IN THE COURT OF SPECIAL APPEALS OF MARYLAND

ADNAN SYED,	*	
Appellant,	*	
v.	*	Application for Leave to Appeal (Post-Conviction)
STATE OF MARYLAND,	*	No. 2519 September Term, 2013
Appellee.	*	

* * * * * * * * * * * *

SUPPLEMENT TO APPLICATION FOR LEAVE TO APPEAL THE DENIAL OF POST-CONVICTION RELIEF AND REQUEST FOR REMAND

Appellant, Adnan Syed, by and through his attorney, C. Justin Brown, pursuant to Md. Code Ann., Crim. Pro. Section 7-109 and Md. Rule 8-204, hereby supplements his Application for Leave to Appeal the Denial of Post-Conviction Relief. This Supplement has two parts. First, Syed respectfully requests that the Court remand this matter to the Circuit Court in light of material evidence that has emerged since the closure of the Post-Conviction proceedings. Under the circumstances described below, "justice will be served by permitting further proceedings." Md. Rule 8-604(d).

Second, in the alternative, and in reply to the State's Response, Syed urges the Court to consider both issues he has raised in his Application for Leave to Appeal ("ALA"), for the reason that they are meritorious and inextricably linked. As it stands now, the Court has ordered the State to respond to only one of the issues raised in the ALA – related to trial counsel's failure to obtain a plea offer. But, as is evident from the State's response, that issue cannot be considered in a vacuum; it relies upon the other issue raised in Syed's ALA – that trial counsel was ineffective for failure to investigate an alibi witness. To consider one issue without the other would frustrate the purposes of this appellate process.

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.

The police initially focused their investigation on Jay Wilds, a fellow Woodlawn student. Wilds told police different stories, alternately inculpating and exculpating himself. Eventually, Wilds settled on a version of the story that led to first-degree murder charges against Lee's ex-boyfriend, Adnan Syed.

Syed was arrested on February 28, 1999, and detained at the Baltimore City Detention Center. In the days immediately following his arrest, before details of the case were publically known, he received two letters from a potential witness named Asia McClain, who was also a Woodlawn student. (Ex. 1, McClain's 3/1/1999 letter (admitted at post-conviction hearing as Defendant's Ex. 4); Ex. 2, McClain's 3/2/1999 letter (admitted at post-conviction hearing as Defendant's Ex. 5)). In the March 1, 1999, letter, McClain wrote: "I'm not sure if you remember talking to me in the library on Jan. 13th, but I remembered chatting with you . . . I also called the Woodlawn Public Library and found that they have a survailance [*sic*.] system inside the building... I'm trying to reach your lawyer to schedule a possible meeting with the three of us . . . I will try my best to help you account for some of your unwitnessed, unaccountable lost time (2:15 – 8:00; Jan 13th) . . . My boyfriend and his best friend remember seeing you there too." (Ex. 1).

In the letter dated March 2, 1999, McClain restated her memory of being with Syed on the 13th. She wrote: "Why haven't you told anyone about talking to me in the library? . . . How long did you stay in the library that day? Your family will probably try to obtain the library's surveillance tape . . . It's weird, since I realized that I saw you in the public library that day, you've been on my mind. The conversation that we had, has been on my mind. Everything was cool that day, maybe if I would have stayed with you or something this entire situation could have been avoided." (Ex. 2).

Syed informed his defense team multiple times that McClain had been with him the afternoon of January 13th and that she was willing to talk. This was proven by notes found in the

file of Syed's trial attorney, Cristina Gutierrez. (Ex. 3 (admitted at post-conviction hearing as Defendant's Ex. 1); Ex. 4).[1] The alibi was in no way inconsistent with Syed's trial defense. But, for no explicable reason, Gutierrez failed to act on this information in any way. What is arguably worse, she later told Syed she had looked into McClain, but that nothing had come of it. (State's Opp. to ALA Ex. 7 ("State's Ex. 7"), 10/25/2012 post-conviction hearing transcript, at 33).

After he was told that his alibi "did not check out," Syed became concerned about his fate at trial. He asked Gutierrez to obtain a plea offer from the State. (State's Ex. 7 at 33). Gutierrez never did this. Instead, she went back to Syed and falsely reported that the State was not offering a plea. (State's Ex. 7 at 33). Syed repeated this request after his first trial ended in a mistrial and he was awaiting his second trial. By this time, he had heard the testimony of Wilds, who was the State's star witness. Again, Gutierrez falsely told him the State would not offer a plea. In fact, Gutierrez had never even discussed a plea with the State prosecutors, Kevin Urick and Kathleen Murphy. (State's Ex. 7 at 37).

Syed was eventually convicted – he never could prove where he was at the time of the murder. Shortly after the conviction, Syed learned that Gutierrez had never followed up on his request to contact McClain about the alibi. He learned this because a friend of the Syed family, Rabia Chaudry, then a law school student, made contact with McClain and obtained her affidavit, in which she stated that she had been with Syed right at the time when the State theorized the murder took place; she had been willing to testify; and she had never been contacted by the Syed defense team. (Ex. 5, McClain's 3/25/2000 Affidavit (admitted at post-conviction hearing as Defendant's Ex. 2)). Upon learning of this information, Syed pleaded with Gutierrez to raise this information in a Motion for New Trial, but she never did. (Ex. 6, Letter from Mr. and Mrs. Rahman to Gutierrez (admitted at post-conviction hearing as Defendant's Ex. 6)).

