or no, did you have discussions?
THE WITNESS: Yes, ma'am.
Q And did they concern your being charged?
A No, ma'am.
Q Did they concern a plea?
A Yes, ma'am.
Q And did they concern the same events about which we've spoken so many times?
A Yes.
Q In this case?
A Yes, ma'am.
Q Your various statements?
A Yes, ma'am.
Q And what it was that you would be expected to testify about?

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A The subject matter?
Q Yes.
A Yes, ma'am.
Q And that discussion took place inside the State's Attorney's Office, did it not?
A Yes, ma'am.
Q And that discussion took how long?
A About an hour.
Q And at the end of that hour you signed an agreement that you called the truth agreement, did you not?
A Yes.
Q And Mr. Urick signed it?
A Yes, ma'am.
Q And Ms. Benaroya signed it?
A Excuse me, yes, ma'am.
Q Was that agreement typed up while you were talking to them in that same room?
A No, ma'am.
Q This agreement that you signed was presented to you for the first time in that room, was it not?
A Which room?
Q The State's Attorney's office?
A Which room?

and decided that he wanted. And to have Ms. Julian come in serves no purpose in the interest of justice or a furtherance of this case. And so, for that reason, Ms. Julian will not be permitted to testify unless she has some personal knowledge about this case or some relevant testimony other than what you've already proffered to this Court.

And I would also note for the record that you are well within developing your theory, but whatever theory you develop, I still have the discretion to determine whether the information is relevant to this proceeding.

MS. GUTIERREZ: I understand, Judge.

THE COURT: And you can disagree and you can note the record, as you have.

MS. GUTIERREZ: You know that I'll do it.

THE COURT: And so, I respect your argument --

MS. GUTIERREZ: I would ask for some guidance --

THE COURT: -- and your right to make your argument, as I'm sure you respect my right --

MS. GUTIERREZ: And as the Court knows, I'm --

THE COURT: -- to disagree.

MS. GUTIERREZ: -- working on a jury instruction --

THE COURT: Very well.

MS. GUTIERREZ: -- to that and I will

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Q Wherever you, Mr. Urick, and Ms. Benaroya were talking. Did you talk in more than one?
A No, ma'am.
Q Was there anybody else ever involved in the discussion?
A No, ma'am.
MR. URICK: Objection.
Q Well, in that room --
THE COURT: Overruled.
Q Was that the first time that you were presented with this agreement?
A No, ma'am.
Q And you had been presented that previously, had you not?
A Yes, ma'am.
Q After you were introduced to Ms. Benaroya, correct?
A Yes, ma'am.
Q And at the time you were presented it, it was already typed up, was it not?
MR. URICK: Objection.
THE COURT: Sustained.
Q There was no place in the agreement for fill in the blanks, was there?
MR. URICK: Objection.

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THE COURT: Sustained.
Q When you were in the room with Mr. Urick and this woman Ms. Benaroya, did any of you make any alterations to the agreement --
MR. URICK: Objection.
Q -- that you were presented with?
THE COURT: Overruled. Any alterations to the agreement that you were presented with?
THE WITNESS: Yes.
Q Yes. And did you cross out things?
A Yes.
Q Put your initials on places?
A Yes.
Q And did you insist on other terms?
A No, ma'am.
Q And were you asked to read all of the terms in your presence?
A Yes, ma'am.
Q And to make sure you understood them?
A Yes, ma'am.
Q And were you given an opportunity to ask questions of your own?
MR. URICK: Objection.
THE COURT: Sustained as to the question.
Q Sir, did you make alterations?

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A No, ma'am.
Q And did your lawyer?
MR. URICK: Objection.
THE COURT: Sustained as to the question. If you could put a time did your lawyer make --
Q In the hour and a half that you were in the room together with Mr. Urick and this woman that had been introduced to you as a very good lawyer, or defense lawyer that did pro bono stuff --
MR. URICK: Objection.
Q -- during that time period --
MR. URICK: Objection.
THE COURT: Overruled. Did you observe your attorney in the presence of the others make changes to that plea agreement? Yes or no.
THE WITNESS: Yes.
THE COURT: Yes.
Q And were you discussing it with your lawyer at that time?
MR. URICK: Objection.
THE COURT: Sustained.
Q Were you discussing it with Mr. Urick?
A No, ma'am.
Q The changes that you made you said the alterations that you made concerned what?

