IN THE CIRCUIT COURT
FOR BALTIMORE CITY, MARYLAND

ADNAN SYED, Petitioner,	*	
v.	*	Case Nos. 199103042-46 Post Conviction No. 10432
STATE OF MARYLAND, Respondent	*	

* * * * *

APPLICATION FOR LEAVE TO APPEAL THE DENIAL OF POST-CONVICTION RELIEF

Petitioner Adnan Syed, by and through his attorney, C. Justin Brown, pursuant to Md. Code Ann., Crim. Pro. § 7-109, and Maryland Rule 8-204, hereby submits this Application for Leave to Appeal from the Denial of Post-Conviction Relief. It is in the interest of justice that this application be granted.

I. INTRODUCTION

By this Application, the Petitioner respectfully asks this Court to reconsider two issues that were erroneously denied by the Circuit Court:

1. Whether it was ineffective assistance of trial counsel to ignore and fail to investigate a credible alibi witness who had stated, prior to trial, that she was with Petitioner at approximately the same time as the murder occurred; and

2. Whether trial counsel was ineffective for telling her client she had fulfilled his wish and approached the State about a plea offer, when in fact trial counsel never spoke to the State about a potential plea deal.

160

II. PROCEDURAL HISTORY

Syed was convicted by a jury in the Circuit Court for Baltimore City on February 25, 2000, for first-degree murder, robbery, kidnapping and false imprisonment.[1] He was represented at trial by Christina Gutierrez.[2] Judge Wanda Heard sentenced Syed on June 6, 2000, to life in prison for the murder, 30 years (consecutive) for the kidnapping, and 10 years for the robbery (concurrent to the kidnapping and consecutive to the murder).

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

> 1. Whether the State committed prosecutorial misconduct, violated *Brady*, and violated Appellant's Due Process rights when it (1) suppressed favorable, material evidence of an oral side agreement with its key witness, and (2) when it introduced false and misleading evidence;
> 2. Whether the trial court committed reversible error in prohibiting Appellant from presenting evidence to the jury;
> 3. Whether the trial court erred in admitting hearsay in the form of a letter from the victim to the Appellant, which was highly prejudicial; and
> 4. Whether the trial court erred in permitting the introduction of the victim's diary, which constituted irrelevant prejudicial hearsay.

Syed then filed a timely Petition for post-conviction relief, and Supplement, in the Circuit Court for Baltimore City, raising the following allegations:

1. Trial counsel failed to establish a timeline that would have disproved the State's theory and would have shown that Petitioner could not have committed the offense in the manner described by the State's key witness, Jay Wilds;

---

[1] Syed's first trial, before Judge William D. Quarles, resulted in a mistrial.
[2] Gutierrez died years before this post-conviction petition was filed.

161

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

3. Trial counsel failed to move for a new trial based on the statements of Asia McClain;

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

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

6. Trial counsel failed to inform Petitioner of his right to request a change of venue;

7. Trial counsel failed to adequately investigate State witness Jay Wilds;

8. Appellate counsel failed to raise an issue challenging the impermissible testimony of the State's expert witness related to cell tower technology;

9. Sentencing counsel failed to request that the Court hold Petitioner's Motion for Modification of Sentence in abeyance;

10. Cumulative ineffective assistance of counsel.

Baltimore City Circuit Court Judge Martin Welch conducted a hearing on October 11, 2012, and October 25, 2012. Judge Welch issued an opinion denying the post-conviction Petition on December 30, 2013.

This Application for Leave to Appeal is timely filed, less than 30 days after the issuance of the Order denying the Petition.

III. STATEMENT OF FACTS

The murder of Hae Min Lee, a Woodlawn High School student who disappeared on January 13, 1999, initially confounded investigators. There were no witnesses. There was no forensic evidence of any significance. The body was not found until nearly a month later, in Leakin Park, Baltimore.

As the police investigated, they initially focused on Jay Wilds, a fellow Woodlawn student. Upon being called in for questioning, Wilds told police numerous different stories, alternately inculpating and exculpating himself. Eventually, Wilds settled on a final version of his story – the story that would lead to murder charges against Syed.

