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

Reply Brief of Petitioner/Cross-Respondent

BRIAN E. FROSH
Attorney General of Maryland

THIRUVENDRAN VIGNARAJAH
Special Assistant Attorney General

DLA Piper LLP (US)
100 Light Street, Suite 1350
Baltimore, Maryland 21202
(410) 580-3000 (O)
(410) 580-3001 (F)
thiru.vignarajah@dlapiper.com

Counsel for State of Maryland

October 23, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

QUESTIONS PRESENTED

(1) Whether the Court of Special Appeals erred 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.

(2) Whether the Court of Special Appeals drew itself into conflict with *Curtis v. State*, 284 Md. 132 (1978), when it found that Respondent waived his ineffective assistance of counsel claim based on trial counsel's failure to challenge cell-tower location data, where the claim implicated the fundamental right to effective counsel and was therefore subject to the statutory requirement of knowing and intelligent waiver.

INTRODUCTION

The State's submission contains the State's reply to the response of Respondent/Cross-Petitioner Adnan Syed ("Syed") relating to the question presented on Syed's Sixth Amendment alibi claim, as well as the State's response to Syed's cross-petition on the second question presented concerning Syed's Sixth Amendment cellphone claim. Because of the cross petitions and unusual procedural posture of the case, a brief overview of the organization of the State's responsive pleading is provided.

The State begins with a supplemental Statement of Facts, this time concerning Syed's attorney Cristina Gutierrez's pretrial preparation and vigorous challenge of the prosecution's cellphone evidence. Part I then addresses Syed's response regarding his Sixth Amendment alibi claim. Part II contains the State's response to Syed's Sixth Amendment cellphone petition.

SUMMARY OF ARGUMENT

With respect to Syed's alibi claim, the State respectfully submits that the majority erred in finding both defective performance and prejudice. This was an instance where an experienced attorney conducted extensive pretrial investigation, planned sophisticated lines of attack, and executed them at trial with zeal. No one disputes that the record is silent as to why Gutierrez failed to contact one putative alibi witness, Asia McClain. Yet, Syed's position is that this unexplained decision is alone enough to establish that Gutierrez was constitutionally inadequate.

Syed is wrong. A reviewing court must be able to evaluate the reasonableness of a decision by counsel, including a "decision that makes particular investigations unnecessary." But if the record is silent as to why a decision was made, Syed cannot meet this burden. This is not, as Syed claims, a new "draconian" rule proposed by the State. It is the inexorable result of the presumption of reasonableness in cases where the record is silent — it comes with a corresponding burden that the law imposes upon a defendant seeking to overturn a conviction and obtain a new trial. *Burt v. Titlow*, 571 U.S. 12, 23 (2013) ("It should go without saying that the absence of evidence cannot overcome the strong presumption that counsel's conduct [fell] within the range of reasonable professional assistance."). In many other cases where the record

contained no evidence of why counsel acted or failed to act, state and federal courts have applied this presumption exactly the same way.

Syed's answer only betrays his commitment to minting a new *per se* rule to which the presumption of reasonableness would not apply. As Judge Graeff observed in dissent, Syed ultimately seeks a "blanket assertion that it is unreasonable in every case for trial counsel to fail to contact a potential alibi witness identified by the defense." This finds no support in precedent, nor is this an appropriate case to establish such a rule. Particularly since, even if failing to contact a putative alibi witness was deficient performance, it could not have displaced the overwhelming evidence of Syed's guilt. Accordingly, this Court should reverse the majority's ruling granting Syed a new trial.

With respect to Syed's cellphone claim, the State respectfully maintains that the Court of Special Appeals' unanimous decision that waiver barred this claim is correct. Syed's contrary view is incompatible with the text, structure, and history of the Uniform Post-Conviction Procedure Act (UPPA); it goes beyond what the appellate courts of Maryland have ever permitted; and it is an indefensible application of *Curtis v. State*, 284 Md. 132 (1978), a case decided 40 years ago, which has been followed by two legislative constrictions of the enabling statute and has never once been applied the way Syed seeks. Consequently, this Court should affirm the lower court's ruling on waiver.

STATEMENT OF FACTS

The Court of Special Appeals denied Syed's cellphone claim on waiver grounds, obviating the need to address the merits. Nevertheless, to provide additional context for Gutierrez's preparations and performance at trial — and to supplement the abbreviated facts supplied by Syed's opening brief on the cellphone claim — the following section contains excerpts (without citations) from the State's briefing to the Court of Special Appeals, providing an abridged recitation of discovery, defense preparations, trial challenges, and post-conviction testimony related to the cellphone evidence presented against Syed:

A. Pretrial disclosure of cellphone evidence

> The State communicated to Gutierrez its intent to introduce Syed's cellular telephone records as business records on September 3, 1999, stating that the records "are available for inspection upon reasonable request." Later that month, the State advised that it expected "to have a witness from AT&T Wireless" but that the company "[had] not named its documents representative." On October 8, 1999, the State disclosed its intent to call Abe Waranowitz as an expert witness, and in a separate disclosure the same day provided defense counsel with a summary of an oral report from Waranowitz.
>
> Gutierrez's subsequent correspondence concerning these materials verifies her receipt of and detailed engagement with this body of evidence. For example, on October 20, 1999 (less than 2 weeks after the State's initial disclosures of Waranowitz), Gutierrez sent to the State a 3-page single-spaced letter noting deficits in the State's production and requesting additional information including, for example, "complete definitions of terms in Mr. Waranowitz's statement

as reported in your disclosure, including the terms 'triggers', 'edges', 'cell sites', 'signal strengths', 'fluctuations' and 'mound'." The letter also indicates that Gutierrez's team had been in direct contact with AT&T Wireless, stating that, "[a]fter expending much time and energy," the defense was able to contact Waranowitz's supervisor; Gutierrez also complained that she had not received materials to which she believed she was entitled. Two days later, on October 22, 1999, Gutierrez again wrote to prosecutors requesting an opportunity to view "all evidence collected in connection with this case." An internal defense memorandum dated October 28, 1999, as well as further correspondence in November 1999, from Gutierrez to the State confirm that she and members of her team met with police and prosecutors on multiple occasions, including no less than two visits to the evidence control unit along with a meeting on Oct. 28, 1999, when Gutierrez had an opportunity to review the State's file.

Also contained in Gutierrez's file is a 4-page table, dated November 2, 1999, compiling and commenting on records of Syed's cellphone use on January 13, 1999; each page is marked "Attorney/Client Privilege & Work Product." The document, which lists call times, dialed numbers, possible names associated with each number, call duration, cell site codes and corresponding locations, synthesizes information from Syed's cellphone records and the State's disclosure relating to Waranowitz's oral statement, demonstrating that Gutierrez and her team were actively scrutinizing this evidence.

* * * * *

B. Presentation and challenge of cellphone evidence at trial

[A] number of witnesses told the jury about calls to and from Syed on the day of the murder, emphasizing different facets of Syed's cellphone records — which yielded information about the (1) time, (2) duration, (3) sequence, (4) dialed numbers, and (5) cell site location associated with calls appearing on Syed's cellphone records for January 13, 1999.

In sum, as the State said in its opening brief, "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."

Consistent with her focused attention on the cellphone evidence in advance of trial, Gutierrez also vigorously challenged the State's expert witness with a bevy of objections and requests for limiting instructions during direct examination, followed by a broad-gauged attack during cross examination. Gutierrez's approach throughout the expert's testimony, on direct and cross-examination, reflected serious and thorough engagement with a novel forensic field. She told the court on the second day of Waranowitz's testimony that she had gone back and reviewed the tape of direct examination before beginning her cross. And, at one point, she advised the court that she would need more time than she originally anticipated, saying, "[i]t's just because of this witness I know that I'm not rushing it."