Some ten years later, Syed raised the alibi issue at post-conviction, arguing that Gutierrez had been constitutionally ineffective for failing to even speak to McClain. This argument, when

[1] Exhibit 4 is an additional note found in Gutierrez' file that shows her awareness of the McClain alibi.

presented to the Circuit Court, was undercut by two factors. First, the defense, despite substantial efforts, could not produce McClain in court. Second, the former prosecutor, Urick, testified that he had spoken to McClain (just before the filing of the post-conviction petition), and she had told him that she had only written the affidavit "because she was getting pressure from the [Syed] family. And she basically wrote it to please them and get them off her back." (State's Opp. to ALA Ex. 6 ("State's Ex. 6"), 10/11/2012 post-conviction hearing transcript, at 30).[2]

The Circuit Court denied the post-conviction, essentially concluding that Gutierrez, by then deceased, had "several reasonable strategic grounds . . . to forego pursuing Ms. McClain as an alibi witness." Post-Conviction Opinion at 11. McClain's letters, the court said, "did not clearly show [her] potential to provide a reliable alibi." *Id.* The Opinion also concluded – without explanation – that McClain's letters somehow contradicted Syed's version of events, *id.* at 12, even though Syed's post-conviction testimony dovetailed with McClain's. (State's Ex. 7 at 26–27, 29-30 (Syed testifying that he was in the library with McClain after school, and they stayed there until he had track practice around 3:00 p.m.)). The Circuit Court opinion never answered the question of how Gutierrez could have made a strategic decision not to use McClain as an alibi witness if nobody from the defense team ever spoke to McClain.

The Circuit Court also denied Syed's allegation that Gutierrez was ineffective for failing to follow his requests to seek a plea bargain. The court found that there was no guarantee the State would have offered a plea bargain, and there was no way of knowing that Syed would have accepted a plea. *Id.* at 15–16.

Syed filed a timely Application for Leave to Appeal on January 27, 2014.

During the pendency of the Application for Leave to Appeal, something remarkable happened. Sarah Koenig, a reporter for National Public Radio, began an exhaustive investigation into the Syed case. In her 12-part podcast, called "Serial," she did what Syed's defense team could not do: she got through to Asia McClain and finally heard her story. McClain, in an interview with Koenig, unambiguously affirmed what she had written some 13 years earlier: she

[2] Urick made similar comments in an "exclusive" interview he gave with an internet news site called "The Intercept."

had been with Syed, in the public library just off the school campus, at precisely the same time as the State claimed the murder took place. She affirmed that nobody from Syed's defense team contacted her prior to trial.

After speaking with Koenig, and after the Serial podcast was completed, McClain retained an attorney in Baltimore and contacted undersigned counsel. She provided an affidavit explaining her story, and agreeing to testify if the courts would allow. (Ex. 7, McClain's 1/13/2015 Affidavit).

McClain's affidavit is significant for at least three reasons. First, she repeats, unambiguously, that she was with Syed at the time of the murder and nobody contacted her. Second, she explains that State prosecutor Kevin Urick was incorrect when he said at the post-conviction hearing that she was pressured into signing the affidavit. Finally, she explains that Urick's comments to her prior to the post-conviction hearing convinced her not to participate in the post-conviction proceeding. (Ex. 7).

LEGAL ARGUMENTS

I. IT IS IN THE INTERESTS OF JUSTICE TO REMAND TO THE CIRCUIT COURT SO THAT SYED MAY PRESENT THE TESTIMONY OF HIS ALIBI WITNESS, ASIA MCCLAIN.

This Court should remand Syed's case for further fact-finding so that the Circuit Court can consider the testimony of Asia McClain, the alibi witness who is central to Syed's most important post-conviction issue. Remand is permissible under the circumstances of this case pursuant to Maryland Rule 8-204(f). McClain has retained an attorney in Baltimore and she is prepared to testify.

There are three reasons why the Court should exercise its power to remand. First, if McClain's allegations are correct – and a State prosecutor convinced her not to participate in the post-conviction process, and then misrepresented her position at the post-conviction hearing – it is in the interests of justice that the Court afford Syed another opportunity to present his witness to the Circuit Court. Second, it is in the interest of judicial economy to resolve issues surrounding McClain now, rather than in a future proceeding. And third, the presentation of

Syed's alibi witness to the Circuit Court is reasonably likely to change the outcome of the post-conviction proceeding.

a. Remand is permissible under the Maryland Rules.

The Maryland Rules specifically grant this Court the power to remand this case to the Circuit Court for further fact-finding. When the Court reviews an Application for Leave to Appeal, it may consider "any response, the record, and any additional information," and it may "grant the application and remand the judgment to the lower court with directions to that court." Md. Rule 8-204(f)(4).

