IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2013

NO. 2519

ADNAN SYED,

Appellant

v.

STATE OF MARYLAND,

Appellee

APPEAL FROM THE CIRCUIT COURT
FOR BALTIMORE CITY
(Martin P. Welch, Sr., Judge)

BRIEF OF APPELLEE

BRIAN E. FROSH
Attorney General of Maryland

THIRUVENDRAN VIGNARAJAH
Deputy Attorney General

EDWARD J. KELLEY
Assistant Attorney General

Office of the Attorney General
200 Saint Paul Place Baltimore,
Maryland 21202
(410) 576-6300
oag@oag.state.md.us

Counsel for Appellee

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE.....1

QUESTIONS PRESENTED.....1

STATEMENT OF FACTS.....2

A. The Murder of Hae Min Lee. 2

1. The Verdict of the Jury.....2

2. The Evidence at Trial.....3

B. The Petition for Post-Conviction Relief.....10

1. The Pursuit of an Alibi. 12

2. The Purported Alibi of Asia McClain.....13

C. The Denial of Post-Conviction Relief. 15

ARGUMENT:

I. THE COURT RIGHTLY REJECTED SYED'S CLAIM THAT COUNSEL WAS INEFFECTIVE WITH RESPECT TO ASIA MCCLAIN. 18

A. Syed failed to establish that Gutierrez' strategy and judgment with respect to an alibi defense based upon Asia McClaine was constitutionally deficient. 19

B. Syed also failed to establish prejudice. 23

1. Syed's claim of ineffective assistance fails as a matter of law because Syed did not produce the supposed alibi witness at the post-conviction hearing.....23

Page

2. Nor can Syed establish prejudice where the State presented overwhelming evidence in support of the jury's verdict. 25

II. FAILING TO SEEK A PLEA WHERE NONE HAS BEEN OFFERED DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL 26

A. Failure to seek a plea offer from prosecutors when none has been offered is not a cognizable constitutional claim under the Sixth Amendment 27

B. Syed failed to prove that Gutierrez acted deficiently or that plea negotiations were viable for either Syed or the State. 28

C. Syed failed to establish that this alleged ineffective counsel claim prejudiced the outcome of his criminal proceedings. 30

CONCLUSION 34

PERTINENT PROVISIONS. 35

APPENDIX. ..... Apx. 1-4

TABLE OF AUTHORITIES

Cases

Aguilar v. Alexander, 125 F.3d 815 (9th Cir. 1997). 31

Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986). 24

Cole v. Slayton, 378 F.Supp. 364 (W.D. Va. 1974) 30

Freund v. Butterworth, 165 F.3d 839 (11th Cir. 1999) 29

Griffin v. Warden, 970 F.2d 1355 (4th Cir. 1992). 22, 24

Page

Grooms v. Solem, 923 F.2d 88 (8th Cir. 1991). 24

In re Parris W., 363 Md. 717 (2001). 24

Johns v. Perini, 462 F.2d 1308 (6th Cir. 1972) 24

Kulbicki v. State, 440 Md. 33 (2014) 17

Lafler v. Cooper, 132 S. Ct. 1376 (2012). ..... 27, *passim*

Martin v. Rose, 717 F.2d 295 (6th Cir. 1983). 30

Mason v. Balcom, 531 F.2d 717 (5th Cir. 1976) 30

Michel v. Louisiana, 350 U.S. 91 (1955) 18

Missouri v. Frye, 132 S. Ct. 1399 (2012). ..... 27, *passim*

Montgomery v. Peterson, 846 F.2d 407 (7th Cir. 1988) 24

Newman v. Vasbinder, 259 F. App'x 851 (6th Cir. 2008) (unpublished) 29

State v. Latham, 182 Md. App. 597 (2008) 18

State v. Lloyd, 48 Md. App. 535 (1981) 22

State v. Mahoney, 16 Md. App. 193 (1972) 23

State v. Purvey, 129 Md. App. 1 (1999) 18

State v. Simms, 420 Md. 705 (2011) 21

Strickland v. Washington, 466 U.S. 668 (1984) ..... 17, *passim*

Tosh v. Lockhart, 879 F.2d 412 (8th Cir. 1989) 24

United States v. Gordon, 979 F.Supp. 337 (E.D. Pa. 1997). 29

Page

Veney v. Warden, 259 Md. 437 (1970) 16, 23

Weatherford v. Bursey, 429 U.S. 545 (1977). 27

White v. State, 324 Md. 626 (1991) 32, 33

White v. Warden, 1 Md. App. 670 (1967) 23

Williams v. Florida, 399 U.S. 78 (1970) 21

Williams v. State, 326 Md. 367 (1992) 28

Constitutional Provisions

United States Constitution

Sixth Amendment. 17, 27, 33

Rules

Maryland Rule of Procedure:

Rule 8-131 32

Rules of Professional Conduct:

Rule 3.3 22

CONTENTS OF APPENDIX

Letter from Syed to Court.. . . . . Apx. 1

Notice of Alibi Witnesses. . . . . Apx. 2-4

IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2013

NO. 2519

ADNAN SYED,

Appellant

v.

STATE OF MARYLAND,

Appellee

APPEAL FROM THE CIRCUIT COURT
FOR BALTIMORE CITY
(Martin P. Welch, Sr., Judge)

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee, the State of Maryland, accepts the Statement of the Case set forth in the brief of Appellant, Adnan Syed.

QUESTIONS PRESENTED

1. Whether the court correctly dismissed Adnan Syed's claim of ineffective assistance of counsel with respect to his attorney's judgment not to pursue an alibi defense dependent on a single potential witness, Asia McClain?

2. Whether the court correctly rejected Syed's claim of ineffective assistance of counsel for declining to act on Syed's alleged request to seek a plea offer from the prosecution?

Comment [A1]: These comments are from Ross Guberman, author of *Point Made: How to Write Like the Nation's Top Advocates* (Oxford 2014). He can be reached at ross@legalwritingpro.com.

STATEMENT OF FACTS

A. The Murder of Hae Min Lee

On January 13, 1999, Adnan Syed strangled to death and buried in a shallow grave his ex-girlfriend, 18-year-old, Hae Min Lee. (T. 2/2/00 at 39-41; T. 2/23/00 at 22-23, 38). Syed and Lee, both students at Woodlawn High School, had broken up and reunited at least twice during the course of their turbulent ten-month relationship, but never before had Lee become involved with someone else. (T. 1/28/00 at 237-40; T. 2/16/00 at 300; State's Exhibit 2). That changed two weeks before the murder, when Lee went on a first date with a new romantic interest, an older co-worker named Donald Cliendinst. (T. 2/1/00 at 72).

The week of the murder, as Lee's affection for Syed visibly flickered, her relationship with Cliendinst at once became sexually intimate and public at school. (*See* T. 1/28/00 at 239; T. 2/1/00 at 88; T. 2/4/00 at 12). That same week, Syed activated a new cell phone, which was instrumental in Lee's murder, and told Jay Wilds — an accessory to the crime enlisted by Syed — that he intended "to kill that bitch" (referring to Lee) because of how she was treating him. (T. 1/28/00 at 185; T. 2/4/00 at 125-26; T. 2/18/00 at 186). On the morning of January 13, Syed lent Wilds his vehicle and his new cell phone and directed him to await his call. (T. 2/4/00 at 125-26). That day at Woodlawn, Syed lured Lee away from the high school campus, falsely claiming he needed a ride to pick up his car. (T. 1/28/00 at 209; T. 1/31/00 at 8). Syed then strangled Lee inside her vehicle and stashed her body in the trunk of the car. (T. 2/2/00 at 39-41; T. 2/4/00 at 131). After the murder, Syed bragged to Wilds that he had killed Lee with his bare hands and that she had tried to apologize to Syed with her last breath. (T. 2/4/00 at 142-43). The two men disposed of Lee's crumpled body in Leakin Park in Baltimore City and abandoned her car near Edmondson Avenue. (T. 2/4/00 at 148-51; T. 1/27/00 at 202).

1. The Verdict of the Jury

On February 25, 2000, Syed was convicted of murder and all related charges at the conclusion of a six-week trial during which the State presented overwhelming evidence of Syed's guilt. (T. 2/25/00 at 133-35). Syed and his celebrated attorney, Christina Gutierrez, received a

Comment [A2]: In just a single opening paragraph, the State effectively recounts the murder and even suggests a possible motive.

Comment [A3]: It's awkward to pair the adverb "visibly" with the "flickered" metaphor. Perhaps "as Lee stopped showing affection toward Syed."

Comment [A4]: Other way around: "became at once sexually intimate and public."

Comment [A5]: Change to "had been." The brief often confuses the simple past and the past perfect, making it harder for the reader to track the story.

Comment [A6]: Good choice of a strong verb.

Comment [A7]: Although it's not a mixed metaphor like "visibly flickered," "falsely claiming" is also awkward, especially because of its legal connotation. Try just "pretending that he needed."

Comment [A8]: Another effective verb choice.

Comment [A9]: This important sentence should have been split in two, with the order of the points reversed to track chronology. Right now, the first three points in this section are in reverse chronological order.

Comment [A10]: Add "had" here.

preview of the prosecution's case when Syed's first trial ended with the judge granting a defense motion for a mistrial. (T. 12/15/99 at 255). Emboldened after speaking with jurors following the mistrial, the defense was confident in its case and eager for trial. (T. 1/10/00 at 33).

At the second trial, as set forth in greater detail below, the State's case included, *inter alia*, the testimony of Wilds who helped Syed bury the victim and later led police to the victim's car (T. 2/4/00 at 115-64); witnesses who spoke of Syed's possessive behavior toward Lee, his ploy to get a ride from Lee after school on the day she disappeared, and his presence with Wilds that afternoon and evening (T. 2/17/00 at 136-37; T. 1/28/00 at 209; T. 1/31/00 at 8; T. 2/15/00 at 193; T. 2/16/00 at 209-11); toll records and tower location data corresponding to Syed's cell phone, which corroborated the testimony of Wilds and other witnesses, and placed Syed at Leakin Park that night a short distance from where Lee's corpse was unearthed (*See* T. 2/8/00 & T. 2/9/00); a map page to Leakin Park, ripped from a map book with Syed's palm print on the back cover, both left in Lee's abandoned car (T. 1/31/00 at 58-60; T. 2/1/00 at 24-29); the diary of Hae Min Lee recounting the decline of her relationship with Syed and the bloom of her love for Cliendinst (State's Exhibit 2); a letter seized from Syed's bedroom, written by Lee imploring Syed to respect her wishes and move on, with the ominous words "I'm going to kill" written in a separate script on the back side of the note (T. 1/28/00 at 247-55); as well as Syed's peculiar conduct after the murder and his incongruous statements to police (T. 1/28/00 at 26-29, 149; T. 1/31/00 at 8, 25-27; T. 2/16/00 at 209-13).

