IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2013
No. 2519

ADNAN SYED,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

Appeal from the Circuit Court of Baltimore City
(The Honorable Martin P. Welch Presiding)

BRIEF OF APPELLANT ADNAN SYED

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STATEMENT OF THE CASE

Adnan Syed was charged in the Circuit Court for Baltimore City with first-degree murder, robbery, kidnapping, and false imprisonment. Syed's first trial ended in a mistrial. Syed was tried again and, on February 25, 2000, the jury returned a verdict of guilty on all counts.

On June 26, 2000, Judge Wanda Heard sentenced Syed to life in prison for murder, 30 years (consecutive) for kidnapping, and 10 years for robbery (concurrent to the kidnapping and consecutive to the murder). The trial court merged the false imprisonment and kidnapping counts.

Syed filed a timely appeal to the Court of Special Appeals, which was denied in an unreported opinion filed on March 19, 2003.

Syed then filed a timely Petition for Post-Conviction Relief, and Supplement, in the Circuit Court for Baltimore City. Judge Martin Welch conducted hearings on November 29, 2010, February 6, 2012, October 11, 2012, and October 25, 2012. Judge Welch issued an opinion denying the post-conviction relief on December 30, 2013.

On January 27, 2014, Syed filed a timely Application for Leave to Appeal the Denial of Post-Conviction Relief in this Court, and he filed a Supplement on January 20, 2015. He also filed a Motion for Leave to Supplement, which is currently pending before this Court. This Court granted Syed's Application for Leave to Appeal on February 6, 2015, and referred the open Motion for Leave to Supplement to the Panel.

QUESTIONS PRESENTED

I. Was Appellant's trial counsel constitutionally ineffective when she failed to investigate a potential alibi witness, then told Appellant that "nothing came of" the alibi witness?

II. Was Appellant's trial counsel constitutionally ineffective when Appellant asked her to seek a plea offer, but counsel failed to do so, and counsel falsely reported back to Appellant that the State refused to tender an offer?

STATEMENT OF THE FACTS

The murder of Hae Min Lee, a Woodlawn High School student who disappeared on January 13, 1999, initially confounded investigators. There were no witnesses. There

was no forensic evidence of any significance. The body was not found until nearly a month later, in Leakin Park, Baltimore.

As police investigated, they initially focused on Jay Wilds, a fellow Woodlawn student. Upon being called in for questioning, Wilds told police numerous different stories, alternately inculpating and exculpating himself. Eventually, Wilds settled on a version of his story that led to murder charges against Lee's ex-boyfriend, Adnan Syed.

a. The First Pre-Trial Phase

Syed was arrested on February 28, 1999. He was 17 years old and had no criminal history. Bail was denied, and he was detained at the Baltimore City Detention Center. Shortly thereafter, Syed received two letters from a Woodlawn classmate named Asia McClain. Those letters are at the center of this appeal. McClain wrote to Syed that she remembered seeing him in the library the day Lee went missing. Although Syed and McClain were not particularly close, they knew each other from the high school honors classes they both took. PC.[1] 10/25/12 at 23–24.

In the first letter, dated March 1, 1999, the day after Syed's arrest, McClain, wrote "I'm not sure if you remember talking to me in the library on Jan. 13th, but I remember chatting with you." PC. 10/25/12 Def.'s Ex. 7 (admitted at 26). She went on to state that she took it upon herself to visit his family on March 1, before writing Syed, to tell them that she was with Syed when the murder allegedly took place. *Id.* She explained: "I will try my best to help you account for some of your unwitnessed, unaccountable lost time (2:15–8:00; Jan. 13th). The police have not been notified yet to my knowledge. Maybe it will give your side of the story a . . . head start. I hope that you appreciate this, seeing as though I would like to stay out of this whole thing." *Id.*

McClain elaborated that she called the library and found out it had a surveillance system, which might have helped the defense. *Id.* She provided her phone number and asked Syed to call her. She added, "[m]ore importantly, I'm trying to reach your lawyer to schedule a possible meeting[.]" *Id.* She ended the letter with "If you were in the library

[1] "PC." refers to the post-conviction transcript and is followed by the date of the hearing to which the citation refers.

for a while tell the police and I'll continue to tell what I know even louder than I am. My boyfriend and his best friend remember seeing you there too." *Id.*

In the second letter, dated one day later, March 2, 1999, McClain again reached out to Syed, even though, according to her, she did not know Syed or Lee very well. PC. 10/25/12 Def.'s Ex. 6 (admitted at 25). She wrote that "the information I know about you being in the library could [be] helpful[,] unimportant, or unhelpful to your case." *Id.* She again referred to the library's surveillance tape. The letter ended with a few questions and a statement, "I guess that inside I know you're innocent too." *Id.*

At this point in time, the State had not publically disclosed its theory of when the murder took place.

Syed eventually showed the letters to his attorney, Cristina Gutierrez, who assured him that she would contact McClain. PC. 10/25/12 at 31. Syed repeated this information at least once, at a July 13, 1999, visit with Gutierrez' law clerk, Ali Pourneder, who took down the information and put it in the case file. PC. 10/25/12 Def.'s Ex. 5 (admitted at 6); PC. 10/25/12 at 5. Pourneder's notes stated the following: "Asia McClean → saw him in the library @ 3:00 → Asia boyfriend saw him too" and "library might have cameras[.]" PC. 10/25/12 Def.'s Ex. 5.

At a later meeting with Gutierrez, Syed asked her if she had contacted McClain. Gutierrez told him, "I looked into it and nothing came of it." PC. 10/25/12 at 33.

After Gutierrez told him that "nothing came of" McClain, Syed grew increasingly worried about his prospects at trial. After discussing his case with other detainees at the jail, it was suggested that he ask Gutierrez what his plea offer was. *Id.* at 18.

At a meeting some time prior to the first trial, Syed requested that Gutierrez obtain a plea offer. *Id.* at 18–19. She agreed to do so. *Id.* at 18. At a subsequent meeting, she lied to him, stating "they're not offering you a plea deal." *Id.*

b. The First Trial and the Second Pre-Trial Phase

The case proceeded to trial on December 8, 1999, before Judge William Quarles. During opening statements, the State disclosed its theory that the murder took place on January 13th, between the time when school let out, 2:15 p.m., and approximately 2:30–

2:40 p.m. T1.[2] 12/9/99 at 137. This theory was supported by the testimony of Jay Wilds, the State's primary cooperating witness. T1. 12/14/99 at 193–94.

The trial ended abruptly, however, in the middle of the State's case. At a bench conference, concerning the admissibility of a State's exhibit, Judge Quarles called Gutierrez a "liar." At least one member of the jury overheard that comment, and Gutierrez' motion for mistrial was granted. T1. 12/15/99 at 254–55.