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A Minor things, going to court.
Q Pardon?
A Minor things like how and when I was supposed to go to court.
Q When you were supposed to go to court?
A How, how.
Q How, meaning how were you supposed to get there?
A No, like the terms.
Q The terms of going to court?
A Yes.
Q Well, you understood, sir, that the agreement requires you to testify at any time they tell you to do so?
A Yes, ma'am.
Q And is there -- maybe you could help tell us what part of that you wanted to change?
MR. URICK: Objection.
THE COURT: Sustained.
Q What part of that did you change?
MR. URICK: Objection.
A I believe it was --
THE COURT: Just one moment. What part -- I'm going to sustain the question.
Q Mr. Wilds, while you were in that room with

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attorneys because for all I know she has other appropriate business with them. But I think that will suffice in addressing the concerns of Ms. Gutierrez. Any other matters before we bring the jury out?

MS. GUTIERREZ: Well Judge, --

THE COURT: Mr. Urick.

MS. GUTIERREZ: No, not on my list. I have others. Although I would ask before continuing the cross examination of Mr. Wilds an ability to review those notes.

THE COURT: Absolutely. Why don't we do that. In fact, if we can have Mr. Wilds come in because --

MR. URICK: I have a couple of motions if Defense Counsel is finished with hers.

THE COURT: Very well. Before Mr. Wilds comes in.

MS. GUTIERREZ: Finished them until I think there's some new ones.

THE COURT. I will hear from Mr. Urick.

MR. URICK: Your Honor, the first, well they're both motions in limine. It struck me after the fact that Ms. Gutierrez was asking questions of Mr. Wilds about discussions he had with his attorney, that's privileged information as the Court notes one

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time, several times this morning.

I would ask that the Court direct Ms. Gutierrez not to ask any questions of the witness as to any discussions he had with his attorney because that is privileged information and it would be not -- he would have an absolute privilege to keep that from being revealed. The second motion in limine is that I would move that she not be allowed to inquire any further into his assistance of counsel and in support of that motion in limine and I provided the Court today with Jeffrey Ebb versus State of Maryland. This is a discretionary motion and it goes to admissibility of evidence. Ms. Gutierrez is trying to inject an issue before the jury that is not a jury question.

THE COURT: Which issue is that?

MR. URICK: His assistance of counsel. She's trying to claim it as a benefit, it's not, it's a fundamental right. Because it's a fundamental right --

THE COURT. Do you understand her argument?

MR. URICK: Yes I do, Your Honor.

THE COURT: And her argument as you see it that his right to counsel?

MR. URICK: She is trying to make that a quantifiable asset like it's a good, it's not. It's a fundamental right. Because it's a fundamental right it

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is not a benefit.

THE COURT: He has a right to counsel, correct?

MR. URICK: Yes.

THE COURT: If someone paid for him to have an attorney, would that be a benefit?

MR. URICK: I believe that probably would be.

THE COURT: If someone arranged for him to have an attorney that he might not ordinarily be able to have, higher obtained. Would that be a benefit?

MR. URICK: The State has a duty to provide him an attorney.

THE COURT I didn't ask you that. I asked you whether or not it would be a benefit?

MR. URICK: I believe it would be a fundamental right, it would not be a benefit.

THE COURT: You work for an employer and the employer said, oh, by the way if you get in trouble I'll pay for your lawyer, is that a benefit? It's a benefit. You work for a drug dealer and he says, oh, by the way if you get in any trouble I have a lawyer, is that a benefit? It's a benefit, it's a benefit. Now we don't know whether or not he accepted or rejected any lawyer that you offered him or anyone on behalf of the State offered him. He, like anyone has a

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right to object.

If you have an insurance company, you're in a car accident, you can take the lawyer that goes with the insurance company or you can say, that's okay, I'll get my own. If you work for a drug dealer and he says I'll give you a lawyer if you get in trouble, you can always say, that's okay I don't want him and if the State offers you an attorney you can always say, that's okay, I'll get someone else because the right is the Defendant's right. As you said, but the benefit is still one which counsel could argue existed. Whether a jury, a finder of fact believes in fact he benefited, whether the finder of fact believes that if effects his credibility is an argument that Ms. Gutierrez will have and I do find that arguably it could be perceived as a benefit, could be.

