IN THE COURT OF APPEALS OF MARYLAND

STATE OF MARYLAND

Petitioner

v.

ADNAN SYED

Respondent

No. 24
September Term, 2018

On Writ of Certiorari to the Court of Special Appeals

Brief of Petitioner

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STATEMENT OF THE CASE

In February 2000, in the Circuit Court for Baltimore City, Respondent Adnan Syed was charged and convicted by a jury of first-degree murder, kidnapping, robbery, and false imprisonment, for which he was sentenced in June 2000 to life in prison. After exhausting his direct appeals in 2003, Syed timely filed for post-conviction relief in 2010. The Honorable Judge Martin Welch denied relief in December 2013.

In January 2014, Syed sought leave to appeal that denial, which he supplemented in January 2015. Pursuant to a limited remand authorized by the Court of Special Appeals in May 2015, Syed successfully filed a motion (June 2015), followed by a supplement (August 2015), to reopen post-conviction proceedings. After hearings in February 2016, the post-conviction court issued a written opinion in June 2016, granting in part and denying in part Syed's petitions for relief.

In August 2016, the State filed for leave to appeal, Syed filed a conditional application to cross appeal, and the State followed with a conditional application for a limited remand. In January 2017, the Court of Special Appeals granted the parties' applications for leave to appeal and cross appeal, referred the application for a limited remand to the panel, and issued a briefing schedule, with oral argument set for June 2017.

In March 2018, a divided panel granted Syed relief on a single ground, ruling unanimously against Syed on all other grounds. In May 2018, the State filed a Petition for Writ of Certiorari, and Syed thereafter filed a conditional Cross-Petition. This Court granted both Petitions and set dates for briefing and argument.

QUESTION PRESENTED

Did the Court of Special Appeals err in holding that defense counsel pursuing an alibi strategy without speaking to one specific potential witness violates the Sixth Amendment's guarantee of effective assistance of counsel?

SUMMARY OF ARGUMENT

Adnan Syed was convicted of murdering his ex-girlfriend, Hae Min Lee, on the basis of overwhelming evidence including testimony from the sole accomplice, fingerprint and cellphone records, the victim's personal diary, inconsistencies in Syed's statements to police and suspicious behavior after the victim's disappearance and death, as well as proof of motive, preparation, and cover-up, nearly every facet of which was corroborated by multiple disinterested witnesses. In the face of the State's potent case, Syed's veteran defense attorney, Cristina Gutierrez, meticulously planned, prepared, and executed a wholesale assault on virtually every aspect of the State's case. One part of her defense was an alibi premised upon Syed's daily routine, an

alibi that was consistent with what Syed told police and his defense team. In the end, Gutierrez's thorough, vigorous defense of Syed failed.

Syed now attacks Gutierrez, who is since deceased, on the ground that she failed to interview a possible alibi witness named Asia McClain, a fellow high school student who made a suspicious and nebulous offer to place Syed at the public library at the time the State contended the victim was killed. The record is silent on why Gutierrez decided speaking to McClain was unnecessary. And the law places the burden on Syed to overcome the strong presumption that defense counsel acted reasonably in whatever decisions she made. Nevertheless, in a divided opinion, with the Honorable Judge Kathryn Graeff in dissent, the Court of Special Appeals ruled that Gutierrez's decision was constitutionally defective and prejudiced Syed at trial.

The majority's decision — reversing the post-conviction court, which had twice denied relief on two separate grounds — is flatly wrong. Where the record is silent as to an attorney's decision (a matter on which the majority and dissent agree), state and federal courts have uniformly concluded that a petitioner cannot overcome the strong presumption required by *Strickland v. Washington* and its progeny. That is especially true here where the record supports many potential explanations for counsel deciding that interviewing McClain was unnecessary, "possible reasons" that the Supreme Court

requires reviewing courts to "affirmatively entertain." *See Cullen v. Pinholster*, 563 U.S. 170, 196 (2011). Moreover, even if it were constitutional error not to pursue McClain, the majority's conclusion that this putative misstep was prejudicial overstates the potency of a narrow alibi based on a single person and disregards the unusually formidable evidence presented by the State at trial. To rule in Syed's favor here is to mint a blanket rule for alibi witnesses that is unwarranted, unwieldy, and goes well beyond what is promised by the Sixth Amendment's guarantee of effective representation.

STATEMENT OF FACTS

A. The Murder of Hae Min Lee

On January 13, 1999, Adnan Syed strangled to death and buried in a shallow grave his ex-girlfriend, 18-year-old, Hae Min Lee. (E. 0269-71, 0739-41).[1] Syed and Lee, both students at Woodlawn High School, had broken up and reunited at least twice during the course of their turbulent ten-month relationship, but never before had Lee become involved with someone else. (E. 0230-33, 0723, 1335-52). That changed two weeks before

[1] This amended Brief of Petitioner has been updated with citations to a two-volume, Joint Record Extract.

the murder, when Lee went on a first date with a new romantic interest, an older co-worker named Donald Clinedinst. (E. 0265).

The week of the murder, Syed activated a new cell phone, which was instrumental in Lee's murder, and told Jay Wilds — an accessory to the crime enlisted by Syed — that he intended "to kill that bitch" (referring to Lee) because of how she was treating him. (E. 0224, 0343-44, 0735). On the morning of January 13, Syed lent Wilds his vehicle and his new cell phone and directed him to await his call. (E. 0343-44). That day at Woodlawn, Syed lured Lee away from the high school campus, falsely claiming he needed a ride to pick up his car. (E. 0228, 0245). Syed then strangled Lee inside her vehicle and stashed her body in the trunk of the car. (E. 0269-71, 0349). After the murder, Syed bragged to Wilds that he had killed Lee with his bare hands and that she had tried to apologize to Syed with her last breath. (E. 0360-61). The two men disposed of Lee's crumpled body in Leakin Park in Baltimore City and abandoned her car near Edmondson Avenue. (E. 0366-69, 0214).

1. The Verdict of the Jury

Syed's first trial ended in December 1999 with the judge granting a defense motion for a mistrial. (E. 0203). After a second trial that lasted six

weeks, during which the State presented overwhelming evidence of Syed's guilt, a jury convicted Syed of murder and all related charges. (E. 0780-82).

At this second trial, the State's case included, *inter alia*, the testimony of Wilds who helped Syed bury the victim and later led police to the victim's car (E. 0333-82); witnesses who spoke of Syed's possessive behavior toward Lee, his ploy to get a ride from Lee after school on the day she disappeared, and his presence with Wilds that afternoon and evening (E. 0228, 0245, 0694, 0700-02, 0726-27); toll records and tower location data corresponding to Syed's cell phone, which corroborated the testimony of Wilds and other witnesses, and placed Syed at Leakin Park that night a short distance from where Lee's corpse was unearthed (E. 0683-89); a map page to Leakin Park, ripped from a map book with Syed's palm print on the back cover, both left in Lee's abandoned car (E. 0251-53, 0258-63); the diary of Hae Min Lee recounting the decline of her relationship with Syed and the bloom of her love for Clinedinst (E. 1335-522); a letter seized from Syed's bedroom, written by Lee imploring Syed to respect her wishes and move on, with the ominous words "I'm going to kill" written in a separate script on the back side of the note (E. 0234-42, 1287-88); as well as Syed's peculiar conduct after the murder and his incongruous statements to police (E. 0217-20, 0222, 0245, 0247-49, 0700-704).

The defense mounted a vigorous challenge to the State's case, but in view of the prosecution's evidence, the jury's verdict was unimpeachable.

2. The Evidence at Trial

For consistency, the State adopts its factual recitations from its prior pleadings, see Brief of Appellee at 12-15 (filed May 6, 2015), select excerpts of which are set forth below.