After hearing Wilds' testimony, Syed more fully appreciated the fact that his case depended largely on whether he could prove his whereabouts after school on January 13th. PC. 10/25/12 at 36–37. Thinking that "nothing came of" his alibi, he again asked Gutierrez about the possibility of obtaining a plea offer. Again, she falsely told him that the State would not offer a deal. *Id.* at 33, 37, 38.

c. The Second Trial

The second trial began on January 21, 2000, before Judge Heard. The State relied heavily on the testimony of Wilds. In Wilds' story, Syed and Wilds went to the mall together the morning of January 13, 1999. T2.[3] 2/4/00 at 123. Afterwards, Syed lent Wilds his car and cell phone on the condition that Wilds drop him off at school and pick him up later. T2. 2/4/00 at 125–26. According to the State's theory, Syed convinced Lee to give him a ride after school ended. *Id.* Then, according to the State, the two friends drove to the parking lot of the nearby Best Buy, where Syed strangled her. T2. 1/27/00 at 104–05. There were no witnesses to the alleged crime, even though it supposedly took place in an open, public parking lot. Wilds claimed that, right after the murder, Syed called him from a pay phone at the Best Buy parking lot. That call, according to the State, was placed at 2:36 p.m. T2. 2/4/00 at 130; T2. 2/25/00 at 66.

Wilds claimed that, after receiving the call from Syed, he drove to the Best Buy parking lot. Syed, wearing bright red gloves, allegedly showed Wilds Lee's body, which

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[2] "T1." refers to the transcript of the first trial and is followed by the date of the trial to which the citation refers.

[3] "T2." refers to the transcript of the second trial and is followed by the date of the trial to which the citation refers.

by then was in the trunk of her car. T2. 2/4/00 at 131. Syed then allegedly drove away in Lee's car, and Wilds followed. *Id.* at 132. Later that night, Wilds claimed, he and Syed went to Leakin Park and buried the body (although Wilds claimed that he did not actively participate). *Id.* at 150–52. The body was discovered on February 9, 1999, by Alonzo Sellers, who stumbled upon it while looking for a place to urinate. T2. 2/17/00 at 187.

Wilds' story was riddled with inconsistencies. Police interviewed him three separate times, and each time he told a different story. T2. 2/10/00 at 41–44. Wilds admitted that he lied to investigators on multiple occasions. T2. 2/4/00 at 222. The first time he spoke with police, Wilds stated that he had nothing to do with the killing or burying the victim and did not know anything about it. *Id.* at 229. During a subsequent interview, Wilds lied about the location of Lee's car and then physically directed the detectives to a false location. T2. 2/10/00 at 68–72. Wilds also took the police to a false location where he allegedly first saw the body, lied about the location of his disposed clothes, and withheld the names of friends who he thought could corroborate his story. *Id.* at 125–27.

The police turned off the tape recorder several times during Wilds' interview. *Id.* at 47–50. Eventually, Wilds agreed to plead guilty as an accessory after the fact and cooperate against Syed. T2. 2/15/00 at 113–19. The State's Attorney's Office took the extraordinary measure of providing Wilds with a handpicked attorney, free of charge, to represent him in the negotiation of this deal. *Id.* at 130.

The only physical evidence linking Syed to the crime was a map found in Lee's car with his fingerprints on it. However, this was unremarkable because Syed had been in Lee's car on numerous occasions, before and after they dated. T2. 2/23/00 at 191. Hairs found on Lee's body were compared to Syed, but they did not match. T2. 2/1/00 at 116. Likewise, investigators compared fibers from Lee's clothes to Syed's clothes, but did not find a match. *Id.* at 165. Police seized Syed's boots and took soil samples to compare to the soil at the burial site, but did not find a match. *Id.* at 170–71. The police recovered a bloody shirt from Lee's car, and tests showed that the blood was not Syed's. T2. 2/2/00 at

27. The medical examiner testified that Lee had been strangled, but did not know a specific time or place that she had been killed. *Id.* at 70–72.

With an unreliable star witness and virtually no physical evidence, the State relied on other themes to round out its case. A predominant subplot of the trial focused on Syed's cultural and religious background: Syed was a Muslim, dating was forbidden for Muslims, etc. T2. 1/27/00 at 97. The State theorized that it was Syed's abandonment of his Muslim faith that led him to kill Lee after the relationship ended. *Id.* There were approximately 270 references to Syed's culture and religion throughout the trial. The State introduced Syed to the jury by saying, "The defendant is of Pakistani background, he's a Muslim" – even though Syed was born in the United States. *Id.* It encouraged the jury to consider Syed's ethnicity, religion, and involvement in the institution described only as "Islamic culture." *Id.* The State argued that Syed committed the murder because "his honor had been besmirched[,]" claiming that it was Syed's religion that motivated him to kill. *Id.* at 101.

Gutierrez did not put on an affirmative defense and did not call any alibi witnesses. She left open the question of where Syed was at the time of the murder. The witnesses she called were mostly character witnesses who could explain Syed's religion and the significance of Ramadan. T2. 2/23/00 at 249–81; T2. 2/24/00 at 110–25, 161–80, 187–95. In some ways, this fell right into the State's hands by bolstering the State's efforts to make the case about religion.

Gutierrez's ineffectiveness was not surprising. Right around the time of trial, she was having personal troubles. Her health was bad,[4] and she was preoccupied with money. Syed's mother, Shamim Rahman, later testified that in multiple meetings with Gutierrez, prior to and after trial, Gutierrez would repeatedly demand additional funds, in cash, to continue her representation. Even though the family had paid the full agreed-upon fee, at one point Gutierrez threatened to take the family's house unless they paid more, so, in an

[4] At one point during the trial, Gutierrez complained of health problems, stating to the Judge that she was not feeling well and had vomited while walking between her house and the courthouse. T2. 2/9/00 at 164.

effort to protect their house, the family transferred the property into the name of their oldest son. PC. 10/11/12 at 85–92.

The episode with Judge Quarles – in which the judge questioned her honesty – was not an isolated incident. Years before, Judge Marvin Smith of the Court of Appeals had raised concerns about Gutierrez' lack of candor when he objected to her admission into the Maryland bar because of a theft conviction and what he thought to be an incomplete disclosure. He wrote: "how can we *know* that her demonstrated qualities of dishonesty, untruthfulness, and lack of candor will not again rise to the surface?" *In re Application of Maria C.*, 294 Md. 538, 541 (1982) (dissent) (emphasis in original). A Baltimore City Circuit Court judge later concluded that Gutierrez had committed perjury and wrote "[s]adly, she is simply not worthy of belief." *Merzbacher v. Shearin*, 732 F. Supp. 2d 527, 539 (D. Md. 2010), *rev'd*, 706 F.3d 356 (4th Cir. 2013). Finally, Gutierrez' legal career ended, shortly after the Syed trial, when she was disbarred by consent for mishandling client funds on May 24, 2001. Order for Disbarment by Consent, Misc. Docket AG No. 68, September Term 2000.

d. Intermediate Events

On February 25, 2000, the jury convicted Syed. Afterwards, Syed told Rabia Chaudry, a family friend (and second-year student at George Mason School of Law) about Asia McClain, the alibi witness. PC. 10/11/12 at 43–44; PC. 10/25/12 at 39–40. Chaudry decided to look into this herself and called McClain using the phone number provided in one of the letters to Syed. PC. 10/11/12 at 44. During that call, McClain seemed happy that someone was reaching out to her and agreed to meet with Chaudry. *Id.* at 45.

On March 25, 2000, Chaudry met McClain, who she found to be "earnest and sincere." *Id.* Chaudry then asked McClain to write out her recollection in an affidavit. The notarized affidavit stated the following:

> On 1/13/1999, I was waiting in the Woodlawn Branch Public Library. I was waiting for a ride from my boyfriend (2:20) when I spotted Mr. Syed and held a 15–20 minute conversation. We talked about his girlfriend and he seemed extremely calm and very caring. He explained to me that he just

> wanted her to be happy. Soon after my boyfriend (Derrick Banks) and his best friend (Gerrad Johnson) came to pick me up. I spoke to Adnan (briefly) and we left around 2:40. No attorney has ever contacted me about January 13, 1999 and the above information.