C. Conflicting expert interpretations at post-conviction hearing

The question that was the subject of expert dispute at the post-conviction hearing is whether the term "location" in the technical legend on AT&T fax cover sheets referenced data in the "Location1" column on the full subscriber activity report or whether it applies to cell site data in the "Cell Site" column on the condensed report. The State's expert witness, Special Agent Chad Fitzgerald (FBI), testified that the term "location" referred to data in the "Location1" column, which contained what he identified as "switch" data, *i.e.*, a broad regional designation for an area like Washington-Baltimore. Syed's expert insisted that "location" referred to the individual cell tower codes in the "cell site" column on the condensed report. The diagrams on the following page reflect their divergent views.

State's Expert's Interpretation

How to read "Subscriber Activity" Reports

Please note: All call times are recorded in Eastern Standard time

Type codes are defined as the following:

Int = Outgoing long distance call
CFO = Call forwarding
Inc = Incoming Call
Lcl = Outgoing local call
Sp = Special Feature

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

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

Blacked out areas on this report (if any) are cell site locations which need a court order signed by a judge in order for us to provide.

SUBSCRIBER ACTIVITY

Subscriber Number: 4432539023 Printed: Wed Feb 17 1999 11:08:12 AM

	Auth	MtoN	Call Date	Call Time	Type	Cov	Dial.#/Local	Duration	EndOfCall	ICell	LCell	Location1	TripType	Feature
1	Y		02/16/1999	08:54:41 PM	Inc	N		00:00:00:06	08:54:49 PM	[redacted]		DC 4196Washington2-B		
2	Y		02/16/1999	08:54:43 PM	Sp	N	#4432539023	00:00:00:06	08:54:49 PM			DC 4196Washington2-B		CFO
3	Y		02/16/1999	07:17:24 PM	Inc	N		00:00:00:06	07:17:30 PM			DC 4196Washington2-B		
4	Y		02/16/1999	07:17:24 PM	Sp	N	#4432539023	00:00:00:06	07:17:30 PM			DC 4196Washington2-B		CFO
5	Y		02/16/1999	02:46:32 PM	Lcl	N	410-788-8495	00:00:00:40	02:47:12 PM			DC 4196Washington2-B		

Syed's Expert's Interpretation

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

	Dialed No.	Call Time HR:MN:SC	Call Duration HR:MN:SC	Call Site
1	4106035244	11:27:13 PM	00:00:02	L608C
2	4109229704	11:07:36 PM	00:18:46	L651C
3	3016038657	11:05:57 PM	00:00:36	L651C
4	4109229704	09:41:35 PM	00:03:18	L651C
5	4432539023	09:32:36 PM	00:00:28	BLTM2

Because the Court of Special Appeals denied Syed's Sixth Amendment cellphone claim on waiver grounds, it did not consider the merits. The State respectfully submits that the waiver ruling was correct and should be left undisturbed. The State provides factual background on this claim principally to ensure adequate context for this Court's review, touching upon the merits only briefly below.

ARGUMENT

I.

A. Requiring Syed to overcome presumption of reasonableness is neither a new nor unreasonable rule.

The Court of Special Appeals candidly acknowledged, and Syed does not now dispute, that the record is silent as to why Gutierrez did not pursue McClain. (E. 0107) ("[T]here 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."). Faced with no record on why Gutierrez did not contact a supposed alibi witness, the majority failed to heed the presumption of reasonableness established by *Strickland v. Washington,* 466 U.S. 668 (1984). In cases where counsel does not testify, as Judge Graeff explained below, it is difficult (but not impossible) to overcome the presumption accorded to decisions by counsel. (E. 0147) ("[A]bsence of testimony by trial counsel makes it difficult for Syed to meet his burden of showing deficient

performance."). In cases where the record is silent, whatever the reason, the Supreme Court has held that the strong presumption of competence "cannot" be overridden. *See Burt*, 571 U.S. at 23 ("It should go without saying that the absence of evidence cannot overcome the strong presumption that counsel's conduct [fell] within the range of reasonable professional assistance.").

Syed claims that denying relief based upon the presumption of reasonableness where the record is indisputably silent imposes a new and unfair requirement, particularly since Gutierrez is deceased. *See* Brief of Respondent at 16 ("The State's proposed rule is contrary to existing law and fundamentally flawed in several respects."); *id.* at 31 ("Relief on those [post-conviction] claims does not, and should not, depend on whether counsel happens to be alive and available to testify.").

The requirement Syed contests is neither novel nor unreasonable. First, it should be noted that, as Judge Graeff's dissent and other cases make clear, the death of counsel — or the absence of testimony from defense counsel at a post-conviction hearing — does not preclude a Sixth Amendment petitioner from satisfying his or her burden. Those petitioners can marshal evidence, for example, of why an attorney acted a certain way from the original trial court record. *See, e.g., Bryant v. Scott*, 28 F.3d 1411, 1418, 1419 n.3 (5th Cir. 1994) (finding deficient performance where counsel stated on the original trial record

that he "would have *loved* to have had the [alibi] evidence" but felt he did not have enough time to pursue it) (emphasis added); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (finding deficient performance where defense counsel told the trial judge on the record that he had not requested discovery because he was under the impression "that it was the State's obligation to inform him of its case against his client"); *Cullen v. Pinholster*, 563 U.S. 170, 230 (2011) (Sotomayor, J., dissenting) ("The majority's explanation for counsel's conduct contradicts the best available evidence of counsel's actions: [counsel's] frank, contemporaneous statement to the trial judge that he 'had not prepared any evidence by way of mitigation.'").[1]

---

[1] This is further confirmed by cases cited by Syed, *see* Brief of Respondent at 29-30, where a record was developed based upon the original trial transcript even where counsel was deceased or had not testified. *See Ex parte Love*, 468 S.W.2d 836, 836-37 (Tex. Crim. App. 1971) (finding deficient performance where the trial record showed that counsel, deceased by the time of the habeas proceeding, had not "discuss[ed] the facts of the case with petitioner, as he said he was busy trying to get probation for [a co-defendant]"); *Towns v. Smith*, 395 F.3d 251 (6th Cir. 2005) (finding deficient performance for failing to interview an exculpatory witness where the trial record showed that defense counsel "insisted" on an opportunity to speak to the witness, "explicitly stated to the trial judge that 'I have to speak with him first'", but then returned to trial the next day without doing so).

In two other cases cited by Syed, *see* Brief of Respondent at 29-30, a preliminary showing without counsel's testimony was declared enough only to earn the defendant an evidentiary hearing, *i.e.*, an opportunity to make a full record; it was not deemed sufficient to find a Sixth Amendment violation or grant a new trial. *See Powers v. United States*, 446 F.2d 22, 24 (5th Cir. 1971); *Ex parte Love*, 468 S.W.2d 836, 836-37 (Tex. Crim. App. 1971).

Thus, the results of requiring a record to overcome the presumption of reasonableness are not as capricious or vexing as Syed contends. Moreover, as Judge Graeff references in her dissent, equities aside, the death of counsel simply does not alter the obligations of a petitioner seeking a new trial. *See Walker v. State,* 194 So.3d 253, 297 (Ala. Crim. App. 2015) ("[T]he death of an attorney did not relieve postconviction counsel of satisfying the *Strickland* test when raising claim of ineffective assistance of counsel.").

Syed claims that denying relief where the record is silent is inconsistent with "existing law." Brief of Respondent at 16. On the contrary, Supreme Court precedent requires exactly that. In *Burt*, 571 U.S. at 22-23, the Supreme Court found "troubling" the Sixth Circuit's conclusion that counsel was ineffective because the record contained "no evidence that he gave constitutionally adequate advice on whether to withdraw [a] guilty plea." The Court then made clear the proper result in a case where the record is silent:

> We have said that counsel should be strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment, and that the burden to show that counsel's performance was deficient rests squarely on the defendant. The Sixth Circuit turned that presumption of effectiveness on its head. It should go without saying that the absence of evidence cannot overcome the strong presumption that counsel's conduct [fell] within the range of reasonable professional assistance.

Id. (internal citations and quotation marks omitted).