I don't find that the State did anything in error in not disclosing it because I think the State honestly and with good faith did not perceive it as a benefit. However, it is now been disclosed to the Defense and the way in which it happened, the circumstances under which it happened is still kind of foggy and unclear, but as it is foggy and unclear the Defense is always able to take facts that are foggy and unclear and argue

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Ms. Benaroya and Mr. Urick, did anybody else come in and out?
A Yes, ma'am.
Q And who was that?
A Ms. Murphy.
Q Ms. Murphy. And you understood who she was, right?
A She introduced herself.
Q Well, you just told us you had heard her name before?
A Yes, ma'am.
Q And you knew her to be a prosecutor before, right?
A Yes, ma'am.
Q Right?
A I had never seen her.
Q So although you had not met her you knew who she was?
A I knew of her.
Q You knew of her. And she came in and out of that room how many times?
A I do not recall.
Q That session ended at some point?
A Yes, ma'am.
Q And at the conclusion of that session had

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this been totally negotiated?
A Yes, ma'am.
Q And was it retyped?
A Excuse me, no, ma'am.
Q No. So what you ended up with and what you signed is the same document that was first presented to you before you walked to the place where you spoke with Ms. Benaroya and Mr. Urick?
MR. URICK: Objection.
THE COURT: Overruled. Do you know if it was the same document?
THE WITNESS: Not exactly.
Q Meaning you don't know exactly or it wasn't exactly the same document?
A It's not exactly the same document.
Q And so the document that you signed did it have any alterations that you made in it?
A Yes.
Q And what were those?
A Things involving whether it was a drug case or not and stuff like that.
Q Well, this wasn't a drug case?
A That's why we made the alterations.
THE COURT: Sustained.
Q And, sir, you hadn't been told you were

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going to be charged in regard to any drug case, had you?
MR. URICK: Objection.
THE COURT: Overruled.
A No, ma'am.
Q The only thing that you were told is that you were going to be charged as an accessory after the fact to murder; is that correct?
A Yes, ma'am.
Q The murder that you had spoken to them about that you say occurred on January 13th, right?
A Yes, ma'am.
Q That was the only thing they told you, right?
A Yes, ma'am.
Q They weren't threatening you with drug charges at any time, were they?
A No, ma'am.
Q On the 6th, the day before they didn't tell you, oh, by the way, you're going to be charged with an accessory after the fact to the murder about which you discussed and also you're going to get charged in all of these drug cases?
MR. URICK: Objection.
THE COURT: Sustained. Asked and answered

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Q Now, sir, if you recall the other day I asked you about 1-A. It states that you the defendant represent that he or she has fully and truthfully responded to all questions put to you by law enforcement during all prior interviews. do you recall that?
A Yes, ma'am.
Q And you've acknowledged, sir, that you hadn't responded truthfully to all of their questions, right?
A There came a point when all of the questions were answered truthfully.
Q Pardon?
A There came a point when all of the questions were answered truthfully.
Q Well, no, sir. My question to you, you've already acknowledged that you've lied to them, have you not?
MR. URICK: Objection.
THE COURT: Sustained.
Q And you were aware when you read this that you had lied to them --
MR. URICK Objection.
THE COURT: Sustained.
Q -- were you not -- and sir, were you asked

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the number I should use to contact the clerk's office let me do that and if it turns out that it's not the correct number and I've been misled then I'll deal with that.

MR. URICK: I misspoke, that was the tracking number. The case number is 299 --

THE COURT: One moment. 299 --

MR. URICK: 250.

THE COURT: 250.

MR. URICK: 001.

THE COURT: 001 and his name is not an alias, it is Jay, J-A-Y.

MR. URICK. Yes.

THE COURT. W-I-L-D-S?

MR. URICK: Yes.

THE COURT: Very well. Ms. Connelly, if you could kindly locate this guilty plea, get me a date, find out from Ms. Sheldon if the tape is available. Ms. Gutierrez, your next issue.

MS. GUTIERREZ: Yes Judge, at this time we would make a motion before full disclosure pursuant to the Rules, pursuant to Maryland case law, pursuant to Federal case law, pursuant to Brady, pursuant to due process for full disclosure covering any and all circumstances of exactly what help Mr. Urick provided

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in getting a lawyer, how the lawyer was selected or was any other circumstances surrounding the selection of that lawyer or the setting that up. What was communicated from Mr. Urick to Mr. Wilds? Was there any correspondence between that lawyer and Mr. Urick or anyone acting as Mr. Urick's agent or from anyone assisting or acting as Ms. Benaroya's agent?