In Wilds' story, Syed and Wilds went to the mall together the morning of January 13, 1999. Afterwards, Syed lent Wilds his car on the condition that Wilds dropped Syed off at school. Wilds also said Syed lent him is cellular phone, so Syed could call Wilds when he needed a ride. Some time in the early afternoon, according to the State's theory, Syed convinced Lee, the victim, to give him a ride. Then, according to the State, Syed and Lee drove to the parking lot of the nearby Best Buy, where Syed allegedly strangled her. There were no witnesses to the alleged crime, even though it supposedly took place in an open, public parking lot. Wilds claimed that, right after the murder, Syed called him from a pay phone at the Best Buy parking lot. Based on the State's arguments, and phone records, that call had to have taken place at 2:36 p.m.

Wilds claimed that, after receiving the call from Syed, he drove to meet Syed at the Best Buy parking lot. Syed, wearing bright red gloves, allegedly showed Wilds Lee's body in the trunk of her car. Syed allegedly drove away in Lee's car, and Wilds followed. Later that night, Wilds claimed, he and Syed went to Leakin Park and buried the body (although Wilds claimed he did not actively participate). The body was discovered on February 9, 1999, by Alonzo Sellers, who randomly stumbled upon it.

What did not come out at trial, however, was the testimony of witnesses who were with Syed around the time when the murder allegedly took place. The most important witness, Asia McClain, also a student at Woodlawn, had a conversation with Syed lasting until 2:40 p.m. in the library adjacent to the school campus. Despite a willingness to testify, and her ability to provide a complete alibi, she was never contacted by defense attorney Christina Gutierrez.

IV. POST CONVICTION HEARING

At the Post-Conviction hearing, Petitioner focused on two issues: 1) the failure of trial counsel to investigate and call as a witness Asia McClain; and 2) the failure of trial counsel to seek a plea offer from the State when her client had requested that she do so.

a. Alibi witness Asia McClain.

At the Post-Conviction hearing, Petitioner painstakingly proved the existence of an alibi witness who was never contacted by Syed's attorney, Christina Gutierrez.

To begin with, Syed testified that, shortly after his arrest, while he was detained at the Baltimore City Detention Center, he received two letters from a classmate at Woodlawn named Asia McClain. Although he was not particularly good friends with her, he knew her from some of the honors classes they took together. T. 10/25/12 at 23-24.[3] Those letters were introduced into evidence as Defendant's exhibits 6 and 7.

The letters stated, essentially, that McClain remembered being with Syed in the library adjacent to the school on the afternoon when the murder took place, at approximately the same time as the State theorized the murder took place. In addition, the letters provided a contact number and stated that McClain wanted to meet with Syed's attorney.

Syed testified at the post-conviction hearing that he remembered seeing McClain and her boyfriend at the library that day, and that he had been at the library to send an email. He also said the day was memorable because it was the day before school was cancelled because of snow. *Id.* at 29.

After receiving the letters, Syed testified, he showed them to Gutierrez, and urged her to contact McClain. He also asked Gutierrez to retrieve video footage from the security cameras at the library, and check his email to confirm that he had sent an email around the time he was in the library. *Id.* at 31. The next time he saw

[3] "T." refers to the post-conviction hearing transcript, followed by the date of the hearing, followed by the page numbers to which Petitioner is citing.

165

Gutierrez, she told him she had looked into the encounter with McClain, but nothing came of it. *Id.* at 33.

Syed was able to prove that Gutierrez was aware of Asia McClain by producing notes that were obtained from Gutierrez' case file. The particular note, introduced as Defendant's Exhibit 5, was written by a law clerk for Gutierrez, Ali Pournador, who subsequently authenticated it.[4] The note said "Asia McClain saw him in the library at 3:00. Asia, boyfriend saw him too." *Id.* at 5.