PC. 10/11/12 Def.'s Ex. 2 (admitted at 60).

McClain told Chaudry that she remembered January 13th because there had been snow that night and school was closed the following two days. After their meeting, Chaudry checked the weather reports and school records to see if this was correct. It was. PC. 10/11/12 at 66.

Chaudry forwarded McClain's Affidavit to Syed and his family. *Id.* at 67; PC. 10/25/12 at 43. On March 30, 2000, Syed sent Gutierrez a letter asking her to include the information about McClain in a motion for a new trial. PC. 10/25/12 Def.'s Ex. 8 (admitted at 45); PC. 10/25/12 at 43–46. That same day, Syed's parents also sent Gutierrez a similar letter, in which they requested the same and attached McClain's affidavit. PC. 10/11/12 Def.'s Ex. 3 (admitted at 68); PC. 10/11/12 at 67–68. Gutierrez never presented this information to the court and, instead, told Syed that it was something that could only be raised on appeal. PC. 10/25/12 at 46. Syed eventually dismissed Gutierrez as his attorney and obtained new counsel for sentencing. TD.[5] at 4.

On June 26, 2000, Judge Heard sentenced Syed to life plus 30 years in prison. Syed filed a timely appeal to the Court of Special Appeals, which was denied in an unreported opinion filed on March 19, 2003.

e. The Post-Conviction Proceeding

Some ten years later, Syed filed a timely Petition for Post-Conviction Relief, and a Supplement, in the Circuit Court for Baltimore City. At the post-conviction hearing, Syed focused on two issues: (1) the failure of trial counsel to investigate and call Asia McClain as an alibi witness; and (2) the failure of trial counsel to seek a plea offer from the State when Syed had requested that Gutierrez do so.

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[5] "TD." refers to the transcript of Defendant's Postponement of Sentencing and Dismissal of Attorney, which occurred on April 5, 2000.

1. Alibi Witness Asia McClain

At the post-conviction hearing, Syed painstakingly proved that (1) there was a credible alibi witness, Asia McClain; (2) Syed asked Gutierrez to contact McClain; and (3) Gutierrez never contacted McClain (even though she told her client she had).

First, Syed showed that McClain could have provided an alibi that would have disproved the State's ultimate theory of the case. This was accomplished by the two letters McClain mailed to Syed just after he had been arrested. As explained *supra*, in the first letter, McClain wrote that she was in the library with Syed during the crucial 21 minutes that the State argued the murder took place. McClain also provided her phone number and stated, "I'm trying to reach your lawyer to schedule a possible meeting with the three of us." PC. 10/25/12 Def.'s Ex. 7. In the second letter, she again wrote about being with Syed in the library and again expressed her willingness to help. PC. 10/25/12 Def.'s Ex. 6.

McClain's memory of being with Syed at the library was subsequently confirmed in McClain's 2000 Affidavit, which Chaudry obtained after Syed's conviction. PC. 10/11/12 Def.'s Ex. 2. Chaudry, by then a barred attorney, testified credibly about her meeting with McClain, the tenor of the meeting, and McClain's willingness to speak. PC. 10/11/12 at 54, 56, 65–66.

Second, it was proven – and not even disputed by the State – that Gutierrez was on notice of the potential alibi witness. In addition to Syed's testimony that he told Gutierrez about McClain, Syed introduced the note found in Gutierrez' case file showing that the defense had been aware of the alibi. The note was written by Gutierrez' law clerk, Ali Pourneder, who had met with Syed at the jail on July 13, 1999. The note was entered into evidence by stipulation. PC. 10/25/12 Def.'s Ex. 5; PC. 10/25/12 at 5.

Syed testified at the post-conviction hearing that, during the first visit he had with Gutierrez after receiving the letters, he showed her the letters, she read them, and he asked her to contact McClain. PC. 10/25/12 at 31. When Syed later followed up on his request, Gutierrez responded, "I looked into it and nothing came of it." PC. 10/25/12 at 33.

Third, Syed proved that Gutierrez never contacted McClain. This was proven by the Affidavit that Chaudry obtained from McClain, in which McClain stated that "[n]o attorney has ever contacted me about January 13, 1999 and the above information." PC. 10/11/12 Def.'s Ex. 2. At the hearing, Chaudry confirmed that the information in the Affidavit was entirely consistent with what McClain told her in person. PC. 10/11/12 at 61.

Chaudry also testified that, after obtaining McClain's Affidavit, she sent it to Syed and Syed's parents, who then sent letters about the affidavit to Gutierrez. PC. 10/11/12 at 66–67; PC. 10/11/12 Def.'s Ex. 3; PC. 10/25/12 Def.'s Ex. 8.

Further, Syed testified that, after Chaudry told him the information that she obtained from McClain and sent him McClain's Affidavit, he spoke with Gutierrez on the phone about it:

> I read through the affidavit and I reminded her about the letters. And I said, Ms. Gutierrez, did you speak to her? Did you talk to her? Did you contact her? And she said, no. And I was very upset at that point. Because I said, Ms. Gutierrez, it's the exact same time. And I asked her, did she ever try to go to the library to secure the video footage? And she said, no. So, I became very upset with her. And I asked her, was there anything we can do at this point. And she said, no. We need to focus on the appeal.

PC. 10/25/12 at 40.

Finally, Syed called Margaret Meade as an expert "in the practice of criminal defense of murder cases in the Circuit Court for Baltimore City." *Id.* at 68. Meade testified that, having reviewed the case materials, McClain's account of events would have been consistent with the defense case and, at the very least, "there would be no reason" for defense counsel not to interview and investigate McClain. *Id.* at 94.

2. Plea Offer

Syed also demonstrated at the post-conviction hearing that Gutierrez (1) ignored his request to obtain a plea offer from the State and (2) falsely reported back to him that the State would not offer a plea deal.

Syed testified that Gutierrez never explained his option to bargain for a plea deal. *Id.* at 17. After Gutierrez told him that "nothing came of" McClain, he became concerned

about whether he would be able to prove his whereabouts on the day that Lee disappeared. Syed learned from other detainees at the jail that plea bargaining was a common practice in Baltimore City Circuit Court and that almost every defendant received an offer. *Id.* at 18.

After learning this, Syed asked Gutierrez to find out what the State would offer. Gutierrez said she would fulfill his request. When they spoke later, however, Gutierrez told Syed "[t]hey're not offering you a plea deal." *Id.* at 18–19.

Syed repeated this same request between the first and second trials. By then he had heard Jay Wilds testify, and he more fully appreciated the fact that his case relied upon his whereabouts at 2:36 p.m. on January 13. *Id.* at 37. Once again, Gutierrez responded that "[t]hey're not offering you a deal." *Id.*

At the post-conviction hearing, however, it became apparent that Gutierrez had not done what Syed asked her to do. Not only did she fail to ask the State for a plea offer, she falsely reported back to Syed that she had contacted the State about it, but the State refused to extend an offer. This was proven by the testimony of Kevin Urick, the State's lead prosecutor, who testified that Gutierrez had never approached him, or his co-counsel, Kathleen Murphy,[6] to seek a plea offer. PC. 10/11/12 at 18–19.