That correspondence request would include any phone records, any notes of conversations, whether or not the information was reduced to a formal piece of correspondence. The substance of any conversations and now that we're on notice that subsequent to the plea that there was a further proceeding, what if any -- what if anything occurred that led to that second proceeding where this client was asked if he was happy with the lawyer and satisfied with the lawyer that was selected by Mr. Urick.

We'd also request information on all the same grounds, any information as from Mr. Urick as to whether or not he's ever picked a lawyer for the main suspect in a murder case outside the formal procedures available in this jurisdiction to do so whether or not in this case or any other case. He's made a referral to the Public Defender's office if he ever approached any judicial entity, what if any arrangements were made

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to pay the lawyer or not pay the lawyer through any means. Direct money, other billing, any means whatsoever. By any that would be including the State's Attorney's Office hasn't received any billing from Ms. Benaroya or correspondence or the submission of documents indicating her time and when it was.

Any information regarding how he specifically picked this lawyer, with his relationship with this lawyer is and what is the substance of any of their conversations prior to the 7th, on the 7th, regarding the plea, regarding their specifically not just the terms of the plea, but who made the decision regarding 1A in the plea. Regarding an attestation by Mr. Wilds that he's always told the truth in all of his dealings with the police or with the prosecutor up and until that time and the substance of any conversation regarding how that lawyer got to be there on the 7th and what if any conversations took place that included Mr. Urick in the presence of Ms. Benaroya on the 7th that also included the presence of Mr. Wilds regarding the introduction of the lawyer.

He's testified he had never met the lawyer before that day and what was said about the lawyer or communicated about the lawyer in any manner. A telephone message, a telephone call through one of the

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detectives through any other person or communication to anyone else meant to get to Mr. Wilds about the lawyer that Mr. Wilds was about to meet on the 7th as to why she was chosen, what her experience was, what she now knew in through what terms and we would request immediate disclosure of all of those circumstances Clearly believing we would have been entitled to have that disclosed, that it was a benefit and that we need that disclosure now to effectively cross examine continually this witness about those terms because they clearly will relate to his credibility is dependant on that dependance of that lawyer, his dependance on Mr Urick and would also impact, for instance on our ability to effectively question Ms. Benaroya

THE COURT: The State does not wish to be heard, do you?

MR. URICK: No. Thank you.

THE COURT: The motion is denied. The information that you are seeking to contain would be information that Mr. Wilds would have a privilege, that is how he chose a lawyer, the circumstances under which he chose a lawyer. I do not believe the State has information of that magnitude that would warrant me asking the State to provide that information. In fact, the fact that the witness has already testified that

Ok. There it goes... U'm really getting annoyed that this situation is going the way it is. At first, U kinda wanted to make this easy, for me + for you. You know, people break up ALL THE TIME! Your life is NOT going to end. You'll move on and U'll move on. But, apparently, you don't respect me enough to accept my decision, U really couldn't give damn about whatever you wanna say. With the way things have been since 7:45 a.m. this morning, now U'm more certain that U'm making the right choice. The more fuss you make, the more U'm determined to do what U gotta do U really don't think U can be in a relationship like we had. Not between us, but mostly about the stuff around us. U seriously DID expected you to accept, although not understand. U'll be busy today, tomorrow, and probably 'till Thursday. U got other things to do, better than give you any hope that we'll get back together, U really don't see that happening, especia now. U NEVER wanted to end this like this, so hostile + cold. But U really don't know what to do. Hate me up. You will. But you should remember that U could never hate you.

NO I- [illegible]

[redacted]

I'm going to kill . . .

Here's the thing.

[illegible]

You should ask her to make a list of all her symptoms, and compare it w/ the list on the overhead

Can we ask her "Are you a real lender?"

~~[illegible]~~

Maybe she was pregnant & she and [illegible] or [illegible] while we went to [illegible]

Her clumsy self probably tripped and fell on the way to the clinic and ~~[illegible]~~ caused an abortion.

she would never think she's pregnant & we [illegible]

I do anything [illegible] & you [illegible] I can.

whenever you kiss a guy you probably think you're pregnant, she's scheduled for sonograms and she's still in denial. Not that bad, for me for her hell yeah.