Numerous courts, before and after *Burt*, have similarly held. *See, e.g.*, *Jones v. State*, 500 S.W.3d 106, 114 (Tex. Crim. App. 2016) ("When the record is silent on the motivations underlying counsel's tactical decisions, the appellate usually cannot overcome the strong presumption that counsel's conduct was reasonable."); *see also Williams v. Head*, 185 F.3d 1223, 1227-28 (11th Cir. 1999); *Henry v. Dave*, No. 4:07-CV-15424, 2010 WL 4339501; *Sallahdin v. Mullin*, 380 F.3d 122 (10th Cir. 2004); *Hughley v. State*, 330 Ga. App. 786 (2015); *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000); *and Broadnax v. State*, 130 So.3d 1232 (Ala. Crim. App. 2013).

Syed does not dispute this general proposition. Instead, Syed's strategy is to suggest that all these cases, because of the various contexts in which they arise, do not bear on how a court should analyze a Sixth Amendment challenge based upon a failure to contact a putative *alibi* witness. Brief of Respondent at 26 & 27, n.3. Specifically, Syed argues that the diverse range of judgments and decisions by counsel at issue in the State's cited cases — including a motion for a new trial (*Williams*), the decision not to cross examine a witness (*Jones*), failing to impeach a witness (*Henry*), failing to present mitigating evidence (*Sallahdin*), failing to call an expert (*Hughley*), failing to present a character witness at sentencing (*Chandler*), and even failing to investigate a potential alibi defense (*Broadnax*) — are all different in kind from the "failure to contact

a particular, identified alibi witness." Brief of Respondent at 26. Unlike all of these other decisions, Syed insists that Gutierrez's failure to pursue McClain has only "one side," *see id.* at 28, and hence falls outside the uniform precedent established by these cases that the presumption of reasonableness cannot be overcome where the record is silent.

Syed's creative reasoning rings hollow. For one thing, not one of these courts determined that the petitioner could not prevail on a silent record because of the nature of the decision counsel was accused of failing to properly make. The rationale of these courts was based upon the presumption of reasonableness and the obligation of a Sixth Amendment petitioner to overcome it. *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 by giving Williams the benefit of the doubt where it is unclear what [counsel] did or did not do[.]'").

Moreover, Syed is forced to draw specious distinctions to separate his case from the circumstances of *Broadnax*. According to Syed, *Broadnax* involved "counsel's failure to investigate one potential alibi defense — not the failure to contact a particular, identified alibi witness." Brief of Respondent

at 26. Syed does not explain why this distinction matters. Nor does Syed elaborate on why the former would be subject to the harsh outcome of denying relief where the record is silent whereas the latter would not. Syed further sought to distinguish *Broadnax* on the grounds that the alibi in question in *Broadnax* "directly contradict[ed] the alibi defense presented at [Broadnax's] trial" and was "inconsistent with what Broadnax told trial counsel." *Id.* But, these are also facets of the case at bar. Like *Broadnax*, claiming Syed inexplicably departed from his general routine and visited the public library would have been at odds with the alibi Gutierrez in fact presented that Syed went from school to track practice to the mosque. (E. 0140, n.9 (Judge Graeff outlining how Gutierrez presented Syed's school-track-mosque alibi during direct and cross examination and in opening and closing statements)). Similarly, insisting that Syed was at the public library shortly after school was not what Syed told either his defense counsel or police. Syed disputes the extent to which the public library alibi is incongruous with what he told police and his attorneys and with the alibi Gutierrez presented at trial. But those assessments — how much a particular defense strains credulity or fits with other facts — are exactly the kind of judgment properly left to the province of seasoned counsel, not to be second-guessed years later by reviewing courts. *Strickland*, 466 U.S. at 681 ("[A]dvocacy is an art and not a science.").

Ultimately, Syed's endeavor to distinguish the alleged failures in prior cases from the failure to contact a possible alibi witness only reveals what Syed actually seeks: a new *per se* rule that finds deficient performance, even on a silent record, when counsel fails to contact a potential alibi witness, no matter the circumstances, no matter what reasons counsel may have had for her decision. Syed's proposed rule, as explained below, finds no support in precedent, conflicts with recent Supreme Court jurisprudence, and is far broader than Syed claims.

B. Syed asks Maryland courts to adopt a rule that counsel must contact any potential alibi witness identified by a defendant.

Syed explicitly endorses creating a new requirement that, "once a defendant identifies potential alibi witnesses, defense counsel has the duty to make some effort to contact them to ascertain whether their testimony would aid the defense." Brief of Respondent at 21 (quoting the majority's decision, E. 0105 (internal quotation marks and citations omitted)). Syed provides no explanation for why this is necessary, as Judge Graeff notes, when the thrust of the witness's account is already known to counsel. Syed permits no exceptions to this categorical rule, even where the putative alibi witness's known account seemingly conflicts with the account Syed has given privately to defense counsel and publicly to police. And Syed offers no limiting principle to confine this newfound obligation to putative alibi witnesses.

Syed asserts that his proposed *per se* rule is rooted in *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986): "The Supreme Court has long recognized pre-trial investigation as a crucial prerequisite to competent representation." *See* Brief of Respondent at 23.

But to justify a blanket obligation to investigate any potential alibi witness identified by a criminal defendant, no matter what, Syed radically misreads *Kimmelman*. All that *Kimmelman* established is that defense counsel must conduct "*some* investigation into the prosecution's case and into various defense strategies." 477 U.S. at 384 (emphasis added). Indeed, the deficits in counsel's performance in *Kimmelman* were conspicuous: "Counsel was unapprised of the search and seizure because he had conducted no pretrial discovery. Counsel's failure to request discovery, again, was not based on 'strategy,' but on counsel's mistaken beliefs that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense[.]" *Id.* at 385. The Court explained that the case presented a "total failure to conduct pre-trial discovery" and that counsel's justifications for this failure "betray a startling ignorance of the law." *Id.* at 385, 386.

Thus, under *Kimmelman*, failing to perform *any* investigation constitutes defective performance. The difference between a minimum threshold demanding some pretrial investigation — which Gutierrez

indisputably surpassed — and a new requirement to contact all putative alibi witnesses is the difference between constitutionally competent representation and something more closely resembling "perfect advocacy," which the Supreme Court has repeatedly emphasized the Constitution does not and cannot assure. *See generally Maryland v.* ***Kulbicki,*** 136 S. Ct. 2 (2015) (per curiam) ("The Court of Appeals demanded something close to 'perfect advocacy' — far more than the 'reasonable competence' the right to counsel guarantees." (quoting *Yarborough* v. *Gentry*, 540 U.S. 1, 8 (2003) (per curiam)).

Syed's proposed rule also conflicts with the reasoning in the Supreme Court's recent decision in *McCoy v. Louisiana*, which emphasizes that decisions about "what arguments to pursue" are the "lawyer's province." 138 S. Ct. 1500, 1508 (2018). In *McCoy*, the Court ruled that counsel was ineffective when he conceded his client's guilt in a gambit to avoid the death penalty, disregarding his client's wishes to maintain his innocence. But the majority distinguished between certain fundamental decisions such as whether to admit guilt, on the one hand, and strategic decisions about how to mount a defense, on the other. The former are objectives that the client is entitled to dictate; the latter are the "province" of counsel:

> Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. Some decisions,

> however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal.

McCoy, 138 S. Ct. at 1508 (citations and internal quotation marks omitted).

The blanket *per se* rule Syed seeks is what *McCoy* confers upon certain fundamental decisions that the defendant is entitled to make: the requirement is absolute and inflexible and applies no matter what countervailing reasons counsel may have had. Conversely, if counsel is entitled to decide "what arguments to pursue," counsel must also be allowed to determine how and to what extent to investigate them. *See Cullen*, 563 U.S. at 195 ("*Strickland* itself rejected the notion that the same investigation will be required in every case). To be sure, defense counsel must do *some* pretrial investigation under *Kimmelman*. *Cf. Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform *basic* research on that point is a quintessential example of unreasonable performance under *Strickland*." (emphasis added)). But without Syed's strained reading of *Kimmelman* requiring every lead to be chased equally, it becomes clear that the prerogative to determine what arguments to pursue is also the prerogative to decide how best to investigate them—so long as "some investigation" is conducted.