Maryland Rule 8-604, an analogous provision, sheds light on the circumstances that warrant remand. Maryland Rule 8-604(a) provides that an appellate court may dispose of a case by "remand[ing] the action to a lower court in accordance with section (d)." Section (d)(1) provides that the court may remand if it "concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment." Alternatively, it may also remand if it concludes that "justice will be served by permitting further proceedings." *Id.* Courts have explained that the rule was "designed to permit the appellate court, in the interests of justice and judicial expediency, to remand a case for further proceedings instead of entering a final order affirming, reversing, or modifying the judgment from which the appeal was taken." *Southern v. State*, 371 Md. 93, 103 (2002) (citing *Eastgate Associates v. Apper*, 276 Md. 698 (1976)).

Generally speaking, remand is available only "in a proceeding collateral to the trial itself which results in unfairness to a party." *Southern*, 371 Md. at 107; *see also Gill v. State*, 265 Md. 350, 357 (1972) (stating that remand "may be suitable to correct procedures subsidiary to the criminal trial, [but] it can never be utilized to rectify prejudicial errors committed during the trial itself."). In *Reid v. State*, 305 Md. 9 (1985), for example, the Court of Appeals ordered remand to consider the question of whether two sentencing letters had been fabricated by a defendant, and subsequently presented to the sentencing judge. The Court of Appeals noted that the allegation raised by the State concerned "intrinsic fraud" and that such an allegation could be considered so long as the Court of Appeals mandate had not issued. *Id.* at 17. Similarly, in

Wiener v. State, 290 Md. 425 (1981), the Court of Appeals ordered remand to conduct additional fact-finding into an issue concerning a State agent who allegedly spied on and interfered with the defendant's defense strategy. The Court noted that remand was permissible because this was a collateral proceeding and it concerned allegations pertaining to the defendant's right to effective assistance of counsel. *See id.* at 437–38.

Syed's request for remand is procedurally consistent with these principles. It is a collateral proceeding; it involves an allegation of prosecutorial misconduct and perjured testimony; and it pertains to the defendant's Sixth Amendment right to effective assistance of counsel. Remand is necessary for the Court to get to the "substantial merits" of Syed's alibi claim. Md. Rule 8-604(d)(1).

b. Remand is in the interests of justice.

It is also in the "interests of justice" that the Court considers Asia McClain's testimony – particularly in light of the new evidence revealed in her affidavit. *See Southern*, 371 Md. at 103 (noting that remand is permissible in the "interests of justice"). McClain states in her affidavit that (1) the State discouraged her from participating in the post-conviction proceedings, and (2) a State prosecutor misstated the circumstances under which she provided alibi information.

Although the Maryland courts have not specifically defined the phrase "interests of justice" as it applies to Rule 8-204, the courts have considered the phrase in the similar contexts of a motion to reopen post-conviction, pursuant to Md. Code Ann., Crim. Pro. § 7-104, and a motion for new trial, pursuant to Md. Rule 4-331. There is no reason to think that the standards employed in those circumstances should not apply to an application for leave to appeal.

In *Love v. State*, 95 Md. App. 420, 427 (1993), the Court of Special Appeals stated that the grounds for the granting of a new trial "[are] virtually open-ended," including the following circumstances: "that the verdict was contrary to the evidence; newly discovered evidence; accident and surprise; . . . misconduct or error of the judge; fraud or misconduct of the prosecution." *See also Gray v. State*, 158 Md. App. 635, 646 n.3 (2004) (citing to *Love* and applying same interpretation of "interests of justice" to a motion to reopen post-conviction).

Here, Syed asks for something much less than the new trial sought in *Love*. He merely asks that the case be remanded for a further evidentiary hearing concerning Asia McClain.

Not only does McClain's new affidavit show her materiality to the case, and her willingness to testify, but it raises allegations that, under *Love*, merit further fact-finding by a Maryland court. In the affidavit, McClain narrates what happened in 2010 when she was contacted by Syed's post-conviction defense team. She was caught off guard and, not understanding why she was being sought, she called Kevin Urick, the State's prosecutor from the original trial. She explains:

> I had a telephone conversation with Urick in which I asked him why I was being contacted and what was going on in the case.
>
> He told me there was no merit to any claims that Syed did not get a fair trial. Urick discussed the evidence of the case in a manner that seemed designed to get me to think Syed was guilty and that I should not bother participating in the case, by telling what I knew about January 13, 1999. Urick convinced me into believing that I should not participate in any ongoing proceedings. Based on my conversation with Kevin Urick, the comments made by him and what he conveyed to me during that conversation, I determined that I wished to have no further involvement with the Syed defense team, at that time.

(Ex. 7 at ¶¶ 27–28).

McClain goes on the explain that Urick's post-conviction testimony characterizing their phone conversation – in which he claimed she said she was pressured into coming forward as an alibi witness – was simply incorrect. McClain states:

> Urick and I discussed the affidavit that I had previously provided to [Rabia] Chaudry. I wanted to know why I was being contacted if they already had the affidavit on file and what the ramifications of the document were. I never told Urick that I recanted my story or affidavit about January 13, 1999. In addition I did not write the March 1999 letters or the affidavit because of pressure from Syed's family. I did not write them to please Syed's family or to get them off my back. What actually happened is that I wrote the affidavit because I wanted to provide the truth about what I remembered. My only goal has always been, to provide the truth about what I remembered.