Q. Okay. And you recognize Ms. Lee's handwriting?

A. Yes.

Q. And on the reverse side, what -- describe what is on that page?

A. It was a little note in between me and Adnan had drawn in class, I guess. And my handwriting's in pencil, his is in ink.

Q. Okay. You recognize both your handwriting and Mr. Syed's handwriting?

A. Uh-huh.

MS. MURPHY: Your Honor, I would ask that State's Exhibit 38 be moved at this time?

THE COURT: Any objection?

MS. GUTIERREZ: I would object.

THE COURT: All right. May I see the exhibit?

(Pause.)

THE COURT: For the record, I note your objection.

I ask that you indicate a time frame, and, if you're able to do that through this witness, the exhibit will be admitted.

MS. MURPHY: Thank you, Your Honor.

BY MS. MURPHY:

Q. Ms. Pittman, based on your review of this exhibit, can you -- do you have an idea of when this note

was written?

A. It was sometime early in November after the Adventure World trip.

Q. Thank you.

MS. MURPHY: Your Honor, I'd ask at this time the exhibit be admitted.

MS. GUTIERREZ: Same objection, and renew the objection. Prejudicial.

THE COURT: There's two parts of handwriting on it. There's one on the front, there's handwriting on the back. The witness has testified as to when she wrote on the back, and are you saying you wrote on the back in November?

THE WITNESS: Yes.

THE COURT: Okay. Do you know when the front page of that was written? Of if there's anything in that that would indicate to you the time frame, based on your knowledge of the relationship between the parties?

THE WITNESS: This was also written in the beginning of November, sometime after the Adventure World trip.

THE COURT: And how do you know that?

THE WITNESS: Content of the letter.

THE COURT: Very well. It'll be admitted over objection.

(State's Exhibit No. 38, having previously been marked for identification, was received in evidence.)

MS. MURPHY: Thank you, Your Honor. Your Honor, I would ask to publish this letter to the jurors by way of Ms. Pittman reading first the front side and then the back side?

THE COURT: Any objection? I know you have an objection to the --

MS. GUTIERREZ: Only to the --

THE COURT: I understand that you have an objection --

MS. GUTIERREZ: -- document.

THE COURT: -- to the document. That's preserved. Do you have any objection to the process of her reading it as opposed to passing it along the jurors and having them read it?

MS. GUTIERREZ: I do. I'd prefer the jurors read it.

THE COURT: I'm gonna allow the witness to read the exhibit.

One caveat: You may not read anything that is not visible to your eye. You may not decide what

A. Yes, I did.

Q. Okay. Thank you.

MS. MURPHY: Your Honor, at this time I'd offer State's Exhibit 2.

THE COURT: Any objections?

MS. GUTIERREZ: No, Your Honor.

THE COURT: All right. Let it be admitted.

(State's Exhibit No. 2, having previously been marked for identification, was received in evidence.)

BY MS. MURPHY:

Q. In fact, Mr. Lee, did there come a time when your sister found out that you read her diary?

A. Yes.

Q. She wasn't very happy about that, was she?

A. No.

Q. Mr. Lee, I'd ask you to look at a particular page that I've marked. Is this the page you've described to the jury?

A. Yes, it is.

Q. All right. And what does it depict?

A. It has the phone number and the name Don written over the paper.

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A Yes, I have.
Q Can you identify that item?
A It's Hae's diary.
Q Had you -- when had you seen it?
A I saw it the day that she bought it.
Q Had you seen her carry it before?
A Uh-huh, yes, I had.
Q If I may, I'll ask you to read for the jurors the entry under May 14th, 1998?
MS. GUTIERREZ: Objection.
THE COURT: Overruled.
A I think I'll try that one week recess Deb suggested. I hope forth and went out with Iesha, Deb, and Sean in Sean's new car. It is so fly with those tinted windows. We went to Baskins Robbins and I got some cappuccino blast. I couldn't be with my baby because he had to go to D.C. for his religious stuff. That's what I need to figure out. Do I dare to pull him away from his religion? Ms. Savic was all up in my face about it. She said stuff like well Adnan used to be so religious and strict last year but this year he is so loose, like I changed him. Actually, I did and I don't want to pull him away from who he is. I think I need time to organize these things but I do not know that -- but I do know