Syed was also able to prove that Gutierrez neither investigated nor spoke with Asia McClain. For this purpose, Syed called Rabia Chaudry, who at the time was a law student and the sister of one of Syed's friends from school. Chaudry testified that she met with Syed just after he was convicted. At that time, Syed told her about Asia McClain, and how Gutierrez had not pursued her. T. 10/11/12 at 44.

Acting on this information, Chaudry called McClain and set up a meeting with her. At the meeting, McClain told Chaudry about her encounter with Syed at the school library the day of the murder, and her willingness to discuss this with Syed's lawyer. At that point, Chaudry asked McClain to write out an affidavit, which she did. They then took the affidavit and had it notarized. The affidavit, entered into evidence as Defendant's Exhibit 2, stated the following:

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

[4] Pournador did not testify at the post-conviction hearing, however, he provided an affidavit regarding his note. The State stipulated to the authenticity of the affidavit.

166

I am 18 years old. I attend college at Catonsville Community College of Baltimore County. In January of 1999, I attended high school at Woodlawn High School. I have known Adnan Syed since my 9th grade freshmen year (at high school). On 01/13/99, I was waiting in the Woodlawn Branch Public Library. I was waiting for a ride from my boyfriend (2:20) when I spotted Mr. Syed and held a 15-20 minute conversation. We talked about his girlfriend and he seemed extremely calm and very caring. He explained to me that he just wanted her to be happy. Soon after my boyfriend (Derrick Banks) and his best friend (Gerrad Johnson) came to pick me up. I spoke to Adnan (briefly) and we left around 2:40. No attorney has ever contacted me about January 13, 1999 and the above information.
--Asia McClain

After obtaining the affidavit, Chaudry testified, she provided a copy to Syed's family. She also helped his family write a letter to Gutierrez urging her to use Asia McClain's statement as a grounds to pursue a motion for a new trial. *Id.* at 68. Gutierrez never responded and never acted upon the affidavit in any way.

At the post-conviction hearing, Syed also called as an expert witness Margaret Meade, who was accepted as "an expert in the practice of criminal defense of murder cases in the Circuit Court for Baltimore City." T. 10/25/12 at 68. Meade testified that, having reviewed case materials, McClain's testimony – and alibi – would have been consistent with the defense case and, at the very least, "there would be no reason" not to interview and investigate McClain. *Id.* at 94.

b. Failure to Obtain a Plea Offer

Syed testified that, as trial approached, and as he waited in the Baltimore City Detention Center, he became curious as to what plea offer he could potentially receive from the State. One of the reasons for this was that other

161

detainees were asking him what his offer was. Another reason was that Syed was concerned about the difficulty of proving exactly where he was at the time of the murder, particularly because Gutierrez had told him nothing came of the Asia McClain lead. T. 10/25/12 at 34.

According to Syed, he asked Gutierrez on multiple occasions to obtain a plea offer. He asked her once before the first trial, to which Gutierrez responded that she would talk to the prosecutor. Gutierrez then went back to Syed and told him "they're not offering you a deal." *Id.* at 37.

After the first trial ended in a mistrial – because the Judge admonished Gutierrez for lying and the jurors overheard him – Syed renewed his request to Gutierrez to seek a plea offer. Again, Gutierrez told Syed that the State would not extend an offer. *Id.*

At the post-conviction hearing, however, it became apparent that Gutierrez had not done what her client had asked her to do. In fact, not only did Gutierrez fail to ask the State for a plea offer, but she falsely reported back to Syed that the State refused to extend an offer. This was proven by the testimony of Kevin Urick, the State's lead prosecutor. Urick testified unequivocally that Gutierrez had never approached him, or his co-counsel, Kathleen Murphy,[5] to seek a plea offer. T. 10/11/12 at 18-19.

For this issue Syed again called his expert witness, Margaret Meade. Meade testified that she was a criminal defense attorney defending murder charges in

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

Baltimore City at the time of Syed's trial. She emphasized the importance of obtaining a plea offer in a case like this, even if the defendant maintained his innocence. T. 10/25/12 at 77.