(Ex. 7 at ¶ 29).

These comments by McClain – regarding the conduct of Urick – constitute "newly discovered evidence" and they potentially show "fraud or misconduct of the prosecution." *Love*, 95 Md. App. at 427.

First, if it is true that the State prosecutor discouraged McClain from testifying, that is just the type of conduct that invokes the "interests of justice" standard. It would amount to a violation of Syed's due process rights in that he was prevented from calling his witness at the post-conviction hearing. *See Campbell v. State*, 37 Md. App. 89 (1977) (ordering new trial on due process grounds when prosecutor discouraged the testimony of a potential defense witness and caused that witness to not testify).

It is also cause for remand that, according to McClain, the prosecutor misrepresented to the post-conviction court what she said in a phone conversation. Urick testified that McClain said she signed the original affidavit under pressure from Syed's family – but McClain states in her January 13, 2015, affidavit that this is absolutely untrue. She was never pressured to sign the affidavit. This misrepresentation by the State, if believed, also invokes the "interests of justice." *See Curry v. State*, 54 Md. App. 250 (1983) (remanding for new trial when, among other reasons, prosecutor made misrepresentation to jury about the backgrounds of State witnesses).

c. Remand is in the interest of judicial economy.

The Court should also remand this case to the Circuit Court for further fact-finding because to do so would be in the interest of "judicial expediency." *Southern*, 371 Md. at 103. If this Court agrees that it is in the interests of justice that Asia McClain be allowed to testify, remand would be the most efficient way to achieve that result.

Remand makes sense here because of Syed's procedural posture under the Uniform Post-conviction Procedure Act. The act allows Syed to file a post-conviction petition (which he has done), and if that is denied, the act allows him to request a reopening of the post-conviction proceeding. The reopening of the post-conviction is permitted when "the court determines that the action is in the interests of justice." Md. Code Ann., Crim. Pro., § 7-104.

If this court is currently of the opinion that it is in the interest of justice that McClain be afforded an opportunity to testify, then it makes sense to let her do so now. It would be plainly inefficient, and a frustration of the interests of justice, to require Syed to go through the appellate

courts then, if denied, restart the post-conviction process with a motion to reopen – when the same result could be achieved more efficiently through remand.

As mentioned above, the witness, McClain, is now represented by counsel in Maryland, and is now willing to testify.

d. Remand is reasonably likely to affect the outcome of the post-conviction proceeding.

Remanding Syed's case for further fact-finding would create a reasonable probability that the Circuit Court would reverse its decision and grant Syed's post-conviction petition. The new information related to McClain is truly material to this case.

In *In re Parris W.*, 363 Md. 717 (2001), the Court of Appeals granted the defendant a new trial based upon defense counsel's failure to present alibi witnesses, including one who could have contradicted the State's timeline for the crime charged. The Court of Appeals was able to grant a new trial because there was a proffer about when the key alibi witness saw the defendant on the afternoon of the crime. *Id.* at 720–21. In support of its opinion, the Court of Appeals cited several cases, all of which held that defendants received ineffective assistance of counsel when two factor were present: (a) the failure to contact and/or investigate alibi witnesses, and (b) the testimony of those witnesses that they saw the defendant at the time of the crime. *See Griffin v. Warden, Md. Corr. Adjustment Center*, 970 F.2d 1355 (4th Cir. 1992) ("strikingly similar" Maryland case of ineffective assistance based upon failure to contact alibi witnesses who later testified at a post-conviction proceeding consistent with seeing defendant at time of crime); *Montgomery v. Petersen*, 846 F.2d 407 (7th Cir. 1988) (ineffective assistance based upon failure to investigate alibi witness who testified at another trial consistent with seeing defendant at time of crime); *Grooms v. Solem*, 923 F.2d 88 (8th Cir. 1991) (ineffective assistance based upon failure to contact alibi witnesses who later testified at habeas corpus proceeding consistent with seeing defendant at time of crime); *Tosh v. Lockhart*, 879 F.2d 412 (8th Cir. 1989) (ineffective assistance based on failure to contact alibi witnesses who later testified at an evidentiary hearing consistent with seeing defendant at time of crime).

The main difference between those cases and the present case is that McClain did not testify at the post-conviction hearing. Instead, the Circuit Court heard from Urick, who claimed that McClain told him she was pressured into writing her prior affidavit – something we now know to be untrue. McClain's new affidavit avers that this testimony was inaccurate and that she stands by her prior affidavit. If this Court remands and McClain testifies consistent with her affidavits, her testimony would establish that (1) she saw Syed between 2:20 and 2:40 at the Woodlawn Library, which directly contradicts the State's theory that Syed killed the victim between 2:15 and 2:36 in the Best Buy parking lot and (2) McClain was never contacted by Syed's lawyer, despite her willingness to come forward as a witness. Such testimony would allow the Circuit Court to grant Syed a new trial based upon the opinion of the Court of Appeals in *In re Parris W.* and the cases cited therein.

For the reasons described above, remand is permissible, in the interests of justice, in the interests of judicial efficiency, and reasonably likely to affect the outcome of the post-conviction proceeding.