When police executed a search warrant at Syed's residence, they found a November 1998 letter from Lee tucked into a textbook, in which Lee sought to reassure Syed that they would both survive a breakup: "Your life is NOT going to end. You'll move on and I'll move on. But, apparently you don't respect me enough to accept my decision ... I NEVER wanted to end like this, so hostile + cold. Hate me if you will. But you should remember that I could never hate you." (E. 0211-13, 1287). Syed's apparent answer was scrawled on the back: "I'm going to kill." (E. 1288).

During the trial, the State also proved the steps Syed took in the 24 hours before he killed Lee. On a newly-acquired cell phone, which was activated a day before the murder, Syed called Wilds to determine if he was available the next day. (E. 0337, 1356-61). That same evening, after talking with Wilds, Syed attempted to call Hae Min Lee three times just before and after midnight. (E. 1356-61).

Syed's first call the next morning was to Wilds, whom Syed then left school to pick up. (E. 0339-41, 1356-61). While driving, Syed told Wilds about how hurt he was by Lee's treatment of him, how mad she made him, and said to Wilds, "I'm going to kill that bitch." (E. 0343). Wilds — who pled guilty to being an accessory to the murder and agreed to take the stand for the State — testified that Syed left him his cell phone and car, instructing him to be ready to retrieve Syed when he called. (E. 0343-44).

In addition, Crystal Myers, a mutual friend of Syed and Lee, testified about a conversation she had with Syed at school on the day Lee was killed. Syed told her that Lee was supposed to drive him after school to pick up his car, either from the repair shop or from Syed's brother. (E. 0228). After the murder, Syed told conflicting stories about what happened that afternoon to two separate police officers. *Compare* (E. 0245) *with* (E. 0249).

But not only did Syed eventually disavow any plans to get a ride after school from Lee; he also shifted from telling Officer O'Shea, on the one hand, that he went to track practice after last seeing Lee during the final class period of the day to, on the other hand, feigning that he had no memory at all of the day his ex-girlfriend vanished when asked by the lead homicide detective a month later. (E. 0247-48).

The jury learned from Wilds and other witnesses that all of Syed's vacillating accounts were untrue. After school ended, Wilds received a call from Syed who directed him to the Best Buy store on Security Boulevard. (E. 0348). Parked to the side of the building was Lee's gray Sentra. After asking Wilds if he was "ready for this," Syed opened the trunk and revealed the dead body of Hae Min Lee. (E. 0348-49).

Wilds testified that over the next few hours he and Syed alternated between driving around in search of marijuana, attempting to establish an alibi for Syed, and disposing of the body. (E. 0350-75). Wilds later dropped Syed off at track practice at the high school so that Syed could be "seen," only to return a short time later to pick him up. (E. 0360, 0362).

Both men then proceeded to the home of Kristi Vinson. (E. 0362). Around that time, Syed received phone calls from the victim's parents and Officer Adcock, asking if Syed knew where his ex-girlfriend was. (E. 0363).[2] After one of the calls, Syed abruptly motioned to Wilds that it was time to leave. (E. 0364-65).

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[2] It was during this call with Officer Adcock that Syed said that he had expected to get a ride from Lee after school that day, but that he had been delayed. (E. 0245).

Wilds testified that, afterwards, Syed convinced him to help dispose of the body. (E. 0365). After the makeshift grave was prepared, Syed and Wilds returned the shovels to Syed's car. (E. 0371). Wilds told the jury that he refused to help move Lee's body from the trunk of her car, so Syed transported the corpse to the grave site alone and "started to throw dirt on her head." (E. 0369-70).

During the course of that fateful night, Syed bragged in detail to Wilds about what he had done. Syed reported that during the struggle Lee had kicked off the car's turn signal and had attempted to apologize to him. (E. 0360). He told Wilds that killing Lee "kind of hurt him," but that when someone treated him the way she had, that person deserved to die. (E. 0360). Syed later added that the murder, "kind of makes [me] feel better and then again it doesn't." (E. 0374). Syed also derived a measure of pride in the method of the murder: "motherfuckers think they are hard, I killed somebody with my bare hands." (E. 0360).

The State called additional witnesses who fortified critical features of the prosecution's case, such as Wild's testimony, which was corroborated by various witnesses including Kristi Vinson, (E. 0362, 0700-21), and Jennifer Pusateri, (E. 0692-97).

The testimony of witnesses familiar with Syed, Lee, and the events of January 13 were one component of the State's case. Also persuasive was the prosecution's presentation of phone records and location data derived from the calls Syed and Wilds made in the hours before and after the murder. For one thing, the timing of calls to Hae Min Lee the night before her murder, as well as calls to Jay Wilds, Jennifer Pusateri, Nisha Tanna, and Yasser Ali on the day of the murder, reinforced the testimony of the State's witnesses and the prosecution's theory of what happened when and why.

The State's expert witness, Abraham Waranowitz, also plotted the location of cell towers corresponding to each call Syed and Wilds made that day. In order to validate this information, the expert actually visited locations where a call was supposedly made and initiated a test call to determine what tower the call engaged. (E. 0462).

Furthermore, the State established that Syed's palm print was on the back cover of a map book inside Lee's car and that a page showing Leakin Park was torn from that book; the standalone page was also recovered from the middle of the back seat of Lee's car, where it could be reached from the driver's seat. (E. 0251-55, 0258-63). The State also showed that the wiper lever inside of Lee's car was broken, which was consistent with Wilds'

testimony that Syed described Lee kicking as he strangled her in the front seat of the car. (E. 0774).

B. The Petition for Post-Conviction Relief

On May 28, 2010, ten years after he was convicted and sentenced and seven years after his direct appeal ended, Syed filed an original timely petition for post-conviction relief, which contained, *inter alia*, a claim of ineffective assistance of counsel premised on Syed's trial counsel, Cristina Gutierrez, failing to contact or call to testify a putative alibi witness named Asia McClain. (E. 0785-86, 0789-91). This claim — which was originally denied by the post-conviction court, *Syed v. Maryland*, Circuit Court for Baltimore City, No. 199103042-46, 2013) ("Memorandum Op. I"); on appeal to the Court of Special Appeals but remanded before briefing was complete; denied again on different grounds, *Syed v. Maryland*, Circuit Court for Baltimore City, No. 199103042-46, 2016) ("Memorandum Op. II"), but subsequently granted when the Court of Special Appeals reversed the post-conviction court's second denial, *Syed v. State*, 236 Md. App. 183 (2018) — is

currently the sole ground on which Syed has been granted relief and is the subject of the State's appeal to this Court.[3]

At the first post-conviction hearing conducted in October 2012, Syed called five witnesses relating to his Sixth Amendment alibi claim, but failed to call McClain. After the claim was denied and on appeal, Syed obtained an affidavit from McClain, on the basis of which he was granted a limited remand. At the second hearing conducted in February 2016, in addition to one witness related to Syed's added cellphone claim, McClain and five other witnesses testified concerning Syed's alibi claim. Gutierrez had died in 2004. (E. 0785). None of the other members of Syed's defense team were called by Syed to testify. The State called two witnesses, one related to the alibi claim and another on the cellphone claim. Significantly, at the February 2016 hearing, the State also admitted into evidence voluminous materials from Gutierrez's defense file, which the State had sought and obtained — without objection from Syed — shortly before that hearing.

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[3] A separate claim of ineffective assistance of counsel premised on Gutierrez's challenge to the State's cellphone evidence, which was belatedly and improperly filed during the limited remand, was denied as waived by the Court of Special Appeals. Because that claim is the subject of Syed's cross-petition to this Court, the State will address the facts, procedural history, and merits of that claim in separate briefing.

The following is a summary of the evidence entered at both hearings relevant to Syed's claim that failing to contact a single potential alibi witness, Asia McClain, was constitutionally defective performance by Gutierrez, even where she developed and presented an alibi defense based upon Syed's daily routine, taking Syed from school to track practice to the mosque for prayer, alongside a number of other angles of vigorous attack.