Meade stated that she represented about 10 to 20 defendants per year who were charged with murder, and that in all of her experience she never encountered an instance in which the State refused to extend a plea offer. *Id.* at 81-82. Moreover, she stated that, if she had been representing Syed at the time, she would have pushed for, and expected, a plea offer in the range of 25 to 30 years. *Id.* at 90. She also stated that, as a matter of practice, a criminal defense attorney must pursue some type of plea bargain.

Syed testified that, in light of the fact that Gutierrez failed to pursue an alibi defense with Asia McClain, he would have accepted a plea of 25 to 30 years. *Id.* at 48.

V. LEGAL ANALYSIS

a. Failure to Investigate and Call Alibi Witness.

The Circuit Court committed reversible error when it denied Syed's post-conviction on the alibi issue. In particular, the Court incorrectly *invented* a reason why it would have been trial strategy for counsel to not investigate the alibi witness, Asia McClain. The Court acknowledged this much in its opinion: "[T]he court can only presume as to the ultimate basis for trial counsel's strategic decisions to forego pursuing Ms. McClain as an alibi witness in Petitioner's case." Circuit Court Opinion at p. 11, n. 6.

The Court went on to parse the two letters McClain wrote to Syed, as he awaited trial, and surmise that somehow the letters were not explicit enough to provide evidence of a "concrete alibi." *Id.* at 11.

This conjecture by the Court is wholeheartedly wrong. The entire trial depended on whether Syed could prove where he was at the time of the murder. Meanwhile, a credible witness –an honors student who had no obvious bias in favor of Syed – had come forward unsolicited with a recollection that she had been with Syed around the time of the murder. The potential witness wrote two credible letters to Syed, in which she specifically requested to speak to Syed's lawyer. Syed then relayed this information to his lawyer – as we know from the notes found in the file – and specifically asked her to interview the witness. Yet the lawyer did absolutely nothing.

It simply lacks credibility for the Court to now invent a strategic reason why the lawyer would not have, at the very least, picked up the phone to call the witness.

The claim of ineffective assistance of counsel for failure to investigate has its roots in *Strickland v. Washington*, 466 U.S. 668 (1984), which specifically addressed trial counsel's failure to investigate mitigation that could have been used at the defendant's sentencing. The *Strickland* court held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691.

Maryland courts have applied *Strickland* to alibi issues like the one presented by Syed. The Court of Appeals has held that failure of counsel to call an alibi witness, or a witness corroborating an alibi witness, may amount to ineffective assistance of counsel. *In re: Parris W.*, 363 Md. 717 (2001). In this case, the Court of Appeals cites approvingly to *Johns v. Perini*, 462 F.2d 1308, 1313 (6th Cir. 1972), which held that "counsel's failure to investigate and present [defendant's] alibi deprived him of his constitutional right to effective assistance of counsel."

In the instant case, the Court must make a genuine effort to determine whether a lawyer in a case like this had a duty to follow up in some manner and investigate the alibi witness. Petitioner concedes that even a phone call would have been enough. But when there is a complete lack of any follow-up to a potentially explosive trial issue, counsel falls below the professional standard of practice. As Margaret Meade, the defense expert witness, testified, "[t]here would be no reason not to find out and send an investigator to talk to this person." T. 10/25/12 at 94.

If the trial attorney, Gutierrez, had taken the time to speak with Asia McClain, she would have found out that McClain was with Syed at precisely the same time as the State theorized the murder took place. Not only would this fact alone have been enough to affect the outcome of the case, but it likely would have led to other corroborating evidence. For example, McClain's boyfriend, Derrick Banks, and his best friend, Gerrad Johnson, could have testified that they also saw

Syed that day. The defense could have subpoenaed the surveillance video from the library and they could have checked Syed's email account to confirm that he sent an email at the time when he went to the library.[6] In short, there was every reason in the world for Gutierrez to follow up and investigate Asia McClain's story; and there was no reason not to.

b. Failure to seek a plea offer.