Moreover, Syed's alibi-witness rule is particularly indefensible on the facts of this case. As the State argued in its opening brief and as Judge Graeff noted in her dissent, (E. 0138, E. 0145), Syed's counsel already had some sense of what McClain could offer in terms of an alibi, understanding that McClain was willing to place Syed at the public library for a short time following school on the day in question. That is more than enough for a seasoned attorney to decline this defense angle in favor of an alibi that, *inter alia*, (a) covers the entire evening based upon Syed's habit and routine, (b) does not entail what *jurors* could find to be a deviation from Syed's routine, and (c) comports with rather than contradicts what Syed has already told police and counsel. *Cf. Harrington v. Richter*, 562 U.S. 86, 109 (2011) (cautioning that courts should not "insist counsel confirm every aspect of the strategic basis for his or her actions" because "[t]here is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect" (citations and internal quotation marks omitted)).

Moreover, Syed's original attorneys had preliminarily explored the Woodlawn Public library in the early days of the investigation, driving the area and speaking to the security officer who worked there at the time Hae Min Lee went missing. Syed baldly answers that this is not enough, that Gutierrez could not make a judgment about what defense to pursue without doing more.

See Brief of Respondent at 35-36. In so doing, Syed admits that the constitutional obligation he seeks to establish is not one that requires "some investigation," but is a requirement that can only be satisfied in one way: by speaking to the potential witness. Such a specific and inflexible rule finds no support in the Supreme Court's guidance on the obligations of counsel to investigate. As the Court said in *Cullen*, "*Strickland* itself rejected the notion that the same investigation will be required in every case." 563 U.S. at 195.

Finally, there is a subtle bait-and-switch feature of Syed's argument that betrays what a significant obligation the Syed's new rule would impose. Gutierrez's defective ***performance*** was, according to Syed, her failure to make at least some contact with McClain, an obligation that Syed declares is modest and insists comes at no cost and carries no risk. But, the *prejudice* Syed alleges is the product not of merely failing to contact McClain, but rather of Gutierrez's failure to pursue the McClain alibi strategy at trial, which is a far more consequential and perilous tactical decision.

Syed's framing of the rule he asks this Court to adopt is therefore misleading: it begins with a "modest" duty to investigate a witness but then presents prejudice based upon the more complex decision to pursue at trial a particular alibi defense rather than another. The proper Sixth Amendment analysis does not allow an assertion of defective performance and then an

assessment of prejudice based upon a different error. It requires a correspondence between the alleged error by counsel and the alleged error that is the predicate of the supposed prejudice. *See, e.g., Weaver v. Massachusetts*, 137 S.Ct. 1899, 1910 (2017) ("[T]he defendant must show that the attorney's error . . . prejudiced the defense."); *Maslonka v. Hoffner*, 900 F.3d 269, 273-74 (6th Cir. 2018) (stating that a defendant must show that "this deficiency prejudiced him"); *Thomas v. Vannoy*, 898 F.3d 561, 572 (5th Cir. 2018) (same); *Hooper v. Garraghty*, 845 F.2d 471, 475 (4th Cir. 1988) (same).

This sleight of hand allows Syed to minimize the burden of contacting McClain before trial rather than acknowledging the significant burden and risks of actually calling McClain at trial. This is important because it suggests that the failure Syed needs to establish as constitutional error is not (a) the failure to contact a single potential alibi witness in the middle of an otherwise thorough investigation, but rather (b) the decision not to pursue an alibi defense predicated on that witness and to present a different alibi defense altogether. After all, *that* decision — to pursue one alibi defense over another — is the one upon which Syed's prejudice analysis is predicated. But *that* decision is also the kind of tactical judgment that seasoned counsel is fully entitled to make and that neither Syed nor the majority has even thought to challenge or second guess.

Put simply, the constitutional rule the majority has adopted for Maryland finds no support in precedent; invades the traditional province of counsel as to what arguments to pursue and how to investigate them; and in practice imputes the full prejudice of a decision about what defense to pursue at trial to the modest decision of whether to contact a witness.

C. *Cullen* not only permits, but requires, courts to affirmatively consider the "range of possible reasons" for defense counsel's decision, especially when record is silent.

Syed refuses to accept the clear holding of the Supreme Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011). In *Cullen*, the Court considered whether defense counsel's failure to "pursue[] and present[] additional evidence" concerning a capital defendant's schooling, family background, and health history was ineffective assistance of counsel. The Court of Appeals for the Ninth Circuit originally granted habeas relief and rejected conceivable justifications for defense counsel's actions identified by the dissent as "fabricat[ing] an excuse that the attorneys themselves could not conjure up." 590 F.3d, at 673.

The Supreme Court reversed, holding that under the "strong presumption of competence" of *Strickland*, the lower court was in fact "required not simply to 'give [the] attorneys the benefit of the doubt,' but to affirmatively

entertain the range of possible 'reasons [the defendant's] counsel may have had for proceeding as they did." *Cullen*, 563 U.S. at 196.[2]

Demonstrating how to conduct the proper analysis under *Strickland*, the Court entertained possible reasons for counsel's failure — the same ones the lower court dissent had proposed — and on the basis of those reasons rejected petitioner's Sixth Amendment claim, even though they were not the reasons counsel himself gave for his failure.

Thus, the very argument Syed now presses — that it is improper to entertain possible explanations that counsel did not give at the time — has been expressly rejected by *Cullen*. This was no inadvertency or accident. Justice Sotomayor, in dissent, argued that the majority had erred in positing explanations for counsel's decision that the attorney did not necessarily have. This position did not prevail and, hence, is not the governing law. In fact, Justice Sotomayor's exact objection was to *substituting* an explanation for the attorney's inaction when there is record evidence of the *actual* reason for the course counsel took:

> The majority surmises that counsel decided on a strategy to get the prosecution's aggravation witnesses excluded for lack of notice, and if that failed, to put on Pinholster's mother. This is the sort of post hoc rationalization for counsel's decisionmaking that contradicts the available evidence of counsel's actions that courts

[2] Syed correctly notes that *Cullen* came before the Court in the posture of a federal habeas case. No part of the *Strickland* analysis, however, was framed in this context, either by the majority or dissent.

> cannot indulge. The majority's explanation for counsel's conduct contradicts the best available evidence of counsel's actions: [counsel's] frank, contemporaneous statement to the trial judge that he 'had not prepared any evidence by way of mitigation.'

563 U.S. at 230 (Sotomayor, J., dissenting) (citations and some internal quotation marks omitted).[3]

Thus, *Cullen* could be fairly interpreted to mean that reviewing courts are required to "affirmatively entertain" possible explanations for counsel's decision not just where, as here, the record is silent as to counsel's rationale, but also in cases where counsel's reason for acting is known. In both scenarios, so long as there is a conceivable reasonable explanation, a defendant's Sixth Amendment claim must be denied.

---

[3] The *Cullen* dissent's position resembles that of *Griffin v. Warden, Maryland Corr. Adjustment Ctr.*, 970 F.2d 1355 (4th Cir. 1992). In *Griffin*, the Fourth Circuit objected to courts "conjur[ing] up tactical decisions an attorney could have made, but plainly did not." (E-0107). In that case, the post-conviction court devised and then substituted alternate, hypothetical reasons for counsel's decisions when the actual reason was established by trial counsel's own testimony. *See Griffin*, 970 F.2d at 1357 (finding ineffective assistance of counsel where trial counsel did not interview an alibi witness because he believed the case "was going to be pleaded"). As the State argued in its opening brief, *Griffin* is inapposite in cases where the record is silent as to the original rationale of trial counsel's decisions. It should be acknowledged — though the issue need not be resolved in this case — that, under *Cullen*, it is permissible to entertain and accept potential reasons even when an actual reason was provided (since Justice Sotomayor's dissent only garnered a total of three votes). But at a minimum, under *Cullen*, the Supreme Court has made clear that *Strickland* requires a court to consider possible explanations for defense counsel's decisions when the record is silent.