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

2. The Evidence at Trial

Hae Min Lee's decomposing body was found on February 9, 1999, nearly four weeks after she vanished from Woodlawn High School. (T. 2/23/00 at 4). On February 12, 1999, an anonymous caller encouraged police to concentrate on Adnan Syed; the caller also gave police the name, high school, and home phone number of a friend of Syed's. (T. 2/24/00 at 58-60). According to the caller, Syed had told this friend that if he (Syed) ever hurt his girlfriend he

Comment [A11]: The "set forth" and the "inter alia" mar what has so far been a compelling narrative line.

Comment [A12]: Add a comma here. "Who" is nonrestrictive, not restrictive. The State makes this mistake throughout the brief.

Comment [A13]: Add a comma here.

Comment [A14]: These facts are compelling, but they lose their force in this sterile and bureaucratic presentation. Bullet points would have helped.

would drive her car into a lake. (*Id.*). Police traced the home number provided by the caller to one of Syed's closest friends, Yasser Ali. According to Syed's cell phone records, Ali received two calls from Syed's cell phone on the night of the murder. (*Id.* at 60; State's Exhibit 34; T. 2/3/00 at 79-83). Although police originally considered other suspects, particularly Alonzo Sellers (the person who came across the body in Leakin Park), the evidence uniformly converged on Syed beginning with the tip provided by the anonymous caller. (*See* State's Exhibit 29; T. 2/1/00 at 71-75; T. 1/31/00 at 10-11; T. 2/24/2000 at 21-26, 58-60, 71-72; T. 2/17/00 at 226-31).

Ensconced in a relationship complicated by culture and custom, Syed and Lee were nevertheless consumed with one another. (T. 2/3/00 at 85-87; T. 1/28/00 at 140-43; T. 2/16/00 at 299, 309). At the same time, to friends and in her diary, Lee described Syed as possessive, jealous, and overprotective. (T. 2/17/00 at 136-37; State's Exhibit 2). When police executed a search warrant at Syed's residence, they found a November 1998 letter from Lee tucked into a textbook, in which Lee sought to reassure Syed that they would both survive a breakup: "Your life is NOT going to end. You'll move on and I'll move on. But, apparently you don't respect me enough to accept my decision . . . I NEVER wanted to end like this, so hostile + cold. Hate me if you will. But you should remember that I could never hate you." (T. 1/27/00 at 184-86; State's Exhibit 38). Syed's apparent answer was scrawled on the back: "I'm going to kill." (State's Exhibit 38).

By December 1998, Lee felt compelled to keep her growing interest in Cliendinst a secret from Syed, concerned he would never forgive her. (State's Exhibit 2). Her anxieties were not without basis. Syed had told a classmate, Deborah Warren, that he was convinced Lee was having a relationship with Cliendinst while she was still involved with him. (T. 2/16/00 at 301-03). Syed was reassured by Warren at the time, but by the week of the murder, as Warren testified and Cliendinst confirmed, Lee had spent the night with Cliendinst. (T. 2/16/00 at 304; T. 2/1/00 at 88). And by then teachers and classmates alike knew of the relationship. (T. 1/28/00 at 145, 250; T. 2/4/00 at 12; T. 2/16/00 at 304).

Comment [A15]: "Uniformly converged" is awkward, and "uniformly" is yet another example of an adverb that does more harm then good. Does the State mean "all the evidence led to Syed"?

Comment [A16]: Add a comma here.

Comment [A17]: This phrase is fantastic, and it gives needed context to the State's theory of the case.

Comment [A18]: Change to "each other." "One another" is for three or more.

Comment [A19]: This is a great example of why you rarely want two wind-up phrases before you get to the main event. "To friends and in her diary" makes no sense here, and it would work better after "Syed."

Comment [A20]: The "in which" appears to be modifying the textbook, which makes no sense. (Plus you don't need a comma, because it's restrictive.) Try "they found tucked into a textbook a November 1998 letter from Lee in which she sought."

Comment [A21]: This modifying phrase should have followed "Lee" and preceded "felt compelled." It makes no sense here. And add "that" after "concerned."

Comment [A22]: This is oddly sterile, even bureaucratic. "Her anxieties were understandable"?

During the trial, the State also proved the steps Syed took in the 24 hours before he killed Lee. On a newly-acquired cell phone, which was activated a day before the murder, Syed called Wilds to determine if he was available the next day. (T. 2/4/00 at 119; State's Exhibit 34). That same evening, after talking with Wilds, Syed attempted to call Hae Min Lee three times just before and after midnight. (State's Exhibit 34). During the third call, Syed gave Lee his new number, which she scribbled in the margin of her diary on the same page where she wrote "Don" 166 times. (State's Exhibit 2). Opposite this page is Lee's last diary entry, dated January 12, the night before she was killed: "I love you, Don. I think I have found my soul mate. I love you so much." (*Id.*).

Syed's first call the next morning was to Wilds, whom Syed then left school to pick up. (T. 2/4/00 at 121-23; State's Exhibit 34). While driving, Syed told Wilds about how hurt he was by Lee's treatment of him, how mad she made him, and said to Wilds, "I'm going to kill that bitch." (T. 2/4/00 at 125). Wilds — who pled guilty to being an accessory to the murder and agreed to take the stand for the State — testified that Syed left him his cell phone and car, instructing him to be ready to retrieve Syed when he called. (T. 2/4/00 at 125-26).

In addition, Crystal Myers, a mutual friend of Syed and Lee, testified about a conversation she had with Syed at school on the day Lee was killed. Syed told her that Lee was supposed to drive him after school to pick up his car, either from the repair shop or from Syed's brother. (T. 1/28/00 at 209). Syed similarly advised Officer Scott Adcock — who called Syed on January 13 after Lee was reported missing — that he was supposed to get a ride home from Lee, but that he was delayed and assumed Lee had left by the time he was ready. (T. 1/31/00 at 8). Two weeks later, on February 1, Syed retracted these statements when Officer Joseph O'Shea confronted him with what he had said to Officer Adcock. This time, contradicting what Syed had told Myers (*i.e.*, that Lee was going to give him a ride to pick up his car) and what he told Officer Adcock (*i.e.*, that Lee was supposed to give him a ride home), Syed stated that he would not have needed a ride from Lee since he had his own car. (T. 1/31/00 at 27).

Comment [A23]: The State didn't prove the steps Syed took. It proved WHAT steps Syed took.

Comment [A24]: Don't hyphenate phrasal adjectives when the first word ends in –ly.

Comment [A25]: It's more credible in a fact section to use words that the party in question might have used. "Determine" doesn't sound natural here. Try "find out."

Comment [A26]: Try "on which she had written."

Comment [A27]: The list needs parallel structure: Syed told Wilds about X and Y and then said Z.

Comment [A28]: The language here is not credible. "Telling him to be ready to pick Syed up."

Comment [A29]: Cut i.e. in both places — it's superfluous. Better yet, set off the contrasting accounts with dashes.

But not only did Syed eventually disavow any plans to get a ride after school from Lee; he also shifted from telling Officer O'Shea, on the one hand, that he went to track practice after last seeing Lee during the final class period of the day to, on the other hand, feigning that he had no memory at all of the day his ex-girlfriend vanished when asked by the lead homicide detective a month later. (*Id.* at 25-26).

The jury learned from Wilds and other witnesses that all of Syed's vacillating accounts were untrue. After school ended, Wilds received a call from Syed who directed him to the Best Buy store on Security Boulevard. (T. 2/4/00 at 130). Parked to the side of the building was Lee's gray Sentra. After repeatedly asking Wilds if he was "ready for this," Syed opened the trunk and revealed the dead body of Hae Min Lee. (*Id.* at 131).

Wilds testified that over the next few hours he and Syed alternated between driving around in search of marijuana, attempting to establish an alibi for Syed, and disposing of the body. (*Id.* at 132-57). They initially moved Lee's car, with her body still inside, to the Park & Ride at Interstate 70 and Security Boulevard, just west of Leakin Park. (*Id.* at 132). Wilds later dropped Syed off at track practice at the high school so that Syed could be "seen," only to return a short time later to pick him up. (*Id.* at 142, 144).

Both men then proceeded to the home of Kristi Vincent. (*Id.* at 144). Around that time, Syed received phone calls from the victim's brother, Young Lee, and Officer Adcock, asking if Syed knew where his ex-girlfriend was. (*Id.* at 145).[1] After one of the calls, Syed abruptly motioned to Wilds that it was time to leave. (*Id.* at 146-47).

Wilds testified that, afterwards, Syed convinced him to help dispose of the body. (*Id.* at 147). Wilds told the jury that he dealt drugs, that he lived with his grandmother, and that he did not want trouble for her. (*Id.*) So he joined Syed who had secured two shovels and returned to the Park & Ride to retrieve Lee's car. (*Id.* at 147-48). They settled on dumping the body in

[1] It was during this call with Officer Adcock that Syed said that he had expected to get a ride from Lee after school that day, but that he had been delayed. (T. 1/31/00 at 8).

Comment [A30]: Move to after "from" to create proper parallelism with from . . . to.

Comment [A31]: Insert a comma here (it's nonrestrictive).

Comment [A32]: Insert a comma here.

Comment [A33]: How about "first"?

Comment [A34]: This sentence is one of the clearest and most natural yet. In general, the State could relax its diction and try to mimic the type of language the parties would actually use.

Comment [A35]: Repeat "from" here to avoid misreading as a series.

Comment [A36]: "Syed gestured to Wilds."

Comment [A37]: "Syed later."

Comment [A38]: Insert comma here (it's nonrestrictive).

Comment [A39]: This could be cut to just "but had."

Leakin Park, where they went to an area a distance off the road and started digging Lee's grave. (*Id.* at 148-50). Wilds estimated it was around 7 p.m.; a little earlier, Wilds had used Syed's cell phone to page a friend of his, Jennifer Pusateri, to alert her that they would not be meeting up as they had previously planned. (*Id.* at 149-50). While Syed and Wilds were at Leakin Park, Pusateri returned the page, calling Syed's phone in order to speak to Wilds. (*Id.* at 151). Syed answered and told Pusateri that Wilds was busy, but that he would call her back later. (*Id.*).

After the makeshift grave was prepared, Syed and Wilds returned the shovels to Syed's car. (*Id.* at 153). Wilds told the jury that he refused to help move Lee's body from the trunk of her car, so Syed transported the corpse to the grave site by himself and "started to throw dirt on her head." (*Id.* at 151-52). For Syed and Wilds, there were points during the burial at Leakin Park where both men seemed disturbed and disoriented by the gravity of the moment. (*Id.*).

They left the city park as they had arrived, Syed operating his victim's car and Wilds driving Syed's. (*Id.* at 154). After trailing one another for a time, Syed eventually abandoned Lee's vehicle behind apartments and returned to his own car, which until then Wilds had driven. (*Id.*). They then proceeded to Westview Mall, where they discarded the shovels and where Pusateri recalled joining the two of them a little later. (*Id.* at 156-57).

