APPENDIX

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

September Term, 2018

STATE OF MARYLAND

v.

ADNAN SYED

No. 24

Appeal from the Circuit Court for Baltimore City

Case No. 199103042 through 199103046

Argued: November 29, 2018

Barbera, C.J.

Greene

McDonald

Watts

Hotten

Getty

Adkins, Sally D., (Senior Judge, Specially Assigned),

JJ.

Opinion by Greene, J.

Watts, J. concurs.

Barbera, C.J., Hotten and Adkins, JJ., concur and dissent

Filed: March 8, 2019

In the present case, we are asked to reconsider the decision of a post-conviction court that granted the Respondent, Adnan Syed, a new trial. That decision was affirmed in part and reversed in part by our intermediate appellate court with the ultimate disposition—a new trial—remaining in place. The case now stands before us, twenty years after the murder of the victim, seventeen-year-old high school senior Hae Min Lee ("Ms. Lee"). We review the legal correctness of the decision of the post-conviction court and decide whether certain actions on the part of Respondent's trial counsel violated Respondent's right to the effective assistance of counsel.

FACTUAL AND PROCEDURAL BACKGROUND

We shall not endeavor to replicate the thorough, carefully-written and well-organized Opinion, penned by then-Chief Judge Patrick Woodward, of the Court of Special Appeals in this case. For a more exhaustive review of the underlying facts, evidence presented at trial, and subsequent procedural events involving Respondent's (hereinafter "Respondent" or "Mr. Syed") conviction of first-degree murder of his ex-girlfriend, we direct readers to the Opinion of that court. *Syed v. State*, 236 Md. App. 183, 181 A.3d 860 (2018) ("*Syed*"). For purposes of our review of the issues before us, we shall include relevant facts as

necessary as well as an abbreviated recitation of the significant procedural markers in this case's sojourn.

On February 25, 2000, a jury sitting in the Circuit Court for Baltimore City convicted Mr. Syed of first-degree murder, robbery, kidnapping, and false imprisonment of Ms. Lee. Mr. Syed challenged his conviction on direct appeal. In an unreported opinion, the Court of Special Appeals affirmed his conviction on March 19, 2003. *Syed v. State*, No. 923, Sept. Term 2000. On May 28, 2010, Mr. Syed filed a petition for post-conviction relief, which he supplemented on June 27, 2010. In that petition, Mr. Syed alleged that he received ineffective assistance of counsel and in so alleging lodged claims against his trial counsel, sentencing counsel, and appellate counsel. In the post-conviction petition, Mr. Syed argued nine bases for his claim that he had received ineffective assistance of counsel. *Syed*, 236 Md. App. at 206-07, 181 A.3d at 872-73 (listing the nine bases on which Mr. Syed claimed his trial counsel or appellate counsel were ineffective). Of relevance to our inquiry is that none of the nine bases was a claim that his trial counsel failed to challenge an alleged *Brady*[1] violation regarding the admission of evidence that potentially undermined the reliability of cell tower location evidence that was used as part of the State's case.[2] Mr. Syed did raise and argue

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[1] When evidence that is favorable to an accused is not disclosed or is suppressed by the State, the result—colloquially referred to as a *Brady* violation—is considered a denial of due process. *See Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

[2] By way of comparison, in his Motion to Re-Open Post-Conviction Proceedings, which he filed upon remand to the

that his trial counsel was ineffective for failing to investigate or call Asia McClain ("Ms. McClain") as an alibi witness. After a two-day hearing on October 11, 2012 and October 25, 2012, the post-conviction court issued an order and memorandum in which it denied post-conviction relief on January 6, 2014.

Thereafter, Mr. Syed filed a timely application for leave to appeal, which presented the issue of his trial counsel's failure to interview or investigate Ms. McClain as a potential alibi witness.[3] Subsequent to his filing of an application for leave to appeal, Mr. Syed supplemented his application for leave to appeal and requested that the Court of Special Appeals remand the case for the post-conviction court to consider an affidavit from Ms. McClain.[4] The

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Circuit Court by the Court of Special Appeals, Mr. Syed presented two related questions regarding the cell tower location evidence. As the Court of Special Appeals characterized, one of the issues presented in his motion was "[w]hether the State withheld potentially exculpatory evidence related to the reliability of cell tower location evidence in violation of the disclosure requirements under *Brady*." *Syed v. State*, 236 Md. App. 183, 208-09, 181 A.3d 860, 874 (2018). The second issue presented was whether "trial counsel's alleged failure to challenge the reliability of the cell tower location evidence violated [Mr. Syed's] Sixth Amendment right to effective assistance of counsel." *Id.* at 209.

[3] Additionally, Mr. Syed requested that the Court of Special Appeals review whether his trial counsel rendered ineffective assistance of counsel when she failed to pursue a plea offer on his behalf.

[4] The affidavit, dated January 13, 2015, repeated Ms. McClain's recollection of seeing and talking with Mr. Syed at the Woodlawn Public Library at approximately 2:30 p.m. on January 13, 1999, the day of Ms. Lee's murder. The affidavit explained that no one from Mr. Syed's defense team contacted her even though she would have been willing to tell her story.

intermediate appellate court granted Mr. Syed's request and issued a limited remand order in which it afforded Mr. Syed "the opportunity to file such a request to re-open the post-conviction proceedings" in the Circuit Court. *See Syed,* 236 Md. App. at 210, 181 A.3d at 875 (reciting the Remand Order in relevant part).

Upon remand by the Court of Special Appeals and as part of his request to the Circuit Court to reopen his post-conviction proceedings, Mr. Syed filed a request for the Circuit Court to consider, for the first time, a new basis for his claim of ineffective assistance of counsel related to a purported *Brady* violation concerning the cell tower location evidence. Mr. Syed continued to maintain his argument that his trial counsel's failure to pursue Ms. McClain as an alibi witness amounted to ineffective assistance of counsel. The Circuit Court granted Mr. Syed's request to reopen his post-conviction proceedings to review both of the aforementioned issues.

After a five-day hearing, the post-conviction court issued an order, accompanied by a thorough memorandum, in which it denied relief to Mr. Syed on the issue of his counsel's failure to investigate Ms. McClain as an alibi witness. The post-conviction

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Ms. McClain affirmed that she completed an affidavit on March 25, 2000 and that she did so without pressure from Mr. Syed's family. Ms. McClain also affirmed that after a conversation with one of the prosecutors involved with Mr. Syed's case, Ms. McClain was persuaded to cease further involvement with Mr. Syed's defense team. Finally, the affidavit indicates that after an interview with a reporter from National Public Radio in January 2014, Ms. McClain felt compelled to provide an affidavit to Mr. Syed's lawyer and appear in court, if necessary.

court concluded that although Mr. Syed's trial counsel was deficient for not contacting Ms. McClain, counsel's failure to investigate Ms. McClain's claim did not prejudice Mr. Syed. Next, the post-conviction court concluded that Mr. Syed waived his claim of a *Brady* violation with respect to the cell tower location evidence because he had not raised the claim in his post-conviction petition. Finally, with respect to Mr. Syed's claim of ineffective assistance of counsel concerning his trial counsel's failure to challenge the cell tower location evidence, the post-conviction court first determined that Mr. Syed did not knowingly and intelligently waive this claim. Then, the post-conviction court reasoned that Mr. Syed's trial counsel's failure to challenge the cell tower information was in fact deficient and that this deficiency prejudiced Mr. Syed. As a result, the post-conviction court vacated the convictions and granted Mr. Syed a new trial.

In its review of the post-conviction court's order, the Court of Special Appeals reversed the rulings in two respects. With regard to the claim that Mr. Syed suffered ineffective assistance of counsel due to his trial counsel's failure to investigate a potential alibi witness, the Court of Special Appeals applied the tenets of *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), and concluded that Mr. Syed's trial counsel's performance was deficient and that this deficiency resulted in prejudice. Specifically, the intermediate appellate court determined that Mr. Syed was prejudiced by the absence of Ms. McClain's testimony because of the State's timeline of the murder and the fact that the State was required to prove that Mr. Syed caused

the death of the victim in order to secure a conviction for first-degree murder. 236 Md. App. at 281, 181 A.3d at 916. The court explained that, "the State had to establish that [Mr.] Syed 'caused the death' of [Ms. Lee], and the State's theory of when, where, and how [Mr.] Syed caused [Ms. Lee's] death was critical to proving this element of the crime." *Id.* The court characterized the State's case as a circumstantial one that "did not directly establish that [Mr.] Syed caused [Ms. Lee's] death sometime between 2:15 p.m. and 2:35 p.m. in the Best Buy Parking lot on January 13, 1999." *Id.* at 282, 181 A.3d at 916. By contrast, according to the intermediate appellate court, Ms. McClain's testimony would have been evidence that could have supplied "'reasonable doubt' in at least one juror's mind leading to a different outcome[.]" *Id.* at 284, 181 A.3d at 918. The Court of Special Appeals, thus, determined that Mr. Syed was entitled to a new trial.[5] *Id.* at 286, 181 A.3d at 919.

In addition, the Court of Special Appeals considered whether Mr. Syed had waived his right to a claim of ineffective assistance of counsel on the basis that his trial counsel failed to challenge the cell tower location evidence. *Id.* at 230, 181 A.3d at 886. Heeding the collective guidance of the reasoning in *Curtis v. State,*[6] *Wyche v. State,*[7] and *Arrington v.*

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[5] One member of the panel dissented and filed a separate opinion. That member would have affirmed the post-conviction court's determination that Mr. Syed failed to meet his burden with respect his claim of ineffective assistance of counsel, and, thus, would have denied Mr. Syed's request for a new trial. *Syed,* 236 Md. App. 183, 306, 181 A.3d 860, 931 (2018) (Graeff, J., dissenting).

[6] 284 Md. 132, 395 A.2d 464 (1978).

State,[8] the intermediate appellate court ruled that because Mr. Syed had previously raised the issue of ineffective assistance of counsel in his petition for post-conviction relief, he was precluded from raising the issue again on a totally different ground, namely, the cell tower location ground. *Id.* at 237, 181 A.3d at 890. Specifically, the intermediate appellate court explained that Mr. Syed's post-conviction petition, "advanced seven claims that trial counsel's representation[9] was constitutionally inadequate, each on a separate ground. The cell tower ground was not one of those grounds. Consequently, the question of waiver regarding the failure to raise the issue of ineffective assistance of trial counsel is not present here." *Id.* at 236-37, 181 A.3d at 890. The Court of Special Appeals further held that the theory relative to the reliability of the cell tower location evidence was a non-fundamental right, and, as such, Mr. Syed's failure to assert this ground in his post-conviction petition constituted a waiver. *Id.* at 239, 181 A.3d at 892. In short, because Mr. Syed could have raised his ineffective assistance of counsel claim on the basis of the cell tower location evidence in his post-conviction petition and did not, he waived the claim by failing to do so.[10] *Id.* at 240, 181 A.3d at 892.

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[7] 53 Md. App. 403, 454 A.2d 378 (1983).

[8] 411 Md. 524, 983 A.2d 1071 (2009).

[9] Mr. Syed advanced nine claims in all in his post-conviction petition, including seven claims related to trial counsel, one claim related to appellate counsel, and one claim related to sentencing counsel.

[10] The Court of Special Appeals also ruled on the issue of whether Mr. Syed's trial counsel was ineffective by failing to

Upon the issuance of the Opinion of the Court of Special Appeals, the State filed in this Court a petition for writ of certiorari. Mr. Syed filed a conditional cross-petition for writ of certiorari. The State requested that we review

> [w]hether the Court of Special Appeals erred in holding that defense counsel pursuing an alibi strategy without speaking to one specific potential witness of uncertain significance violates the Sixth Amendment's guarantee of effective assistance of counsel.

Whereas, Mr. Syed in his conditional cross-petition requested that we review

> [w]hether the Court of Special Appeals drew itself into conflict with *Curtis v. State*, 284 Md. 132 (1978), in finding that [Mr.] Syed waived his ineffective-assistance claim based on trial counsel's failure to challenge cell-tower location data, where the claim implicated the fundamental right to effective [assistance of] counsel and was therefore subject to the statutory requirement of knowing and intelligent waiver?

We granted *certiorari* on both issues. 460 Md. 3, 188 A.3d 918 (2018).

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pursue a plea offer with the State. *Syed,* 236 Md. App. 183, 241-46, 181 A.3d 860, 893-96. The court applied the two-part *Strickland* test and held that the post-conviction court properly denied Mr. Syed relief on this claim because Mr. Syed "failed to prove that the State would have made him a plea offer if trial counsel had requested one." *Id.* at 246, 181 A.3d at 896.

STANDARD OF REVIEW

Our review of a post-conviction court's findings regarding ineffective assistance of counsel is a mixed question of law and fact. *Newton v. State,* 455 Md. 341, 351, 168 A.3d 1, 7 (2017) (citing *Harris v. State,* 303 Md. 685, 698, 496 A.2d 1074, 1080 (1985) ("[T]o determine the ultimate mixed question of law and fact, [we ask] namely, was there a violation of a constitutional right as claimed."). The factual findings of the post-conviction court are reviewed for clear error. *Id.* The legal conclusions, however, are reviewed *de novo. Id.* at 351-52, 168 A.3d at 7. The appellate court exercises "its own independent analysis" as to the reasonableness, and prejudice therein, of counsel's conduct. *Oken v. State,* 343 Md. 256, 285, 681 A.2d 30, 44 (1996).

DISCUSSION

Trial Counsel's Failure to Investigate a Potential Alibi Witness

Parties' Arguments

Mr. Syed urges this Court to affirm the Court of Special Appeals's holding as to the issue of whether his trial counsel's failure to investigate a potential alibi witness was violative of *Strickland.* According to Mr. Syed, it was a dereliction of duty for trial counsel to make no effort to contact Ms. McClain. This is so because, according to Mr. Syed, trial counsel did not raise an alibi defense. Moreover, Mr. Syed argues that because Ms. McClain's alibi was offered for a precise time it was even more crucial for trial counsel to investigate her, and there is no tactical consideration that could have justified a failure to contact Ms. McClain. Finally, Mr. Syed

suggests that Ms. McClain was a disinterested witness whose testimony would have "punctured both the 'when' and the 'where' of the State's core theory[,]" and, therefore, would have created reasonable doubt as to Mr. Syed's involvement to satisfy the prejudice prong of *Strickland.*

The State, of course, seeks a reversal of the Court of Special Appeals on the issue of trial counsel's efforts to investigate Ms. McClain as an alibi witness. According to the State, the record here is silent as to trial counsel's reasons or motivations for not investigating Ms. McClain and, without more, Mr. Syed cannot satisfy his burden under *Strickland.* The State contends that a proper application of *Strickland* in the face of a silent, ambiguous or incomplete record as to trial counsel's reasons requires that a court deny relief based on the presumption that trial counsel acted reasonably. Here, according to the State, there were several plausible explanations for why Mr. Syed's trial counsel did not need to investigate Ms. McClain's purported alibi. Ultimately, the State concludes that Mr. Syed has failed to show that his trial counsel's performance satisfied the second prong of *Strickland* because the State presented "overwhelming evidence of [Mr. Syed's] guilt."

Trial Counsel's Duty to Investigate

The Sixth Amendment affords an individual accused of a crime the right to effective assistance of counsel. The Supreme Court has cautioned that "a person who happens to be a lawyer [who] is present at trial alongside the accused [] is not enough to satisfy the constitutional command." *Strickland v. Washington,* 466 U.S. 668, 685, 104 S. Ct. 2052,

2063, 80 L.Ed.2d 674 (1984). When a defendant advances an ineffective assistance of counsel claim, and requests that his or her conviction be reversed, he or she must meet a two-part test to succeed on his or her claim. *Id.* at 687, 104 S. Ct. at 2064, 80 L.Ed.2d 674. This test, referred to as the *Strickland* test, guides a reviewing court's consideration of the claim of ineffective assistance of counsel. *Id.* Under the first prong, the defendant must show that his or her counsel performed deficiently. *Id.* Next, the defendant must show that he or she has suffered prejudice because of the deficient performance. *Id.* In the absence of satisfying both prongs of the test, "it cannot be said that the conviction [] resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

The United States Supreme Court settled on an objective standard of reasonableness for determining whether an attorney's performance was deficient. *Id.* The Supreme Court declared, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L.Ed.2d 674. In light of that objective standard, "[j]udicial scrutiny of counsel's performance is highly deferential, and there is a strong (but rebuttable) presumption that counsel rendered reasonable assistance[.]" *In re Parris W.,* 363 Md. 717, 725, 770 A.2d 202, 207 (2001). This Court has required that a defendant, when alleging that counsel's performance was deficient, "must also show that counsel's actions were not the result of trial strategy." *Coleman v.*

State, 434 Md. 320, 338, 75 A.3d 916, 927 (2013). A strategic trial decision is one that "is founded upon adequate investigation and preparation." *Id.* (quoting *State v. Borchardt,* 396 Md. 586, 604, 914 A.2d 1126, 1136 (2007)) (cleaned up).

Whether the attorney's performance was reasonable is measured by the "prevailing professional norms." *Strickland,* 466 U.S. at 688, 104 S. Ct. at 2065, 80 L.Ed.2d 674. In the context of this case, we look to the American Bar Association's Standards for Criminal Justice to inform our understanding of the prevailing professional norms of a criminal defense attorney's duty to investigate a potential alibi witness. Specifically, the ABA Standards for Criminal Justice 4-4.1 provided at the time of Mr. Syed's trial, in relevant part:

> Duty to Investigate
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> (a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

American Bar Ass'n, *ABA Standards for Criminal Justice* (3rd ed. 1993).[11] *See also Strickland,* 466 U.S.

[11] The fourth edition of the ABA Standards for Criminal Justice was issued in 2015, long after trial counsel rendered

representation to Mr. Syed. Standard 4-4.1 currently provides, in relevant part:

> Duty to Investigate and Engage Investigators
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> (a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges. (b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.
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> (b) Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

at 689, 104 S. Ct. at 2065, 80 L.Ed.2d 674 ("A fair assessment of attorney performance requires . . . [a court] to evaluate the conduct from counsel's perspective at the time.").

Pertinent to our analysis is the definition of an alibi witness and the contours of an alibi defense. An alibi witness is one "whose testimony 'must tend to prove that it was impossible or highly improbable that the defendant was at the scene of the crime when it was alleged to have occurred.'" *McLennan v. State,* 418 Md. 335, 352, 14 A.3d 639, 649 (2011) (quoting *Ferguson v. State,* 488 P.2d 1032, 1039 (Alaska 1971)) (cleaned up); *see also* Maryland Rule 4-263(e)(4) ("Without the necessity of a request, the defense shall provide to the State's Attorney: [i]f the State's Attorney has designated the time, place, and date of the alleged offense, the name and . . . address of each person other than the defendant whom the defense intends to call as a witness to show that the defendant was not present at the time, place, or date designated by the State's Attorney."). When a criminal defendant asserts an alibi defense, he or she does so not as an affirmative defense but to "den[y] the claim of the prosecution that he was present at the scene of the crime at the time it was committed." *Simms v. State,* 194 Md. App. 285, 308, 4 A.3d 72, 85 (2010) (cleaned up); *see also In re Parris* W., 363 Md. 717, 728, 770 A.2d 202, 208 (2001) ("An alibi is not an affirmative defense[.]"). An alibi defense is a defendant's claim "that he [or she] was at another place at the time when the alleged crime was

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American Bar Ass'n, *ABA Standards for Criminal Justice* (4th ed. 2015).

committed[.]" *Simms,* 194 Md. App. at 308, 4 A.3d at 85 (internal citations omitted). Importantly, to establish an alibi that negates the defendant's criminal agency, "the [alibi] testimony must cover the whole time in which the crime . . . might have been committed." *Id.* (citing *Floyd v. State,* 205 Md. 573, 581, 109 A.2d 729, 732 (1954)).

As the Court of Special Appeals and the post-conviction court observed, an analysis of counsel's duty to investigate a potential alibi witness starts with our decision *In re Parris* W., 363 Md. 717, 770 A.2d 202 (2000). There, it was nearly a foregone conclusion that counsel's failure to subpoena corroborating alibi witnesses for the correct trial date constituted deficient performance. *Id.* at 727, 770 A.2d at 208. ("That counsel's performance was deficient, even under the highly deferential standard of *Strickland,* seems clear."). We explained that "counsel's single, serious error . . . did not constitute the exercise of reasonable professional judgment and that such failure was not consistent with counsel's primary function of effectuating the adversarial testing process in this case." *Id.* In reaching the conclusion that counsel's deficiency prejudiced the defendant, we cited a number of cases, which we shall discuss forthwith, that held that trial counsel's failure to investigate a potential alibi witness fell short of reasonable professional standards.

For example, in *Griffin v. Warden, Maryland Correctional Adjustment Center,* the defendant provided his attorney with a list of five alibi witnesses that would have accounted for his time on the day of a robbery and shooting at a drug store. 970 F.2d 1355, 1356 (4th Cir. 1992). The attorney

failed to conduct any investigation of the witnesses and failed to respond to the State's discovery requests, which included failing to provide notice of intent to rely on an alibi and the identities of the alibi witnesses. *Id.* Upon transferring the case to another attorney, Mr. Griffin's first trial attorney counseled his successor that Mr. Griffin should plead guilty. *Id.* Although the second attorney accepted the case at least five months before Mr. Griffin's trial, he failed to conduct any investigation of the alibi witnesses or confirm his predecessor's compliance with the State's discovery requests. *Id.* Moreover, the attorney knew that Mr. Griffin refused to plead guilty. *Id.* A jury convicted Mr. Griffin of robbery and use of a handgun in connection with a crime of violence. *Id.*

Mr. Griffin sought relief in the state court on an ineffective assistance of counsel claim but was ultimately unsuccessful. *Id.* On a request for habeas relief, the United States Court of Appeals for the Fourth Circuit applied the *Strickland* two-prong inquiry. *Id.* at 1357-58. As to the first prong, that court determined that Mr. Griffin's trial counsel's statements, in which he admitted that he did not conduct an investigation of the alibi witnesses because he expected his client to plead, were "unambiguous admissions of unpardonable neglect." *Id.* at 1358. Given the facts in *Griffin,* counsel's performance was deficient because his lack of preparation for trial fell below the standard of "prevailing professional norms[.]" *See Strickland,* 466 U.S. at 690, 104 S. Ct. at 2066, 80 L.Ed.2d 674; *see also Griffin,* 970 F.2d at 1357-58.

In *Grooms v. Solem,* the defendant, William Grooms, was accused of selling a stolen Native American artifact between 5:00 and 5:30 p.m. in Scenic, South Dakota on May 15, 1984. 923 F.2d 88, 89 (8th Cir. 1991). During the second of his three meetings with his appointed counsel, Mr. Grooms explained that he had an alibi. *Id.* On the morning of his trial, Mr. Grooms informed his counsel that on the day of the alleged crime, he, his wife, and a friend were in Rapid City, South Dakota, a town fifty miles away from Scenic, South Dakota. *Id.* Mr. Grooms produced for his counsel a cancelled check as well as a work order, both of which supported Mr. Grooms's alibi that he was in Rapid City, South Dakota getting his truck's transmission repaired until well into the evening hours. *Id.* The cancelled check was dated for May 15, 1984 and the work order reflected the same check number as that of the cancelled check. *Id.* In subsequent proceedings, two witnesses from the repair shop testified that the repairs lasted until sometime between 7:00 p.m. and 7:30 p.m. *Id.* at 89-90. Mr. Grooms's trial counsel failed to investigate the repair shop for corroboration, failed to notify the trial court as to a possible alibi witness, and failed to request a continuance in light of his client's claims. *Id.* at 90. The Eighth Circuit advised that, "[o]nce a defendant identifies potential alibi witnesses, it is unreasonable not to make some effort to contact them to ascertain whether their testimony would aid the defense." *Id.* Accordingly, the court concluded that even accepting as true that Mr. Grooms's trial counsel learned of the alibi on the first day of trial, counsel should have taken efforts to convey to the court that an investigation of the alibi was necessary. *Id.* at 91.

"Once [trial counsel] discovered the potential alibi, [ ] trial counsel had a duty to attempt to investigate and to argue on the record for the admission of the alibi witnesses' testimony." *Id.* The Eighth Circuit affirmed the grant of habeas relief to Mr. Grooms on the basis that his trial counsel's performance was deficient and that the deficiency prejudiced Mr. Grooms. *Id.*

In *Montgomery v. Petersen,* a defendant was charged and tried for burglary in two different jurisdictions for separate acts occurring on the same day. 846 F.2d 407, 408 (1988). In Macon County, Illinois the defendant was acquitted of burglary, whereas in Moultrie County, Illinois the defendant was convicted of burglary. *Id.* "The only difference between the evidence presented in the two trials was the testimony—presented in the Macon County trial but not in the Moultrie County trial—of a disinterested witness[, a store clerk]."[12] *Id.* at 408-409. The State's evidence in both trials consisted of witness testimony that the defendant had spent nearly twelve hours attempting to or committing burglaries. *Id.*

In Moultrie County, the defendant moved for post-conviction relief on the basis of ineffective assistance of counsel. *Id.* at 409. At the hearing on his motion,

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[12] The disinterested witness testified that the defendant was in Springfield buying a child's bike in the afternoon on the day of the burglaries. *Montgomery v. Petersen,* 846 F.2d 407, 409 (1988). The defendant's wife and mother-in-law used the store receipt, which contained an employee code, to locate the witness, presumably in time for the clerk to be called as a witness for the Macon County trial but not for the Moultrie County trial. *Id.* at 410.

trial counsel, who had tried both cases, admitted that he did not investigate the store clerk as a potential alibi witness due to his "inadvertence" and because he "simply didn't believe the defendant[.]" *Id.* at 410. The post-conviction court concluded that the store clerk's testimony, as that of a disinterested alibi witness, was significant. *Id.* at 411. The store clerk's testimony would have not only "greatly enhance[d] the defense['s] case if it stood alone" but it would have served to corroborate "the otherwise impeachable testimony of 12 additional alibi witnesses." *Id.* The post-conviction hearing judge determined that, "the *failure to investigate the only available disinterested alibi witness* fell below the standard of reasonably effective assistance required by *Strickland." Id.* (emphasis in original). The Seventh Circuit affirmed. *Id.* at 416. In doing so, the court observed that the neutral, unbiased store clerk was the linchpin for the alibi defense. *Id.* at 413-14. The testimony was particularly impactful because, without the disinterested witness testimony, the case was "a straightforward credibility choice" between twelve defense witnesses and four prosecution witnesses, all of whom had family ties to each other. *Id.* at 414.

As was consistently true in the cases cited in *In re Parris W.,* a trial attorney's failure to investigate a potential alibi witness ordinarily will fall below the standard of reasonable professional judgment because it undermines the adversarial testing process inherent in a contested case. *See Strickland,* 466 U.S. at 690, 104 S. Ct. at 2066, 80 L.Ed.2d 674 ("In making that determination, the court should keep in mind that counsel's function, as elaborated in

prevailing professional norms, is to make the adversarial testing process work in the particular case."). Counsel's duty is "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691, 104 S. Ct. at 2066, 80 L.Ed.2d 674. Counsel cannot form a sound trial strategy without an "adequate investigation and preparation." *Coleman,* 434 Md. at 338, 75 A.3d at 927.

The post-conviction court's factual findings indicate that Mr. Syed's attorney had ample notice of the existence of Ms. McClain as an alibi witness. The post-conviction court found, for example, that on July 13, 1999 "[Mr. Syed] informed trial counsel's law clerk that [Ms.] McClain saw [Mr. Syed] at the Woodlawn Public Library at around 3:00 p.m. on January 13, 1999." The notes in defense counsel's file also included the notation that "[Ms. McClain] and her boyfriend saw [Mr. Syed] in [the] library." Those notes in the attorney's files did not indicate that counsel or her staff investigated Ms. McClain's statements or evaluated the two letters in which Ms. McClain offered herself as an alibi. The post-conviction court found that sometime "prior to trial" Mr. Syed gave to his attorney two letters from Ms. McClain, one dated March 1, 1999 and the other dated March 2, 1999. In the letters, Ms. McClain claimed to have seen Mr. Syed on the afternoon of January 13, 1999 at the Woodlawn Public Library at 2:15 p.m. and offered herself as a witness to his

whereabouts for part of that day.[13] Finally, the post-conviction court found that "[a]lthough trial counsel had notice of the potential alibi witness, neither she nor her staff ever contacted [Ms.] McClain."

We uphold the factual findings of the post-conviction court unless those findings are clearly erroneous. *See Newton v. State,* 455 Md. 341, 351, 168 A.3d 1, 7 (2017). Notwithstanding that principle, the parties do not dispute that Mr. Syed's counsel failed to investigate Ms. McClain as a potential alibi witness. Trial counsel's failure to investigate or inquire into whether Ms. McClain might aid Mr. Syed's defense did not meet the standard of reasonable professional judgment. Mr. Syed's trial counsel failed to even contact Ms. McClain. This lack of exploration of Ms. McClain, whom trial counsel learned of as early as July 13, 1999 and for whom trial counsel had contact information, falls short of the tenets of a criminal defense attorney's minimum duty to investigate the circumstances and facts of the case. *See* American Bar Ass'n, *ABA Standards for Criminal Justice,* 4-4.1 (3rd ed. 1993) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case[.]"); *see also Rompilla v. Beard,* 545 U.S. 374, 387, 125 S. Ct. 2456, 2466, 162 L.Ed.2d. 360 (2005) ("We long have referred to these ABA Standards as guides to determining what is reasonable." (internal quotations and citations omitted)).

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[13] The Court of Special Appeals quoted Ms. McClain's two letters in full in its Opinion. *Syed,* 236 Md. App. at 251-55, 181 A.3d at 898-900.

The Court of Special Appeals explained that, "no reasonable evaluation of the advantages or disadvantages of [Ms.] McClain's alibi testimony, as compared to an alibi defense based on [Mr.] Syed's habit or routine, could be made without first contacting [Ms.] McClain." *Syed,* 236 Md. App. at 272, 181 A.3d at 911. We agree.

At a minimum, due diligence obligated Mr. Syed's trial counsel to contact Ms. McClain in an effort to explore her potential as an alibi witness. An attorney cannot be said to be carrying out the ABA's requirement of due diligence without conducting a factual investigation of an alibi witness who claims to have knowledge of the defendant's whereabouts on the day of the crime in question. Even if Mr. Syed's trial counsel knew what facts Ms. McClain would present about seeing Mr. Syed on January 13, 1999, trial counsel should have nevertheless made a bona fide effort to investigate Ms. McClain. An investigation could have verified Ms. McClain's assertions as well as revealed whether Ms. McClain was a disinterested witness. Our conclusion does not change in spite of the "heavy measure of deference to counsel's judgments" required by *Strickland.* 466 U.S. at 687, 691, 104 S. Ct. at 2064, 2066, 80 L.Ed.2d 674. Where a defendant provides his or her counsel with information about an alibi witness, the attorney has an affirmative duty to make reasonable efforts to investigate the information that was provided. Thus, the performance of an attorney who clearly failed to effectuate her duty to investigate a potential alibi witness, or provide a reasonable explanation for not investigating the witness, would be deficient under *Strickland.*

In the present case, Mr. Syed gave trial counsel the name and address along with facts about the testimony the potential witness would offer. Mr. Syed's trial counsel had received this information and, therefore, had a duty to investigate Ms. McClain as a potential alibi witness. By all accounts, trial counsel did not conduct any inquiry of Ms. McClain. Trial counsel neither confirmed Ms. McClain's statements, nor indicated in her case file the reasons why she did not investigate Ms. McClain's background or alibi. Mr. Syed's trial counsel's task list dated September 4, 1999 indicated that one task was to "[m]ake determination regarding alibi[,]" and a hand-written "urgent" appeared next to this entry. We are mindful of *Strickland' s* wisdom that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." 466 U.S. at 693, 104 S. Ct. at 2067, 80 L.Ed.2d 674. Documentation, though, is not an art. To the extent that an attorney documents the steps of his or her investigation is a reflection of that attorney's minimal competence and *not* a reflection of trial strategy. If trial counsel had interviewed Ms. McClain and decided that the information Ms. McClain had about Mr. Syed's whereabouts on the afternoon of January 13, 1999 was not helpful to Mr. Syed's case, a notation in the file indicating as much would have plainly defeated Mr. Syed's argument on his claim of ineffective assistance of counsel. Without some indication to the contrary, we cannot conclude that trial counsel's failure to interview a potential alibi witness was the result of a reasonable trial strategy.

We hold that trial counsel did not satisfy her duty "to make [a] reasonable investigation[] or . . . make a reasonable decision that makes a particular investigation[ ] unnecessary." *Strickland,* 466 U.S. at 691, 104 S. Ct. at 2066, 80 L.Ed.2d 674. Under the circumstances, trial counsel knew in advance of trial the identity of and how to contact Ms. McClain. Trial counsel also knew the nature of her potential testimony, yet still failed to contact the witness prior to trial or make an effort to communicate with her. Moreover, trial counsel's failure to attempt to contact the witness prior to trial did not constitute a reasonable tactical or strategic decision because it was not based upon an adequate investigation of the facts. *See State v. Borchardt,* 396 Md. 586, 604, 914 A.2d 1126, 1136 (2007). Although trial counsel was not available, as a result of her death, to testify at the post-conviction proceedings to explain why she did not attempt to make a reasonable investigation of Ms. McClain's background or alibi, her case file notes were admitted into evidence during those proceedings. Her notes, however, did not explain why the investigation of Ms. McClain was unnecessary or why she failed to ascertain whether Ms. McClain's testimony would aid the defense.

Our holding is limited to the narrow question of whether trial counsel was deficient for failing to *investigate* Ms. McClain as an alibi witness. Because we conclude that counsel was deficient for failing to *investigate* Ms. McClain, we need not and do not hold that trial counsel was deficient for failing to *call* Ms. McClain as an alibi witness at trial.

The State strongly advocates that we adopt a broad bright-line rule that would never allow a defendant

to prevail on the deficiency prong of the *Strickland* test in the absence of trial counsel's reasoning for his or her failure to investigate an alibi witness. According to the State, "where the record is silent—or even just incomplete or ambiguous—proper application of *Strickland's* presumption of competence requires that a court deny relief." Applied here, the State's reasoning is grounded in the fact that Mr. Syed's trial counsel was unable—due to her death—to explain why she did not contact Ms. McClain as part of trial preparations. Therefore, according to the State, Mr. Syed could not have met, and did not meet, the high burden that *Strickland* demands. The State would have this Court rule that whenever a record is silent as to the reasons why trial counsel failed to investigate a potential alibi witness, the defendant may never prevail on an ineffective assistance of counsel claim because a reviewing court could not declare trial counsel's performance deficient. A ruling such as this would divorce this Court from its obligation to review the totality of the circumstances of ineffective assistance claims through the lens of an "objective standard of reasonableness." *Strickland,* 466 U.S. at 687-88, 104 S. Ct. at 2064, 80 L.Ed.2d 674 ("When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate."). We are not persuaded that such a sweeping mandate accomplishes the goal that *Strickland* sought to achieve, namely, that of a just result.

Additionally, the State argues that any attempt by this Court to rely on cases where the record was *not* silent as to counsel's reasoning, such as *Griffin,* is a means of "turning *Strickland* on its head." We resist this siren call, as well. A silent record cannot be the sole determinant in our reasonableness assessment. Such a result would betray *Strickland's* decree that a "court must [] determine whether, *in light of all the circumstances,* the identified acts or omissions were outside the wide range of professionally competent assistance." 466 U.S. at 690, 104 S. Ct. at 2066, 80 L.Ed.2d 674 (emphasis added). Whether trial counsel's omission was due to neglect, an intentional strategic decision, or some other reason altogether, we hold that Mr. Syed's trial counsel's performance fell below the standard of reasonable professional judgment and was, therefore, deficient.

Whether Trial Counsel's Deficient Performance Prejudiced Mr. Syed

The second-prong of the *Strickland* standard requires the defendant to show prejudice. *Id.* at 687, 104 S. Ct. at 2064, 80 L.Ed.2d 674. A showing of prejudice is present where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068, 80 L.Ed.2d 674. We have explained that under this standard a defendant "must show either: (1) a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; or (2) that the result of the proceeding was fundamentally unfair or unreliable." *Newton v. State,* 455 Md. 341, 355, 168 A.3d 1, 9 (2017) (quoting *Coleman v. State,* 434 Md. 320, 340, 75 A.3d 916, 928

(2013) (cleaned up)). The *Strickland* Court described a reasonable probability as "a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068, 80 L.Ed.2d 674. We have interpreted *reasonable probability* to mean "there was a substantial or significant possibility that the verdict of the trier of fact would have been affected." *Bowers v. State,* 320 Md. 416, 426, 578 A.2d 734, 739 (1990). A reviewing court's determination of prejudice to the defendant "must consider the totality of the evidence before the judge or jury." *Strickland,* 466 U.S. at 695, 104 S. Ct. at 2069, 80 L.Ed.2d. 674.

Important to the present case is the principle that even if a court has found that an attorney's performance was deficient, the court does not presume the defendant suffered prejudice as a result of the deficient performance. *See Weaver v. Massachusetts,* 582 U.S. ____, ____, 137 S. Ct. 1899, 1910, 198 L.Ed.2d 420 (2017) ("The prejudice showing is in most cases a necessary part of a *Strickland* claim. The reason is that a defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.") (internal citation omitted). In other words, every mistake made by trial counsel does not cause prejudice to the defendant's case. *See, e.g., St. Cloud v. Leapley,* 521 N.W.2d 118, 128 (S.D. 1994) (holding that attorney's failure to investigate the defendant's tribal court file offended reasonable professional judgment but that the failure did not prejudice the case); *see Brewer v. Hall,* 603 S.E.2d. 244, 247 (Ga. 2004) (holding that appellate counsel's failure to present the testimony of trial counsel at an

evidentiary hearing was deficient but that, ultimately, trial counsel's performance was not deficient; thus, appellate counsel's performance caused no prejudice); *see also Moreland v. Robinson,* 813 F.3d 315, 329 (6th Cir. 2016) (holding that even if counsel's failure to use police reports at trial to challenge a discrepancy was deficient performance, the defendant was not prejudiced). A court's evaluation of the prejudice prong under *Strickland* asks, "whether it is 'reasonably likely' the result would have been different" if not for counsel's deficient performance. *Harrington v. Richter,* 562 U.S. 86, 111, 131 S. Ct. 707, 792, 178 L.Ed.2d 624 (2011); *see also Bowers v. State,* 320 Md. 416, 426, 578 A.2d 734, 739 (1990) (holding that the *Strickland* prejudice standard is best described as "a substantial or significant possibility that the verdict of the trier of fact would have been affected."). More succinctly, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington,* 562 U.S. at 112, 131 S. Ct. at 792, 178 L.Ed.2d 624.

Our analysis begins with the State's theory of Mr. Syed's involvement in the murder of Ms. Lee. The State focused primarily on Mr. Syed's actions on the evening of January 13, 1999. During the six-hour period from approximately 2:00 p.m. after school dismissed to approximately 8:00 p.m., the State's strongest evidence against Mr. Syed related to the period of time Mr. Syed was involved in burying Ms. Lee's body in Leakin Park and the subsequent abandonment of Ms. Lee's car. The State relied on the testimony of Jay Wilds ("Mr. Wilds") to establish that Mr. Syed buried the victim in Leakin Park at approximately 7:00 p.m. Mr. Wilds testified that Mr.

Syed received two calls to his cell phone during the time that Mr. Syed was preparing the burial site for the victim's body. The State introduced Mr. Syed's cell phone records to corroborate Mr. Wilds's testimony. The cell phone records showed that Mr. Syed's cell phone received two incoming calls, one at 7:09 p.m. and one at 7:16 p.m. The State's expert testified that the cell towers where the calls were received connected with cell sites that encompassed Leakin Park, which is where Ms. Lee's body was discovered. The State also relied on the testimony of Jennifer Pusateri ("Ms. Pusateri"). Ms. Pusateri's testimony served to corroborate the fact of the incoming call at 7:09 p.m. or 7:16 p.m. as well as to place Mr. Syed and Mr. Wilds together at the time of that call. Ms. Pusateri testified that she received a message from Mr. Wilds to call him, so she tried to reach him using the number that was on her caller I.D. from his message. When she called and asked to speak with Mr. Wilds, the person who answered the phone responded that Mr. Wilds was busy and would call her back. The State proved that the number Ms. Pusateri called was the number for Mr. Syed's cell phone. About ten to fifteen minutes after that call, according to Ms. Pusateri, she met Mr. Wilds in a parking lot where she saw Mr. Wilds get out of a car that Mr. Syed was driving.

Additionally the State presented evidence that this was a crime of premeditation and deliberation. For example, through Mr. Wilds's testimony, the State established that Mr. Syed told Mr. Wilds on January 13, 1999, hours before the murder, referring to Ms. Lee, "I'm going to kill that bitch." According to Mr. Wilds, while he and Mr. Syed were standing near the

victim's car in the Best Buy parking lot, Mr. Syed showed Mr. Wilds the victim's body in the trunk and boasted, "I killed somebody with my bare hands." Also at that time, Mr. Wilds observed Mr. Syed wearing red gloves. Following this conversation, Mr. Syed directed Mr. Wilds to follow him, in Mr. Syed's car as Mr. Syed drove the victim's car, to a Park and Ride on Interstate 70. Thereafter, according to Mr. Wilds, Mr. Syed said that he needed to return to school so that he could be seen at track practice. They left the victim's car parked at the Park and Ride and drove back to Mr. Syed's school in his car.

In her discovery responses, Mr. Syed's counsel presented a theory that Mr. Syed had a routine of attending track practice after school followed by attending prayer service at his mosque. On October 4, 1999, Mr. Syed's trial counsel issued an alibi notice to the State, in which she stated:

> On January 13, 1999, Adnan Masud Syed attended Woodlawn High School for the duration of the school day. At the conclusion of the school day, the defendant remained at the high school until the beginning of his track practice.[14] After track practice, Adnan Syed went home and remained there until attending services at his mosque that evening. 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.

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[14] The Woodlawn High School track coach testified that track practice was "every day after school, after their study hall . . . approximately 4:00 [p.m.] to 5:30 [p.m.], 6 [p.m.]."

The notice also included the names of over eighty individuals who would testify as to Mr. Syed's routine involving track practice and the Mosque. *See* Md. Rule 4-263(e)(4) (explaining that defendant is required to furnish to the State's Attorney "the name and . . . the address of each person other than the defendant whom the defense intends to call as a witness to show that the defendant was not present at the time, place, or date designated by the State's Attorney[.]"); *see also McLennan v. State,* 418 Md. 335, 352, 14 A.3d 639, 649 (2011) (adopting the definition of alibi witness as "a witness whose testimony 'must tend to prove that it was impossible or highly improbable that the defendant was at the scene of the crime when it was alleged to have occurred.' (quoting *Ferguson v. State,* 488 P.2d 1032, 1039 (Alaska 1971))); *see also Jackson v. State,* 22 Md. App. 257, 260, 322 A.2d 574, 576 (1974) ("Proof of an alibi, like any other defense testimony, is simply a means of controverting the State's effort to establish criminal agency."). This alibi notice to the State was consistent with the statements Mr. Syed had made to the police on prior occasions.

On the evening of January 13, 1999, Officer Scott Adcock spoke with Mr. Syed inquiring about Mr. Syed's knowledge of the whereabouts of Ms. Lee. At that time, Mr. Syed told Officer Adcock that "he was suppose[d] to get a ride home from the victim, but he got detained at school and felt that she just got tired of waiting and left." Mr. Syed did not provide Officer Adcock with an explanation of what detained him or what he did after school. Two weeks after the initial conversation with Officer Adcock, Mr. Syed was

interviewed by Detective O'Shea on January 25, 1999. At that time, Mr. Syed said that he had attended track practice after school on January 13, 1999. Detective O'Shea spoke with Mr. Syed again on February 1, 1999 to ask him if he remembered telling Officer Adcock that Ms. Lee was waiting to give him a ride after school. At that time, Mr. Syed told Detective O'Shea that "[Officer Adcock's information] was incorrect because he drives his own car to school so he wouldn't have needed a ride from her." When Mr. Syed was interviewed on February 26, 1999, he told investigators that he could not remember what he did on January 13, 1999. Although Mr. Syed offered conflicting statements to law enforcement about needing a ride after school, the conflict in those statements was not inconsistent with whether he attended track practice that day.

In his post-conviction petition, Mr. Syed relied on Ms. McClain's contention that she observed him in the Woodlawn Public Library on the afternoon of January 13, 1999. Specifically, Ms. McClain averred in her 2015 affidavit that she saw Mr. Syed between 2:30 p.m. and 2:40 p.m. and had a conversation with him at that time. In assessing Ms. McClain's value as an alibi for Mr. Syed, her letters tended to show that Mr. Syed and the victim were not together between 2:30 p.m. and 2:40 p.m. on January 13, 1999.[15] Even taking Ms. McClain's statements as

[15] Ms. McClain has offered various times when she observed Mr. Syed at the Woodlawn Public Library. For example, in her letter to Mr. Syed dated March 1, 1999, Ms. McClain indicates that she could help account for his "unaccountable lost time (2:15 [p.m.] — 8:00 [p.m.]; Jan. 13th)." In the affidavit dated March 25, 2000, Ms. McClain avers that she had been in the library waiting for a ride at 2:20 p.m. when she saw Mr. Syed

true, her alibi does little more than to call into question the time that the State claimed Ms. Lee was killed and does nothing to rebut the evidence establishing Mr. Syed's motive and opportunity to kill Ms. Lee. Thus, the jury could have disbelieved that Mr. Syed killed Ms. Lee by 2:36 p.m., as the State's timeline suggested, yet still believed that Mr. Syed had the opportunity to kill Ms. Lee after 2:40 p.m. Ms. McClain's testimony, according to her affidavit, failed to account for Mr. Syed's whereabouts after 2:40 p.m. on January 13, 1999. Likewise, Mr. Syed's statements to the police fail to

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and "held a 1520 minute conversation" with him and that she left around 2:40 p.m. In Ms. McClain's affidavit dated January 13, 2015, she alleges that she saw Mr. Syed enter the library "at around 2:30 p.m." and had a conversation with him at that time and that she "left the library around 2:40 [p.m.]". Had the jury heard Ms. McClain's alibi, her testimony could have been more problematic than helpful to Mr. Syed's case. For example, Ms. McClain's belief about Mr. Syed's whereabouts on the afternoon of January 13, 1999 did not comport with the theory that Mr. Syed's routine was to attend track practice after school because his routine did not involve going to the Woodlawn Public Library. Also, Ms. McClain's letter dated March 1, 1999 indicated that she would "try [her] best to help [Mr. Syed] account for some of [his] unwitnessed, unaccountable lost time (2:15 — 8:00; Jan. 13th)." The jury could have concluded that Ms. McClain's statement was an offer to fabricate an alibi for Mr. Syed, thereby undermining Ms. McClain's credibility as a disinterested witness. Given this potential, we cannot say there is a substantial probability that the jury would have discounted Mr. Wilds's testimony in favor of Ms. McClain's testimony. Furthermore, Ms. McClain's testimony could have been more harmful than helpful because it would have created another inconsistency in Mr. Syed's case. Namely, Ms. McClain's testimony would have interjected facts into the case that were inconsistent with Mr. Syed's statements that he needed a ride after school.

account for his whereabouts after 2:15 p.m. when school let out. Therefore, even if the alibi testimony had been admitted into evidence it could not have affected the outcome of the case because that evidence did not negate Mr. Syed's criminal agency.