1. The Purported Alibi of Asia McClain

Asia McClain was a fellow student at Woodlawn High School. (E. 0789). After Syed's arrest, McClain sent Syed two letters, dated March 1, 1999, and March 2, 1999, requesting to talk with him to explore the relevance of a conversation McClain recalls having on January 13, 1999, at the nearby public library. (E. 1208-09, 1211a-c). She does not say in this set of correspondence why she remembers that day or what precisely she recalls. Both letters express hope that Syed is innocent and simultaneously relay concerns that he is not: "I want you to look into my eyes and tell me of your innocence. If I ever find otherwise I will hunt you down and wip [sic] your ass ... I hope that you're not guilty and I hope to death that you have nothing to do with it. If so I will try my best to help you account for some of your unwitnessed, unaccountable lost time (2:15-8:00)" (E. 1208-09); "The information that I know about you being in the library could helpful [sic],

unimportant or unhelpful to your case... I guess that inside I know that you're innocent too. It's just that the so-called evidence looks very negative." (E. 1211a). In neither letter does McClain specify a particular time when she saw Syed at the library. (E. 1208-09, 1211a). She notes however that she aspires to become a criminal psychologist for the FBI. (E. 1211a-c).

Syed presented evidence to the post-conviction court that he made his defense team aware of these two original letters. To corroborate this, he referred to the notes of one of Gutierrez's law clerks, which suggest that McClain was discussed at a meeting between Syed and this clerk. (E. 0853-54). Syed testified at the post-conviction hearing that he was "fairly certain" that his presence at the public library would have been to access his email account. (E. 0879-81). Consistent with this, Syed's email username and password are contained in the same section of the clerk's notes. (E. 1255). In addition, Syed testified that he personally asked Gutierrez if she had looked into the McClain alibi angle. (E. 0881-82). Syed acknowledged that Gutierrez advised him that she had "looked into it and nothing came of it." (E. 0882).

Syed also introduced an affidavit McClain signed a year later, on March 25, 2000, in which McClain claimed she saw Syed at a specific time at the library on the day of Lee's murder, and that she was never contacted by Syed's defense team. (E. 0824, 1213a-b). This affidavit, signed a month after

Syed was convicted, was prepared in the presence of Rabia Chaudry, a close family friend of Syed's and a law student at the time. (E. 0824, 0828). In this post-trial affidavit, McClain recalled with pinpoint accuracy that she had waited for her boyfriend at 2:20 p.m., that she held a 15-20 minute conversation with Syed, and then left at about 2:40 p.m. (E. 1213a-b). Nothing in the affidavit explained why McClain was now able to provide a concrete, narrow alibi for Syed when details like this were notably absent from her original letters to Syed. (E. 1213a-b). Whatever the reason, the times neatly coincided with the State's postulation at Syed's trial as to when Syed may have killed Hae Min Lee. (E. 1213a-b).

At the hearing, Chaudry stated that she spoke to Syed on multiple occasions by phone from the time of his arrest and throughout both trials; she attended most of the second trial and participated in two meetings between Gutierrez and Syed's parents. (E. 0800-45). Chaudry claimed, however, that it was not until after Syed was convicted that she asked him to account for his whereabouts at the time of the murder. (E. 0810-11, 0843). According to Chaudry, Syed told her that, "it was like any other day for me," and that he had no specific memory of speaking to McClain (or anyone else at the library) that day. (E. 0810-11, 0843).

For his part, Syed testified at the post-conviction hearing that he received the letters from McClain within a week of his arrest and that the letters "fortified" the memory that he had of going to the library after school and staying there from 2:40 p.m. to 3 p.m. (E. 0875-77). He further stated that he remembers exactly who he spoke with and what they spoke about. (E. 0878). Syed's sharpened recollection nearly 14 years after the murder stood in contrast to the statements he gave police in the early days of the investigation and contradicted Chaudry's testimony of his statements to her that, even after he was convicted of murder, he had no memory of where he was after school on January 13, 1999.

In Syed's own accounts of that day — to police and his own attorneys — at no time did Syed mention being at the public library, before or after his memory was "fortified" by McClain's letters. (E. 0875-77). For example, an internal defense memorandum summarizing an August 1999 interview with Syed stated that Syed "believes he attended track practice on that day because he remembers informing his coach that he had to lead prayers on Thursday." (E. 1221). It refers to additional details about a call Syed received from the victim's brother that afternoon, what was said on the call, where Syed believes he was, and his memory that he was in his car with Jay and "reach[ed] over Jay to get the phone from the glove compartment." (E. 1221).

At the bottom of this memo is a note indicating that Syed also provided "a handwritten account of his recollection of his whereabouts on Jan 13." (E. 1221). The accompanying handwritten page appears to be Syed's description of his day with a number of details of what happened in certain classes, what gift he gave to Jay's girlfriend, what time he left school to drop off his car and cellphone to Wilds, what time he returned, and even a reference to remembering that he arrived a few minutes late to his last class "cause it took some time in the guidance office." (E. 1222). Syed makes no reference to ever visiting the public library on the day in question or any other. (E. 1222).

During other interviews, as documented in other internal defense memoranda, Syed had told his defense team where, in fact, he often went between school and track practice. But it was not the public library to check his email, but rather the Best Buy parking lot where he and the victim would be intimate: "They also frequented the *Best Buy parking lot* next to Security Square Mall (this was their designated spot when school started)." (E. 1232). Syed told his defense team that "[o]n average they saw one another 4,5,6 times a week and ... [s]ince Hae was responsible for picking up her niece after school, they would have sex in the Best Buy parking lot close to the school after school," and that Hae would then "leave to get her niece." (E. 1233).

What Syed had told his defense team was consistent with what at least one other witness had reported to police: Ju'uan Gordon — described by Syed's brother, according to an internal defense memo, as Syed's "best friend outside of the Muslim community," (E. 1219) — told police that Syed and Lee frequented the Best Buy parking lot. (E. 1272-74, 1276-78).

At the second hearing, McClain herself testified. She stated that she had a conversation with Syed at the public library shortly after 2:15 p.m. for 15 to 20 minutes. (E. 1077). McClain acknowledged at the hearing that the timeframe in her first March 1st letter (2:15-8:00 p.m.) was supplied by Syed's family, (E. 1102); she claimed she had written the second (March 2nd) letter in class, as the letter represents, but had typed it up later at home and does not remember whether she incorporated additional information after she composed the handwritten draft, (E. 1116-17); and she was unable to recall where she obtained Syed's identification number, prison address, and certain specific facts about the case, (E. 1121, 1154-57, 1163), but on redirect accepted that she may have gotten them from news coverage of the case (E 1181-82).

David Irwin, a veteran attorney whom Syed called as a legal expert, judged McClain's credibility favorably and mainly testified that he could not

think of a scenario or reason that a defense attorney would not need to contact a possible alibi witness. (E. 1201).

2. Gutierrez's Pursuit of an Alibi

At the time when Syed retained Gutierrez, she was a renowned criminal defense attorney. (E. 0847-51, 0890, 0893). Syed originally had other counsel who represented him for several weeks beginning the day he was arrested. (E. 0849-50, 0857). Gutierrez was selected in part because of the professional endorsement by others of her; Syed's mosque screened candidates and conducted interviews of three attorneys, before selecting Gutierrez as the best choice. (E. 0847-50). Syed's mother testified that Gutierrez was hired because she had an "extensive background in trying criminal cases" and was known for "fighting very hard for the client." (E. 0850).