During the course of that fateful night, Syed detailed, reflected on, and bragged to Wilds about what he had done. Syed reported that during the struggle Lee had kicked off the car's turn signal and had attempted to apologize to him. (*Id.* at 142). He told Wilds that killing Lee "kind of hurt him," but that when someone treated him the way she had, that person deserved to die (*Id.*); Syed later added that the murder, "kind of makes [me] feel better and then again it doesn't." (*Id.* at 156). Syed also derived a measure of pride in the method of the murder: "motherfuckers think they are hard, I killed somebody with my bare hands." (*Id.* at 142).

The State called additional witnesses who fortified key facts and critical features of the narrative and timeline established by the State at trial. For example, Nisha Tanna, a friend of Syed's, claimed she remembered receiving a call from Syed who, conspicuously, then placed Wilds on the phone, just as Wilds testified. (*Id.* at 136-37; T. 1/28/00 at 189-90). Syed's cell

Comment [A40]: Add "that" here. Otherwise it sounds like "it" is the object.

Comment [A41]: Cut the comma along with the "that he."

Comment [A42]: Add "had."

Comment [A43]: Very awkward. Maybe "At different points during the burial at Leakin Park, both Syed and Wilds ."

Comment [A44]: Insert "with" here.

Comment [A45]: Change to "each other." "One another" is for more than two.

Comment [A46]: Add comma here.

Comment [A47]: Delete comma.

Comment [A48]: Add "that."

Comment [A49]: Delete commas.

phone records also confirmed two calls to Tanna on January 13 during the time Syed and Wilds were together. (State's Exhibit 34).

Kristi Vincent also observed Syed and Wilds together the evening of the murder. Vincent told the jury, consistent with Wilds' testimony, that Wilds arrived at her apartment with Syed, whom she had never met and whom Wilds never introduced, at around 6 p.m. (T. 2/16/00 at 209-215, 225-33; T. 2/4/00 at 144). She recalled the episode because both men were acting "real shady," and she noticed that Syed seemed to be hiding his face. (T. 2/16/00 at 237-39). Syed and Wilds left abruptly after Syed answered a call on his cell phone and said to the caller, "they're going to come talk to me . . . what should I say, what should I do?" (*Id.* at 213-14).

Also significant at trial was the testimony of Pusateri. She first came to the attention of police when — soon after the anonymous caller identified Syed as a suspect — police traced to Pusateri's address a phone number that had multiple contacts with Syed's cell phone on the day of the murder. (T. 2/17/00 at 154-55, 159). Pusateri first met with detectives on February 26, 1999 (*Id.*); she told them she had heard that Lee had been strangled, a fact that had not been released to the public. (*Id.* at 314-15). Pusateri also encouraged police, at Wilds' suggestion, that they should talk with Wilds. (*See* T. 2/15/00 at 204). The next day, unsolicited, Pusateri returned to police headquarters along with her mother and an attorney; she then outlined for detectives what she had learned from Wilds on the very night of the murder. (*Id.* at 202-03).

At trial, Pusateri reinforced crucial elements of the State's case. She corroborated, for instance, Wilds' testimony with respect to the afternoon, stating that Wilds had been at her home playing video games, waiting for a phone call. (*Id.* at 186-87). She explained that she later received a page from Wilds from an unknown number; when Pusateri called back, someone besides Wilds answered and said that Wilds was busy and would return her call when he was ready to be picked up. (*Id.* at 188-90). A short time later, Wilds paged Pusateri, asking her to meet him at Westview Mall. (*Id.* at 191-92). She testified that, when she arrived, Syed and Wilds pulled up in a car driven by Syed. (*Id.* at 194). Soon after Wilds got into Pusateri's car, he

Comment [A50]: This phrase is awkward, but it's also superfluous given that Kristi had never met Adnan.

Comment [A51]: Nice transition and nice inverted sentence structure for variety.

Comment [A52]: The number itself didn't have contacts with the phone. Try "a number that had shown up on Syed's cell phone multiple times on the day of the murder."

Comment [A53]: You don't encourage someone "that they" do something. You encourage someone "to" do something.

Comment [A54]: Another example of too much windup. "Unsolicited" would make a lot more sense after "headquarters."

Comment [A55]: Change to "about."

Comment [A56]: I would either scrap the semicolon after "number" and write two sentences or change to "She later received a page from an unknown number, but when she called back . "

confided in her that Syed had strangled Lee in the Best Buy parking lot and urged her not to tell anyone. (*Id.* at 195-96). Pusateri added that they later returned to Westview Mall, so that Wilds could make sure there were no prints on the shovels they had left behind. (*Id.* at 196).

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

The State's expert witness, Abraham Waranowitz, also plotted the location of cell towers corresponding to each call Syed and Wilds made that day. In order to validate this information, the expert actually visited locations where a call was supposedly made and initiated a test call to determine what tower the call engaged. (T. 2/8/00 at 83). For example, Waranowitz made three calls from the 4700 block of Gateway Terrace and found that two cell towers had strong signals on that street — those two towers coincided with the three calls on Syed's cell phone between 6 p.m. and 6:30 p.m. when Syed and Wilds were at Kristi Vincent's apartment, which was located at 4703 Gateway Terrace. (*Id.* at 96-97; State's Exhibit 34). The State's expert similarly confirmed that the two calls just after 7 p.m. — when Wilds placed himself and Syed at Leakin Park — connected to a tower at 2121 Windsor Garden Lane, due north of the spot where Syed buried Lee's body. (T. 2/8/00 at 97-98; State's Exhibit 34).

Furthermore, the State established that Syed's palm print was on the back cover of a map book inside Lee's car and that a page showing Leakin Park was torn from that book; the standalone page was also recovered from the middle of the back seat of Lee's car, where it could be reached from the driver's seat. (T. 1/31/00 at 58-60, 118-119; T. 2/1/00 at 24-29). The State also showed that the wiper lever inside of Lee's car was broken, which was consistent with

Comment [A57]: Delete comma.

Comment [A58]: Should be "was" to agree with "testimony," not "witnesses."

Comment [A59]: Nice.

Comment [A60]: Avoid this common writing tic by changing to "The State also established." And then change the start of the next sentence to "And the State showed."

Wilds' testimony that Syed described Lee kicking as he strangled her in the front seat of the car. (State's Exhibit 6; T. 2/25/00 at 50).

Also illuminating was Syed's conduct in the weeks following the murder. Some at Woodlawn High School were concerned about Lee's whereabouts. Hope Schab, a teacher at Woodlawn, worked with detectives to ask for information and distributed written questions within the high school community. (T. 1/28/00 at 146-48). Not only did Syed decline to participate in these efforts, he affirmatively sought to thwart them, especially once he learned that he was a subject of interest. Schab testified that Syed asked her to stop raising questions about him; he claimed to Schab that he was concerned his parents would learn too much about his personal life. (T. 1/28/00 at 149). Similarly, Deborah Warren told the jury that Syed once borrowed her journal, but that when he returned it, all the papers inside were gone, including one with questions about him and Lee. (T. 2/16/00 at 317). Syed also elected not to attend the memorial service for Lee, telling Inez Hendricks, another teacher at Woodlawn, that he skipped the service because he and Lee practiced different religions. (T. 2/4/00 at 24-25). Also curious, although Syed regularly called Lee in the days, weeks, and months before her disappearance (including three times around midnight on January 13), between when Syed learned Lee was missing and when her body was discovered in Leakin Park, Syed never attempted to contact her. Not once. (*See* T. 10/25/12 at 57-59; State's Exhibit 34).

B. The Petition for Post-Conviction Relief

On May 28, 2010, ten years after he was sentenced and seven years after his direct appeal ended, Syed filed a petition for post-conviction relief, which was supplemented on June 27, 2011. The petition, as amended, raised, *inter alia*, two claims of ineffective assistance of counsel. First, Syed asserted that his trial attorney, Christina Gutierrez, was ineffective for failing to investigate and call to testify a supposed alibi witness, Asia McClain. (T. 11/29/10 at 5-6; T. 10/11/12 at 5-8). Second, Syed claimed he asked Gutierrez to approach the State about a plea deal and she failed to do so. (*Id.*). To support these claims, defense counsel called to testify five witnesses at the post-conviction hearing: Kevin Urick (one of the original prosecutors who tried

Comment [A61]: Add "but" here.

Comment [A62]: Who is she?

Comment [A63]: Diction too sterile for the occasion. Try "chose."

Comment [A64]: This phrase doesn't link up with any noun. Perhaps change to "Also curious is that."

Comment [A65]: Excellent use of a short sentence.

Comment [A66]: Add "that" here.

Comment [A67]: Add "that" here.

Comment [A68]: Confusing. I think the State meant "called five witnesses to testify."

the case), Rabia Chaudry (Syed's close friend), Shamin Rahman (Syed's mother), Margaret Meade (admitted as an expert in criminal defense in Baltimore City), and Syed himself.

Gutierrez died in 2004. (T. 11/29/10 at 5). At the time when Syed retained her, however, she was a renowned criminal defense attorney who was hired because Syed and his family wanted to obtain an outright acquittal. (T. 10/11/12 at 84, 98-100; T. 10/25/12 at 98, 113). Prior to trial, Syed was represented by two prominent attorneys, both law professors today, Michael Millemann and Douglas Colbert. (T. 10/11/12 at 98-99; T. 10/25/12 at 8). Gutierrez was selected in part on the strength of Millemann's and Colbert's endorsement of her; Syed's mosque also screened candidates and conducted interviews of three attorneys, before deciding that Gutierrez was the best choice. (T. 10/11/12 at 84-85, 98-99). Syed's mother testified that Gutierrez was hired because "she had a reputation for being very tough," an "extensive background in trying criminal cases," and was known for "fighting very hard for the client." (*Id.* at 98-99).

Gutierrez was so coveted by Syed that, in fact, Syed fervently opposed the State's motion to remove her as his attorney. The State had requested disqualification on the ground that she already represented two grand jury witnesses, Balail Ahmed and Saad Chaudry, who might testify against Syed at trial. (T. 7/9/99). Millemann represented Syed in these proceedings and argued that Syed was entitled to the counsel of his choice. (*Id.*). Following the hearing, Syed wrote a long letter to the court, pleading with the judge to permit him to keep Gutierrez because of the strong personal and professional bond between them:

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

(Apx. 1). Later that month, the court denied the State's motion. (*See* T. 7/23/99).

Comment [A69]: Cut to just "When."

Comment [A70]: Change to a colon.

Comment [A71]: It's a single endorsement by two people, so the possessive should be attached only to the second name.

Comment [A72]: No need for a comma here.

Comment [A73]: Insert "had" here for parallel structure in the list.

Comment [A74]: The passive makes the construction awkward. "Syed so coveted Gutierrez, in fact, that he fervently opposed."