Margaret Meade, Syed's expert witness, testified about the necessity of obtaining a plea offer in a case like this, even if the defendant maintained his innocence. PC. 10/25/12 at 77.

Meade, with over 20 years of practice experience, stated that she represented about ten to 20 defendants per year who were charged with murder, and that in all of her experience she never encountered an instance in which the State refused to extend a plea offer. *Id.* at 81–82. Moreover, she stated that, if she had been representing Syed at the time, she would have sought a plea offer in the range of 25 to 30 years. *Id.* at 90. She also stated that, as a matter of practice, a criminal defense attorney must pursue some type of plea bargain, even if the defendant maintains his innocence. *Id.* at 84. She explained that,

[6] Murphy represented the State in the post-conviction proceeding.

in her experience, pleas subsequent to *North Carolina v. Alford*, 400 U.S. 25 (1970), were generally accepted by Baltimore City Circuit Court judges. PC. 10/25/12 at 76–77.

Finally, Syed testified that, given the circumstances as Gutierrez portrayed them to him, he would have accepted a plea of 25 to 30 years. *Id.* at 47–48.

3. Judge Welch's Opinion

The post-conviction court denied Syed's ineffective assistance of counsel claims. With respect to the alibi claim, the court found that Gutierrez was made aware of McClain, but made a strategic decision not to pursue her for the purpose of an alibi. App. at 11. Because Gutierrez died before Syed filed his post-conviction petition, and could not testify, the court presumed that Gutierrez' decision not to pick up the phone and call McClain was reasonable, and the court generated "several reasonable strategic grounds" that it believed could have supported Gutierrez's decision to ignore McClain. *Id.* at 11, n. 6.

First, the court opined that McClain's letters "do not clearly show" McClain's potential to provide a reliable alibi for Syed. *Id.* at 11. It noted that, in the first letter, McClain did not include the exact time that she was with Syed in the library. *Id.* Instead, she offered to help account for some of Syed's "'un-witnessed, unaccountable lost time (2:15–8:00; Jan. 13th).'" *Id.* (quoting PC. 10/25/12 Def.'s Ex. 7). The court concluded, "[t]o interpret such vague language as evidence of a concrete alibi would hold counsel to a much higher standard than is required by *Strickland*." App. at 11–12. The court also noted that Gutierrez could have reasonably concluded that McClain was offering to lie in order to help Syed – although it did not explain how Gutierrez could have reached this conclusion without speaking to McClain. App. at 12.

Second, the court concluded that Gutierrez had adequate reason to believe that pursuing McClain as a potential alibi witness would not have been helpful to Syed's defense because her information supposedly contradicted Syed's alibi. It explained that the information in McClain's letter, that she was with Syed in the library, was

inconsistent with Syed's stated alibi "that he remained on the school campus from 2:00 to 3:30 p.m."[7] *Id.* at 12.

With regard to the plea bargain issue, the post-conviction court found that Gutierrez was not deficient for failing to seek a plea offer, and that Syed was not prejudiced from any failure to do so. *Id.* at 15–16. The court concluded Gutierrez was not deficient because there was "nothing in the record indicating that the State was prepared to make a plea offer had trial counsel pursued plea negotiations." *Id.* at 15. It found that Syed was not prejudiced because "it is impossible to determine with certainty whether [Syed] would have agreed to accept a plea." *Id.* at 16. Despite Syed's unequivocal statements at the post-conviction hearing that he wanted Gutierrez to seek a plea offer, and despite the possibility of an *Alford* plea, the court stated that Syed's "statements at sentencing indicate the contrary; that [Syed] intended to maintain his innocence throughout." *Id.*

STANDARD OF REVIEW

An appellate court will not disturb the factual findings of the post-conviction court unless they are clearly erroneous. However, the appellate court makes "an independent determination of relevant law and its application to the facts." *Arrington v. State*, 411 Md. 524, 551 (2009) (internal quotations and citations omitted). "In other words, the appellate court must exercise its own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any." *State v. Jones*, 138 Md. App. 178, 209 (2001). Because the post-conviction court should have found that Appellant's trial counsel was constitutionally ineffective with respect to both of the issues presented here, this Court must reverse the post-conviction court and remand for a new trial.

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[7] The court did not explain where Syed stated an alibi, as none was offered at trial. Undersigned counsel believes that it was from the alibi notice that Gutierrez sent to the State before trial, referred to earlier in the post-conviction opinion, in which Gutierrez listed 80 potential alibi witnesses and "noted how each witness could be used to support Petitioner's own stated alibi; that he had remained at school from 2:15 p.m. until track practice at 3:30 p.m. the day of the murder." App. at 9.

ARGUMENT

The errors committed by trial counsel were of such a fundamental nature that Syed must be given a new trial. Both of these errors occurred during the pretrial phase, which is arguably the most critical phase of the criminal process. Not only did Gutierrez entirely ignore Syed's best defense, his alibi, but she failed to fulfill the fundamental task of asking the prosecutor for a plea offer. Making matters worse, rather than tell her client the truth about his case, and counsel him, Gutierrez repeatedly lied to Syed, a 17-year-old who had never been in trouble before.

Under these circumstances, it is inescapable that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A criminal defendant is supposed to have two options from which to choose: plea or go to trial. After reasonable investigation, he is supposed to be adequately informed of each option. He is supposed to make a knowing and voluntary choice. Here, however, Syed was denied that choice. One option, trial, was fatally undermined by the failure of trial counsel to conduct even the most basic investigation: picking up the phone and calling an alibi witness. The other option, a plea bargain, was eliminated for reasons that, quite frankly, are impossible to comprehend. The result is that Syed never had a real choice, and it is impossible to conclude that he received a fair trial.

a. Trial counsel was ineffective for failing to take any action to pursue a credible alibi witness.

At the post-conviction hearing, Syed established the facts necessary to show that Gutierrez was constitutionally ineffective regarding the alibi issue. First, Syed proved that he asked Gutierrez to contact an alibi witness, Asia McClain, and wanted to present an alibi defense at trial. Second, Syed showed that Gutierrez wholly failed to investigate McClain—she did not even pick up the phone to call her—and the record did not establish that she had a reasonable basis for not doing so. Third, when Syed asked Gutierrez what happened with McClain, Gutierrez lied to him, telling him that she had looked into it, but nothing came of it.

The court committed reversible error when it denied Syed's post-conviction regarding this issue. The circumstances here are worse than the circumstances of any other case in which a court has found ineffective assistance of counsel relating to an alibi issue. Guterrez' actions cannot be considered the result of a reasonable, strategic decision. And, because her deficiency resulted in prejudice, this Court must reverse its decision and remand for a new trial.

1. *Strickland*'s Application to Alibi Witness Cases

The claim of ineffective assistance of counsel for failure to investigate has its roots in *Strickland*, 466 U.S. 668, which specifically addressed trial counsel's failure to investigate mitigation that could have been used at the defendant's sentencing. The *Strickland* Court held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. Further, the Court explained, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–91.

As the Supreme Court explained in *Strickland*, the American Bar Association (ABA) Standards are "guides to determining what is reasonable[.]" *Id.* at 688. The ABA instructs that defense counsel has a duty to "conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case[.]" ABA STANDARDS FOR CRIMINAL JUSTICE at § 4.1 (3d ed. 1993). These standards further impose the duty to "keep the client informed of the developments in the case and the progress of preparing the defense and . . . promptly comply with reasonable requests for information." *Id.* at § 3.8.