Gutierrez was so coveted by Syed that, in fact, Syed fervently opposed the State's motion to remove her as his attorney. The State had requested disqualification on the ground that she already represented two grand jury witnesses, Balail Ahmed and Saad Chaudry. (E. 0156-71). Another respected attorney represented Syed in these proceedings and argued that prosecutors sought to disqualify Gutierrez because they knew she would provide Syed with a vigorous defense. (E. 0152, 0156-71). Following the hearing, Syed

wrote a letter to the court, pleading with the judge to permit him to keep Gutierrez:

> Professionally, M. Gutierrez's reputation proceeds [sic] her. Her presentations in court are remarkable, as is her success rate. Personally, she has a warm, caring, even motherly atmosphere that offers me a great deal of comfort. It is not her winning record, however, that compels me to retain her. It is her hardwork, determination & belief in my innocence that assures I am in the best hands.

(Apx. 1, Brief of Appellee (filed May 6, 2015)). Later that month, the court denied the State's motion, and Gutierrez served as Syed's counsel from then until the conclusion of the second trial at which Syed was convicted. (E. 0193-99).

In preparation for trial in Syed's case, Gutierrez assembled a team consisting of law clerks and a private investigator to assist with pretrial investigation. (E. 0857-881). Fashioning an alibi for Syed's whereabouts that supported Syed's statements to police was a clear priority for Gutierrez. In fact, the defense file contained a detailed team task list, (E. 1246-51), that includes an "urgent" entry about making a "determination regarding alibi" and contains handwritten notes that refer to Syed's school, track practice, and the mosque. (E. 1249). Gutierrez ultimately filed an alibi notice on October 5, 1999, that listed 80 witnesses and covered Syed's whereabouts from when he left school until much later in the evening:

> On January 13, 1999, Adnan Masud Syed attended Woodlawn High School for the duration of the school day. At the conclusion of the school day, the defendant remained at the high school until the beginning of track practice. After track practice, Adnan Syed went home and remained there until attending services at his mosque that evening. These witnesses will testify to [sic] as to the defendant's regular attendance at school, track practice, and the Mosque; and that his absence on January 13, 1999 would have been missed.

(E. 1283-85).

At the second post-conviction hearing, Syed called William Kanwisher who testified that Gutierrez sometimes filed voluminous alibi notices to compel the prosecution to do additional work, (E. 0895-97), as well as Sean Gordon, who testified that he had reached out to many of the listed alibi witnesses who did not recall being contacted as alibi witnesses, (E. 1194). Gordon admitted he had not spoken to Mike Lewis or any other member of Syed's defense team, nor was he shown any of the documents in Gutierrez's defense file that displayed names, phone numbers, and short handwritten notes describing conversations between Gutierrez's defense team and the listed alibi witnesses. (E. 1195-96, 1283-85).

At trial Gutierrez affirmatively pursued an alibi defense through cross-examination of witnesses presented by the State (*see, e.g.*, E. 0279-324, 0328-31), by substantiating a reliable routine that Syed followed every day, *i.e.*, attendance at school followed by track practice followed by services at the

mosque (E. 0746-50, 0752-53, 0756-57, 0759-61, 0765-68), and by calling to testify Syed's father, who asserted that on the evening of Lee's disappearance he went to the mosque with his son at approximately 7:30 p.m. for an 8 p.m. prayer meeting (E. 0756). The trial court agreed to give an alibi instruction to the jury, thus finding that an alibi defense had been generated by the facts established by Gutierrez at trial. (E. 0771-72).

After the first hearing, the post-conviction court denied relief, concluding that "the letters sent from Ms. McClain to Petitioner do not clearly show Ms. McClain's potential to provide a reliable alibi witness." *Syed v. Maryland*, Circuit Court for Baltimore City, No. 199103042-46, 2014) ("Memorandum Op. I"), at 11. Judge Welch added that to interpret the "vague language" in McClain's letters as evidence of a concrete alibi "would hold counsel to a much higher standard than is required by *Strickland*" and found that Gutierrez could have reasonably have interpreted McClain's letters as an offer to lie in order to help Syed avoid conviction. *Id.* at 11-12.

After the second hearing, the post-conviction court reversed itself on whether failing to contact McClain was defective performance but nevertheless denied Syed relief, this time concluding that Syed could not establish prejudice since the time of death was a weak part of the State's presentation, that the strongest part of the State's case was the convergence

of evidence at the location and time Syed and Wilds buried the victim, and that McClain's proposed alibi did nothing to undermine that critical evidence. *See* Memorandum Op. II at 25.

On appeal, in a divided 2-1 decision, the Court of Special Appeals reversed the post-conviction court. (E. 0018-125). The majority found that failing to contact McClain constituted defective performance and that this error was prejudicial. It challenged the post-conviction court's assessment of what was the "crux of the case," concluding that events that took place after the murder itself were less important than the time of death, even where the State's evidence of that was weak. (E. 0119-20).

Judge Graeff dissented. (E. 0126-49). She objected to the bright line rule the majority effectively adopted, explained that there were reasonable explanations in this case not to pursue a particular witness, and that in any event where the record was silent Syed had not satisfied his burden of establishing that Gutierrez's decision was unreasonable, especially in light of the strong presumption established by *Strickland*.

ARGUMENT

I. THE MAJORITY ERRED IN HOLDING THAT GUTIERREZ WAS DEFICIENT IN HER PERFORMANCE AS COUNSEL

In *Strickland v. Washington*, 466 U.S. 668, 686 (1984), the Supreme Court established a two-prong test for ineffective assistance of counsel claims

under the Sixth Amendment: "First, the defendant must show that counsel's performance was deficient." *Id.* at 687. Second, the defendant must show that counsel's deficient performance was prejudicial, *i.e.*, that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Relevant to Syed's claim, ***Strickland*** made clear that "counsel has a duty to make reasonable investigations *or to make a reasonable decision that makes particular investigations unnecessary.*" 466 U.S. at 691 (emphasis added). Decisions by defense counsel enjoy a presumption of reasonableness, so that for a defendant to establish constitutionally deficient performance, he or she must overcome the strong presumption that counsel's conduct "falls within the wide range of reasonable professional assistance" and that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689-90. Courts, in assessing Sixth Amendment claims, are required to "eliminate the distorting effects of hindsight," *id.* at 689, and to "avoid the post hoc second-guessing of decisions simply because they proved unsuccessful." *Evans v. State*, 396 Md. 256, 274 (2006). Thus, the requirement of defective performance can be "satisfied only where, given the facts known at the time, *counsel's choice was so patently unreasonable that no competent attorney would have made it.*" *State v. Borchardt*, 396 Md. 586,

623 (2007) (emphasis added, internal quotations omitted). Furthermore, *Strickland's* presumption of competence requires reviewing courts "not simply to give [the] attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons" for a defense attorney's choices. *Cullen*, 563 U.S. at 196 (internal quotation marks omitted).

In order to reach the conclusion that Gutierrez's performance was deficient, the majority violated virtually every one of these directives. They disregarded the presumption of reasonableness, declined to entertain the range of possible reasons for Gutierrez's decisions, and revisited from the comfortable perch of hindsight an assiduous investigation and sound defense by a seasoned attorney.

A. The majority reversed *Strickland's* presumption by finding deficient performance even where the record is silent on Gutierrez's rationale.

The majority's ruling that Gutierrez was constitutionally deficient for failing to interview McClain effectively reverses the presumption of reasonableness established by *Strickland*. The operation of legal presumptions should be clearest when a record is silent on a matter to which a presumption applies. As Judge Graeff rightly concludes in her dissent, the "absence of testimony by trial counsel makes it difficult for Syed to meet the burden of showing deficient performance." (E. 0147). In fact, in numerous

state and federal cases, where the record is silent on why counsel failed to act, courts have consistently concluded that the defendant has not satisfied his or her burden. Conversely, in cases where a defendant has prevailed on a Sixth Amendment claim for failing to investigate, that defendant established on the record why trial counsel failed to act and then convinced the court that counsel's rationale was unreasonable.