1. The Pursuit of an Alibi

In preparation for trial in Syed's case, Gutierrez assembled a team consisting of a private investigator and law clerks to assist with the pretrial investigation. (T. 10/25/12 at 8-32). Fashioning an alibi for Syed's whereabouts that supported Syed's statements to police was a clear priority for Gutierrez. (Apx. 2-3). In fact, Gutierrez, aware that Maryland rules required her to disclose potential alibi witnesses in advance of trial so that the State would have an opportunity to investigate the basis of the alibi, provided to the State a list of 80 potential alibi witnesses on October 5, 1999. (Apx. 2-3). According to the alibi notice:

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

(Apx. 2-3). Because Syed had spoken to police on multiple occasions before he was charged and before he retained counsel, the alibi framed in Gutierrez's notice to the State had the advantage of comporting with what Syed had already said to law enforcement. (T. 1/31/00 at 5-14, 25-39; T. 2/17/00 at 256-73; T. 2/18/00 at 191-94).

Gutierrez also pursued an alibi defense at trial, through subtle cross-examination of witnesses presented by the State (*See, e.g.*, T. 2/4/00 at 97-100; T. 2/3/00 at 88-133), by substantiating a reliable routine that Syed followed every day, *i.e.*, attendance at school followed by track practice followed by services at the mosque (T. 2/23/00 at 79-81, 100-04, 274-75; T. 2/24/00 at 16-17, 116-17, 151, 185, 193-96), and by calling to testify for a specific alibi Syed's father, a credible and sympathetic figure who asserted that on the evening of Lee's disappearance he went to the mosque with his son at approximately 7:30 p.m. for an 8 p.m. prayer meeting (T. 2/24/00 at 16). Importantly, the trial court agreed to give an alibi instruction to the jury, thus

Comment [A75]: Cut to just "could."

Comment [A76]: Many judges will skip the block quote, so it would have been better to use the lead-in to sum up the point of the quotation.

Comment [A77]: Delete the comma and change to "by subtly cross-examining" so it matches the other items on the list.

finding that an alibi defense had been generated by the facts established by Gutierrez at trial. (T. 2/25/00 at 32-33).

2. The Purported Alibi of Asia McClain

Notwithstanding Gutierrez's extensive pretrial investigation and efforts during trial, Syed now claims that Gutierrez was constitutionally ineffective for her alleged failure to adequately investigate one additional alibi witness, Asia McClain. (Appellant's Brief at 1).

Asia McClain was a fellow student at Woodlawn High School. (T. 10/11/12 at 5). After Syed's arrest, McClain sent Syed two letters, dated March 1, 1999, and March 2, 1999, requesting to talk with him to explore the relevance of a conversation McClain recalls having on January 13, 1999, at the nearby public library. (Defense P.C. Exhibits 6 & 7). She does not say in this set of correspondence why she remembers that day or what precisely she recalls. (*Id.*). Both letters express hope that Syed is innocent and simultaneously relay concerns that he is not: "I want you to look into my eyes and tell me of your innocence. If I ever find otherwise I will hunt you down and wip [sic] your ass . . . I hope that you're not guilty and I hope to death that you have nothing to do with it. If so I will try my best to help you account for some of your unwitnessed, unaccountable lost time (2:15-8:00)" (Defense P.C. Exhibit 7); "The information that I know about you being in the library could helpful [sic], unimportant or unhelpful to your case. . . . I guess that inside I know that you're innocent too. It's just that the so-called evidence looks very negative." (Defense P.C. Exhibit 6). In neither letter does McClain specify a particular time when she saw Syed at the library. (Defense P.C. Exhibits 6 & 7). She notes however that she aspires to become a criminal psychologist for the FBI. (Defense P.C. Exhibit 6).

Syed presented evidence to the post-conviction court that he made his defense team aware of these two original letters. To corroborate this, he referred to the notes of one of Gutierrez's law clerks, which suggest that McClain was discussed at a meeting between Syed and the clerk. (T. 10/25/12 at 4-5). Syed testified at the post-conviction hearing that he was "fairly certain" that his presence at the public library would have been to access his email account. (*Id.*

Comment [A78]: Rather than simply making Adnan's argument and then launching into a discussion of Asia McClain, the State should have first summarized its objection to this claim in at least a sentence.

Comment [A79]: "Requesting" does not take an infinitive. Change to "Asking."

Comment [A80]: Change to "while relaying."

Comment [A81]: Add commas before and after "however."

Comment [A82]: Add "had."

Comment [A83]: Need to avoid "notes of one of" and to clarify that "which suggest" modifies "the notes." Perhaps "he referred to the notes taken by one of Gutierrez's law clerks, which suggest. "

at 30-32). Consistent with this, Syed's email username and password are contained in the same section of the clerk's notes. (Defense P.C. Exhibit 5). In addition, Syed testified that he personally asked Gutierrez if she had looked into the McClain alibi angle. (T. 10/25/12 at 33-34, 38- 39). Syed acknowledged that Gutierrez advised him that she had "looked into it and nothing came of it." (T. 10/25/12 at 33).

Syed also introduced an affidavit McClain signed a year later, on March 25, 2000, in which McClain claimed she saw Syed at a specific time at the library on the day of Lee's murder, and that she was never contacted by Syed's defense team. (T. 10/11/12 at 57-60; Defense P.C. Exhibit 2). This affidavit, signed a month after Syed was convicted, was prepared in the presence of Rabia Chaudry, a close family friend of Syed's and a law student at the time. (Defense P.C. Exhibit 2). In this post-trial affidavit, McClain recalled with pinpoint accuracy that she had waited for her boyfriend at 2:20 p.m., that she held a 15-20 minute conversation with Syed, and then left at about 2:40 p.m. (*Id.*). Nothing in the affidavit explained why McClain was now able to provide a concrete, narrow alibi for Syed when details like this were notably absent from her original letters to Syed. (*Id.*). Whatever the reason, the times neatly coincided with the State's postulation at Syed's trial as to when Syed may have killed Hae Min Lee. (*Id.*).

At the hearing, Chaudry stated that she spoke to Syed on multiple occasions by phone from the time of his arrest and throughout both trials; she attended most of the second trial and participated in two meetings between Gutierrez and Syed's parents. (T. 10/12/12 at 33-78). Chaudry claimed, however, that it was not until after Syed was convicted that she asked him to account for his whereabouts at the time of the murder. (*Id.* at 43-44, 76). According to Chaudry, Syed told her that, "it was like any other day for me," and that he had no specific memory of speaking to McClain (or anyone else at the library) that day. (*Id.*).

Kevin Urick, one of the original prosecutors, testified that McClain called him after the post-conviction was filed to say she had written the affidavit only because of pressure from the defendant's family and hoped that, by doing so, they would leave her alone. (T. 10/11/12 at 30). She expressed to Urick concerns about participating in the post-conviction hearing, and

Comment [A84]: Insert "that."

Comment [A85]: Insert "had."

Comment [A86]: Insert "that" here for parallel with "that she was never contacted" in the next part of the sentence.

Comment [A87]: Insert "that she" for parallel with "that she had waited" and "that she held."

Comment [A88]: "When" doesn't work here as a subordination device; the passive voice isn't helpful; and "details . . .absent" ironically takes the focus off of Asia McClain. Perhaps "even though she had left all those details out of her original letters."

Comment [A89]: Change to "had spoken."

Comment [A90]: A perfect sentence.

Comment [A91]: No comma here. Words of speech take a comma, but not when they are followed by "that."

Comment [A92]: "Your participle is dangling," as Weird Al Yankovic put it in his" Word Crimes" video. "They" aren't the ones who would be "doing so." Put a period after "family" and start a new sentence: "She hoped that if she wrote the affidavit, they would leave her alone."

ultimately she did not testify. (*Id.*). Urick's characterization of McClain's reticence is confirmed by Syed's present counsel who said that although he tried to produce McClain, she evaded service of the defense subpoena. (T. 10/25/12 at 106).

For his part, Syed testified at the post-conviction hearing that he received the letters from McClain within a week of his arrest and that the letters "fortified" the memory that he had of going to the library after school and staying there from 2:40 p.m. to 3 p.m. (*Id.* at 26-28). He further stated that he remembers exactly who he spoke with and what they spoke about. (*Id.* at 29). Syed's sharpened recollection nearly 14 years after the murder stood in contrast to the statements he gave police in the early days of the investigation and contradicted Chaudry's testimony of his statements to her that, even after he was convicted of murder, he had no memory of where he was after school on January 13, 1999.

Comment [A93]: A comma is needed after "counsel" to make what follows nonrestrictive. You would omit the comma ONLY if the phrase were restrictive: "I hired the lawyer who seemed the smartest" vs. "The characterization is confirmed by counsel, who said."

Comment [A94]: This is a good example of a long sentence that is nevertheless clear and easy to follow.

C. The Denial of Post-Conviction Relief

The post-conviction court diligently considered and flatly dismissed, with detailed factual findings, Syed's claim that Gutierrez acted deficiently with respect to Asia McClain. First, the court concluded that "the letters sent from Ms. McClain to Petitioner do not clearly show Ms. McClain's potential to provide a reliable alibi witness." (App. 11):

> In the first letter, sent on March 1, 1999, Ms. McClain recounted that she saw Petitioner in the public library on January 13, 1999, but did not state the exact time during which the encounter took place. Defense Post-Conviction Exhibit 7. The only indication of Ms. McClain's potential to be an alibi witness for Petitioner is in Ms. McClain's offer to "account for some of [Petitioner's] un-witnessed, unaccountable lost time (2:15 - 8:00; Jan 13th)." *Id.* In the letter sent on March 2, 1999, the following day, Ms. McClain again told Petitioner that she saw the Petitioner in the public library on January 13th and conjectured, "maybe if I would have stayed with you or something this entire situation could have been avoided." Defense Post-Conviction Exhibit 6. To require counsel to interpret such vague language as evidence of a concrete alibi would hold counsel to a much higher standard than is required by *Strickland*. In addition, trial counsel could have reasonably concluded that Ms. McClain was offering to lie in order to help Petitioner avoid conviction.

(App. 11-12).

The Honorable Judge Martin P. Welch also determined that, since neither McClain nor any other purported alibi witness testified at the hearing, Syed had failed to substantiate his claim of ineffective assistance of counsel: "In *Veney v. Warden*, the Court denied relief to a defendant who failed to call an alibi witness on post-conviction and instead, made a proffer that the witness' trial testimony would have supported the defendant's alleged alibi. *Veney v. Warden*, 259 Md. 437, 450 (1970)." (App. 9).

Moreover, the post-conviction court found that Gutierrez did in fact conduct a substantial investigation and developed a potential alibi theory on Syed's behalf:

> Trial counsel identified more than eighty (80) potential alibi witnesses prior to Petitioner's trial. State Post-Conviction Exhibit 1. Trial counsel also noted how each witness could be used to support Petitioner's own stated alibi; that he had remained at school from 2:15 p.m. until track practice at 3:30 p.m. on the day of the murder. *Id.*

(App. 9).

The court also found as fact that the information supplied by McClain contradicted the version of the events Syed relayed to the police and presumably to his defense team:

> Secondly, the information in Ms. McClain's letters stating the Petitioner was present at the public library contradicted Petitioner's own version of the events of January 13th, namely Petitioner's own stated alibi that he remained on the school campus from 2:15 p.m. to 3:30 p.m. Based 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 Petitioner's defense and may have, in fact, harmed the defense's theory of the case.

(App. 12).