Accordingly, the exercise of considering possible explanations for Gutierrez's decision not to investigate McClain are not forbidden post hoc rationalizations, but rather are required by *Cullen* as part of properly applying *Strickland's* presumption of reasonableness.

D. Many possible explanations remain for why Gutierrez reasonably could have decided that contacting McClain was unnecessary.

In its opening brief, following the instruction of *Cullen*, the State presented in some detail a range of reasons why Gutierrez may have decided against pursuing McClain, any of which is sufficient to defeat Syed's Sixth Amendment claim. Brief of Petitioner at 34-46. As Judge Graeff also put it, "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). Syed's answers to this raft of possible reasons are ultimately unavailing.

(1) With respect to the inconsistency between McClain seeing Syed at the public library and Syed's account that he went from school to track practice to the mosque, Syed asserts that the high school and public library were close enough to one another that this discrepancy could have been artfully framed as only a "minor inconsistency." Brief of Respondent at 32-33. Syed does not dispute that the McClain alibi would in fact create an inconsistency; he does

not dispute that he never told anyone that he was at the public library, on that day or any other; he does not dispute that he was observed frequently at the school library and that witnesses had told police this; and he does not dispute that, as late as August 1999 (well after McClain had contacted him), he provided a detailed accounting to his counsel of his whereabouts, from one class to the next, (E. 1221-22), never mentioned the public library but said that "he believes he attended track practice on that day because he remembers informing his coach that he had to lead prayers on Thursday." (E. 1221). Under these circumstances, a seasoned defense attorney is surely entitled to make judgments about whether a possible inconsistency is trivial or significant, the magnitude of the risks it might carry at trial, and if investigation of a potentially treacherous defense angle is ultimately worthwhile. For the purposes of Sixth Amendment analysis, once it is acknowledged that there is an inconsistency, major or minor, between the alibi that McClain proposed and what Syed had told police and his own counsel, the decision that this particular investigation was unnecessary cannot be deemed outside the realm of reasonable professional assistance.

(2) With respect to a decision to favor an alibi based upon Syed's habit and routine rather than one premised on McClain, Syed no longer claims that this would have been an unreasonable choice. Syed claims instead that

Gutierrez did not, in fact, pursue an alibi by routine at trial.[4] First, it is unclear why that matters given that Gutierrez certainly set out to pursue that defense, providing to prosecutors notice of an alibi that was explicitly based upon Syed's regular practice: "These witnesses will be used to support the defendant's alibi as follows . . . These witnesses will testify 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 noticed." (E. 1283). Presumably, Gutierrez was entitled to favor, pursue, and materially develop one alibi strategy instead of another before trial, without being obligated to carry through with that plan, if her strategy during the course of trial changed. *Strickland,* 466 U.S. at 681 ("[A]dvocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment.").

---

[4] *See* Brief of Petitioner at 37, n.5 (quoting a treatise that explains that, when it comes to an alibi, "members of the jury may be suspicious of a witness who claims to remember details of a sort that the members, themselves, knew they would not" and that "[o]ne way around this difficulty is to establish a routine that was invariably followed by the defendant," but acknowledging that "defense counsel will rarely be privileged to have available evidence of so apt a pattern of behavior," 27 Am. Jur. Proof of Facts 2d 431 § 14 (2007)); *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1524 (11th Cir. 1985) ("Generally, habit evidence is highly persuasive as proof of conduct on a particular occasion, and its admission depends on the 'degree of regularity of the practice and its coincidence with the occasion.'" (quoting McCormick on Evidence, § 195 n.16)).

Moreover, as Judge Graeff's dissent noted, Gutierrez *did* in fact pursue this alibi defense at trial, through direct and cross examination, by calling witnesses including Syed's father for this purpose, and with references in opening and closing to Syed's regular attendance at track practice and in closing to his regular presence at mosque. (E. 1040, n.9). Judge Graeff acknowledged that, at trial, Gutierrez's overall focus was on "trying to cast doubt on the whole of the State's case." Electing not to emphasize her preferred alibi strategy at trial as much as Syed now believes Gutierrez should have is not a basis for concluding that the alibi strategy Gutierrez chose constituted an irredeemable tactical error. *See Harrington*, 562 U.S. at 109 ("[I]t sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates.").

(3) With respect to the State's contention that Gutierrez could validly have decided to focus on casting doubt on the prosecution's timeline rather that adopting it, Syed again does not question that this would have been a legitimate judgment. Syed asserts only that this "misses the point" because this decision could come only after talking with McClain. Brief of Respondent at 34. For the reasons discussed, *supra*, in Part I.B., Syed's retreat to this argument under *Kimmelman* that strategic judgments cannot be made without first investigating is sound only insofar as it requires *some*

investigation. Gutierrez had ample understanding of the prosecution's multi-faceted case to reasonably make the judgment that it was more important to challenge the whole of the State's case and to emphasize that the State could not pinpoint the time of death than to pursue a single witness and a narrow alibi whose value and viability depended on the very timeline that Gutierrez believed was infirm and intended to attack. As the Supreme Court said in *Harrington*, to "support a defense argument that the prosecution has not proved its case[,] it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates." 562 U.S. at 109.

(4) With respect to Gutierrez's possible decision to not give prosecutors a plausible answer to the question she jotted down in her notes, "How did Adnan get in Hae's Car?" (E. 1253) — a question Syed himself flagged for his defense team, (E. 1225) ("So how did Adnan get into her car or have Hae meet him") — Syed claims that because Inez Butler and Deborah Warren would "presumably" testify that they saw the victim alone, Gutierrez could still emphasize that no one saw Syed and the victim together after school. Brief of Respondent at 34. The problem remains that placing Syed at the public library could have ironed out the wrinkle Gutierrez (and Syed) had identified. Details aside, these are precisely the kind of fact-intensive judgments that experienced counsel must make. The State's point in raising these tactical questions, large

and small, is not to debate in hindsight which strategy was superior, but to "affirmatively entertain the range of possible reasons [the defendant's] counsel may have had for proceeding as they did." *Cullen*, 563 U.S. at 196 (citations and internal quotation mark omitted). The variety of possible reasons that could reasonably explain why Gutierrez preferred not to pursue a witness who placed Syed at the public library underscores why a court should not now declare that decision constitutional error.

(5) Finally, with respect to Gutierrez possibly deciding not to pursue McClain out of concern that McClain is offering to fabricate an alibi or that she and Syed are in contact with one another, Syed claims that two courts have rejected this and that, in any event, the best way to address this fear would have been to clear it up directly with McClain. First, it is one thing to say that *one* option when faced with a false alibi or possible collusion is to speak with the person in question; it is quite another to hold that interviewing that individual is constitutionally imperative and that failing to do so amounts to defective performance. Furthermore, Syed is wrong that the post-conviction court rejected the possibility that McClain was offering to lie. As a matter of fact, in its first decision, that court concluded that Gutierrez, upon reading McClain's letters, might have thought exactly that. Mem. Op. I at 12 ("[T]rial counsel could have reasonably concluded that Ms. McClain was offering to lie

in order to help Petitioner avoid conviction."). While the court did not reach the same conclusion in its second decision, on this issue, it stated instead: "While the State's speculation is plausible, the State is essentially asking the court to favor one conjecture and ignore other equally plausible speculations." Mem. Op. II at 19. Where it remains a plausible speculation that McClain was in fact lying, surely Gutierrez could have decided on that ground alone that further investigation of this proposed alibi was unnecessary. Moreover, as Judge Graeff points out in her dissent (E. 0148, n.12), it is not the State's obligation to present evidence that Gutierrez did in fact believe that McClain was lying; it is Syed's burden to overcome the presumption that Gutierrez made a reasonable decision not to pursue her.