In denying Syed's claim based on his trial counsel's failure to seek a plea offer, the Circuit Court failed to address the critical question raised by this issue: Whether trial counsel had a duty to seek a plea when her client unequivocally requested that she do so. It is Syed's position that counsel had a duty, and that when counsel falsely reported back to her client that the State would not make an offer, counsel was constitutionally ineffective.

Strickland v. Washington is "applicable to ineffective-assistance claims arising out of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). The Supreme Court has "long recognized that the negotiation of a plea bargain . . . [implicates] the Sixth Amendment right to effective assistance of counsel," *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

There are several ways in which counsel's omissions or mistakes may amount to deficient performance under the first prong of *Strickland*. In cases in which "defense counsel has failed to inform a defendant of a plea offer, or where

---

[6] Syed testified at the post-conviction hearing that he had been at the library that day to check his email.

defense counsel's incompetence results in a defendant's deciding to go to trial rather than pleading guilty, the federal courts have been unanimous in finding that such conduct constitutes a violation of the defendant's Sixth Amendment constitutional right to effective assistance of counsel." *Merzbacher v. Shearin*, 732 F.Supp.2d 527, 528 n.1 (D. Md. 2010), citing *Turner v. Tennessee*, 858 F.2d 1201, 1205-09 (6th Cir. 1988). Under this line of cases, courts have reasoned that failure to convey a plea offer falls below a minimum standard of competence because it deprives a defendant of the fundamental right "to be adequately informed of the risks and advantages" of accepting a plea offer. *United States v. Mohammad*, 999 F. Supp. 1198, 1200 (N.D. Ill. 1998).

Another line of cases has found that an attorney's failure to "explor[e] possible plea negotiations and deals" on the defendant's behalf may fail the first prong of *Strickland* when the particular circumstances of the case and prevailing practice standards show that a reasonably competent attorney would have done so. *Newman v. Vasbinder*, 259 Fed. Appx. 851, 854 (6th Cir. 2008); *see, e.g., Freund v. Butterworth*, 165 F.3d 839, 880 (11th Cir. 1999) ("Exploring possible plea negotiations is an important part of providing adequate representation of a criminal client") (finding ineffective assistance of counsel for failure to pursue plea of not guilty by reason of mental illness); *Mason v. Balcom*, 531 F.2d 717 (5th Cir. 1976) (ineffective assistance in part due to counsel's failure to plea bargain when his client may have benefitted); John W. Hall, Jr., Professional Responsibility of the Criminal Lawyer § 14.2, at 472 (1987) ("If the nature of the

case warrants it, defense counsel should explore plea discussions with the prosecutor").

When an attorney's failure to convey or to pursue a plea offer satisfies the first prong of *Strickland*, a defendant must also demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Redman v. State*, 363 Md. 298 (2001). To satisfy the prejudice prong of *Strickland*, a defendant need not establish that he definitely would have accepted a plea offer; "[a]ll that is required is that the totality of the evidence supports an inference that the outcome 'may well' have been different had he been fully and accurately informed." *Williams v. State*, 326 Md. 367, 379 (1992).

"The test for determining whether a defendant would have accepted a plea offer had he been properly advised of the law by his counsel is an objective one, under which the court considers what a reasonable defendant would have decided to do, had he been given proper advice." *Schroeder v. Renico*, 156 F. Supp. 2d 838, 844 (E.D. Mich. 2001); *see, e.g., Yoswick v. State*, 347 Md. 228, 246 (1997) (evaluating whether a "reasonable defendant ... would have insisted on going to trial" absent counsel's errors).

Courts have looked to various objective factors to make this determination. For example, a defendant's willingness to consider a plea option will support an inference of prejudice. *See, e.g., Turner v. Tennessee*, 858 F.2d 1201, 1206 (6th Cir.1988) (finding that a client's response to a plea offer with a counter-offer

supported a finding of prejudice). Conversely, a defendant's prior refusals to bargain will negate prejudice. *See, e.g., U.S. v. Hall*, 212 F.3d 1016 (7th Cir. 2000) (finding defense counsel was not ineffective in failing to procure plea agreement with Government when defendant did not cooperate and insisted that he not serve jail time).