To conclude that Mr. Syed allegedly suffered prejudice as a result of his trial counsel's deficient performance, we must determine in light of all of the evidence before the jury, that "there was a substantial or significant possibility" that the jury's verdict would have been affected by the deficient performance. *See Bowers,* 320 Md. at 426, 578 A.2d at 739. The Court of Special Appeals provided a thorough recounting of the evidence that the State established in its case in chief, which included a combination of witness testimony, cell phone technology evidence, and some forensic evidence. *See Syed,* 236 Md. App. at 196-06, 181 A.3d at 867-72. The State, however, "adduced no direct evidence of the exact time that [Ms. Lee] was killed, the location where she was killed, the acts of the killer immediately before and after [Ms. Lee] was strangled, and of course, the identity of the person who killed [Ms. Lee]." *Id.* at 284, 181 A.3d at 917. Whether the State's case was "a strong circumstantial case," as the Court of Special Appeals described it, or a case built upon a combination of direct and circumstantial evidence, is of no consequence under the *Strickland* analysis. *Compare Hebron v. State,* 331 Md. 219, 226, 627 A.2d 1029, 1032 (1993) ("Maryland has long held that there is no difference between direct and circumstantial evidence.") *with Strickland,* 466 U.S. at 696, 104 S. Ct. at 2069, 80 L.Ed.2d 674 ("[A] verdict or

conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). Our analysis considers the totality of the evidence before the jury. *See Strickland,* 466 U.S. at 695, 104 S. Ct. at 2069, 80 L.Ed.2d 674.

With that in mind, we highlight some of the more crucial evidence the State relied on to prove its case. Mr. Wilds testified that Mr. Syed had complained of Ms. Lee's treatment of him and said that he intended "to kill that bitch." Mr. Wilds claimed to have seen the body of Ms. Lee in the trunk of her car at the Best Buy parking lot. Ms. Pusateri, a friend of Mr. Wilds, told police, and testified at trial consistent with those statements, that Mr. Wilds told her that Ms. Lee had been strangled. At the time Ms. Pusateri relayed this information to the police, the manner of Ms. Lee's death had not been publicly released. Mr. Syed's cell phone records showed him receiving a call in the vicinity of Leakin Park at the time that Mr. Wilds claimed he and Mr. Syed were there to bury Ms. Lee's body. Mr. Wilds directed the police to the location of Ms. Lee's abandoned vehicle, which law enforcement had been unable to find for weeks. Mr. Syed's palm print was found on the back cover of a map book that was found inside Ms. Lee's car; the map showing the location of Leakin Park had been removed from the map book. Various witnesses, including Ms. Pusateri, Nisha Tanna, and Kristina Vinson, testified to either seeing or speaking by cell phone with Mr. Wilds and Mr. Syed together at various times throughout the afternoon and evening on January 13, 1999.

Given the totality of the evidence the jury heard, we conclude that there is not a significant or substantial possibility that the verdict would have been different had trial counsel presented Ms. McClain as an alibi witness. Ms. McClain would have been an alibi witness who contradicted the defendant's own statements, which were themselves already internally inconsistent; thus Ms. McClain's proffered testimony could have further undermined Mr. Syed's credibility. Moreover, Ms. McClain's account was cabined to a narrow window of time in the *afternoon* of January 13, 1999. Her testimony would not have served to rebut the evidence the State presented relative to Mr. Syed's actions on the *evening* of January 13, 1999. At best, her testimony would have highlighted Mr. Syed's failure to account precisely for his whereabouts after school on January 13, 1999. Trial counsel's deficient performance, therefore, could not have prejudiced Mr. Syed in light of the totality of the evidence presented to the jury.

Ultimately, the post-conviction court reached the same conclusion as we do here. That court viewed Ms. McClain's testimony in light of "the crux of the State's case" which "did not rest on the time of the murder." The post-conviction court reasoned that the State placed Mr. Syed in Leakin Park at approximately 7:00 p.m. on January 13, 1999 through the testimony of Mr. Wilds and the cell phone location evidence. With this theory in mind, the post-conviction court concluded that Ms. McClain's testimony "would not have been able to sever this crucial link" between Mr. Syed burying Ms. Lee's body and the State's evidence supporting

that allegation. The Court of Special Appeals, however, disagreed with the post-conviction court.

The intermediate appellate court suggested that the post-conviction court failed to consider that in order to convict Mr. Syed of first-degree murder, the State needed to prove that Mr. Syed "caused the death" of Ms. Lee. 236 Md. App. at 281, 181 A.3d at 916. According to the intermediate appellate court, "[t]he burial of [Ms. Lee] was not an element that the State needed to prove in order to convict [Mr.] Syed." *Id.* Accordingly, "the State's theory of when, where, and how [Mr.] Syed caused [Ms. Lee's] death was critical to proving this element of the crime." *Id.* To that end, the Court of Special Appeals concluded that Ms. McClain's alibi testimony would have "directly contradicted the State's theory of when [Mr.] Syed had the opportunity and did murder [Ms. Lee]." *Id.* at 284, 181 A.3d at 917-18. The Court of Special Appeals insisted that it did not consider Ms. McClain's testimony in isolation. *Id.* at 282, 181 A.3d at 917. Nevertheless, clearly that court analyzed Ms. McClain's testimony exclusively against a backdrop of what evidence was absent from the State's case with respect to the timing of Ms. Lee's death. *See id.* at 28384, 181 A.3d at 917 (listing evidence that might have been used to establish the State's timeline of the murder but was not). In light of the absence of evidence by the State relative to the time of Ms. Lee's murder and the fact that the evidence against Mr. Syed was circumstantial, the Court of Special Appeals surmised that one piece of evidence in the form of Ms. McClain's alibi would have "altered the entire evidentiary picture." *Id.* at 284,

181 A.3d at 917-18 (citing *Strickland,* 466 U.S. at 696, 104 S. Ct. at 2069).

A reviewing court's rejection of significant circumstantial evidence in the face of a singular piece of potential evidence undermines the evidentiary value of circumstantial evidence. We have previously opined:

> Circumstantial evidence need not be such that no possible theory other than guilt can stand. . . . It is not necessary that the circumstantial evidence exclude every possibility of the defendant's innocence, or produce an absolute certainty in the minds of the jurors. . . . While it must afford the basis for an inference of guilt beyond a reasonable doubt, it is not necessary that each circumstance, standing alone, be sufficient to establish guilt, but the circumstances are to be considered collectively.

Hebron v. State, 331 Md. 219, 227, 627 A.2d 1029, 1033 (1993) (citations omitted) (cleaned up). A reviewing court must consider the entirety of the evidence against the post-conviction petitioner who has made a claim of ineffective assistance of counsel, rather than separately weigh the circumstantial evidence against the direct evidence. *See Strickland,* 466 U.S. at 695, 104 S. Ct. at 2069, 80 L.Ed.2d. 674.

In the case *sub judice,* the State's case against Ms. Syed was based, *inter alia,* on the testimony of Mr. Wilds, the cell tower location evidence, as well as the testimony of individuals who not only corroborated Mr. Wilds's testimony but also corroborated the cell tower location evidence. Furthermore, the State proved that Mr. Syed had the motive and the

opportunity to take Ms. Lee's life on January 13, 1999. As the post-conviction court noted in its first Memorandum Opinion,[16] "[a]s a motive, the State presented evidence that [Mr. Syed] was jealous and enraged at the victim's new romantic relationship with another man." The medical examiner determined that Ms. Lee had died by strangulation. The post-conviction court observed that the State established through Mr. Wilds's testimony that Mr. Syed "called Mr. Wilds from a payphone . . . at 2:36 p.m. on January 13, 1999 to request a ride." According to Mr. Wilds's testimony, Mr. Syed "opened the trunk of the victim's car, revealing the victim's lifeless body . . . told Mr. Wilds that he had strangled the victim and bragged, 'I killed someone with my bare hands.'" The post-conviction court found that the "State corroborated [Mr.] Wilds['s] testimony with [Mr. Syed's] cell phone records."

Finally, the post-conviction court observed that, "the crux of the State's case did not rest on the time of the murder. In fact, the State presented a relatively weak theory as to the time of the murder because the State relied upon inconsistent facts to support its theory." In other words, the State did not rely on the time of the victim's murder as much as it relied on the substantial circumstantial evidence that pointed to Mr. Syed's motive and his transportation and burial of the victim's body to establish his guilt. In reaching its conclusion that

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[16] The facts presented in the Statement of the Case in the post-conviction court's subsequent Memorandum Opinion ("Memorandum Opinion II") were substantially the same as in its first Memorandum Opinion, but some details in Memorandum Opinion II were abbreviated.

Mr. Syed was not prejudiced by his trial counsel's failure to investigate Ms. McClain, the post-conviction court identified the State's testimonial evidence and the evidence used to corroborate that testimonial evidence, which, taken together, established Mr. Syed's motive and his opportunity to fatally strangle Ms. Lee. Ms. McClain's alibi provided evidence of Mr. Syed's whereabouts for a narrow period of time, whereas the State's case covered a much more expanded period of time on January 13, 1999. We agree with the post-conviction court, and in doing so, depart from the view of the Court of Special Appeals that the State's evidence failed to establish Mr. Syed's criminal agency.[17]

Given our task of determining whether there is a "substantial or significant" possibility that the jury's verdict would have been affected, we consider the totality of the evidence. Under the circumstances, the State's case against Respondent could not have been substantially undermined merely by the alibi testimony of Ms. McClain because of the substantial direct and circumstantial evidence pointing to Mr. Syed's guilt. *See Harrington,* 562 U.S. at 112, 131 S. Ct. at 792, 178 L.Ed.2d 624 (noting that the prejudice standard under *Strickland* means "[t]he likelihood of a different result must be substantial, not just conceivable.").

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[17] We observe without further comment that Mr. Syed did not challenge on direct appeal the sufficiency of the evidence of the State's case against him.

Whether Respondent Waived Argument Regarding Cell Tower Location Evidence

Parties' Contentions

In his conditional cross-petition, Mr. Syed suggests that the Court of Special Appeals drew itself into conflict with this Court's opinion in *Curtis v. State,* 284 Md. 132, 395 A.2d 238 (1978), when the intermediate appellate court held that Mr. Syed had waived his ineffective assistance of counsel claim based on the allegation that his trial counsel failed to challenge cell-tower location data. Mr. Syed describes his ineffective-assistance claim variously as a separate, free-standing, factually distinct allegation of error that independently entitles him to relief. According to Mr. Syed, because the allegation of error he makes is premised on a fundamental right, the waiver provision in the post-conviction statute, as interpreted by *Curtis,* can only be waived intelligently and knowingly. Mr. Syed suggests that there is no sound reason for this Court to abandon the well-established, and frequently affirmed, precedent established by *Curtis,* which he argues, is that the right to counsel is sufficiently fundamental to require a knowing and intelligent waiver under the post-conviction statute. With respect to the holding of the Court of Special Appeals, Mr. Syed argues that the distinction that that court made between the issue of a violation of a fundamental right and the grounds supporting such a claim is a semantic distinction with no relevance. Finally, Mr. Syed points this Court to an analogous context in federal law, the federal habeas exhaustion requirement. In that context, Mr. Syed argues that

ineffective assistance claims with different factual predicates must be treated separately.

The State responds to Mr. Syed's cross-petition urging this Court to affirm the Court of Special Appeals. The State points to a number of important distinctions between the facts of *Curtis* and Mr. Syed's case. The defendant in *Curtis* had never raised the issue of ineffective assistance of counsel in any prior court case.[18] Whereas in the present case, Mr. Syed set forth numerous grounds for finding ineffective assistance of counsel in his post-conviction petition. Additionally, the State argues that *Curtis* was decided when the General Assembly permitted a defendant to file an unlimited number of post-conviction petitions. Since *Curtis,* the Legislature has repeatedly circumscribed the number of post-conviction petitions that a person may file. In 1986, the Legislature limited the number of post-conviction filings to two, then in 1995 further limited the number of filings to one. According to the State, adopting Mr. Syed's reading of *Curtis* would effectively undermine the General Assembly's legislative intent.

Waiver of Allegation of Error

The waiver provision contained in the Uniform Postconviction Procedure Act ("UPPA") provides for waiver of an allegation of error when:

> (b)(1)(i) Except as provided in subparagraph (ii) of this paragraph, an allegation of error is waived when a petitioner could have made but

[18] *Curtis v. State,* 284 Md. 132, 134, 395 A.2d 464, 466 (1978).

intelligently and knowingly failed to make the allegation:

1. before trial;

2. at trial;

3. on direct appeal, whether or not the petitioner took an appeal;

4. in application for leave to appeal a conviction based on a guilty plea;

5. in a habeas corpus or coram nobis proceeding began by the petitioner;

6. in a prior petition under this subtitle; or

7. in any other proceeding that the petitioner began.

* * *

(2) When a petitioner could have made an allegation of error at a proceeding set forth in paragraph (1)(i) of this subsection but did not make an allegation of error, there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation.

Md. Code Ann., Criminal Procedure Article, § 7-106 (2001, 2008 Repl. Vol., 2017 Supp.) ("Crim. Pro. Art.").

In our opinion in *Curtis,* we explored the principles of waiver as they related to the predecessor to Crim. Pro. Art., § 7-106, which was then codified as part of the Maryland Post Conviction Procedure Act, Article 27, § 645A. In 1967, Mr. Curtis was convicted of first degree murder. 284 Md. 132, 134, 395 A.2d 464, 466. Thereafter, he unsuccessfully challenged his conviction on appeal, then filed, with the assistance

of counsel, a post-conviction petition. *Id.* After a hearing, the Circuit Court denied Mr. Curtis relief and he was subsequently denied an application for leave to appeal. *Id.* Six years after his first petition was denied, Mr. Curtis filed a second petition for post-conviction relief, arguing for the first time that he had been denied effective assistance of counsel at his trial, on appeal and during his post-conviction proceedings. *Id.* We summarized the ineffective assistance of counsel claims contained in his second petition for post-conviction relief as follows:

> With respect to the trial, the allegation was based on the trial attorney's failure to request a jury instruction on alibi, failure to request an instruction that voluntary intoxication could reduce first degree murder to second degree murder, failure of trial counsel to object to hearsay testimony of certain witnesses, and failure of counsel to request an instruction on the defense of "diminished capacity." The allegation that Curtis's second attorney was inadequate was grounded upon that attorney's failure at the first post conviction proceeding to raise the issue of previous counsel's ineffectiveness.

Id. at 134-35, 395 A.2d at 466. In granting *certiorari* in that case, we reviewed the holding of the Court of Special Appeals which concluded that "a waiver was found to exist even though, under the proffered facts . . . the defendant himself had not 'intelligently and knowingly' failed to raise the question of trial counsel's alleged inadequate representation." *Id.* at 137, 395 A.2d at 468. We reversed the intermediate appellate court and explained that its holding

"virtually does away with the concept of 'waiver' as an intelligent and knowing failure to raise an issue." *Id.* at 140, 395 A.2d at 468. Our conclusion was founded on a standard of whether the post-conviction petitioner "was previously 'aware of and understood the possible defense[,] " such as in cases where the facts established that the defendant lacked comprehension. *Id.* at 140, 395 A.2d at 469. Thus, we held that in situations where "the [post-conviction] petitioner establishes that he did not in fact intelligently and knowingly fail to raise an issue previously, such issue cannot be deemed to have been waived." *Id.*

Next, in that opinion, we signaled that our holding in Mr. Curtis's case was not dispositive of all cases in which "there has been a failure to raise a matter previously." *Id.* at 141, 395 A.2d at 469. Specifically, we narrowed the applicability of the principles of waiver within the context of the post-conviction statute to "those circumstances where the waiver concept *of Johnson v. Zerbst*[19] *and Fay v. Noia*[20] *was* applicable." *Id.* at 149, 395 A.2d at 474. In other words, only "where the courts have required an

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[19] 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). We described *Johnson v. Zerbst,* which involved a defendant who was tried and convicted without the presence of counsel, as the "cornerstone" case involving the "waiver of certain basic constitutional rights." *Curtis v. State,* 284 Md. 132, 142-43, 395 A.2d 464, 470 (1978).

[20] 372 U.S. 391, 83 S. Ct. 822, 9 L.Ed.2d 837 (1963). *Fay v. Noia* involved a defendant who "failed to appeal a murder conviction even though it was undisputed that a coerced confession was used against him at trial." *Curtis,* 284 Md. at 144, 395 A.2d at 471. The Supreme Court reversed the lower court's finding that the defendant had waived his claim. *Id.*

'intelligent and knowing' standard" would we apply the waiver provision of the Maryland Post Conviction Procedure Act. *See id.* at 148, 395 A.2d at 473. We cautioned that any construction of the post-conviction statute must not "lead to an unreasonable or illogical result[,]" and that "[i]f . . . the General Assembly intended to make [the waiver provision] . . . applicable every time counsel made a tactical decision or a procedural default occurred, the result could be chaotic." *Id.* at 149, 395 A.2d at 474. In the case of Mr. Curtis, we held that because his allegations involved the inadequacy of his trial counsel's representation, which invoked the "intelligent and knowing" waiver standard of *Johnson v. Zerbst,* the issue of ineffective assistance of counsel could not be said to have been waived and we remanded for consideration of his claims. *Id.* at 150-51, 395 A.2d at 474-75.

Mr. Syed suggests that the Court of Special Appeals drew itself into conflict with the holding of *Curtis* because the intermediate appellate court concluded that Mr. Syed's claim of ineffective assistance of counsel based on counsel's failure to challenge cell-tower location evidence had been waived. According to Mr. Syed, because his claim, like Mr. Curtis's claim, invokes a fundamental right, *i.e.* the right to counsel, the claim was subject to the statutory requirement of knowing and intelligent waiver.

As the Court of Special Appeals recognized, *Curtis* was decided when the UPPA permitted an unlimited number of post-conviction petition filings. *See Syed,* 236 Md. App. at 224, 181 A.3d at 883. Since that time the Legislature has limited the number of post-

conviction petitions a person may file to one. *See* Crim. Pro. Art. § 7-103(a) ("For each trial or sentence, a person may file only one petition for relief under this title."). In *Alston v. State,* we thoroughly examined the legislative history of Chapter 110 of the Acts of 1995. 425 Md. 326, 334-36, 40 A.3d 1028, 1033-35 (2012). The law, which originated as Senate Bill 340 ("S.B. 340"), modified the number of petitions a person could file. *Id.* at 335, 40 A.3d at 1034. The amendment also provided a reopening provision "in the interests of justice" which was "for the purpose of providing a safeguard for the occasional meritorious case where the convicted person had already filed one postconviction petition." *Id.* at 335, 40 A.3d at 1034 (case citations omitted); *see also* Crim. Pro. Art. § 7-104.[21] We cautioned, however, that the reopening provision "was not to authorize a second postconviction petition with all of the requirements applicable to postconviction petitions[.]" *Id.* In our discussion of the legislative materials relative to these changes to the Act, we quoted the testimony of the Governor's Chief Legislative Officer, who explained, "[c]ommon sense dictates that the defendant should include all grounds for relief in one petition. The right to file a second postconviction petition simply affords the . . . defendant an unwarranted opportunity for delay." *Id.* at 336, 40 A.3d at 1034. Additionally, the bill file contained the testimony of the chairperson of the committee that drafted S.B. 340. *Id.* The chairperson's testimony explained that, "[t]here is

[21] Crim. Pro. Art. § 7-104 provides, "The court may reopen a postconviction proceeding that was previously concluded if the court determines that the action is in the interests of justice."

simply 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; he should not get more than one post-conviction petition." *Id.*

In its analysis in the present case, the Court of Special Appeals echoed these telling statements from the legislative history of the 1995 amendments to the post-conviction statute. *Syed,* 236 Md. App. at 239, 181 A.3d at 891. Based upon the legislative history, the intermediate appellate court concluded that the Legislature's intention was for a post-conviction petitioner to raise "all claims cognizable under the UPPA in his or her original petition." *Syed,* 236 Md. App. at 239, 181 A.3d at 892. We point out that previously we have observed that the purpose of the introduction of the doctrine of waiver in the UPPA "was to achieve finality in the criminal adjudicative process, without unduly interfering with a defendant's right to fully present his case before a court." *Arrington v. State,* 411 Md. 524, 548, 983 A.2d 1071, 1085 (2009). The Legislature's emphasis on bringing *all* cognizable claims in one and only one petition under the UPPA serves to underscore our holding. Mr. Syed's claim of ineffective assistance of counsel on the basis that his counsel failed to challenge the cell tower location evidence was waived because he did not raise that as a ground when advancing his ineffective assistance of counsel claim in his petition.

We reject Mr. Syed's suggestion that the holding of *Curtis* applies to his case. Unlike in *Curtis,* Mr. Syed did not fail to raise a claim of ineffective assistance of counsel in his petition for post-conviction relief. Mr.

Syed advanced a claim of ineffective assistance of counsel and provided nine bases upon which that claim was premised. Those grounds were fully litigated at a hearing on October 11, 2012 and October 25, 2012. Whereas Mr. Curtis had not previously advanced his claim of ineffective assistance of counsel, thus implicating the possibility that he had waived review of a fundamental right, that is not the scenario in the present case. The Court of Special Appeals reasoned:

> To extend *Curtis's* requirement of a knowing and intelligent waiver from the issue of ineffective assistance of counsel to every ground that could support such claim would run counter to the legislative history and purpose of Chapter 110 of the Acts of 1995, because it would allow a petitioner to raise claims of ineffective assistance of counsel on grounds not previously raised *ad infinitum.*

Syed, 236 Md. App. at 239, 181 A.3d at 892. The Legislature's various amendments to the UPPA, which have curtailed the filing of successive post-convictions petitions, support this conclusion. The Legislature unmistakably intended to discourage a post-conviction petitioner from failing to raise all claims, and the grounds or allegations supporting those claims, for post-conviction relief in one petition. When Mr. Syed advanced a claim of ineffective assistance of counsel in his one post-conviction petition under the UPPA but failed to assert all grounds upon which that claim is made, he waived any allegation upon which the ineffective assistance of counsel claim could have been made but was not. Permitting otherwise would result in an end-run

around the UPPA's limit to one post-conviction petition and, importantly, the Legislature's intention to achieve finality in the context of post-conviction litigation.[22]

Finally, recognizing that the case of *Bahm v. Indiana,* 794 N.E.2d 444 (Ind. Ct. App. 2003), is only persuasive authority for us, we nevertheless observe that our holding in the present case is consistent with that of our brethren jurisdiction. In response to a petition for rehearing, the intermediate appellate court clarified its earlier opinion with regard to petitioner's request for post-conviction relief. In affirming its previous decision, the intermediate appellate court explained in a succinct opinion that upon remand issues that were previously waived "as free-standing arguments" may be raised as an argument supporting a claim of ineffective assistance of counsel with the caveat that "for an argument to be available in post-conviction proceedings as a reason why counsel was ineffective, the petitioner must have raised such *ground* in his petition for post-conviction relief." *Id.* at 445 (emphasis added).

CONCLUSION

For the reasons stated herein, we agree with the conclusion of the Court of Special Appeals that Mr. Syed's trial counsel's performance was deficient

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[22] The Court of Special Appeals relied on a footnote in the case of *Wyche v. State,* 53 Md. App. 403, 454 A.2d 378 (1993) to conclude that the "many different grounds that may be advanced in support of a claim of a violation of a fundamental right are not themselves a fundamental right." *Syed,* 236 Md. App. at 233, 181 A.3d at 888. Given our interpretation of the legislative intent of the UPPA, we need not reach the question of the authoritative value of the footnote in *Wyche.*

under the *Strickland v. Washington* standard in failing to investigate the alibi witness. We disagree, however, with that court's conclusion that Mr. Syed was prejudiced by his trial counsel's deficiency. Finally, we agree with the holding of the intermediate appellate court that Mr. Syed waived his claim of ineffective assistance of counsel related to his trial counsel's failure to challenge cell-tower location data. Accordingly, we hold that Mr. Syed waived this claim under the waiver provision of the UPPA. Because we conclude that trial counsel's deficient performance in one aspect of her representation did not prejudice Mr. Syed within the meaning of *Strickland,* we reverse the judgment of the intermediate appellate court.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH DIRECTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY WHICH GRANTED RESPONDENT A NEW TRIAL. COSTS TO BE PAID BY RESPONDENT.

IN THE COURT OF APPEALS OF MARYLAND

September Term, 2018

STATE OF MARYLAND

v.

ADNAN SYED

No. 24

Appeal from the Circuit Court for Baltimore City

Case No. 199103042 through 199103046

Argued: November 29, 2018

Barbera, C.J.

Greene

McDonald

Watts

Hotten

Getty

Adkins, Sally D., (Senior Judge, Specially Assigned),

JJ.

Concurring Opinion by Watts, J.

Filed: March 8, 2019

Respectfully, I concur. As the Supreme Court observed in Strickland v. Washington, 466 U.S. 668, 689 (1984), "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." (Citation omitted).

I fully agree with the Majority that, by failing to raise the contention in the petition for postconviction relief, Adnan Syed, Respondent/Cross-Petitioner, waived the contention that he received ineffective assistance of trial counsel with regard to his trial counsel's cross-examination of the wireless network expert of the State, Petitioner/Cross-Respondent. See Maj. Slip Op. at 44. I also agree with the Majority that Syed was not prejudiced by his trial counsel's decision to refrain from contacting or calling as a witness Asia McClain, an alleged alibi witness.[1] See Maj. Slip Op. at 44. Accordingly, I join the Majority's decision to reverse the Court of Special Appeals's judgment and remand to that Court with instructions to reverse the Circuit Court for Baltimore City's judgment, and to remand to the circuit court with instructions to deny the petition for postconviction relief. See id. at 44-45.

[1] Although the potential alibi witness's current last name is Chapman, her last name was McClain during the events that gave rise to Syed's convictions, and she has used her former last name during the postconviction proceeding in this case. Thus, I refer to her by her former last name.

I do not, however, join all of the Majority's reasoning. Although I agree with the Majority that Syed has failed to prove that his trial counsel's performance prejudiced him, I disagree with the Majority that Syed has proven that his trial counsel's performance was deficient. See id. at 44. In my view, Syed has failed to rebut the "strong presumption that [his trial] counsel's conduct [fell] within the wide range of reasonable professional assistance[.]" Strickland, 466 U.S. at 689 (citation omitted).

Most importantly, in light of the Majority's determination regarding the lack of prejudice, it is unnecessary for the Majority to address whether Syed has proven deficient performance, and the Majority's determination in this regard is merely *dicta*. Thus, to the extent that the Majority implies that trial counsel is always deficient for failing to investigate or contact a potential alibi witness, these comments are *dicta* and do not constitute precedent of this Court.

To establish ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice. See id. at 687. Where a court determines that a defendant has failed to satisfy either the performance prong or the prejudice prong, the court may end its inquiry without addressing the other prong. See id. at 697. As the Supreme Court instructed in Strickland, id.:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, **there is no reason for a court deciding an ineffective assistance claim** to approach the inquiry in the same order or even **to address both**

> **components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.** The object of an ineffectiveness claim is not to grade counsel's performance. **If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.**

(Emphasis added). In other words, a court may—and, under certain circumstances, "should"—dispose of a claim of ineffective assistance of counsel by addressing only the prejudice prong. Id.

In multiple cases, this Court has done exactly that, relying on the above-quoted portion of Strickland, id. For example, in Newton v. State, 455 Md. 341, 366, 168 A.3d 1, 15 (2017), this Court concluded that a defendant's trial counsel's and appellate counsel's performances did not prejudice him, and thus did not address the performance prong. This Court observed: "*Strickland* [] instructs that courts . . . need [not] address both prongs in every case." Newton, 455 Md. at 356, 168 A.3d at 9 (citing two cases, including Strickland, 466 U.S. at 697). In Gross v. State, 371 Md. 334, 355, 809 A.2d 627, 639 (2002), this Court explained: "We need not 'grade' counsel's performance in failing to object or determine whether counsel's performance was deficient, [] *Strickland,* 466 U.S. at 697, [] because[,] even if

[counsel's] failure to object was deficient performance, [the defendant] was not prejudiced." And, in Yoswick v. State, 347 Md. 228, 246, 700 A.2d 251, 259 (1997), this Court determined: "We need not address the question of whether counsel's advice constituted deficient representation because we find that [the defendant] has failed to show that he was prejudiced by [counsel's] advice." (Citing two cases, including Strickland, 466 U.S. at 697).

Similar to Newton, Gross, and Yoswick, in this case, because the Majority concludes that Syed has failed to prove prejudice, the Majority need not address whether deficient performance was proven. Thus, significantly, all of the Majority's comments on the performance prong are *dicta* because they are not necessary to the holding that Syed did not receive ineffective assistance of trial counsel, *i.e.,* the Majority's observations concerning trial counsel's alleged deficient performance and the need to contact the alleged alibi witness have no precedential value.

That said, given that the Majority addresses the performance prong, I will comment on the matter as well. Contrary to the majority opinion, I would hold that it is reasonable for a defendant's trial counsel to refrain from contacting a potential alibi witness where trial counsel already knows of the potential alibi witness's version of events, and it is reasonable for a defendant's trial counsel to refrain from calling a potential alibi witness where the potential alibi witness's testimony could prejudice the defendant by contradicting the defendant's pretrial statements to law enforcement officers, contradicting the defendant's trial counsel's reasonable choice of

defense strategy, and/or otherwise appearing to be a fabrication.

Where a defendant's trial counsel has sufficient information to know of a potential alibi witness's version of events, it does not constitute deficient performance for the defendant's trial counsel to refrain from contacting the potential alibi witness to confirm what trial counsel already knows. Indeed, as the Supreme Court instructed in Strickland, 466 U.S. at 691, "when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether." And, as the Supreme Court of Montana unanimously stated: "`A claim of failure to interview a witness may sound impressive in the abstract, but it cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel.'" State v. Thomas, 946 P.2d 140, 144 (Mont. 1997) (quoting United States v. Decoster, 624 F.2d 196, 209 (D.C.Cir.1976) (plurality op.)). By way of illustration, in Weaver v. State, 114 P.3d 1039, 1042, 1044 (Mont. 2005) (plurality op.), where a defendant's trial counsel received police reports and recordings of interviews "demonstrating the existence of potential alibi witnesses," a plurality of the Supreme Court of Montana concluded that the defendant's trial counsel's decision to refrain from contacting the potential alibi witnesses was reasonable because "the record demonstrate[d] that [the defendant's trial counsel] knew the possible accounts of exculpatory testimony that may have been solicited from [the] potential [alibi] witnesses."

Here, I would conclude that Syed has failed to rebut the presumption that it was reasonable for his trial counsel to refrain from contacting McClain, as Syed's trial counsel already knew McClain's version of events. The circuit court found that, before trial, Syed gave McClain's letters to his trial counsel; and, in those letters, McClain described her alleged interactions with Syed on January 13, 1999—i.e., the date on which Hae Min Lee was murdered. In her March 1, 1999 letter, McClain stated in pertinent part: "I'm not sure if you remember talking to me in the library on Jan 13th, but I remembered chatting with you. . . . My boyfriend [(Derrick Banks)] and his best friend [(Gerrod Johnson)] remember seeing you there too." McClain mentioned "the Woodlawn Public Library[,]" thus making it clear that she was referring to the public library, not the school library.[2] McClain identified a timeframe in the following sentence: "I will try my best to help you account for some of your unwitnessed, unaccountable lost time (2:15 - 8:00; Jan 13th)." In her March 2, 1999 letter, McClain reiterated that, on January 13, 1999, she and Syed had allegedly spoken to each other in the public library.

In addition to McClain's letters, notes from Syed's defense file demonstrate that his trial counsel was

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[2] The Woodlawn Branch of the Baltimore County Public Library is at 1811 Woodlawn Drive. See Baltimore County Public Library, Woodlawn Branch, https://www.bcpLinfo/locations/woodlawn/index.html [https://perma.cc/2G9D-62H9]. Woodlawn High School is next-door, at 1801 Woodlawn Drive. See Contact, Woodlawn High School, http://woodlawnhs.bcps.org/contact school [https://perma.cc/S3L2-74JJ].

aware of McClain's version of events. Undated notes from Syed's defense file state: "Asia + boy[]friend saw him in Library 2:15 - 3:15[.]" Notes from Syed's defense file dated July 13, 1999 state: "Asia McClain → saw him in the library @ 3:00[.]" Immediately below that, the following language appears: "Asia boyfriend saw him too[.]" Under these circumstances, like the defendant's trial counsel in Weaver, 114 P.3d at 1044, Syed's trial counsel "knew the possible accounts of exculpatory testimony that may have been solicited from" a potential alibi witness. There is no indication in the record—or, indeed, any allegation whatsoever—that Syed's counsel would have gained any new material information by speaking to McClain. Indeed, in his brief, Syed acknowledges that his "trial counsel knew what McClain would say[.]"

By determining that Syed's trial counsel needed to contact McClain, the Majority effectively purports to adopt a bright-line rule that a defendant's trial counsel must always contact every single potential alibi witness whom the defendant identifies before trial. Ironically, both Syed and the majority of the panel of the Court of Special Appeals have expressly denied that they have espoused such a bright-line rule—but that is essentially what the Majority has set forth. At oral argument, Syed's postconviction counsel claimed that Syed's position was not "that there's a *per se* rule that, every time there's a[potential] alibi witness, [he or] she must be contacted." Similarly, the majority of the panel of the Court of Special Appeals insisted that it did not "say, or imply, that there is a bright[-]line rule with respect to ineffective assistance of counsel claims."

Syed v. State, 236 Md. App. 183, 271 n.37, 181 A.3d 860, 910 n.37 (2018) (internal quotation marks omitted). Nonetheless, the Majority states that lamn attorney cannot be said to be carrying out the [American Bar Association]'s requirement of due diligence without conducting a factual investigation of an alibi witness who claims to have knowledge of the defendant's whereabouts on the day of the crime in question." Maj. Slip Op. at 19. And the Majority, Maj. Slip Op. at 15, favorably quotes the following statement by the Eighth Circuit in Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991): "Once a defendant identifies potential alibi witnesses, it is unreasonable not to make some effort to contact them to ascertain whether their testimony would aid the defense." (Citing Lawrence v. Armontrout, 900 F.2d 127, 129 (8th Cir. 1990); Tosh v. Lockhart, 879 F.2d 412, 414 (8th Cir. 1989)).

I would decline to adopt the bright-line rule the Majority has essentially espoused. In my view, such a bright-line rule is inconsistent with the Supreme Court's mandate that, "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691. Strickland, id., indicates that, in determining whether a defendant's trial counsel's decision to refrain from contacting a potential alibi witness was reasonable, a court must consider the circumstance that the defendant's trial counsel already knows of the potential alibi witness's version of events—which may obviate any need for the

defendant's trial counsel to contact the potential alibi witness.

Tellingly, in each of the three aforementioned Eighth Circuit cases—i.e., Grooms, Lawrence, and Tosh—a defendant's trial counsel failed to contact a potential alibi witness where there was no indication that the defendant's trial counsel knew of the potential alibi witness's version of events. In Grooms, 923 F.2d at 89-90, a defendant's trial counsel did not contact a garage, and thus did not find out whether anyone who worked at the garage remembered whether the defendant's truck had been repaired there on the date of the crimes with which the defendant had been charged. In Lawrence, 900 F.2d at 128-29, at a postconviction hearing, a defendant testified that he asked his trial counsel to interview two potential alibi witnesses "who would have corroborated [the] story" of his girlfriend, who "was his main alibi witness"; the defendant's trial counsel testified that she interviewed the defendant's girlfriend and one of the other potential alibi witnesses; the defendant's trial counsel also testified that the defendant's girlfriend attempted to contact yet another potential alibi witness; and, as far as the Eighth Circuit's opinion reveals, the defendant's trial counsel did not know the versions of events of the two potential alibi witnesses whom she did not interview. In Tosh, 879 F.2d at 413-14, at trial, a defendant's girlfriend testified that, at approximately the time of the crimes with which the defendant had been charged, one of her neighbors confronted the defendant, and the neighbor's sister and father were present during the confrontation; the defendant's trial counsel did not contact the

neighbor or his sister; and, as far as the Eighth Circuit's opinion reveals, the defendant's trial counsel did not know of the neighbor's or his sister's versions of events.

Given that Grooms, Lawrence, and Tosh involved defendants' trial counsel who evidently lacked information about potential alibi witnesses' versions of events, the Eighth Circuit's edict that, "[o]nce a defendant identifies potential alibi witnesses, it is unreasonable not to make some effort to contact them to ascertain whether their testimony would aid the defense" is inapplicable here. Grooms, 923 F.2d at 90 (citing Lawrence, 900 F.2d at 129; Tosh, 879 F.2d at 414).

I am unpersuaded by Syed's postconviction counsel's contention at oral argument that, despite knowing the contents of McClain's letters, his trial counsel was required to contact McClain to ask questions such as: "Who was with you? Can they come? What was the camera?" As to the first question, Syed's trial counsel already knew who was with McClain; in her March 1, 1999 letter, McClain stated that Banks (her boyfriend) and Johnson (Banks's friend) also saw Syed in the public library. As to the second question, McClain could not have known for certain whether Banks and/or Johnson would be willing to testify on Syed's behalf. As to the third question, McClain was a high school student at the time, and thus could not have been expected to know how the public library's surveillance cameras functioned, or whether it would have been possible to retrieve any recordings from January 13, 1999. Further, at oral argument, the Special Assistant Attorney General advised that, at the second

postconviction hearing, a manager who had worked at the public library testified that recordings from the public library's surveillance cameras were maintained for only a matter of days. Under these circumstances, Syed clearly failed to rebut the presumption of reasonableness concerning trial counsel not contacting McClain.

Having concluded that Syed has failed to rebut the presumption that it was reasonable for his trial counsel to refrain from contacting McClain, I would address the issue of whether Syed has rebutted the presumption that it was reasonable for his trial counsel to refrain from calling McClain as a witness at trial.[3]

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[3] In his brief, Syed contends that the majority of the panel of the Court of Special Appeals "appropriately rejected the State's explanations for why Syed's [trial] counsel *could* potentially have believed it to be unnecessary to present the alibi *at trial"* because "[t]he challenged conduct at issue was [Syed's] trial counsel's failure even to contact [McClain] *before* trial." (Emphasis in original). Syed is mistaken to the extent that he argues that this Court must exclusively analyze his trial counsel's refraining from contacting McClain, and that this Court cannot analyze his trial counsel's refraining from calling McClain as a witness. To establish ineffective assistance of counsel, Syed must prove both deficient performance and prejudice. Syed would be unable to establish prejudice if his claim of ineffective assistance of counsel was based exclusively on his trial counsel's refraining from contacting McClain. After all, it would have made no difference to the second trial if Syed's trial counsel had contacted McClain, but then refrained from calling her as a witness. Indeed, in his brief, Syed argues that his "trial counsel's failure to contact [McClain] and present her testimony to the jury" prejudiced him. Thus, it is necessary for this Court to analyze Syed's trial counsel's refraining from calling McClain as a witness.

In resolving that issue, I would hold that it is reasonable for a defendant's trial counsel to refrain from calling a potential alibi witness where his or her testimony could prejudice the defendant. As the Supreme Court mandated in Strickland, 466 U.S. at 691, "when a defendant has given counsel **reason to believe that pursuing certain investigations would be fruitless or even harmful,** counsel's failure to pursue those investigations may not later be challenged as unreasonable." (Emphasis added). Although this principle from Strickland, id., pertains to trial counsel's decision as to whether to pursue an investigation, there is no reason why the principle should not apply with equal force to trial counsel's decision as to whether to call a witness. I agree with the Fourth Circuit that "[a]n attorney's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it." Griffin v. Warden, Md. Corr. Adjustment Ctr., 970 F.2d 1355, 1358 (4th Cir. 1992) (citing, among other cases, Lawrence, 900 F.2d at 130, and Grooms, 923 F.2d at 90) (internal quotation mark omitted). I also agree with the Eighth Circuit that "not every failure to call a[potential] alibi [witness] will render an attorney's performance deficient. For example, the decision not to use alibi testimony may reflect the reasonable exercise of judgment in view of the attorney's concern

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As discussed below, I would conclude that, in light of information of which Syed's trial counsel was aware, McClain's testimony could have prejudiced Syed. That conclusion supports both Syed's trial counsel's decision to refrain from contacting McClain and her decision to refrain from calling McClain as a witness.

that the testimony would be conflicting, or otherwise unfavorable[.]" Tosh, 879 F.2d at 414 (citations omitted).

One way in which a potential alibi witness's testimony could prejudice the defendant is by contradicting the defendant's pretrial statements to law enforcement officers. For example, in Broadnax v. State, 130 So. 3d 1232, 1260, 1248-49 (Ala. Crim. App. 2013), the Court of Criminal Appeals of Alabama unanimously held that a defendant's trial counsel's performance was not deficient where the defendant's trial counsel allegedly failed to adequately investigate an alibi. In Broadnax, id. at 1237, on a certain date, sometime after 6:00 p.m., the defendant's wife and her grandson visited the defendant at his workplace. At approximately 9:00 p.m., in a town that was a ninety-minute drive away from the town where the defendant lived and worked, law enforcement officers saw blood on and near the defendant's wife's vehicle; the officers summoned paramedics, who opened the trunk and discovered the bodies of the defendant's wife and her grandson. See id. at 1237-38, 1249. At approximately 10:30 p.m., witnesses saw the defendant at his workplace. See id. at 1239. The defendant told law enforcement officers that he had last seen his wife at 8:20 p.m., and that he had been at his workplace until 10:45 p.m. See id. Consistent with his pretrial statement to the officers, at trial, the defendant's theory of the case was that he was at his workplace all evening. See id. The government's theory of the case was that the defendant killed his wife at his workplace at approximately 6:30 p.m., put her body and her grandson into her vehicle, drove to the town

where their bodies were found, killed his wife's grandson, and got a ride back to his workplace, to which he returned by approximately 10:30 p.m. See id. In a petition for postconviction relief, the defendant contended that his trial counsel were ineffective because they failed to discover certain potential alibi witnesses. See id. at 1248-49. At a postconviction hearing, the potential alibi witnesses testified that, at 9:00 p.m. on the date of the murders, they saw the defendant at his work-release facility. See id. at 1249. A trial court denied the petition for postconviction relief. See id. at 1268.

The Court of Criminal Appeals of Alabama unanimously affirmed. See id. The Court of Criminal Appeals concluded that the defendant had failed to prove that his trial counsel's performance was deficient, as, before trial, the defendant told both his trial counsel and law enforcement officers that, at 9:00 p.m. on the date of the murders, he had been at his workplace, not his work-release facility. See id. at 1258. The Court of Criminal Appeals observed that, at trial, the government had offered evidence that the defendant made three false pretrial statements to the officers—namely, that his work uniform (on which blood was found) had been stolen, that his wife had left his workplace at 8:20 p.m., and that he had telephoned his brother from his workplace at approximately 9:00 p.m. See id. at 1257. These three statements were demonstrably false because there had been no report of a stolen work uniform, his wife's body had been found at approximately 9:00 p.m. in a town that was a ninety-minute drive away from the town where he lived and worked, and there was no record of a telephone call from the

defendant's workplace to his brother's residence on the night of the murders. See id. The Court of Criminal Appeals explained that, in the postconviction proceeding, the defendant "argue[d], essentially, that his trial counsel should have investigated and presented evidence to the jury that [he] had lied to the police a fourth time—when he had said that he was at [his workplace] until 10:45 p.m. the night of the murders." Id. at 1257-58 (footnote omitted). The Court of Criminal Appeals stated:

> [E]ven if [the defendant's] counsel had some basis for possibly thinking that [the defendant] had lied to them and to the police[,] and may have, in fact, been at [his work-release facility] at 9:00 p.m., **given that it was clear that [the defendant] had lied to the police regarding other things, we cannot say that any decision to forgo attempting to further impugn their client's credibility by presenting additional evidence of [the defendant]'s lying to the police was unreasonable.**

Id. at 1258 (emphasis added).

Another way in which a potential alibi witness's testimony could prejudice a defendant is by contradicting the defendant's trial counsel's reasonable choice of defense strategy. For example, in Weeks v. Senkowski, 275 F. Supp. 2d 331, 341, 336 (E.D.N.Y. 2003), the United States District Court for the Eastern District of New York concluded that a defendant's trial counsel's performance was not deficient where the defendant's trial counsel did not investigate multiple potential alibi witnesses. In

Weeks, id. at 335, at trial, the government offered evidence that the defendant and four accomplices broke into an apartment and murdered two children. In a habeas corpus proceeding, the defendant alleged that he had provided his trial counsel with the names of seven potential alibi witnesses, whom his trial counsel failed to interview or otherwise investigate. See id. at 341. The defendant also alleged that he was drinking with the potential alibi witnesses for several hours on the date of the murders. See id.

The District Court concluded that there was "little doubt that [the defendant's] trial counsel's refusal to investigate the potential for an alibi . . . was a sound strategic choice." Id. The District Court noted that three of the seven potential alibi witnesses had been charged with the same murders as the defendant. See id. The District Court explained that the defendant's trial counsel did not need "to pursue a trial strategy in which [the] defense would be that he was with the other [defendant]s drinking in a different location; to do so would require [the defendant] to, in essence, disprove the [government]'s ironclad case against the other defendants." Id. The District Court explained, that, "[i]nstead, [the defendant's trial] counsel reasonably channeled his efforts toward suggesting to the jury that [the defendant] was not at the crime scene[,] where . . . the other defendants were" murdering the victims. Id.

Commonwealth v. Rainey, 928 A.2d 215, 234 (Pa. 2007) is an example of a case in which a potential alibi witness's testimony could have prejudiced a defendant by contradicting both the defendant's

pretrial statement to law enforcement officers and the defendant's trial counsel's reasonable choice of defense strategy. In Rainey, id. at 233-34, the Supreme Court of Pennsylvania held that a defendant's trial counsel's performance was not deficient where the defendant's trial counsel did not investigate potential alibi witnesses in a murder case. In a postconviction proceeding, the defendant alleged that, before trial, he told his trial counsel that five potential alibi witnesses would testify that, on the night of the murder, the defendant spent the entire night at their residence. See id. at 233. The defendant's trial counsel indicated that the defense strategy was to concede that the defendant had been involved with the murder, and argue that he was guilty of a lesser degree of murder than first-degree murder. See id. The trial court denied the petition for postconviction relief. See id. at 220.

The Supreme Court of Pennsylvania vacated the trial court's order, remanded for an evidentiary hearing on an issue that was unrelated to alibi witnesses, and affirmed "[i]n all other respects[.]" Id. The Supreme Court of Pennsylvania determined that there was "[a] reasonable basis for not introducing [the] purported alibi evidence[,]" as, before trial, the defendant admitted to a law enforcement officer that he had been present at the scene of the murder. See id. at 234. The Supreme Court of Pennsylvania explained that, although the government had not offered the defendant's pretrial statement during its case-in-chief, if the defendant had offered evidence of an alibi, the government likely would have offered the defendant's pretrial statement in rebuttal. See id. The Supreme Court of Pennsylvania stated that

the defendant's trial "[c]ounsel was not ineffective for declining to open the door for [the defendant]'s [pretrial] statement to police." Id. The Supreme Court of Pennsylvania also noted that evidence of an alibi "would have contradicted [the] defense strategy" of conceding that the defendant had been involved with the murder, and arguing that the defendant was guilty of a lesser degree of murder than first-degree murder—"which was reasonable[,] given the testimony of" two eyewitnesses to the murder. See id. at 234, 220-21.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below **an objective standard of reasonableness."** Strickland, 466 U.S. at 687-88 (emphasis added). In other words, a court must engage in "an inquiry into the **objective reasonableness of counsel's performance, not counsel's subjective state of mind."** Harrington v. Richter, 562 U.S. 86, 110 (2011) (citing Strickland, 466 U.S. at 688) (emphasis added). Thus, a court must "affirmatively entertain **the range of possible reasons** [that the defendant]'s counsel **may** have had for proceeding as they did[.]" Cullen v. Pinholster, 563 U.S. 170, 196 (2011) (cleaned up) (emphasis added).