These duties are particularly important regarding alibi witnesses, as "few defenses have greater potential for creating reasonable doubt as to a defendant's guilt in the minds of the jury than an alibi." *State v. Porter*, 80 A.3d 732, 737–38 (N.J. 2013) (internal citations and quotations omitted) (also referencing ABA Standards). Therefore, counsel's

failure to fulfill these duties with respect to an alibi witness will result in deficient performance. *Id.*

Maryland courts, as well courts from other jurisdictions, have applied *Strickland* to alibi issues like the one presented here. They have held that that failure to investigate and/or call an alibi witness, or a witness corroborating an alibi witness, may amount to ineffective assistance of counsel. *See, e.g., In re Parris W.*, 363 Md. 717 (2001); *Griffin v. Warden, Md. Corr. Adjustment Center*, 970 F.2d 1355, 1358–59 (4th Cir. 1992) (finding ineffective assistance when the defendant provided his counsel with a list of alibi witnesses, and his counsel failed to contact them); *Grooms v. Solem*, 923 F.2d 88, 89–91 (8th Cir. 1991) (finding ineffective assistance when the defendant's alibi was that he was at a car repair shop, his counsel failed to contact the repair shop, and two employees there remembered the defendant being there the day of the crime); *Tosh v. Lockhart*, 879 F.2d 412, 414–15 (8th Cir. 1989) (finding ineffective assistance when the defendant identified four alibi witnesses, and his counsel called only one, who had the most bias, and failed to call the other three); *Johns v. Perini*, 462 F.2d 1308, 1310–15 (6th Cir. 1972) (finding ineffective assistance when counsel failed to investigate alibi); *Tenorio v. State*, 261 Ga. App. 609 (2003) (finding ineffective assistance when two biased alibi witnesses testified, but counsel failed to locate a third unbiased alibi witness who had been partially identified by defendant). There are several examples of cases where trial counsel's failure to investigate or call alibi witnesses were far less egregious than this case, in which counsel did not even contact the alibi witness, and courts found that counsel was constitutionally ineffective.

One example is *In re Parris W.*, 363 Md. 717, in which the Court of Appeals found trial counsel ineffective for failing to subpoena five witnesses who would have provided corroborating testimony for the defendant's alibi. *Id.* at 720–21. There, the state's only evidence was eyewitness identification testimony from the victim. *Id.* at 722. The only alibi witness was the defendant's father, who the state argued was biased. *Id.* at 722–23. Before trial, the defendant had informed his attorney of five additional unbiased witnesses who would have corroborated his father's testimony. The attorney, however,

made an innocent mistake: he put the wrong trial date on the trial subpoenas, so the witnesses missed the trial. Ultimately, the court found the victim to be more credible than the defendant's father and convicted the defendant. *Id.*

The Court of Appeals found that counsel was ineffective, explaining that the testimony of the unbiased alibi witnesses was "critical to the success of [the defendant's] alibi defense and that his counsel's failure to produce them deprived him of a fair trial." *Id.* at 723–24. It also explained the importance of testimony supporting the alibi defense: "'An alibi of an accused, proceeding as it does upon the idea that [the defendant] was elsewhere at the time of the commission of the crime, does, of course, if thoroughly established, preclude the possibility of guilt.'" *Id.* at 728 (quoting *Floyd v. State*, 205 Md. 573, 581 (1954)). It found that counsel's deficiency prejudiced the defendant because there was a reasonably possibility that the corroborating witnesses' testimony would have been sufficient to create reasonable doubt. *See id.* at 729.

Another example is *Montgomery v. Petersen*, 846 F.2d 407 (7th Cir. 1988), cited to approvingly in *In re Parris W*, where the court found that counsel was constitutionally ineffective for failing to investigate a witness who could corroborate the defendant's alibi witnesses. There, the defendant's alibi was that he had been shopping with his wife at the time of the crime, and he called one alibi witness and twelve corroborating witnesses at trial. However, his trial counsel inadvertently failed to investigate the single unbiased alibi witness, the Sears clerk who remembered him purchasing a bicycle that day. *Id.* at 408–09.

The Seventh Circuit found that counsel was constitutionally ineffective and explained:

> In this case, . . . the petitioner has pointed to a specific witness whose missing testimony would have been exculpatory. In fact, the Sears witness' testimony was significant to the petitioner's defense in several respects. First, it directly contradicted the state's chief witness, who testified that he and the petitioner were together [at a specific time] . . . Thus, the Sears clerk's testimony had a direct bearing on this witness' veracity, a witness upon whose testimony the state depended in order to secure a conviction. However, even more important than impeaching the testimony of the state's

> chief witness, the Sears clerk's testimony provided the petitioner with an unbiased alibi defense. As such, it did not merely raise doubts about the petitioner's guilt; if believed by the jury, it would have directly exonerated him of the crime. . . . Therefore, the Sears clerk's testimony may have transformed a weak case into a strong one merely by corroborating the testimony of these other defense witnesses.

Id. at 415 (internal citations and footnotes omitted).

A third example is *Code v. Montgomery*, 799 F.2d 1481 (11th Cir. 1986), in which the Eleventh Circuit found that the defendant's counsel was constitutionally ineffective by failing to investigate alibi witnesses. Before trial, the defendant provided his counsel with general leads regarding his alibi, including his mother and his girlfriend, but not specific names of alibi witnesses. At trial, the defense had no alibi witnesses. *Id.* at 1482. At the post-conviction hearing, it was established that trial counsel did not contact both of the witnesses. Instead, counsel only briefly called the defendant's mother, but he failed to ask her where the defendant was the day of the crime. Had he asked, he would have learned that, while the defendant's mother did not know, she could have provided him with leads concerning other possible alibi witnesses. The defendant's mother testified that she contacted his coworker, an alibi witness, shortly after the phone call with his counsel and, had she known the date of the crime, she might have mentioned it to the coworker, who then would have provided an alibi. *Id.* at 1483, n. 5. The defendant's lawyer testified that she did not think finding such witnesses, who were in another town, was within her requirements as an attorney. *Id.* at 1483. Ultimately, the district court denied the claim. *See id.* at 1482.

The Eleventh Circuit reversed, however, finding that counsel's failure to question the potential alibi witnesses constituted ineffective assistance of counsel. It explained that "[t]he adequacy of a pretrial investigation turns on the complexity of the case and trial strategy." *Id.* at 1483 (citing *Washington v. Strickland*, 693 F.2d 1243, 1251 (11th Cir. 1982) (en banc), *rev'd on other grounds*, 466 U.S. 688 (1984)). In *Code*, just like in this case, there was only one viable strategy: an alibi defense. Therefore, the court reasoned, a competent attorney would have asked the witness if she could corroborate the alibi and

would have asked her whether there were any alibi witnesses. *Id.* By not inquiring as to the defendant's whereabouts the day of the crime, the court reasoned, counsel's investigation was inadequate:

> [Trial counsel's] limitation on his pretrial investigation is wholly unsupported by reasonable professional judgment; although his sole strategy was to present an alibi defense, he terminated his investigation without determining whether the one witness he contacted could provide an alibi. In short, . . . [he] attempted to present an alibi defense with no alibi witnesses.

Id. at 1484.