Courts may also look to facts that indicate the likelihood that a prosecutor would be willing to consider a plea. For example, a prosecutor's stated refusal at the time of trial to consider a plea bargain tends to negate prejudice.[7] *See, e.g.*, *Aguilar v. Alexander*, 125 F.3d 815 (9th Cir. 1997) (Defense counsel's alleged failure to be sufficiently aggressive in pursuing plea negotiations with prosecutor was not ineffective assistance when prosecutor refused to offer anything less than first-degree murder). The strength of the prosecution's case at the time of trial is also relevant to a determination that counsel's failures prejudiced a defendant. *Yoswick v. State*, 347 Md. 228, 247 (1997) (finding that no rational defendant would have proceeded to trial rather than accept a plea given the "overwhelming" evidence against defendant).

In Syed's case, the lack of crucial information regarding his options was far more severe than in the cases cited above. In cases in which the attorneys ultimately failed to convey a plea offer, the attorneys at least made the effort to inform themselves of a client's options. Petitioner's trial counsel, by contrast, did

[7] The lead Assistant State's Attorney prosecuting the case, Kevin Urick, testified that the decision of whether to offer a plea, and under what terms, was not up to him; rather he would have had to ask his supervisors. T. 10/11/12 at 26-27.

not even determine what options were available. As an experienced trial attorney, Gutierrez was presumably familiar with the State's willingness to recommend a reduced sentence in exchange for a guilty plea in first-degree murder cases. Yet she led her client to believe that the State's Attorney had refused any plea option, and allowed him to rely on this belief in making the false 'choice' of going to trial.

Just as a criminal defendant has a well-established right to be informed of any plea offers tendered by the prosecution, "a defendant who expresses an interest in pleading guilty has a similar right to be adequately informed of the risks and advantages of doing so," *United States v. Mohammad*, 999 F. Supp. 1198, 1200 (N.D. Ill. 1998) (finding that "counsel's alleged failure to even ask the government about the possibility of a plea agreement is inexplicable, especially if, as claimed, his client repeatedly inquired on the subject."). Gutierrez could not have apprised Petitioner of these risks and advantages adequately, because she made no effort to discover what advantages might be gained through a plea offer.

Gutierrez' inaction also fails the first prong of *Strickland* because, given the particular circumstances of the case, a reasonably competent attorney would have explored a plea option even without an explicit request from the client. *Newman v. Vasbinder*, 259 Fed. Appx. 851, 854 (6th Cir. 2008). In Syed's case, Gutierrez' meager defense at trial made the risk of a conviction particularly high; Gutierrez offered no affirmative defense and provided no alibi witnesses (particularly not Asia McClain).

The Sixth Circuit has found, in similar circumstances, that "entering the trial without any defense while making no effort to obtain a plea bargain constituted ineffective assistance of counsel." *Martin v. Rose*, 717 F.2d 295, 296 (6th Cir. 1983). In *Martin*, both the District Court and the Sixth Circuit found, contrary to the state courts, that petitioner's counsel was ineffective for failing to investigate possible defenses prior to trial, including "failure to interview witnesses identified by petitioner in order to determine whether they should be called at trial." *Martin*, 717 F.2d at 296. Significantly, the attorney found to have been ineffective in *Martin* did far more to prepare for trial than Gutierrez did in the instant case.[8]

An attorney who reasonably believes that a client has no chance of prevailing at trial may not abstain from efforts to plea bargain simply because their bargaining position is weak:

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

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

---

[8] There, the attorney interviewed at least one individual named as a potential alibi witness, and provided the jury with a written copy of the pre-trial statements. *State v. Martin*, 627 S.W.2d 139, 141 (Tenn. Crim. App. 1981).

171

In Syed's case, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Redman v. State*, 363 Md. 298 (2001). To demonstrate prejudice, Petitioner does not need to establish that he would have received and accepted a plea offer 'but for' counsel's errors. "All that is required is that the totality of the evidence supports an inference that the outcome 'may well' have been different had he been fully and accurately informed." *Williams v. State*, 605 A.2d 103, 109 (Md. 1992).