II. SYED'S PLEA ISSUE IS INEXTRICABLY LINKED TO HIS ALIBI ISSUE, AND BOTH ARGUMENTS SHOULD BE CONSIDERED TOGETHER.

Appellant's two arguments pertaining to ineffective assistance of trial counsel should be considered in tandem because one is built upon the other. It was only after Gutierrez' failure with regard to the alibi issue that Syed requested a plea agreement. Both of these errors by trial counsel occurred during the pretrial phase, which is arguably the most critical phase of the criminal process. Together, these issues show that Syed was denied effective assistance of counsel.

The State in its Response construes a very narrow issue, and in so doing misses the heart of Syed's argument. The State argues that "failure to pursue a plea offer is not a cognizable ineffective assistance of counsel claim." Opp. at 12. It makes this argument under the rubric of *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) and *Missouri v. Frye*, 132 S. Ct. 1399 (2012), both of which address the failure of defense counsel to convey a plea offer. The State argues that

because the State never tendered a plea offer, and because there is no right to a plea offer, his claim cannot go forward.

Syed agrees that there is no right to a plea bargain. *See Lafler*, 132 S. Ct. at 1410 (explaining there is no right to be offered a plea). But this is not what he argues. What he argues is that trial counsel, Cristina Gutierrez, abrogated her duty at the time when he needed her most, and she did so in the worst possible way. It is not that she failed because she could not *deliver* a plea bargain from the State. Rather she failed by (a) not investigating his best trial defense, the alibi, and (b) by refusing to carry out his wish to *request* a plea offer. After each failure, moreover, she lied to her client about what had transpired.[3] When considered in tandem, these errors by trial counsel poisoned the pretrial phase and eventually led to a denial of Syed's Sixth Amendment right to effective assistance of counsel.[4]

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). This tenet of constitutional law is only bolstered by *Frye* and *Lafler*. Central to these decisions is the fact that "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler*, 132 S. Ct. at 1389. Thus, the pretrial phase of a criminal proceeding – not the trial – is "almost always the critical point for a defendant." *Frye*, 132. S. Ct. at 1407.

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[3] Gutierrez' career was plagued by concerns about her lack of honesty. First, when she sought admittance to the bar, Judge Smith of the Court of Appeals dissented because of concerns about her "dishonesty, untruthfulness and lack of candor." *In re Application of Maria C.*, 294 Md. 538, 541 (1982). In the instant case, the first trial ended in a mistrial because Judge Quarles called her a liar and a member of the jury overheard that comment. *Merzbacher v. Shearin*, 732 F. Supp. 2d 527, 531 n.5 (D. Md. 2010), *rev'd*, 706 F.3d 356 (4th Cir. 2013). In another post-conviction case considering Gutierrez' handling of the plea bargaining phase, a Circuit Court judge concluded that Gutierrez had committed perjury and stated "[s]adly, she is simply not worthy of belief." *Id.* at 539. Eventually Gutierrez agreed to disbarment related to mishandling of client funds.

[4] Syed raised in his post-conviction petition the issue of cumulative ineffective assistance of counsel, pursuant to *Bowers v. State*, 320 Md. 416, 436 (1990).

As professor Anthony G. Amsterdam explained in TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES (1988) (cited by *Boria v. Keane*, 99 F.3d 492, 497 (2d Cir. 1996)):[5] "The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case. This decision must ultimately be left to the client's wishes. Counsel cannot plead a client guilty, or not guilty, against the client's will. But counsel may and *must* give the client the benefit of counsel's professional advice on this crucial decision." (internal citation omitted, emphasis in original). This is in stark contrast to the position the State adopts in its opposition: "Here, opting not to engage the prosecution in plea negotiations was a reasonable strategic decision under the circumstances." Opp. at 16.

In Syed's case, he was denied a meaningful decision between pleading guilty or going to trial. Syed's counsel failed to apprise him of the choice. When he asked her to investigate his alibi, she failed to do so and falsely reported back to him that Asia McClain did not check out. When he asked to find out what his plea offer was, trial counsel falsely told him that the State would not make an offer. What was supposed to be a counseled choice, at the most critical phase of the case, turned out to be no choice at all. Syed had to go to trial, albeit with a flawed defense.

The State further confuses Syed's argument by fixating on the fact that Syed maintained his innocence throughout the proceedings. In arguing that this would have precluded him from pleading guilty, the State claims that the "best evidence" of this is the testimony of his mother, which indicates that "clearly Gutierrez was hired and paid substantial sums to obtain an acquittal, not a guilty plea." Opp. at 16.

But what the State fails to see is that there are times when a defendant is wise to plead guilty, even if he maintains his innocence. This is commonly done by a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).

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[5] As *Boria* explains, this manual was generated by the American College of Trial Lawyers, the National Defender Project of the National Legal Aid and Defender Association, and the ALI-ABA Committee on Continuing Professional Education – thus it is representative of a prevailing norm of practice. The Reporter, Amsterdam, was a Professor of Law and Director of Clinical Programs and Trial Advocacy at New York University School of Law.