As the Supreme Court made clear in *Cullen*, the exercise of considering potential reasons that would justify a decision by counsel is not only permissible; it is required. The Court so found even where, as Justice Sotomayor noted in dissent, there was record evidence of the actual reason for counsel's decision. Here, in a case where the record is altogether silent, this Court could — as Judge Graeff did, (E. 0148-49), following the teaching of *Burt* — reject Syed's Sixth Amendment claim without considering possible reasons for Gutierrez's decision, instead finding simply that Syed had not carried his burden to overcome the presumption of reasonableness. *See Burt*, 571 U.S. at

23 ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the range of reasonable professional assistance.'" (quoting *Strickland*, 466 U.S. at 689)). Alternatively, should this Court conclude that, per *Cullen*, it is appropriate to entertain the range of possible reasons for Gutierrez's decision, such reasons abound — and any one of them is sufficient to deny Syed's claim.

E. Syed has failed to establish prejudice in this case.

Courts are permitted to deny Sixth Amendment claims on either of *Strickland's* two prongs, defective performance or prejudice. The State respectfully submits that this is a case where reversal of the Court of Special Appeals' judgment is appropriate on both grounds.

On prejudice, the State has endeavored to convey the volume and variety of evidence presented at trial against Syed. The State has consistently characterized this evidence as "overwhelming," but it does not intend to accomplish with a word what only a thorough review of the trial court evidence can show about the strength of the case against Syed. Instead of reprising the lengthy catalog of proof adduced by the State with regard to forensics, motive and preparation, accomplice testimony and corroboration, and the telling deviations in Syed's accounts, the State respectfully refers this Court to Part II of its opening brief. Brief of Petitioner at 50-53.

Syed's rebuttal on the issue of prejudice has two primary components. First, Syed selects a few facts from the long menu and suggests that the State has either failed to provide record support for them or has overstated their importance. Brief of Respondent at 38, n.5 (raising three specific concerns regarding (a) lack of support for claim that Syed never called Hae Min Lee after she disappeared, (b) evidence that students knew Syed planned to get a ride from her, and (c) the significance of palm prints in the victim's car).

These quibbles with how specific pieces of evidence were framed by the State are ungrounded. Evidence, for example, that Syed never attempted to contact Hae Min Lee after she went missing can be found in the trial testimony of the victim's brother who explained that he answered the phone for their household and that to his knowledge Syed never called their home after she disappeared. (E. 0219). Similarly, Crystal Myers testified that Syed had told her that he did not have his car and that Hae Min Lee was supposed to take him to pick it up after school. (E. 0228). And although Syed had been in the victim's car, the forensic evidence of significance was Syed's palm print on the back cover of a map book with a page ripped out that included Leakin Park, the shallow burial site where Hae Min Lee's body was discovered. (E. 0251-53).

Part of why the State presents the case against Syed in the format it does is because, while certain witnesses and pieces of evidence are especially potent,

the strength of the case against Syed lies in the interlocking, corroborative character of so much of the evidence. When, for example, Jay Wilds testifies about a call to Nisha Tanna on the day of Hae Min Lee's murder, the testimony of Tanna, along with Syed's cellphone records, as well as the unusual character of the call itself combine to cement the persuasive character of each evidentiary brick. Similarly, certain diary entries by Hae Min Lee and the breakup note recovered from Syed's bedroom on which he has written "I'm going to kill" corroborate Wilds' testimony about what Syed told him as to why he intended to kill his ex-girlfriend. Likewise, Jennifer Pusateri's testimony about seeing Syed and Wilds together that night, what Wilds told her had happened, and the calls she made and received to Syed's reinforce how cogent the cellphone records and celltower analysis are — and those records and analysis, in turn, render Pusateri's testimony all the more credible. Illustrations like this from Syed's case are numerous. This is perhaps why an amicus brief filed by twenty-one Maryland State's Attorneys to the Court of Special Appeals represented that "the evidence put before the jury in [Syed's] case is stronger than what is routinely presented against criminal defendants who are tried and rightly convicted and whose convictions are affirmed all the time." Brief of Amicus Curaie of State's Attorneys at 2 (Md. Ct. Spec. App., Oct. 4, 2016).

Aside from challenging certain aspects of the State's evidence, Syed's other argument on prejudice is to assert the supposedly silver-bullet threat of the McClain alibi. The difficulty for Syed is that this defense is not aimed at the heart of the State's case. The State presented modest evidence as to when Hae Min Lee was killed because, as the State candidly acknowledged when Gutierrez inquired about it during discovery, the State was limited in its ability to specify time of death, saying only that the murder happened some time "shortly after [the victim] would have left school." Brief of Petitioner at 38. Syed rehearses the majority's contention that the State "implicitly conceded" the potency of McClain's testimony when it noted that the prosecution's proffered timeline could have been adjusted to account for McClain and still be compatible with the evidence at trial. Brief of Respondent at 38 n.6. This simply does not follow: the ease with which the State could have altered the theorized timeline shows only that the evidence of when precisely Lee was murdered was weak, which was in fact one of the vulnerabilities Gutierrez intended to exploit.

The State did not present single threads of evidence to be judged one by one, but stitched together a durable fabric that could not be unraveled by a single stray witness. In fact, witnesses called by Syed and the State sometimes presented testimony that did not fit neatly into the State's timeline. Deborah

Warren, for instance, told the jury that she saw the victim at about 3 p.m. near the high school gym. Likewise, Syed's father testified on behalf of the defense that he and his son drove to their mosque at approximately 7:30 p.m.

In complex criminal cases that unfold in the crucible of real life, modest gaps in memory and inconsistencies in time do not undermine the integrity and veracity of a jury's verdict. Juries are expected during deliberations to grapple with and ultimately reconcile tensions that inexorably arise in the course of trial. Hence, even if McClain had testified the way Syed anticipated, in the face of unusually formidable evidence, Syed cannot establish prejudice.

II.

The Court of Special Appeals declined to permit Syed to raise an ineffective assistance of counsel claim that he could have raised in his original post-conviction petition but failed to include. Syed filed other ineffective assistance claims when he previously sought post-conviction relief and had able counsel at every prior proceeding. Consequently, the Court of Special Appeals properly concluded that Syed's ineffective assistance claim alleging trial counsel's failure to challenge cellphone evidence had been waived. This Court should affirm that determination.[5]

---

[5] The State also argued in the Court of Special Appeals that "[t]he post-conviction court's decision to allow Syed to raise in an untimely filing a new ineffective assistance of counsel claim that had no connection to [Asia McClain] was an abuse of discretion" because it exceeded the Court of Special Appeals'

A. The Court of Special Appeals correctly ruled that Syed waived his latest ineffective assistance of counsel claim.

The Court of Special Appeals unanimously and correctly decided that Syed waived his ineffective assistance claim alleging a failure to challenge cellphone evidence because Syed had filed an earlier post-conviction petition containing Sixth Amendment claims but had failed to include this particular ground, which indisputably he could previously have raised. (E. 0069-0073).

Syed was seemingly aware of the potential waiver problem and preemptively claimed that there was a *Brady v. Maryland* (1963) violation that would excuse his belated filing. Pet'r's Reply to State's Consolidated Resp. at 9, n.4 (Oct. 13, 2015). No such *Brady* violation ever materialized.

Under the UPPA, there is a rebuttable presumption that a petitioner knowingly and intelligently waived his allegation of error, where petitioner could have raised the allegation before but failed to do so. Md. Code Ann.,

---

remand order. Brief of Appellant at 15 (Md. Ct. Spec. App., Feb. 27, 2017). The State argued that reopening the proceeding "in the interests of justice" was also an abuse of discretion, because "there was no new evidence, no change in law, no connection to the reason for the remand, and no excuse for why the claim was not raised earlier." *Id.* at 19. The Court of Special Appeals did not accept these arguments, finding that the post-conviction court did not abuse its discretion in making either determination. (E. 0045-46, E. 0052-53).