The court in *Code* also found that trial counsel's deficiency prejudiced the defendant. It explained that, under *Strickland*, the court does not determine whether, despite eyewitness testimony at trial, "alibi testimony *would* have resulted" in acquittal. *Id.* (emphasis in original). Instead, the question is whether the defense was sufficiently prejudiced by counsel's ineffectiveness to the extent that the court's "'confidence in the [trial] outcome'" is undermined. *Id.* (quoting *Strickland*, 466 U.S. at 694). There, *Strickland*'s prejudice prong was satisfied because counsel's failure to investigate the defendant's alibi "effectively deprived . . . [the defendant] of any defense whatsoever." *Id.*

2. *Strickland*'s Application to Syed's Case

Here, Gutierrez' performance was deficient, and her failure to contact McClain prejudiced Syed. The record shows that Gutierrez was informed of McClain's story, which unequivocally established an alibi defense for Syed. Immediately after Syed found out about McClain, he informed Gutierrez, and asked her to contact McClain. However, Gutierrez did not do anything that Syed asked, and instead she lied to Syed about her efforts, saying that "nothing came of it." (PC. 10/25/12 at 33). There is simply no reasonable basis for her actions.

The cases discussed above are all far less egregious than the instant case. In contrast to *In re Parris W.*, 363 Md. 717, here, Gutierrez' complete failure to investigate was not an innocent mistake; it was a complete failure to follow her client's wishes, a

decision to lie, and a decision that any reasonable attorney would know could very well cost the defendant his case—precisely what happened.

Further, unlike in *In re Parris*, where the defendant had at least one alibi witness, and *Montgomery*, 846 F.2d 407, where the defendant had one alibi witness and twelve corroborating witness, here, Gutierrez did not call any other alibi witnesses. At trial there simply was no explanation as to where Syed was at the time of the murder. Thus, Gutierrez's complete failure to contact the alibi was much more devastating for Syed's case. And, in *Code*, 799 F.2d 1481, defendant's counsel contacted at least one of the leads the defendant had given him, but did not ask her about alibis or give her other necessary information. In this case, Syed provided McClain's contact information (including phone number), and her letters indicated a desire to meet with Gutierrez, but Gutierrez failed to even pick up the phone and call her. If she had contacted McClain, moreover, McClain could have led the defense to other alibi witnesses, including her boyfriend, Derrick Banks and his friend, Gerrad Johnson, as well as possibly help obtain surveillance video footage from the library. PC. 10/11/12 Def.'s Ex. 2.

In Syed's case, the court incorrectly *invented* a reason why it would have been trial strategy for counsel to *not* investigate McClain. The Court acknowledged this much in its opinion: "[T]he court can only presume as to the ultimate basis for trial counsel's strategic decisions to forego pursuing Ms. McClain as an alibi witness in Petitioner's case." App. at 11, n. 6. It incorrectly hypothesized two reasons for its decision. *See Caldwell v. Lewis*, 414 Fed. Appx. 809, 815–16 (6th Cir. 2011) (unpublished) ("Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer.").

First, the Court parsed the two letters McClain wrote to Syed, as he awaited trial, and surmise that somehow the letters were not explicit enough to provide evidence of a "concrete alibi." App. at 11.

This conjecture by the court is wholeheartedly wrong. The entire trial depended on whether Syed could prove where he was at the time of the murder. Meanwhile, a credible

witness – an honors student who had no obvious bias in favor of Syed – had come forward unsolicited with a recollection that she had been with Syed around the time of the murder. She wrote two credible letters to Syed, in which she specifically requested to speak to Syed's lawyer. Syed then relayed this information to his lawyer – as we know from the notes found in Gutierrez' file – and specifically asked her to interview the witness. Yet the lawyer did absolutely nothing. As the Sixth Circuit noted, "where counsel fails to investigate and interview promising witnesses, and therefore has no reason to believe that they would not be valuable . . ., counsel's inaction constitutes negligence, not trial strategy." *Workman v. Tate*, 957 F.2d 1339, 1345 (6th Cir. 1992) (internal quotations and citations omitted).

Second, the court incorrectly concluded that Gutierrez had adequate reason to believe that pursuing McClain as a potential alibi witness "would not have been helpful to [Syed's] defense and may have, in fact, harmed the defense's ultimate theory of the case." App. at 12. The court went on to explain that it believed the account in McClain's letters that she was with Syed at the Woodlawn Public Library after school contradicted Syed's stated alibi "that he remained on the school campus from 2:00 to 3:30 p.m." *Id.* The court did explain or cite to where Syed stated his alibi. However, earlier in the court's opinion, the court cited to State's Exhibit 1, Syed's alibi notice, in which Gutierrez listed 80 potential alibi witnesses and "noted how each witness could be used to support Petitioner's own stated alibi; that he had remained at school from 2:15 p.m. until track practice at 3:30 p.m. the day of the murder." *Id.* at 9. There are multiple reasons why the court's reliance on the alibi notice is misplaced.

First, the alibi notice was submitted after Gutierrez was informed of McClain and, therefore, the alleged contradiction between it and McClain's statements could not have been the reason for her not contacting McClain. The alibi notice is dated October 4, 1999, Syed testified that he told Gutierrez about McClain right after he received the letters, and Pourneder's notes are dated July 13, 1999. PC. 10/25/12 State's Ex. 1 (admitted at 102); PC. 10/25/12 at 31; PC. 10/25/12 Def.'s Ex. 5. Because Gutierrez knew about McClain at

least several months before she submitted the alibi notice, the notice could not have been a strategic reason to forego contacting McClain.

Second, the court should not have relied upon the alibi notice because it had no legal value at trial. In *State v. Simms*, 420 Md. 705, 723 (2011), the Court of Appeals explained that the purpose of an alibi notice is to put the State on notice; it is a tool of discovery. It does not lock the defendant into a defense at trial, it cannot be used to establish a negative inference against the defendant, and it cannot be used as impeachment evidence where, as here, the defendant did not call any alibi witnesses at trial. *Id.* at 735–36; *see also Williams v. Florida*, 399 U.S. 78, 85 (1970) (explaining that the requirement to provide advance notice of an alibi does not fix the defense or affect the "crucial decision to call alibi witnesses"). It is apparent, if not obvious, that the notice was intended as a general reservation of Gutierrez' ability to call alibi witnesses – in which she listed just about every witness she could think of. Ironically, she left out the one witness who mattered.

Finally, it is clear that, had McClain testified at trial, she would not have "harmed the defense's ultimate theory of the case." App. at 12. Syed did not testify at trial, and no other defense witnesses said anything that contradicted McClain's version of events. Further, the post-conviction court should have taken judicial notice of the fact that the Woodlawn Public Library and the Woodlawn High School are on the same street, right next to each other, and, therefore, McClain's account and the statement in the notice would not have directly contradicted each other.[8]

It was error for the court to have invented a strategic reason why Gutierrez would not have, at the very least, picked up the phone to call McClain. Syed concedes that even a phone call to McClain would have been enough to satisfy the *Strickland* requirement of reasonable investigation. But, when there is a complete lack of any investigation into a

[8] The Woodlawn Public Library is located at 1811 Woodlawn Drive, Baltimore, Maryland, and the Woodlawn Public High School is located at 1801 Woodlawn Drive, .01 miles away.

potentially explosive trial issue, counsel falls below the professional standard of practice. As Margaret Meade, the defense expert witness, testified, "[t]here would be no reason not to find out and send an investigator to talk to this person." PC. 10/25/12 at 94.