By their nature, legal presumptions operate to determine — even dictate — the outcome of a case when the record is silent or ambiguous. For this reason, courts have uniformly concluded that it will be exceptionally difficult for defendants to rebut *Strickland's* presumption where, as here, the record does not plainly disclose the reason or motivation for trial counsel's decisions. In her dissent, Judge Graeff cited a series of cases that explicitly adopted this view. *See, e.g., Jones v. State*, 500 S.W.3d 106, 114 (Tex. Ct. App. 2016) ("When the record is silent on the motivations underlying counsel's tactical decisions, the appellant usually cannot overcome the strong presumption that counsel's conduct was reasonable"); *Broadnax v. State*, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013) (explaining that it will be "extremely difficult" for a petitioner "to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred

outside the record"); *Williams v. Head*, 185 F.3d 1223, 1228-29 (11th Cir. 1999), *cert. denied*, 530 U.S. 1246 (2000) (holding "where the record is incomplete or unclear about [counsel's] actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment" and noting that the "court correctly refused to 'turn that presumption on its head by giving Williams the benefit of the doubt when it is unclear what [counsel] did or did not do.'").[4]

To be clear, the analysis of these courts is perfectly consonant with the cases relied upon by Syed and the Court of Special Appeals. After all, in each of those cases where counsel was declared ineffective, the petitioner proved on the record the motivation or reason for counsel's course of action. Thus, in *Washington v. Smith*, 219 F.3d 620, 625, 630 (7th Cir. 2000), for instance, counsel admitted he did not contact alibi witnesses because he did not receive the names until the first day of trial, and "at that late time," he was too "busy trying the case." *See also Bryant v. Scott*, 28 F.3d 1411, 1419 n.13 (5th Cir.

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[4] Moreover, the cases cited by Judge Graeff are hardly outliers; in fact, there are cases across the country that reach the same conclusion on the very same or similar grounds. *See, e.g., Sallahdin v. Mullin*, 380 F.3d 1242, 1250–51 (10th Cir.2004); *Chandler v. United States*, 218 F.3d 1305, 1315, n.15 (11th Cir. 2000); *Hughley v. State*, 330 Ga. App. 786, 794, 769 S.E.2d 537, 544 (2015); *Henry v. Dave*, No. 4:07-CV-15424, 2010 WL 4339501, at *9 (E.D. Mich. Oct. 25, 2010).

1994) (counsel testified that he "would have loved to have the [alibi] evidence" but believed he did not have adequate time to pursue it). In *Griffin v. Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355, 1357 (4th Cir. 1992), counsel's excuse was that he assumed the case was going to be resolved by plea; in *Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991), the defendant established that counsel thought the court would preclude the alibi evidence due to lack of sufficient notice; and in *Montgomery v. Petersen*, 846 F.2d 407, 412 (7th Cir. 1988), counsel candidly admitted he failed to investigate a potential alibi witness due to "inadvertence."

The common feature of cases where a court has found defective performance on the basis of failing to pursue a potential alibi witness is a clear record that establishes the reason — one that is ultimately judged unreasonable — for why counsel failed to act. That feature is indisputably absent in this case. And where the record is silent — or even just incomplete or ambiguous — proper application of ***Strickland's*** presumption of competence requires that a court deny relief. *See Dunaway v. State*, 198 So.3d 530, 547 (Ala. Crim. App. 2009) ("If the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim.").

Indeed, on the main question of whether defense counsel made "a reasonable decision that makes particular investigations unnecessary," *Strickland*, 466 U.S. at 691, the Court of Special Appeals candidly acknowledged that the record was silent on Gutierrez's reasons: "Here, however, because of trial counsel's death, there is no record of why trial counsel decided not to make any attempt to contact McClain and investigate the importance *vel non* of her testimony to Syed's defense." (E. 0107). *See Walker v. State*, 194 So.3d 253, 297 (Ala. Crim. App. 2015) ("the death of an attorney did not relieve post-conviction counsel of satisfying the Strickland test when raising claim of ineffective assistance of counsel.").

This should have led inexorably to the conclusion that Syed had not met his burden given the "strong presumption" that *Strickland* demands. Instead, the majority proceeded to explain that "[i]n such a situation," it must guard against the "distorting effects of hindsight," *id.* (quoting *Strickland*, 466 U.S. at 689), and must not "conjure up tactical decisions an attorney could have made, but plainly did not," (E. 0107) (quoting *Griffin*, 970 F.2d at 1358).

The majority's errors here are manifest and help expose its flawed analysis. *Strickland*'s instruction to avoid "the distorting effects of hindsight" appeared in the middle of the Supreme Court's exposition of why judicial

scrutiny of counsel's decisions must be "highly deferential" and how "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. The Court's directive to eliminate the dangers of hindsight was certainly not meant to tilt *in Syed's favor* an evaluation of the "range of possible reasons" for counsel's decisions. After all, those decisions enjoy — as *Strickland* said in the very next sentence — the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

Similarly plucked out of context is the majority's invocation of the Fourth Circuit's caution in *Griffin* not to "conjure up tactical decisions an attorney could have made, but plainly did not." (E. 0107). In *Griffin*, the post-conviction court concocted and substituted alternate, hypothetical reasons for counsel's decisions for the *actual* reason supplied by trial counsel's own testimony. *See Griffin*, 970 F.2d at 1357 (finding ineffective counsel where trial counsel did not interview an alibi witness because he believed the case "was going to be pleaded"). *Griffin* is inapposite in cases where the record is silent as to the reasons behind trial counsel's decisions. In fact, the Supreme Court has said the proper analysis under *Strickland*

requires courts to "affirmatively entertain the range of possible reasons" that Gutierrez may have had for proceeding as she did:

> *Strickland* specifically commands that a court "must indulge [the] strong presumption" that counsel "made all significant decisions in the exercise of reasonable professional judgment. The Court of Appeals was required not simply to "give [the] attorneys the benefit of the doubt," but to affirmatively entertain the range of possible reasons [] counsel may have had for proceeding as they did.

Cullen, 563 U.S. at 196.

In other words, the majority grafted the guidance a federal appellate court gave in a case where the record was not silent about counsel's reasoning (*Griffin*) and adopted it for cases where the record is silent. This is exactly the error of turning Strickland's presumption on its head that courts have warned against. *See Williams*, 185 F.3d at 1227-28 (holding "where the record is incomplete or unclear about [counsel's] actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment" and noting that the "court correctly refused to 'turn that presumption' on its head").

Disregarding the teachings of *Strickland* and its progeny, the majority failed to apply the presumption of reasonableness and as a result, in a case where the record is silent, reached the flatly wrong conclusion. On the basis of this first reason alone, this Court can and should reverse the majority's decision granting Syed relief.

B. The record supports that there are several possible explanations why interviewing McClain was unnecessary.

The presumption of *Strickland* in a case where the record is silent is enough to deny Syed relief. That result is particularly valid where there are a number of fair explanations, each rooted in and consistent with the record, for why Syed's counsel could have reasonably decided that investigating McClain was unnecessary.

To be sure, because Gutierrez died in 2004 and because Syed did not call any other member of his defense team, we cannot know for certain why McClain was not interviewed. Establishing possible reasons for Gutierrez's decisions is not the State's burden; but nor is it an improper example of "hindsight sophistry" as the post-conviction court characterized it. (*See* E. 0094 (quoting Memorandum Op. II at 17)). Rather, it is an exercise the Supreme Court has directed reviewing courts to perform: courts must not only give counsel "the benefit of the doubt" but must also "affirmatively entertain the range of possible reasons" for an attorney's course of action. *Cullen*, 563 U.S. at 196 (rejecting an ineffective assistance claim involving a failure to investigate and present mitigating evidence based upon a "possible strategy" described not by trial counsel, but by the dissenting opinion in the appellate decision under review). Here, as the dissenting opinion below rightly concluded, "a review of the record as a whole indicates possible

reasons why trial counsel reasonably could have concluded that pursuing Ms. McClain's purported alibi, which was known to trial counsel, could have been more harmful than helpful to Syed's defense." (E. 0139).