The post-conviction court also rejected Syed's contention that Gutierrez was constitutionally deficient for failing to seek a plea offer that Syed claimed he requested. The undisputed evidence before the post-conviction court was that Syed had always maintained his innocence. (App. 16; T. 10/25/12 at 56). In part because of this, no plea discussions took place. (T. 10/25/12 at 108-10). Moreover, the post-conviction court made a factual determination that there was "nothing in the record indicating that the State was prepared to make a plea offer had

Comment [A95]: Nice lead-ins to all of these block quotes.

Comment [A96]: Add "had."

Comment [A97]: Awkward. "That is one reason" might be better.

trial counsel pursued such negotiations. In fact, Petitioner has provided no convincing evidence that a plea offer was even contemplated or discussed by the State." (App. 15).

The only evidence before the post-conviction court that Syed ever asked Gutierrez to seek a plea deal was Syed's testimony, which was not credited by the court. In fact, the court found "that Petitioner intended to maintain his innocence throughout." (App. 16). Lacking any credible evidence to support Syed's assertion that he had sought a plea, Judge Welch ruled that Syed had failed to prove that Gutierrez had violated his Sixth Amendment right to effective assistance of counsel. (App. 16).

The post-conviction court's factual finding that Syed "intended to maintain his innocence throughout" was also dispositive with respect to prejudice. Because there was no reliable evidence that Syed would have entered a guilty plea under any circumstances, the court determined that Syed had not established what harm he had suffered. Ultimately, Judge Welch concluded, "trial counsel's failure to initiate plea negotiations was not a deficient act and did not prejudice Petitioner." (App. 16).

ARGUMENT

Syed contends that the post-conviction court erred in denying his claims that Gutierrez was ineffective. (*See* Appellant's Brief). Sixth Amendment claims of ineffective assistance of counsel are evaluated under the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Kulbicki v. State*, 440 Md. 33, 46 (2014). In order to prevail, a criminal defendant must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) that counsel's deficient performance resulted in prejudice to the defendant. *See Strickland*, 466 U.S. at 687; *Kulbicki*, 440 Md. at 46. The reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. The reviewing court's scrutiny of counsel's conduct "must be highly deferential." *Id.* at 689. The court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," as "[t]here are countless ways to provide effective assistance in any

Comment [A98]: Changing this passive construction to the active "the court did not credit" would not only shave a word but would prime the reader for the shift to "the court" as the subject of the next sentence.

Comment [A99]: You generally don't want to start your Argument by piecing together a bunch of boilerplate quotes. It's better to give a persuasive overview of your main points first.

given case" and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.* Thus, "[a] fair assessment of attorney performance requires that every effort 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.* To succeed, the defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Additionally, even where a court finds an error of constitutional dimension, "[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." *Id.* at 694. Furthermore, whereas "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.* at 694, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding," *id.* at 693. "The 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 cannot be relied on as having a just result." *Id.* at 686.

Whether counsel's representation has been constitutionally inadequate is a mixed question of law and fact: "As a question of whether a constitutional right has been violated, we make our own independent evaluation by reviewing the law and applying it to the facts of the case. We will not, however, disturb the findings of fact and credibility determinations of the post-conviction court, unless they are clearly erroneous." *State v. Purvey*, 129 Md. App. 1, 10-11 (1999) (citations omitted); *State v. Latham*, 182 Md. App. 597, 613 (2008).

I.

THE COURT RIGHTLY REJECTED SYED'S CLAIM THAT COUNSEL WAS INEFFECTIVE WITH RESPECT TO ASIA MCCLAIN.

Syed asserts that Gutierrez was ineffective because she failed to investigate, and possibly call in defense, Asia McClain, a purport`ed alibi witness. (Appellant's Brief at 14-24). He claims

Comment [A100]: "Additionally" is generally a weak transition at the beginning of a paragraph, because it signifies nothing more than "I'm going to say something else." Perhaps change this to "But even when a court."

Comment [A101]: "Furthermore" adds nothing. Start with "Whereas."

Comment [A102]: The entire opening consists of boilerplate propositions and quotations. A little more advocacy would help set the stage for the first heading.

Comment [A103]: Permissibly rejected? Did not err in rejecting?

that the failure to investigate McClain deprived him of a defense, and that had McClain been investigated, there is a reasonable probability that the result of the trial would have been different. (*Id.*).

Syed's claim is meritless. Gutierrez presented to the State a list of 80 alibi witnesses that she developed and reserved the right to call in defense. The anticipated testimony of those witnesses squared with what Syed had already told police. The post-conviction court rightly held, in contrast, that McClain's nebulous correspondence did not warrant serious attention. Where Gutierrez, a diligent and experienced trial attorney, developed an alibi theory based on Syed's usual routine, a court should not revisit an attorney's judgment to adhere to one alibi theory instead of pursuing another. In addition, because Syed did not produce McClain at the post-conviction hearing, Syed failed, both as a matter of law and on the facts of this case, to establish prejudice. Accordingly, the post-conviction court properly denied this claim for relief.

A. Syed failed to establish that Gutierrez' strategy and judgment with respect to an alibi defense based upon Asia McClaine was constitutionally deficient.

The post-conviction court reasonably concluded that the purported alibi that McClain offered to provide was vague and unreliable. As the court found, the letters written by McClain were vague and did not provide Syed with a concrete promise of a specific alibi. Indeed, at the bottom of the second page of the March 1, 1999, letter, McClain openly qualifies her information when she states: "*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). This indicates that McClain may have been guessing about Syed's presence in the library, or that her recollection was mistaken if not fabricated. This conclusion is consistent with Urick's post-conviction testimony that McClain told him she was pressured by Syed's family into drafting and signing an affidavit confirming the content of the earlier letters and specifying a time that was not contained in the original correspondence. (T. 10/11/12 at 30).

Comment [A104]: "Where" is always legalistic, but here it's also awkward, because it doesn't even introduce a condition and because this statement is a specific application and not a generic statement of law. Try "Because."

Comment [A105]: Splitting this from "Syed failed" makes the sentence confusing. Move it back to what it belongs with.

Comment [A106]: The verb-agreement error here ("was" should be "were") is also a good example of why it's better to keep like parts of the sentence together.

Comment [A107]: Cut this phrase and put the colon after "information."

Comment [A108]: "This" is ambiguous. This statement? This promise?

Comment [A109]: Add a comma here.

Comment [A110]: Change to "that she had been."

Comment [A111]: Cut this word. You rarely need it.

The court also correctly determined that Syed did not establish a failure to perform by Gutierrez with respect to investigating Asia McClain. Even assuming *arguendo* that McClain's offer of an alibi warranted some attention, Syed bears the burden of proving that Gutierrez failed to do so. Syed elected not to call any member of the defense team and was unable to secure McClain's testimony at the post-conviction hearing. What remains is a dubious affidavit prepared long ago by McClain that, according to Urick's testimony, was generated as a result of pressure from Syed's family in the wake of Syed's conviction at trial. The court below rightly found that this was insufficient to meet Syed's burden.

Moreover, Syed claimed that Gutierrez advised him that she had explored the McClain alibi and nothing had come of it. (T. 10/25/12 at 32-35, 38-39). Syed baldly insists that his counsel deceived him, but the post-conviction court had no evidence of this before it. Even if Syed relies upon McClain's affidavit (which states that she was not contacted by a member of Guterriez's team), speaking to McClain is not the only way for Gutierrez to have assessed the value and veracity of the potential alibi. In fact, the evidence before the post-conviction makes clear that other methods of inspecting the potential alibi existed. After all, the law clerk's notes upon which Syed relied to show that the defense was aware of the McClain letters in the first place also reveal that, on the same date the McClain correspondence was discussed, the defense team obtained — presumably from Syed — his email account information and were made aware that the public library may have had surveillance cameras. (*See* Defense Post Conviction Exhibit 5). Syed himself indicated that he was "fairly certain" that use of his email account would have been the principal reason for this presence at the Woodlawn library between the end of school and the start of track practice. (T. 10/25/12 at 30-32). Thus, by simply entering the login and password scribbled on the law clerk's note, Gutierrez's team could have swiftly evaluated the potential alibi by determining whether Syed's email account had activity during the relevant timeframe. And where a seasoned defense attorney like Gutierrez generates a list of 80 potential

Comment [A112]: Change to "had not established."

Comment [A113]: The combination of "failure to perform by Gutierrez" and "with respect to" is somewhat confusing and awkward. Perhaps "Syed had not established that Gutierrez failed to perform when she declined to investigate Asia McClain."

Comment [A114]: Change to "if."

Comment [A115]: This doesn't make any sense. The only verb mentioned that "so" could refer to is "warranted." Maybe the State meant "failed to give it any"?

Comment [A116]: "This" is ambiguous. Change to "this solicited affidavit"?

Comment [A117]: Don't be afraid of "Syed also claimed."

Comment [A118]: Change to "but that."

Comment [A119]: "Baldly" is an odd adverb for the occasion. I'd cut it.

Comment [A120]: The passive doesn't seem to work here. Perhaps "that no one on Gutierrez's team contacted her."

Comment [A121]: Change to "was."

Comment [A122]: Generally, avoid "existed." And let's keep Gutierrez the subject here: "that she had other ways to inspect the potential alibi."

Comment [A123]: Nice transition.

Comment [A124]: Awkward and stilted wording. There's nothing wrong with ending a sentence, much less a mid-sentence phrase, with a preposition. Try "that Syed relied on."

Comment [A125]: "Team" is singular in American English, so this should be "was."

Comment [A126]: Change to "when."

alibi witnesses, it is reasonable to conclude that some inspection of this 81st alibi witness was performed. For this reason too, Syed's claim of deficient performance failed.[2]

Likewise, the court correctly found that declining to pursue the McClain alibi may have been a sound exercise of strategic judgment. As the post-conviction court noted, the information contained in the McClain letters was not helpful to Syed because McClain's account contradicted the story Syed told the police regarding his whereabouts the day Lee disappeared. On January 25, 1999, Detective O'Shea contacted Syed, and Syed told O'Shea that he was at school all day and stayed until track practice began. (T. 1/31/00 at 5-14, 25-39). Presumably, Syed shared with Gutierrez this same information, and she was entitled to act accordingly. The extensive alibi notice filed with the court proves that she did so.[3] *See Strickland*, 466 U.S. at 691 ("[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.").

Indeed, as the post-conviction court aptly recognized, this was not a case where there was no investigation into a potential alibi defense. (App. 9). Nor was this a case where Gutierrez botched the alibi notice requirements. Rather, the record reflects that through meetings with Syed and an extensive investigation of the case, the defense team compiled a list of 80 potential alibi witnesses that were available to combat the prosecution's case. (App. 9). Given the extent

---

[2] Syed repeatedly states that Gutierrez lied to him when she stated that nothing came of her investigation of McClain. (Appellant's Brief at 14-24). The claim is a bald assertion based solely on Syed's own self-serving testimony, which the post-conviction court generally did not credit.