In applying an objective standard of reasonableness to claims of ineffective assistance of trial counsel, the Supreme Court has inquired into what a reasonable lawyer in the defendant's trial counsel's position could, or could not, have decided. For example, in Richter, 562 U.S. at 106, in assessing a claim of ineffective assistance of trial counsel, the Supreme Court stated: "It was at least arguable that **a**

reasonable attorney could decide to forgo inquiry into the blood evidence in the circumstances here." (Emphasis added). Similarly, in Rompilla v. Beard, 545 U.S. 374, 389 (2005), in assessing a claim of ineffective assistance of trial counsel, the Supreme Court stated: **"No reasonable lawyer** would forgo examination of the file[,] thinking [that] he [or she] could do as well by asking the defendant or family relations whether they recalled anything helpful or damaging in the [] victim's testimony." (Emphasis added). Likewise, here, the question is not what Syed's trial counsel's rationale was, but rather what the rationale of a reasonable lawyer in Syed's trial counsel's position could have been.

Significantly, there is not necessarily only one answer to that question. "Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689 (citation omitted). Thus, a court's role is not to pinpoint the best decision that a reasonable lawyer in the defendant's trial counsel's position could have possibly made; instead, the court must determine whether the defendant's trial counsel's decision was "within the wide range of reasonable professional assistance[.]" Id. (emphasis added). In other words, "[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Richter, 562 U.S. at 105 (citing Strickland, 466 U.S. at 690).

The question is whether a reasonable lawyer in Syed's trial counsel's position could have refrained

from calling McClain as a witness.[4] I would answer that question unequivocally in the affirmative, and would conclude that Syed has failed to rebut the presumption that it was reasonable for his trial counsel to refrain from calling McClain as a witness, as her testimony could have prejudiced Syed by contradicting his pretrial statements to law enforcement officers, contradicting his trial counsel's reasonable choice of defense strategy, and otherwise appearing to be a fabrication. Syed's pretrial statements to law enforcement officers, and his trial counsel's reasonable choice of defense strategy, indicated that he was at track practice after school—and did not indicate, in any way, that he was at the public library after school. Additionally, there were several other obvious indications that McClain's version of events was false.

In his pretrial statements to law enforcement officers, Syed mentioned being at track practice, but did not mention a library, and he made inconsistent statements. At the second trial, Officer Scott Adcock testified that, on January 13, 1999, Syed said that he

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[4] I am unpersuaded by the State's contention that, where the record is silent as to the reasons for a defendant's trial counsel's decision, the defendant cannot rebut the presumption that his or her trial counsel's decision was reasonable. Strickland and its progeny make clear that what matters is "the objective reasonableness of counsel's performance, **not counsel's subjective state of mind."** Richter, 562 U.S. at 110 (citing Strickland, 466 U.S. at 688) (emphasis added). Thus, here, even if the record were silent as to the reasons for Syed's trial counsel's decision not to call McClain as a witness, the record's silence would make no difference to the proper analysis, which turns on whether a reasonable lawyer in Syed's trial counsel's position could have refrained from calling McClain as a witness.

had seen Lee at school earlier that day. According to Officer Adcock, Syed also said that Lee had been supposed to give him a ride home from school, but he had gotten held up, and presumed that she had gotten tired of waiting for him and left without him. At the second trial, Detective Joseph O'Shea testified that, on January 25, 1999, Syed said that, on January 13, 1999, he had been in a class with Lee from 12:50 p.m. to 2:15 p.m. According to Detective O'Shea, Syed also said that he had not seen Lee after school because he had gone to track practice. Detective O'Shea testified that, on February 1, 1999, he asked Syed whether he had told Officer Adcock that, on January 13, 1999, Lee had been supposed to give him a ride. According to Detective O'Shea, Syed responded that that was incorrect because he had driven to school, and thus would not have needed a ride. In other words, Syed made inconsistent pretrial statements to Officer Adcock and Detective O'Shea; he told Officer Adcock that Lee had been supposed to give him a ride, but he later told Detective O'Shea that Lee had not been supposed to give him a ride.

Syed's pretrial statements to Officer Adcock and Detective O'Shea were inconsistent not only with each other, but also with McClain's version of events. If, as McClain testified at the second postconviction hearing, shortly after school ended, Syed went to the public library and spoke to McClain, then, contrary to his pretrial statement to Officer Adcock on January 13, 1999, he neither expected a ride home from Lee after school, nor missed that ride because he got held up. Additionally, as Syed's postconviction counsel acknowledged at oral argument, McClain's version of events was inconsistent with Syed's

pretrial statement to Detective O'Shea on February 1, 1999, in that Syed failed to allege that he had gone to the public library after school on January 13, 1999. Syed had every incentive to be complete while volunteering to Detective O'Shea information about his whereabouts on the date on which Lee had gone missing, given that Syed knew that he was speaking to a detective, that Lee had been missing for more than two weeks, and that he was Lee's most recent ex-boyfriend.

Syed's trial counsel would have known of his pretrial statements to Officer Adcock and Detective O'Shea before the first trial. At the time of the second trial, Maryland Rule 4-263(b)(2)(B) stated: "Upon request of the defendant, the State's Attorney shall . . . [a]s to all statements made by the defendant to a State agent that the State intends to use at . . . trial, furnish to the defendant . . . the substance of each oral statement and a copy of all reports of each oral statement[.]" In the absence of evidence to the contrary, we must presume that Syed's trial counsel and the prosecutors acted pursuant to former Maryland Rule 4-263(b)(2)(B); "[t]here is a presumption of regularity [that] normally attaches to trial court proceedings, although its applicability may sometimes depend upon the nature of the issue before the reviewing court." Harris v. State, 406 Md. 115, 122, 956 A.2d 204, 208 (2008) (citations omitted). The record extract contains no evidence that rebuts the presumptions that Syed's trial counsel made, and that the prosecutors complied with, a request for records of all of Syed's pretrial statements to law enforcement officers. Additionally, Syed's trial

counsel heard Officer Scott Adcock testify at the first trial. Thus, before the second trial, Syed's trial counsel necessarily knew of his pretrial statements to Officer Adcock.

Consistent with Syed's pretrial statements to Officer Adcock and Detective O'Shea, his trial counsel chose a defense strategy of, among other things, establishing that he regularly attended track practice. The circuit court found the following facts regarding Syed's trial counsel's choice of defense strategy:

> [Syed's t]rial counsel engaged in a three[-]prong [defense] strategy at [the second] trial: (1) to prove that [Syed] and [Lee] ended their relationship amicably due to outside pressures and remained friends after the breakup, thereby challenging the State's suggested motive; (2) to show that the police hastily focused their investigation on [Syed,] and thus[] failed to pursue evidence that would have proven [his] innocence; and (3) **to undermine [Jay] Wilds's version of the events by establishing [Syed]'s habit of attending track practice after school**[5]

[5] Although the circuit court inadvertently stated that the State's evidence indicated that Lee was murdered between 2:35 p.m. and 2:40 p.m. on January 13, 1999, in actuality, the State's evidence indicated that, on that date, Lee was murdered sometime in the twenty-one minutes between 2:15 p.m., when the school day ended, and 2:36 p.m., when, according to Syed's cell phone records and Wilds's testimony, Syed used a pay phone to telephone Wilds (who had Syed's cell phone) and asked him to come to the parking lot of the Best Buy in Woodlawn. Wilds testified that, after he arrived at the parking lot, Syed showed him Lee's body.

> and then reciting taraweeh prayers at the mosque during the month of Ramadan.

(Emphasis added). In short, the circuit court expressly found that Syed's trial counsel pursued an alibi that was based on his daily routine, which included regular attendance of track practice—and did not include regular attendance of the public library.[6]

Syed's trial counsel's choice of defense strategy—i.e., pursuing an alibi that was based on his daily routine—was reasonable, given that Syed's pretrial statements to Officer Adcock and Detective O'Shea did not include information about going to the public library. Additionally, Syed's statements to his trial counsel and her law clerk demonstrated that his memory of his whereabouts after school on January 13, 1999 varied over time. At the first postconviction hearing, Syed testified that he had received McClain's letters within a week of being arrested on February 28, 1999. According to Syed, McClain's letters "kind of fortified the memory that [he] had of after school" on January 13, 1999. But, Syed testified that, after his trial counsel told him that "nothing came of" McClain's letters, he told his trial counsel "that [he] didn't really have confidence that [he]'d be able to prove [that he] was somewhere else when

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[6] The majority of the panel of the Court of Special Appeals stated that, "in her opening statement and closing argument, [Syed's] trial counsel did not raise *any* alibi defense[.]" Syed, 236 Md. App. at 272, 181 A.3d at 910 (emphasis in original). Opening statements and closing arguments, however, are not evidence. See MPJI-Cr 3:00. As the circuit court found, during the second trial's evidentiary phase, Syed's trial counsel pursued an alibi that was based on his daily routine.

[Lee's] murder [took] place[.]" The undated notes from Syed's defense file indicate that he told his trial counsel's law clerk that McClain and Banks (her boyfriend) saw him in a library between 2:15 p.m. and 3:15 p.m. The notes from Syed's defense file dated July 13, 1999 indicate that he told his trial counsel's law clerk that McClain and Banks saw him in a library at 3:00 p.m. In a memorandum summarizing an August 21, 1999 interview with Syed, his trial counsel's law clerk stated that Syed "believe[d that] he attended track practice on [January 13, 1999] because he remembers informing his coach that he had to lead prayers on Thursday." Attached to the memorandum summarizing the August 21, 1999 meeting with Syed was a handwritten account of his recollection of his whereabouts on January 13, 1999. In that document, Syed did not write anything about his whereabouts after school on January 13, 1999. In sum, Syed's pretrial statements to Officer Adcock, Detective O'Shea, his trial counsel, and her law clerk demonstrate that he lacked a consistent memory of his whereabouts after school on January 13, 1999—which made it reasonable for Syed's trial counsel to focus on his daily routine rather than McClain's allegations about his whereabouts after school on that date in particular.

This conclusion is supported by Syed's post-trial statements, which demonstrate that, after the second trial, Syed could not remember his whereabouts after school on January 13, 1999. At the first postconviction hearing, Syed testified that, after the jury found him guilty on February 25, 2000, he told Rabia Chaudry, a family friend: "I wish there was

some way that I could [have] proved that I was somewhere else at [the] time" of Lee's murder. Consistently, at the first postconviction hearing, Chaudry testified that, after the jury found him guilty, Syed stated that January 13, 1999 "was like any other day for" him, and that he did not "have any specific recollection of that day[.]" Syed's post-trial statements constitute additional evidence that, before trial, he failed to offer his trial counsel a consistent memory of his whereabouts after school on January 13, 1999.

In stark contrast to Syed, McClain has claimed to remember his whereabouts after school on January 13, 1999. In her March 1, 1999 letter, McClain stated that, on January 13, 1999, at or after 2:15 p.m., she, Banks (her boyfriend), and Johnson (Banks's friend) saw Syed in the public library. Similarly, at the second postconviction hearing, McClain testified that, on January 13, 1999, she encountered Syed in the public library shortly after 2:15 p.m., and spoke to him for approximately fifteen to twenty minutes; afterward, Banks and Johnson approached Syed and McClain, and she and Banks left the public library.

Because McClain's version of events contradicted Syed's pretrial statements to Officer Adcock and Detective O'Shea and his trial counsel's reasonable choice of defense strategy, far from helping Syed's case, McClain's testimony could have given the jury reason to believe that McClain's version of events was a fabrication—and, worse still, reason to believe that Syed himself had come up with the fabrication himself. Such an inference would have been disastrous to Syed's case, as "[m]any jurors regard a false alibi as an admission of guilt." Henry v. Poole,

409 F.3d 48, 65 (2d Cir. 2005) (cleaned up). In sum, although Syed essentially argues that McClain's testimony was a life preserver that could have saved him from conviction, her testimony was actually an anchor that could have sunk his case.

This case is similar to Broadnax, 130 So. 3d at 1258, and Rainey, 928 A.2d at 234, in that a potential alibi witness's testimony would have contradicted the defendant's pretrial statements to law enforcement officers. In Broadnax, 130 So. 3d at 1249, 1239, the potential alibi witnesses' testimony that they saw the defendant at his work-release facility at 9:00 p.m. on the date of the murders would have contradicted the defendant's pretrial statement to law enforcement officers that he was at his workplace until 10:45 p.m. on the date of the murders. In Rainey, 928 A.2d at 234, the potential alibi witness's testimony would have contradicted the defendant's statement to law enforcement officers that he had been present at the scene of the murder. Similarly, here, McClain's testimony would have contradicted Syed's pretrial statements to Officer Adcock and Detective O'Shea, both in that Syed never alleged that he had been at the public library while volunteering to the officers information about his whereabouts after school on January 13, 1999, and in that he alleged that he had either been at track practice and/or had been supposed to get a ride from Lee and got held up.

This case is especially analogous to Broadnax, 130 So. 3d at 1258, in that, at trial in each case, there was evidence that the defendant had lied to law enforcement officers. In Broadnax, id. at 1257, the defendant made to law enforcement officers three

demonstrably untrue statements, such as his false allegation that he had telephoned his brother from his workplace on the night of the murders. Similarly, here, Syed told Officer Adcock that Lee had been supposed to give him a ride after school on January 13, 1999; however, later, Syed told Detective O'Shea that Lee had not been supposed to give him a ride. Just like the defendant's trial counsel in Broadnax, id. at 1258, a reasonable lawyer in Syed's trial counsel's position could have decided to "forgo attempting to further impugn [his or her] client's credibility by presenting additional evidence of [Syed]'s lying to the police[.]" (Citation omitted).

This case is also similar to Weeks, 275 F. Supp. 2d at 341, and Rainey, 928 A.2d at 234, in that a potential alibi witness's testimony would have contradicted a defendant's trial counsel's reasonable choice of defense strategy. In Weeks, 275 F. Supp. 2d at 341, the potential alibi witnesses had been charged with the same murders as the defendant, and their testimony would have contradicted the "reasonabl[e]" defense strategy of attempting to establish that the defendant was not with the potential alibi witnesses at the time of the murders. In Rainey, 928 A.2d at 234, 237, the potential alibi witnesses' testimony "would have contradicted [the] defense strategy[—]which was reasonable"—of conceding that the defendant had been involved with the murder, and arguing that he was guilty of a lesser degree of murder than first-degree murder. Similarly, here, McClain's testimony would have contradicted Syed's trial counsel's reasonable choice of defense strategy of pursuing an alibi that was based on his daily routine, which included regular

attendance of track practice—and did not include regular attendance of the public library.

The record belies Syed's postconviction counsel's assertion at oral argument that McClain's version of events was consistent with Syed's trial counsel's choice of defense strategy because it would have been possible for Syed to speak to McClain in the public library, then arrive at track practice on time. McClain's version of events was inconsistent with Syed's trial counsel's choice of defense strategy because the whole point of that strategy was to convince the jury that, given that Syed had a daily routine, he likely followed it on January 13, 1999—and McClain's version of events indicates that Syed deviated from his daily routine by going to the public library. Indeed, at oral argument, Syed's postconviction counsel acknowledged that going to the public library "was not part of his regular routine." Similarly, the majority of the panel of the Court of Special Appeals noted that, if Syed had gone to the public library, he would have been "deviating from his routine[.]" Syed, 236 Md. App. at 273, 181 A.3d at 911.

Having shown that McClain's testimony could have prejudiced Syed by contradicting his pretrial statements to Officer Adcock and Detective O'Shea and his trial counsel's reasonable choice of defense strategy, the inquiry could end at this point. In addition, however, to the indications of fabrication that were apparent at the second trial (such as Syed's failure to tell Officer Adcock or Detective O'Shea that he had been in the public library after school on January 13, 1999), Syed's trial counsel was privy to numerous other signs that McClain's version

of events was false. These were signs of fabrication that could have led a reasonable lawyer in Syed's trial counsel's position to doubt the veracity of McClain's version of events, and could have prompted ethical concerns about suborning perjury by calling McClain as a witness.[7]

One sign of possible fabrication that was available to Syed's trial counsel is that, as far as the record extract reveals, outside of giving McClain's letters to his trial counsel, Syed told his defense team on only two occasions that he had been seen at a library, by merely conveying the information to his trial counsel's law clerk. The notes from Syed's defense file indicate that, on July 13, 1999 and another date, he told his trial counsel's law clerk that McClain and Banks (her boyfriend) had seen him in a library. The July 13, 1999 notes indicate that McClain and Banks had seen Syed at the library at 3:00 p.m. The undated notes from Syed's defense file state that McClain and Banks saw him in a library between 2:15 p.m. and 3:15 p.m. Given that the circuit court found that no one on Syed's defense team contacted McClain, the information on the undated notes from Syed's defense file must have come from Syed himself. In light of the importance of Syed's whereabouts after school on January 13, 1999, a reasonable lawyer in Syed's trial counsel's position could have expected him to mention having been seen at a library more than two times and to have discussed the matter directly with trial counsel. Moreover, the notes do not allege that Syed ever told

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[7] At the time of the second trial, Maryland Rule of Professional Conduct 3.3(a)(4) stated: "A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false."

his defense team that he was, in fact, at a library on July 13, 1999, but only that Syed alleged that others had indicated that they had seen him there.

Another sign of fabrication is that Syed's two references to the alibi during his meetings with his trial counsel's law clerk were inconsistent with each other. On July 13, 1999, Syed said that McClain and Banks had seen him at a library at 3:00 p.m. On another date, Syed said that McClain and Banks had seen him in a library between 2:15 p.m. and 3:15 p.m. A reasonable lawyer in Syed's trial counsel's position could have found it unusual that Syed pinpointed a specific time on one occasion, yet referred to a one-hour timeframe on another.

Yet another sign of fabrication is that, in stark contrast to the two references to the library in the notes from Syed's defense file, the mention of the library is conspicuously absent from memoranda in which a member of Syed's defense team summarized meetings with him on August 21, 1999, October 9, 1999, and January 15, 2000. Attached to the memorandum summarizing the August 21, 1999 meeting with Syed was a handwritten account of his recollection of his whereabouts on January 13, 1999. In that document, Syed did not write anything about his whereabouts after 2:15 p.m.—much less allege that he had gone to a library around that time. According to the memorandum summarizing the October 9, 1999 meeting with Syed, he said that he and Lee had frequently gone to the parking lot of the Best Buy in Woodlawn to engage in sexual activity—but the memorandum does not say anything about Syed going to a library, frequently or otherwise. And, according to the memorandum summarizing the

January 15, 2000 meeting with Syed, there were several "points [that] he wanted to make with regard to the first friar—none of which involved him being at a library.

An additional sign of fabrication is that detectives' interview notes, which the prosecutors made available to Syed's trial counsel, indicated that two employees of Woodlawn High School said that Syed frequently visited the school library—as opposed to the public library, which is in a separate building next-door to Woodlawn High School. According to the employees, Syed and Lee went to the school library often, and multiple computers at the school library had internet access—which undermines Syed's testimony at the first postconviction hearing that, after school on January 13, 1999, he went to the public library to check his e-mail. Additionally, according to the memorandum summarizing the January 15, 2000 meeting, Syed challenged Wilds's testimony's implication that he killed Lee on the side of the Best Buy, as he "would not then walk all the way to the phone booth (it is a long walk[,] and [Syed] does not like walking)." Syed did not challenge Wilds's account on the ground that he had been at the public library at the time of the murder, and was not responsible for the murder.

Another sign of fabrication is that the notes from Syed's defense file do not specify which library he claimed to have visited on January 13, 1999—the school one, or the public one. Although the circuit court found that the notes from Syed's defense file dated July 13, 1999 indicated that he told his trial counsel's law clerk that McClain saw him in the public library, in actuality, the notes simply refer to

"the library[.]" Similarly, the undated notes from Syed's defense file state that McClain and Banks "saw him in Library[.]" Immediately below that, the following language appears: "Went to Library often[.]" Even assuming that this language refers to Syed, as opposed to McClain and/or Banks, the undated notes from Syed's defense file do not specify the library to which Syed claimed to go often. It is possible that—consistent with his regular practice, according to the two employees of Woodlawn High School—Syed told his trial counsel's law clerk on two occasions that he had visited the school library after school on January 13, 1999—which would have contradicted both of McClain's letters, in which she stated that she had seen him in the public library.

An additional sign of fabrication is that, outside of McClain's and Syed's statements, the record extract contains no evidence that Banks (McClain's boyfriend) and/or Johnson (Banks's friend) ever told anyone else that they had seen Syed in the public library on the afternoon of January 13, 1999. Although McClain stated in her March 1, 1999 letter that Banks and Johnson indicated that they had seen Syed in the public library, McClain did not even mention Banks or Johnson in her March 2, 1999 letter, much less repeat her allegation that they had also seen Syed. Additionally, although the notes from Syed's defense file indicated that he told his trial counsel's law clerk on two occasions that McClain and Banks had seen him at a library, the notes from Syed's defense file do not indicate that he ever said that Johnson also saw him in a library.[8] Under these

[8] Neither Banks nor Johnson testified at the postconviction hearings; thus, the record is devoid of any direct evidence that

circumstances, a reasonable lawyer in Syed's trial counsel's position could have been suspicious of McClain's version of events, which lacked corroboration from anyone other than Syed—who obviously had a motive to be untruthful about his whereabouts after school on January 13, 1999 and who had not been consistent in accounting for his whereabouts on that date.

A further important sign of fabrication is that, assuming that McClain actually saw Syed in the public library on January 13, 1999, in her letters, she would not have used language that indicated that her version of events was untrue. In her March 1, 1999 letter, McClain stated in pertinent part:

> I hope that you're not guilty[,] and a I want hope to death that you have nothing to do with it. If so[,] **I will try my best to help you account for some of your unwitnessed, unaccountable lost time (2:15 - 8:00; Jan 13th).** The police have not been notified Yet to my knowledge[. M]aybe it will give your side of the story a particle [sic] head start. **I hope that you appreciate this,** seeing as though I really would like to stay out of this whole thing.

(Bolding added) (underlining in original) (paragraph break omitted). McClain also stated: "If you were in the library for a[ ]while, tell the police[,] and I'll continue to tell what I know even louder than I am." This unusual language is indicative of an offer to provide a false alibi.

Banks or Johnson remember seeing Syed in the public library after school on January 13, 1999.

Another sign of fabrication is that, in her March 1, 1999 letter, McClain referred to the nearly-six-hour timeframe of 2:15 p.m. to 8:00 p.m. That circumstance was unusual in light of Syed's statement to his trial counsel's law clerk that McClain had seen him in a library for only a fraction of that timeframe—namely, between 2:15 p.m. and 3:15 p.m.[9] A final sign of fabrication is that detectives' notes regarding their April 9, 1999 interview of Ja'uan Gordon (a friend of Syed's) stated that Gordon said:

> ▲[10] WROTE ME A LETTER. HE CALLED YESTERDAY, BUT I WASN'T HOME. WROTE ▲ BACK
>
> **HE WROTE A LETTER TO A GIRL TO TYPE UP WITH HIS ADDRESS ON IT BUT SHE GOT IT WRONG**
>
> **101 EAST EAGER STREET**
>
> **ASIA?** 12TH GRADE
>
> I GOT ONE, JUSTIN A[D]GER GOT ONE

(Emphasis added) (capitalization in original). The detectives' notes constitute evidence that Syed wrote a letter to McClain and asked her to type it and include the address of the Baltimore Central Booking & Intake Center, and that, as a result, McClain

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[9] At the second postconviction hearing, McClain revealed that she learned about the timeframe of 2:15 p.m. to 8:00 p.m. from Syed's family.

[10] The black, upward-pointing triangles in the detectives' notes **(▲)** look similar to the uppercase Greek letter delta (Δ), which is common shorthand for a defendant. See People v. Jones, 930 N.Y.S.2d 176 n.2 (Sup. Ct. 2011). Thus, it is clear that, when the detectives used a triangle, they were referring to Syed.

typed the letter and put an incorrect address on it. Specifically, McClain put on her March 2, 1999 letter the address of 301 East Eager Street—which is an address that is associated with, but is not the main address of, the Baltimore Central Booking & Intake Center.[11]

The circuit court discounted the possibility that Syed wrote a letter to McClain and asked her to type it, stating:

[T]o adopt the State's theory, the Court would have to assume that the "Asia"

> [who is] referenced by Gordon is McClain[,] as opposed to another individual who shares the same name. [The detectives'] notes are unclear as to the identity of this "letter"; Gordon could be referencing [McClain's] March 2, 1999 letter[,] or another letter altogether. With respect to the "wrong address," the Court is left to speculate whether "101 East Eager Street" is the correct or wrong address[,] given the lack of context in [the detectives'] notes.

Yet, McClain is the only person who is ever mentioned throughout the entire record extract whose first name or last name is "Asia." Given that circumstance, it is extremely unlikely that Gordon was referring to someone other than McClain when he mentioned "Asia." Additionally, the record extract

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[11] The Baltimore Central Booking & Intake Center's main address is 300 East Madison Street. See Department of Public Safety & Correctional Services, Baltimore Central Booking & Intake Center, https://www.dpscs.state.md.us/locations/bcbic.shtml [https://perma.cc/7VSP-MBJ7].

is devoid of any letters to Syed other than McClain's letters to him, which undermines the circuit court's theory that Gordon might have been referring to "another letter altogether."

Significantly, the circuit court's reasoning is not entitled to deference. In reviewing a trial court's determination as to whether a defendant received ineffective assistance of counsel, an appellate court reviews for clear error the trial court's findings of fact, and reviews without deference the trial court's conclusions of law. As Judge Adkins wrote for this Court in Newton, 455 Md. at 351-52, 168 A.3d at 7:

> The review of a postconviction court's findings regarding ineffective assistance of counsel is a mixed question of law and fact. Because we are not finders of fact, we defer to the factual findings of the postconviction court unless clearly erroneous. But we review the court's legal conclusion regarding whether the defendant's Sixth Amendment rights were violated without deference. We re-weigh the facts in light of the law to determine whether a constitutional violation has occurred.

(Cleaned up). Accordingly, here, this Court reviews without deference the circuit court's conclusions of law, such as its conclusion that Syed's trial counsel's performance was deficient. In other words, this Court gives no weight to the circuit court's determination that Syed had proven deficient performance, and the reasoning underlying that determination. This standard of review is especially appropriate in light of the circumstance that the circuit court judge who presided over both postconviction hearings was not the circuit court

judge who presided over the second trial; in other words, the circuit court judge whose decision we are reviewing was not in a better position than this Court is to determine whether Syed's trial counsel's performance was deficient.

I am unpersuaded by Syed's reliance on Grooms, 923 F.2d at 90-91, Lawrence, 900 F.2d at 129-30, Montgomery v. Peterson, 846 F.2d 407, 409-11 (7th Cir. 1988), Griffin, 970 F.2d at 1355-56, Bryant v. Scott, 28 F.3d 1411, 1419 (5th Cir. 1994), and Towns v. Smith, 395 F.3d 251, 259 (6th Cir. 2005), in which Courts concluded that defendants' trial counsel were deficient for failure to contact, investigate, and/or call potential alibi witnesses. In none of those cases was there any indication that a potential alibi witness's testimony could have prejudiced the defendant. By contrast, here, McClain's testimony could have prejudiced Syed by contradicting his pretrial statements to Officer Adcock and Detective O'Shea, contradicting his trial counsel's reasonable choice of defense strategy, and otherwise appearing to be a fabrication.

Syed's trial counsel was not required to call McClain as a witness just because there was a chance, however slight, that the jury would have viewed her testimony as exculpatory. No reasonable criminal defense lawyer would advocate that, in every case, the defense should, to use a colloquialism, "throw everything at the wall to see what sticks." Instead, a reasonable criminal defense lawyer should evaluate each piece of allegedly exculpatory evidence to determine whether it would, in fact, help the defendant. Where, as here, the evidence could prejudice the defendant, it is reasonable for the

defendant's trial counsel to exercise caution by refraining from pursuing the evidence.

It might be tempting to reason that, given that the jury found Syed guilty, his trial counsel might as well have contacted McClain and called her as a witness, as doing so could not have resulted in a worse outcome for Syed. Such reasoning, however, would fly in the face of the Supreme Court's jurisprudence regarding ineffective assistance of counsel. By definition, a defendant who asserts ineffective assistance of counsel has been found guilty. See Strickland, 466 U.S. at 689. In assessing a claim of ineffective assistance of counsel, a court must make "every effort [] to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. Here, the question is whether, in light of the information that was available to Syed's trial counsel before the second trial, a reasonable lawyer in her position could have refrained from calling McClain as a witness. In my view, the answer is a resounding "yes."

In conclusion, I completely agree with Judge Graeff that "a review of the record as a whole indicates possible reasons why [Syed's] trial counsel reasonably could have concluded that pursuing [] McClain's purported alibi, which was known to [Syed's] trial counsel, could have been more harmful than helpful to Syed's defense." Syed, 236 Md. App. at 297, 181 A.3d at 925 (Graeff, J., dissenting).

For the above reasons, respectfully, I concur.

IN THE COURT OF APPEALS OF MARYLAND

September Term, 2018

STATE OF MARYLAND

v.

ADNAN SYED

No. 24

Appeal from the Circuit Court for Baltimore City

Case No. 199103042 through 199103046

Argued: November 29, 2018

Barbera, C.J.

Greene

McDonald

Watts

Hotten

Getty

Adkins, Sally D., (Senior Judge, Specially Assigned),

JJ.

Concurring/Dissenting Opinion by Hotten, J.,

which Barbera, C.J. and Adkins, J. join

Filed: March 8, 2019

I respectfully concur in part and dissent in part from the majority opinion. I agree with the majority's conclusion that Mr. Syed's trial counsel's failure to investigate Ms. McClain as a potential alibi witness constituted deficient performance under *Strickland v. Washington.* However, unlike the majority, I am persuaded that this deficiency was prejudicial against Mr. Syed and his defense. For these reasons, I would affirm the Court of Special Appeals.[1]

Trial Counsel's Failure to Investigate an Alibi Witness was Deficient

The Supreme Court of the United States outlined a two-prong test for determining whether a criminal defendant has received ineffective assistance of counsel in violation of the Sixth Amendment. *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1984). The defendant must first prove that trial counsel's performance was deficient. *Id.* at 687, 104 S. Ct. at 2064. If established, the defendant must then demonstrate that they were prejudiced by trial counsel's deficiency. *Id.* The majority accurately observes that Mr. Syed's trial counsel was under a duty to investigate the circumstances of the case, and explore any viable defenses on behalf of her client. The scope of this duty to investigate extended

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[1] I also concur with the majority's conclusion that Mr. Syed waived his right to bring an ineffective assistance of counsel claim based on his trial counsel's failure to challenge the cell-tower location data, because this ground was not raised in Mr. Syed's petition for post-conviction relief. I would therefore affirm the Court of Special Appeals on this issue as well.

to trial counsel's investigation into alibi witnesses and alibi defenses for Mr. Syed.

The majority references a list of decisions in which a trial counsel's failure to investigate a potential alibi witness constituted a deficiency under *Strickland*. Majority Slip Op. at 13-17; *see In re Parris W.,* 363 Md. 717, 770 A.2d 202 (2000) (concluding that trial counsel's failure to subpoena corroborating alibi witnesses for the correct trial date constituted a deficiency); *Griffin v. Warden, Maryland Correctional Adjustment Center,* 970 F.2d 1355 (4th Cir. 1992) (concluding that even though trial counsel was transferred to the case five months prior to trial, his failure to investigate five potential alibi witnesses constituted a deficiency); *Grooms v. Solem,* 923 F.2d 88 (1991) (concluding that trial counsel's failure to investigate and corroborate an alibi witness that had been brought his attention prior to, and on the day of, the trial, constituted a deficiency); *Montgomery v. Petersen,* 846 F.2d 407 (1988) (concluding that trial counsel's decision to offer alibi testimony in the defendant's burglary case in one jurisdiction, but not for a second burglary charge allegedly occurring on the same day in another jurisdiction, constituted a deficiency).

Mr. Syed's trial counsel's actions are indistinguishable from these cases. Mr. Syed informed trial counsel that he saw Ms. McClain at the public library around 3:00PM on the date of Ms. Lee's death. Mr. Syed's trial counsel also received two letters from Ms. McClain, offering herself as a witness who would testify that she saw Mr. Syed at the public library. Given Mr. Syed's trial counsel's undisputed knowledge of Ms. McClain as a potential

alibi witness, I agree with the majority that trial counsel's failure to act, "falls short of the tenets of a criminal defense attorney's minimum duty to investigate the circumstances and facts of the case." Majority Slip Op. at 18.

Trial Counsel's Deficiency Prejudiced Mr. Syed

I respectfully diverge from the majority's conclusion that Mr. Syed suffered no prejudicial effect regarding trial counsel's deficient performance within the context of *Strickland. I* would hold, as did the majority of the Court of Special Appeals panel, that counsel's deficient performance did, in fact, prejudice Mr. Syed's defense. After determining that trial counsel's failure to investigate Ms. McClain as an alibi witness was deficient, the majority nonetheless concludes that this failure did not prejudice Mr. Syed. The majority explains that "the State's case against [Mr. Syed] could not have been substantially undermined merely by the alibi testimony of Ms. McClain because of the substantial direct and circumstantial evidence pointing to Mr. Syed's guilt." Majority Slip Op. at 35.

Under the prejudice prong of *Strickland,* a reviewing court must determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068. A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome." *Id.* This Court has further interpreted the "reasonable probability" standard to mean that there existed "a substantial or significant possibility that the verdict of the trier of fact would have been affected[.]" *Bowers v. State*, 320 Md. 416, 426, 578

A.2d 734, 739 (1990). While the *Strickland* standard for proving prejudice is undeniably high, and decidedly deferential to trial counsel's performance, it clearly requires the showing of merely "a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068.

The State offered a significant amount of evidence regarding Mr. Syed's whereabouts and actions on the evening of January 13, 1999, beginning after the time in which the State argued Ms. Lee had been killed. The State posited that Ms. Lee was killed between 2:15PM and 2:35PM that afternoon, a contention that Mr. Syed did not, and does not, refute. The State's evidence included testimony that Mr. Syed's handprint was found on Ms. Lee's car, evidence putting him in the vicinity of Ms. Lee's body, evidence of Mr. Syed's involvement in disposing Ms. Lee's body, and motive and opportunity to kill Ms. Lee. Of particular importance, the State offered no direct evidence regarding Mr. Syed's whereabouts during the time of Ms. Lee's death. This evidence submitted by the State, albeit extensive, was circumstantial. The post-conviction court even observed that the crux of the State's argument was that Mr. Syed buried Ms. Lee in the park at approximately 7:00PM on January 13, 1999, roughly four and a half hours after the State's proposed time of death.

In his defense, Mr. Syed offered testimony from a number of witnesses to establish a timeline of Mr. Syed's daily schedule and habit. This included Mr. Syed's practice of attending track practice from approximately 4:00PM to 5:30PM or 6:00PM, followed by attending services at his mosque in the

evening. The evidence offered by Mr. Syed similarly does not address his whereabouts during the crucial time of Ms. Lee's death that day. The lack of evidence offered establishing Mr. Syed's location between 2:15PM and 2:35PM is precisely why Ms. McClain's alibi is so significant to the present case. Ms. McClain offered to testify, and offered multiple corresponding affidavits, that she and her boyfriend at the time saw and spoke with Mr. Syed at the Woodlawn Public Library at the time the State contends that Mr. Syed killed Ms. Lee. Not only does Ms. McClain's alibi address the most integral period of time in the case, it presents direct, not merely circumstantial, evidence of Mr. Syed's whereabouts during that time. In so far as I could determine, no other evidence was offered by the State that would have refuted Ms. McClain's testimony and affidavits.

In *Griffin v. Warden, Maryland Correctional Adjustment Center*, the Fourth Circuit determined that an attorney's failure to investigate an alibi witness was both deficient and prejudicial to the defendant's case. 970 F.2d 1355, 1358 (4th Cir. 1992). The Fourth Circuit reasoned that "[e]yewitness identification evidence, uncorroborated by a fingerprint, gun, confession, or coconspirator testimony, is a thin thread to shackle a man for forty years." *Id.* at 1359. In the present case, the State offered no eyewitness testimony, or any other evidence for that matter, putting Mr. Syed with Ms. Lee during the time of her death, much less any direct evidence that Mr. Syed caused the death of Ms. Lee. Ms. McClain's alibi was direct, uncontroverted evidence that Mr. Syed was elsewhere at the time of Ms. Lee's death. Mr. Syed

does not have to definitively rebut his criminal agency, he merely has to establish that there is a reasonable probability that the result would have been different. *See id.* at 1359 (commenting that the state court incorrectly posited that the alibi evidence "did not affirmatively demonstrate that [Griffin] was at home when the crime was committed[]"). In my view, there exists a reasonable probability that had this alibi defense been offered, at least one juror, if not more jurors, would have had a reasonable doubt of Mr. Syed's guilt.

In concluding that Mr. Syed did not reach this reasonable probability threshold, the majority points out that if Ms. McClain's testimony was offered and believed by the jury, the jury could still conclude that Mr. Syed killed Ms. Lee, but at a different time. In fact, the State made the same argument, attempting to establish before the post-conviction court a new timeline in which Ms. Lee died after 2:45PM rather than between 2:15PM and 2:35PM. However, "[t]he post-conviction court concluded that ' [b]ased on the facts and arguments reflected in the record, the [c]ourt finds that *the State committed to the 2:36 p.m. timeline and thus, the [c]ourt will not accept the newly established timeline." Syed v. State,* 236 Md. App. 183, 281, 181 A.3d 860, 916 (2018) (emphasis in original). This original timeline was undisputed by Mr. Syed during trial, and throughout his post-conviction proceedings. The post-conviction court was correct in declining to adopt this new timeline. The majority's argument that Mr. Syed could have killed Ms. Lee at another time blatantly conflicts with the post-conviction court's holding. I would not disturb the post-conviction court's ruling on this issue. The

possibility that Ms. Lee was killed at a different time was not offered before the judge and jury during trial. Accordingly, I would not adopt the unsubstantiated opinion that the jury could create and believe a timeline other than the original one posited to them at trial. *See Strickland,* 466 U.S. at 695, 104 S.Ct. at 2052 (stating that a court must analyze "the totality of the evidence *before the judge or jury[ ]")* (emphasis added).

The majority, echoing the argument advanced by the State during the post-conviction proceeding, declared that Ms. McClain's alibi is just a single piece of evidence that does not satisfactorily challenge the substantial amount of evidence presented by the State. To my knowledge, this Court has never held within the *Strickland* context, that a criminal defendant must offer demonstrative evidence to prove that there is a reasonable probability that the verdict would have been affected. There is no dispute that the State offered a significant amount of evidence regarding Mr. Syed's involvement in Ms. Lee's burial, and that such evidence "did create an inference that he committed her murder." 236 Md. App. at 282, 181 A.3d at 916. However,

> [t]he burial of [Ms. Lee] was not an element that the State needed to prove in order to convict [Mr.] Syed. Instead, the State had to establish that [Mr.] Syed "caused the death" of [Ms. Lee], and the State's theory of when, where, and how [Mr.] Syed caused [Ms. Lee's] death was critical to proving this element of the crime.

Id. at 281, 181 A.3d at 916.

A jury is advised during jury instructions that the law does not distinguish between the weight to be given to direct or circumstantial evidence and that the jury must weigh all of the evidence presented in reaching its verdict. Even though this Court has acknowledged "that there is no difference between direct and circumstantial evidence[,]" it does not automatically follow that one significant piece of direct evidence cannot sufficiently contradict many pieces of circumstantial evidence, so as to affect the jury's verdict. *Hebron v. State,* 331 Md. 219, 226, 627 A.2d 1029, 1032 (1993). "But as with many criminal cases of a circumstantial nature, [the present case] had its flaws." 236 Md. App at 283, 181 A.3d at 917. The State offered no direct evidence establishing that Mr. Syed "caused the death" of Ms. Lee, and its case was largely dependent on witness testimony, which the State readily admitted was conflicting and problematic. *See id.* On the other hand, Ms. McClain's alibi testimony would have been direct evidence, from a disinterested witness, that Mr. Syed was not in the same location as Ms. Lee at the time of her death. *Id.* at 282, 181 A.3d at 916. In fact, "[t]he State's case was weakest when it came to the time it theorized that [Mr.] Syed killed [Ms. Lee]." *Id.* at 283, 181 A.3d at 917. As the Court of Special Appeals observed, "[Ms.] McClain's testimony, if believed by the trier of fact, would have made it impossible for [Mr.] Syed to have murdered [Ms. Lee]." *Id.* at 285, 181 A.3d at 918.

Ms. McClain's uncontroverted alibi witness testimony for Mr. Syed and Ms. Lee's uncontroverted time of death, as well as the State's lack of direct evidence as to Mr. Syed's whereabouts at the time of

Ms. Lee's death, was sufficient to establish "a reasonable probability that, but for trial counsel's deficient performance, the result of [Mr.] Syed's trial would have been different." *Id.* at 284, 181 A.3d at 918. Because Mr. Syed has, in my opinion, proven both the deficiency and prejudice prongs of the *Strickland* test thereby establishing an ineffective assistance of counsel, I would remand the case for a new trial.

For these reasons, I respectfully concur in part and dissent in part, and would affirm the judgment of the Court of Special Appeals.

Chief Judge Barbera and Judge Adkins have authorized me to state that they join in this opinion.

APPENDIX B

IN THE COURT OF APPEALS OF MARYLAND

September Term, 2018

STATE OF MARYLAND,

Petitioner / Cross-Respondent,

v.

ADNAN SYED,

Respondent / Cross-Petitioner.

No. 24

ORDER

The Court having considered the Respondent/Cross-Petitioner's Motion for Reconsideration of this Court's Opinion issued on March 8, 2019, and Request for Additional Briefing and Argument; the Motion for Leave to File Brief of Amici Curiae the Innocence Network and the MacArthur Justice Center in Support of Respondent's Motion for Reconsideration; the Motion for Special Admission of Out-of-State Attorney, Elaine J. Goldenberg; the Motion for Leave to File Brief of Amici Curiae Maryland Criminal Defense Attorneys' Association, Maryland Office of the Public Defender, and Individual Criminal Defense Attorneys in Support of Respondent's Motion for

Reconsideration; the Motion for Leave to File Brief of Amicus Curiae The National Association of Criminal Defense Lawyers in Support of Respondent's Motion for Reconsideration; the Motions for Special Admission of Out-of-State Attorneys, Elizabeth A. Franklin-Best, Lindsay C. Harrison, and Catherine C. Cease; and the responses filed thereto, in the above-captioned case, it is this 19th day of April, 2019,

ORDERED, by the Court of Appeals of Maryland, a majority of the Court concurring, that the Respondent/Cross-Petitioner's Motion for Reconsideration of this Court's Opinion issued on March 8, 2019, and Request for Additional Briefing and Argument, the Motions for Leave to File Briefs of Amici Curiae, and the Motions for Special Admissions of Out-of-State Attorneys, be and they are hereby, DENIED.

/s/Mary Ellen Barbera

Chief Judge

APPENDIX C

COURT OF SPECIAL APPEALS OF MARYLAND

ADNAN SYED,

v.

STATE OF MARYLAND,

STATE OF MARYLAND,

v.

ADNAN SYED,

No. 2519, Sept. Term, 2013
No. 1396, Sept. Term, 2016

March 29, 2018

Circuit Court for Baltimore City, Case Nos. 199103042 to 046. ***Martin P. Welch, Judge.***

Argued by: C. Justin Brown (Brown & Nieto, LLC, Baltimore MD), (Cate E. Stetson, Kathryn M. Ali, James W. Clayton, W. David Maxwell, Hogan Lovells US LLP, Washington, D.C.), all on the brief, for Appellant.

Argued by: Thiruvendran Vignarajah (DLA Piper LLP, Brian E. Frosh, Atty. Gen., on the brief) Baltimore, MD, for Appellee.

Panel: Woodward, C.J., Wright, Graeff, JJ.*

Woodward, C.J.

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* Judge Matthew J. Fader did not participate in the Court's decision to designate this opinion for publication pursuant to Md. Rule 8–605.1.

Hae Min Lee ("Hae") [1] was last seen on the afternoon of January 13, 1999, at Woodlawn High School in Baltimore County, Maryland. Less than a month later, on February 9, 1999, Hae's body was discovered in a shallow grave in Leakin Park located in Baltimore City, Maryland. Through investigation, Baltimore City authorities came to believe that appellant/cross-appellee, Adnan Syed, was responsible for Hae's death and charged Syed with first degree murder and related crimes.

On February 25, 2000, a jury in the Circuit Court for Baltimore City returned verdicts of guilty against Syed for first degree murder, kidnapping, robbery, and false imprisonment. The court subsequently sentenced Syed to life imprisonment for first degree murder, thirty years for kidnapping (to run consecutive to the life sentence), and ten years for robbery (to run consecutive to the life sentence but concurrent to the thirty years for kidnapping). The conviction for false imprisonment was merged for sentencing purposes. On direct appeal, this Court affirmed the convictions in an unreported opinion, and in June 2003, the Court of Appeals denied Syed's petition for writ of certiorari. *Syed v. State*, No. 923,

[1] Because the brother of Hae Min Lee is mentioned in the Background Section, infra, we will refer to Hae and her brother by their first names for the sake of clarity. We intend no disrespect in doing so.

Sept. Term 2000 (filed March 19, 2003), *cert. denied*, 376 Md. 52, 827 A.2d 114 (2003).

The unusual procedural posture of this case began ten years after Syed's convictions, when he filed a petition for post-conviction relief on May 28, 2010. After a two-day hearing, the circuit court denied all nine of Syed's claims for post-conviction relief in January 2014.

Syed filed a timely application for leave to appeal to this Court, which we granted on February 6, 2015. After considering Syed's request to remand his appeal because of a newly obtained affidavit from Asia McClain, a potential alibi witness, we remanded the case to the circuit court by order dated May 18, 2015, for that court to decide whether to reopen Syed's post-conviction proceeding. We stayed the remaining question raised in Syed's appeal.

On remand, the circuit court reopened Syed's post-conviction proceeding and conducted a five-day evidentiary hearing in February 2016. Ultimately, the circuit court granted Syed a new trial on the grounds of ineffective assistance of trial counsel[2] for counsel's failure to properly challenge the reliability of the evidence relating to the location of Syed's cell phone at the time that incoming calls were received on the night of the murder.

The State filed a timely application for leave to appeal on August 1, 2016, and Syed filed a

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[2] Syed's trial counsel was M. Cristina Gutierrez, Esq. Unfortunately, Gutierrez passed away prior to the filing of Syed's petition for post-conviction relief. Unless otherwise stated, "trial counsel" or "Syed's trial counsel" will refer to Gutierrez.

conditional cross-application for leave to appeal. We granted both applications, lifted the stay imposed pertaining to Syed's original appeal, and consolidated the appeals. Accordingly, we will consider the questions and issues raised in both appeals, which we have rephrased and organized into the following questions:[3]

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[3] In their briefs, the parties presented the following questions and issues:

Syed's Appeal Questions—No. 2519–2013:

1. Was [Syed's] trial counsel constitutionally ineffective when she failed to investigate a potential alibi witness, then told [Syed] that "nothing came of" the alibi witness?
2. Was [Syed's] trial counsel constitutionally ineffective when [Syed] asked her to seek a plea offer, but counsel failed to do so, and counsel falsely reported back to [Syed] that the State refused to tender an offer?