First, the alibi proposed by McClain was inconsistent with what Syed had told police, and Gutierrez reasonably could have concluded that "McClain's testimony that she saw Syed at the public library after school, when Syed never before had mentioned the public library, could be harmful because it would give the State *another* inconsistency or omission in Syed's statements to the police." (E. 0143 (emphasis added); E. 0142-43, n.10 (pointing out that Syed had already given one set of incongruent accounts to different police officers, which the State in fact exploited at trial)).

As Judge Graeff explains, it is no answer to this possible concern that the public library was located adjacent to the high school. No matter how close they were, Syed had not once told anyone — not police, fellow students, or his defense team — that he ever visited the public library on that day or any other. (E. 0142 (noting that "evidence that the high school and the public library were in close proximity . . . does not take away from the fact that Syed never mentioned going to the public library")). *See also* ***Strickland***, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. . . .

And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.").

Furthermore, placing Syed at the public library, a place no one had ever associated with Syed, could have been readily discredited by witnesses already known to the State and Gutierrez. Specifically, according to detectives' interview notes, two high school employees, Virginia Madison and Cheryl Metzger, advised police that Syed was a "regular" at the *high school* library (not the public library), that Syed went there "frequently," that he and the victim would visit there "often," and that the school library had computers with internet access. App-120–21, 122. Conversely, Gutierrez had no evidence — from Syed or anyone else (except McClain) — that Syed had ever visited the *public* library to check email or for any other purpose.

Thus, the further investigation Syed contends is imperative would, at best, have created a further inconsistency with what Syed had told police (and his attorneys) and could have been easily undermined by witnesses with whom police had already spoken. Under these circumstances, Gutierrez could reasonably have concluded that interviewing McClain was unnecessary. Indeed, chasing an uncertain alibi witness that carried such serious risks should not be an investment or investigation required by the Constitution.

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

Second, Gutierrez reasonably could have concluded that it was unnecessary to investigate a witness who could not testify to Syed's daily habits and routine. That, after all, was the basis of the alibi Gutierrez investigated, set forth in her notice to the State, and pursued at trial — an alibi strategy that had the key advantage of conforming to what Syed had already told police. This approach also fit with the broad-gauged assault that Gutierrez mounted at trial in which she "took the long view, trying to cast doubt on the whole of the State's case." (E. 0140-141 (Judge Graeff's dissent)). The majority acknowledged that Gutierrez's alibi notice (which listed 80 witnesses) placed Syed at the high school, then track practice, and then the mosque each night, but quibbled with whether and how Gutierrez executed this alibi at trial. (E. 0108-09). In this respect, the majority's analysis fell victim to the "distorting effects of hindsight," illustrating why, as *Strickland* put it, "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." 466 U.S. at 689.

An alibi based upon Syed's routine, as Judge Graeff points out, was plainly part of the defense strategy. (E. 0140-41, n.9 (cataloging examples from trial of how Gutierrez established Syed's alibi by routine, on direct and cross examination and during opening and closing statements)). Given the potential advantages of an alibi by routine, and the risks of a narrow alibi that placed Syed somewhere besides where he had told police, Gutierrez could reasonably have decided that interviewing a witness who could not speak to her client's habits and routine was unnecessary.[5]

Third, as Judge Graeff points out in her dissent, part of Gutierrez's strategy was to challenge the State's evidence as to when Hae Min Lee was killed, not to accept the State's proposed timeline and craft an alibi accordingly. (E. 0141). Although the State did not specify the time of death in its correspondence with Gutierrez before the first trial, saying only that it was sometime "shortly after she would have left school," the majority notes

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[5] *See generally* 27 Am. Jur. Proof of Facts 2d 431 § 14 (2017) ("Since considerable time may have passed between the date a crime was committed and the date of the defendant's trial, it is not unusual for an alibi witness to be unable to recall specific details about what occurred on the earlier date. Indeed, members of the jury may be suspicious of a witness who claims to remember details of a sort that the members, themselves, know they would not remember so long after the fact. One way around this difficulty is to establish a routine that was invariably followed by the defendant. . . . Unfortunately, defense counsel will

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that prosecutors at the first trial narrowed the time of death during opening statement to 2:15 p.m. to 2:35 p.m. Based upon this, the majority reasoned that Gutierrez should have realized that this time frame "was going to be crux of the State's case, and therefore, an alibi covering this precise time frame was extremely important." (E. 0112).

Gutierrez simply pursued a different angle. As Judge Graeff explained, instead of embracing the State's proposed time of death and attempting to fashion for that narrow window an alibi that would have conflicted with what Syed told police, Gutierrez challenged the State's evidence on time of death and argued to the jury that the medical examiner could not confirm a time of death and that Deborah Warren — one of the State's own witnesses — reportedly saw the victim alive at 3:00 p.m. on the day of the murder. (E. 0141). This attack injected uncertainty into the State's timeline, extended the time when Hae Min Lee could have been missing but not dead, and expanded the roster of possible suspects beyond the one person whom witnesses said had asked the victim for a ride right after school. Thus,

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rarely be privileged to have available evidence of so apt a pattern of behavior as is illustrated in the proof.").

Gutierrez reasonably could have preferred to dispute the alleged time of death and develop a defense that "cast doubt on the whole of the State's case" rather than "focus[] too much on Syed's whereabouts right after school." (E. 0141-42). *See* ***Strickland***, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.").

Gutierrez's choice not to concentrate on Syed's location right after school is especially reasonable since Syed told members of his defense team, as memorialized in a memorandum in the defense file, that right after school he and Hae Min Lee "frequented the Best Buy parking lot next to Security Square Mall (this was their designated spot when school started)" and that "[o]n average they saw one another 4,5,6 times a week and . . . [s]ince Hae was responsible for picking up her niece after school, they would have sex in the Best Buy parking lot close to the school after school," and that Hae would then "leave to get her niece." (E. 1232-33).[6]

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[6] Another internal defense memo from an interview between Syed's trials suggests that Syed himself connected the alleged location of the murder with the place he and Hae Min Lee would have sex: "Jay allegedly met him at the Best Buy parking lot around 3:30. So how did Adnan get into her car or have Hae meet him, kill Hae, pick her up drag her from the car to the trunk (how could he lift her??) between 2:15 and 3:30 with noone [sic] seeing him. *Where in the Best Buy parking lot did this* ***allege****dly take place?? If Jay said it*

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Since Syed never told his defense team he went to the public library, and given that where he told them he regularly was between the end of school and the start of track practice would place him with the victim at the very location he is alleged to have killed her, Gutierrez could reasonably have decided not to focus on Syed's precise location immediately after school and hence reasonably concluded that talking to a possible witness about that narrow time period was unnecessary. *See Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. . . . And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."); *Harrington*, 562 U.S. at 105 (holding that deferential review of trial counsel's performance is required because "[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client.").

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occurred on the side where they would have sex, Adnan would not then walk all the way to the phone booth (it is a long walk and Adnan does not like walking)." (E. 1225).

Fourth, Gutierrez could reasonably have concluded that talking to a witness who placed Syed at the public library was unnecessary because putting Syed at that location would have ironed out a wrinkle in the State's case that Gutierrez intended to exploit. A review of Gutierrez's notes and her approach at trial indicate that she had identified what she judged to be a weakness in the prosecution's case: it was unclear how Syed got into Lee's car the day she was killed. Two of the State's witnesses had told police they had seen Hae Min Lee by herself soon after school on the day she went missing. According to notes from an interview in late March 1999, Inez Butler, a school employee, told police she saw the victim at around 2:30 p.m. (E. 1261-62). Debbie Warren, a fellow student, also told police she saw the victim at around 3:00 p.m. "by herself" and that "she was inside the school near the gym." (E. 1259).