[3] Relying on *State v. Simms*, 420 Md. 705 (2011), and *Williams v. Florida*, 399 U.S. 78 (1970), Syed suggests on appeal that the alibi witness list was not evidence upon which the court should have relied. (Appellant's Brief at 22). The alibi witness list was admitted without objection, (T. 10/25/12 at 101-02), and was relevant to show the extent of the investigation conducted by Gutierrez, which Syed was challenging. Neither *Simms* nor *Williams* state that the alibi notice was not admissible for this purpose. Syed actually relied on the notice in his closing argument to the post-conviction court. (T. 10/25/12 at 104-05).

Comment [A127]: Cut this word.

Comment [A128]: Change to "in which" here and in the next sentence.

Comment [A129]: With "neither . . . nor," agree with the second noun. So "states," not "state."

of this investigation, Gutierrez clearly had a basis upon which to conclude that McClain's information was either false, unreliable, immaterial, or harmful to the defense. In fact, there is no evidence in the record — at trial or in the post-conviction proceedings — that visiting the library to check email between school and track practice was part of the Syed's habitual pattern; accordingly, it would have been a conspicuous aberration from the daily routine that Gutierrez sought to establish. Also, at no point did Syed tell anyone that he deviated from his customary practice and went to the Woodlawn Public Library after school that day.

In light of these facts, the post-conviction court properly concluded that trial counsel's decision not to reflexively pursue McClain as a potential alibi witness was reasonable under the circumstances. *See Strickland*, 466 U.S. at 690-91 (recognizing that when judging an allegation of ineffectiveness, 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"); *see also State v. Lloyd*, 48 Md. App. 535, 540 (1981) ("[T]he decision whether to call a witness is ordinarily a matter of trial tactics within the discretion of defense counsel.").[4]

Syed's reliance on *Griffin v. Warden*, 970 F.2d 1355 (4th Cir. 1992), is misplaced. (Appellant's Brief at 23). Griffin's attorney expected his client to take a plea and therefore admitted that he did not contact any potential alibi witnesses in preparation for trial. In addition, the court in *Griffin* found that there was no strategic justification for this total failure to prepare a defense. *Griffin*, 970 F.2d at 1356-59.

[4] Syed cites the American Bar Association Standard of Criminal Justice for the proposition that trial counsel must conduct a sufficient investigation of the case. (Appellant's Brief at 15). On the record before the post-conviction court, there is no doubt that Gutierrez more than satisfied this requirement. Also, the Maryland Lawyers' Rules of Professional Conduct forbid counsel from knowingly presenting to the court false facts or evidence. Md. Rule Prof. Resp. 3.3. *See Lloyd*, 48 Md. App. at 541 (recognizing that it is improper for defense counsel to call alibi witnesses when the attorney knows or is convinced that these witnesses will offer perjured testimony).

Comment [A130]: Cut this phrase.

Comment [A131]: When you have two complex sentences, the last thing you want to do is to join them with a semicolon and "accordingly." Start a new sentence here instead: "A library visit would have thus been a conspicuous departure from ."

Comment [A132]: Starting a sentence with "Also" is too slangy. Change to "Nor at any point did Syed tell."

Comment [A133]: Insert "had."

Comment [A134]: Change to "had gone."

Comment [A135]: Throughout the brief, the State makes good use of parentheticals.

Comment [A136]: A throwaway line like this is rarely persuasive without a summary of what the "misplaced reliance" was purported to prove. The judges are not going to remember why Adnan cited *Griffith v. Warden*.

Comment [A137]: Change to "had not contacted."

Comment [A138]: Although the level of diction in this brief veers toward the stiff end of the spectrum, starting sentences with "Also" goes too far in the other direction. It's nonstandard.

Comment [A139]: Here's another concise and effective parenthetical.

By contrast, here, there was ample evidence of proactive pursuit of an alibi defense, and there were serious risks to expanding that defense to include an unpredictable and potentially contradictory witness. Put simply, Gutierrez's team assiduously developed 80 alibi witnesses that would conform to the account provided by Syed to police. To demand that a skilled and seasoned trial attorney like Christina Gutierrez abandon — or risk compromising — one alibi strategy to chase after another is inconsistent with the constitutional guarantee of effective counsel.

B. Syed also failed to establish prejudice.

1. Syed's claim of ineffective assistance fails as a matter of law because Syed did not produce the supposed alibi witness at the post-conviction hearing.

Syed failed to produce McClain, the purported alibi witness, at the post-conviction hearing in support of his claim for a new trial. Rather, he attempted to prove his case by McClain's two vague letters and by an "affidavit to Chaudry" that was over a dozen years old (Appellant's Brief at 24).[5] As the State argued below, Syed's evidence was in a form incapable of being tested for reliability. (T. 10/11/12 at 11-12, 58-60; T. 10/25/12 at 119-20). In fact, particularly with respect to McClain's purported "credibility," (Appellant's Brief at 20-21), Syed's claim rests on nothing other than bald and speculative assertions.

The Court of Appeals has held that "a failure to call witnesses will only constitute a ground for post conviction relief where the petitioner produces the alleged witnesses in support of his claim that the denial was prejudicial to his right to a fair trial." *Veney v. Warden*, 259 Md. 437, 450-51 (1970); *see also State v. Mahoney*, 16 Md. App. 193, 207 (1972) (recognizing that failure to present testimony of purported alibi witnesses at post-conviction hearing reduced the claim of prejudice to a mere "bald assertion"); *White v. Warden*, 1 Md. App. 670, 674 (1967) ("Failure of counsel to call witnesses may under some circumstances be a ground for

[5] Syed stated that McClain "evaded service in Oregon. We could not produce her." (T. 10/25/12 at 106).

Comment [A140]: Cut this comma.

Comment [A141]: This point is one of the State's strongest, and it makes the point very well.

Comment [A142]: Another needless adverb. Something simpler like "managed to find" would keep the attention on 80, where it belongs.

Comment [A143]: Change to "Syed provided."

Comment [A144]: Great sentence, but start with "Demanding" rather than "To demand," because only a noun can be "inconsistent with" a guarantee.

Comment [A145]: Just cut this phrase. It rarely if ever adds anything.

Comment [A146]: "Rather," which is overused in general, makes no sense here. Perhaps "He attempted to prove his case instead."

Comment [A147]: Change to "through" here and later in the sentence.

Comment [A148]: The transition is abrupt here. The reader is expecting something about Syed's assertions.

Comment [A149]: Note to the Maryland Court of Appeals: move "only" to after "relief"!

post-conviction relief, but as the applicant was unable to produce the alleged witness, the claim has not been supported and must be denied."). By failing to produce McClain at the post-conviction hearing, there was no showing that her testimony would have been helpful to the defense. Thus, Syed failed, as a matter of law, to prove that any failure by Gutierrez to investigate or call McClain as a witness prejudiced his right to a fair trial. The analysis of Syed's ineffective assistance of counsel claim should end here. *Strickland*, 466 U.S. at 697 ("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.").

The cases cited by Syed do not compel a contrary result. Indeed, the relevant cases upon which Syed relies support the proposition that, in order to be entitled to post-conviction relief based on trial counsel's failure to investigate alibi witnesses, the defendant must produce the witnesses at an evidentiary hearing before he can prove that he was prejudiced by their absence.[6] *See generally Griffin*, 970 F.2d at 1357 (defendant's purported alibi witnesses testified at state post-conviction hearing); *Grooms v. Solem*, 923 F.2d 88, 89-90 (8th Cir. 1991) (defendant's purported alibi witnesses testified at state post-conviction hearing); *Tosh v. Lockhart*, 879 F.2d 412, 413-14 (8th Cir. 1989) (defendant's purported alibi witnesses testified at federal evidentiary hearing); *Johns v. Perini*, 462 F.2d 1308, 1311 (6th Cir. 1972) (records corroborating defendant's purported alibi presented at federal evidentiary hearing); *Montgomery v. Peterson*, 846 F.2d 407, 409 (7th Cir. 1988) (in state post-conviction proceedings, defendant introduced trial transcript of purported alibi witness's testimony); *Code v. Montgomery*, 799 F.2d 1481, 1482 (11th Cir. 1986)

Comment [A150]: "There" didn't do the failing. Nor do I understand how failing to produce Asia McClain in itself would be "no showing." Does the State mean that "By failing to produce McClain at the hearing, Syed appears to have conceded that her testimony would not have helped the defense"?

Comment [A151]: "Syed thus failed to prove."

Comment [A152]: Simpler and better: "suggest otherwise."

Comment [A153]: This sounds stilted—"he relies on" is better. Does the State think that you're not allowed to end ANYTHING with a preposition? Not even a midsentence phrase?

Comment [A154]: Excellent way to shoot down a line of cases. See "One Fell Swoop" in my *Point Made*.

---

[6] *In re Parris W.*, 363 Md. 717 (2001) is inapposite for two reasons. First, the defense attorney admitted that he had failed to subpoena witnesses for the correct date in the juvenile proceeding. Second, because the parties disagreed on whether post-conviction relief was available in the context of juvenile proceedings, and because the court found that the critical facts were not in dispute, the Court of Appeals permitted resolution of the issue on direct appeal; this represent a rare exception to the rule that ineffectiveness claims are resolved in post-conviction proceedings. Because this is a post-conviction appeal, *Veney* controls.

(defendant's purported alibi witnesses testified at federal evidentiary hearing). Having failed to do this, Syed failed to meet his burden of proof as to this claim.[7]

2. Nor can Syed establish prejudice where the State presented overwhelming evidence in support of the jury's verdict.

Even assuming *arguendo* that Syed met his burden of production with respect to the first prong of *Strickland*, his claim would still fail. The State did not present single threads of evidence to be judged one by one, but stitched together a durable fabric that could not be unraveled by a single stray witness. In fact, witnesses called by the State sometimes presented testimony that did not fit neatly into the State's timeline. Deborah Warren, for instance, told the jury that she saw the victim at about 3 p.m. near the high school gym. (T. 2/16/00 at 303). Syed's father testified on behalf of the defense that he and his son drove to their mosque at approximately 7:30 p.m., around the time when Syed and Wilds were at the gravesite at Leakin Park and were about to leave to dispose of Lee's car.

Even if Asia McClain had testified the way Syed and his family imagined she would, under the weight of crushing evidence presented by the State, Syed cannot credibly assert prejudice.[8] Juries are expected during deliberations to wrestle with and ultimately reconcile the

---

[7] Attached to Syed's supplement to application for leave to appeal is a statement signed by McClain on January 13, 2015, "under penalty of perjury," that contains troubling accusations. McClain also states a willingness to testify. McClain's January 13, 2015, affidavit obviously was not part of the proceedings below and should not be considered in this appeal. Nor should this case be remanded because of McClain's new affidavit.

[8] The school day ended at Woodlawn High School at 2:15 p.m. on January 13, 1999. Syed's cell phone records for that day show two incoming calls from unidentified numbers at 2:36 p.m. (5 seconds long) and 3:15 p.m. (20 seconds long). At Syed's trial, prosecutors posited that the 2:36 p.m. entry corresponded to Syed's call to Wilds from the Best Buy store on Security Blvd., suggesting that the murder took place between 2:15 p.m. and 2:36 p.m. Asia McClain's affidavit from March 2000, prepared shortly after Syed was convicted on this timeline, avers that Syed was with her at the public library until 2:40 p.m., when she left. Accordingly, Syed claims that McClain's testimony would have been especially relevant to his alibi defense.