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one thing. I love him and he loves me. Nothing will change that. I'll try the recess week and see what happens. I'll probably kill myself if I lose him but I'll go crazy with things complicating. I wish he'll call back soon.
MS. MURPHY: Thank you.
Q Now, in the entry she mentions a one week recess?
A Yes.
Q Do you know what she was talking about?
A Yes, I suggested to her --
Q Can you explain?
A Sure. I suggested to her that she and Adnan take at least a week off from each other because their relationship was becoming very stressful. They were both coming to me with things about their relationship that were really bothering them and I suggested that they take some time off from each other to figure things out personally.
Q I ask you now to read the entry under May 15th?
MS. GUTIERREZ: Again objection.
THE COURT: Overruled.
A I did it. Me and Adnan are officially on recess week or time out. I don't know what's going

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to happen to us. Although I'm in love with him, I don't know about him. He actually suggests that what we have is like, not love. I heard the doubt in his voice. Although he couldn't pick up mine, I felt the same way. I like him. No, I love him. It's just all the things that stand in the middle, his religion and Muslim customs all are in the way. It irks me to know that I am against his religion. He called me a devil a few times. I knew he was only joking, but it's somewhat true. I hate that. It's like making him choose between me and his religion.
The second thing is the possessiveness. Independence rather. I'm a very independent person. I rarely rely on my parents. Although I love him it's not like I need him. I know I'll do just fine without him. I need time for myself and with my friends other than him. How dare he get mad at me for planning to hang out with Iesha.
The third thing is the mind play. I've matured out of my jealousy shit. I don't get jealous over trying to get him jealous is a fool -- him trying to get me jealous is a fool because I'll definitely loose him -- me. I prefer a straight relationship that don't get in people mixed up just because he want to play mind games.

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The fourth thing is nothing. Because I do love him. It's just all of the shitty things that are messing with my mind. I'm just too confused. If I don't take the time to set things straight, the whole thing will blow up on my -- blow up in my head making me mad and do something I'll regret forever That's why I need the time out. I just hope that I don't lose him because of this. I love him. When I hold him, I want it to be forever. I feel secure and comfy with him. I think he expected more of a spontaneous combustion. That's not going to happen all of the time. Our relationship burns lightly at first and then it eventually calms down. We started strong and now we settle in a boring but secure and loving relationship. I don't know what he wants. All I want is him to hold on to, to cuddle up to, kiss when I feel empty inside. Maybe I'm not supposed to be loved but supposed to love and I thought I had found another keeper and maybe I have Hopefully, we'll go through this and come out much stronger -- with a much stronger foundation I love him. I can live without him but I love him and want him with me. Please Adnan be patient with me, love
Q Thank you. Now, she had discussed with you that recess week which she talked about?

to kill her," which he clearly didn't.

But absent that, I would argue that what he says is not admissible, it's hearsay, it's not necessarily an admission. Anything that he said doesn't make -- Mr. Urick said hasn't made it out to be an admission. It's like, well, it sort of goes to motive, that sort of developed over four to six months, doesn't make it so. So, --

THE COURT: I'm gonna allow the State to inquire as to the relationship that this witness was aware of based on conversations that she had directly with the defendant or directly with the victim in a period of time preceding the murder.

However, I'm gonna allow the defense to have free reign to inquire as to the limitations of that knowledge, any restrictions that that knowledge may have had, to including right up to the time of the murder.

And I would also remind you that it is to be her personal knowledge and not based on information she had received from other sources. So when her sentence starts off with some other person other than the defendant, the victim said such and such, or we all knew, that will be not permitted.

MR. URICK: I'm sorry. Did you say she can't say anything the victim told her?

THE COURT: She can tell you -- she can say what the victim said, she can say what the defendant said as to their relationship. But beyond that --

MS. GUTIERREZ: At any time period prior to her disappearance?

THE COURT: The period of time on or about, as you've indicated, October, November, December in 1998. However, I will not allow anything other than what conversations she had with the witness, victim or the defendant. Other than that, not a we knew, what we all knew, what we all heard. That will not be permitted. And again, I will allow the defense on cross to inquire to the extent that that information will have limitations.

MR. URICK: Thank you.

MS. GUTIERREZ: We would note an objection.

THE COURT: All right.

(Counsel and the defendant returned to the trial tables, and the following ensued.)

THE COURT: Now, you may reask your last question or your next question in line with the Court's ruling.

MR. URICK: Thank you.

BY MR. URICK:

Q. Drawing your attention to the Fall of 1998,