The State's Appeal Issues—No. 1396–2016:

1. Whether the post-conviction court abused its discretion in reopening the post-conviction proceeding to consider Syed's claim that his trial counsel's failure to challenge the reliability of the cell phone location data evidence, based on the cell phone provider's "disclaimer" about the unreliability of incoming calls for location purposes violated Syed's Sixth Amendment right to the effective assistance of counsel.
2. Whether the post-conviction court erred in finding that Syed had not waived his claim regarding trial counsel's failure to challenge the reliability of the cell phone location data for incoming calls by failing to raise it earlier.
3. Whether the post-conviction court erred in finding that Syed's trial counsel's failure to challenge the State's cell phone location data evidence, based on the cell phone

The State's Procedural Questions:

1. Did the post-conviction court abuse its discretion by exceeding the scope of this Court's May 18, 2015 remand order?
2. Did the post-conviction court abuse its discretion when it reopened Syed's post-conviction proceeding to consider the claim of ineffective assistance of counsel for trial counsel's failure to properly challenge the reliability of the cell tower location evidence?
3. Did the post-conviction court err by determining that Syed did not waive his ineffective assistance of counsel claim pertaining to trial counsel's failure to properly challenge the reliability of the cell tower location evidence?[4]

Syed's Questions on His Claims of Ineffective Assistance of Counsel:

1. Did the post-conviction court err by holding that Syed's right to effective assistance of counsel

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provider's "disclaimer," violated Syed's Sixth Amendment right to effective assistance of counsel.

Syed's Cross–Appeal Issue—No. 1396–2016:

1. Whether the post-conviction court erred in concluding that—despite the finding Syed's trial counsel rendered ineffective assistance in failing to investigate a potential alibi witness—counsel's deficient representation did not violate Syed's Sixth Amendment right because Syed was purportedly not "prejudiced."

[4] Because, as discussed *infra*, we conclude that Syed waived his claim of ineffective assistance of counsel regarding trial counsel's failure to properly challenge the reliability of the cell tower location evidence, we need not address the State's challenge to the post-conviction court's ruling in favor of Syed on that claim.

was not violated when trial counsel failed to pursue a plea deal with the State?

2. Did the post-conviction court err by holding that Syed's right to effective assistance of counsel was not violated when trial counsel failed to investigate McClain as a potential alibi witness?

For the reasons set forth below, we affirm the judgment of the circuit court, but do so by concluding that Syed's Sixth Amendment right to effective assistance of counsel was violated by trial counsel's failure to investigate McClain as a potential alibi witness. Accordingly, we remand the case for a new trial.

BACKGROUND

A. Trial

At trial,[5] the State's theory was one of a scorned lover. The State described Syed as resentful when Hae ended her and Syed's on-again, off-again relationship in November of 1998. According to the State, this resentfulness only grew after Syed discovered that at the beginning of January 1999, Hae had begun dating Donald Cliendinst ("Don"). To make matters worse, Hae's new relationship quickly became common knowledge among students and teachers at Woodlawn High School, where both Hae and Syed were enrolled as students in the Magnet program for gifted students.

The State theorized that sometime before the school day ended on January 13, 1999, Syed asked

[5] Syed's first trial ended in a mistrial on December 15, 1999. The second trial began on January 27, 2000, and concluded on February 25, 2000.

Hae for a ride so that he could pick up his car at the repair shop, knowing that she would say yes. During that ride, Syed, a regular operator of Hae's Nissan Sentra, drove them to the Best Buy parking lot situated off Security Boulevard in Baltimore County, a location frequented by them during their courtship. Central to the State's theory was that Syed murdered Hae between 2:15 p.m. and 2:35 p.m. in the Best Buy parking lot by strangling her and then placing her body in the trunk of her car. The State adduced evidence showing that later that night, Syed and Jay Wilds (the State's key witness) buried Hae's body in Leakin Park.

A summary of the evidence adduced at trial in a light most favorable to the State is set forth below.

1. The Day of the Murder

a. Morning of January 13, 1999

At 10:45 a.m. on January 13, 1999, Syed used his newly purchased cell phone[6] to call Wilds's home phone. Syed asked Wilds if he had any plans that day, to which Wilds replied that he needed to go to the mall to purchase a birthday present for his girlfriend. Syed stated that he would give Wilds "a lift." Later that morning, Syed arrived at Wilds's house in a tan four-door Honda Accord, and the two drove to Security Square Mall.

After shopping, Syed told Wilds that he had to get back to school, because his lunch period was ending. During the drive to school, Syed told Wilds "how [Hae] made him mad," and declared, "I'm going to

[6] Syed purchased and activated a new cell phone two days before Hae's murder.

kill that bitch . . .” Wilds dropped Syed off at school, and Syed permitted Wilds to drive his car and keep Syed’s cell phone. Syed said that he would give Wilds a call when he was ready to be picked up.

b. Midday

As Wilds was leaving school, he used Syed’s phone to call his close friend, Jennifer Pusateri, to see if he could come over to her house. Syed’s cell phone records indicate that a call was placed to Pusateri’s phone at 12:07 p.m. Pusateri’s brother answered the phone and told Wilds to come over, even though Pusateri was still at work. Pusateri was supposed to leave work around noon but was delayed that day. While at Pusateri’s house, Wilds received a call from Syed, who stated that he was not ready to be picked up yet but that he needed to be picked up “at like 3:45 or something like that[.]”

When Pusateri got home from work, she observed that Wilds had a cell phone with him and had driven a tan four-door car to her house. Pusateri also noted that Wilds “wasn’t acting like [he] normally acts[,]”and “[h]e wasn’t as relaxed as he normally is[.]”

c. Afternoon

Aisha Pittman, Hae’s best friend, said that she saw Hae “[r]ight at the end of the school day at 2:15 [p.m.] in Psychology class.” When Pittman saw Hae, Hae was talking to Syed. Rebecca Walker, a student and friend of Hae and Syed, said that she too “saw [Hae for] a few seconds after class let out” at 2:15 p.m. that day. Walker said that she “saw [Hae] heading towards the door [that would have led to where her car was parked] but [ ] did not see [Hae]

actually leave." Hae told Walker that "she had to be somewhere after school." But Hae did not say where she was going.

Inez Butler Hendricks, a teacher and athletic trainer at Woodlawn High School, saw Hae at the concession stand in the gym lobby at "about 2:15, 2:20 [p.m]." She recalled that Hae was wearing "[a] little short black skirt, light colored blouse, [ ] black heels[, and] . . . some [clear] nylon stockings [on her legs]" that day.[7]

Young Lee, ("Young"), Hae's brother, stated that Hae was supposed to pick up their cousin from elementary school around 3:00 p.m. that day. Young discovered that Hae had not picked up the cousin when the elementary school called to notify him that the cousin needed to be picked up.

Meanwhile, Wilds received a phone call from Syed. According to Wilds, "[Syed] asked [him] to come and get him from Best Buy." Syed's cell phone records indicate an incoming call was received at 2:36 p.m.[8]

Upon receiving the call from Syed, Wilds stated that he went straight to Best Buy where he saw Syed standing next to a pay phone wearing a pair of red gloves. Syed instructed Wilds to drive to the side of the building and park the car next to a gray Nissan Sentra, which was later identified as Hae's car. Wilds got out of the car and walked towards Syed.

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[7] These were the clothes found on Hae's body.

[8] Syed's phone records set forth the time, duration, and number dialed of each outgoing call. For incoming calls, however, the records showed the time and duration of each call, but not the number of the incoming call, listing it simply as "incoming call."

Syed asked Wilds if he was "ready for this." According to Wilds, Syed "opened the trunk and [Hae] was dead in the trunk."

Syed then closed the trunk and instructed Wilds to follow him as he drove Hae's car. In a self-described state of bewilderment, Wilds followed Syed to the Interstate 70 Park and Ride where Syed parked Hae's car. Syed got into the driver's seat of his car and drove away with Wilds as a passenger. Syed asked Wilds if he wanted to go buy some marijuana, to which Wilds agreed.

On their way to the house of Patrick Furlow, Wilds's friend and marijuana dealer, Wilds made a call to Pusateri to see if she knew if Furlow was home; Pusateri replied that she did not. Syed's cell phone records indicate that a call was made to Pusateri's phone at 3:21 p.m.

During their drive to Furlow's house, Syed also made a call to Nisha Tanna, a friend of his who lived in Silver Spring. Syed asked Wilds if he wanted to talk to Tanna and passed the cell phone to Wilds. Not feeling like talking, Wilds said, "hello, my name is Jay" and passed the phone back to Syed. According to Tanna, Syed asked her how she was doing and then "put his friend Jay [Wilds] on the line, and he basically asked the same question." Syed's cell phone records indicate that a call was made to Tanna's phone at 3:32 p.m.

Wilds called Furlow at 3:59 p.m. and learned that he was not home. At this point, Syed and Wilds changed course and drove to Forest Park to purchase marijuana. Wilds stated that he called Pusateri to

see if she knew if Kristina Vinson,[9] a mutual friend of Pusateri and Wilds, was home. Syed's cell phone records indicate that a call was made to Pusateri's phone at 4:12 p.m.

Syed told Wilds that he wanted to go to track practice at Woodlawn High School, because "he needed to be seen."[10] During the ride to Woodlawn High School, Syed express that "it kind of hurt him but not really, and when someone treats him like that, they deserve to die." Syed asked: "How can you treat somebody like that, that you are supposed to love?" Wilds stated that Syed spoke about the murder and confessed that "he thought [Hae] was trying to say something to him like apologize or say she was sorry, and that she had kicked off the turn signal in the car, and he was worried about her scratching him on the face or something like that . . . ."[11] When they arrived at Woodlawn High

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[9] "Vinson" is occasionally spelled as "Vincent" throughout the record and in this Court's unreported opinion in the direct appeal. *Syed v State*, No. 923, Sept. Term 2000 slip op. at 4-5 (filed Mar. 19, 2003), *cert. denied*, 376 Md. 52, 827 A.2d 114 (2003). Upon our review of the record, we believe that "Vinson" is the correct spelling and will use that spelling to reference her in this opinion.

[10] Hendricks stated that Syed was on the track team at Woodlawn High School. She testified that she would see Syed go to track practice, because Syed would come over and talk to her or would purchase things from the concession stand located in the gym lobby. Track practice began at 3:00 p.m., and the athletes had to be at practice by at least 3:30 p.m. Because no attendance was taken at track practice, it is unclear whether Syed attended practice on January 13, 1999, and if so, when he arrived for practice.

School, Syed told Wilds, "mother-fuckers think they are hard, I killed somebody with my bare hands."

Wilds then drove to Vinson's apartment to smoke marijuana and debate with himself about what to do. Wilds received a call from Syed on the cell phone half an hour later saying that he was at school ready to be picked up, and Wilds left Vinson's apartment to retrieve Syed.

d. Evening

Wilds stated that, after he picked up Syed, they both went to Vinson's apartment. Vinson stated that Wilds and Syed arrived at her apartment around 6:00 p.m. According to Vinson, it was memorable, because "they were acting real shady when they got there." While they were at Vinson's apartment, Wilds recalled that Syed received three phone calls. The first call was from Hae's parents asking if Syed knew where Hae was, to which he stated, "I haven't seen Hae, I don't know where she is, try her new boyfriend."

Wilds said that the second call occurred when "Hae's cousin or someone had called back[,] but it was the wrong number. They thought it was the new boyfriend's number[,] and it was his cellphone number or something like that." Young testified that "[he] looked around the house to look for [Hae's] friends' phone numbers and such," and discovered a phone number listed in Hae's diary as "443 253–

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[11] Kevin Forrester, former homicide Sergeant for the Baltimore City Police Department, stated that on February 28, 1999, Wilds led him, Detective Gregory MacGillivary, and another detective to Hae's abandoned car. According to Sergeant Forrester, the wind-shield wiper control was broken.

9023."[12] Young called that phone number believing that it was the number of Hae's new boyfriend, Don, because the sheet of paper had "Don" written all over it. After talking for a while, Young realized that he was speaking to Syed, because he recognized Syed's voice. Young asked Syed "if he knew where [Hae] was, or where she could be." According to Young, Syed did not say whether he knew where Hae was.

The third phone call, according to Wilds, was "from a police officer who was asking about Hae." Officer Scott Adcock testified that he called Syed between 6:00 p.m. and 6:30 p.m. and spoke to him for "no more than three to four minutes." Syed responded to the police officer stating, "I don't know where Hae is." Syed also "advised [him] that he did see her at school and that [Hae] was going to give him a ride home from school, but he got detained and felt that she probably got tired of waiting for him and left."

Vinson testified that after receiving the last phone call, Syed said, "they're going to come talk to me" and then "ran out of the apartment." According to Vinson, Wilds "jumped up and ran out of the apartment, too." Vinson looked out the window of her apartment and observed Syed and Wilds drive away. Syed's cell phone records indicate that three incoming calls were received by Syed's cell phone at 6:07 p.m., 6:09 p.m., and 6:24 p.m.

e. Nighttime

Wilds recounted that after leaving Vinson's apartment, Syed drove them to Wilds's house. There, Syed told Wilds that he needed his help getting rid of

[12] This is Syed's cell phone number.

Hae's body, stating that "he knew what [Wilds] did," and "how [he] did it[.]" Fearing that this comment was a threat to report Wilds to the police for his drug dealing, Wilds agreed to help. Syed then "grabbed two shovels and put them in the back seat of his car. [Wilds] got in [Syed's] car with him." The two went back to the Interstate 70 Park and Ride where Syed got out of his car and got into Hae's parked car. Wilds followed Syed, and they drove around for forty-five minutes, ultimately arriving at Leakin Park.

Wilds stated that, because he was supposed to meet Pusateri at 7:00 p.m. that evening, he paged her to tell her that he was going to be late for their meeting. Syed's cell phone records indicate that a call was made to Pusateri's pager number at 7:00 p.m.

When Syed and Wilds arrived at Leakin Park, Syed parked Hae's car on a nearby hill, got into his car, and instructed Wilds to drive down the hill. They then went about 150 feet[13] into the woods and used the shovels to begin digging.

Wilds stated that, "while we were digging, [Pusateri] had called back, and [Syed] just told her [Wilds] was busy now and hung up the phone." Pusateri testified that at 7:00 p.m. she received "a page from [Wilds,] and it was a voice message." She was confused by Wilds's page and "didn't understand the message [about] where [Wilds] wanted [her] to pick him up and what time. So [she] thought that it

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[13] According to Technician Romano Thomas and Detective Gregory MacGillivary of the Baltimore City Police Department Homicide Unit, the burial site of Hae's body was 127 feet from the road.

was necessary to call him." When she called the number on her caller I.D., "[s]omeone answered the phone and said [Wilds] will call me when he was ready for me to come and get him. He was busy." Syed's cell phone records indicate an incoming call was received at 7:09 p.m. Abraham Waranowitz, the State's expert in "cell phone network design and functioning[,]" testified that this call registered with cell site "L689B[,]" which was the strongest cell site for the location of Hae's body in Leakin Park.

After digging the grave, Wilds and Syed went back to Syed's car and put the shovels in the passenger side. Wilds then drove up the hill and parked behind Hae's car. According to Wilds, "[Syed] asked me for like five to ten minutes, he was like I don't think I'm going to be able to get her out by myself, I think I need your help." When Wilds responded that he was not going to help, Syed drove Hae's car down the hill.

Soon thereafter, Syed came back up the hill, parked Hae's car, got into his car, and told Wilds that they needed to bury Hae. Wilds returned with Syed to the woods where Hae was "laying kind of twisted face down." While they were burying the body, Syed received another phone call. Wilds did not know who the caller was, but noted that part of the conversation was not in English. Syed's cell phone records indicate an incoming call was received at 7:16 p.m. and registered with the same cell site, "L689B."

After Wilds and Syed finished burying Hae's body, Syed put the shovels in his car, and they drove up the hill to Hae's parked car. Syed drove away in Hae's car, with Wilds following behind driving Syed's car. Wilds recalled that the two traveled towards the

[C]ity on Route 40 and some of the back streets. We cut north and south, up and down roads. [Syed] pulled into like this alcove in the back of a whole lot of apartments. He parked [Hae's] car and came back to his vehicle.[14] At that time, I told him just flat out to take me home. He started driving me home.

Wilds further testified that Syed stopped his car at Westview Mall where he threw Hae's wallet, prom picture, and other possessions into a dumpster. Wilds then told Syed to pull behind Value City in Westview Mall where he threw the two shovels into a dumpster.[15]

Wilds stated that he paged Pusateri, and she testified that she received a page to pick Wilds up from Westview Mall around 8:00 p.m. Pusateri testified further that she picked Wilds up from the Value City in Westview Mall about ten to fifteen minutes after receiving his page. When Wilds got into her car, "the first thing he said was like put on your seat belt and let's go." When they left the parking lot, Wilds confessed that he had something to tell her that she could not tell anybody. Wilds then disclosed that Syed had strangled Hae in the Best Buy parking lot and that he had seen Hae's body in the trunk of a car.

2. Forensic Evidence

Although there were no eyewitnesses to the murder, there was forensic evidence that the State theorized linked Syed to the crimes. Margarita Korell, M.D., an assistant medical examiner at the

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[14] Hae's vehicle was found parked at this location.

[15] Detective MacGillivary testified that Hae's possessions, as well as the shovels, were never recovered.

Office of the Chief Medical Examiner in Baltimore City, was accepted as "an expert in forensic pathology" at trial. Dr. Korell testified that on February 10, 1999, she performed an autopsy on Hae. Dr. Korell opined that "the cause of death was strangulation" and that the manner of death was "[h]omicide." Dr. Korell noted that the hyoid bone in Hae's neck was broken, and the strap muscles of the neck showed hemorrhaging, which indicated that pressure had been applied to the skin on the neck. Dr. Korell stated that in her experience, "if [ ] pressure [is applied] on the neck for ten seconds or so," that could lead to unconsciousness and death within "a couple of minutes."

Romano Thomas, a crime lab technician with the Baltimore City Police Department Mobile Crime Lab Unit, testified that on February 28, 1999, he supervised the inspection of Hae's vehicle. Thomas stated that one of the items recovered from the car was a map of the Leakin Park area that was torn out of a map book. The torn out piece was found in the rear seat area of the vehicle.

Sharon Talmadge, an employee at the Baltimore City Police Department Latent Print Unit, testified that her duties were to "evaluate partial latent prints to determine if they [were] suitable for comparison." Talmadge would "then compare suitable partial latent prints to the prints of victims, suspects[,] or defendants. [She would also] process physical evidence to determine if there [were] any partial latent prints on that particular piece of evidence." Talmadge said that she was asked to determine if there were any partial latent prints on the map and map book that were recovered from

Hae's vehicle. Talmadge made a comparison to Syed and Wilds, and testified that "[a] partial latent print developed on the back cover of the map [book] . . . was identified as an impression of the left palm of [ ] Syed."

3. Verdict and Appeal

After six weeks of trial, the jury spent only about three hours deliberating before finding Syed guilty on February 25, 2000, of the charges of first degree murder, robbery, kidnapping, and false imprisonment. Syed was sentenced on June 6, 2000, to a total term of life imprisonment plus thirty years.

On direct appeal, Syed did not challenge the sufficiency of the State's evidence pertaining to any of his convictions. *See Syed v. State*, No. 923, Sept. Term 2000, slip op. at 1 (filed March 19, 2003), *cert. denied*, 376 Md. 52, 827 A.2d 114 (2003). Instead, he raised numerous evidentiary issues and alleged violations of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Id.* at 1–2. In an unreported opinion, filed on March 19, 2003, this Court found no merit to Syed's contentions and affirmed all of his convictions. *Id.* at 57. The Court of Appeals denied Syed's petition for writ of certiorari on June 20, 2003.

B. Post–Conviction Proceedings

On May 28, 2010, Syed filed a petition for post-conviction relief, and later supplemented his petition on June 27, 2010. Syed raised nine claims of ineffective assistance of counsel concerning trial counsel, sentencing counsel, and appellate counsel, which the post-conviction court summarized as follows:

I. Trial counsel failed to establish a timeline that would have disproved the State's theory and shown that [Syed] could not have killed [Hae] in the manner described by [the] State[']s witness Jay Wilds[;]

II. Trial counsel failed to call or investigate an alibi witness, Asia McClain, who was able and willing to testify;

III. Trial counsel failed to move for a new trial based on the statements of Asia McClain, which exonerated [Syed];

IV. Trial counsel failed to adequately cross-examine Deborah Warren, a State witness;

V. Trial counsel failed to approach the State about a possible plea deal;

VI. Trial counsel failed to inform [Syed] of his right to request a change of venue;

VII. Trial counsel failed to investigate the State's key witness, Jay Wilds, for impeachment evidence;

VIII. Appellate counsel failed to challenge testimony of [the] State's expert witness that strayed outside of his expertise; and

IX. [Syed's] counsel at sentencing failed to request that the [sentencing court] hold [Syed's] hearing on Motion for Modification of Sentence in abeyance.[16]

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[16] In his petition, Syed also raised the issue of cumulative error, but the post-conviction court did not address it. In Syed's first application for leave to appeal, he did not challenge the failure of the post-conviction court to address this issue, and

On October 11, 2012, and October 25, 2012, a post-conviction hearing was held ("first hearing"). In a Memorandum Opinion and Order ("Memorandum Opinion I"), issued on January 6, 2014, the post-conviction court denied Syed post-conviction relief.

On January 27, 2014, Syed filed a timely application for leave to appeal to this Court, which requested that we review "(1) whether his trial counsel rendered ineffective assistance [of counsel] by failing to interview or even contact Asia McClain, a potential alibi witness; and (2) whether [his trial counsel rendered ineffective assistance of counsel by] failing to pursue a plea offer and purportedly misrepresenting to Syed that she had." On January 20, 2015, Syed supplemented his application for leave to appeal, requesting that this Court remand the case for additional fact finding in light of an affidavit by McClain, dated January 13, 2015. In that affidavit, McClain reaffirmed her recollection of seeing Syed at the Woodlawn Public Library at the time that the State alleged that Syed murdered Hae. McClain also stated in the affidavit that in telephone conversations with the Assistant State's Attorney, Kevin Urick, she was discouraged from attending the first hearing.

After granting leave to appeal on February 6, 2015, and receiving briefs from both the State and Syed, this Court, on May 18, 2015, issued an order staying Syed's appeal on the issue of ineffective assistance of trial counsel for failure to pursue a plea offer. We further granted Syed's request to remand the case to

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Syed did not raise it in his motion to reopen the post-conviction proceeding.

the circuit court for further proceedings pursuant to the Uniform Post conviction Procedure Act ("UPPA"), Maryland Code (2001, 2008 Repl. Vol.), § 7–109(b)(3)(ii)(2) of the Criminal Procedure Article ("CP") and Maryland Rule 8–604(a)(5), (d). In our order, we instructed the post-conviction court to consider reopening the post-conviction proceeding if Syed were to file a motion to reopen within 45 days of our order.

On remand, on June 30, 2015, Syed filed, pursuant to CP § 7–104, a Motion to Reopen Post–Conviction Proceedings ("Motion to Reopen"), based upon the January 13, 2015 affidavit of McClain. On August 24, 2015, Syed filed a "Supplement to Motion to Re–Open Post–Conviction Proceedings" ("Supplement"), requesting that the post-conviction court reopen the post-conviction proceeding to consider new claims of ineffective assistance of trial counsel and a *Brady* violation concerning the reliability of certain cell tower location evidence admitted at trial. The State filed a consolidated response, and Syed, in turn, filed a reply. The post-conviction court granted Syed's request to reopen his post-conviction proceeding to consider those "issues raised by McClain's January 13, 2015 affidavit[,] and [Syed's] Supplement concerning the matter of cell tower location reliability."

On February 3, 2016, the post-conviction court began a five-day hearing ("second hearing") to consider the aforementioned issues raised by Syed, and on June 30, 016, the post-conviction court issued its "Memorandum Opinion II." In this opinion, the post-conviction court first considered the issue of "[w]hether trial counsel's alleged failure to contact

McClain as a potential alibi witness violated [Syed's] Sixth Amendment right to effective assistance of counsel." On this issue, the post-conviction court concluded that Syed's trial counsel was deficient by failing to investigate McClain as a potential alibi witness but that such deficiency did not prejudice Syed. Accordingly, the post-conviction court denied Syed post-conviction relief on that claim.

Next, the post-conviction court considered "[w]hether the State withheld potentially exculpatory evidence related to the reliability of cell tower location evidence in violation of the disclosure requirements under *Brady*." The post-conviction court ruled that Syed had waived this claim by failing to raise it in his petition for post-conviction relief and accordingly, denied post-conviction relief. [17]

Lastly, the post-conviction court considered Syed's claim that "trial counsel's alleged failure to challenge the reliability of the cell tower location evidence violated [his] Sixth Amendment right to effective assistance of counsel." The post-conviction court first held that Syed had not knowingly and intelligently waived this claim. On the merits, the post-conviction court determined that the performance of Syed's trial counsel was deficient because of her failure to cross-examine Waranowitz concerning a fax cover sheet for Syed's cell phone records that contained a disclaimer stating: "Any incoming calls will NOT be considered reliable information for location." The post-conviction court then concluded that such deficiency was

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[17] In the instant appeal, Syed does not challenge the post-conviction court's decision that Syed waived his claim of a *Brady* violation.

prejudicial to Syed, because the State's case relied heavily on placing Syed at Leakin Park at the alleged time of the burial of Hae's body. Accordingly, on this issue, the post-conviction court granted Syed's petition for post-conviction relief. The court vacated Syed's convictions and granted him a new trial.

On August 1, 2016, the State filed a timely application for leave to appeal to this Court. Syed then filed a conditional application for leave to cross-appeal. On January 18, 2017, this Court issued an order granting the State's application for leave to appeal and Syed's conditional application for leave to cross-appeal. We further lifted the stay of Syed's first appeal imposed by our remand order and consolidated the appeals.

Additional facts will be provided as they become necessary to the resolution of the questions presented in the case *sub judice*.

THE STATE'S PROCEDURAL QUESTIONS

I. Did the Post–Conviction Court Abuse Its Discretion by Exceeding the Scope of This Court's May 18, 2015 Remand Order?

A. Background

[1] In our May 18, 2015 remand order, this Court wrote, in relevant part:

> **The purpose of the stay and the remand is to provide Syed with the opportunity to file with the circuit court a request, pursuant to § 7–104 of the Criminal Procedure Article of Md. Code, to re-open the previously**

concluded post-conviction proceeding in light of [ ] McClain's January 13, 2015, affidavit, which has not hereto-fore been reviewed or considered by the circuit court. Moreover, because the affidavit was not presented to the circuit court during Syed's post-conviction proceeding, as it did not then exist, it is not a part of the record and, there-fore, this Court may not properly con-sider it in addressing the merits of this appeal. This remand, among other things, will afford the parties the opportunity to supplement the record with relevant documents and even testimony pertinent to the issues raised by this appeal.

We shall, therefore, remand the case to the circuit court, without affirmance or reversal, **to afford Syed the opportunity to file such a request to re-open the post-conviction proceedings. In the event that the circuit court grants a request to re-open the post-conviction proceedings, the circuit court may, in its discretion, con-duct any further proceedings it deems appropriate.** If that occurs, the parties will be given, if and when this matter returns to this Court, an opportunity to supplement their briefs and the record.

Accordingly, it is this 18th day of May 2015, by the Court of Special Appeals,

ORDERED that the above-captioned appeal be and hereby is STAYED; and it is further

ORDERED that [Syed's] request for a remand to the circuit court is GRANTED and the case be and hereby is REMANDED to the Circuit Court

> for Baltimore City, without affirmance or reversal, for the purpose set forth in this Order; and it is further
>
> ORDERED that [Syed] shall file his motion to re-open the closed post-conviction proceeding within 45 days of the date of this Order and, if he fails to do so, the stay shall be lifted and this Court will proceed with the appeal without any reference to or consideration of [Syed's] Supplement to Application for Leave to Appeal or any documents not presently a part of the circuit court's record; and it is further
>
> ORDERED **that, after taking any action it deems appropriate, the circuit court shall forthwith re-transmit the record to this Court for further proceedings.**

(Emphasis added).

As authorized by our remand order, Syed timely filed the Motion to Reopen, which was based on the McClain affidavit. Almost two months later, however, Syed filed the Supplement that raised, among other things, a claim of ineffective assistance of counsel pertaining to trial counsel's failure to properly challenge the reliability of the cell tower location evidence, which claim had never been raised before in any proceeding arising out of the charges against Syed. In the Supplement, Syed explained why such claim should be heard at the same time as the claim raised in his Motion to Reopen:

> [A]s a matter of judicial economy, the [c]ourt should consider this issue now. If it does not, and if Syed's conviction is not vacated on the alibi issue, Syed would have to raise the issue in a

> successive motion to re-open post-conviction proceedings. Not only could this lead to another separate proceeding, but it could lead to another appeal. It is in the interest of all parties to resolve this matter—and get to the heart of the problem—once and for all. Now is the time to do so.

In its consolidated response, the State acknowledged that Syed appeared to be advocating for his Supplement to be considered as a new motion to reopen under CP § 7–104, but argued that the post-conviction court should not reopen, be-cause the issue concerning the failure of trial counsel to properly challenge the reliability of the cell tower location evidence had "been repeatedly waived."

In its "Statement of Reasons" regarding Syed's Motion to Reopen and Supplement, the post-conviction court first observed that "[t]his [c]ourt may reopen [Syed's] previously concluded post-conviction proceedings if the [c]ourt determines that reopening the matter is in the interests of justice. Crim. Pro. § 7–104." With respect to Syed's Motion to Reopen, which was based on the McClain affidavit, the court determined, "in its own discretion," that "reopening the post-conviction proceedings would be in the interests of justice for all parties[,]" because "[t]his [would] allow [Syed] to introduce the January 13, 2015 affidavit from McClain, the potential testimony of McClain, and relevant evidence concerning [Syed's] claims of ineffective counsel and alleged prosecutorial misconduct during the post-conviction proceedings," and also would give the State "an equal opportunity to introduce testimony and other evidence to refute [Syed's] claims."

Next, the post-conviction court addressed Syed's Supplement, and stated in relevant part:

> [Syed] also moves this [c]ourt to reopen the post-conviction proceedings to allow him to raise the issue of cell tower location reliability, **which is not currently before the Court of Special Appeals and was not raised at the previously concluded post-conviction proceedings. Although this [c]ourt is aware that the Court of Special Appeals issued a limited remand, the Remand Order provided this [c]ourt with the discretion to conduct any further proceedings it deems appropriate**.

(Emphasis added).

The post-conviction court concluded by ordering that "[Syed's] Motion to Reopen [ ] and Supplement thereto is hereby **GRANTED**[.]" (Bold emphasis in original) (italic emphasis added).

B. Contentions

The State argues that the post-conviction court abused its discretion when it exceeded the scope of this Court's remand order by reopening Syed's post-conviction proceeding to consider issues that were not raised in the first hearing, and not the subject of our remand order. The State interprets the scope of our remand order as follows: "the plain and natural reading of the order gave the post-conviction court considerable discretion to conduct a full range of proceedings, so long as they were related to [ ] McClain and the issue of Syed's alibi defense." From that reading of the "limited" remand order, the State concludes that to allow the court to reopen Syed's

post-conviction proceeding and consider any issue other than those arising out of the McClain affidavit would run counter to the order's purpose and would constitute "an open invitation to litigate unpreserved issues altogether unconnected to McClain and the issue of an alibi."[18]

Syed responds that this Court delegated to the post-conviction court the latitude to "conduct further proceedings it deem[ed] appropriate." In Syed's view, our remand order was sufficiently broad to allow the post-conviction court to reopen Syed's post-conviction proceeding for any reason that it deemed was in the interests of justice.

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[18] The State also argues that this Court's remand order prohibited the post-conviction court from considering the Supplement, because the Supplement was filed after the 45–day deadline specified in the order. We disagree. First, the 45–day deadline in our remand order was a procedural mechanism to prevent the instant appeal from entering a state of limbo. The remand order specified that either the appeal would be stayed pending the post-conviction court's consideration of a motion to reopen filed within 45 days, or the appeal would proceed without this Court's consideration of any document not made part of the circuit court record, e.g., the McClain affidavit. Because Syed filed the Motion to Reopen within 45 days, the purpose of that deadline was satisfied. Second, as will be discussed *infra*, the Supplement sets forth a separate motion to reopen Syed's post-conviction proceeding under CP § 7–104. CP § 7–104 does not specify a limitation on the number of motions to reopen that can be filed or on the time that any such motion must be filed. *See Gray v. State*, 388 Md. 366, 380, 380 n.6, 879 A.2d 1064 (2005) (stating that CP "§ 7–104 does not prohibit a person from filing more than one petition to reopen" and that "the statute does not specify when a defendant must file a petition to reopen").

C. Analysis

This Court concludes that the post-conviction court did not exceed the scope of our May 18, 2015 remand order. In remanding Syed's appeal, we did not require that the post-conviction court reopen Syed's previously concluded post-conviction proceeding. Instead, we provided Syed "with the opportunity to file" with the post-conviction court a motion, pursuant CP § 7–104, "to re-open the previously concluded post-conviction proceeding in light of [ ] McClain's January 13, 2015, affidavit." Syed did in fact take such opportunity by filing the Motion to Reopen, which was based on McClain's affidavit.

Upon Syed's filing of the Motion to Reopen, the post-conviction court was required by the remand order to decide whether to reopen the post-conviction proceeding under CP § 7–104. CP § 7–104 states: "The court may reopen a post[-]conviction proceeding that was previously concluded if the court determines that the action is in the interests of justice." Here, the post-conviction court decided to grant the Motion to Reopen, because the reopening of the post-conviction proceeding to consider the issues raised by the McClain affidavit would be "in the interests of justice for all parties." In the instant appeal, the State does not challenge the post-conviction court's granting of the Motion to Reopen.

The remand order goes on to provide that "*[i]n the event that the circuit court grants a request to re-open the post-conviction proceedings*, the circuit court may, in its discretion, conduct any further proceedings it deems appropriate." Because the post-conviction court granted Syed's Motion to Reopen, the court was

specifically authorized to "conduct any further proceedings it deem[ed] appropriate."

As the State properly points out, the authority granted by our remand order for the post-conviction court to "conduct further proceedings it deem[ed] appropriate" was not a *carte blanche* grant for the court to hear any matter raised by the parties. Here, however, the Supplement was, in effect, a separate motion to reopen the post-conviction proceeding under CP § 7–104 for the court to consider, among other things, a new claim of ineffective assistance of counsel, namely, the failure of trial counsel to properly challenge the reliability of the cell tower location evidence. Clearly, as Syed suggests, it would be in the interests of judicial economy for the post-conviction court to hear both of Syed's claims of ineffective assistance of trial counsel under CP § 7–104 in one proceeding. Therefore, under the circumstances of the instant case, the post-conviction court acted within the scope of the May 18, 2015 remand order to conduct a "further proceeding[ ]" regarding the Supplement.

Nevertheless, because we conclude that the Supplement is a separate motion to reopen under CP § 7–104, there is a condition precedent to the post-conviction court's consideration of the Supplement with the Motion to Reopen—the court must determine whether a reopening for the Supplement is in the "interests of justice." See CP § 7–104. As will be discussed, infra, the post-conviction court exercised its discretion and concluded that the reopening of the post-conviction proceeding to consider the Supplement was "in the interests of justice." We shall now turn to the issue of whether

the post-conviction court abused its discretion in so doing.

II. Did the Post–Conviction Court Abuse Its Discretion When It Reopened Syed's Post–Conviction Proceeding to Consider the Claim of Ineffective Assistance of Counsel for Trial Counsel's Failure to Properly Challenge the Reliability of the Cell Tower Location Evidence?

A. Background

[2] As previously stated, the post-conviction court first granted Syed's Motion to Reopen concerning his claim of ineffective assistance of counsel for trial counsel's failure to investigate a potential alibi witness, McClain. After recognizing its authority under the remand order "to conduct any further proceedings it deems appropriate[,]" the post-conviction court stated, in relevant part:

> *After careful consideration of the parties' pleadings, this [c]ourt in the exercise of its discretion, concludes that reopening the post-conviction proceedings to allow [Syed] to raise the issue of cell tower location reliability and supplement the record with relevant materials would be in the interests of justice.* The issue of cell tower location reliability is premised upon [Syed's] claims of ineffective assistance of counsel and potential prosecutorial misconduct during trial, which are grounds for reopening the post-conviction proceedings under Maryland law. [*Gray v. State*, 388 Md. 366, 382 n.7, 879 A.2d 1064 (2005)]. [The State] can, of course, submit relevant materials to rebut [Syed's] claims.

* * *

> **ORDERED**, that this [c]ourt shall limit its consideration to:
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> * * *
>
> 2) Relevant evidence relating to a) trial counsel's alleged failure to cross[-]examine [the State's] expert on the reliability of the cell tower location evidence and b) potential prosecutorial misconduct during trial[.]

(Bold emphasis in original) (italic emphasis added).

B. Contentions

The State argues that the post-conviction court abused its discretion by reopening the post-conviction proceeding to consider the claim of ineffective assistance of trial counsel raised in the Supplement, 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." Recognizing that Maryland appellate courts have interpreted the "interests of justice" standard to give wide discretion to a post-conviction court to consider whether to reopen a previously concluded post-conviction proceeding, the State, nevertheless, contends that, "the 'interests of justice' standard must operate as a *standard*." (Emphasis in original). According to the State, if "the 'interests of justice' standard is satisfied whenever [an] attorney[ ] can conjure a 'potentially meritorious' claim based on a decades-old record, despite there being no new evidence, no change in the law, no misconduct, and

no other special circumstances, then the 'interests of justice' standard amounts to no standard at all."[19]

Syed responds that the interests of justice standard has been interpreted to give a post-conviction court broad discretion in determining whether it is in the interests of justice to reopen a post-conviction proceeding. Acknowledging that the Court of Appeals gave examples of meritorious reasons to reopen a post-conviction proceeding in *Gray v. State*, 388 Md. 366, 879 A.2d 1064 (2005), Syed argues that those examples are just examples, and a post-conviction court is not required to grant a motion to reopen only on grounds that Maryland courts have heretofore suggested are proper. Syed further points out that the State cannot cite to any case where a post-

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[19] The State also argues that Syed's Supplement should be considered a second post-conviction petition, which is forbidden under CP § 7-103(b)(1). We have searched the record in vain to find where the State has ever articulated this argument. Our review of the record reveals that on remand, the State never characterized Syed's Supplement as a second petition for post-conviction relief. Moreover, the State's procedural argument has consistently been that Syed's cell tower location claims fell outside the scope of our remand order and that those claims were waived. Accordingly, we do not consider the State's argument, because it was not "raised in or decided by the trial court." Md. Rule 8–131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"); *see also Conyers v. State*, 367 Md. 571, 593–95, 790 A.2d 15 (2002). Even if this Court were to consider the State's argument, we would conclude that the post-conviction court did not abuse its discretion when it interpreted Syed's Supplement as a new motion to reopen and not a second petition for post-conviction relief. *See Gray v. State*, 388 Md. 366, 383–84, 879 A.2d 1064 (2005).

conviction court's reopening of a post-conviction proceeding has been overturned on appeal.

C. Analysis

We begin by briefly reciting the history of CP § 7–103, which governs a petition for post-conviction relief, and its relationship to CP § 7–104. This Court has articulated such history as follows:

> Since the enactment of the UPPA in 1958, the General Assembly has acted to limit the number of post[-]conviction petitions that a person may file for each conviction. Originally, the UPPA "did not place any limit on the number of post[-]conviction petitions which a petitioner was entitled to file." *Mason v. State*, 309 Md. 215, 217–18, 522 A.2d 1344 (1987). But, effective July 1, 1986, Art. 27, § 645A was amended by adding subsection (a)(2), which provided that a "person may not file more than two petitions, arising out of each trial, for relief under this Subtitle," *Grayson v. State*, 354 Md. 1, 3, 728 A.2d 1280 (1999).
>
> In 1995, the General Assembly again changed the number of petitions that could be filed to challenge a particular conviction. By Ch. 110 of the Acts of 1995, which primarily amended provisions relating to the death penalty, (I) and (II) were added to subsection (a)(2) and subsequently codified as Art. 27, [§] 645A(a)(2)(i) and (iii). Under subsection (a)(2)(i), a person was permitted to "file only one petition[,] arising out of each trial," *id.* at 4, 728 A.2d 1280, and subsection (a)(2)(iii) provided that "[t]he court may in its discretion reopen a post[-]conviction proceeding that was previously concluded if the

> court determines that such action is in the interests of justice." *Id.*
>
> In 2001, the UPPA was repealed and reenacted at CP §§ 7–101 et seq. The provision relating to the reopening of a post[-]conviction proceeding is now codified at CP § 7–104 and contains "new language derived without substantive change." Revisor's Note. The words "in its discretion" were "deleted as surplusage." *Id.*

Gray v. State, 158 Md. App. 635, 645–46, 857 A.2d 1176 (2004), *aff'd*, 388 Md. 366, 879 A.2d 1064 (2005).

We further noted that

> [t]here are significant differences between the filing of a petition for post[-]conviction relief and a request to reopen a post[-]conviction proceeding. For example, a person is entitled, as a matter of right, to file one post[-]conviction petition. CP § 7–103(a). The reopening of a closed post[-]conviction proceeding, however, is at the discretion of the circuit court. CP § 7–104.
>
> Also, as a matter of right, a person filing a petition for post[-]conviction relief is entitled to a hearing and the assistance of counsel. CP § 7–108(a); Md. Rule 4–406(a). A request that a post[-]conviction proceeding be reopened does not entitle a person to either. Under the statute, the circuit court determines if a hearing and the assistance of counsel "should be granted." CP § 7–108(b)(1). Md. Rule 4–406(a) provides that, in the absence of a stipulation that the applicable facts and law justify the requested relief, the circuit court may not reopen a proceeding or grant relief

> without a hearing, but a request to reopen can be denied without a hearing.

Id. at 645, 857 A.2d 1176.

The Court of Appeals has determined that the proper standard of review for a ruling on a motion to reopen is an abuse of discretion standard, which

> is one of those very general, amorphous terms that appellate courts use and apply with great frequency but which they have defined in many different ways . . . [A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. **The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable**. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective. **That, we think, is included within the notion of untenable grounds, violative of fact and logic, and against the logic and effect of facts and inferences before the court.**

Gray, 388 Md. at 383–84, 879 A.2d 1064 (alternations in original) (emphasis added) (internal quotation marks omitted).

Relevant to the instant appeal, the Court of Appeals has discussed the meaning of the phrase "interests of justice:"

> The phrase "interests of justice" has been interpreted to include a wide array of possibilities. *See Love v. State*, 95 Md. App. 420, 427, 621 A.2d 910, 914 (1993) (mentioning a long list of reasons for granting a new trial in the interests of justice). **While it is within the trial court's discretion to decide when "the interests of justice" require reopening, we note that some reasons for reopening could include, for example**, ineffective assistance of post[-]conviction counsel or a change made in the law that should be applied retroactively. *See Oken v. State*, 367 Md. 191, 195, 786 A.2d 691, 693 (2001) (noting Oken's motion to reopen a post[-]conviction proceeding on the basis that the Supreme Court's opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) rendered his sentencing proceeding invalid); *see Harris v. State*, 160 Md. App. 78, 862 A.2d 516 [(2004)] (discussing the defendant's motion to reopen post[-]conviction proceeding on the ground that he had ineffective assistance of post[-]conviction counsel, in addition to ineffective assistance of trial and appellate counsel); [*Stovall v. State*, 144 Md. App. 711, 715, 800 A.2d 31, 34 (2002)] (holding that a defendant may petition to reopen a post[-]conviction proceeding if post[-]conviction counsel was ineffective).

Id. at 382 n.7, 879 A.2d 1064 (emphasis added).

It is clear to us that the Court of Appeals' discussion of the phrase "interests of justice" in *Gray*, quoted above, reaffirmed the broad discretion accorded to trial courts in deciding, "when 'the interests of justice' require reopening[.]" *See id.* The

Court cited to a number of cases as examples of the reasons found by the courts to support a reopening of a post-conviction proceeding. *Id.* The examples cited by the Court of Appeals are just that—examples. *See id.* They are by no means intended to circumscribe the trial court's discretion in deciding whether or not the "interests of justice" warrant a reopening of a post-conviction proceeding.

In the case *sub judice*, the post-conviction court determined that it was in the interests of justice to reopen Syed's post-conviction proceeding to consider Syed's claims that (1) trial counsel rendered ineffective assistance when she failed to properly challenge the reliability of the cell tower location evidence, and (2) the State failed to disclose potentially exculpatory evidence related to the reliability of the cell tower location evidence in violation of the State's obligation under *Brady*. The aforementioned claims revolve around the AT & T fax cover sheet for Syed's phone records, which cover sheet contained a disclaimer stating that "[a]ny incoming calls will NOT be considered reliable information for location." Although trial counsel had the disclaimer at the time of trial, she never cross-examined the State's cell tower expert, Waranowitz, about the reliability of the location of Syed's cell phone based on the location of the cell tower when the cell phone received an incoming call. Also, Waranowitz filed an affidavit in which he averred that the State never gave him the disclaimer before he testified as to the phone records' reliability for determining cell phone location.

Syed's claims of ineffective assistance of trial counsel and violation of *Brady* by the State regarding

the reliability of the cell tower location evidence are clearly cognizable under the UPPA. *See* CP § 7–102(a).[20] If his claims were not waived, and if he adduced sufficient evidence to satisfy the test of *Strickland* or *Brady*, Syed would be entitled to the remedy of a new trial under the UPPA. Therefore, it was not "violative of fact and logic" for the post-conviction court to conclude that reopening Syed's post-conviction proceeding to consider his claim regarding the reliability of the cell tower location evidence was in the "interests of justice." *See Gray*, 388 Md. at 383–84, 879 A.2d 1064. Hence, the post-conviction court did not abuse its discretion in so doing.

Nevertheless, the State argues that the post-conviction court abused its discretion by reopening Syed's post-conviction proceeding, because his claim regarding the reliability of the cell tower location

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[20] CP § 7–102(a) provides:

> (a) *In general*—Subject to subsection (b) of this section, §§ 7–103 and 7–104 of this subtitle and Subtitle 2 of this title, a convicted person may begin a proceeding under this title in the circuit court for the county in which the conviction took place at any time if the person claims that:
>
> (1) the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of the State;
>
> (2) the court lacked jurisdiction to impose the sentence;
>
> (3) the sentence exceeds the maximum allowed by law; or
>
> (4) the sentence is otherwise subject to collateral attack on a ground of alleged error that would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy.

evidence could have been raised in his petition for post-conviction relief and prosecuted at the first hearing but were not. In other words, the State contends that the decision of whether to reopen a post-conviction proceeding under CP § 7–104 necessarily includes a decision on whether the subject claim has been waived, and if so, whether the waiver can be excused under the circumstances of the case. *See, e.g.*, CP § 7–106(b)(1)(ii) (stating that "[f]ailure to make an allegation of error shall be excused if special circumstances exist").