(continued...)

Comment [A155]: The State does a nice job of using descriptive phrases in these parentheticals, rather than the more familiar kind beginning with a present participle.

Comment [A156]: The State is referring to a verb—"produce"—so it needs "so," not "this."

Comment [A157]: Change to "if."

Comment [A158]: Add "had."

Comment [A159]: I like the imagery a lot, but this passage would be even more effective as two sentences, the first ending with "one by one," the second beginning "Instead, it stitched."

Comment [A160]: Change to "as."

Comment [A161]: The State generally uses footnotes very effectively, but here the analysis in the footnote is too important to be relegated there. The main statement is bold, suggesting as it does that as long as the prosecution puts forth a lot of evidence, prejudice is impossible. To be credible, that statement needed the nuances that are now in the footnote.

Comment [A162]: You don't "state a willingness."

tensions that inexorably arise in the course of a trial. In complex criminal cases that unfold in the real world and are tried before real juries, these kinds of gaps and inconsistencies do not undermine the integrity and veracity of the jury's verdict.

II.

FAILING TO SEEK A PLEA WHERE NONE HAS BEEN OFFERED DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

Syed also challenges the post-conviction court's denial of his claim that Guterriez failed to request a plea offer as he had instructed her to. (Appellant's Brief at 24-30). He argues that, upon his purported request to seek a plea offer, Gutierrez was constitutionally obligated to engage the prosecution in plea negotiations, and her failure to do so cost him the opportunity to choose between pleading guilty and going to trial. (*Id.*).

This Court should not extend for the first time the constitutional right to effective assistance of counsel to a defense attorney's judgment of whether to seek from the State a plea offer, particularly where the State did not offer a plea, nor is there any reason to think it would have. First, it would be odd to establish a constitutional obligation for a defense attorney to ask the State to extend a plea where the opposing party (*i.e.*, the State) has no corresponding

Comment [A163]: Change to "during."

Comment [A164]: Add "that" before "are."

Comment [A165]: Add "that."

Comment [A166]: Always compelling, especially on appeal.

(...continued)

The problem with this logic is that the State could have worked off the (also tenable) assumption that it was the 20-second 3:15 p.m. call, not the earlier 2:36 p.m. entry, that corresponded to Syed's call to Wilds to come meet him. In other words, had McClain testified that she and Syed were sending emails or talking to one another at the Woodlawn library until 2:40 p.m., that would have presented a relevant alibi on only one of two possible timelines that the State could have argued to the jury. Both calls were short and originated from an unspecified number; either of them could have been presented by the State as the key communication from Syed to Wilds; and neither timeline was more or less consistent with the remainder of the State's case. To be clear, the point is not that the State's asserted timeline was flawed, but only that Syed overstates the significance of Asia McClain. At most, McClain would have, like Warren and Syed's father, added a modest wrinkle to the possible timelines of the crime. This too underscores why Syed has not established prejudice as a result of the alleged failure to pursue Asia McClain.

obligation to extend that offer. Second, for a court to enforce such a right and fashion a remedy would require the court to pile speculation upon speculation in order to determine what offer the State may have made, what offer the defendant may have accepted, and how those negotiations would have unfolded during the pendency of a criminal case. In addition, the facts of this case illustrate why Syed's argument, if accepted, would yield an unworkable precedent. As the post-conviction court found, Syed failed to establish that he desired a plea or that he affirmatively requested his attorney to ask for one. Syed also failed to establish that the State, charged with prosecuting the ruthless murder of a young girl where the State possessed overwhelming evidence, would have contemplated offering Syed any plea at all. Finally, even if this Court accepts that Syed asked Gutierrez to request a plea, Syed has failed to prove prejudice since there is no evidence that Syed was prepared to accept any deal that the State might have been willing to extend.

Comment [A167]: In theory, "the pendency of," like many "of" phrases, is unnecessary, but here it seems to add some helpful emphasis.

Comment [A168]: A strong sentence built on what . . what . . . how.

Comment [A169]: Change to "show."

Comment [A170]: "Where" doesn't work here, and it almost suggests that the State is about to tell us "where" the ruthless murder took place. Try "in the face of overwhelming evidence."

Comment [A171]: "Since" is better for time. This might have been a good place for a colon after "prejudice."

A. Failure to seek a plea offer from prosecutors when none has been offered is not a cognizable constitutional claim under the Sixth Amendment.

The Supreme Court has never recognized a defendant's right to a plea and the jurisprudence concerning plea negotiations manifestly does not support Syed's claim to ineffective counsel on this basis. In *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, 132 S. Ct. 1399 (2012), the Court recognized a right to effective counsel in the context of plea bargaining, but did not contemplate creating a duty to seek a plea when none has been offered.

Comment [A172]: Put a comma here. And why the shift in subject to "jurisprudence"? Aren't we still talking about the Supreme Court and what it has or has not held?

Comment [A173]: No comma in a compound predicate.

Under the Supreme Court's reasoning, it is the prosecution's act of extending the formal plea offer that triggers the corresponding obligation for defense counsel to act in accordance with the Constitution. *See Frye*, 132 S. Ct. at 1408 (holding only that defense counsel has constitutional duty to communicate to defendant formal offers from prosecutors). The formal plea offer is the critical benchmark because "there is no constitutional right to a plea bargain; the prosecutor need not do so if [he or she] prefers to go to trial." *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). In other words, whether the defendant gets a "choice" to plead guilty in exchange for a reduced sentence or criminal charge is at the sole discretion of the prosecution

because defendants have "'no right to be offered a plea." *Lafler*, 132 S. Ct. at 1387 (quoting *Frye*, 132 S. Ct. at 1410). Thus, "[i]f no plea offer is made," the issue of whether counsel was ineffective with respect to plea negotiations "simply does not arise." *Id.*; *see also Williams v. State*, 326 Md. 367, 378 (1992) ("A trial attorney performs deficiently when he or she does not disclose to the client that the State has made a plea offer."). It follows that the failure to pursue a plea bargain, by itself, is not enough to engage the ineffective assistance of counsel test. Indeed, this must be the case because, in the absence of formalized plea terms, it is difficult to fashion an appropriate remedy for the purported constitutional violation. *Cf. Lafler*, 132 S. Ct. at 1389 (describing remedial alternatives that apply where ineffective assistance of counsel results in the nonacceptance of a formal plea offer, both of which are defined by the offer's terms).

B. Syed failed to prove that Gutierrez acted deficiently or that plea negotiations were viable for either Syed or the State.

Syed's contention that Gutierrez acted deficiently by reporting to him that the State was not offering him a plea deal is unavailing. (*See* Appellant's Brief). The only evidence supporting this claim is Syed's own, self-serving post-conviction testimony, which the post-conviction court did not credit. (App. 15-16). Moreover, if Gutierrez reported to Syed that the State was not offering him a plea deal, that information was accurate. Based on the evidence presented at the post-conviction hearing, entering a guilty plea was not an option for Syed, regardless of whether Gutierrez affirmatively pursued that option on his behalf. Syed committed to proceed to trial and seek an acquittal, and he in fact never deviated from that position, maintaining his innocence even after he was convicted. (App. 16) ("In fact, Petitioner's own statements at sentencing indicate the contrary; that Petitioner intended to maintain his innocence throughout.") The post-conviction testimony of Syed's mother is perhaps the best evidence of this — clearly Gutierrez was hired and paid substantial sums to obtain an acquittal, not a guilty plea. (T. 10/11/12 at 83-100).

Even assuming Syed raised a cognizable ineffective assistance of counsel claim, he still failed to establish that Gutierrez acted deficiently in the context of his case. The post-conviction

Comment [A174]: Ideally, this phrase would be hyphenated as a compound modifier, but I rarely see hyphenation in these instances.

Comment [A175]: Throughout the brief, "this" is used to refer vaguely to some previous point. It's not clear here, for example, what exactly "this" refers to.

Comment [A176]: No comma here. Hint: if you couldn't insert "and" between two adjectives, don't use a comma.

Comment [A177]: Avoid using a dash to splice together two independent clauses (things that could have been complete sentences on their own).

Comment [A178]: Change to "if Syed had"

court found that Syed failed to show that the prosecution ever considered extending a plea offer in the case. (App. 15) ("In fact, Petitioner has provided no convincing evidence that a plea offer was even contemplated or discussed by the State."). The post-conviction court also found that Syed failed to sustain his burden of proof that he would have agreed to enter a guilty plea. (App. 16). Both of these critical findings of fact are fully supported by the record and are not clearly erroneous.

In light of these facts, any attempt by trial counsel to engage the prosecution in plea negotiations certainly would have been a futile, if not counterproductive, effort. As one court has stated, "[l]awyers must take clients as they find them, and the client who persists in his protestation of innocence would scarcely welcome advice from his champion that would assure his incarceration. Put another way, it stretches common sense to impose on a lawyer the affirmative duty to canvass options which the lawyer knows are directly contrary to the client's wishes." *United States v. Gordon*, 979 F.Supp. 337, 341 (E.D. Pa. 1997). To be sure, defense counsel is not compelled to engage an unwilling prosecutor in plea negotiations solely for the purpose of reporting to a client unwilling to enter a guilty plea that no plea offer is forthcoming. Here, in light of Syed's protestations of innocence and his desire to be vindicated at trial, Gutierrez had valid reasons not to engage the prosecution in plea negotiations. *See, e.g.*, *Strickland*, 466 U.S. at 688-89 (emphasizing that Petitioner bears the burden of proving deficient conduct and reviewing court must give substantial deference to counsel's strategic decisions).

The cases Syed cites to support his assertion of deficient conduct pre-date *Lafler* and *Frye*, the two Supreme Court decisions that clarified the constitutional obligations of counsel in this context, and generally do not support his claim for relief. *See Newman v. Vasbinder*, 259 F. App'x 851, 854 (6th Cir. 2008) (unpublished) ("We will not hold that an attorney rendered constitutionally deficient assistance because she did not seek a plea agreement that she reasonably believed the prosecutor would reject, and that could not be reconciled with her client's version of the facts of the offense."); *Freund v. Butterworth*, 165 F.3d 839, 880 (11th Cir. 1999) (proposition upon which Petitioner relies is from dissenting opinion where majority found

Comment [A179]: These "double trouble" constructions are often more trouble than they're worth. "Effort" here is superfluous, for example, and the State could have simply written that the attempt "would have been futile, if not counterproductive."

Comment [A180]: I'm somewhat surprised that the only authority cited for this generic point is a 1997 federal case from another state.

Comment [A181]: Nice concession transition.