As the Ninth Circuit has explained, the prejudice caused by counsel's failure to plea bargain is not the loss of "the right to a fair trial or the right to a plea bargain, but the right to participate in the decision as to, and to decide, his own fate—a right also clearly found in Supreme Court law." *Nunes v. Mueller*, 350 F.3d 1045, 1053 (9th Cir. 2003). Gutierrez deprived Petitioner of this right by failing to explore a plea when there was a reasonable possibility that Petitioner would have preferred to accept a plea bargain rather than proceed to trial.

Many of the objective factors courts have used to determine prejudice at the plea bargaining phase under *Strickland* support an inference of prejudice in Syed's case. First, according to the testimony of expert Margaret Meade, the Baltimore City State's Attorney's Office is overwhelmingly receptive to plea bargain agreements in first-degree murder cases.

Due to Gutierrez' failure to act, no specific terms were ever offered in Syed's case. Had Gutierrez approached the prosecution regarding a plea deal, however, she certainly would have received an offer more favorable than the life

sentence that Petitioner risked, and actually received, at his trial. At the very least, a defendant's willingness to plead is an incentive for the State to offer something less than the maximum penalty at stake. *Cole v. Slayton*, 378 F. Supp. 364, 368 (W.D. Va. 1974).

Had Gutierrez satisfied her minimum obligation to seek a plea agreement, as her client requested, there is also sufficient objective evidence that Petitioner may well have accepted a plea arrangement rather than proceed to trial. First, there is evidence of Petitioner's willingness to consider a plea bargain agreement. Petitioner did not insist on going to trial or express a refusal to consider a plea, factors that courts have relied on to excuse an attorney's failure to pursue a plea bargain. *See, e.g., U.S. v. Huddy*, 184 Fed. Appx. 765 (10th Cir. 2006) (finding defense counsel's failure to initiate plea negotiations not deficient, as element of ineffective assistance of counsel claim, when defendant had forcefully told her attorney she was not interested in any plea negotiations, and claimed she wanted an attorney who would take her case to trial).

The risks Petitioner faced at trial, given Gutierrez' failure to prepare an adequate defense, also support an inference that that a reasonable defendant in Petitioner's situation would have chosen to take a plea offer rather than proceed to trial. *Schroeder v. Renico*, 156 F. Supp. 2d 838, 844 (E.D. Mich. 2001); *Yoswick v. State*, 347 Md. 228, 246 (1997). Petitioner himself understood that a trial might be risky if the evidence looked "really bad against him."

Even a month before trial, trial counsel had not responded to Petitioner's queries regarding his alibi witness, Asia McClain, or the State's evidence in the case. Petitioner had a rational basis to believe that the State's case against him might be vulnerable to attack, especially if he had an eyewitness to his whereabouts at the State's alleged time of the crime. Had Petitioner known, however, that Gutierrez did not plan to call Asia McClain, and had not adequately investigated the State's evidence, he may have rationally chosen to pursue a plea agreement rather than proceed to trial with an unprepared defense attorney. All of this was supported by Syed's testimony at the post-conviction hearing, in which he stated that he would have accepted a reasonable plea offer. T. 10/25/12 at 47-48.

VI. CONCLUSION

The post-conviction court incorrectly applied the law and facts to the two primary issues raised by Petitioner. Trial counsel was constitutionally ineffective for 1) not investigating a credible alibi witness and 2) for not honoring the defendant's request to obtain a plea offer. For these reasons, Petitioner respectfully asks this Court to grant this Application and allow an appeal to the Court of Special Appeals.

Respectfully submitted,

/S/

The Law Office of C. Justin Brown
231 E. Baltimore St., Suite 1102
Baltimore, MD 21202
(410) 244-5444

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2014, a copy of the foregoing was provided to Kathleen Murphy, Office of the State's Attorney, 120 E. Baltimore St., Baltimore, MD 21202; and the Office of the Attorney General, Criminal Appeals, 200 St. Paul Place, Baltimore, MD 21202.

/S/