We need not decide whether the issue of waiver is part of the decisional process regarding a motion to reopen under CP § 7–104. In the instant case, the post-conviction court did not address the State's waiver argument when it decided that the reopening of the post-conviction proceeding to hear Syed's claims set forth in the Supplement was "in the interests of justice." Nonetheless, the court fully considered the waiver issue during the reopened post-conviction proceeding and ruled on that issue in its Memorandum Opinion II. Therefore, even if the post-conviction court erred by failing to address the waiver issue when it decided to reopen the post-conviction proceeding under CP § 7–104 to hear the Supplement, such error was harmless.

III. Did the Post–Conviction Court Err by Determining That Syed Did Not Waive His Ineffective Assistance of Counsel Claim Pertaining to Trial Counsel's Failure to Properly Challenge the Reliability of the Cell Tower Location Evidence?

A. Legal Background

The UPPA's waiver provision in CP § 7–106(b) states as follows:

> (b) *Waiver of allegation of error*.—(1)
>
> (i) Except as provided in subparagraph (ii) of this paragraph, **an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation:**
>
> 1. before trial;
>
> 2. at trial;
>
> 3. on direct appeal, whether or not the petitioner took an appeal;
>
> 4. in an application for leave to appeal a conviction based on a guilty plea;
>
> 5. in a habeas corpus or coram nobis proceeding began by the petitioner;
>
> 6. **in a prior petition under this subtitle; or**
>
> 7. in any other proceeding that the petitioner began.
>
> (ii) 1. **Failure to make an allegation of error shall be excused if special circumstances exist.**

2. The petitioner has the burden of proving that special circumstances exist.

(2) **When a petitioner could have made an allegation of error at a proceeding set forth in paragraph (1)(i) of this subsection but did not make an allegation of error, there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation.**

(Italic emphasis in original) (bold emphasis added).

In the seminal case of *Curtis v. State*, 284 Md. 132, 133, 395 A.2d 464 (1978), the Court of Appeals addressed the application of CP § 7–106(b), then known as Article 27, § 645A,[21] to claims of ineffective

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[21] The waiver provision in Maryland Code (1957, 1976 Repl. Vol.), Article 27, § 645A (c) read as follows:

> (c) *When allegation of error deemed to have been waived*.—For the purposes of this subtitle, an allegation of error shall be deemed to be waived when a petitioner could have made, but intelligently and knowingly failed to make, such allegation before trial, at trial, on direct appeal (whether or not said petitioner actually took such an appeal), in any habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, unless the failure to make such allegation shall be excused because of special circumstances. The burden of proving the existence of such special circumstances shall be upon the petitioner.
>
> When an allegation of error could have been made by a petitioner before trial, at trial, on direct appeal (whether or not said petitioner actually took such an appeal), in any habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, but was not in fact so made, there shall be

assistance of counsel. Because both parties in the instant appeal focus their arguments on *Curtis*, we shall begin with an examination of that case.

In 1967, Curtis "was convicted of first degree murder . . . in . . . Prince George's County[;]" a conviction that was subsequently upheld on direct appeal. *Id*. at 134, 395 A.2d 464. With the aid of counsel different from his trial and appellate counsel, Curtis filed his first petition for post-conviction relief. *Id.* Curtis's petition alleged several errors, but it did not contain any claim of ineffective assistance of counsel. *Id.* "After a hearing on the merits, the [post-conviction] court denied relief" in 1970. *Id.*

In 1976, when the UPPA still allowed an unlimited number of post-conviction petitions,[22] Curtis filed a second petition for post-conviction relief with the aid of new post-conviction counsel. *See id.* at 134, 395 A.2d 464. In that petition, Curtis raised for the first time, among other things, the issue of ineffective assistance of trial counsel. *Id.* at 134–35, 395 A.2d 464. Upon consideration of the State's motion to dismiss, the post-conviction court dismissed Curtis's second petition for post-conviction relief, reasoning that, because Curtis failed to raise the issue of ineffective assistance of trial counsel in his first post-

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a rebuttable presumption that said petitioner intelligently and knowingly failed to make such allegation.

[22] "Ch. 110 of the Acts of 1995," "permitted [a petitioner] to 'file only one petition arising out of each trial,' . . . . [and] provided that '[t]he court may in its discretion reopen a post[-]conviction proceeding that was previously concluded if the court determines that such action is in the interests of justice.' " *Gray*, 158 Md. App. at 645–46, 857 A.2d 1176 (quoting *Grayson v. State*, 354 Md. 1, 4, 728 A.2d 1280 (1999)).

conviction petition, he waived the issue. *Id.* at 135–36, 395 A.2d 464.

After this Court granted Curtis leave to appeal and upheld the post-conviction court's dismissal, the Court of Appeals granted certiorari. *Id.* at 136–37, 395 A.2d 464. The Court stated that the issue before it was whether

> the General Assembly, by use of the term 'waiver' in the [UPPA], intend[ed] that [that] definition of 'waiver' set forth in subsection (c) [now CP § 7–106(b)] determine in all cases the right to raise for the first time any issue in a post[-]conviction action, regardless of the nature of prior procedural defaults, tactical decisions of counsel, or omissions of counsel[.]

Id. at 141, 395 A.2d 464.

The Court determined that, because the term "waiver" possesses inherent ambiguity, the waiver provision in the UPPA did not necessary apply to "all allegations made in post[-]conviction actions." *Id.* at 142, 395 A.2d 464. The Court reasoned:

> **If, in defining "waiver" for purposes of the [UPPA], the General Assembly intended to make subsection (c), with its "intelligent and knowing" definition, applicable every time counsel made a tactical decision or a procedural default occurred, the result could be chaotic. For example, under such an interpretation of the statute, for a criminal defendant to be bound by his lawyer's actions, the lawyer would have to interrupt a trial repeatedly and go through countless litanies with his client.** One of the

> basic principles of statutory construction is that a statute should not be construed to lead to an unreasonable or illogical result. *Grosvenor v. Supervisor of Assess.*, 271 Md. 232, 242, 315 A.2d 758 (1974); *Coerper v. Comptroller*, 265 Md. 3, 6, 288 A.2d 187 (1972); *Pan Am. Sulphur Co. v. State Dep't of Assessments and Taxation*, 251 Md. 620, 627, 248 A.2d 354 (1968); *Sanza v. Maryland Board of Censors*, 245 Md. 319, 340, 226 A.2d 317 (1967). It is hardly conceivable that the Legislature, in adopting § 645A (c) [now CP § 7–106(b)], could have intended to use the word "waiver" in its broadest sense, thereby requiring that the "intelligent and knowing" standard apply every time an issue was not raised before.

Id. at 149, 395 A.2d 464 (emphasis added). The Court then turned its attention to "what type of situations the Legislature intended to" require an intelligent and knowing waiver. *See id.* at 142, 149, 395 A.2d 464.

The Court held that the UPPA's "intelligent and knowing" requirement applies "in those circumstances where [a knowing and intelligent] waiver" is required to relinquish certain fundamental constitutional rights such as the right to counsel, the right to a jury trial, the right against self-incrimination, and the right against double jeopardy. *Id.* at 143–44, 49, 395 A.2d 464. The Court cautioned, however, that not all rights are so fundamental as those rights that require a knowing and intelligent waiver. *Id.* at 145, 395 A.2d 464. For example, even though "a defendant has a constitutional right not to be tried in [prison] attire, only by affirmatively asserting this right will it be

given effect." *Id.* This is because when competent trial counsel represents a defendant, that counsel may determine as a matter of trial tactics to decline to invoke this right. *Id.* at 145–46, 395 A.2d 464. In addition, the Court stated that the Supreme Court has recognized that "a 'procedural default' in certain circumstances, even where a defendant may personally have been without knowledge or understanding of the matter, may result in his being precluded from asserting important rights[,]" such as a procedural requirement that a defendant timely object to the racial composition of a grand jury. *Id.* at 146–47, 395 A.2d 464.

[3] In sum,

> whether one is precluded from asserting a constitutional right because of what may have occurred previously, even though the failure was not "intelligent and knowing," depends upon the nature of the right and the surrounding circumstances. A defendant may forego a broad spectrum of rights which are deemed to fall within the category of tactical decisions by counsel or involve procedural defaults.

Id. at 147, 395 A.2d 464.

The Court concluded that

> the term "waiver" could be said to connote the intelligent and knowing relinquishment of certain basic constitutional rights under circumstances where the courts have held that only such intelligent and knowing action will bind the defendant. In our view, the Legislature was using the word "waiver" in this narrow sense in the

> Maryland Post Conviction Procedure Act, Art. 27, § 645A [now CP § 7–106(b)].

Id. at 148, 395 A.2d 464.

Returning to the case before it, the Court addressed Curtis's claim "that the representation by his trial counsel was so inadequate that he was deprived of his Sixth Amendment right to have the Assistance of Counsel for his defense." *Id.* at 150, 395 A.2d 464 (internal quotation marks omitted). The Court held "that a criminal defendant cannot be precluded from having this *issue* considered because of his [or her] mere failure to raise the *issue* previously." *Id*. (emphasis added). The Court explained:

> The question of the constitutional adequacy of trial counsel's representation is governed by the *Johnson v. Zerbst* [304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)] standard of an "intelligent and knowing" waiver. *Hawk v. Olson*, 326 U.S. 271, 274, 279, 66 S.Ct. 116, 90 L.Ed. 61 (1945); *Glasser v. United States*, 315 U.S. 60, 70–72, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975); *Kelly v. Peyton*, 420 F.2d 912, 914 (4th Cir. 1969); *Sawyer v. Brough*, 358 F.2d 70, 73–74 (4th Cir. 1966). Consequently, subsection (c) of the [UPPA] is applicable to Curtis's contention, and it can only be deemed "waived" for purposes of the [UPPA] if Curtis "intelligently and knowingly" failed to raise it previously. **The proffered facts**, accepted as true by the circuit court for purposes of the State's motion to dismiss on the ground of waiver, **clearly disclose that Curtis did not "intelligently and knowingly" fail to previously raise the matter of his trial**

> **counsel's alleged inadequacy. Therefore, the issue cannot be deemed to have been waived**.

Id. at 150–51, 395 A.2d 464 (emphasis added).

[4–7] The *Curtis* Court's holding that the UPPA waiver provision is only applicable when allegations of error raised by a petitioner invoke a narrow set of fundamental constitutional rights has created "a dual framework" for analyzing whether a petitioner has waived a particular issue for failure to raise that issue in a previous proceeding. *See Hunt v. State*, 345 Md. 122, 137–38, 691 A.2d 1255 (1997). A court must examine whether the "nature of the right involved" is recognized by the Supreme Court as requiring an intelligent and knowing waiver, and thereby a fundamental right governed by CP § 7–106(b), *see id*. at 137–38, 691 A.2d 1255, or, whether the "nature of the right involved" is a non-fundamental right and thereby governed by the "general legal principles" of waiver. *See State v. Torres,* 86 Md. App. 560, 568, 587 A.2d 582 (1991) (stating that for claims invoking non-fundamental rights "waiver is determined by general legal principles. The most significant of these principles is that the failure to exercise a prior opportunity to raise an allegation of error generally effects a waiver of the right to raise the matter at a later time."). In other words,

> when [a] court finds that the possibility existed for a petitioner to have previously raised a particular allegation but he [or she] did not do so, the allegation will be deemed waived because of the failure to have previously raised it only if the right upon which the allegation is premised is a non-fundamental right. Conversely, if the right

> upon which the allegation is premised is a fundamental right, the allegation will not be deemed waived simply because it was not raised at a prior proceeding. Fundamental rights . . . may be waived only where the petitioner intelligently and knowingly effects the waiver.

Wyche v. State, 53 Md. App. 403, 407, 454 A.2d 378 (1983).[23] With the above legal background in mind, we return to the case before us.

B. Reopened Post-Conviction Proceeding

Syed argued at the second hearing that his trial counsel rendered ineffective assistance of counsel on the ground that she failed to challenge the reliability of the cell tower location evidence by cross-examining Waranowitz about the fax cover sheet disclaimer, which stated: "Any incoming calls will NOT be

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[23] To be sure, however, if a post-conviction court determines that a petitioner has waived his or her allegation of error, a petitioner still has the opportunity to argue that the court should excuse the waiver and proceed to the merits. *Hunt*, 345 Md. at 139, 691 A.2d 1255. If a petitioner waived an allegation premised on a fundamental right, then the petitioner has the burden of proving that "special circumstances" exist. *See* CP § 7–106(b)(1)(ii). If a petitioner has waived an allegation premised on a non-fundamental right, then a court, in a post-conviction proceeding, can excuse a waiver "if the circumstances warrant such action." *See Walker v. State*, 343 Md. 629, 647–48, 684 A.2d 429 (1996) ("Nevertheless, as the circuit court recognized in the present case, this Court has taken the position that a court, in a post[-]conviction proceeding can excuse a waiver based upon an earlier procedural default if the circumstances warrant such action. In effect, we have upheld the application of the 'plain error' or 'special circumstances' principles to waivers of the type here involved."); *see also Cirincione v. State*, 119 Md. App. 471, 512–17, 705 A.2d 96 (1998).

reliable information for location" ("cell tower ground"). Syed asserted that the disclaimer was important, because the State relied on the cell tower location for two incoming calls to place him at the burial site after 7:00 p.m. on January 13, 1999. The State responded that Syed waived this allegation of error, because he failed to raise it during the first hearing.

In considering the State's waiver argument, the post-conviction court, relying on *Curtis*, stated that "the Sixth Amendment right to effective assistance of counsel [w]as a fundamental right in the context of waiver." The post-conviction court then determined that Syed had sufficiently rebutted the presumption that he intelligently and knowingly waived such claim, reasoning:

> Although [Syed] alleged that trial counsel may have been ineffective on other grounds in his initial petition, he has never alleged that trial counsel rendered ineffective assistance for her alleged failure to challenge the State's cell tower expert with the disclaimer. More importantly, [Syed] was never advised that trial counsel may have been ineffective for her alleged failure to challenge the State's cell tower expert at trial with the disclaimer in prior proceedings. In fact, [Syed's] counsel for the post-conviction proceedings did not advise [Syed] about the issue until shortly before August 24, 2015, when counsel consulted with a cell tower expert about the potential ramifications of the disclaimer . . . Since [Syed] did not know about the potential implications of trial counsel's failure to challenge the cell tower evidence, he could not have

knowingly waived his right to raise the allegation.

The post-conviction court then proceeded to address the merits of such claim and granted Syed post-conviction relief.

C. Contentions on Appeal

The State contends that the post-conviction court erred in ruling that Syed's ineffective assistance of counsel claim was based on a fundamental constitutional right and thus required a knowing and intelligent waiver pursuant to CP § 7– 106(b) and *Curtis*. The State asserts that the post-conviction court erroneously relied on *Curtis*, because in that case, Curtis never raised the issue of ineffective assistance of trial counsel in his first post-conviction petition while in the instant case, Syed did raise the issue of ineffective assistance of trial counsel at the first hearing, but failed to raise the cell tower ground. Accordingly, the State urges this Court to conclude that Syed waived his new claim of ineffective assistance of counsel.

Syed responds that the post-conviction court properly ruled that a knowing and intelligent waiver was required for Syed to waive his claim of ineffective assistance of counsel pursuant to Curtis. Syed contends that *Curtis* has not been overturned, is still good law, and is not distinguishable. Moreover, Syed asserts that he did not knowingly and intelligently waive his claim of ineffective assistance of counsel on the cell tower ground, because he did not discover such ground until after this Court stayed and remanded his first appeal and

his post-conviction counsel informed him of the significance of the fax cover sheet disclaimer.[24]

D. Analysis

[8] In our view, the question that the State raises in the instant appeal is as follows: Where the *issue* of ineffective assistance of trial counsel has been raised and decided in a previous post-conviction proceeding, does a petitioner, absent a knowing and intelligent waiver, have the right to raise such *issue again but on a different ground* in a reopening of that proceeding? The post-conviction court answered this question by announcing that Curtis stood for the proposition that the issue of ineffective assistance of counsel may be raised a second time on a ground not raised previously, and a petitioner only waives this issue when he or she does so knowingly and intelligently as to that particular ground. We disagree with this broad reading of *Curtis*.

We are not aware of any decision by the Supreme Court, Court of Appeals of Maryland, or this Court holding that for waiver to apply, a petitioner in his or her first post-conviction proceeding must intelligently and knowingly waive the grounds not raised in support of a claim of ineffective assistance

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[24] At oral argument before this Court, Syed's counsel suggested that waiver is not applicable in this case, because Syed's original post-conviction proceeding was not finally litigated when his case was remanded by this Court's May 18, 2015 remand order. The record is devoid of any instance in which Syed has ever articulated this argument. Therefore, Syed's argument is not preserved for appellate review. Md. Rule 8–131(a); *see also Conyers v. State*, 367 Md. 571, 593–95, 790 A.2d 15 (2002) ("Ordinarily, an argument not raised in the proceedings below is not preserved for appellate review.").

of counsel. Moreover, Syed has not directed our attention to any precedent to support such principle, except that of a broad reading of *Curtis*. Our research, however, has identified two Maryland cases that point us to the answer.

In *Wyche*, this Court reviewed the denial of Wyche's third petition for post-conviction relief, in which he contended "that he was denied his constitutional right to be present at his trial because he was not present when the trial judge . . . reinstructed the jury." 53 Md. App. at 404, 454 A.2d 378. Because Wyche had failed to raise such error at trial, on appeal, or in either of his prior post-conviction petitions, the post-conviction court held that Wyche had waived his right to raise it. *Id.* at 404– 05, 454 A.2d 378. Consequently, we were called upon to decide whether the post-conviction court correctly determined that there had been a waiver because of Wyche's failure to raise the claim in a prior proceeding. *Id.* at 405, 454 A.2d 378. In our discussion of the law, we set forth a synthesis of the holdings in *Curtis* and its progeny regarding waiver under Article 27, § 645A. *Id.* at 405–06, 454 A.2d 378. At the conclusion of our summary of the dichotomy between the waiver of a fundamental right, which requires an intelligent and knowing waiver by the petitioner, and a non-fundamental right, which occurs from the failure to raise a violation in a prior proceeding when it was possible to do so, we added the following footnote:

> 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.

Id. at 407 n.2, 454 A.2d 378.

We recognize that the above footnote is *dicta* and that no legal authority was cited in support of it. Nevertheless, we believe that the language in the footnote identifies an important distinction in the UPPA waiver analysis. Specifically, the distinction between *the issue* of a violation of a fundamental right, such as a claim of ineffective assistance of counsel, and *the grounds* supporting such claim where the fundamental right can be violated in many different ways. The footnote suggests that the "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. In other words, the many different grounds that may be advanced in support of a claim of a violation of a fundamental right are not themselves a fundamental right.

We also find *Arrington v. State*, 411 Md. 524, 983 A.2d 1071 (2009), to be instructive. In *Arrington*, "Arrington was convicted of second degree murder in connection with the stabbing death of Paul Simmons" in 1995 and filed his post-conviction petition in 2000. *Id.* at 527, 530, 983 A.2d 1071. In his post-conviction petition, Arrington raised the issue of ineffective assistance of counsel on the ground of trial counsel's failure "to have the blood evidence presented in the case tested through a DNA

analysis[,]" despite Arrington's request for testing. *Id.* at 530, 983 A.2d 1071. The blood evidence at trial showed only that the bloodstains on Arrington's sweatpants "were consistent with the blood type of the victim in this particular case, *or any other individual with the same blood type*[.]" *Id.* at 529, 983 A.2d 1071 (emphasis added) (internal quotation marks omitted). According to Arrington, DNA testing would have shown that the blood on his sweatpants was not the victim's blood. *Id.* at 531, 983 A.2d 1071. The post-conviction court, however, determined from the testimony of Arrington's trial counsel that counsel made the tactical decision not to have Arrington's sweatpants tested, because of, among other things, the risk that the DNA testing would show that the victim's blood was indeed on Arrington's sweatpants. *Id.* at 532–33, 983 A.2d 1071. Thus the post-conviction court denied Arrington's request for a finding of ineffective assistance of counsel. *Id.* at 532, 983 A.2d 1071.

In 2006, Arrington filed a motion to reopen his post-conviction proceeding and request for a new trial pursuant to CP § 8–201[25] on the basis of "newly discovered DNA testing results" that proved that the blood on Arrington's sweatpants was not from the victim. *Id.* at 534, 983 A.2d 1071. Arrington asserted that he was entitled to a new trial, because the blood

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[25] "Maryland is among the many states in this country that have enacted post-conviction DNA testing statutes. Section 8–201 was enacted in Maryland in 2001, in line with a nationwide trend to adopt post[-]conviction DNA testing statutes designed to provide an avenue for the exoneration of the actually innocent." *Blake v. State*, 395 Md. 213, 218–19, 909 A.2d 1020 (2006) (footnote omitted).

evidence at trial misled the jury. *Id.* In addition to this claim, Arrington made claims of ineffective assistance of trial counsel based on grounds not previously raised, including, *inter alia*, grounds that "his trial counsel[ ] fail[ed] to cross-examine the State's expert regarding the percentage of the population that possesse[d] the blood type or enzyme at issue in the case[,]" and that his trial counsel allegedly failed "to make use of critical exculpatory evidence contained in various police reports." *Id.* at 535, 983 A.2d 1071.

The post-conviction court dismissed the new claims of ineffective assistance of trial counsel as waived, and the Court of Appeals quoted the post-conviction court's reasoning at length. *Id.* at 539–40, 983 A.2d 1071. That reasoning was as follows:

> **Petitioner also claims ineffective assistance of counsel stemming from counsel's failure to use critical exculpatory evidence contained in various police reports, as well as failure to establish the percentage of individuals having the same blood type as both Petitioner and the victim. Petitioner raised ineffective assistance of counsel at his first post[-]conviction proceeding. It is Petitioner's position that a reopening of post[-]conviction proceedings pursuant to § 8–201, ipso facto reopens all issues, regardless of any claims of waiver, abandonment or that claims have been fully litigated.** Petitioner fails to cite any authority for such a reading of § 8–201. The legislature intended § 8–201 to provide a mechanism for those with claims of "actual innocence" to utilize

favorable scientific evidence at any time to prove their innocence. **The statute was not designed to open the floodgates of otherwise structured and constricted post[-]conviction law.** Nor was it designed to provide a "super-appeal" as an end-run around the entire body of post[-]conviction law. An additional question for the [c]ourt is whether it is in the interests of justice to reopen the issue of ineffective assistance of counsel at this juncture.

Petitioner points to trial counsel's failure to utilize exculpatory information contained within certain police reports to demonstrate ineffective assistance of trial counsel. All of the information was known prior to trial, let alone prior to the first post[-]conviction hearing. Petitioner had the benefit of counsel on appeal and failed to raise these issues. Further, Petitioner had the benefit of counsel during his initial post[-]conviction and failed to raise these issues in support of his allegation of ineffective assistance of counsel. Consequently, Petitioner has waived the right to now assert these claims. Furthermore, it would not be in the interests of justice to reopen the ineffective assistance of counsel claim where, as here, the Petitioner had access to the information complained of prior to his appeal, as well as his first post[-]conviction hearing, and failed to raise these issues in those forums.

Id. (emphasis added).

On a direct appeal to the Court of Appeals, pursuant to CP § 8–201(j)(6) (2001, 2008 Repl. Vol.), Arrington argued that the post-conviction court erred in failing to reopen his post-conviction proceeding to consider his claims of ineffective assistance of counsel on new grounds. *Id.* at 540–42, 983 A.2d 1071. In rejecting Arrington's argument, the Court stated:

> This Court has yet to decide whether a petitioner in a reopened post[-]conviction proceeding may raise claims that would normally be precluded under the statutory provisions about waiver in the Uniform Post[-]conviction Procedure Act ("UPPA"), CP Sections 7–101 through 7–301 (2008 Repl. Vol.). We decide today, for the reasons explained below, that a petitioner may not assert, in a post[-]conviction proceeding reopened under the authority of CP Section 8–201, claims that could have been, but were not, raised in the original post[-]conviction proceeding, other than claims based on the results of the post[-]conviction DNA testing.

Id. at 545, 983 A.2d 1071.

The above language in *Arrington* implies that "under the statutory provisions about waiver in the [UPPA,]" *id.*, Arrington had waived his right to assert claims of ineffective assistance of counsel on the new grounds alleged in his motion to reopen, where (1) all of the information about the new grounds was known prior to the first post-conviction hearing; (2) Arrington had the benefit of post-conviction counsel during the initial post-conviction proceeding; and (3) his post-conviction counsel failed to raise those grounds in support of his claims of

ineffective assistance of trial counsel. *See id.* at 539, 983 A.2d 1071. The issue before the Court of Appeals in Arrington was whether the waived claims of ineffective assistance of counsel could still be raised "in a post[-]conviction proceeding reopened under the authority of CP Section 8–201[.]" *Id.* at 545, 983 A.2d 1071. The Court held that those waived claims could not be raised. *Id.*

[9] Considering *Curtis*, *Wyche*, and *Arrington* together, we conclude that the UPPA's "intelligent and knowing" requirement for the waiver of a fundamental right is limited to situations where the issue of a violation of a fundamental right was not raised in a prior proceeding. In *Curtis*, the issue of ineffective assistance of counsel was not raised in the first petition for post-conviction relief. 284 Md. at 134–35, 395 A.2d 464. The Court of Appeals determined that the issue of ineffective assistance of counsel was premised on a fundamental constitutional right, and thus "a criminal defendant cannot be precluded from having this issue considered because of his mere failure to raise the issue previously." *Id*. at 150, 395 A.2d 464. In the instant case, by contrast, Syed did raise the issue of ineffective assistance of trial counsel at the first hearing. Syed's post- conviction counsel advanced seven claims that trial counsel's representation was constitutionally inadequate, each on a separate ground. The cell tower ground was not one of those grounds. Consequently, the question of waiver regarding the failure to raise the issue of ineffective assistance of trial counsel is not present here.

[10] In *Curtis*, the Court of Appeals identified non-fundamental rights, which can be precluded without

an "intelligent and knowing" waiver, as those that "fall within the category of tactical decisions by counsel or involve procedural defaults." *Id.* at 147, 395 A.2d 464. "Tactical decisions, when made by an authorized competent attorney, as well as legitimate procedural requirements, will normally bind a criminal defendant."[26] *Id*. at 150, 395 A.2d 464. In our view, the selection of a particular ground to support a claim of ineffective assistance of counsel is a quintessential tactical decision of counsel. Counsel must (1) decide whether the record supports a particular ground for a claim of ineffective assistance of counsel, (2) identify and develop evidence in support of such ground, (3) assess the strength of the evidence, and (4) evaluate the likelihood of success. Therefore, although the issue of ineffective assistance of counsel is premised on a fundamental right under *Curtis*, a ground supporting that issue is not. *Cf. Arrington*, 411 Md. at 545, 983 A.2d 1071; *Wyche*, 53 Md. App. at 407 n.2, 454 A.2d 378. Accordingly, the cell tower ground supporting Syed's new claim of ineffective assistance of trial counsel is

[26] Although Curtis also asserted that first post-conviction counsel was ineffective because that attorney failed to raise the issue of ineffective assistance of trial counsel in the first petition, this Court held that the representation of first post-conviction counsel was not constitutionally inadequate, and Curtis did not challenge that holding before the Court of Appeals. *Curtis*, 284 Md. at 135, 137–41, 395 A.2d 464. Likewise, in the instant case, the failure to raise the cell tower ground at the first hearing was done by competent post-conviction counsel. Nowhere in the Motion to Reopen or the Supplement did Syed assert that his post-conviction counsel was ineffective at the first hearing.

based on a non-fundamental right for the purpose of waiver under the UPPA.

[11, 12] As the Court of Appeals has explained:

> As to lesser or non-fundamental rights, the petitioner will be deemed to have waived any claim of error if petitioner or petitioner's counsel failed to exercise a prior opportunity to raise it notwithstanding a lack of personal knowledge of the right of which petitioner was deprived, except when the failure to allege the error is excused by special circumstances.

McElroy v. State, 329 Md. 136, 140–41, 617 A.2d 1068 (1993) (footnote omitted). We thus conclude that, where the issue of ineffective assistance of counsel is raised in a prior proceeding, the failure to assert a particular ground in support of the issue will constitute a waiver of that ground, unless the court finds that the ground could not have been presented in the prior proceeding.[27]

Our conclusion is consistent with the legislative history of the UPPA; specifically, Chapter 110 of the Acts of 1995, which reduced the number of petitions allowed to one and created the procedure for reopening a post-conviction proceeding. *See Alston v. State*, 425 Md. 326, 335, 40 A.3d 1028 (2012). In examining the legislative history of Chapter 110 of the Acts of 1995, the Court of Appeals observed that the purpose of this provision was to amend the UPPA to allow for a petitioner to have one petition for post-conviction relief but "provide a safeguard for

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[27] Even if a particular ground has been waived, the court has the authority to excuse such waiver if the circumstances so warrant. *See supra* note 23.

the occasional meritorious case" through the reopening procedure, now codified in CP § 7–104. *See id.*

The Court explained the new provision by pointing to the testimony of "the Governor's Chief Legislative Officer [ ] before the Senate Judicial Proceedings Committee on Senate Bill 340, which became Ch. 110," and was as follows:

> "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 the . . . defendant an unwarranted opportunity for delay**. Senate Bill 340 limits the *defendant* to one post[-]conviction petition unless the court determines that reopening the case is necessary to prevent a miscarriage of justice."

Id. at 336, 40 A.3d 1028 (italic emphasis in original) (bold emphasis added). In addition,

> [t]he Chairperson of the Governor's Commission on the Death Penalty, which drafted Senate Bill 340, also testified on the Bill before the Senate Judicial Proceedings Committee. He stated:
>
> > "This amendment would reduce the number of post[-]conviction petitions from two to one, but would permit a court to reopen a previously concluded proceeding if necessary to avoid a miscarriage of justice. This balances the need for procedural safeguards with the need for

> stemming cost and delay. **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; **he should not get more than one post[-]conviction petition**."

Id. (emphasis added).

As we read the legislative history, the General Assembly intended that a petitioner raise all claims cognizable under the UPPA in his or her original petition. *See id.* To extend *Curtis's* requirement of a knowing and intelligent waiver from the issue of ineffective assistance of counsel to every ground that could support such claim would run counter to the legislative history and purpose of Chapter 110 of the Acts of 1995, because it would allow a petitioner to raise claims of ineffective assistance of counsel on grounds not previously raised *ad infinitum*.

Finally, because the cell tower ground is premised on a non-fundamental right, the failure to assert such ground at the first hearing constituted a waiver of the claim of ineffective assistance of trial counsel based on that ground, unless it was not possible for Syed to have raised it at that time. *See Wyche*, 53 Md. App. at 407 n.2, 454 A.2d 378. Syed has not argued that it was not possible for his post-conviction counsel to raise in the initial petition the claim of ineffective assistance of counsel based on the cell tower ground, and we see no support in the record for the argument that it was not possible for Syed's post-conviction counsel to assert such ground at that time. Specifically, there is no dispute that Syed's trial counsel and post-conviction counsel possessed the fax

cover sheet disclaimer, which is the basis of Syed's new ineffective assistance of trial counsel claim. Because Syed's post-conviction counsel could have raised at the first hearing the claim of ineffective assistance of counsel based on trial counsel's failure to challenge the reliability of the cell tower location evidence by cross-examining Waranowitz about the fax cover sheet disclaimer, we hold that Syed waived this claim of ineffective assistance of counsel.[28]

SYED'S QUESTIONS ON HIS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

A defendant has the right to effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights. *State v. Sanmartin Prado*, 448 Md. 664, 681, 141 A.3d 99 (2016). When a defendant claims that this right has been violated, he or she must satisfy a two-step test known as the *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires

[28] We note that Syed did not argue that his waiver should be excused under general waiver principles in his reopened post-conviction proceeding. See, e.g., *Walker v. State*, 343 Md. 629, 647–650, 684 A.2d 429 (1996) (concluding that the petitioner did not present circumstances sufficient to excuse waiver of jury instruction error). Accordingly, such issue is not before us in the instant appeal. *See* Md. Rule 8–131(a).

> showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Id.

Standard of Review

[13–16] When a claim of ineffective assistance of counsel is considered on appeal, as in this case, we apply the following standard of review:

> [T]he [trial] court's determinations regarding issues of effective assistance of counsel is a mixed question of law and fact. We will not disturb the factual findings of the post-conviction court unless they are clearly erroneous. But, a reviewing court must make an independent analysis to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed. 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. . . . [The appellate court] will evaluate anew the findings of the [trial] court as to the reasonableness of counsel's conduct and the prejudice suffered. As a question of whether a constitutional right has been violated, we make our own independent analysis by reviewing the law and applying it to the facts of the case.

Sanmartin Prado, 448 Md. at 679, 141 A.3d 99 (some alterations in original) (internal quotation marks and citation omitted).

I. Did the Post–Conviction Court Err by Holding that Syed's Right to Effective Assistance of Counsel Was Not Violated When Trial Counsel Failed to Pursue a Plea Deal With the State?

A. Background

In his petition for post-conviction relief, Syed claimed, *inter alia*, that his trial counsel was ineffective for failing to pursue a plea offer. The following relevant testimony was adduced at the first hearing.

Syed testified that he consistently expressed his innocence to trial counsel, but after speaking with fellow inmates at the Baltimore City jail, he was urged to ask trial counsel about the possibility of the State offering a plea. Consequently, according to Syed, he took the following actions prior to his first trial:

> [SYED]: [ ] I asked [trial counsel] if the State offered a plea deal. She said no. My next question [ ] was to her, could she speak to the State's Attorney or request some type of a plea. And I explained to her that I didn't really have confidence that I'd be able to prove I was somewhere else when the murder take [sic] place and when the State's theory that the murder took place, from the information that we were getting. So that's what I asked her.
>
> [PC1 COUNSEL]: And how did she respond to your request?

[SYED]: She responded in the affirmative. And I took it to mean that, okay, she was going to ask [the State].

[PC1 COUNSEL]: And did she ever follow-up on this?

[SYED]: Well, my [sic] next time that I saw her, I asked her, what was the end result? Did she get a chance to speak to the State's Attorney? And her response was, "They're not offering you a plea deal." So, when she said that, that's what it was. There was nothing else for me to ask her after that, because I believed that she went and spoke to the State's Attorney, the State's Attorney said no, and that's what it was.

After the first trial ended in a mistrial but before the second trial began, Syed recalled:

[SYED]: [ ] I expressed to [trial counsel] again that, I really didn't have confidence in the case because now, my fears are confirmed that, that's essentially to me what it came down to. The perception in my mind was, this is what this case comes down to. Where was I at this time. So, I asked [trial counsel] once again, do you think the State will offer a deal? Could you talk to them again?

[PC1 COUNSEL]: And, did she respond?

[SYED]: She responded that, they're not offering you a deal.

Kevin Urick, the lead prosecutor for Syed's case, testified as to his recollection of any plea discussions, as follows:

> [PC1 COUNSEL]: Okay. So . . . to the best of your knowledge, it's your recollection and it's [co-counsel's] recollection, that **[trial counsel] never once approached either of you about a plea, a plea deal for [ ] Syed?**
>
> [URICK]: That's correct. **She never made any presentation other than that they were seeking a finding of actual innocence for [Syed].**
>
> [PC1 COUNSEL]: **And when we spoke on the phone, you told me that you had no idea what kind of plea [ ] Syed might have received if one had been requested; is that correct?**
>
> [URICK]: **That is correct.**

(Emphasis added).

When asked whether there was any "plea bargaining policy that existed within the State's Attorney's Office" at the time of Syed's trial, Urick stated that "[t]here's never been an established plea bargaining policy. At least not in the time [he] was [t]here." Moreover, Urick explained that in a high profile case like Syed's, he would have had to take multiple steps in order to find out if he could even make a plea offer:

> [STATE]: Had you been asked to extend any kind of an offer in a case such as this one, how would you handle that?
>
> [URICK]: The first thing I would have done, would have been to talk to the family. In a case like this, you give even more consideration to a family of a homicide victim. You try always to

> be considerate of a victim, and the victim's family in all cases. But a homicide case, it's even more so. So, I would have talked to Ms. Lee's family, see what they thought. Then after I talked to them, I would have gone probably to Sal Fili[, Urick's supervisor and Division Chief of Felony Narcotics], and told him that we were beginning to talk about [a] plea and I was planning to go to Mark Cohen[, the head of the Homicide Unit at the time,] to discuss it. . . . I would have then gone to talk to Mark Cohen to see what he felt. And I'm pretty certain that in this particular case, he would have suggested that we go to Ms. Jessamy[, the Baltimore City State's Attorney at the time,] with it and see where she stood on it as well.

Urick was never asked whether, after the above consultations were conducted, he would have made a plea offer to Syed. Finally, Urick recalled that he handled at least three other high profile murder cases, like Syed's, and he did not recall any plea discussions with defense counsel in those cases.

Syed called Margaret Meade as an expert in the practice of criminal defense of murder cases in the Circuit Court for Baltimore City, and she testified about her experience with the prosecutors at the State's Attorney's Office in Baltimore City. In Meade's experience, she could not "even imagine" the State not offering a plea if she were to ask for it.

B. Memorandum Opinion I

In its Memorandum Opinion I, the post-conviction court addressed Syed's claim of ineffective assistance of trial counsel for failure to pursue a plea offer:

> **[T]here is nothing in the record indicating that the State was prepared to make a plea offer had trial counsel pursued such negotiations.** In fact, [Syed] provided no convincing evidence that a plea offer was even contemplated or discussed by the State. **[Syed's] bald assertion that the policy of the State's Attorney's Office at the time was to offer plea[s] to defendants charged with murder is unfounded** and is inconsistent with the State's claim that there was never a plea available in [Syed's] case.

(Emphasis added). The post-conviction court concluded that trial counsel was not deficient, and even if she was deficient, Syed failed to prove prejudice, because there was no indication that Syed would have accepted any type of plea offer after maintaining his innocence throughout the trial and sentencing. The post-conviction court, therefore, denied Syed post-conviction relief on that claim.

C. Analysis

[17] On appeal, Syed contends that trial counsel had a duty to pursue plea negotiations, and trial counsel was deficient for failing to explore a possible plea offer when Syed requested her to do so. Moreover, Syed argues that he was prejudiced, because he "was denied the basic right to make a choice of whether to go to trial or to accept a plea bargain[,]" and had trial counsel done what Syed requested, "it is extremely likely that Syed would have had a choice" of whether to go to trial or to plea.

The State responds by arguing that, "[e]ven assuming Syed raised a cognizable ineffective

assistance of counsel claim, he still failed to establish that [his trial counsel] acted deficiently in the context of his case." Specifically, the State contends that Syed failed to show that the State would have made a plea offer, and there was "no evidence regarding a specific charge or sentence that Syed would have been offered[,]" much less accepted.

[18–20] "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012). Defendants do not, however, have the *"right to be offered a plea . . . ."* *Id.* at 168, 132 S.Ct. 1376 (emphasis added). Therefore, assuming that defense counsel has the duty to pursue a plea offer when requested, the failure to pursue a plea offer cannot prejudice a defendant without evidence demonstrating that, if defense counsel had requested a plea offer, the State would have made a plea offer. *Cf. Delatorre v. United States*, 847 F.3d 837, 846 (7th Cir. 2017) ("Because [the defendant's] prejudice argument centers on his attorney's inability to secure a plea agreement for him, [the defendant] had to show—at a minimum— that the prosecutor would have actually offered him a deal had his attorney been competent.").

In the case *sub judice*, Urick testified that, if Syed's trial counsel had asked for a plea, Urick would have begun a process of speaking with Hae's family and his superiors to ascertain whether he could offer a plea. Urick, however, was never asked whether, after completing such process, he would have made Syed a plea offer. Thus the post-conviction court was not clearly erroneous when it found that "there is

nothing in the record indicating that the State was prepared to make a plea offer had trial counsel pursued such negotiations."

Moreover, Urick testified that there was no "plea bargaining policy" within the State's Attorney's Office while he was there, and with regard to three high profile murder cases that he handled, Urick did not recall any plea discussions with defense counsel. On the other hand, Syed's expert stated that in her experience, the prosecutor always made a plea offer when requested and could not "even imagine a State's Attorney saying, we're not offering anything." By crediting Urick's testimony, the post-conviction court had sufficient evidence to support its finding that Syed's "assertion that the policy of the State's Attorney's Office at the time was to offer plea[s] to defendants charged with murder is unfounded."

Because Syed failed to prove that the State would have made him a plea offer if trial counsel had requested one, the post-conviction court correctly concluded that Syed had not established a claim of ineffective assistance of counsel based on trial counsel's failure to pursue a plea offer. We, therefore, affirm the post-conviction court's denial of relief on that claim.

II. Did the Post–Conviction Court Err by Holding that Syed's Right to Effective Assistance of Counsel Was Not Violated When Trial Counsel Failed to Investigate McClain as a Potential Alibi Witness?

A. Background

1. First Hearing

In his petition for post-conviction relief, Syed raised the issue of ineffective assistance of counsel for trial counsel's failure "to call or investigate an alibi witness, Asia McClain, who was able and willing to testify[.]"

On October 25, 2012, the second day of the first hearing, Syed testified that, after he was arrested on February 28, 1999, he "received two letters from [McClain] back to back." He "received these letters within the first week of being arrested," and "immediately notified" trial counsel. According to Syed, "the next time that [he] saw [trial counsel] on a visit, [he] showed her the two letters and she read them. And [he] asked her, could she please do two things, contact [ ] McCla[in], and try to go to the library to retrieve whatever security footage was there." Syed stated that prior to the first trial, he told trial counsel's law clerk, Ali Pournader, about McClain; specifically, that "[he] remembered being in the public library with her that day from right after school, which is about 2:15 to around 2:40, 2:45'ish, close to three [p.m].'"[29]

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[29] An affidavit written and signed by Ali Pournader was admitted as an exhibit at the second hearing. It stated:

> I remember that on at least one occasion I visited [ ] Syed in jail. . . . [I]t appears that I may have visited

Syed stated further that during the next visit he had with trial counsel, he "immediately asked her . . . did [she] speak to [ ] McCla[in]?" Trial counsel responded that she had "looked into it and nothing came of it." Syed then testified that, "[w]hen I asked her, and her response was that, I asked her again, well, [trial counsel], did you go speak to her? You know, did they say that—I just began in my mind to try to understand what she meant, but she moved onto another subject."

Shortly after his conviction, Syed mentioned McClain to Rabia Chaudry, a family friend who was a law student at the time. Syed stated that he "wish[ed] there was some way that [he] could [have] prove[n] that [he] was somewhere else at this time." Syed explained to Chaudry that trial counsel "checked into it and obviously it didn't pan out." At that point, Chaudry requested Syed to send her the information about McClain, and Syed sent her copies of the two letters. Chaudry then contacted McClain by calling McClain's grandparents' phone number, listed on one of the letters. After contacting McClain, Chaudry told Syed that "McCla[in] informed her that she was never contacted."

Chaudry testified at the first hearing and confirmed that she had spoken with McClain about Syed's case. Chaudry stated that during their brief phone conversation, McClain "seemed very happy

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> Syed at BCDC on July 13, 1999. [ ] I reviewed a copy of some hand-written notes, dated '7/13,' and those notes (attached) are in my handwriting. [ ] Those notes mention an individual named Asia McClain, and say, among other things, "Asia McClain→ saw him in the library @ 3:00."

that somebody was reaching out to her. And she was very willing to meet." The day following the phone conversation, Chaudry met with McClain in the parking lot of the Woodlawn Public Library. Chaudry stated that from their conversation, she "learned [ ] that, [McClain] had seen [Syed] after school that day at the library, which was next door to the school. And she recalled the day very clearly. She recalled very specific things about the day and she had spent the time immediately after school with him for about 15, 20 minutes." Chaudry asked McClain if she would put her story down on paper, and McClain agreed. That same day, McClain signed an affidavit dated March 25, 2000, which was then notarized.

Chaudry gave Syed a copy of McClain's affidavit, and Syed called trial counsel from the jail. Syed testified:

> I read through the affidavit and I reminded her about the letters. **And I said, [trial counsel], 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, [trial counsel], 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.

(Emphasis added).

Trial counsel did not testify at the first hearing, because she had passed away before the hearing took

place. McClain also did not testify at the first hearing.

On January 6, 2014, the post-conviction court issued its Memorandum Opinion I denying Syed post-conviction relief. The post-conviction court determined, among other things, that Syed's trial counsel was not deficient for failing to investigate McClain for two reasons. First, "the letters sent from [ ] McClain to [Syed] [did] not clearly show [ ] McClain's potential to provide a reliable alibi for [Syed]." The court explained that the letters did not state an exact time the encounter at the library took place and thus "trial counsel could have reasonably concluded that [ ] McClain was offering to lie in order to help [Syed] avoid conviction." Second, McClain's story conflicted with Syed's version of events and thus "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." The post-conviction court concluded that trial counsel's failure to investigate McClain as an alibi witness was the result of sound and reasonable trial strategy, and thus was not deficient performance.

2. First Appeal

On January 27, 2014, Syed filed a timely application for leave to appeal to this Court, raising two issues, one of which was whether Syed's trial counsel rendered ineffective assistance of counsel by failing to interview or even contact the potential alibi witness, McClain. As previously indicated, on January 20, 2015, Syed supplemented his application for leave to appeal, requesting that this Court remand the case back to the post-conviction court for

additional fact-finding on the alibi witness issue in light of McClain's January 13, 2015 affidavit. On February 6, 2015, this Court granted Syed's application for leave to appeal, reserving a decision on Syed's request to remand. After reviewing the briefs, Syed's supplement, and other pleadings, this Court by order dated May 18, 2015, stayed Syed's appeal and remanded to the post-conviction court for Syed to file a motion to reopen the post-conviction proceeding.

3. Second Hearing

Pursuant to this Court's remand order, Syed filed a Motion to Reopen, and the post-conviction court granted the motion "to introduce the January 13, 2015 affidavit from McClain, the potential testimony of McClain, and relevant evidence concerning [Syed's] claims of ineffective counsel and alleged prosecutorial misconduct during the post-conviction proceedings[.]" The second hearing began on February 3, 2016, and lasted until February 9, 2016.

At the second hearing, McClain[30] testified to being with Syed at the Woodlawn Public Library on January 13, 1999. That day, McClain had a conversation with Syed "[s]hortly after 2:15 [p.m.]" while McClain was waiting for her boyfriend to pick her up from the library. McClain noted that Syed's demeanor was "[c]ompletely normal." The conversation lasted "about 15 to 20 minutes" and ended when McClain's boyfriend and his friend arrived to pick her up. McClain further stated that

[30] At the time of the second hearing, Asia McClain was known as Asia Chapman.

school was closed the next two days, January 14 and January 15, 1999, due to bad weather.[31]

McClain testified that, after Syed was arrested on February 28, 1999, she and her friend, Justin Adger, went to Syed's house to inform his family that she had seen Syed and spoke to him at the library on January 13, 1999. On March 1, 1999, McClain wrote a letter ("first letter") to Syed. The first letter,[32] which was admitted into evidence at the second hearing, stated the following:

> It's late.
>
> I just came from your house an hour ago.
>
> March 1, 1999
>
> Dear Adnon, (hope I sp. it right)
>
> I know that you can't visitors, so I decided to write you a letter. **I'm not sure if you remember talking to me in the library on Jan. 13th, but I remembered chatting with you**. Throughout you're actions that day I have reason to believe in your innocense. I went to your family's house and discussed your "calm" manner towards them. **I also called the Woodlawn**

[31] At the first hearing, Chaudry testified to a conversation that she had with McClain in March of 2000, during which McClain mentioned that school was closed for two days following her conversation with Syed due to heavy snowfall. Chaudry stated that she verified the two-day school closure because of snow, and that such verification was significant to her, because "[t]hat showed [her] that there were details about that day. It was not just any other day for [McClain]. She remembered specific details about that day, and her details were verifiable."