Comment [A182]: The form of this parenthetical is different from the following ones, making the line of cases hard to track. Either open all of these with participles like "finding" or switch the start of this one to "ineffective assistance," like the others.

no ineffective assistance of counsel); *Mason v. Balcom*, 531 F.2d 717, 725 (5th Cir. 1976) (ineffective assistance found on "assembly-line nature" of representation, not failure to pursue plea negotiations); *Martin v. Rose*, 717 F.2d 295, 296 (6th Cir. 1983) (ineffective assistance premised principally on total failure of counsel to mount a defense as opposed to the failure to pursue plea negotiations); *Cole v. Slayton*, 378 F.Supp. 364, 368 (W.D. Va. 1974) (same).

Syed does not suggest, nor could he, that Gutierrez's representation was a complete failure, and, indeed, the record establishes the opposite. Syed's case was tried twice. At a pretrial hearing on January 10, 2000, the defense, with Syed present, specifically informed the court that, based on interviews of jurors following the first trial, the defense was confident in its case and ready to begin a second trial. (T. 1/10/00 at 33). Gutierrez thereafter presented a forceful defense to the State's case in a trial that lasted six weeks. What the record shows is that Syed was satisfied with Gutierrez's services until the jury returned an adverse verdict at the second trial, and then he waited ten years to claim that she was ineffective for failing to pursue a plea offer at his request. Because no deficient act was proven, the post-conviction court properly denied relief on this claim.

Comment [A183]: Don't overpromise. The "opposite" would be a "complete success." But he was convicted!

Comment [A184]: Perhaps the State could have made more of this timeline.

C. Syed failed to establish that this alleged ineffective counsel claim prejudiced the outcome of his criminal proceedings.

Syed failed to establish prejudice because he made no showing that the State would have considered a plea, nor was he entitled to one. As the Supreme Court stated In *Frye*,

> [t]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Comment [A185]: This is a long and dull-looking block quote, and it needs to be introduced with some substance linking the language to the broad statement in the previous sentence.

Frye, 132 S. Ct. 1409 (citation omitted).

It is undisputed in this case that the State never extended a plea offer to Syed. (*See, e.g.*, T. 10/25/12 at 108-09, 126). It is also undisputed that the State never considered extending a plea offer to Syed. (*Id.*). There is therefore no evidence regarding a specific charge or sentence that Syed would have been offered or accepted. As a result, Syed failed to establish that, but for a deficient act by his trial counsel, his case would have ended in a plea to a lesser charge or a sentence of less prison time. *See, e.g.*, *Aguilar v. Alexander*, 125 F.3d 815, 820-21 (9th Cir. 1997) (explaining that counsel was not deficient for failing to not further pursue a plea offer where there was no evidence that additional efforts would have resulted in the prosecution extending an offer).

Furthermore, there is also no proof that Syed would have entertained a plea offer that required him to serve time in prison. To the contrary, the post-conviction court, which observed Syed's testimony, found as fact that, at the time of trial, Syed was only interested in pursuing a full acquittal. (App. 15-16). This finding is not only consistent with the manner in which the case was defended, but also by Syed's own words. Syed cited Gutierrez's belief in his innocence when he personally urged the court to deny the State's motion to disqualify counsel. (Apx. 1). Even after being convicted, he reaffirmed his innocence:

> Yes. Since the beginning I have maintained my innocence, and I don't know why people have said the things that they have said that I have done or that they have done. . . . I have maintained my innocence from the beginning, and to my family and to those who have believed in me since the beginning, I would just like to let them know it is for a reason.

(T. 6/6/00 at 15-16). Under the record before the post-conviction court, Syed's claim that he would have considered a plea offer in the case was not credible.[9]

---

[9] Even if credible, Syed's testimony falls short of establishing a reasonable probability that he would have entered a guilty plea. In his post-conviction testimony, Syed only vaguely suggested he would have considered a plea offer that carried a sentence of "20 or 30 years" of (continued...)

Comment [A186]: Reflecting?

Comment [A187]: This phrase is tough going. Maybe "not deficient merely because it failed to continue pursuing."

Comment [A188]: Better: "Nor is there proof."

Comment [A189]: This should be "interested only."

Comment [A190]: In general, "the manner in which" is better reduced to "how."

Comment [A191]: This is a classic "not only . . . but (also)" parallelism glitch, and "by" makes no sense with "consistent" (something isn't "consistent by" something). "The finding is consistent NOT ONLY with how the case was defended BUT ALSO with Syed's own words."

Comment [A192]: Nice lead-in here.

D. Syed's "presumed prejudice" claim is unpreserved and meritless.

For the first time, Syed argues that this scenario warrants a "presumption of prejudice," a standard contrary to that articulated by *Strickland*. (*Id.*).[10] Syed's claim, that his ineffective assistance of counsel claim fits within the small class of cases for which prejudiced is presumed, (Appellant's Brief at 24-30), was not raised before the post-conviction court. Nor was it raised in Syed's application for leave to appeal, which was granted by this Court. Because the argument was not raised below or in Syed's application for leave to appeal, the argument is not preserved for appellate review. *See, e.g.*, *White v. State*, 324 Md. 626, 640 (1991) (argument not made to trial court is not properly before appellate court) (citing Md. Rule 8-131(a)).[11]

This argument fails in any event. None of the cases cited by Syed support the argument that defense counsel is ineffective per se by not engaging the prosecution in plea negotiations.

---

[9](...continued)
which he would only have to serve half; he also has made clear that he would not have considered an offer that included a term of life in prison. (T. 10/25/12 at 47-48). Syed has never indicated that that he would have made a full confession to murdering Hae Min Lee, a precondition that the State and the victim's family would likely have insisted upon in a case like this. (*Id.*). Syed also testified that he followed Gutierrez's advice, and there is no evidence that she would have advised him to enter a guilty plea.

It should also be noted that, if Syed only desired a 20- or 30-year plea offer, imposing a constitutional requirement that his counsel be the first to act in the context of what can be subtle, delicate bargaining is a mistake. A defense attorney retained to take cases to trial could reasonably decide that the only hope for a client to secure a 30-year-sentence is to allow the State to make the first offer. Those are the sort of tactical judgments properly vested to the wisdom of counsel.

[10] He also claims that he is entitled to relief under *Strickland* in any event. To the extent these arguments are preserved, they should be rejected.

[11] This argument is vaguely presented in Syed's supplement to his application for leave to appeal. Syed's motion for leave to file that supplement remains pending in this Court, but, regardless of how this Court rules on his motion, the argument is unpreserved. Although this Court may conclude that a lower court is right for a reason not argued below, it generally may not conclude that the lower court is wrong for a reason not argued below.

Comment [A193]: By now we've forgotten what *Strickland* is, and the phrase is otherwise awkward, in part because cases don't really "articulate" standards. Perhaps ", which is not the standard the Supreme Court set forth in *Strickland*."

Comment [A194]: A long phrase like this generally works better set off with dashes than with commas.

Comment [A195]: Better: "Syed cites." I don't harp on the passive voice as much as some do, but the State really could use more active voice throughout.

Comment [A196]: Change to "desired only."

In fact, as discussed, *supra*, the Supreme Court held in *Lafler*, 132 S. Ct. 1376, and *Frye*, 132 S. Ct. 1399, that the *Strickland* standard applies to claims of ineffective assistance of counsel with respect to plea negotiations. Furthermore, Syed's claim is dependent on there being credible evidence that he asked Gutierrez to seek a plea offer from the State, that she failed to do so, and that she lied to him when she stated she did. The post-conviction court, however, did not credit even the first of these assumptions. (App. 16) ("In fact, Petitioner's own statements at sentencing indicate the contrary; that Petitioner intended to maintain his innocence throughout."). Not only was there no credible evidence before the post-conviction court that Syed asked Gutierrez to seek a plea offer, there was no credible evidence that Gutierrez lied to Syed in the manner he alleges. Thus, even if preserved, Syed's presumptive prejudice argument should be rejected.[12]

Ultimately, there is no proof that Syed and the State could have reached a tenable plea agreement. The understanding of all parties to the case — the prosecution, the defense, Syed and the family of Hae Min Lee — make clear that this was a case to be tried, not pled. Proceeding to trial was the choice Syed wanted. For these reasons, Syed failed to establish *Strickland* prejudice.

Enshrined in the Constitution is a guarantee that every criminal defendant will have effective representation. The importance of this bedrock commitment to the fairness of the criminal justice system cannot be overstated. But that safeguard is not an invitation to second guess tactical decisions and trial strategy, nor does it give license to smear the reputation of defense attorneys from the comfortable perch of history and hindsight. The promise of the

Comment [A197]: No comma before *supra*, but in any event just use "above."

Comment [A198]: I'd scrap "there being" and replace it with something like "Syed's claim requires credible evidence."

Comment [A199]: Simple past doesn't work here: "when she stated she had."

Comment [A200]: Move "however" to the end of the sentence. It's not the court that's being contrasted here, but the court's findings with Syed's burden.

Comment [A201]: Insert "but" here to complete the "Not only . . . but" construction.

Comment [A202]: To me this doesn't sound credible coming from the State, as if its concern here is that the defendant is defaming his lawyer.

---

[12] Syed alludes to a polygraph examination that he sought to introduce into evidence to support his assertion that he asked Gutierrez to seek a plea offer. (Appellant's Brief at 27). The post-conviction court denied admission of the polygraph examination, and Syed did not challenge this ruling in his application for leave to appeal. The results of the inadmissible polygraph examination were not part of the proceedings below and do not have any bearing on the current appeal.

Sixth Amendment is sacrosanct, and there are no doubt defendants who are deprived of it. Adnan Syed, however, is not among them.

Comment [A203]: A highly effective closing line.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the judgment of the Circuit Court for Baltimore City be affirmed.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

THIRUVENDRAN VIGNARAJAH
Deputy Attorney General

EDWARD J. KELLEY
Assistant Attorney General

Counsel for Appellee

KELLEYE\Syed.Adnan.appeal.2319.2013.FINAL.MAY5.POSTREVIEW.wpd
Garamond13 point

PERTINENT PROVISIONS

United States Constitution, Amendment VI - Right to speedy trial, witnesses, etc.

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

Rule 3.3. Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
(e) Notwithstanding paragraphs (a) through (d), a lawyer for an accused in a criminal case need not disclose that the accused intends to testify falsely or has testified falsely if the lawyer reasonably believes that the disclosure would jeopardize any constitutional right of the accused.

(2011)

Rule 8-131. Scope of review.

(a) *Generally.* The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will

not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

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

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

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

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

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

(2012)

ADNAN SYED,	*	IN THE
Appellant	*	COURT OF SPECIAL APPEALS
v.	*	OF MARYLAND
STATE OF MARYLAND,	*	September Term, 2013
Appellee	*	No. 2519

* * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of May, 2015, three copies of the Brief and Appendix of Appellee were mailed, first-class, postage pre-paid, to C. Justin Brown, Esquire, Law Office of C. Justin Brown, 231 East Baltimore Street, Suite 1102, Baltimore, Maryland 21202.

EDWARD J. KELLEY
Assistant Attorney General

Office of the Attorney General
Criminal Appeals Division
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-7964

Counsel for Appellee