This Court need not reconsider these issues and can dispense with Syed's claim on waiver grounds alone. Nevertheless, the State respectfully contends — and incorporates by reference its prior arguments below — that the lower court should have found that the post-conviction court abused its discretion by reopening proceedings to consider a Sixth Amendment cellphone claim that was beyond the scope of the remand order and not "in the interests of justice."

Crim. Proc. § 7-106(b)(3). This restriction on new claims has been consistently applied by Maryland courts. Predating the modern statute, *Curtis*, 284 Md. 132 (1978), is a standalone case that authorized an ineffective assistance claim, even though the defendant could timely have raised the issue before but failed to do so. Because *Curtis* has never been applied beyond its original circumstances, and because it is materially distinguishable from Syed's case, *Curtis* does not and cannot help Syed overcome the challenge of waiver.

(1) The Court of Special Appeals rightly distinguished *Curtis*.

Curtis considered a defendant, convicted at trial and denied relief in his first post-conviction petition, who filed a second post-conviction petition raising for the first time ineffective assistance of counsel. *See* 284 Md. at 134. At each of these stages — trial, initial post-conviction petition, and second post-conviction petition — Curtis had legal representation, though ultimately he claimed ineffective assistance by all prior counsel. *See id.* This Court, some 40 years ago, permitted Curtis to proceed with his ineffective assistance claim even though he could have raised it earlier. There are four distinctions that separate *Curtis* from this case, which together make it clear that Syed cannot reasonably find support in *Curtis* for the purposes of avoiding waiver.

First, *Curtis* dealt with a total abandonment by counsel, as Curtis alleged failure of counsel "at the trial, on direct appeal, and at the first post

conviction proceeding." 284 Md. at 134. This constituted a categorical failure of all counsel, placing Curtis in a similar position to the defendant in *Johnson v. Zerbst*, 304 U.S. 458, 460 (1938), who lacked counsel altogether. This also renders *Curtis* distinguishable from the present case because Curtis (unlike Syed) had alleged, *inter alia*, ineffective assistance by post-conviction counsel. *See* 284 Md. at 134.

Second, the post-conviction court in *Curtis* accepted as true the fact that "[t]he issue of ineffective assistance of counsel . . . has never been raised by petitioner in any prior court case." 284 Md. at 135. While Curtis had raised no prior ineffective assistance claims, Syed filed several separate claims of ineffective assistance in his initial post-conviction petition. *See* Pet. for Post-Conviction Relief at 10-20 (Mar. 28, 2010). Conspicuously absent from Syed's original petition was the cellphone claim he later on added. *See Wyche v. State*, 53 Md. App. 403, 407 n.2 (1983) ("If an allegation concerning a fundamental right has been made and considered at a prior proceeding, a petitioner may not again raise that same allegation in a subsequent post conviction petition by assigning new reasons as to why the right had been violated."); *Pole v. Randolph*, 570 F.3d 922, 934-35 (7th Cir. 2009) ("[I]neffective assistance of counsel is a single ground for relief. . . . Thus, if a

petitioner fails to assert . . . a particular factual basis for the claim of ineffective assistance, that particular factual basis may be considered defaulted.").

Third, *Curtis* was decided when an unlimited number of post-conviction petitions could be filed, and *Curtis* itself dealt with a second such filing. *See* 284 Md. at 134. Since then, the General Assembly has pursued a deliberate legislative strategy of limiting the availability of post-conviction relief by restricting the number of such petitions to two in 1986 and then to one in 1995. *See Gray v. State*, 158 Md. App. 635, 645-46 (2004). In the face of this purposeful narrowing by the General Assembly, reviving *Curtis's* pre-amendment language would gut these amendments by returning our post-conviction procedures to effectively allow for unlimited petitions. As there is no on-the-record colloquy with a defendant at or after trial concerning his lawyer's decisions, a defendant could claim he only became aware of a potential ineffective counsel claim at some subsequent point. Such a rendering of *Curtis* would undermine the legislative intent of the post-*Curtis* amendments and create precisely the "chaotic" results feared by *Curtis*. 284 Md. at 149.

Fourth, the petitioner in *Curtis* was compelled to rely "entirely" on his counsel since he was "a layman with a seventh grade education and an I.Q. of 72" and "a chronic alcoholic who had suffered some brain damage as a result of extended drinking for nineteen (19) years." *Id.* at 136. By comparison, Syed

was a high school honors student when he was arrested for the murder of his ex-girlfriend. Pet. for Post-Conviction Relief at 3 (Mar. 28, 2010). Moreover, unlike Curtis, Syed evidently did not rely solely on his attorney to develop and execute a trial strategy. He brought specific strategic points to the attention of his trial counsel, some of which she adopted; exchanged numerous memos with his attorneys; and complained at sentencing about his counsel's failure to make an argument that he wanted to advance. (E. 0852, E. 0856). Moreover, Gutierrez's defense file contains numerous memoranda that reflect active and regular participation by Syed in preparing for trial. (E. 1223); (T. 6/6/00 at 3-5). Ultimately, Syed discharged Gutierrez on the grounds that she had not scheduled mitigating witnesses for sentencing or amended his motion for new trial, which Syed "ha[d] repeatedly asked" her to do. *See* Pet. for Post-Conviction Relief (May 28, 2010), Ex. 7. In this respect as well, then, Syed was in a far different position than Curtis.

(2) The Court of Special Appeals correctly declined to extend the "knowing and intelligent" standard beyond *Curtis*.

In *Curtis*, this Court explored the concept of "waiver" in what was then the Maryland Post Conviction Procedure Act[6] and concluded that the General

[6] The language regarding waiver in the Maryland Post Conviction Procedure Act, Art. 27, § 645A(c), as quoted in *Curtis*, 284 Md. at 138, is identical in pertinent part to the waiver language in the current form of the UPPA, Crim. Proc. § 7-106(b).

Assembly intended that the "intelligent and knowing" standard for waiver articulated therein would be applicable "only in those circumstances where the waiver concept of *Johnson v. Zerbst*" applied. 284 Md. at 149.[7] It would therefore apply only to claims encompassing "that narrow band of rights that courts have traditionally required an individual knowingly and intelligently relinquish or abandon in order to waive the right or claim." *State v. Rose*, 345 Md. 238, 245 (1997). In particular, these include the Sixth Amendment right to counsel, rights surrendered by a guilty plea, and the right to trial by jury. *See McElroy v. State*, 329 Md. 136, 140 n.1 (1993). Importantly, these are all situations that require a colloquy with the defendant in open court, where the defendant demonstrates the reasoning behind his waiver. *See Holmes v. State*, 401 Md. 429, 457-58, 458 n.11 (2007).

In *Holmes*, this Court directly considered the reach of *Curtis* and stated that "we held [in *Curtis*] that the intelligent and knowing waiver standard in Section 645A(c) was applicable only 'in those circumstances where the waiver concept of *Johnson v. Zerbst* and *Fay v. Noia* [is] applicable,' *i.e.*, situations which require a litany with the defendant." *Id.* at 457-58 (second alteration in

---

[7] *Johnson v. Zerbst*, 304 U.S. 458 (1938), is the seminal case requiring an intelligent waiver of the right to counsel, where the Supreme Court applied this high standard to a criminal defendant who was tried, convicted, and sentenced without the assistance of any legal counsel at all, not merely ineffective counsel. *Id.* at 460.

original). This colloquy must be on-the-record "so as to be available for appellate review." *Martinez v. State*, 309 Md. 124, 133 n.8 (1987) (quoting *Countess v. State*, 286 Md. 444, 454 (1979)); *see also In re Blessen H.*, 392 Md. 684, 699-700 (2006).

These considerations together make it clear that *Curtis* does not apply to a Sixth Amendment claim premised on a failure to investigate a witness.

(3) Syed's objections to the issue-ground distinction are without merit.

Syed's main objection to the Court of Special Appeals' ruling is the distinction that the Court has drawn between "issues" and "grounds." Syed claims this distinction is arbitrary and incompatible with the statute's focus on "allegations of error." Brief of Respondent at 41-46. The taxonomy set forth by the Court of Special Appeals is not arbitrary at all — it provides coherence and gives useful labels to how Maryland courts have consistently interpreted and applied the UPPA.