[32] The typographical errors therein have not been altered.

Public Library and found that they have a surveillance system inside the building. Depending on the amount of time you spend in the library that afternoon, it might help in your defense. I really would appreciate it if you would contact me between 1:00pm–4pm or 8:45pm → until . . . My number is [redacted]. More importantly I'm trying to reach your lawyer to schedule a possible meeting with the three of us. We aren't really close friends, but I want you to look into my eyes and tell me of your innocense. If I ever find otherwise I will hunt you down and wip your ass, ok friend.

I hope that you're not guilty and **I hope to death that you have nothing to do with it. If so I will try my best to help you account for some of your unwitnessed, unaccountable lost time (2:15– 8:00; Jan 13th.)**

The police have not been notified Yet to my knowledge maybe it will give your side of the story a particle head start. I hope that you appreciate this, seeing as though I really would like to stay out of this whole thing. Thank Justin, he gave me a little more faith in you, through his friendship and faith. I'll pray for you and that the "REAL TRUTH" comes out in the end.

"I hope it will set you free" Only trying to help Asia McClain

*P.S. **If necessary my grandparents line number is [redacted]**. Do not call that line after 11:00 O.K.

Like I told Justin if your innocent I do my best to help you. But if you're not only God can help you.

If you were in the library for awhile, 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.

Your amiga

Asia McClain

(Emphasis added).

McClain testified that she wrote Syed a second letter ("second letter"), dated March 2, 1999. The second letter,[33] which was admitted into evidence at the second hearing, stated in relevant part:

Adnon Syed # 992005477
301 East Eager Street
Baltimore, MD. 21202

Dear Adnon,

How is everything? I know that we haven't been best friends in the past, however I believe in your innocence. I know that central booking is probably not the best place to make friends, so I'll attempt to be the best friend possible. I hope that nobody has attempted to harm you (not that they will). Just remember that if someone says something to you, that their just f**king with your emotions. I know that my first letter was probably a little harsh, but I just wanted you to know where I strode in this entire issue (on the centerline). **I don't know you very well, however I didn't know Hae very well.**

[33] *See supra* note 32.

The information that I know about you being in the library could helpful, unimportant or unhelpful to your case. I've been think a few things lately, that I wanted to ask you:

1. **Why haven't you told anyone about talking to me in the library? Did you think it was unimportant, you didn't think that I would remember? Or did you just totally forget yourself?**
2. How long did you stay in the library that day? Your family will probably try to obtain the library's surveillance tape.
3. Where exactly did you do and go that day? What is the so-called evidence that my statement is up against? And who are these WITNESSES?

* * *

You'll be happy to know that the gossip is dead for your associates, it's starting to get old. Your real friends are concentrated on you and your defense. I want you to know that I'm missing the instructions of Mrs. Ogle's CIP class, writing this letter. **It's weird, since I realized that I saw you in the public library that day, you've been on my mind. The conversation that we had, has been on my mind. Everything was cool that day, maybe if I would have stayed with you or something this entire situation could have been avoided.** Did you cut school that day? Someone told me that you cut school to play video games at someone's house. Is that what you told the police? This entire case puzzles

me, you see I have an analytical mind. I want to be a criminal psychologist for the FBI one day. I don't understand how it took the police three weeks to find Hae's car, if it was found in the same park. I don't understand how you would even know about Leakin Park or how the police expect you to follow Hae in your car, kill her and take her car to Leakin Park, dig a grave and find you way back home. As well how come you don't have any markings on your body from Hae's struggle. I know that if I was her, I would have struggled. I guess that's where the SO–CALLED witnesses. White girl Stacie just mentioned that she thinks you did it. Something about your fibers on Hae's body...something like that (evidence). I don't mean to make you upset talking about it...if I am. I just thought that maybe you should know. Anyway I have to go to third period. I'll write you again. Maybe tomorrow.

Hope this letter brightens your day. . . Your Friend,

Asia R. McClain

P.S: Your brother said that he going to tell you to maybe call me, it's not necessary, save the phone call for your family. You could attempt to write back though. So I can tell everyone how you're doing (and so I'll know too).

Asia R. McClain

6603 Marott Drive

Baltimore, MD 21207

Apparently a whole bunch of girl were crying for you at the jail...Big Playa Playa (ha ha ha he he he).

(Emphasis added).

McClain testified that no one from Syed's defense team contacted her, but had they, she would have spoken to them. McClain stated that after Syed's conviction, Chaudry came to her house and asked if she had a conversation with Syed in the library on January 13, 1999. McClain told Chaudry that she did have a conversation with Syed, to which Chaudry requested McClain write an affidavit. The notarized affidavit, dated March 25, 2000 ("March 25, 2000 affidavit"), [34] was admitted into evidence at the second hearing and stated the following:

Affidavit

A.R.M.

Asia McClain having been duly sworn, do depose and state:

I am 18 years old. I attend college at Catonsville Community College of Baltimore County. In January of 1999, I attended high school at Woodlawn Senior High. I have known Adnan Syed since my 9th grade freshmen year (at high school.) **On 1/13/99, 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 (Gerrod**

[34] *See supra* note 32.

Johnson) came to pick me up. Spoke to Adnan (briefly) and we left around 2:40.

A.R.M.

No attorney has ever contacted me about January 13, 1999 and the above information

Asia McClain 3/25/00

[signature of notary listed below]

(Emphasis added).

After moving across the country to the State of Washington, McClain testified that Syed's first post-conviction counsel attempted to contact her in April of 2010. She then contacted the lead prosecutor from Syed's trial, Kevin Urick, to see if he could provide her with unbiased information as to what was going on with the case. Urick explained to her the evidence of the case, the absence of alibi witnesses at trial, and the likely result of the post-conviction proceeding. Because of Urick's advice "that it was [ ] a waste of time for [McClain] to get involved with something that was just obviously a tactic to manipulate the court system[,]" McClain did not respond to the inquiries of Syed's post-conviction counsel. McClain stated that in January of 2014, she was contacted by National Public Radio ("NPR") and was interviewed about the case. According to McClain, the NPR podcast changed her outlook on the case and caused her to realize how important her information was.

McClain contacted Syed's post-conviction counsel in December of 2014, after learning that Urick had testified at Syed's first hearing that McClain wrote the March 25, 2000 affidavit because of pressure from Syed's family. Thereafter, McClain wrote the

January 13, 2015 affidavit, which was admitted into evidence at the second hearing. The January 13, 2015 affidavit[35] stated in relevant part:

ASIA MCCLAIN

1. I swear to the following, to the best of my recollection, under penalty of perjury:
2. I am 33years old and competent to testify in a court of law.
3. I currently reside in Washington State.
4. I grew up in Baltimore County, MD, and attended high school at Woodlawn High School. I graduated in 1999 and attended college at Catonsville Community College.
5. While a senior at Woodlawn, I knew both Adnan Syed and Hae Min Lee. I was not particularly close friends with either.
6. On January 13, 1999, I got out of school early. At some point in the early afternoon, I went to Woodlawn Public Library, which was right next to the high school.
7. I was in the library when school let out around 2:15 p.m. I was waiting for my boyfriend, Derrick Banks, to pick me up. He was running late.
8. At around 2:30 p.m., I saw Adnan Syed enter the library. Syed and I had a conversation. We talked about his ex-girlfriend Hae Min Lee and he seemed extremely calm and caring. He explained that he wanted her to be happy and that he had no ill will towards her.

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[35] *See supra* note 32.

9. Eventually my boyfriend arrived to pick me up. He was with his best friend, Jerrod Johnson. We left the library around 2:40. Syed was still at the library when we left.

10. I remember that my boyfriend seemed jealous that I had been talking to Syed. I was angry at him for being extremely late.

11. The 13th of January 1999 was memorable because the following two school days were cancelled due to hazardous winter weather.

12. I did not think much of this interaction with Syed until he was later arrested and charged in the murder of Hae Min Lee.

13. Upon learning that he was charged with murder [sic] related to Lee's disappearance on the 13th, I promptly attempted to contact him.

14. I mailed him two letters to the Baltimore City Jail, one dated March 1, the other dated March 2. (See letters, attached). In these letters I reminded him that we had been in the library together after school. At the time when I wrote these letters, I did not know that the State theorized that the murder took place just before 2:36 pm on January 13, 1999.

15. I also made it clear in those letters that I wanted to speak to Syed's lawyer about what I remembered, and that I would have been willing to help his defense if necessary.

16. The content of both of those letters was true and accurate to the best of my recollection.

17. After sending those letters to Syed in early March, 1999, I never heard from anybody from the legal team representing Syed. Nobody ever contacted me to find out my story.

18. If someone had contacted me, I would have been willing to tell my story and testify at trial. My testimony would have been consistent with the letters described above, as well as the affidavit I would later provide. *See below*.

* * *

[Signature]
ASIA MCCLAIN
DATE 1/13/15

David Irwin, Esquire, was called to testify at the second hearing as an expert in criminal defense practices and *Brady* disclosure duties of the prosecution. Irwin opined that McClain's story was "[p]owerfully credible." Irwin explained that back in 1999, based on what trial counsel had and was on notice for, she

> had to meet the minimal objective standard of reasonable defense care. She had to go talk to [ ] McClain. She had to investigate what [ ] McClain was saying and she had to then determine if—she had to investigate the two young guys that were with her. She had to go talk to them. Somebody had to talk to those people because the testimony could have been critical.

Irwin stated further that "now we know that [ ] McClain is a fabulous witness, lovely lady, credible, intelligent and she would have been material and

changed the ball game's result. It's pretty obvious to me." It was Irwin's opinion that trial counsel's performance "was well below the minimum required by *Strickland*[.]" (Emphasis added). Irwin concluded that McClain's testimony "was a game changer. It would have made an incredible difference in the outcome of the case. It's material. It's important. It certainly takes away any confidence that one would have in the verdict in that case."

4. Memorandum Opinion II

In addressing the deficiency prong of *Strickland* in its Memorandum Opinion II, the post-conviction court held that trial counsel's "failure to investigate McClain as a potential alibi witness fell below the standard of reasonable professional judgment." In reaching its holding, the post-conviction court found that after learning about McClain, trial counsel "failed to make any effort to contact McClain and investigate the bona fides of the March 1, 1999 and March 2, 1999 letters, or ascertain whether McClain's testimony would aid [Syed's] defense." According to the post-conviction court, trial counsel learned about the potential alibi witness "nearly five months prior to trial, and thus, she had ample time and opportunity to investigate the potential alibi."

The post-conviction court rejected the State's argument that trial counsel's failure to investigate was a "strategic decision not to investigate McClain because the potential alibi was in fact a scheme manufactured by [Syed] to secure a false alibi." The post-conviction court stated that, because adopting the State's argument "would require the [post-conviction court] to retroactively supply key assumptions and speculations, the [c]ourt rejects the

State's invitation to indulge in such hindsight sophistry, given that it is contrary to the legal framework set forth under *Strickland*."

The post-conviction court summarized its holding of deficient performance by Syed's trial counsel, succinctly and articulately, as follows:

> As the [c]ourt has explained, reasonable professional judgment under the facts of the present case required trial counsel to contact the potential alibi witness and investigate whether her testimony would aid [Syed's] defense. The facts in the present matter are clear; trial counsel made *no effort* to contact McClain in order to investigate the alibi and thus, trial counsel's omission fell below the standard of reasonable professional judgment.

(Emphasis in original).

B. Deficient Performance for Failure to Investigate McClain as a Potential Alibi Witness

1. Contentions

Syed contends that the post-conviction court correctly ruled that trial counsel's failure to investigate McClain as an alibi witness rendered her performance deficient, because trial counsel "was aware that McClain would have testified that Syed was in the Woodlawn Public Library at the time of the murder." The State responds that the post-conviction court erred in holding that trial counsel rendered deficient performance. The State contends that trial counsel had three justifiable reasons for not pursuing the McClain alibi defense: (1) "the alibi proposed by McClain threatened to suggest that

Syed had lied to police and had gone to the public library, a place no one had ever associated with Syed[;]" (2) "the [public] library alibi ran the risk of placing Syed at the public library with the victim at critical junctures[;]" and (3) "pursuing the [ ] McClain alibi expose[d] Syed to the risk of being accused of colluding with a witness to falsify an alibi." The State further argues that the defense theory adopted by trial counsel, which was based upon Syed's daily routine, was better than the McClain alibi, because "it covered a broader range of time, which was important since prosecutors could not narrow [the] time of death even after [trial counsel] inquired."

In his reply brief, Syed asserts that instead of providing support for the proposition that trial counsel's performance was not deficient, "the State relies on assorted after-the-fact rationalizations for why trial counsel could have ignored Syed's request that she pursue the McClain alibi." Syed argues that the post-conviction court thus was proper in disregarding these rationalizations. Lastly, Syed contends that, because the State disclosed the timeline for the murder five months before trial and further clarified that timeline during its opening statement at the first trial on December 9, 1999, trial counsel had plenty of time to contact McClain and determine whether her testimony would be helpful to Syed's defense.

We agree with the post-conviction court that trial counsel's performance was deficient under *Strickland*. We shall explain.

2. Relevant Case Law

As stated *supra*, in *Strickland* the Supreme Court set forth a two-step process for determining whether an attorney's assistance was so defective as to require reversal of a conviction. 466 U.S. at 687, 104 S.Ct. 2052. "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Id.*

[21] In discussing the first step, commonly referred to as the deficiency prong, the Supreme Court stated that "the proper standard for attorney performance is that of reasonably effective assistance[,]" *id.*, and that "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. The Court noted that the reasonableness of attorney performance must be considered "under prevailing professional norms" and under "all the circumstances." *Id.* The Court then cautioned that "[j]udicial scrutiny of counsel's performance must be highly deferential[,]"with "every effort to be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052. In other words, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* In sum, in deciding the deficiency prong of an ineffective assistance of counsel claim under *Strickland*, a court must assess counsel's performance under an objective standard of a reasonably competent attorney acting under prevailing norms, taking into

consideration all of the circumstances existing at the time of counsel's conduct with a strong presumption of reasonable professional assistance.

In further defining the objective standard of reasonable professional assistance, the Court in *Strickland* identified certain basic duties of counsel's representation of a criminal defendant, to include a duty of loyalty, a duty to avoid conflicts of interest, and a duty to advocate the defendant's cause. *Id.* at 688, 104 S.Ct. 2052. Like the instant case, the duty at issue in *Strickland* was "counsel's duty to investigate." *Id.* at 690, 104 S.Ct. 2052. The Court discussed the duty to investigate as follows:

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

Id. at 690–91, 104 S.Ct. 2052 (emphasis added).

In the case *sub judice*, our inquiry is not on the general duty of trial counsel to investigate a possible defense for Syed, but rather a subset of that duty.

Specifically, the duty in question here is trial counsel's duty to investigate a potential alibi witness, and the issue raised is whether trial counsel's failure to investigate McClain as a potential alibi witness was deficient performance under *Strickland*.

The Court of Appeals has defined an alibi witness as follows: "[A]n 'alibi' witness [is] a witness whose testimony 'must tend to prove that it was impossible or highly improbable that [the defendant] was at the scene of the crime when it was alleged to have occurred.' " *McLennan v. State*, 418 Md. 335, 352, 14 A.3d 639 (2011) (quoting *Ferguson v. State*, 488 P.2d 1032, 1039 (Alaska 1971)). In *Simms v. State*, this Court explained what an alibi defense is:

> An alibi is [a] defense that places the defendant at the relevant time of [the] crime in a different place than the scene involved . . . . The presence of the defendant at the scene of the crime at the time it was committed is obviously an essential element of the prosecutor's case[.] When a defendant raises an alibi defense, he is in effect denying the claim of the prosecution that he was present at the scene of the crime at the time it was committed. By claiming that he was at another place at the time when the alleged crime was committed, the defendant is denying by necessary implication, if not expressly, the allegations set forth in the charge.

194 Md. App. 285, 307–08, 4 A.3d 72 (2010) (internal quotation marks and citations omitted), *aff'd*, 420 Md. 705, 25 A.3d 144 (2011).

Our research has revealed no Maryland case that has addressed directly the issue of a defense

counsel's failure to investigate a potential alibi witness in the context of an ineffective assistance of counsel claim. The closest Maryland case is *In re Parris W.*, 363 Md. 717, 770 A.2d 202 (2001), but that case involved defense counsel's failure to subpoena alibi witnesses for the correct trial date. *Id.* at 727, 770 A.2d 202. Nevertheless, in *In re Parris W.*, the Court of Appeals cited with approval, and discussed at length, three federal cases that considered, among other things, the issue of defense counsel's failure to investigate a potential alibi witness. *Id.* at 730–34, 770 A.2d 202. Thus a review of those cases first, along with others from outside of Maryland, will be instructive to our analysis.

In *Griffin v. Warden, Maryland Correctional Adjustment Center*, Griffin was identified by two security guards as being a participant in an armed robbery that occurred at 3:45 p.m. on July 24, 1983. 970 F.2d 1355, 1356 (4th Cir. 1992). Griffin provided his trial counsel with a list of five alibi witnesses. *Id.* Defense counsel, however, failed to contact these witnesses or to respond to the State's discovery request to be notified of an alibi defense and the identities of alibi witnesses. *Id.* Defense counsel explained that he did not contact any of the alibi witnesses, because he expected Griffin to take a plea. *Id.* Among the "cogent tactical considerations" that the state court bestowed on defense counsel was not calling one of the alibi witnesses, because a security guard had identified that witness as a participant in the robbery and calling a witness who was an accomplice to the robbery could have hurt Griffin's case. *Id.* at 1358. The Fourth Circuit rejected the state court's rationale, because defense counsel did

not even interview the witness, "let alone make some strategic decision not to call him." *Id.* The Fourth Circuit warned:

> [C]ourts 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 about putting [the witness] on the stand. A court should evaluate the conduct from counsel's perspective at the time. Tolerance of tactical miscalculations is one thing; fabrication of tactical excuses is quite another.

Id. at 1358–59 (internal quotation marks and citations omitted).

In *Grooms v. Solem*, Grooms was convicted of selling stolen Native American artifacts. 923 F.2d 88, 89 (8th Cir. 1991). Grooms's conviction was based on the testimony of a police informant who was married to Grooms's ex-wife, and they were engaged with Grooms "in a bitter and spiteful battle over the custody of the three children." *Id.* The informant testified that on May 15, 1984, between 5:00 p.m. and 5:30 p.m. in Scenic, South Dakota, Grooms sold him a stolen Native American beaded dress. *Id.* Grooms told his counsel on the day of trial that he, his wife, and a friend spent that same day waiting at a garage for the mechanics to replace the transmission in his truck. *Id.* The garage was located in Rapid City, South Dakota, approximately fifty miles from Scenic, South Dakota. *Id.* Grooms had a cancelled check dated May 15, 1984, payable to the garage and labeled "trans repair" in the memo. *Id.* Grooms also produced a work order dated May 14,

1984, with the same check number written on the face of the order. *Id.* At the post-conviction hearing, the garage's employees who worked on Grooms's transmission testified that they did not finish working on Grooms's truck until 7:00 or 7:30 p.m. *Id.* at 90. Defense counsel did not look into this possible alibi defense nor did he request a short continuance of the trial for further investigation; "he assumed that the court would preclude any evidence of alibi[,] because counsel had not given the notice of an alibi . . . ." *Id.* The Eighth Circuit noted that, "[o]nce a defendant identifies potential alibi witnesses, it is unreasonable not to make some effort to contact them to ascertain whether their testimony would aid the defense." *Id.* The Eighth Circuit determined that defense counsel's failure to make any effort to check the bona fides of the alibi was unreasonable under the circumstances. *Id.* The Court concluded that, even though counsel discovered this alibi on the day of trial, "trial counsel had a duty to attempt to investigate and to argue on the record for the admission of the alibi witnesses' testimony." *Id.* at 91; *accord Washington v. Smith*, 219 F.3d 620, 630–32 (7th Cir. 2000) (holding that defense counsel rendered constitutionally deficient performance by failing to attempt to contact alibi witnesses who were not identified until immediately before trial).

The Seventh Circuit in *Montgomery v. Petersen* addressed whether defense counsel was ineffective for failing to investigate and call the single disinterested alibi witness identified by the defendant. 846 F.2d 407, 407 (7th Cir. 1988). In *Montgomery*, Montgomery was charged with the commission of two burglaries in two different

counties on the same day. *Id.* at 408. At the trial for one burglary, Montgomery's wife testified that she and her husband spent the afternoon of the robbery shopping for a bicycle for their son in Springfield, Illinois, and that Montgomery was at home the rest of the day and evening. *Id.* at 409. Such testimony was in direct contradiction to the testimony of the State's witnesses, who testified that they and Montgomery had spent the day committing burglaries. *Id.* at 408–09. Defense counsel called twelve other witnesses who were friends or close relatives of Montgomery to testify as to Montgomery's whereabouts on the day of the crime. *Id.* at 409. Defense counsel failed to investigate or call the sole disinterested witness, a Sears clerk who sold Montgomery and his wife the bicycle. *Id.* Montgomery was convicted of burglary. *Id.* At the trial for the other burglary, Montgomery's counsel called the clerk, and the trial resulted in an acquittal. *Id.* at 409.

At Montgomery's post-conviction hearing, defense counsel testified that Montgomery and his wife gave him a receipt for the purchase of the bicycle and requested that he investigate the Sears clerk, but he failed to do so. *Id.* at 409–10. Defense counsel stated that his failure to investigate "was merely due to 'inadvertence' on his part, as he was busy interviewing other potential witnesses" and did not believe Montgomery. *Id.* at 410. The Seventh Circuit agreed with the post-conviction court that, "[i]n light of the information available to counsel at the time, the *failure to investigate the only available disinterested alibi witness* fell below the standard of reasonably effective assistance required by

Strickland." *Id.* at 411–12 (emphasis in original) (internal quotations omitted). The Seventh Circuit stated that defense counsel should have recognized the crucial importance of the clerk as the only disinterested witness in the case. *Id.* at 414. The fact that defense counsel did not have the name or address of the clerk did not excuse defense counsel's failure to investigate, because Montgomery's wife and mother-in-law were able to find the clerk easily. *Id.* Nor did counsel's lack of belief in Montgomery's alibi serve as "an adequate basis for ignoring such an important lead. Indeed, if counsel had taken the few steps necessary to identify and interview the Sears clerk, he may well have formed a more favorable view of his client's veracity." *Id.*

In *Bryant v. Scott*, the Fifth Circuit determined that Bryant's counsel rendered ineffective assistance of counsel by failing to investigate and interview alibi witnesses made known to counsel three days before trial. 28 F.3d 1411, 1411 (5th Cir. 1994). At trial, Bryant was convicted of armed robbery. *Id.* at 1413–14. After exhausting state court remedies, Bryant filed a petition for writ of habeas corpus in the federal district court claiming, *inter alia*, that trial counsel was ineffective for failure to investigate alibi witnesses. *Id.* at 1414. Because the district court found that Bryant had not given defense counsel the names and addresses of any alibi witnesses prior to trial, the court concluded that defense counsel provided Bryant with effective assistance of counsel. *Id.* at 1415.

On appeal, the Fifth Circuit disagreed with the district court. *Id.* at 1416. The Court stated that defense counsel was well aware of Bryant's interest

in pursuing an alibi defense. *Id.* The Court acknowledged that Bryant did not provide defense counsel with the names or addresses of alibi witnesses prior to the pre-trial hearing, *id.* at 1415, but defense counsel, according to the Court, obtained sufficient information at the pre-trial hearing to contact Bryant's alibi witnesses. *Id.* at 1417. The Court also noted that there was seventy-two hours between the pre-trial hearing and the trial during which defense counsel had the opportunity to contact the alibi witnesses. *Id.* The Court concluded that "the record shows that [defense counsel] had information on potential alibi witnesses before trial, and had the opportunity to try to interview such witnesses." *Id.* Accordingly, the Court held that defense counsel

> abdicated his responsibility of investigating potential alibi witnesses and failed to "attempt to investigate and to argue on the record for the admission of the alibi witnesses' testimony." *Grooms v. Solem*, 923 F.2d 88, 91 (8th Cir. 1991). [Defense counsel's] failure to investigate potential alibi witnesses was not a "strategic choice" that precludes claims of ineffective assistance. *See Nealy* [*v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985).]

Id.

In summary, the Fifth Circuit stated:

> Thus, we disagree with the district court's conclusion that [defense counsel] was "hog-tied" or "stonewalled" from making any investigation of alibi witnesses. **[Defense counsel] knew of three alibi witnesses before trial and should have made some effort to contact or**

> **interview these people in furtherance of Bryant's defense.** [Defense counsel's] complete failure to investigate alibi witnesses fell below the standard of a reasonably competent attorney practicing under prevailing norms.

Id. at 1418 (emphasis added) (footnotes omitted).

In *Lawrence v. Armontrout*, Lawrence was convicted of capital murder and murder in the first degree. 900 F.2d 127, 128 (8th Cir. 1990). After his convictions were affirmed on appeal, Lawrence sought post-conviction relief in state court, claiming ineffective assistance of counsel. *Id.* Lawrence claimed that defense counsel was ineffective because she "failed to interview or call as witnesses several people who would have corroborated his alibi on the evening of the murders." *Id.* According to the record, four potential alibi witnesses were identified to defense counsel: Betty Buie (Lawrence's girlfriend), Brenda Buie, Veronica Trice, and Felicia Longstreet. *Id.* at 128–29. At the evidentiary hearing, defense counsel testified that she interviewed Betty Buie and Brenda Buie, but decided not to use either of them at trial. *Id.* at 129. Defense counsel, however, made no effort to locate or interview the other two witnesses, relying instead on Betty Buie's assertions that Longstreet could not be located and Trice would not come to court. *Id.* After relief was denied in state court, Lawrence filed a petition for writ of habeas corpus in federal district court, which also denied any relief. *Id.*

On appeal, the Eighth Circuit reversed, stating that, "once Lawrence provided his trial counsel with the names of potential alibi witnesses, it was unreasonable of her not to make some effort to

interview all these potential witnesses to ascertain whether their testimony would aid an alibi defense." *Id.* Moreover, according to the Court, defense counsel's "failure to attempt to find and interview Longstreet and Trice *herself* [fell] short of the diligence that a reasonably competent attorney would exercise under similar circumstances." *Id.* at 129–30 (emphasis added). The Court concluded that defense counsel "owed Lawrence a duty to pursue his alibi defense and to investigate all witnesses who allegedly possessed knowledge concerning Lawrence's guilt or innocence. Because she failed to do so, Lawrence [ ] satisfied the first prong of the *Strickland* standard." *Id.* at 130 (citation omitted); *see Avery v. Prelesnik*, 548 F.3d 434, 437–38 (6th Cir. 2008) (finding deficient performance where defense counsel never personally attempted to contact any of the potential alibi witnesses, even though counsel's investigator had talked with one alibi witness).

There are also cases where courts have found defense counsel's performance was not deficient for failing to investigate an alibi witness. One such case is *Russell v. Lynaugh*, 892 F.2d 1205 (5th Cir. 1989), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2909, 115 L.Ed.2d 1073 (1991). The Fifth Circuit in *Russell* held that counsel's decision not to investigate alibi and character witnesses to testify on behalf of a murder defendant was not deficient performance. *Id.* at 1205. In 1977, Russell was convicted of capital murder and sentenced to death. *Id.* at 1207. After exhausting all state court remedies, Russell petitioned for writ of habeas corpus in federal district court, claiming, *inter alia*, that trial counsel was ineffective at trial and on appeal. *Id.* at 1212. Russell

argued that "his lawyer failed to investigate the law and facts. In particular, *he failed to discover alibi witnesses* who could have testified in the guilt-innocence phase of the trial." *Id.* (emphasis added). On appeal, the Fifth Circuit affirmed the district court's decision to deny Russell post-conviction relief. *Id.* at 1213. Explaining that Russell "specifically identified no potential alibi witnesses who did not testify," the Court concluded that Russell failed to show that his counsel's "performance in this respect was deficient and prejudicial." *Id.* Accordingly, the Court denied relief. *Id.*

3. Analysis

[22] We learn from the above cases 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." *Grooms*, 923 F.2d at 90; *accord Lawrence*, 900 F.2d at 129; *Bryant*, 28 F.3d at 1415; *see Russell*, 892 F.2d at 1213. Such identification normally includes names and addresses of potential alibi witnesses, but need not if sufficient information is provided or acquired to enable defense counsel to contact the witnesses. *See Montgomery*, 846 F.2d at 414 (although defense counsel did not have the name or address of the Sears clerk, Montgomery's wife and mother-in-law were able to find him easily); *Bryant*, 28 F.3d at 1416–17 (defense counsel learned the names and contact information of potential alibi witnesses at a pre-trial hearing). Such identification also includes sufficient information to suggest that the witness's testimony could provide the defendant with an alibi.

[23] In the case *sub judice*, Syed identified McClain as a potential alibi witness and requested trial counsel to contact her. Syed gave trial counsel two letters written by McClain, the first contained McClain's phone number and her grandparents' phone number and the second contained McClain's address in Baltimore. In the first letter, McClain reminded Syed that she had talked with him in the Woodlawn Public Library in the afternoon after school on January 13, 1999, and that she may be able to account for his "lost time" from "2:15–8:00" that day. She also told Syed that the library had a surveillance system inside the building. In the second letter, McClain again referred to their conversation at the library that day. In addition, trial counsel's file contained notes from her law clerk of an interview with Syed on July 13, 1999, wherein Syed said that McClain "saw him in the library @ 3:00 [p.m.]" and her "boyfriend saw him too." Trial counsel also noted in her file that "[McClain] + boyfriend saw [Syed] in library 2:15–3:15 [p.m.]." Finally, trial counsel was aware, at least six weeks before the second trial, that McClain's alibi testimony probably covered the same time period as when the State theorized that Hae's murder occurred.[36] Therefore, we conclude that Syed's trial counsel had the duty to investigate McClain as a potential alibi witness, which required counsel to make some effort to contact McClain to ascertain whether her testimony would aid Syed's defense. *See Grooms*, 923 F.2d at 90.

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[36] For a discussion of the State's disclosure to trial counsel of its timeline for the murder, see *infra* p. 274-75, 181 A.3d at 912.

The post-conviction court found that Syed's trial counsel "failed to make any effort to contact McClain and investigate the bona fides of the March 1, 1999 and March 2, 1999 letters, or ascertain whether McClain's testimony would aid [Syed's] defense." That finding is not challenged by the State.

[24–26] "The failure to investigate a particular lead may be excused if a lawyer has made 'a reasonable decision that makes particular investigations unnecessary.' " *Washington*, 219 F.3d at 631 (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052). In other words, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. Here, however, because of trial counsel's death, there is no record of why trial counsel decided not to make any attempt to contact McClain and investigate the importance *vel non* of her testimony to Syed's defense. In such a situation, we must guard against "the distorting effects of hindsight," *id.* at 689, 104 S.Ct. 2052, or to "conjure up tactical decisions an attorney could have made, but plainly did not." *Griffin*, 970 F.2d at 1358. Yet, even without trial counsel's explanation for her failure to investigate McClain as an alibi witness, we must still assess trial counsel's performance under the objective standard of a reasonably competent attorney acting under prevailing norms.[37]

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[37] The dissent disagrees that trial counsel had a duty to make some effort to contact McClain to ascertain whether her testimony would aid Syed's defense. The dissent then argues that in *Strickland* "the Supreme Court has rejected a bright line rule with respect to ineffective assistance of counsel

The State posits four reasons why Syed's trial counsel performed as a reasonably competent attorney when she failed to investigate McClain as an alibi witness. We conclude that none of these reasons have merit.

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claims." Respectfully, the dissent misconstrues the analytical paradigm that we have just set forth. In sum, the first step in the paradigm is to determine whether the duty arose for defense counsel to investigate a potential alibi witness. If, and only if, such duty arose and defense counsel failed to make any effort to contact the alibi witness, we move to the second step of the paradigm and determine whether defense counsel's failure was deficient performance under the objective standard of a reasonably competent attorney acting under prevailing norms. Nowhere do we say, or imply, that there is "a bright line rule with respect to ineffective assistance of counsel claims."

The dissent also attempts to distinguish the cases on which we rely on the ground that "[i]n those cases there was testimony by defense counsel, or other statements in the record, indicating that the reason defense counsel did not interview the witness was something other than trial strategy." The dissent argues that "[t]he absence of testimony by trial counsel makes it difficult for Syed to meet his burden of showing deficient performance[,]" citing for authority to *Broadnax v. State*, 130 So.3d 1232 (Ala. Crim. App. 2013). *Broadnax* is clearly distinguishable from the case *sub judice*, because both of Broadnax's trial attorneys testified at the post-conviction hearing, but were never questioned about their investigation of Broadnax's alibi defense. *Id.* at 1256. The Alabama court concluded "that Broadnax, by failing to question his attorneys about this specific claim, failed to overcome the presumption that counsel acted reasonably." *Id*. at 1256 (footnote omitted). Under *Strickland*, the "deference to counsel's judgments" is part of, but not controlling over, the requirement that "a particular decision not to investigate must be directly assessed for reasonableness in all of the circumstances." 466 U.S. at 691, 104 S.Ct. 2052.

> *First*, the alibi proposed by McClain threatened to suggest that Syed had lied to police and had gone to the public library, a place no one had ever associated with Syed. There are a number of problems with the alibi proposed by McClain, especially compared to the alibi strategy [trial counsel] adopted based on habit and routine—Syed stayed at Woodlawn High School until track practice after which he attended prayers at his mosque.

In this argument, the State suggests that trial counsel rejected the McClain alibi because it was inconsistent with the alibi defense adopted by trial counsel "based on [Syed's] habit and routine." The record does contain trial counsel's alibi notice to the State in October of 1999, in which she appeared to adopt the alibi defense of Syed's routine of staying at the high school after class, going to track practice, then going home and to the mosque. It is important to note, however, that in her opening statement and closing argument, trial counsel did not raise *any* alibi defense for Syed. Specifically, trial counsel said *nothing* about Syed's whereabouts from 2:15 p.m. to 2:35 p.m. on January 13—the precise twenty minute time period during which the State argued to the jury that Syed murdered Hae.[38]

Nevertheless, in our view, the bottom line is that no reasonable evaluation of the advantages or disadvantages of McClain's alibi testimony, as compared to an alibi defense based on Syed's habit or

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[38] In her closing argument, trial counsel did say that Syed told the police that he went to track practice on the day of the murder. But trial counsel then stated that, according to Coach Michael Sye, "track practice—no later than 4 to 5 or 5:30."

routine, could be made without first contacting McClain. Only by contacting McClain would trial counsel have been able to determine (1) exactly what McClain would say, (2) how certain McClain was concerning her interactions with Syed that day, (3) how credible McClain would appear to a jury, (4) what, if any, corroborating evidence was available, and (5) whether McClain's testimony would aid in Syed's defense.

In *Griffin*, the Fourth Circuit stated that the failure of defense counsel to "even talk to [the alibi witness]" "deprived him of the opportunity to even make a tactical decision about putting [the alibi witness] on the stand." 970 F.2d at 1358; *see Avery*, 548 F.3d at 438 (stating that it was "impossible for [defense counsel] to have made a 'strategic choice' not to have [the two alibi witnesses] testify because he had no idea what they would have said"). Moreover, in *Lawrence*, defense counsel had decided to defend Lawrence on a theory of misidentification. 900 F.2d at 130. The Eighth Circuit held that such decision "d[id] not excuse her failure to investigate all potential alibi witnesses." *Id.* Thus, without contacting McClain, trial counsel could not reasonably reject McClain's potential alibi testimony.

> *Second*, the [ ] alibi [proposed by McClain] ran the risk of placing Syed at the public library [and ultimately at Best Buy] with the victim at critical junctures. A review of [trial counsel's] notes and her approach at trial also indicated that she identified and sought to exploit a weakness in the prosecution's case—it was unclear how Syed got into [Hae's] car the day she was killed.... Thus, placing Syed at or near the public library, where

> students were regularly picked up and where Hae [ ] could have picked up Syed, resolves a flaw [trial counsel] intended to exploit.

The State fails to provide a citation from the record to support the assertion that students were regularly picked up from the Woodlawn Public Library, nor is this a finding made by the post-conviction court. Nevertheless, if we follow the State's adopted theory at trial, that the murder occurred between 2:15 p.m. and 2:35 p.m., McClain's testimony would have rendered irrelevant the aforementioned weakness in the prosecution's case. In other words, Syed deviating from his routine to go to the Woodlawn Public Library and to speak with McClain from 2:20 p.m. to 2:40 p.m. would have placed him at a location other than the crime scene at precisely the time of Hae's murder. Thus it would not matter whether the alibi "ran the risk of placing Syed at the public library with the victim at critical junctures."

> *Third*, pursuing the [ ] McClain alibi exposes Syed to the risk of being accused of colluding with a witness to falsify an alibi. The State submitted that, with the knowledge and documents available to [trial counsel] . . ., she could easily have detected in the letters . . . clear warning signs that would have prompted this experienced criminal attorney to fear that her client was coordinating, either directly or indirectly, with McClain to falsify an alibi.

This argument was rejected by the post-conviction court in its Memorandum Opinion II. The post-conviction court observed that the details about Hae's murder and the investigation were a matter of public knowledge prior to when McClain wrote the

letters. The post-conviction court ultimately concluded that, "[i]f trial counsel had reservations about the bona fides of the letters as the State suggests, trial counsel could have spoken to McClain about these concerns instead of rejecting the potential alibi outright." Such conclusion is consistent with the case law. In *Montgomery*, the Seventh Circuit rejected the argument that defense counsel's lack of belief in the defendant's credibility was a reasonable basis for foregoing the investigation of a potential alibi witness. 846 F.2d at 414. Moreover, trial counsel was aware of potential corroboration of McClain's information. Trial counsel's file noted that McClain's "boyfriend saw [Syed] in library." Also, in McClain's first letter she advised Syed of the surveillance system inside of the Woodlawn Public Library. Thus, whether McClain and Syed were involved in the falsification of an alibi defense could be determined by a reasonably competent attorney only after contacting McClain and investigating her potential alibi testimony.

Finally, the State asserts that the alibi adopted by trial counsel, which was based upon Syed's habit or routine, was advantageous, "[b]ecause a precise time of death was not identified by the State leading up to trial, [and thus trial counsel] had to establish an alibi that would account for Syed's whereabouts for an extended period of time after school on January 13." This argument is directly contrary to the facts in the record.

In its Amended State's Disclosure filed with the circuit court on July 8, 1999, the State notified Syed that, "to the best of the State's information, the victim was murdered *the afternoon of the day she*

was reported missing, shortly after she would have left school for the day, January 13, 1999." (Emphasis added). This disclosure dating more than five months prior to the first trial was sufficient to put Syed's trial counsel on notice that Syed's whereabouts that afternoon needed to be accounted for. In addition, at Syed's first trial, the State noted in its opening statement that Wilds received the call from Syed around "2:30, 2:40" p.m. and Wilds went to meet Syed, which was when he saw the victim's body. Because the first trial ended in a mistrial, the State's opening statement was sufficient to put Syed's trial counsel on notice of the pertinent time frame for which Syed needed an alibi going into the second trial, which began six weeks later. There was only one call listed in Syed's cell phone records that fell within the time frame of "2:30, 2:40" p.m. and that was the 2:36 p.m. call. As a result, trial counsel had clear knowledge six weeks before the second trial that the time frame of 2:15 p.m. to 2:35 p.m. on January 13, 1999, was going to be the crux of the State's case, and therefore, an alibi covering this precise time frame was extremely important.

In sum, Syed gave to trial counsel McClain's name and contact information as a potential alibi witness. Trial counsel also was aware six weeks before the second trial that McClain's testimony could place Syed at a location other than the scene of the crime at the exact time that the State claimed Syed murdered Hae. Thus trial counsel had the duty to make some effort to interview McClain to ascertain whether her testimony would aid in Syed's defense. Trial counsel failed to make any effort to contact McClain, and neither a review of the record nor the

State's arguments provide a reasonable basis to justify such failure. Moreover, regardless of the defense strategy that trial counsel had adopted for Syed's trial, once the State committed itself, at the first trial, to the period of 2:15 p.m. to 2:35 p.m. on January 13, 1999, as the time of the murder, it was manifestly unreasonable for trial counsel not to make any effort to contact McClain, who, along with her boyfriend, had seen Syed "in library 2:15–3:15[,]" according to trial counsel's own notes to the file. We, therefore, conclude that trial counsel's failure to make any effort to contact McClain as an alibi witness fell below the objective standard of a reasonably competent attorney acting under prevailing norms, taking into consideration all of the circumstances existing at the time of counsel's conduct with a strong presumption of reasonable professional assistance.[39] Accordingly, trial counsel's performance was deficient, and Syed has satisfied the first prong of the *Strickland* test.

C. Prejudice for Trial Counsel's Failure to Investigate McClain as a Potential Alibi Witness

Having found trial counsel's performance deficient, we now turn to the second step in the *Strickland*

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[39] The dissent argues at length that trial counsel's strategy at trial was reasonable, and thus there was no deficient performance. The issue raised in the deficiency prong of the Strickland test in the instant case is not whether the apparent defense strategy adopted by trial counsel fell below the objective standard of a reasonably competent attorney acting under prevailing norms. Rather, the issue presented is whether trial counsel's failure to make any effort to contact McClain as a potential alibi witness fell below such standard.

test, commonly known as the prejudice prong. To satisfy this prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. We, however, do not "focus solely on an outcome determination, but [also] consider 'whether the result of the proceeding was fundamentally unfair or unreliable.' " *Oken v. State*, 343 Md. 256, 284, 681 A.2d 30 (1996) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)).

In determining the prejudice of trial counsel's failure to investigate McClain as a potential alibi witness, we must consider "the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052; *see also Avery*, 548 F.3d at 439 ("[The] potential alibi witnesses coupled with an otherwise weak case renders the failure to investigate the testimony sufficient to 'undermine confidence' in the outcome of the jury verdict. . . . Here, the jury was deprived of the right to hear testimony that could have supplied such 'reasonable doubt.' "). In considering the totality of the evidence, we recognize that

> [s]ome of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. **Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated,**

> **trivial effect.** Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland, 466 U.S. at 695–96, 104 S.Ct. 2052 (emphasis added).

In addressing the prejudice prong of *Strickland*, the post-conviction court concluded

> that trial counsel's failure to investigate McClain's alibi did not prejudice the defense because the crux of the State's case did not rest on the time of the murder. In fact, the State presented a relatively weak theory as to the time of the murder because the State relied upon inconsistent facts to support its theory.

The post-conviction court explained that, had "trial counsel investigated the potential alibi witness, she could have undermined [the State's] theory premised upon inconsistent facts. The potential alibi witness, however, would not have undermined the crux of the State's case: that [Syed] buried the victim's body in Leakin Park at approximately 7:00 p.m. on January 13, 1999." According to the post-conviction court, "Wilds's testimony and [Syed's] cell phone records created the nexus between [Syed] and the murder. Even if trial counsel had contacted McClain to investigate the potential alibi, McClain's testimony

would not have been able to sever this crucial link." The post-conviction court thus concluded that Syed "failed to establish a substantial possibility that, but for trial counsel's deficient performance, the result of the trial would have been different."

1. Contentions

Syed argues that trial counsel's failure to investigate McClain was prejudicial, because "McClain was a disinterested witness whose testimony would have provided Syed an alibi for the entire period when, according to the State, the murder took place." In Syed's view, "[a]t the very least, there is a reasonable probability that a credible alibi witness's testimony would have 'create[d] a reasonable doubt as to [Syed's] involvement,' which is enough to demonstrate *Strickland* prejudice. *In re Parris W.*, 363 Md. [717, 729, 770 A.2d 202 (2001)]."

The State responds that the post-conviction court's focus on the burial of Hae's body was correct, because the "time of death was hardly a key fact of the State's case[.]" The State also contends that Syed cannot meet his burden of establishing prejudice, because the State presented overwhelming evidence of Syed's guilt. The State points to several critical aspects of its case including, but not limited to, (1) evidence of motive from Hae's break up note found in Syed's room in which the words "I'm going to kill" are written on the back; (2) Wilds's testimony; (3) forensic evidence of Syed's partial palm print on the back cover of a map book with the Leakin Park page ripped out; and (4) witness testimony from Vinson, Pusateri, and Tanna that corroborated Wilds's testimony. The State concludes that, when such evidence is considered with the cell tower evidence,

Syed fails to meet his burden of proving prejudice under *Strickland*.

2. Analysis

[27] At the second trial, the State set forth in its opening statement the following timeline for Hae's murder:

> **One Inez Butler [Hendricks],** who's a teacher [at Woodlawn High School] who runs a little concession stand for the athletic department, **talks briefly to Hae Lee about 2:15, 2:20 when she's leaving school.** She picks up a soda and a bag of snacks. She's going to come back and pay for them. That's her usual practice.
>
> She has a cousin who she picks up after school. She's leaving to pick up that relative who's a—I think elementary student, take that person home then come back to school.
>
> **About 2:35, 2:36, Jay Wilds receives a call on the cell phone from the defendant saying, "Hey, come meet me at the [Best Buy]."** This is the [Best Buy] off Security Boulevard just across from Security Square Mall. When he gets there, the defendant has Hae Lee's car.
>
> Defendant says, "I've done it. I've done it." He pops open the trunk of the car. **Jay Wilds see[s] the body of Hae Min Lee in the trunk dead**.

(Emphasis added).

Throughout the trial, the State presented evidence to support this timeline and eventually summarized the timeline in its closing argument:

> **We know that class ended at 2:15 that day**. And remember back to [ ] Pittman's testimony.

[Syed] was talking to [Hae] Lee at that point in time and Inez Butler [Hendricks] sees [Hae] as she rushes out of school, grabs her snack, and heads out the door.[40] **Ladies and gentlemen, she's dead within 20 minutes.**

2:36 p.m. [Syed] calls Jay Wilds, come get me at Best Buy. Jay Wilds is at the home of [Pusateri] at this point, and the records are clear. Call no. 28 occurs in the cell area covered by L651B. This is the area that the AT & T engineer told you covers house—

So Jay drives to the Best Buy, and it is there that [Syed], for the first time, opens his trunk and shows Jay Wilds the body of [Hae] Lee. **By 3 p.m., by 3 p.m., her family knows she hasn't picked up her cousins.**

[Syed] gets Jay to follow him to the I-70 parking lot where they leave [Hae's] car, and they then head back towards Woodlawn from the park and ride together.

It's at that point, at 3:32 p.m., that [Syed] calls [Tanna] in Silver Spring. She says hello to Jay. We know they are together at that point in time. That call lasts for 2 minutes and 22 seconds. Jay Wilds doesn't know [Tanna], and [Tanna] told you this is her own private line, nobody answers that line but her, and [Syed] is the only one who knows her. This occurs in the coverage area of L651C, the pink area, which would be consistent if they were heading back towards Woodlawn from the I–70 parking lot.

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[40] The State theorized that Syed had driven Hae's car to the Best Buy.

(Emphasis added).

According to the post-conviction court, during the second hearing, the State for the first time "suggested a new timeline that would have allowed [Syed] to commit the murder after 2:45 p.m. and then call Wilds at 3:15 p.m. instead of 2:36 p.m., which would negate the relevance of the potential alibi." The post-conviction court rejected this suggestion, stating that "[t]he trial record is clear, however, that the State committed to the 2:25–2:45 p.m. window as the timeframe of the murder and the 2:36 p.m. call as the call from the Best Buy parking lot."

The post-conviction court went on to observe:

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

> completed this sequence of events within a six-minute window under the State's new timeline.