The circuit court's *ad hoc* conjecture here is like the state court's reasoning that was rejected by the Fourth Circuit in *Griffin*, 970 F.2d 1355. There, trial counsel failed to contact an alibi witness. The state court concluded that it may have been sound strategy for trial counsel not to contact the witness because he had been identified in a photo array as an accomplice, so, the court reasoned, he could have hurt the defendant's case. *See id.* at 1358.

The Fourth Circuit called the state court's reasoning "thoroughly disingenuous" because defense counsel "did not even talk to [the witness], let alone make some tactical decision not to call him." *Id.* It warned that "courts should not conjure up tactical decisions an attorney could have made, but plainly did not. The illogic of this 'approach' is pellucidly depicted by this case, where the attorney's incompetent performance deprived him of the opportunity to even make a tactical decision by putting [the witness] on the stand." *Id.* Finally, the court explained "[t]olerance of tactical miscalculations is one thing; fabrication of tactical excuses is quite another." *Id.* at 1359.

Here, the post-conviction court's approach is even worse than the state court's in *Griffin* because, there, the record showed that the attorney may have had a reason not to call the witness; the witness had been identified as an accomplice. In this case, Gutierrez was not aware of any such fact about McClain that would damage her credibility or otherwise harm the defense. Just as in *Griffin*, the circuit court should have found that trial counsel's performance was deficient for failing to contact the alibi witness.

Finally, to prove prejudice, Syed must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 669. A "reasonable probability" is simply "a probability sufficient to undermine confidence in the outcome." *Id.*

Gutierrez's deficient performance squarely resulted in prejudice to Syed's case: her failure to investigate the defendant's only alibi "effectively deprived . . . [Syed] of

any defense whatsoever." *Code*, 799 F.2d at 1484. The State's case centered on those crucial 21 minutes—the period of time from 2:15 to 2:36 p.m. on January 13th—during which, it alleged, Syed murdered Lee. It sought to prove this through Wilds' testimony. Without Wilds, the State had no case. As the Fourth Circuit explained, this type of evidence—eyewitness testimony, uncorroborated by forensic evidence—is "precisely the sort of evidence that an alibi defense refutes best." *Griffin*, 970 F.2d 1359. Thus, if someone else had testified that Syed was somewhere else between 2:15 and 2:36 p.m., there is a reasonable probability that the jury would have believed that person over Wilds. At the very least, there would have been reasonable doubt.

McClain's story, as shown by her two letters to Syed and by her affidavit provided to Chaudry, is that Syed was not in the Best Buy parking lot strangling Lee during those critical 21 minutes. Instead, he was at the Woodlawn Public Library, located right across the street from the school. As McClain stated in her letters, there may have been two other corroborating alibi witnesses: her boyfriend and her boyfriend's best friend. There may also have been video surveillance. However, the jury never had a chance to hear her story because Gutierrez failed to contact her.

As the Court of Appeals explained, "'An alibi of an accused, proceeding as it does upon the idea that [the defendant] was elsewhere at the time of the commission of the crime, does, of course, if thoroughly established, preclude the possibility of guilt.'" *In re Parris W.*, 363 Md. at 728 (quoting *Floyd v. State*, 205 Md. 573, 581 (1954)). Therefore, McClain's testimony would "not merely [have] raise[d] doubts about the petitioner's guilt; if believed by the jury, it would have directly exonerated him of the crime." *Montgomery*, 846 F.2d at 415. There are not many other mistakes imaginable that could have been so prejudicial to Syed's defense.

b. Trial counsel was ineffective for failing to seek a plea offer when her client unequivocally requested that she do so.

It is hard to imagine that Gutierrez could have done anything worse than failing to pick up the phone and call Syed's alibi witness. But, if there was something worse, it was

her failure to obtain a plea offer, and her subsequent misrepresentation to her client about it.

In denying Syed's claim, the Circuit Court failed to address the critical question: whether trial counsel had a duty to seek a plea bargain when her client unequivocally requested that she do so. Syed argues that counsel had an absolute duty to attempt to obtain a plea bargain when she was requested to do so, and that, under no circumstances was it permissible for her to lie to her client that the State was not offering a deal. When Gutierrez undermined her client in this most basic manner, she abrogated her role as defense attorney.

The Supreme Court has "long recognized that the negotiation of a plea bargain is a critical phase for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010); *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). This tenet of constitutional law is bolstered by two recent Supreme Court cases: *Missouri v. Frye*, 132 S. Ct. 1399 (2012), and *Lafler v. Cooper*, 132 S. Ct. 1376 (2012). Central to these decisions is the fact that "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler*, 132 S. Ct. at 1389. Thus, the pretrial phase of a criminal proceeding – not the trial – is "almost always the critical point for a defendant." *Frye*, 132 S. Ct. at 1407.

When defendants are denied representation at a critical stage of the proceedings – such as at the plea bargaining phase – they have not received constitutionally guaranteed assistance of counsel. *See United States v. Cronic*, 466 U.S. 648, 659 (1984) ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial"); *Strickland*, 466 U.S. at 692 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice").

The Supreme Court has held that, when a defendant is denied representation in this manner – even constructively – a standard less rigorous than *Strickland* applies. Thus, when counsel is not present for a critical phase of the trial, it is assumed that the effect was prejudicial and the conviction must be set aside. *Id.* For example, in *Hamilton v.*

Alabama, 368 U.S. 52 (1961), the defendant was not represented by counsel at a critical stage of his trial, the arraignment. Because he pleaded not guilty at the arraignment, the state appellate court found that there was no prejudice. *Id.* at 53. The Supreme Court reversed, however, explaining that the defendant "requires the guiding hand of counsel at every step in the proceedings against him[,]" so that he can make a meaningful choice as to pleading guilty. *Id.* at 54. When he is not represented by counsel, there is no prejudice inquiry because it is impossible to ascertain the degree of prejudice. *Id.* at 55; *see also White v. Maryland*, 373 U.S. 59 (1963) (holding that the reasoning of *Hamilton* applies when the defendant was not represented at his preliminary hearing by counsel and, thus, there is no prejudice inquiry).

In a related context, if the attorney was operating under an actual conflict of interest, prejudice is presumed. This is because it is impossible to determine the impact of a conflict on many aspects of the case, particularly "the attorney's options, tactics, and decisions in plea negotiations[.]" *Holloway v. Arkansas*, 435 U.S. 475, 491 (1978); *see also id.* at 488 ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."); *Cuyler v. Sullivan*, 446 U.S. 335, 345–50 (1980) (stating that prejudice may be assumed when defense attorney was working under actual conflict). The Court further explained that a conflict bears on the attorney's decisions not only as to what to do, but also what "to *refrain* from doing, not only at trial but also as to possible pretrial negotiations." *Holloway*, 435 U.S. at 490 (emphasis in original).

Here, there can be no doubt that Gutierrez' failure to follow her client's request and obtain a plea offer falls well below a reasonable standard of practice. But this failure runs deeper than the typical error or omission that is considered under the umbrella of "effective assistance of counsel." It not only violates something fundamental to the trial process, but it violates the duty of loyalty that is at the heart attorney-client relationship.