To establish this point at the post-conviction hearing, Syed called Margaret Mead, Esq., who was admitted as an expert in criminal defense in Baltimore City. She stated that, as a matter of practice, a criminal defense attorney must pursue some type of plea bargain. The attorney must do this even if the client maintains his innocence, and particularly with the availability in Baltimore City Circuit Court of *Alford* pleas. (State's Ex. 7 at 76).

The essence of this concept is that a defendant may maintain his innocence, but he may also acknowledge that the State has a strong case against him and there is a real chance of conviction. As the Supreme Court explained, "[c]onfronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term." *Alford*, 400 U.S. at 37

Under this premise, a decision by Syed to plead guilty would have been reasonable. He had just been told by his attorney that his alibi did not check out, and he did not know how he could prove where he was at the time of the murder. At the very least, there would have been no harm in finding out what type of plea the State would offer. Then, and only then, would he truly have a choice of how to proceed in his case.

The State's argument that Syed, a 17-year-old with no criminal history, would not have received a plea offer is equally fallacious. This seems to be based on prosecutor Kevin Urick's testimony that he did not know whether there would be a plea offer because he never asked his supervisors for an offer. (State's Ex. 6 at 26). But more compelling was the testimony of Mead, the defense expert, who explained that in her 22 years of experience defending felonies in Baltimore City, in which she handled from ten to 20 murders per year, she had never been told by the Office of the State's Attorney that they would not offer a plea deal.

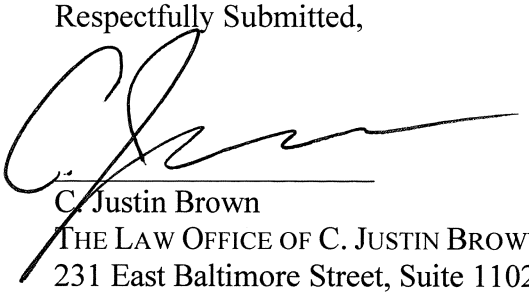
Finally, in its Order directing the State to respond to Syed's plea issue, the Court of Special Appeals posed the question of what relief would be appropriate if it were found that Gutierrez was ineffective by not following Syed's request that she obtain a plea offer. It is Syed's position that such a failure would have infected the pretrial process to such a degree that

he would have been deprived of effective assistance of counsel, and the only appropriate remedy would be a new trial.

CONCLUSION

For the reasons explained above, Appellant respectfully requests that this Court remand this case to the Circuit Court for additional fact-finding related to the alibi issue. In the alternative, Appellant requests that this Court consider both issues presented in the Application for Leave to Appeal, as they are inextricably linked together.

Respectfully Submitted,



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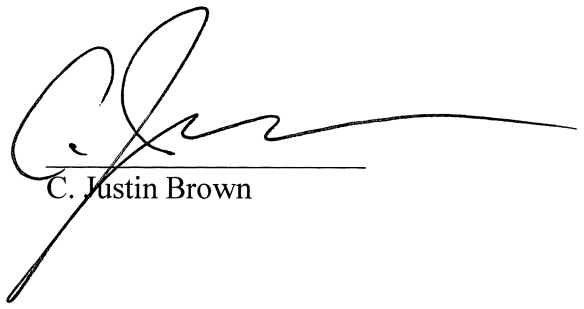
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 2015, a copy of the foregoing was provided to the following:

Edward Kelley
Office of the Attorney General
Criminal Appeals Division
200 St. Paul Place
Baltimore, MD 21202



C. Justin Brown

APPELLANT'S EXHIBIT 1

It's late.

I just came from your house an hour ago.

March 1, 1999

Dear Adnon, (hope I sp. it right)

I know that you can't visitors, so I decided to write you a letter. I'm not sure if you remember talking to me in the library on Jan. 13th, but I remembered chatting with you. Throughout you're actions that day I have reason to believe in your innocense. I went to your family's house and discussed your "calm" manner towards them. I also called the Woodlawn Public library and found that they have a survailance system inside the building. Depending on the amount of time you spend in the library that afternoon, it might help in your defense. I really would appreciate it if you would contact me between 1:00pm - 1pm or 8:45pm → until... My number is (410) 486-7655. More importantly I'm trying to reach your lawyer to schedule a possible meeting with the three of us. We aren't really close friends, but I want you to look into my eyes and tell me of your innocense. If I ever find otherwise I will hunt you down and wip your ass, ok friend.. //

EXHIBIT 4

I hope that you're not guilty and ~~I want~~ hope to death that you have nothing to do with it. If so I will try my best to help you account for some of your unwitnessed, unaccountable lost time (2:15 - 8:00; Jan 13th)
The police have not been notified Yet to my knowledge maybe it will give your side of the story a particle head start. I hope that you appreciate this, seeing as though I really would like to stay out of this whole thing. Thank Justin, he gave me a little more faith in you, through his friendship and faith. I'll pray for you and that the "REAL TRUTH" comes out in the end.
"I hope it will set you free." Only trying to hel

Asia McClain

P.S. If necessary my grandparents line number is 653-2957. Do not call that line after 11:00 O.K.

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

If you were in the library for awhile tell the police and I'll continue ~~to tell what I know~~ even louder than I am. My boyfriend and his best friend remember seeing you there too.