The post-conviction court concluded that "[b]ased on the facts and arguments reflected in the record, the [c]ourt finds that *the State committed to the 2:36 p.m. timeline and thus, the [c]ourt will not accept the newly established timeline*." (Emphasis added).

In *Strickland*, the Supreme Court stated that a court must analyze "the totality of the evidence *before the* judge or *jury*." 466 U.S. at 695, 104 S.Ct. 2052 (emphasis added). Accordingly, we agree with the post-conviction court's rejection of the State's attempt to alter its timeline of the murder and will analyze the prejudice prong relating to McClain's alibi testimony based on the State's timeframe of Hae's murder: between 2:15 p.m. and 2:35 p.m. on January 13, 1999.

We disagree, however, with the post-conviction court's conclusion that, because the crux of the State's case was the burial of Hae's body in Leakin Park, there was no prejudice from the absence of McClain's testimony at trial. Syed was charged with, *inter alia*, first degree murder, and the trial court properly instructed the jury as follows: "In order to convict the Defendant of first degree murder, the State must prove that the conduct of the Defendant caused the death of the victim, Ms. [Hae] Lee, and that the killing was willful, deliberate, and premeditated." *See, e.g.*, *Willey v. State*, 328 Md. 126, 132, 613 A.2d 956 (1992) (approving this portion of the pattern jury instruction). The burial of

Hae was not an element that the State needed to prove in order to convict Syed. Instead, the State had to establish that Syed "caused the death" of Hae, and

the State's theory of when, where, and how Syed caused Hae's death was critical to proving this element of the crime.

We acknowledge that evidence of Syed's involvement in the burial of Hae's body was significant, because Syed's actions after Hae's death did create an inference that he committed her murder. Syed's involvement in the burial, in other words, was circumstantial evidence of his committing the murder of Hae. *See Circumstantial Evidence*, Black's Law Dictionary (10th ed. 2014) (defining circumstantial evidence as "[e]vidence based on inference and not on personal knowledge or observation"). It, however, did not directly establish that Syed caused Hae's death sometime between 2:15 p.m. and 2:35 p.m. in the Best Buy Parking lot on January 13, 1999.

McClain's alibi testimony, on the other hand, would have been direct evidence that Syed was not at the Best Buy parking lot between 2:15 p.m. and 2:35 p.m. *See Direct Evidence*, Black's Law Dictionary (10th ed. 2014) (defining direct evidence as "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption"). McClain's testimony at the second hearing demonstrated that she was a disinterested witness who would have testified about seeing Syed (1) at a specific location, the Woodlawn Public Library, (2) on a specific date, January 13, 1999, and (3) during a specific time frame, at about 2:20 p.m. for 15–20 minutes. Hence, if believed by a trier of fact, McClain's testimony would have "'tend[ed] to prove that it was impossible or highly improbable that [the defendant] was at the scene of

the crime when it was alleged to have occurred.' " *McLennan v. State*, 418 Md. 335, 352, 14 A.3d 639 (2011) (second alteration in original) (quoting *Ferguson v. State*, 488 P.2d 1032, 1039 (Alaska 1971)).

McClain's alibi testimony, however, cannot be viewed in isolation. *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. We must look to the totality of the evidence presented to the jury to determine whether McClain's testimony would "have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture," or whether her testimony would "have had an isolated, trivial effect." *Id.* at 695–96, 104 S.Ct. 2052.

As indicated in the Background Section of this opinion, the State presented a strong circumstantial case. After six weeks of trial, the jury took only three hours to convict Syed of all charges, and on direct appeal, Syed made no claim of insufficiency of the evidence as to any of his convictions. But as with many criminal cases of a circumstantial nature, it had its flaws. With little forensic evidence, the case was largely dependent on witness testimony of events before and after Hae's death. Testimony of these witnesses often conflicted with the State's corroborating evidence, i.e., the cell phone records and the cell tower location testimony by its expert, Waranowitz. The State's key witness, Wilds, also was problematic; something the State readily admitted during its opening statement.[41] Wilds had

[41] In its opening statement, the State made the following remarks:

given three different statements to police about the events surrounding Hae's death.

The State's case was weakest when it came to the time it theorized that Syed killed Hae.[42] As the post-conviction court highlighted in its opinion, Wilds's own testimony conflicted with the State's timeline of the murder.[43] Moreover, there was no video surveillance outside the Best Buy parking lot placing Hae and Syed together at the Best Buy parking lot during the afternoon of the murder; no eyewitness testimony placing Syed and Hae together leaving school or at the Best Buy parking lot; no eyewitness testimony, video surveillance, or confession of the actual murder; no forensic evidence linking Syed to the act of strangling Hae or putting Hae's body in the

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> You're going to hear how on the evening of the 12th of January, the defendant called Jay Wilds.
>
> Now, Jay Wilds was a high school student at Woodlawn, too. But he's not among the bright and gifted. He lives in that area. He lives with his mother, who's very poor. He's had to work most of his own life.
>
> And remember when you hear about Jay Wilds and you hear him, remember this is the person the defendant seated here, [chose] to use to put into effect his murder of his girlfriend.
>
> The State has to take—take its witnesses where it finds them. We don't get to pick and choose. We can't go down and ask Bea Ga[ddy] to come in and testify for us because we need a good witness. We have to take the ones that the defendants leave us.

[42] The post-conviction court opined that "the State presented a relatively weak theory as to the time of the murder[.]"

[43] The post-conviction court cited to Wilds's testimony on cross-examination, wherein Wilds testified to receiving Syed's call to come and get him at Best Buy sometime after 3:45 p.m.

trunk of her car; and no records from the Best Buy payphone documenting a phone call to Syed's cell phone. In short, at trial the State adduced no direct evidence of the exact time that Hae was killed, the location where she was killed, the acts of the killer immediately before and after Hae was strangled, and of course, the identity of the person who killed Hae.

It is our opinion that, if McClain's testimony had been presented to the jury, it would have "alter[ed] the entire evidentiary picture," because her testimony would have placed Syed at the Woodlawn Public Library at the time the State claimed that Syed murdered Hae. *See Strickland*, 466 U.S. at 696, 104 S.Ct. 2052. Such testimony would have directly contradicted the State's theory of when Syed had the opportunity and did murder Hae. The State even implicitly conceded the strength of McClain's testimony and its potential impact on the jury when it attempted to present a new timeline for the murder at the second hearing. The post-conviction court aptly noted that the new timeline "would [have] negate[d] the relevance of the potential alibi." The State's attempt to change the time of the murder further solidifies our own conclusion that "the jury was deprived of the [opportunity] to hear testimony that could have supplied [ ] 'reasonable doubt'" in at least one juror's mind leading to a different outcome: a hung jury. *Avery*, 548 F.3d at 439; *see Strickland*, 466 U.S. at 695, 104 S.Ct. 2052 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."). Accordingly, in considering the totality of the evidence at Syed's trial with the

potential impact of McClain's alibi testimony, this Court holds that there is a reasonable probability that, but for trial counsel's deficient performance, the result of Syed's trial would have been different. *See Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Thus Syed has satisfied the prejudice prong of *Strickland*.[44]

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[44] In the State's Conditional Application for Limited Remand, it requested that this Court allow the State to supplement the record with two witnesses who claimed that McClain did not see Syed at the Woodlawn Public Library on January 13, 1999. Because the State is asking that the post-conviction record be supplemented with testimony or affidavits of these State witnesses, the State, like Syed, would be required to file a motion to reopen the post-conviction proceeding pursuant to CP § 7–104. The State, however, is precluded from doing so by the opinion of the Court of Appeals in *Alston v. State*, 425 Md. 326, 40 A.3d 1028 (2012). The *Alston* Court stated:

> When a final judgment in a post[-]conviction case is adverse to the State, the **only remedy granted to the State in the Post[-]conviction Procedure Act** is to "apply to the Court of Special Appeals for leave to appeal the order."
>
> * * *
>
> There is no support in the language of the Post[-]conviction Procedure Act, in the history of the Act, or in any of this Court's opinions, for the . . . position that the State could reopen a proceeding under [CP] § 7–104. **It is clear that the reopening provision is solely for the benefit of a "convicted person."**

Id. at 332, 338, 40 A.3d 1028 (emphasis added) (internal citations omitted). Accordingly, we deny the State's request for a limited remand. We note, however, that if the State does re-prosecute Syed, the State will have the opportunity to present these witnesses at the new trial.

D. Conclusion

[28, 29] As previously stated, to establish an ineffective assistance of counsel claim under *Strickland*, the defendant must prove that (1) "counsel's performance was deficient[,]" and (2) "the deficient performance prejudiced the defense." 466 U.S. at 687, 104 S.Ct. 2052. In the case *sub judice*, trial counsel rendered deficient performance when she failed to conduct any investigation of McClain as a potential alibi witness. McClain appeared to be a disinterested witness, and her testimony would have placed Syed at a location other than the scene of the crime at the exact time that the State claimed that Syed murdered Hae. McClain's testimony, if believed by the trier of fact, would have made it impossible for Syed to have murdered Hae. Trial counsel's deficient performance prejudiced Syed's defense, because, but for trial counsel's failure to investigate, there is a reasonable probability that McClain's alibi testimony would have raised a reasonable doubt in the mind of at least one juror about Syed's involvement in Hae's murder, and thus "the result of the proceedings would have been different." *Id.* at 694, 104 S.Ct. 2052. Because Syed has proven both the performance and prejudice prongs of the *Strickland* test, we conclude that his claim of ineffective assistance of counsel has been established. Accordingly, Syed's murder conviction must be vacated, and because Syed's convictions for kidnapping, robbery, and false imprisonment are predicated on his commission of Hae's murder, these convictions must be vacated as

well. The instant case will be remanded for a new trial on all charges against Syed.[45]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; CASE REMANDED TO THAT COURT FOR NEW TRIAL ON ALL CHARGES; COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

Dissenting Opinion by Graeff, J.

Dissenting Opinion by Graeff, J.

I respectfully dissent. Although I agree with the majority opinion on the first four questions presented, I disagree with the majority's decision on the last issue, whether Syed received ineffective assistance of counsel due to defense counsel's failure to contact Asia McClain, an alleged alibi witness.

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[45] In analyzing the prejudice prong of the *Strickland* test, a court is confined to the evidence presented at the defendant's trial. 466 U.S. at 695, 104 S.Ct. 2052. Here, the potential impact of McClain's alibi testimony was measured against the timeline for the murder adopted by the State at Syed's trial. By our opinion, we do not and cannot suggest that the State is bound to that timeline in the event that the State decides to re-prosecute and a new trial commences on remand. A new trial on remand is a blank slate, and the State is free to adduce any evidence or adopt any theory that it believes supports the charges against Syed. *See Tichnell v. State*, 297 Md. 432, 440, 468 A.2d 1 (1983) ("With some exceptions, the defendant who successfully challenges his conviction may be retried, under the rationale that the defendant wiped the slate clean and the parties may start anew." (internal quotation marks and citation omitted)); *see also Hammersla v. State*, 184 Md. App. 295, 313, 965 A.2d 912 (2009) ("The reversal of appellant's conviction, with an order for a new trial, 'wiped the slate clean,' and the case began anew procedurally.").

After a review of the record, I conclude that Syed failed to meet his burden of showing that he received ineffective assistance of counsel in this regard.

In *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court stated that the "benchmark" for judging a claim of ineffective assistance of counsel is "whether 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." To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy a two-prong test: "First, the defendant must show that counsel's performance was deficient." *Id.* at 687, 104 S.Ct. 2052. Second, the defendant must show that counsel's deficient performance prejudiced the defense, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. The defendant must make both showings. *Id.* at 687, 104 S.Ct. 2052. If he or she fails to show either prong, "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

The Supreme Court has made clear that " '[s]urmounting *Strickland's* high bar is never an easy task.'" *Harrington v. Richter*, 562 U.S. 86, 105, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (quoting *Padilla v. Kentucky,* 559 U.S. 356, 371, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)). The *Strickland* test "must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to

serve." *Id.* (quoting *Strickland,* 466 U.S. at 689–690, 104 S.Ct. 2052).

Although the performance and prejudice prong can be addressed in either order, I will address first the performance prong. To show that counsel's performance was deficient, the defendant must show that "counsel's representations fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. The performance prong "is satisfied only where, given the facts known at the time, counsel's 'choice was so patently unreasonable that no competent attorney would have made it.' " *State v. Borchardt*, 396 Md. 586, 623, 914 A.2d 1126 (2007) (quoting *Knight v. Spencer*, 447 F.3d 6, 15 (1st Cir. 2006)). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington*, 562 U.S. at 105, 131 S.Ct. 770 (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052).

In reviewing such a claim, the lens through which we view it is critical. We must begin our analysis with the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, and that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 690, 104 S.Ct. 2052. Courts apply a highly deferential standard "to avoid the *post hoc* second-guessing of decisions simply because they proved unsuccessful." *Evans v. State*, 396 Md. 256, 274, 914 A.2d 25 (2006).

It is the defendant's burden to "overcome the presumption that, under the circumstances, the

challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). The defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687, 104 S.Ct. 2052.

Here, Syed contends that his trial counsel rendered deficient performance because she failed to contact Ms. McClain after becoming aware that Ms. McClain "would have testified that Syed was in the Woodlawn Public Library at the time of the murder." The post-conviction court rejected this claim in its first opinion, finding "several reasonable strategic grounds for trial counsel's decision to forego pursuing Ms. McClain as an alibi witness." First, the court found that the letters Ms. McClain sent to Syed did "not clearly show Ms. McClain's potential to provide a reliable alibi" for Syed, noting that the only indication of her potential as an alibi witness was her offer to " 'account for some of [Syed's] unwitnessed, unaccountable lost time (2:15–8:00; Jan 13th).' " And the court concluded that "trial counsel could have reasonably concluded that Ms. McClain was offering to lie in order to help [Syed] avoid conviction." Second, the court stated that the information from Ms. McClain, that Syed was at the public library, contradicted Syed's "own stated alibi that he remained on the school campus from 2:15 p.m. to 3:30 p.m." It found that, "[b]ased on this inconsistency, trial counsel had adequate reason to believe that pursuing Ms. 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." Accordingly, the court determined that counsel's failure to investigate Ms. McClain as a potential alibi witness was "the result of a sound and reasonable trial strategy."

In its second opinion, the court reversed itself, based on "the expanded record and the legal arguments presented."[1] With respect to the State's argument that counsel made a strategic decision not to investigate Ms. McClain because there was evidence suggesting it was a false alibi, the court stated that, although the State presented "a compelling theory," its argument would "invite the [c]ourt to entertain speculations about strategic decisions that counsel made," and the court would not "indulge in such hindsight sophistry." The court found that, because trial counsel knew about the potential alibi witness approximately five months before trial, she had "ample time and opportunity to investigate the potential alibi," and "[u]nder these circumstances," counsel's "failure to contact and investigate McClain as a potential alibi witness fell below the standard of reasonable professional judgment."

The post-conviction court based its ruling on its factual finding that defense counsel was aware that Ms. McClain was a potential alibi witness and did not contact her, ruling that, based on these circumstances, counsel's performance was deficient.

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[1] The expanded record at the second post-conviction hearing included the testimony of David B. Irwin, who was admitted as an expert in criminal practice, that "to meet the minimal objective standard of reasonable defense care," trial counsel "had to go talk to Asia McClain."

Counsel for Syed similarly stated at oral argument that, any time a defendant advises counsel of a potential alibi witness, counsel *must* contact that witness and pursue that potential alibi defense. The majority likewise asserts that, once trial counsel learned about Ms. McClain as a potential alibi witness, she "had the duty to . . . make some effort to contact McClain."

I disagree. There may be good reasons for a reasonable attorney not to contact a potential alibi witness. For example, if the defense is that the defendant was in Maryland during the time a crime was committed in Virginia, defense counsel reasonably could conclude that there was no need to contact or follow up on a potential witness who said that he or she saw the defendant in California at the time of the crime.

Indeed, the Supreme Court has rejected a bright line rule with respect to ineffective assistance of counsel claims. It explained in *Strickland*:

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

> a heavy measure of deference to counsel's judgments.

466 U.S. at 690–91, 104 S.Ct. 2052 (emphasis added). Thus, counsel's "duty" may be satisfied by making a reasonable decision, based on all the circumstances, that it is not necessary to interview an alibi witness.

In determining whether counsel's failure to investigate is reasonable, a court must engage in "a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time,'" eliminating "'the distorting effects of hindsight.'" *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). The information available to counsel is important, particularly statements and information given by the defendant:

> [W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691, 104 S.Ct. 2052. *Accord Espinal v. Bennett*, 588 F.Supp.2d 388, 399 (E.D.N.Y. 2008) ("A reasonable decision to forego investigation may be based on a reasoned judgment that such

investigation would be fruitless, wasteful, or even counterproductive.").[2]

Several courts have held that a failure to investigate a potential alibi did not constitute ineffective assistance of counsel when counsel's decision to forgo investigation was reasonably based in trial strategy. In *Broadnax v. State*, 130 So.3d 1232, 1236 (Ala. Crim. App. 2013), the defendant was convicted of murdering his wife and her grandson. The State's evidence indicated that Broadnax, who had a prior conviction for murder, resided at a work release center and worked at Welborn Forest Products, both in Alexander City, Alabama. *Id.* at 1237. The State's theory was that, between 6:30 p.m. and 10:30 p.m., Broadnax killed his wife after she visited him at Welborn, put her body in the trunk of her car, drove the car to Birmingham, which was approximately one and one-half hours from Welborn, killed his wife's grandson, and found someone to drive him back to Welborn, where witnesses saw him around 10:30 p.m. *Id.* at 1238–39. The defense theory of the case was that the defendant was at Welborn all day and evening, "as Broadnax had said in his statements to police—and that the State's evidence was insufficient to prove that Broadnax had committed the murders." *Id.* at 1239.

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[2] The court in *Espinal v. Bennett*, 588 F.Supp.2d 388, 399 (E.D.N.Y. 2008), went on to state that "a failure to conduct reasonable investigation into possible alibi evidence, in the absence of such a reasonable explanation, falls below the standard of effective representation required by *Strickland*." As explained in more detail, *infra*, the cases cited by Syed and the majority fall into this category.

After he was convicted of murder, Broadnax sought post-conviction relief, claiming that his trial attorneys were "ineffective for not adequately investigating and presenting" the alibi that he was at the work-release facility at 9 p.m. on the night of the murders. *Id.* at 1246. He argued that "a proper and adequate investigation would have resulted in the discovery of witnesses" who saw him at the facility at "'a time which would have made it impossible for him to have committed' the murders."[3] *Id.* at 1249.

The Alabama court rejected Broadnax's claim that counsel's performance was deficient, for several reasons. Initially, the court found that, "by failing to question his [trial] attorneys about this specific claim, [Broadnax] failed to overcome the presumption that counsel acted reasonably." *Id*. at 1256. The court stated: "It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record." *Id*. at 1255. This is because " '[c]ounsel's competence . . . is presumed, and the [petitioner] must rebut this presumption by *proving* that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was notPublish

[3] In support of this argument, Broadnax identified five individuals who supported his alibi that he was at the work release facility, rather than at Welborn, and "[a]ll five witnesses stated that they had never been contacted by defense counsel or by a defense investigator." *Broadnax v. State*, 130 So.3d 1232, 1250–51 (Ala. Crim. App. 2013).

sch_step_judicial.artifact_1.xsl using xsl. sound strategy.'" *Id*. (quoting *Chandler v. U.S.*, 218 F.3d 1305, 1314 n. 15 (11th Cir. 2000)). The court stated: "'If the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim.'" *Id.* at 1256 (quoting *Dunaway v. State*, 198 So.3d 530, 547 (Ala. Crim. App. 2009)).[4]

The court further held that Broadnax failed to overcome the presumption of effectiveness and prove that his counsel's performance was deficient. *Id.* at 1256. In that regard, the court noted that Broadnax's claim was based on an alibi that was inconsistent with what Broadnax told the police and his attorneys, i.e., that he was at Welborn, not the work release facility, until about 10:45 p.m. the night of the murder. *Id.* at 1249. Noting that the State had other evidence that Broadnax lied to the police,[5] the court stated: "[W]e cannot say that any decision to forgo attempting to further impugn the client's credibility by presenting additional evidence of

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[4] In *Broadnax*, 130 So.3d at 1255, the defendant failed to call trial counsel at the post-conviction hearing. Here, trial counsel was unavailable to testify because she passed away prior to the post-conviction hearing. That distinction, however, does not change the legal analysis. *See Walker v. State*, 194 So.3d 253, 297 (Ala. Crim. App. 2015) ("the death of an attorney did not relieve postconviction counsel of satisfying the Strickland test when raising a claim of ineffective assistance of counsel.").

[5] Broadnax told the police that he called his brother from Welborn at approximately 9:00 p.m., but telephone records indicated that no such call was made. *Broadnax*, 130 So.3d at 1239. Broadnax also told the police that a bloody uniform belonging to him had been stolen, but no report of a stolen uniform had been made. *Id*.

Broadnax's lying to the police was unreasonable." *Id.* at 1258.

Although *Broadnax* did not involve a failure to investigate an alibi witness identified by the defendant prior to trial, it does illustrate the principle that a decision not to investigate a certain defense does not constitute ineffective assistance of counsel if it is reasonably based in trial strategy. Two other cases, however, reach the same conclusion in the circumstance where the potential alibi witness was identified by the defendant.

In *Commonwealth v. Rainey*, 593 Pa. 67, 928 A.2d 215, 233 (2007), Rainey argued that he was denied effective assistance of counsel because he made counsel aware of five alibi witnesses, who would have testified that the defendant was at their house on the night of the murder and did not leave, but counsel failed to reasonably "investigate, develop, and present" these witnesses. Trial counsel testified that, although Rainey had "mentioned the possibility of presenting alibi witnesses, 'he had never in my discussions persuaded me that he had witnesses, reliable witnesses to alibi.'" *Id.* The Supreme Court of Pennsylvania, in rejecting Rainey's claim, stated that, "[t]o show ineffectiveness for not presenting alibi evidence, [Rainey] must establish that counsel could have no reasonable basis for his act or omission," but in that case, a reasonable basis for not presenting this purported alibi evidence was "readily apparent from the record." *Id.* at 234.

The record showed that Rainey, who was charged with murder during a robbery, had told the police that he was present during the robbery, but his co-defendant shot the victim. *Id.* at 221. The defense

theory was to concede Rainey's involvement in the crime but argue that the facts did not support first-degree murder. *Id.* The court held that, because pursuing Rainey's purported alibi evidence would have contradicted the defense strategy and opened the door to the State admitting into evidence Rainey's statement to the police, counsel was not ineffective for failing to present the witnesses. *Id.* at 234.[6]

In *Weeks v. Senkowski*, 275 F.Supp.2d 331, 341 (E.D.N.Y. 2003), Weeks alleged that he provided trial counsel with alibi witnesses who would testify that he was drinking with them on the day of the murder. Weeks asserted that he was denied the effective assistance of counsel because trial counsel refused to interview these witnesses. *Id.* at 340. The court rejected this argument, finding that this was a "sound strategic choice," not "ineffective assistance of counsel," where the witnesses had been "convicted of having participated in the same murders for which [Weeks] was being tried." *Id.* at 341.

These cases illustrate that counsel does not, contrary to Syed's argument, have an absolute duty to interview a witness identified as an alibi witness. Rather, the "duty" is "to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 (emphasis added).

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[6] Although the court focused on the failure to present witnesses, the claim was the failure "to investigate and present" the alibi witnesses. *Commonwealth v. Rainey*, 593 Pa. 67, 928 A.2d 215, 233 (2007).

Thus, the finding by the post-conviction court that defense counsel did not contact Ms. McClain is only the first step in the inquiry. It is not the end of the inquiry.

The ultimate inquiry is whether defense counsel made a reasonable decision that interviewing Ms. McClain was not necessary. And more specifically, the question is whether Syed has met his burden to overcome the presumption that counsel's decision was based on reasonable trial strategy. *See Coleman v. State*, 434 Md. 320, 335, 75 A.3d 916 (2013) ("'Reviewing courts must thus assume, **until proven otherwise**, that counsel's conduct fell within a broad range of reasonable professional judgment, and that counsel's conduct derived not from error but from trial strategy.'") (quoting *Mosley v. State*, 378 Md. 548, 558, 836 A.2d 678 (2003) (emphasis added)).[7]

In addressing whether trial counsel made a reasonable decision not to contact Ms. McClain, the decision in *Weaver v. State*, 327 Mont. 441, 114 P.3d 1039 (2005) is instructive. In that case, the Supreme Court of Montana stated: " 'A claim of failure to

[7] Syed, in his petition for post-conviction relief claiming ineffective assistance of counsel regarding the McClain alibi, relied on nothing more than the fact that defense counsel did not contact Ms. McClain, stating summarily that "[t]here is no possible strategic reason why a defense attorney would not even investigate a possible witness." Similarly, on appeal, Syed relies on "the basic fact that trial counsel knew of but failed to pursue a potential alibi witness," stating: "That should be the end of the deficiency inquiry." That counsel failed to contact Ms. McClain, however, is not sufficient to satisfy Syed's burden to overcome the presumption that counsel's decision not to interview Ms. McClain was a reasonable one, based on trial strategy.

interview a witness may sound impressive in the abstract, but it cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel.' " *Id.* at 1043 (quoting *State v. Thomas*, 285 Mont. 112, 946 P.2d 140, 144 (1997)). The court held that, where counsel knew the substance of the testimony that could be elicited from the potential witnesses identified by Weaver, counsel made a "reasonable decision" that it was not necessary to investigate those witnesses, and therefore, Weaver failed to prove that counsel's decision not to investigate fell below an objective standard of reasonableness. *Id.* at 1044.

Here, the evidence that trial counsel failed to obtain by not contacting Ms. McClain, as presented in Ms. McClain's post-conviction testimony, was that Ms. McClain had a 15–20 minute conversation with Syed at the public library on the day of the murder, starting at "[s]hortly after 2:15" p.m.[8] Syed asserts that counsel unreasonably failed to contact Ms. McClain because her testimony provided an alibi for the time the State alleged that the murder occurred, i.e., between 2:15 p.m., when school let out, and 2:36 p.m., when the State alleged that Syed called Jay Wilds to pick him up at the Best Buy parking lot.

The record here reflects that, as in *Weaver*, trial counsel knew the gist of Ms. McClain's alibi. Trial counsel's file contained notes from her law clerk

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[8] Ms. McClain's testimony, that she spoke with Syed for 15–20 minutes, beginning shortly after 2:15 p.m., is similar to, but slightly different from, her January 13, 2015, affidavit, in which she stated that she saw Syed enter the library "around 2:30 p.m.," and Syed was still there when she left the library "around 2:40" p.m.

regarding an interview with Syed on July 13, 1999, indicating that Syed said that Ms. McClain "saw him in the library @ 3:00" and her "boyfriend saw him too." Trial counsel also noted in her file that "[McClain] v boyfriend saw [Syed] in library 2:15–3:15."Because counsel knew the gist of what Ms. McClain would say if counsel contacted her, the reviewing court must presume that she made a "reasonable decision," based on trial strategy, that it was not necessary to investigate this potential alibi.

The State has suggested several possible reasons why the decision not to contact Ms. McClain was a reasonable one, reasons suggesting that the substance of Ms. McClain's testimony would not be particularly helpful, and might be harmful, to the trial strategy counsel was pursuing. The post-conviction court, in its second opinion, rejected this argument, indicating that the reasons were speculative.

The majority similarly states that courts should not " 'conjure up tactical decisions an attorney could have made, *but plainly did not*.'" (quoting *Griffin*, 970 F.2d at 1358). In *Griffin*, however, defense counsel testified that he did not interview the alibi witness because it was his impression that the case was "going to be pleaded." *Id.* at 1357. It was in that context that the court declined to consider other tactical decisions that the attorney "could have made, but plainly did not." *Id.* at 1358.

The Supreme Court has stated that, in applying "the strong presumption of competence that *Strickland* mandates," the court must "affirmatively entertain the range of possible reasons" trial counsel may have had for proceeding as he or she did. *Cullen*

v. Pinholster, 563 U.S. 170, 196, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). Here, 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.

Trial counsel clearly prepared for an alibi defense. She provided the following alibi notice to the State:

> At the conclusion of the school day, the defendant remained at the high school until the beginning of his track practice. After track practice, Adnan Syed went home and remained there until attending services at his mosque that evening. 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 missed.

This alibi was consistent with what Syed told Detective Joshua O'Shea on January 25, 1999, i.e., that on the day of the murder he was in class with the victim until 2:15 p.m., but "[h]e did not see her after school because he had gone to track practice."

The State, however, had strong evidence supporting Jay Wilds' testimony regarding what occurred the evening of January 13, 1999, which, according to his testimony, was when he and Syed buried the victim's body. Trial counsel's strategy, based on her opening statement, closing argument, and examination of witnesses, appears to have included, in addition to eliciting evidence consistent with the alibi notice: (1) attacking the credibility of Jay Wilds; (2) arguing that, although there were phone records supporting that Syed's phone was in

locations consistent with Wilds' testimony, there was no evidence that Syed was in possession of his phone during that time; (3) noting that the State did not produce any evidence of the time the victim was murdered, and one witness stated that she saw the victim at 3:00 p.m. on the date of the murder; (4) presenting Syed, a young man from a good family, who was a gifted student and athlete, well-liked, well-mannered, and cooperative with the police, as a person of good character who would not commit murder; (5) minimizing the inconsistency in Syed's statements regarding whether the victim had agreed to give him a ride after school; and (6) suggesting that, once the police arrested Syed, they "disregarded anything else," including more likely culprits, such as Wilds and the person who found the victim's body.

Trial counsel did convey, consistent with the alibi notice, that Syed typically went to track practice after school, and then to mosque.[9] Counsel's focus, however, took the long view, trying to cast doubt on the whole of the State's case. The circuit court

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[9] For example, trial counsel established during cross-examination of Detective O'Shea that the information that Syed gave, that after class with the victim he went to track practice, was consistent with what Detective O'Shea was able to confirm from other sources. Counsel established during examination of other witnesses that Syed was a regular attendee at track practice. Counsel also elicited testimony that Syed regularly attended mosque in the evening during Ramadan, the holy month from December 20, 1998, through January 18, 1999, and Syed's father testified that he went to mosque with Syed on January 13, 1999, for prayers beginning at 8:00 p.m. During opening statement and closing argument, counsel stated that Syed consistently told people that he went to track practice after school, and in closing argument, counsel further argued that, during Ramadan, Syed was always at mosque.

similarly assessed the strength of the State's case, finding that the State "presented a relatively weak theory as to the time of the murder," and Ms. McClain "would not have undermined the crux of the State's case[,] that [Syed] buried the victim's body" with Wilds, which "created the nexus between [Syed] and the murder." Although the majority disagrees with this determination, it is hard to argue that trial counsel, adopting a strategy based on the view that it was not necessary to contact Ms. McClain, was "so patently unreasonable that no competent attorney" would take a similar view. *Borchardt*, 396 Md. at 623, 914 A.2d 1126 (quoting *Knight*, 447 F.3d at 15).

Ms. McClain's testimony, although addressing the time immediately after school, did nothing to dispute the voluminous evidence connecting Syed to the burial of the body. And trial counsel's strategy with respect to the actual murder, based on her cross-examination of the medical examiner and her closing argument, was that there was no evidence regarding the victim's time of death. Although the State argued that the murder occurred by 2:36 p.m., when it alleged Syed called Wilds to request a ride from Best Buy, trial counsel argued that the medical examiner could not confirm this time of death, and Deborah Warren indicated that she had seen the victim at 3:00 p.m. the day of the murder.

The record supports the post-conviction court's conclusion that the State had limited evidence pinpointing the time of the murder. Indeed, as the post-conviction court noted, Jay Wilds' testimony, that Syed did not call Wilds to pick him up until after 3:45 p.m., was inconsistent with the State's argument that Syed called Wilds at 2:36 p.m.

The State did, however, present significant evidence connecting Syed to the burial of the victim's body, which implicated Syed in the murder. Under all the circumstances, counsel reasonably could have determined that contacting Ms. McClain to pursue her potential alibi, and focusing too much on Syed's whereabouts right after school, would not be particularly helpful, given the context of the State's entire case, especially when weighed against the potential pitfalls presented by pursuing Ms. McClain's testimony.

As indicated, Syed initially told the police that he had gone to track practice after school. He never mentioned going to the public library after school. Although, as the post-conviction court noted, there was evidence that the high school and the public library were in close proximity, that does not take away from the fact that Syed never mentioned going to the public library. The State already had one inconsistency in Syed's statement to the police, which the prosecutor highlighted for the jury. Syed initially told Officer Scott Adcock that he saw the victim at school and that she was going to give him a ride home, but "he got detained and felt that she probably got tired of waiting for him and left." Syed subsequently contradicted himself, telling Detective O'Shea that he drove his own vehicle to school "so he wouldn't have needed a ride from [the victim]."[10]

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[10] The State argued in closing that the jury could consider Syed's actions in assessing his guilt. The prosecutor then noted that Syed told a classmate that the victim was giving him a ride to get his car, which he also told Office Adcock, but Syed later "changed his story," telling Detective O'Shea that he had his

Defense counsel reasonably could have concluded that Ms. McClain's testimony that she saw Syed at the public library after school, when Syed never before had mentioned the public library, could be harmful because it would give the State another inconsistency or omission in Syed's statements to the police. Evidence of inconsistencies in two aspects of Syed's story to the police, whether he had asked the victim for a ride and where he was after school, was detrimental to the strenuous defense that Syed was a good person with nothing to hide.

Documents in the record further indicate potential cause for concern regarding the trustworthiness of Ms. McClain's alibi, and therefore, the reasonableness of counsel's decision not to contact Ms. McClain or pursue her alibi. The first letter Ms. McClain sent to Syed on March 1, 1999, stated that she hoped Syed was not guilty, and "[i]f so I will try my best to help you account for some of your unwitnessed, unaccountable lost time (2:15–8:00; Jan 13th.)." The letter further stated: "*If* you were in the library for awhile, tell the police and I'll continue to tell what I know even louder than I am." (Emphasis added). In its first post-conviction opinion, the circuit court found that, based on this language, "trial counsel could have reasonably concluded that Ms. McClain was offering to lie in order to help [Syed] avoid conviction."

Moreover, at the second post-conviction hearing, the State introduced into evidence trial counsel's file, as well as police records to which trial counsel had

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own car and did not need a ride, so Officer Adcock "must have been incorrect."

access. Included in those records were detective notes indicating that Syed had called and written to someone from school. The notes reflect that Syed:

> WROTE A LETER TO A GIRL TO TYPE UP WITH HIS ADDRESS ON IT
>
> BUT SHE GOT IT WRONG
>
> 101 EAST EAGER STREET
>
> ASIA? 12TH GRADE
>
> I GOT ONE, JUSTIN AGER GOT ONE[11]

A review of the March 2nd letter shows a discrepancy between the address on the top of the letter, "301 East Eager Street" and the address referenced by Gordon: "101 EAST EAGER STREET."

To the extent that Ms. McClain's potential alibi could give the prosecution ammunition to argue that Syed and Ms. McClain were working together to falsify an alibi, it would be a reasonable decision not to contact Ms. McClain to pursue that alibi. *See Henry v. Poole*, 409 F.3d 48, 65 (2d Cir. 2005) ("[I]t is generally acknowledged that an 'attempt to create a false alibi' constitutes 'evidence of the defendant's consciousness of guilt.' ") (quoting *Loliscio v. Goord*, 263 F.3d 178, 190 (2d Cir. 2001)). *See also Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir. 1994) ("By its nature, 'strategy' can include a decision not to investigate . . . [and] a lawyer can make a reasonable decision that no matter what an investigation might produce, he wants to steer clear of a certain course."),

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[11] In closing argument at the second post-conviction hearing, the State asserted that these notes were from a detective's interview with Ju'uan Gordon, one of Syed's best friends.

cert. denied, 513 U.S. 899, 115 S.Ct. 255, 130 L.Ed.2d 175 (1994).

The majority states that trial counsel could not reasonably evaluate the advantages or disadvantages of Ms. McClain's alibi testimony without first contacting her. I disagree, under the facts here, where counsel knew the gist of Ms. McClain's testimony. In *Griffin v. Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355, 1357 (4th Cir. 1992), upon which the majority relies, defense counsel stated that he did not contact any alibi witnesses because it was his impression that the "case was going to be pleaded." It was in that context, where trial counsel "did not even talk to [the witness], let alone make some strategic decision not to call him," that the court found ineffective assistance of counsel. *Id.* at 1358. This case is not remotely analogous to the facts in that case.

Here, based on "all the circumstances, applying a heavy measure of deference to counsel's judgments," *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052, counsel's decision not to call Ms. McClain and pursue the public library alibi defense cannot be said to be "incompetence," *Harrington*, 562 U.S. at 105, 131 S.Ct. 770, or " 'so patently unreasonable that no competent attorney would have made it,' " *Borchardt*, 396 Md. at 623, 914 A.2d 1126 (quoting *Knight*, 447 F.3d at 15), as required to satisfy a finding of deficient performance. This is particularly the case where the post-conviction court, in its first opinion, agreed that counsel's decision was reasonable trial strategy, and in its second opinion, stated that Ms. McClain's testimony ultimately would not have been that helpful because it "would

not have undermined the crux of the State's case[,] that [Syed] buried the victim's body" with Wilds, which "created the nexus between [Syed] and the murder."

This case is distinguishable from the cases relied upon by Syed and the majority, in which courts found ineffective assistance of counsel due to counsel's failure to contact a witness identified by the defendant. In those cases, there was testimony by defense counsel, or other statements in the record, indicating that the reason defense counsel did not interview the witness was something other than reasonable trial strategy. *See Washington v. Smith*, 219 F.3d 620, 625, 630 (7th Cir. 2000) (defense counsel stated that he did not contact identified alibi witnesses because he did not receive the names until the first day of trial, and "at that late time," he "was busy trying the case"); *Bryant v. Scott*, 28 F.3d 1411, 1419 n.13 (5th Cir. 1994) (although making clear that the court was not holding that counsel must interview every claimed alibi witness, because it depends on the overall context of the case, the court found that counsel's failure to investigate potential alibi witness not a "strategic choice" where counsel stated that he "would have loved to have the [alibi] evidence."); *Griffin v. Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355, 1357 (4th Cir. 1992) (trial counsel failed to interview alibi witness, not because he thought the witness would be unhelpful or harmful, but because he thought the case was "going to be pleaded"); *Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991) (where counsel was not advised of the potential alibi witness until the day of trial, the decision not to investigate, because he assumed that

the court would preclude the evidence of an alibi due to the lack of an alibi notice, was deficient performance); *Montgomery v. Petersen*, 846 F.2d 407, 412 (7th Cir. 1988) (where trial counsel stated that he failed to investigate a potential alibi witness due to "inadvertence" and his disbelief of Montgomery, the failure was not a strategic decision, and therefore, counsel "did not make a reasonable decision that further investigation was unnecessary."). *See also Avery v. Prelesnik*, 548 F.3d 434, 437–38 (6th Cir. 2008) (where counsel testified that he was interested in talking with the alibi witness identified by the defendant, but failed to follow up, and counsel had "no idea" what the witness would have said, counsel could not have made a strategic choice not to have the witness testify); *Lawrence v. Armontrout*, 900 F.2d 127, 130–31 (8th Cir. 1990) (counsel's admitted failure to interview potential witnesses was unreasonable where: (1) he relied on assertions of a third person that one witness could not be located and the other would not testify; and (2) the failure was based on the defense strategy to focus on the defense of misidentification, rather than alibi, but alibi witnesses "would bolster rather than detract from a defense of misidentification.").

Here, by contrast, there was no testimony by trial counsel regarding why she did not contact Ms. McClain. Although this was because counsel was deceased at the time the post-conviction hearing occurred, this did not relieve Syed of his duty to satisfy the *Strickland* test. *See Walker v. State*, 194 So.3d 253, 297 (Ala. Crim. App. 2015).

The absence of testimony by trial counsel makes it difficult for Syed to meet his burden of showing deficient performance. As the court stated in *Broadnax*, 130 So.3d at 1255, it is "extremely difficult" for a petitioner "to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record." Similarly, in *Williams v. Head*, 185 F.3d 1223, 1227–28 (11th Cir. 1999), c*ert. denied*, 530 U.S. 1246, 120 S.Ct. 2696, 147 L.Ed.2d 967 (2000), the court stated that, "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," noting that the "district court correctly refused to 'turn that presumption on its head by giving Williams the benefit of the doubt when it is unclear what [counsel] did or did not do.'" *Accord Jones v. State*, 500 S.W.3d 106, 114 (Tex. App.-Hous. [1st Dist.] 2016) ("'When the record is silent on the motivations underlying counsel's tactical decisions, the appellant usually cannot overcome the strong presumption that counsel's conduct was reasonable.'") (quoting *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001)).

To be sure, there could be circumstances where the record is sufficient for the defendant to overcome the presumption that counsel acted reasonably, without questioning trial counsel. This case, however, does not present such circumstances. Syed has pointed to no evidence in the record indicating that trial counsel's decision not to interview Ms. McClain was based on anything other than reasonable trial

strategy, relying instead on his blanket assertion that it is unreasonable in every case for trial counsel to fail to contact a potential alibi witness identified by the defense.[12]

Although possible reasons for counsel's decision have been discussed, we do not know if these were the reasons that counsel decided not to contact Ms. McClain. We do know, based on the record, that trial counsel presented a vigorous defense of Syed in the face of strong evidence of guilt. What we do not know is why trial counsel did not contact Ms. McClain, whether she decided not to for the reasons proffered by the State, or if there were other reasons that led counsel to conclude that it was not necessary to further investigate Ms. McClain's public library alibi.[13]

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[12] Syed does attempt to poke holes in the State's asserted reasons why trial counsel reasonably could have decided not to pursue Ms. McClain's purported alibi. For example, Syed argues that no witness testified in support of the State's argument that trial counsel may have believed the McClain alibi was fabricated. The State, however, does not have the burden to show why trial counsel failed to interview Ms. McClain. It is Syed's burden to overcome the presumption that she did so based on reasonable trial strategy.

[13] The State filed a Conditional Application for Limited Remand requesting that, if this Court granted Syed's application for leave to appeal regarding the McClain-alibi claim, it be permitted to incorporate into the record affidavits of two former classmates of Ms. McClain. The State asserted that these witnesses emailed the State after the post-conviction court granted Syed a new trial, stating that Ms. McClain's "story" about seeing Syed in the library "is a lie," and they recalled a prior conversation in class where Ms. McClain said that she believed in Syed's innocence and "would make up a lie to prove he couldn't have done it." These assertions, although

Under these circumstances, Syed has failed to satisfy Strickland's "high bar," *Harrington*, 562 U.S. at 105, 131 S.Ct. 770. He has failed to meet his burden to overcome the presumption that counsel's failure to contact Ms. McClain was based on reasonable trial strategy, and therefore, he has failed to meet the requirements of the performance prong of the *Strickland* test. I would reverse the judgment of the circuit court granting Syed a new trial.

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not evidence in this appeal, illustrate the danger in a court finding that strategy decisions made by trial counsel were unreasonable, without any evidence regarding why those decisions were made. *See Harrington*, 562 U.S. at 105, 131 S.Ct. 770 (deferential review of trial counsel's performance is required because "[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client.").

APPENDIX D

IN THE CIRCUIT COURT
FOR BALTIMORE CITY

Case Nos. 199103042-046

Petition No. 10432

ADNAN SYED,

Petitioner,

v.

STATE OF MARYLAND,

Respondent,

MEMORANDUM OPINION II

ADNAN SYED, Petitioner, by and through his counsel, filed a Petition for Post-Conviction Relief on May 28, 2010, pursuant to the Maryland Uniform Post-Conviction Procedure Act, codified in Md. Code. Ann. (2001, 2008 Repl.), §§ 7-101 *et seq*. of the Criminal Procedure Article (hereinafter "Crim. Proc."). Petitioner filed a Supplement to the Petition for Post-Conviction Relief on June 27, 2011. The Court held a hearing over the course of two days on October 11, 2012, and October 25, 2012. Based on the reasons stated in the January 6, 2014 Memorandum Opinion, the Court denied the Petition for Post-Conviction Relief and thereby concluded the post-conviction proceedings.

Petitioner filed a timely Application for Leave to Appeal the Denial of Post-Conviction Relief on January 27, 2014.[1] Based on information contained in the January 13, 2015 affidavit of a potential alibi witness, Petitioner filed a Supplement to the Application for Leave to Appeal on January 20, 2015. The Maryland Court of Special Appeals granted Petitioner's Application for Leave to Appeal on February 6, 2015. On May 18, 2015, the Maryland Court of Special Appeals issued an order remanding this matter, without affirmance or reversal, to the Circuit Court for Baltimore City. The Maryland Court of Special Appeals remanded the matter to afford Petitioner the opportunity to file a request to re-open the previously concluded post-conviction proceedings and supplement the record in light of the potential alibi witness's January 13, 2015 affidavit. May 18, 2015 Remand Order, at 4. Although the subject of the Remand Order is limited to the alibi issue, the Maryland Court of Special Appeals gave the Court the discretion to "conduct any further proceedings it deem[ed] appropriate" in the event the Court granted Petitioner's request to re-open the

[1] Petitioner raised nine allegations in the May 28, 2010 Petition for Post-Conviction Relief and the June 27, 2011 Supplement. The Court addressed all nine allegations in the January 6, 2014 Memorandum Opinion and Order. After the Court denied relief, Petitioner filed an Application for Leave to Appeal on whether trial counsel rendered ineffective assistance when she allegedly failed to: 1) contact the potential alibi witness; and 2) pursue a plea deal with the State. *See* January 27, 2014 Petitioner's Application for Leave to Appeal, at 1.

previously concluded post-conviction proceedings.[2] *Id.*

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

The Court issued the Statement of Reasons and Order of the Court on November 6, 2015, granting Petitioner's Motion to Re-Open Post-Conviction Proceedings. The Order limited the scope of the re-opened post-conviction proceedings to the following matters: 1) trial counsel's alleged failure to contact a potential alibi witness, Asia McClain (hereinafter "McClain"); and 2) the reliability of the cell tower location evidence. The Court held a five-day hearing from February 3, 2016, through February 9, 2016. Petitioner presented the following issues to the Court:

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

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

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

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

STATEMENT OF THE CASE

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

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

Petitioner's first trial began on December 9, 1999, before Judge William D. Quarles, Jr., and concluded

in a mistrial on December 15, 1999. Petitioner's second trial lasted from January 7, 2000, through February 25, 2000, before Judge Wanda K. Heard. At both trials, M. Christina Gutierrez, Esq., (hereinafter "trial counsel") represented Petitioner, and Assistant State's Attorneys Kevin Urick, Esq., and Kathleen C. Murphy, Esq., represented the State.

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

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

Sometime during the afternoon of January 13, 1999, Petitioner called Wilds from a payphone in the Best Buy parking lot to request a ride. When Wilds arrived at the Best Buy parking lot, Petitioner opened the trunk of the victim's vehicle, revealing the victim's lifeless body. Petitioner told Wilds that

he had strangled the victim. Petitioner left the Best Buy parking lot in the victim's vehicle, and Wilds followed him in Petitioner's vehicle. Petitioner abandoned the victim and her vehicle in the Interstate 70 Park & Ride located at the end of Security Boulevard and Cooks Lane in Baltimore City. Petitioner and Wilds left the Interstate 70 Park & Ride in Petitioner's vehicle to go buy some marijuana.