Gutierrez's notes confirmed she thought these facts created a wrinkle for the prosecution. Directly above where Gutierrez had written "Debbie Warren saw Hae at 3:00 pm," she wrote: "How did Adnan get in **Hae's car**."

(E. 1253 (emphasis in original)).[7] Thus, placing Syed at or near the public library, where students were picked up,[8] would have answered a gap in the State's case that Gutierrez intended to highlight.

Finally, Gutierrez reasonably could have decided that interviewing McClain was unnecessary because she reasonably believed that McClain was offering to falsify an alibi for Syed, that Syed was colluding with McClain to do so, or that the prosecution would use Syed's and McClain's communications with one another against Syed at trial. Especially in the presence of such risks, an attorney is entitled to avoid these dangers altogether. *See* ***Rogers*** *v. Zant*, 13 F.3d 384, 387 (11th Cir. 1994), *cert. denied*, 513 U.S. 899 (1994) ("By its nature, 'strategy' can include a decision not to investigate . . . [and] a lawyer can make a reasonable decision that no matter

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[7] By the time of his second trial, Syed himself apparently perceived this same problem in the prosecution's case. (E. 1225) ("Jay allegedly met him at the Best Buy parking lot around 3:30. *So how did Adnan get into her car or have Hae meet him*, kill Hae, pick her up drag her from the car to the trunk (how could he lift her??) between 2:15 and 3:30 with noone [sic] seeing him." (emphasis added)).

[8] The majority objected to this argument in part on the ground that the State had failed to provide a citation for the assertion that students were picked up from the public library. This was not a question at oral argument, but the State nevertheless regrets not specifying in its briefing that the private security officer who worked at the Woodlawn Public Library for several years (including 1999) testified at the second post-conviction hearing that "many" students were picked up from that location. (E. 1206).

what an investigation might produce, he [or she] wants to steer clear of a certain course.").

It is easy to see how a seasoned attorney like Gutierrez could read McClain's letters, starting with the letter dated March 1, 1999, as a thinly-veiled offer to manufacture a false alibi. In that letter, conspicuously devoid of details, McClain wrote, "I hope that you're not guilty and I hope to death that you have nothing to do with it. If so I will try my best to help you account for some of your unwitnessed, unaccountable lost time (2:15 - 8:00; Jan 13th)." (E. 1208-09). As Judge Graeff noted in dissent, in the post-conviction court's original decision, Judge Welch reached exactly that conclusion, finding that "trial counsel could have reasonably concluded that Ms. McClain was offering to lie in order to help [Syed] avoid conviction." (E. 0143).

McClain's second letter, purportedly written the morning after her first letter, contained warning signs that would have prompted an experienced criminal attorney to fear that her client was coordinating, either directly or indirectly, with McClain to falsify an alibi. *Cf. State v. Lloyd*, 48 Md. App. 535, 541 (1981) (recognizing that it is improper for defense counsel to call alibi witnesses when the attorney knows or is convinced that these witnesses will offer perjured testimony).

The majority correctly reported that the post-conviction court ultimately rejected this argument. It declined to acknowledge, however, that the court only did so after finding that the State had presented "quite a compelling theory," Memorandum Op. II at 17, and that "[w]hile the State's speculation is plausible, the State is essentially asking the Court to favor one conjecture and ignore other equally plausible speculations," *id.* at 19. In fact, the post-conviction court rejected the State's "plausible" and "compelling" theories only by making the exact same analytical mistakes the Court of Special Appeals made — that is, improperly applying the presumption in Syed's favor rather than the State's, and believing (again, on the basis of *Griffin's* warning against "retrospective sophistry") that it was impermissible to entertain possible reasons for Gutierrez's decision on a silent record when that is precisely what the Supreme Court has commanded reviewing courts to do. *See Cullen*, 563 U.S. at 196.

Moreover, Gutierrez's possible fears were not fanciful or idle speculation. As Judge Graeff observes, the record contains detective notes that indicate that Syed:

> WROTE A LETTER TO A GIRL TO
> TYPE UP WITH HIS ADDRESS ON IT
> BUT SHE GOT IT WRONG
> 101 EAST EAGER STREET
> ASIA? 12TH GRADE
> I GOT ONE, JUSTIN AGER GOT ONE

Adding to the salience of this fact, Judge Graeff noted the discrepancy between the address at the top of the March 2nd letter and the address referenced in the notes. (E. 0144).[9]

In the context of a Sixth Amendment claim, it is not the State's responsibility to prove that Syed and McClain did, in fact, conspire to falsify an alibi — or even to present evidence that "trial counsel may have believed the McClain alibi was fabricated." (E. 0148, n.12). Rather, consistent with *Cullen's* instruction "to affirmatively entertain the range of possible reasons" for a defense attorney's choices, it is enough that these concerns supply yet another possible reason why Gutierrez could reasonably have concluded that interviewing McClain was unnecessary. *See Harrington*, 562 U.S. at 105 (directing deferential review of counsel's performance because "[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client."); *see also* E. 0149, n.13 (Judge Graeff's dissent) (referencing assertions not contained in

[9] In a sworn affidavit signed by Ju'uan Gordon and submitted by Syed at the post-conviction hearing, Gordon confirmed that in an interview with police on April 9, 1999, he "recall[ed] telling police that Adnan talked about asking Asia to write a character letter" and indicated that he and "Justin" received such requests by letter. (E. 1280-81).

the record that McClain told classmates she would lie for Syed as illustrations of "the danger in a court finding that strategy decisions made by trial counsel were unreasonable, without any evidence regarding why those decisions were made").

C. Requiring Gutierrez to interview McClain is unjustifiable in this case given what counsel already knew and had already done.

To establish a constitutional duty to interview a potential alibi witness when the record is silent and even where reasonable explanations abound for why counsel found investigation unnecessary is to impose a blanket requirement that once counsel learns of a potential alibi witness, the attorney has a "duty to make some effort to interview" that witness. (E. 0113). The majority acknowledges that, by doing so, it mints a new rule without precedent in Maryland: "Our research has revealed no Maryland case that has addressed directly the issue of a defense counsel's failure to investigate a potential alibi witness in the context of an ineffective assistance of counsel claim." (E. 0098). Even if such a far-reaching obligation were defensible, this case would be an unusual setting in which to announce it.

To begin with, this is a case where counsel had a meaningful sense of what the potential witness would say and what value the proposed alibi could hold. Both the majority and the dissent agree that Gutierrez knew more than just the name and contact information of the putative witness.

According to notes in the defense file, as of July 1999, Gutierrez was aware that McClain reportedly saw Syed at the library between 2:15 and 3:15. *Compare* (E. 0113) *with* (E. 0138). Combined with McClain's original letters, Gutierrez understood the gist and basic contours of what McClain offered as a potential alibi witness: she could place Syed at the public library for a short time immediately after school on one particular day. This is ample information upon which an attorney can make reasoned decisions, accounting for the comparative strengths and weaknesses of the other defenses counsel is pursuing, on whether further investigation is warranted. Thus, to find deficient performance on the facts of this case would mean defense counsel must conduct interviews to gather additional details from possible alibi witnesses even when counsel already knows the basic substance, including time and location, of the alibi offered by that witness. That is a needless and bizarre burden that well exceeds the promise of the Sixth Amendment. *See Weaver v. State*, 114 P.3d 1039, 1043 (Mont. 2005).

Finding a Sixth Amendment violation in this of all cases is also unwarranted because, within a week of Syed's arrest, his original attorneys and investigators, according to a billing record in the defense file, (E. 1217), conducted *some* investigation of the Woodlawn Public Library — *i.e.*, at a minimum, driving the area of the high school, the victim's burial site, and the

public library, as well as interviewing the private security officer who worked at that library at the relevant time. Again, to find a constitutional obligation under these circumstances is to require Gutierrez to retread the public library angle that her predecessors had already preliminarily explored.