Your Amiga
Asia McClain

APPELLANT'S EXHIBIT 2

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

Dear Adnon,

How is everything? I know that we haven't been best friends in the past, however I believe in your innocence. I know that central booking is probably not the best place to make friends, so I'll attempt to be the best friend possible. I hope that nobody has attempted to harm you (not that they will). Just remember that if someone says something to you, that their just f**king with your emotions. I know that my first letter was probably a little harsh, but I just wanted you to know where I stode in this entire issue (on the centerline). I don't know you very well, however I didn't know Hae very well. The information that I know about you being in the library could helpful, unimportant or unhelpful to your case. I've been think a few things lately, that I wanted to ask you:

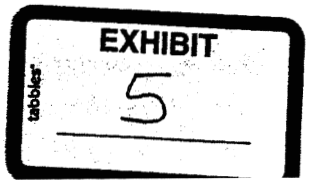
1. Why haven't you told anyone about talking to me in the library? Did you think it was unimportant, you didn't think that I would remember? Or did you just totally forget yourself?

2. How long did you stay in the library that day? Your family will probably try to obtain the library's surveillance tape.

3. Where exactly did you do and go that day? What is the so-called evidence that my statement is up against? And who are these WITNESSES?

Anyway, everything in school is somewhat the same. The ignorant (and some underclassmen) think that you're guilty, while others (mostly those that know you) think you're innocent. I talked to Emron today, he looked like crap. He's upset, most of your "CRUCHES" are. We love you, I guess that inside I know that you're innocent too. It's just that the so-called evidence looks very negative. However I'm positive that

March 2, 1999



It's weird, since I realized that I saw you in the public library that day, you've been on my mind. The conversation that we had, has been on my mind. Everything was cool that day, maybe if I would have stayed with you or something this entire situation could have been avoided. Did you cut school that day? Someone told me that you cut school to play video games at someone's house. Is that what you told the police? This entire case puzzles me, you see I have an analytical mind. I want to be a criminal psychologist for the FBI one day. I don't understand how it took the police three weeks to find Hae's car, if it was found in the same park. I don't understand how you would even know about Leakin Park or how the police expect you to follow Hae in your car, kill her and take her car to Leakin Park, dig a grave and find you way back home. As well how come you don't have any markings on your body from Hae's struggle. I know that if I was her, I would have struggled. I guess that's where the
SO-CALLED witnesses. White girl Stacie just mentioned that she thinks you did it. Something about your fibers on Hae's body...something like that (evidence). I don't mean to make you upset talking about it...if I am. I just thought that maybe you should know. Anyway I have to go to third period. I'll write you again. Maybe tomorrow.

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

Asia R. McClain

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

Asia R. McClain
6603 Marott Drive
Baltimore, MD 21207

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

March 2, 1999

APPELLANT'S EXHIBIT 3

Debbie Watson work w/ Adnan to puff Hees school assembly together

7/13

E-mail → syed__adnan@hotmail.com password poppy

1/14 - 1/15 snow days

Asia McClean → saw him in the library @ 3:00 (library may have cameras)
→ Asia boyfriend saw him too

Track starts @ 3:30

school start @ 7:50 bell rang 7:45 school start

s. M. Mase 1ST Pd. Photography 7:50 - 9:15 take role

s. Jane Efron → English AP English/Social Studies A day B day 9:20 - 10:45

r. Cliff Tomlin → Soc. on the 1/13

Lunch 10:50 - 11:15 on premises lunch left school w/ friends went to Jay's house

Free Period 11:20 - 12:45 stayed @ Jays house

Guidance Office 1/13 Recommendation letter Donner Paoletti → AP Psychology 12:50 - 2:15

school end 2:15

EXHIBIT 1 tabbies

APPELLANT'S EXHIBIT 4

Stephanie like me of his boys

Jay = If anyone ever tried to get between her, I I'd kill her

Stephanie didn't like Hae at all

friends w/ in there Stephanie when they wanted to "broke up"

Car police got for him

Asia + boy friend
saw him in library
2:15 - 3:15
went to library often
3:30 Practice started

Memorial Service

APPELLANT'S EXHIBIT 5

Affidavit

A.K.M.

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

I am 18 years old. I attend college at Catonsville Community College of Baltimore County. In January of 1999, I attended high school at Woodlawn Senior High. I have known Adnan Syed since my 9th grade freshmen year (at high school). On 1/13/99, I was waiting in the Woodlawn Branch Public Library. I was waiting for a ride from my boyfriend (2:20), when I spotted Mr. Syed and held a ~~10~~ 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 (Jarrod Johnson) came to pick me up. Spoke to Adnan (briefly) and we left around 2:40.

EXHIBIT 2

A.R.M.