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

After speaking with the police officer, Petitioner told Wilds that they had to leave Vincent's residence and dispose of the victim's body. Petitioner and Wilds drove back to the Interstate 70 Park & Ride to pick up the victim and her vehicle. After obtaining shovels from Wilds's residence, they drove to Leakin Park, where they dug a shallow grave to bury the

victim's body. Wilds testified that Petitioner received two incoming calls while burying the victim's body in Leakin Park, both at approximately 7:00 p.m. After burying the victim's body, Petitioner and Wilds abandoned the victim's vehicle behind some apartment buildings and then drove east on Route 40 in Petitioner's vehicle. Petitioner and Wilds traveled to a dumpster behind Westview Mall, where they disposed of the victim's belongings and the shovels that they had used to dig the grave.

At trial, the State presented Petitioner's cell phone records and the expert testimony of Abraham Waranowitz (hereinafter "Waranowitz") as circumstantial evidence to corroborate Wilds's testimony. Petitioner's cell phone records indicated that the cell phone made an outgoing call to the Wilds residence on January 13, 1999 at 10:45 a.m., which Wilds testified was the call to offer him a ride to the mall. According to the cell phone records, the cell phone also received an incoming call at 2:36 p.m., which the State argued was the call that Petitioner made to request a ride from Wilds after strangling the victim in the Best Buy parking lot.

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

[3] At trial, Tanna testified that while she may have spoken to Petitioner and Wilds during the 3:32 p.m. phone call, she also testified on cross-examination that she could have spoken to

identified a 5:14 p.m. call made to Petitioner's voicemail, suggesting that Petitioner had his cell phone during this time and called to check his voicemail.[4]

Relying on Waranowitz's expert testimony and Petitioner's cell phone records, the State provided circumstantial evidence as to the possible location of Petitioner's cell phone during the evening of January 13, 1999. As noted, *supra,* Wilds testified that Petitioner received incoming calls from the victim's family and a police officer shortly before leaving Vincent's residence to dispose of the victim's body. The cell phone records indicated that Petitioner's cell phone received an incoming call at 6:07 p.m. that connected with cell site "L655A." The cell phone records also reflected two other incoming calls at 6:09 p.m. and 6:24 p.m., both of which connected with cell site "L608C." Waranowitz testified that the functioning of the AT&T network, as reflected by the cell phone records, would be consistent with testimony that an AT&T wireless subscriber received two or three incoming calls at the 2700 block of Gateway Terrace – the location of Vincent's residence. Waranowitz's testimony essentially confirmed that if the cell phone records showed an incoming call that connected with either cell sites

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Petitioner and Wilds on any other day between meeting Petitioner at a New Year's Eve Party on December 31, 1998 and January 13, 1999.

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

"L655A" or "L608C," then the cell phone could possibly be located at Vincent's residence when the cell phone received the incoming calls.

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

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

reciting taraweeh prayers at the mosque during the month of Ramadan.[5]

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

Petitioner filed a timely appeal to the Maryland Court of Special Appeals. Warren A. Brown, Esq., and Nancy S. Forster, Esq., represented Petitioner. On appeal, Petitioner raised the following issues: (1) whether the State committed prosecutorial misconduct, violated *Brady,* and violated Petitioner's Due Process rights when the State, (a) suppressed favorable and material evidence of an oral side agreement with the State's key witness, and (b)

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

when the State introduced false and misleading evidence; (2) whether the trial court committed reversible error in prohibiting Petitioner from presenting evidence to the jury; (3) whether the trial court erred in admitting hearsay in the faun of a letter written by the victim to Petitioner, which was highly prejudicial; and (4) whether the trial court erred in permitting the introduction of the victim's diary. The Maryland Court of Special Appeals denied Petitioner's appeal on March 19, 2003. On June 25, 2003, the Maryland Court of Appeals denied the petition for certiorari.

Petitioner filed a Petition for Post-Conviction Relief, which was received on May 28, 2010,[6] alleging ineffective assistance of trial counsel, ineffective assistance of counsel at sentencing, Charles H. Dorsey, Jr., Esq., and ineffective assistance of appellate counsel, Warren A. Brown, Esq. On June 27, 2011, Petitioner filed a Supplement to the Petition for Post-Conviction Relief. After multiple postponements, [7] the Court held the first post-

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

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

conviction hearing on October 11, 2012, and October 25, 2012. At the hearing, C. Justin Brown, Esq., represented Petitioner and Kathleen C. Murphy, Esq., represented the State.[8] On January 6, 2014, the Court issued a Memorandum Opinion denying the Petition for Post-Conviction Relief.

Pursuant to the Remand Order and Crim. Proc. § 7-104, Petitioner filed a Motion to Re-Open Post-Conviction Proceedings on June 30, 2015. On August 24, 2015, Petitioner filed a Supplement to the Motion to Re-Open Post-Conviction Proceedings. The Court granted Petitioner's Motion to Re-Open Post-Conviction Proceedings on November 6, 2015, for the limited consideration of: 1) trial counsel's alleged failure to contact McClain as a potential alibi witness; and 2) the reliability of the cell tower location evidence. The Court held the second post-conviction hearing from February 3, 2016, to February 9, 2016. At the February 2016 hearing, C. Justin Brown, Esq., and Christopher C. Nieto, Esq., represented Petitioner, and Deputy Attorney General, Thiruvendran Vignarajah, Esq., Deputy Counsel for Civil Rights, Tiffany Harvey, Esq., Assistant Attorney General, Charlton T. Howard, Esq., and Staff Attorney, Matthew Krimski, Esq.,

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

represented the State. All other pertinent facts will be discussed in the Court's analysis of Petitioner's allegations.

DISCUSSION

I. Ineffective Assistance of Counsel – The Alibi

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

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

of the alleged act or omission. *Strickland,* 466 U.S. at 689-90.

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

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

The State also elicited testimony during the trial that is incongruent with the State's newly adopted timeline. Wilds

presented at trial, the State established that the victim died twenty to twenty-five minutes after school had ended, sometime between 2:35 p.m. and 2:40 p.m. on January 13, 1999.

Prior to trial, Petitioner gave trial counsel two letters from McClain. The letters indicated that she saw Petitioner at a different location during the 2:35 p.m. to 2:40 p.m. window when the victim was allegedly murdered. In the first letter, dated March 1, 1999, McClain wrote that she remembered talking to Petitioner at the Woodlawn Public Library during

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

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

the afternoon of January 13, 1999, and offered to account for some of his "unaccounted lost time (2:15 – 8:00; Jan. 13)." Petitioner's Exhibit PC2-4. McClain also typed a second letter, dated March 2, 1999, affirming that she remembered talking to Petitioner at the library during the afternoon of January 13, 1999. Petitioner's Exhibit PC2-5.

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

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

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[10] At the October 2012 post-conviction hearing, Kevin Urick, Esq., testified that McClain signed the March 25, 2000 affidavit due to pressure from Petitioner's family based on his impression from a telephone conversation with McClain. McClain refuted that assertion in her January 13, 2015 affidavit and during her testimony at the February 2016 post-conviction hearing. Furthermore, Petitioner alleges that Mr. Urick misrepresented McClain's position at the October 2012 post-conviction hearing and committed misconduct by dissuading McClain from testifying. It is unnecessary for the Court to make findings as to the merits of Petitioner's

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

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

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

Wiggins v. Smith, 539 U.S. 510, 521-22 (2003) (citing *Strickland,* 466 U.S. at 690-91). The Court

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allegation regarding potential misconduct because McClain was afforded the opportunity to appear and testify at the February 2016 post-conviction hearing as to the facts of the alibi.

previously held that trial counsel made a strategic decision not to investigate McClain's potential alibi and thus, trial counsel did not render deficient performance. *See* January 6, 2014 Memorandum Opinion at 10-12. In light of the expanded record and the legal arguments presented at the February 2016 post-conviction hearing, however, the Court here finds that trial counsel's failure to investigate McClain as a potential alibi witness fell below the standard of reasonable professional judgment.

The Court's analysis of counsel's duty to investigate a potential alibi witness begins with *In re Parris W.*, 363 Md. 717 (2000). In *Parris,* the juvenile court found the juvenile to be delinquent of assault and trespass that, according to the victim, occurred during the afternoon of April 27, 1999. *Id.* at 720. The juvenile notified counsel that his father could provide a potential alibi; the father would have testified that he took his son to work the entire day and then brought him over to a friend's apartment during the afternoon that the assault occurred. *Id.* at 722-23. Counsel subpoenaed a number of witnesses who could have corroborated the alibi, but counsel inadvertently issued the subpoenas for the wrong date without checking the computer for the correct date. *Id.* at 721-722. The Maryland Court of Appeals held that counsel rendered deficient performance when she failed to issue subpoenas with the correct date for uninterested witnesses that could have corroborated the alibi defense, which ultimately prejudiced the juvenile's defense. *Id.* at 727-30.

Although the issue in the present matter does not involve counsel's failure to subpoena alibi witnesses for the correct date, the Maryland Court of Appeals

in *Parris* cited favorably a number of cases, which ruled that counsel's failure to investigate a potential alibi witness is inconsistent with the exercise of reasonable professional judgment. *Id.* at 730-36; *see Griffin v. Warden, Md. Corr. Adjustment Center*, 970 F.2d 1355, 1358-59 (4th Cir. 1992) (finding that counsel's performance was clearly deficient when counsel failed, due to unpardonable neglect, to contact, interview, and present the testimony of a potential alibi witness); *see also Montgomery v. Petersen,* 846 F.2d 407, 413-14 (7th Cir. 1988) (ruling that counsel rendered deficient performance when counsel failed to investigate the potential alibi witness); *Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991) (holding that counsel's performance fell below the standard of reasonable professional judgment when counsel failed to investigate an alibi witness and request a continuance for further investigation). The Court finds these cases to be instructive in the present matter.

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

that the court would have precluded the evidence of an alibi due to lack of an alibi notice. *Id.* at 90.

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

The present matter before the Court shares similar circumstances to those found in *Grooms.* Similar to *Grooms,* Petitioner informed counsel of a potential alibi defense that could have placed him in the Woodlawn Public Library from about 2:15 p.m. to 2:45 pm on January 13, 1999. Petitioner also produced two letters from McClain, who had written that she remembered talking to Petitioner at the library after school ended on January 13, 1999. Trial counsel, however, failed to make any effort to contact McClain and investigate the bona fides of the March 1, 1999 and March 2, 1999 letters, or ascertain whether McClain's testimony would aid Petitioner's defense. In *Grooms,* the Court held that trial counsel should have attempted to investigate the alibi despite learning about the potential alibi on the day of the trial. *Id.* at 91. Trial counsel in the present case learned about the potential alibi witness on July 13, 1999, nearly five months prior to trial, and thus, she had ample time and opportunity to investigate the potential alibi. Under these circumstances, the

Court is persuaded that trial counsel's failure to contact and investigate McClain as a potential alibi witness fell below the standard of reasonable professional judgment.

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

Second, the State argues that the notes detailing a detective's interview with Ju'uan Gordon

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

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

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

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

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

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

PC2-42. The details of Petitioner's location after his arrest and the cause of the victim's death were also public knowledge prior to when McClain wrote her letter. Petitioner's Exhibit PC2-43.

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

Similarly, the State's reliance on the detective's interview notes of Gordon would require the Court to review counsel's performance with the distortions of hindsight and unwarranted speculations. According to the interview notes, Petitioner wrote a letter to a girl named Asia to "type up," but she wrote the wrong address – "101 E. Eager Street." Based on the sentence fragments of an extensive interview, the State concludes that Petitioner wrote the March 2,

1999 letter for McClain to "type up," revealing Petitioner's scheme to secure a false alibi. In order to adopt the State's theory, the Court would have to assume that the "Asia" referenced by Gordon is McClain as opposed to another individual who shares the same name. The notes are unclear as to the identity of this "letter"; Gordon could be referencing the March 2, 1999 letter or another letter altogether. With respect to the "wrong address," the Court is left to speculate whether "101 East Eager Street" is the correct or wrong address given the lack of context in the notes.

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

The Court also rejects the notion that trial counsel could have relied upon the interview notes with Gordon to make a strategic decision not to investigate the potential alibi witness. *Lawrence v. Armontrout,* 900 F.2d 127 (8th Cir. 1990), is illuminating on this point. There, the defendant was found guilty of committing a murder that occurred at a time when the defendant's girlfriend and several other witnesses could have accounted for the defendant's location. *Id.* at 128-29. Trial counsel elected not to investigate the potential alibi

witnesses partly because the defendant's girlfriend had informed trial counsel that she could not locate one of the witnesses and the other witness refused to testify. *Id.* at 129. The United States Court of Appeals for the Eighth Circuit ruled that counsel's decision not to investigate the potential alibi witnesses fell below the standard of reasonable professional judgment. *Id.* at 129-30. The Court explained that counsel owed a greater duty than merely accepting the hearsay statements of others without independent verification when the life of an individual is at stake. *Id.* Here, the State asserts that trial counsel's reliance on the hearsay statements in Gordon's interview, without any independent verification, was perfectly acceptable, even though the life and liberty interests of a seventeen-year-old were at stake. The Court must disagree. Although the constitutional standard of evaluating counsel's performance is highly deferential, the Sixth Amendment guarantee of effective assistance of counsel carries significantly more weight than a rubber stamp.

The State also argues that trial counsel made a strategic decision against investigating McClain because the potential alibi would have been inconsistent with Petitioner's own stated alibi that he remained on the high school campus from 2:15 p.m. to 3:30 p.m. At the February 2016 post-conviction hearing, however, Petitioner presented evidence showing the close proximity between the school campus of Woodlawn High School and Woodlawn Public Library. Petitioner's Exhibit PC2-39. As such, the potential alibi and Petitioner's own stated alibi placed Petitioner in the general vicinity

of the school campus, albeit with a minor inconsistency. The Court finds that this minor inconsistency does not justify counsel's failure to investigate the potential alibi witness.

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

The Court finds that the State's argument is misplaced. When users log in to their email accounts, they can conduct an array of activities, such as reading recently received emails, drafting correspondences, and deleting old messages. Account holders may log in, check to see if any new messages had been received, and then log out of the account without ever conducting any traceable activity, such as drafting and sending emails. Under this scenario, the lack of traceable activity found on the email account does not necessarily mean that the user did not check the account during a specific timeframe. As such, trial counsel could not have evaluated the

potential alibi simply by signing in to Petitioner's email account.

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

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

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

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[12] Petitioner's assertions regarding trial counsel's matters before the Maryland Attorney Grievance Commission and health status have no bearing on the Court's findings. Petitioner also presented the expert testimony of David B.

In order to prevail on an ineffective assistance of counsel claim, however, Petitioner must prove that trial counsel's failure to investigate McClain as a potential alibi witness prejudiced his defense. Under the prejudice prong, a petitioner must show "a reasonable probability" that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland* 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In *Oken v. State,* 343 Md. 256, 284 (1996), the Maryland Court of Appeals explained that a petitioner must establish a "substantial possibility" that the result of the proceeding would have been different, but for counsel's unprofessional errors. The Court's analysis "should not focus solely on an outcome determination, but whether the result of the proceeding was fundamentally unfair or unreliable." *Id.* (internal citations and quotations omitted).

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

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Irwin, Esq., who testified as to the prevailing professional norms of the duty to contact a potential alibi witness. The Court took Mr. Irwin's testimony into consideration with the limitations specified during the hearing in reaching its findings.

substantial possibility that, but for counsel's deficient performance, the result of the trial would have been different.

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

> [STATE]: And did there come a time when you left [Pusateri's residence]?
>
> [WILDS]: Yes.
>
> [STATE]: And where did you go when you left?
>
> [WILDS]: **Well, in [Petitioner's] last phone call, he was like I need you to come get me at like 3:45 or something like that he told me, and I was like all right, cool. I waited**

> **until then and there was no phone call, so I was going to my friend Jeff's house.**
>
> [STATE]: **And on your way there, what if anything happened?**
>
> [WILDS]: **Jeff wasn't home. As I was leaving his street, I received a phone call. It was Adnan. He asked me to come and get him at Best Buy.**

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

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

Together, Wilds's testimony and Petitioner's cell phone records created the nexus between Petitioner and the murder. Even if trial counsel had contacted McClain to investigate the potential alibi, McClain's

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

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

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

intelligently and knowingly failed to make the allegation of error." Crim. Proc. § 7-1 06(b)(2).

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

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

Therefore, the Court must first determine whether the alleged *Brady* violation relates to a fundamental or non-fundamental right. In *Brady,* the Supreme Court of the United States held that suppression of favorable and material evidence by the State amounts to denial of defendant's right to due process. 373 U.S. at 87. In so holding, the Supreme Court of

the United States recognized that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* A *Brady* violation relates to the right to a fair trial. The right to a fair trial is rooted in the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, both of which form the foundation of our criminal justice system.

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

Conyers v. State, 367 Md. 571 (2002), is instructive in determining whether an allegation of a *Brady* violation relates to a fundamental or non-fundamental right. In *Conyers,* the defendant alleged that the State violated *Brady* when the prosecution failed to disclose impeachment evidence of a witness who testified that the defendant confessed to his involvement in the crime. *Id.* at 583-84. In analyzing whether the defendant waived his right to raise the

Brady allegation, the Maryland Court of Appeals used language suggesting that a *Brady* claim relates to a non-fundamental right. The Maryland Court of Appeals explained that the post-conviction statute presupposes that *"an opportunity to raise the challenge* existed at the time of the lower court proceeding." *Id.* at 595 (emphasis added). The Court then cited to a number of cases that addressed waiver of non-fundamental rights. *Id.* at 595-96; *see also Hunt v. State,* 345 Md. 122, 142-46 (1997) (concluding that the intelligent and knowing standard does not apply to a waiver of the petitioner's right to voir dire of prospective jurors); *Oken v. State,* 343 Md. 256, 269-272 (1996) (holding that a waiver of the right to *"reverse-Witherspoon"* questions on voir dire is not controlled by the "intelligent and knowing" standard); *Walker v. State,* 343 Md. 629, 647 (1996) (noting that a failure to object to a jury instruction does not require a showing of an intelligent and knowing waiver). The Court also noted that "if a right alleged to have been violated is a non-fundamental right, waiver will be found if it is determined that the *possibility* existed for the petitioner to have raised the allegation in a prior proceeding, but he did not do so[.]" *Conyers,* 367 Md. at 596 (citing *Wyche,* 53 Md. App. at 407) (internal quotations omitted; emphasis in original). Based on the Maryland Court of Appeals' treatment of the *Brady* issue in *Conyers,* the Court shall review the potential waiver of Petitioner's *Brady* allegation in the context of a non-fundamental right by determining whether Petitioner had a prior opportunity to raise the issue, but failed to do so.

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

The Court finds that Petitioner waived his right to raise the *Brady* allegation because he had the opportunity to make his claim in a prior proceeding. Petitioner's *Brady* claim is premised on two grounds. First, Petitioner argues that when the State presented his cell phone records at trial, the

prosecution omitted a fax cover sheet that contained a set of instructions on how to read a "subscriber activity report" and a disclaimer about the unreliability of using incoming calls for location. Petitioner's Exhibit PC2-16. Second, Petitioner argues that the State presented his cell phone records without the subject page identifying the cell phone records as an excerpt of a subscriber activity report.[13] Petitioner's Exhibit PC2-15.

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

Even if the Court were to consider the merits of Petitioner's *Brady* argument, the Court would conclude that the State did not commit a *Brady* violation. Petitioner alleges that the State committed a *Brady* violation by suppressing evidence that

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

undermined the reliability of the cell tower evidence. The Supreme Court explained in *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

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

Petitioner's *Brady* allegation is premised on how the State used Petitioner's cell phone records to corroborate Wilds's testimony. At trial, Wilds testified that Petitioner disposed of the victim's body in Leakin Park at approximately 7:00 p.m. on January 13, 1999. According to Wilds, Petitioner received two incoming calls during the time of the burial. The State presented Petitioner's cell phone records (hereinafter "Exhibit 31") as circumstantial evidence to corroborate Wilds's testimony by identifying two incoming calls that occurred at 7:09 p.m. and 7:16 p.m. Both of these calls connected with

cell site "L689B." Waranowitz, the State's cell tower expert, testified that cell site "L689B" serviced the coverage area that encompassed the Leakin Park burial site. Based on the evidence and testimony presented, the State urged the jury to make a reasonable inference that Petitioner's cell phone was possibly located in Leakin Park during the time of the burial.

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

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

pillar of the State's case, and thus, the result of the trial would have been different.

Assuming, *arguendo,* that the documents are favorable and material evidence, the Court does not find merit to Petitioner's argument. Petitioner has failed to establish that the State suppressed the evidence at issue. As a guiding principle, the Supreme Court did not intend for the *Brady* rule "to displace the adversary system as the primary means by which truth is discovered." *Bagley,* 473 U.S. at 675. "The *Brady* rule does not relieve the defense from the obligation to investigate the case and prepare for trial." *Ware v. State,* 348 Md. 19, 39 (1997). The prosecution cannot be said to have suppressed evidence when the information was available to the defense through a "reasonable and diligent investigation." *Id.*

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

The United States Court of Appeals for the Fourth Circuit ruled that although the State did not disclose the exact location of the gun, the defense could have discovered the information through a reasonable and diligent investigation. *Id.* at 976-77. The defendant knew that the State had retrieved the gun at the scene of robbery because a detective revealed this information when he testified during a preliminary hearing. *Id.* at 976. At the trial of the accomplice, the police officers also testified that they had recovered a gun beneath or near the victim's body. *Id.* at 97677. The United States Court of Appeals for the Fourth Circuit rejected the *Brady* challenge because the defendant could have conducted a reasonable and diligent investigation to ascertain the location of the gun by either interviewing the police officers or reviewing the transcripts of the accomplice's trial. *Id.* at 977.

In the present matter, the facts that would have allowed Petitioner to discover the omission of the documents were readily available to Petitioner. The disclaimer and the subject page were found in trial counsel's file, and the State disclosed these documents as part of pretrial discovery and conveyed its intention to introduce these records at tria1.[15] State's Exhibit 1A0023. As he had access and advance notice that the State intended to introduce

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

these records into evidence, Petitioner had the facts and the opportunity to conduct a reasonable and diligent investigation to uncover the State's omission. Therefore, the Court shall deny relief with respect to Petitioner's *Brady* allegation.

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

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

As the Court has explained, *supra,* the standard of proof for finding that a waiver occurred differs depending on whether the allegation of error relates to a fundamental or non-fundamental right. Whereas the right underlying Petitioner's *Brady* claim is a non-fundamental right, Maryland appellate courts have identified the Sixth Amendment right to effective assistance of counsel as a fundamental right in the context of waiver. *See Davis,* 285 Md. at 3334; *see also Wyche,* 53 Md. App. at 406. In order to waive a fundamental right, a petitioner must "intelligently and knowingly" effect the waiver. *Gutierrez,* 153 Md. at 471-72. An intelligent and knowing waiver is an "intentional relinquishment of a known right or privilege." *Thornton,* 73 Md. App. at 253. Therefore,

waiver may be found when the record "expressly reflects" that a petitioner had a basic understanding of the nature of the right and that he or she agreed to waive the claim at issue. *Wyche,* 53 Md. App. at 403. The post-conviction statute places the burden on Petitioner to rebut the presumption that he "intelligently and knowingly" waived his claim that trial counsel rendered ineffective assistance of counsel. Crim. Proc. § 7-106(b)(2).

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

Here, the Court finds that Petitioner has met the burden to rebut the presumption that he intelligently and knowingly waived his right to seek relief based on trial counsel's alleged failure to challenge the reliability of the cell tower evidence. Although Petitioner alleged that trial counsel may have been ineffective on other grounds in his initial petition, he has never alleged that trial counsel rendered

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

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

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

the spirit of the Sixth Amendment. As Justice Alexander George Sutherland explained:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

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

Accordingly, the Court shall consider the merits of the allegation that trial counsel rendered ineffective assistance when she failed to cross-examine the State's cell tower expert about the reliability of the

cell tower evidence.[17] To prevail on an ineffective assistance of counsel claim, a petitioner must satisfy the two-prong test established in *Strickland v. Washington.* 466 U.S. 668, 690-91 (1984). First, a petitioner must show that counsel rendered deficient performance. *Id.* at 690. Second, a petitioner must also establish that counsel's deficient performance prejudiced his or her defense. *Id.* at 691.

Petitioner argues that trial counsel's performance fell below the standard of reasonable professional judgment when she failed to use the disclaimer to confront the State's expert about the reliability of the cell tower evidence. When reviewing counsel's performance for deficiency, the Court presumes that counsel "rendered adequate assistance and made all significant decisions in exercise of reasonable professional judgment." *Bowers v. State,* 320 Md. 416, 421 (1996). Deficient performance may be found, however, if Petitioner establishes that counsel's performance "fell below an objective standard of reasonableness." *Harris v. State,* 303 Md. 685, 697

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

(1985). Most importantly, the Court must refrain from succumbing to the temptation of hindsight; instead, counsel's performance must be evaluated at the time of his or her conduct. *Strickland,* 466 U.S. at 690.

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

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

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

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

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

[WARANOWITZ]: Yes.

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

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

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

[WARANOWITZ]: **L689B.**

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

[WARANOWITZ]: **Yes.**

* * *

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

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

> **be – that functioning of the AT&T network be consistent with the testimony.**
>
> [DEFENSE]: Objection.
>
> [COURT]: You may only answer only as it relates to an Erickson piece of equipment.[19]

[WARANOWITZ]: **Yes.**

Trial Tr., at 97-100, Feb. 8, 2000 (emphasis added). The testimony revealed that when Waranowitz conducted the origination test at the burial site, he recorded that the test call connected with cell site "L689B." At trial, Waranowitz affirmed that his test results matched the same "L689B" cell site identified in Exhibit 31 for the 7:09 p.m. and 7:16 p.m. incoming calls. Waranowitz then testified that if Exhibit 31 showed two incoming calls connected with cell site "L689B," then the cell phone could have possibly been located in Leakin Park when the phone received the incoming calls.

According to Petitioner, Exhibit 31 is an excerpt of a much larger set of documents, and the subject page of these documents is titled: "SUBSCRIBER ACTIVITY." Petitioner's Exhibit PC2-15. Trial counsel also possessed an AT&T fax coversheet that she obtained during pretrial disclosure, and the fax

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

cover sheet contained a set of instructions labeled, "How to read 'Subscriber Activity' Report." Petitioner's Exhibit PC2-16. The set of instructions also included a disclaimer which specified that:

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

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

The Court finds that trial counsel rendered deficient performance when she failed to properly cross-examine Waranowitz about the disclaimer. The Maryland Court of Appeals has recognized that the failure to conduct an adequate cross-examination may be grounds for finding deficient performance. *See Bowers,* 320 Md. at 436-37; *see also People v. Lee,* 185 Ill.App.3d 420, 438 (1989) (holding that counsel's cross-examination of the State's most crucial witness fell below the standard of reasonable professional judgment); *People v. Trait,* 527 N.Y.S.2d 920, 921 (1988) (finding that counsel's "excessive and purposeless" cross-examination deprived the accused of the right to effective assistance of counsel).

The United States Court of Appeals for the Eighth Circuit's decision in *Driscoll v. Delo,* 71 F.3d 701 (8th Cir. 1995), is instructive. In *Driscoll,* the defendant was convicted of murdering a correctional officer during a prison disturbance. *Id.* at 704. At trial, the State presented the testimony of a serological expert,

who conducted a series of blood trace examinations on a homemade knife that belonged to the defendant. *Id.* at 707. According to the State's expert, the examinations revealed that the blood trace found on the homemade knife matched the blood type "A" of another officer, but the examination could not find the victim's blood type "0" on the knife. *Id.* The State advanced the theory that the victim's blood was actually present on the knife, but the presence of an additional blood type "masked" the victim's "0" blood. *Id.* The laboratory report indicated, however, that another test had been conducted showing that no blood type "0" had been masked on the knife, which conclusively disproved the State's argument. *Id.* at 707-08. Although the State had disclosed the report of the test results to defense counsel, he failed to cross-examine the State's serology expert about the test results that would have undermined the State's theory of the case. *Id.* at 708.

The United States Court of Appeals for the Eighth Circuit evaluated counsel's performance in light of the circumstances of the case. In particular, the United States Court of Appeals for the Eighth Circuit noted that the defendant was confronted with a possible death sentence if convicted of the capital murder charge. *Id.* at 709. Given the stakes of the case, whether the blood traces on the defendant's knife matched the blood type of the victim "constituted an issue of utmost importance." *Id.* A reasonable attorney under these circumstances would have carefully reviewed the blood test reports, and exposed the weakness of the State's case on cross-examination if the State advanced a theory that was inconsistent with the test results. *Id.* As

such, the United States Court of Appeals for the Eighth Circuit held that "defense counsel's failures to prepare for the introduction of the serology evidence, to subject the state's theories to the rigors of adversarial testing, and to prevent the jury from retiring with an inaccurate impression that the victim's blood might have been present on the defendant's knife fall short of reasonableness under the prevailing professional norms." *Id.*

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

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

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

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

A reasonable attorney would have exposed the misleading nature of the State's theory by cross-examining Waranowitz. The record reflects, however, that trial counsel failed to cross-examine Waranowitz about the disclaimer.[20] Even under the

[20] Trial counsel cross-examined Waranowitz on several topics. Trial counsel asked Waranowitz whether he ensured the testing conditions were similar to the circumstances present on January 13, 1999, such as by testing under similar weather conditions, using the same brand of cell phone, and dialing the same set of numbers. Waranowitz responded that he did not

highly deferential standard of *Strickland,* the failure to cross-examine the State's expert witness regarding evidence that contradicted the State's theory of the case can hardly be considered a strategic decision made within the range of reasonable professional judgment. *See Washington v. Murray,* 952 F.2d 1472, 1476 (4th Cir. 1991) (noting that counsel's performance would have fallen below the standard of reasonable professional judgment if counsel failed to present available evidence that would have questioned the defendant's involvement in the crime). As in *Driscoll,* Petitioner's trial counsel committed a similar error by failing to use readily accessible information to expose the weakness of the State's theory through adequate cross-examination of the State's expert witness.

The State argues, however, that requiring trial counsel to cross-examine Waranowitz regarding "a fax cover sheet" would be at odds with the highly deferential standard of *Strickland,* which the Supreme Court recently reaffirmed in *Maryland v. Kulbicki,136* S.Ct. 2 (2015) *(per curiam).* As a preliminary matter, the issue before the Court is whether trial counsel failed to cross-examine the State's cell tower expert about the *contents* of the fax cover sheet, namely the set of instructions and

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match any conditions when he conducted the origination test at the burial site because in most cases, cell site "L689B" is the only cell site with the strongest signal to reach the burial site. Moreover, Waranowitz also testified that the Erickson and Nokia brand phones performed almost exactly the same. With respect to Exhibit 31, trial counsel cross-examined Waranowitz about the call times and durations, but she failed to explore the disclaimer in any way.

disclaimer that provided guidance on how to properly interpret Exhibit 31. With respect to the State's reliance on *Kulbicki,* the Court finds that the facts of the present case are significantly different from those found in *Kulbicki.*

In *Kulbicki,* the defendant alleged that trial counsel rendered ineffective assistance when he failed to cross-examine the State's ballistic expert about a report, which failed to explain the causes of the overlapping chemical compositions of bullets produced from different sources. 136 S.Ct. at 3. The Maryland Court of Appeals held that trial counsel rendered deficient performance when he failed to discover this methodological flaw that would eventually lead to the demise of Comparative Ballistic Lead Analysis evidence and cross-examine the State's expert about the report that was authored by the expert a few years prior to trial. *Id.* at 3-4. The Supreme Court of the United States reversed the decision of the Maryland Court of Appeals and held that trial counsel did not perform deficiently by failing to "pok[e] methodological holes in a then-uncontroversial mode of ballistic analysis." *Id.* at 4. In so holding, the Supreme Court of the United State doubted whether a diligent search would have uncovered the report at issue given that "in an era of card catalogues, not a worldwide web, what efforts would counsel have had to expend to find the compilation [that included the report]?" *Id.* As the Supreme Court of the United States explained, the highly deferential standard of *Strickland* does not require attorneys to go "looking for a needle in a haystack." *Id.* at 4-5 (citing *Rompilla v. Beard,* 545 U.S. 374, 389 (2005)).

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

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

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

metaphorical needle at issue – the disclaimer about the unreliability of incoming calls – was disclosed to trial counsel as part of pre-trial discovery. As such, the concerns that the Supreme Court of the United States expressed in *Kulbicki* are not present in the instant case.

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

In addition to establishing deficient performance, Petitioner must also demonstrate that trial counsel's unprofessional errors prejudiced his defense. *Strickland,* 466 U.S. at 691. Prejudice exists if there

is a "reasonable probability" that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* As the Maryland Court of Appeals explained in *Oken,* a petitioner must show a "substantial possibility" that the result of the proceeding would have been different, but for counsel's unprofessional errors. 343 Md. at 284. Citing *Strickland,* the Maryland Court of Appeals noted that when analyzing prejudice, the focus should be on "whether the result of the proceeding was fundamentally unfair or unreliable." *Id.*

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

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

Petitioner's cell phone as the jury's first impression of the case:

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

Trial Tr., at 96, Jan. 27, 2000 (emphasis added). A jury's first impression of a case plays a significant role in the jury's ultimate verdict. As the Maryland Court of Appeals explained in *Arrington v. State,* 411

Md. 524, 555 (2009), since "opening statements are the first characterization of the case heard by the jury and often presented in artful form, [the courts] do not underestimate the ultimate impact of these statements on the jury's verdict."

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

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

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

> [STATE]: The Defense tells you well, they can't place you specifically within any place by this. **Absolutely true, but look at 7:09 and 7:16, 689B, which is the Leakin Park coverage area. There's a witness who says they were**

> **in Leakin Park. If the cell coverage area comes back as that that includes Leakin Park, that is reasonable circumstantial evidence that you can use to say they were in Leakin Park.**

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

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

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

> **instances assume a posture of mystic infallibility in the eyes of a jury[.]**

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

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

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

cell tower expert with the disclaimer, the result of the trial would have been different.

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

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

Petitioner's Exhibit PC2-16. The State argues that because Exhibit 31 is not a subscriber activity report, but "call detail records," the disclaimer regarding the unreliability of using incoming call information for location does not apply. Instead, the State claims that the set of instructions and disclaimer only apply

to the redacted version of Petitioner's cell phone records because the redacted records contain the "type codes" and "blacked out areas" that are characteristic of a subscriber activity report. State's Exhibit 1A-0442 – 0459.

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

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

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

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

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

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

activity report that is specified in the set of instructions.

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

Agent Fitzgerald also testified that even if Exhibit 31 was a subscriber activity report, the term "location" referenced in the disclaimer does not refer to cell site location. Instead, the term "location" means the location of the "switch" that is identified by the "Location1" column in the redacted version of the subscriber activity report. State's Exhibit 1A-0459. According to the Agent, incoming calls are not reliable information for determining the location of the switch because of the call forwarding feature. Agent Fitzgerald explained that when a cell phone receives an incoming call while the phone is turned off, the call is automatically forwarded to the user's voicemail. When the cell phone is turned off, the phone does not connect to a nearby cell site to forward the call. Instead, the cell phone's pre-assigned switch handles the call forwarding mechanic, which is then recorded in the redacted subscriber activity report. Given that the location of the pre-assigned switch may be miles away from the switch that is closest to the cell phone, Agent

Fitzgerald concluded that incoming calls are not reliable for the location of the switch.

However, Petitioner identifies a series of questionable incoming calls in the un-redacted subscriber activity report, the source of Exhibit 31, which shows that the term location may also refer to the location of the cell site. The un-redacted subscriber activity report showed that Petitioner's cell phone made an outgoing call at 10:58 p.m. on January 16, 1999. Petitioner's Exhibit PC2-15. The outgoing call connected with cell site "L651C," which is the cell site that provided coverage to an area that encompassed Petitioner's residence at Johnnycake Road, Baltimore County. About thirty minutes later on that same day, the subscriber activity report showed that Petitioner's cell phone received an incoming call at approximately 11:25 p.m., and the call was forwarded to Petitioner's voicemail. The incoming call at 11:25 p.m. connected with cell site "D125C," which provided coverage to an area near Connecticut Avenue in Washington, D.C. Petitioner argues that it is highly unlikely that he could have made a phone call near his house at 10:58 p.m. and then received an incoming call that connected with a cell site in Washington, D.C. approximately twenty seven minutes later at 11:25 p.m. Petitioner contends that the cell site location that is reflected in the un-redacted subscriber activity report is unreliable because it is highly unlikely that he could have traveled to Washington, D.0 from Baltimore City within twenty seven minutes. Therefore, the Petitioner claims that the term "location" in the disclaimer refers to the location of the cell sites.

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

Regardless of whether Petitioner could have driven from Baltimore City to Silver Spring within a twenty-seven minute window, Agent Fitzgerald's explanation of the metro phenomenon contradicted his own testimony that the term "location" refers to the switch and not the cell site. The Agent initially testified that incoming calls are not reliable for determining the location of the switch due to the call forwarding feature, and thus, the term "location" means the location of the switch and not cell site location. Agent Fitzgerald proceeded to explain, however, that when a call is made or received in the metro transit system, the actual cell site or antenna that the phone connected with is not recorded in the subscriber activity report. Instead, the subscriber

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

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

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

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

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

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

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

CONCLUSION

The present proceedings resulted from a tragedy that occurred approximately seventeen years ago – the death of Hae Min Lee.[25] A jury unanimously convicted Petitioner of first-degree murder, kidnapping, and robbery. Petitioner received a life sentence for first-degree murder, thirty years for robbery to run consecutively with the life sentence, and a concurrent ten-year sentence for robbery. Petitioner comes before the Court requesting relief pursuant to the Maryland Uniform Post-Conviction Procedure Act, which grants Petitioner the legal right to seek relief if "the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of the State [of Maryland]." Crim. Proc. § 7-102(a)(1).

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

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

expert regarding the unreliability of the cell tower location evidence. The Court finds that Petitioner's arguments on the first two issues lack sufficient merit but concludes that he is entitled to post-conviction relief on the third issue.

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

Regarding the State's failure to disclose the disclaimer about the reliability of cell tower location evidence, the Court finds that this allegation fails on two grounds. First, as a procedural matter, Petitioner waived his right to raise the *Brady* allegation because he had an opportunity to make the allegation in prior proceedings, but he failed to do so. Second, even if the Court were to consider the merits of Petitioner's argument, his *Brady* claim would still fail because the allegedly suppressed evidence could have been discovered through a reasonable and diligent investigation of the materials disclosed to trial counsel as part of pre-trial discovery.

Finally, the Court agreed with Petitioner's claim that he was entitled to post-conviction relief because

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

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

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

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

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

Judge Martin P. Welch

Judge's Signature appears
on the original document

APPENDIX E

IN THE CIRCUIT COURT FOR BALTIMORE CITY

Case: 199103042-46

ADNAN SYED,

Petitioner,

v.

STATE OF MARYLAND.

TRANSCRIPT OF OFFICIAL PROCEEDINGS
(EVIDENTIARY HEARING)

BEFORE: THE HONORABLE MARTIN P. WELCH, JUDGE

HEARING DATE: FEBRUARY 3, 2016

APPEARANCES:

For the Petitioner:	C. Justin Brown, Esquire
	Christopher C. Nieto, Esquire
For the State:	Thiruvendran Vignarajah, AAG
	Matthew Krimski, AAG
	Tiffany Harvey, AAG
Transcriptionist:	Patricia Noell

AAERT Cert. No.: CET 362

Transcription Service: ACCUSCRIBES TRANSCRIPTION SERVICE

Proceedings recorded on digital media with video, transcript produced by transcription service.

PROCEEDINGS

* * *

[Testimony of Asia Chapman, formerly Asia McClain, pp. 167:8-168:8; 174:17-177:24]

* * *

ASIA CHAPMAN

called as a witness on behalf of the Petitioner, first duly sworn according to law, was examined and testified as follows:

MADAM CLERK: You may be seated.

MS. CHAPMAN: Thank you.

MADAM CLERK: And please state your full name for the record.

MS. CHAPMAN: Asia Chapman.

MADAM CLERK: Thank you. She's been sworn.

THE COURT: Okay. Mr. Brown?

MR. BROWN: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. BROWN:

Q Good afternoon, Ms. Chapman.

A Good afternoon.

Q Did you formerly go by the name Asia McClain?

A Yes, I did.

Q And is it okay if I refer to you as Asia McClain throughout the course of this examination?

A Yes, it is.

Q And Chapman is your married name, right?

A Yes.

Q Were you with Adnan Syed on January 13th, 1999 at the Woodlawn Public Library?

A Yes, I was.

* * *

BY MR. BROWN:

Q And I – I'm sorry. Can you repeat your answer as to why you were going over to the library?

A Yes. My boyfriend and I made arrangements for him to come pick me up, drop me off at his house and then for him to go back to school.

Q Okay. What was the name of your boyfriend at the time?

A Derek Banks.

Q And when you went to a library, did Mr. Banks come and pick you up as planned?

A No. Not at -- not on time, no.

Q What happened?

A I ended up sitting there for several hours, waiting.

Q And how did you feel about him not showing up?

A Not too happy.

Q Were you still at the library when school let out?

A Yes, unfortunately.

Q How do you know that?

A Because I was aware that the -- the normal school buses that came to pick up the, you know, everybody, they were already in the circle right there in front of the school.

MR. BROWN: If we could have the exhibit one more time, Exhibit 39?

BY MR. BROWN:

Q Are you able to point to --

A Yes. Sorry.

MR. NIETO: If I may, Your Honor?

MS. CHAPMAN: Yeah. So the buses would come up this driveway and they would all park around here and so when the students would come out at the end of the day they would all get on their buses and leave for the day and I was already aware that all the buses were lined up waiting for everyone to come out.

BY MR. BROWN:

Q Right. And what time did school get out?

A 2:15.

Q Okay. Were you concerned about how you would get home?

A Yes. At that point I still didn't know if Derek was going to show up or if I was going to be forced to take one of the school buses or if I was going to stick around and wait for -- and if he didn't come I would

have to take public transportation and I absolutely hated the NTA back then, so.

Q Okay. Did there come a time when you had a conversation with Adnan Syed in the library?

A Yes, there was.

Q And approximately when did that conversation take place?

A Shortly after 2:15.

Q Okay. And how did that conversation go?

A Well, I was sitting there waiting for my ride at one of the tables and he walked in and I was so glad to see someone that I knew because I hadn't been -- I had been sitting there all day practically by myself and so when he came in I -- we saw each other and he came over and sat down across the table from me.

Q And what was his demeanor during the conversation?

A Completely normal.

Q Do you have an idea of approximately how long the conversation lasted?

A Well, honestly, I'd have to refer to my original affidavit and -- I think it was about 15 to 20 minutes.

Q And have you in fact looked at this prior to your testimony, that prior affidavit, to refresh your recollection?

A Yes.

Q Okay. Do you remember how the conversation ended?

A Yeah.

Q With Mr. Syed.

A Yes. We were in the middle of a conversation and my boyfriend and his friend, Jarah (ph.) Johnson, walked in and the entrance was behind where Adnan was sitting, so he couldn't see them and I said, hey, my ride's here. He turned around to see who I was talking about and the two guys came over. Everybody said, hi, and then we left.

* * *

APPENDIX F

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

Indictment No. 199103042-

STATE OF MARYLAND,

v.

ADNAN SYED,

Defendant.

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

(Trial on the merits)

Baltimore, Maryland

February 10, 2000

BEFORE:

HONORABLE WANDA KEYES HEARD, Associate Judge

APPEARANCES:

For the State:

KEVIN URICK, ESQ.,

KATHLEEN MURPHY, ESQ.

For the Defendant:

CHRISTINA GUTIERREZ, ESQ.

RECORDED BY: VIDEOTAPE

TRANSCRIBED BY:

Christopher W. Metcalf

Official Court Reporter

507 Courthouse West

Baltimore, Maryland 21202

P R O C E E D I N G S

* * *

[Testimony of Jay W. Wilds, pp. 125:1-127:24]

* * *

Q Okay. Now, let us then go back to the first interview, the one where there was no tape. Did you provide them information about the location of the car?

A No, ma'am.

Q Now, so you sort of lied by omitting it, did you not?

A Yes, ma'am.

Q Okay. And did you provide them information about seeing the body in the trunk?

A I don't believe so.

Q You don't believe so. So, you lied about that too, right?

A Yes, ma'am.

Q Okay. And or at least what you said at first was very different then what you said next, right?

A In the second time.

Q And in fact, you first told them nothing about Jen Pusateri, right?

A Yes, ma'am.

Q And in your second statement when the tape recorded was turned on you also didn't say anything. about Jen Pusateri, right?

A Correct.

Q Your very, very good friend?

A Yes, ma'am.

Q So, you continued -- and that was a lie, right?

A No, it was not the truth, you're right.

Q It wasn't, so yes it was a lie?

A Yes, ma'am.

Q Okay. And so you lied in the first statement about that and you continued to lie in the second statement about that same thing, right'?

A Yes, ma'am.

Q And the first time before the tape recorder was on, you didn't happen to tell them about your good friend, Christa Myers, did you?

A No, ma'am.

Q And in the second statement you didn't tell them about your good friend, Christa Myers, did you?

A Christa Myers'?

Q I'm sorry. Christa Vincent.

A Yes, ma'am.

Q You didn't tell them, right'?

A No, ma'am.

Q And that was a lie, wasn't it?

A Yes, ma'am.

Q Okay. So, in regard to your good friend, Christa Myers you lied to them the first time, right?

A Vincent.

Q Pardon.

A Vincent.

Q Vincent. In regard to her you lied to them the 3 first time, right?

A Yes.

Q And you lied to them the second time, right?

A Yes.

Q You didn't get around to telling them about Christa Myers --

A Vincent.

Q Christa Vincent, until your third statement, right?

A Yes.

Q Okay. Now, and in regard to events that happened in Lincoln Park as you say in the first statement you didn't tell all about that, did you?

A No, ma'am.

Q And the first time you mentioned that was in the second statement, right?

A Yes, ma'am.

Q After -- after the tape was turned off, right?

A Yes, ma'am.

Q And in regard to issues like your clothes and what you did with them at any time after those

events, you didn't tell them the truth in the first statement, did you?

A No, ma'am.

* * *

APPENDIX G

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

Indictment Nos. 199103042-46

STATE OF MARYLAND,

v.

ADNAN MASUD SYED,

Defendant.

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

(Excerpt – opening statement of Mr. Urick)

Baltimore, Maryland

Wednesday, December 15, 1999

BEFORE:

THE HONORABLE JUDGE QUARLES (and a jury)

APPEARANCES:

For the State:

KEVIN URICK, ESQ.,

KATHLEEN C. MURPHY, ESQ.

For the defendant:

M. CHRISTINA GUTIERREZ, ESQ.

recorded on videotape

TRANSCRIBED BY:

Charles F. Madden

Official Court Reporter

507 Courthouse West

Baltimore, Maryland 21202

P R O C E E D I N G S

* * *

[pp. 250:22-251:2; 254:24-255:5]

* * *

MS. GUTIERREZ: Judge, prior to calling down the jury I would like to make a record about the two separate things?

THE COURT: Yes, please come up.

(Counsel and the defendant approached the bench, and the following ensued:)

* * *

THE COURT: The motion to reopen the cross-examination is denied. However, I do have a note from Alternate Number 4, "In view of that fact that you've determined that Ms. Gutierrez is a liar, will she be removed? Will we start over?"

Your motion for mistrial is granted.

MS. GUTIERREZ: Thank you.

* * *