Lastly, it should be emphasized that, beyond developing and executing an alibi defense, Gutierrez pursued at trial six additional lines of attack, as cataloged by Judge Graeff. (E. 0140). The Supreme Court has cautioned that "*Strickland* does not guarantee perfect representation, only a reasonably competent attorney," adding that it should be hard to establish defective performance on the basis of a single, isolated error "when counsel's overall performance indicates active and capable advocacy." *Harrington v. Richter*, 562 U.S. 86, 110-111 (2011). Overall, then, this is an exquisitely unsuitable case in which to find defective performance: a seasoned defense attorney, with investigators and law clerks working alongside her, conducted a meticulous investigation and put on a robust, multifaceted defense.

II. SYED CANNOT ESTABLISH PREJUDICE IN THIS CASE

Under *Strickland*, to establish prejudice, a defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687. Syed has failed utterly to make that showing here. The majority's conclusion to the contrary is rooted

in the erroneous belief that Syed's whereabouts during a narrow frame of time was indispensable, or even important, to the jury's verdict. Thus, even though both the majority and the dissent agree that evidence of the precise time of death was weak and uncertain, the majority ruled that Gutierrez's failure to pursue a witness who could account for that short segment of time could have upended the jury's verdict, resulting in a trial that was unfair and unreliable. That approach is inconsistent with how prejudice must be analyzed under *Strickland* – especially here, where the State presented a wide range of direct and circumstantial evidence from students, teachers, law enforcement officers, and experts, which together proved beyond a reasonable doubt not only the technical elements of the crime, but also put before the jury a compelling account of Syed's motive, opportunity, and his telltale conduct after the murder.

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

Motive

- Both in conversations with friends and in her diary, Lee described Syed as possessive, jealous, and overprotective. (E. 0726-27, 1308, 1315, 1318).

- In her diary, Lee wrote that she felt compelled to keep her growing interest in Clinedinst a secret from Syed, concerned he would never forgive her. (E. 1343-44).

- During the week of the murder, Lee's relationship with Clinedinst became both sexually intimate and public at school. (E. 0232, 0266, 0327). Lee was strangled to death twelve days after her first date with a new person. (E. 0265).

- Jay Wilds testified that Syed told him he intended "to kill that bitch," referring to Hae Min Lee, because of how Lee was treating him. (E. 0343-44).

- Police recovered from Syed's bedroom a breakup note from Lee to Syed, on which he had written "I'm going to kill." (E. 0234-42, 1288).

Preparation

- Syed activated a brand new cellphone the day before Lee was killed. That night, Syed called her three times from the new phone — as well as Wilds. His first call the next morning was also to Wilds. (E. 0333-82).

- Syed left school to give his car and cellphone to his accomplice, Wilds, instructing him to await his call. (E. 0343-44).

- Syed was overheard asking Hae Min Lee for a ride after school, falsely claiming he needed a ride to get his car. (E. 0228, 0245).

Accomplice Testimony

- Wilds testified that Syed showed him Lee's dead body and confessed to strangling her – describing in detail his feelings about doing so – and that Wilds assisted Syed in digging a grave, burying Lee's body, and disposing of the shovels. (E. 0333-82).

- Wilds led police to Lee's car, which had been missing since the day of the murder. (E. 0333-82).

Corroboration

- Three separate witnesses, Kristi Vincent, Jennifer Pusateri, and Nisha Tanna, put Syed and Wilds together at three different locations at three separate times after school on the night of the

murder, each corroborating Wilds's testimony. (E. 0225-226, 0354-55, 0362, 0367-69, 0700-21).

- Pusateri also met Syed and Wilds at a parking lot on the night of the murder, and Wilds told Pusateri that Syed had strangled Lee that night. Pusateri first told this to police with her mother and attorney present. The fact that Lee had been strangled was not publicly known at the time. (E. 0692-97, 0731-32).

Forensics

- Syed's palm print was found on the back cover of a map book with the Leakin Park page ripped out, which was found inside Lee's car. (E. 0251-53, 0258-63).

- An anonymous caller told police to look at Syed and to talk to Syed's friend, Yasser Ali, because, according to the caller, Syed had discussed with Ali what Syed would do with Lee's car if Syed should ever harm her. (E. 0757.1).

- Syed called Ali two times the night of the murder from the cellphone Syed first activated the day before the murder. (E. 0274-78).

Deviations in Syed's Story

- Syed originally confirmed to police that he had asked Lee for a ride after school on the day of the murder (E. 0245), but then changed his story two weeks later when he spoke to a different officer and said he never needed or asked for a ride from Lee because he drove his own car to school. (E. 0249).

- Syed also originally told police that he went to track practice after last seeing Lee during the final class period of the day, then switched his story, telling a different detective a month later that he had no memory at all of the day his ex-girlfriend vanished. (E. 0247-48).

- Prior to Lee's disappearance, even after their break-up, Syed and Lee spoke multiple times a day. After Lee's disappearance, Syed

never once tried to contact her to find out where she was or if she was okay. (E. 0886-88).

Despite all this, the majority framed the evidence against Syed as a "strong circumstantial case." (E. 0121). The majority also ruled that "[t]he State's case was weakest when it came to the time theorized that Syed killed Hae." (E. 0122). In fixating on this facet of the case, the majority fails to engage and ultimately misunderstands the collection of evidence presented by the State and relied upon by the Post-Conviction Court to find there was no prejudice. *See* Memorandum Op. II at 23-26. For example, the majority states there was "no eyewitness testimony, video surveillance, or confession of the actual murder," but ignores Wilds' testimony that Syed confessed to strangling Hae and discussed the murder at length with him. (E. 0360). The majority claims there was "no forensic evidence linking Syed to the act of strangling Hae or putting Hae's body in the trunk of her car," but fails to acknowledge Syed's palm print found in the back of the car, (E. 0251-53, 0258-63), and the cellphone and celltower corroborating the testimony of the State's witnesses, (E. 0383-689).

In the face of overwhelming evidence of guilt — in a case where the record is silent on Gutierrez's decision that interviewing McClain was unnecessary, where reasonable explanations for that decision abound, where the gist of the alibi was known to counsel, where some investigation of the

location that such an alibi would involve was conducted, and where a thorough, vigorous defense was advanced by a well-resourced, experienced attorney with a team of assistants and investigators — to impose a duty to speak with McClain is to contrive an exceptional and unprecedented requirement with respect to alibi witnesses that elevates their importance, disregards the teachings of *Strickland* and *Cullen*, and improperly rewrites for an individual case a constitutional guarantee that is supposed to be applied the same in all cases.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the grant of relief to Syed by the Court of Special Appeals be reversed.

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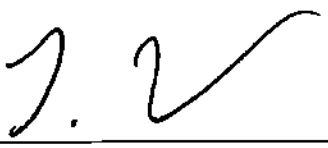
CERTIFICATION OF WORD COUNT AND

COMPLIANCE WITH MARYLAND RULES 8-112 and 2-201(f)

1. This Brief contains 12,219 words, excluding the parts of the Brief exempted from the word count by Maryland Rule 8-303 and 8-503.

2. This Brief complies with the font, spacing, and type size requirements stated in Maryland Rule 8-112.

3. I hereby certify that this Brief does not contain any restricted material.



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PERTINENT PROVISIONS

U.S. Constitution, Amendment 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 defense.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of September, 2018, a copy of this amended Brief was mailed, first-class, postage pre-paid, to C. Justin Brown, Esquire, Law Office of C. Justin Brown, 231 East Baltimore Street, Suite 1102, Baltimore, Maryland 21202.

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