For example, in *Wyche v. State*, 53 Md. App. 403, 407 n.2 (1983) (emphasis added), the Court of Special Appeals has said: "If an allegation concerning a *fundamental right* has been made and considered at a prior proceeding, a petitioner may not again raise that same allegation in a subsequent post conviction petition by assigning *new reasons* as to why the

right had been violated, unless the court finds that those new reasons could not have been presented in the prior proceeding."

What *Wyche* described as the difference between a "right" and the "reasons" for how that right has been violated are the equivalent of "issues" and "grounds," respectively. Thus, the Court of Special Appeals held: "[T]he 'intelligent and knowing' requirement for waiving a fundamental right is limited to a failure to raise a claim of a violation of that right in a prior proceeding and does not extend to the grounds for such claim where the issue has been raised in a prior proceeding." (E. 0071.) Similarly, in *Arrington v. State*, 411 Md. 524, 545 (2009), this Court held that "a petitioner may not assert, in a post conviction proceeding reopened under the [UPPA], claims that could have been, but were not, raised in the original post conviction proceeding." The distinction, again, turns out to be between a broad claim (*i.e.*, a right or an issue) and a particular iteration of that claim (*i.e.*, a reason or ground). What the Court of Special Appeals accomplishes by articulating the issues-grounds distinction is to provide shared terms for what courts are already doing in practice — *i.e.*, precluding a petitioner from raising a specific version of a fundamental right well after statutory deadlines have passed. (E. 0069 (finding consonance among the rulings in *Wyche*, *Arrington*, and *Curtis* in limiting "intelligent and knowing" waiver requirement).

(4) UPPA's Legislative History Supports the Court of Special Appeals' Conclusion on Waiver.

When the UPPA was originally enacted in 1958, it imposed substantive limits on collateral litigation (*e.g.*, waiver provisions), but did not restrict when or how many post-conviction petitions could be filed. *See Arrington v. State*, 411 Md. 524, 548 (2009). That changed in 1986 when the General Assembly amended the law to bar the filing of more than two petitions for relief. *See Gray v. State*, 158 Md. App. 635, 645 (2004). Then again, effective October 1, 1995, the General Assembly:

- Reduced the number of petitions from two to one and authorized courts to reopen post-conviction proceedings when it is "in the interests of justice," *and*

- Imposed, for the first time, a ten-year statute of limitations for post-conviction petitions, absent "extraordinary cause."

Additional legislative history excavated by the Court of Special Appeals only further supports its position. This Court observed in *Alston v. State*, 425 Md. 326, 335 (2012), that the General Assembly amended the UPPA with the intention of permitting a petitioner to file *one* petition for post-conviction relief but "provide a safeguard for the occasional meritorious case." As the Court of Special Appeals documented, the Governor's Chief Legislative Officer testified before the Senate Judicial Proceedings Committee on Senate Bill 340, which became Ch. 110 (the operative UPPA provision):

> In [1986], the General Assembly capped the number of post conviction petitions to two. However, there is no apparent rationale for not limiting the defendant to one petition. Common sense dictates that the defendant should include all grounds for relief in one petition. The right to file a second post conviction petition simply affords . . . an unwarranted opportunity for delay.

Id. at 336. Furthermore, the Chairperson of the Governor's Commission on the Death Penalty, which drafted Senate Bill 340, testified on the Bill before the Senate Judicial Proceedings Committee:

> There simply is no need for routine second petitions — counsel can and should put all claims into a first petition. At the federal level, a defendant gets only one habeas corpus petition. . . .

Id. It follows that the General Assembly intended that a petitioner raise all claims cognizable under the UPPA in his ***original*** petition, not piecemeal in some limitless cascade of subsequent petitions. Extending *Curtis's* rule of a knowing and intelligent waiver from the issue (or right) of ineffective assistance of counsel to every ground (or basis) for such a claim would thwart the UPPA's legislative purpose, permitting petitioners to file ineffective assistance claims on novel grounds in perpetuity.

No one disputes that Syed's trial and post-conviction counsel had the fax cover sheet that would become the basis of Syed's claim. Accordingly, Syed could have raised the claim at an earlier time and, by virtue of failing to do so, procedurally waived that claim for post-conviction purposes. A contrary interpretation and application of the statutory scheme would be incompatible

with the text, context, and history of the UPPA, and it would ultimately countermand what that statute set out to accomplish.

B. Approving an exception to established procedural limits is especially unwarranted when no meritorious Sixth Amendment claim exists.

The record is replete with evidence that, just as with every aspect of Syed's defense, Gutierrez meticulously prepared, carefully developed, and skillfully executed a vigorous challenge to the State's cellphone evidence. Her strategy did not rely, however, on a disclaimer found on boilerplate fax cover sheets whose significance remains a bona fide subject of expert debate. In order to reach the startling conclusion that this was constitutional error, the post-conviction court had to commit several errors of its own — errors that this Court should not countenance or repeat.

For one thing, the post-conviction court drew false, superficial distinctions between the present case and the Supreme Court's controlling decision in *Maryland v.* ***Kulbicki,*** whose surface and substantive parallels to this case are unmistakable. Next, with respect to *Strickland's* first prong, the court simply failed to acknowledge, let alone account for, the candid disagreement among experts in this case. In addition, the post-conviction court disregarded the presumption of reasonableness to which Gutierrez's performance was entitled, which again cannot be overcome when the record (as here) is deafeningly silent. Finally, the post-conviction court contrived

prejudice only by overstating the role of cellphone evidence for incoming calls — which the presiding trial judge admitted only for corroboration — and by significantly understating the potent evidence marshaled against Syed at trial.

The Court of Special Appeals' decision on waiver recognized that procedural rules matter. They are not limits and guidelines that apply to most cases that can be ignored or discarded when they become inconvenient or unpopular. They ensure the integrity of outcomes; they promise that defendants and cases are treated the same; they provide finality and closure and shield victims and their families from endless appeals; and they discourage inefficient, incremental resolution of claims. These requirements govern all cases, and *State v. Adnan Syed* is no exception.

* * * * *

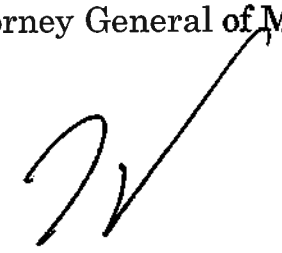
Enshrined in the Constitution is a guarantee that every criminal defendant will have effective representation. The importance of this bedrock commitment to the fairness of the criminal justice system cannot be overstated. But that safeguard is not an invitation to second guess tactical decisions and trial strategy, nor does it give license to devise artful new defenses from the comfortable perch of hindsight. The promise of the Sixth Amendment is sacrosanct, and there are no doubt defendants who are deprived of it. Adnan Syed, however, is not among them.

CONCLUSION

For the reasons set forth in the State's pleadings, this Court should reverse in part and affirm in part, ultimately denying both of Syed's Sixth Amendment claims and affirming his convictions.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland



THIRUVENDRAN VIGNARAJAH
Special Assistant Attorney General

DLA Piper LLP (US)
100 Light Street, Suite 1350
Baltimore, Maryland 21202
(410) 580-3000 (O)
(410) 580-3001 (F)
thiru.vignarajah@dlapiper.com

Counsel for State of Maryland

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH MARYLAND RULES 8-112 and 2-201(f)

1. This Brief contains 11,678 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.

THIRUVENDRAN VIGNARAJAH
Special Assistant Attorney General

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 23nd day of October, 2018, a copy of this 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.

THIRUVENDRAN VIGNARAJAH
Special Assistant Attorney General

DLA Piper LLP (US)
100 Light Street, Suite 1350
Baltimore, Maryland 21202
(410) 580-3000 (O)
(410) 580-3001 (F)
thiru.vignarajah@dlapiper.com

Counsel for State of Maryland