Syed was a 17-year-old with no experience in the criminal justice system, and, after discussing his case with other detainees, he asked his lawyer to obtain a plea offer.[9] Even though Syed maintained his innocence, he had concerns about his ability to prove his whereabouts on the 13th, and wanted to weigh his options. It was a reasonable thing to do. At this moment in time, by making the request to Gutierrez, Syed attempted to enter the plea bargaining phase – which we know to be a critical stage of the proceeding.

But his lawyer effectively stopped representing him. Not only did she fail to fulfill his request, but she affirmatively made a misrepresentation, telling Syed the State would not offer a plea, when really she had never even spoken to a prosecutor about a plea.

There can be no question that, if a criminal defendant asks his counsel to seek a plea offer, counsel must fulfill the request. *See United States v. Mohammad*, 999 F. Supp. 1198, 1200 (N.D. Ill. 1998) (finding "that [trial counsel's] alleged failure to even ask the government about the possibility of a plea agreement is inexplicable, especially if, as claimed, his client repeatedly inquired on the subject").

While failure to fulfill the defendant's request is by itself egregious enough to merit a finding of ineffectiveness, it is even more concerning that counsel would affirmatively make a misrepresentation about what happened with that request. This amounts to a breach of the attorney's duty of loyalty to her client, "perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692. This is the type of conduct that may result in a presumption of prejudice. *Id.* (citing to *Cuyler*, 446 U.S. at 345–50).

If, on the other hand, it is determined that the level of attorney deficiency here amounts to "actual ineffectiveness," then the familiar two-part standard of *Strickland*

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[9] Syed testified to this at the post-conviction hearing. In addition, recognizing the importance of establishing this point, Syed submitted to a polygraph examination, which he offered as evidence. The Circuit Court, however, found the polygraph results to be inadmissible and would not consider them, even though the court could have considered the results pursuant to Maryland Rule 4-406(c) (giving post-conviction court discretion with respect to application of rules of evidence). *See also* Md. Rule 5-101(c)(3) (same). (PC. 2/6/12 at 12–16).

would apply, and again, Syed must be given a new trial. *Id.* at 693 (requiring proof of attorney deficiency and prejudice).

Courts have found that a defense attorney's failure to "explor[e] possible plea negotiations and deals" may amount to deficiency for purposes of the first prong of *Strickland*. *Newman v. Vasbinder*, 259 Fed. Appx. 851, 854 (6th Cir. 2008); *see also, e.g.*, *Freund v. Butterworth*, 165 F.3d 839, 880 (11th Cir. 1999) ("Exploring possible plea negotiations is an important part of providing adequate representation of a criminal client" and finding ineffective assistance of counsel for failure to pursue plea of not guilty by reason of mental illness); *Mason v. Balcom*, 531 F.2d 717 (5th Cir. 1976) (finding ineffective assistance in part due to counsel's failure to plea bargain when his client may have benefitted). Even an attorney who reasonably believes that a client has no chance of prevailing at trial may not abstain from efforts to plea bargain simply because their bargaining position is weak:

> [A]ll defendants, no matter how overwhelming their guilt, have one bargaining point—the plea itself. Whether a prosecutor will agree to accept a plea of guilty in return for a reduced charge or recommended sentence will, of course, depend upon any of a number of factors, but the point is that this possibility should have been attempted.

Cole v. Slayton, 378 F. Supp. 364, 368 (W.D. Va. 1974) (finding ineffective assistance for failure to plea bargain when explanation was that counsel had nothing with which to bargain).

Under *Strickland*, a defendant must also demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 669. To satisfy the prejudice prong of *Strickland*, a defendant need not establish that he definitely would have accepted a plea offer; "[a]ll that is required is that the totality of the evidence supports an inference that the outcome 'may well' have been different had he been fully and accurately informed." *Williams v. State*, 326 Md. 367, 379 (1992).

Even if the Court were to conduct a prejudice inquiry, the facts lean squarely in Syed's favor. The essence of the prejudice is that Syed was denied the basic right to make

a choice of whether to go to trial or to accept a plea bargain. As the Ninth Circuit aptly stated, the prejudice caused by counsel's failure to plea bargain is not the loss of "the right to a fair trial or the right to a plea bargain, but the right to participate in the decision as to, and to decide, his own fate—a right also clearly found in Supreme Court law." *Nunes v. Mueller*, 350 F.3d 1045, 1053 (9th Cir. 2003). In other words, the prejudice lies in the denial to the defendant of a meaningful choice. And it is this choice that is squarely at the heart of the pretrial phase of the proceedings.

If Gutierrez had simply done what Syed asked her to do, it is extremely likely that Syed would have had a choice. Gutierrez would have received an offer from the State, she would have conveyed it to her client, and Syed could have weighed his options. Did he want to go to trial or did he want to accept the State's offer? The injustice here is that this choice was taken away from Syed by his own attorney.

While State prosecutor Kevin Urick testified that he did not know whether he would have received permission from his superiors to offer a plea in this case, defense expert Margaret Mead was confident Syed could have received an offer (if his attorney had only asked for one). PC. 10/11/12 at 19; PC. 10/25/12 at 82, 84. Mead testified that, in the scores of murder cases she had handled in Baltimore City, she had never encountered a case in which the State was not willing to reach a resolution by plea bargain. PC. 10/25/12 at 82. Meade estimated that, in a case like Syed's, involving a 17 year old with no criminal history, she would have sought an offer in the range of 25 to 30 years.[10] *Id.* at 90.

Because the fundamental choice a defendant should have – go to trial or plead guilty – was taken away, Syed was denied the effective assistance of counsel guaranteed by the Constitution. Even if this Court conducts a prejudice inquiry, it must find that

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[10] Syed testified at the post-conviction hearing that, given the fact that Gutierrez told him his alibi witness did not check out, he would have accepted this type of plea offer. This may have been even more desirable to him after the first trial, once he had an opportunity to hear the testimony of Jay Wilds, the primary witness against him. PC. 10/25/12 at 47–48. The evidence also shows Syed's willingness to, at the very least, consider an offer, as he had asked Gutierrez multiple times about obtaining one. *Id.* at 18–19, 37.

Syed was denied the right to "decide his own fate," *Mueller*, 350 F.3d at 1053, and therefore he deserves a new trial.

CONCLUSION

For the foregoing reasons, this Court should find that the post-conviction court erred in concluding that Syed's trial counsel was not constitutionally ineffective with respect to both issues and, accordingly, this Court should reverse the decision of the circuit court and remand this case for a new trial.

Respectfully submitted,

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Statement as to Typeface: The font used in this Brief is Times New Roman and the type size is 13 point.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of March, 2015, two copies of the foregoing Brief of Appellant Adnan Syed were mailed, postage prepaid to the following:

Edward Kelley
Office of the Attorney General
Criminal Appeals Division
200 St. Paul Place
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C. Justin Brown

TEXT OF CITED STATUTES AND RULES

Maryland Rule 4-406(c)

(c) Evidence. Evidence may be presented by affidavit, deposition, oral testimony, or in any other form as the court finds convenient and just. In the interest of justice, the court may decline to require strict application of the rules in Title 5, except those relating to the competency of witnesses.

Maryland Rule 5-101(c)(3)

(c) Discretionary Application. In the following proceedings, the court, in the interest of justice, may decline to require strict application of the rules in this Title other than those relating to the competency of witnesses: . . . (3) Hearings on petitions for post-conviction relief under Rule 4-406

APPENDIX

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