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

Asia McClain 3/25/00

Affidavit

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

I am 18 years old. I attend college at Catonsville Community College of Baltimore County. In January of 1999, I attended high school at Woodlawn 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

APPELLANT'S EXHIBIT 6

Mr. and Mrs. Syed Rahman
7034 Johnnycake Road
Baltimore, Maryland 21207

Christina Gutierrez
Redmond & Gutierrez, P.A.
1301 Fidelity Building
210 North Charles Street
Baltimore, Maryland 21201

March 30, 2000

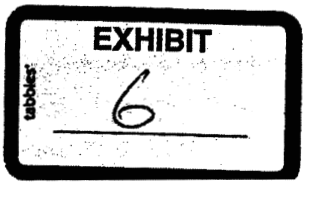
Dear Ms. Gutierrez,

We would like for you to include in the motion for new trial the newly discovered evidence provided by Ms. Asia McClain. We are aware that under Maryland laws, the evidence is considered newly discovered only when it is indeed newly discovered. We feel, however, that Asia's information falls into a gray area because in fact no body contacted her for her story, and that until now her story was undiscovered. Attached please find a copy of an affidavit signed and sworn to by Ms. Asia McClain. According to her, the other two eyewitness alibis are also willing to submit affidavits.

Furthermore, for sentencing we would like to have mitigating witnesses address the court. Please contact us to arrange for this.

Thank you,

Mr. and Mrs. Syed Rahman



APPELLANT'S EXHIBIT 7

ASIA MCCLAIN

1. I swear to the following, to the best of my recollection, under penalty of perjury:
2. I am 33years old and competent to testify in a court of law.
3. I currently reside in Washington State.
4. I grew up in Baltimore County, MD, and attended high school at Woodlawn High School. I graduated in 1999 and attended college at Catonsville Community College.
5. While a senior at Woodlawn, I knew both Adnan Syed and Hae Min Lee. I was not particularly close friends with either.
6. On January 13, 1999, I got out of school early. At some point in the early afternoon, I went to Woodlawn Public Library, which was right next to the high school.
7. I was in the library when school let out around 2:15 p.m. I was waiting for my boyfriend, Derrick Banks, to pick me up. He was running late.
8. At around 2:30 p.m., I saw Adnan Syed enter the library. Syed and I had a conversation. We talked about his ex-girlfriend Hae Min Lee and he seemed extremely calm and caring. He explained that he wanted her to be happy and that he had no ill will towards her.
9. Eventually my boyfriend arrived to pick me up. He was with his best friend, Jerrod Johnson. We left the library around 2:40. Syed was still at the library when we left.
10. I remember that my boyfriend seemed jealous that I had been talking to Syed. I was angry at him for being extremely late.
11. The 13th of January 1999 was memorable because the following two school days were cancelled due to hazardous winter weather.
12. I did not think much of this interaction with Syed until he was later arrested and charged in the murder of Hae Min Lee.
13. Upon learning that he was charged with murder related to Lee's disappearance on the 13th, I promptly attempted to contact him.
14. I mailed him two letters to the Baltimore City Jail, one dated March 1, the other dated March 2. (See letters, attached). In these letters I reminded him that we had been in the library together after school. At the time when I wrote these letters, I did not know that the State theorized that the murder took place just before 2:36 pm on January 13, 1999.
15. I also made it clear in those letters that I wanted to speak to Syed's lawyer about what I remembered, and that I would have been willing to help his defense if necessary.
16. The content of both of those letters was true and accurate to the best of my recollection.

17. After sending those letters to Syed in early March, 1999, I never heard from anybody from the legal team representing Syed. Nobody ever contacted me to find out my story.
18. If someone had contacted me, I would have been willing to tell my story and testify at trial. My testimony would have been consistent with the letters described above, as well as the affidavit I would later provide. *See below.*
19. After Syed was convicted at trial, I was contacted by a friend of the Syed family named Rabia Chaudry.
20. I told my story to Chaudry on March 25, 2000, and wrote out an affidavit, which we had notarized. (Affidavit attached).
21. The affidavit was entirely accurate to the best of my recollection and I gave it by my own free will. I was not pressured into writing it.
22. At the time when I wrote the affidavit I did not know that the State had argued at trial that the murder took place just before 2:36 pm on January 13, 1999.
23. After writing the affidavit and giving it to Chaudry, I did not think much about the Syed case, although I was aware he had been convicted and he was in prison.
24. Eventually I left Maryland and moved to North Carolina and then out west.
25. In the late spring of 2010, I learned that members of the Syed defense team were attempting to contact me. I was initially caught off guard by this and I did not talk to them.
26. After encountering the Syed defense team, I began to have many case questions that I did not want to ask the Syed defense team. After not knowing who else to contact, I made telephone contact with one of the State prosecutors from the case, Kevin Urick.
27. I had a telephone conversation with Urick in which I asked him why I was being contacted and what was going on in the case.
28. He told me there was no merit to any claims that Syed did not get a fair trial. Urick discussed the evidence of the case in a manner that seemed designed to get me to think Syed was guilty and that I should not bother participating in the case, by telling what I knew about January 13, 1999. Urick convinced me into believing that I should not participate in any ongoing proceedings. Based on my conversation with Kevin Urick, the comments made by him and what he conveyed to me during that conversation, I determined that I wished to have no further involvement with the Syed defense team, at that time.
29. Urick and I discussed the affidavit that I had previously provided to Chaudry. I wanted to know why I was being contacted if they already had the affidavit on file and what the ramifications of that document were. I never told Urick that I recanted my story or affidavit about January 13, 1999. In, addition I did not write the March 1999 letters or the affidavit because of pressure from Syed's family. I did not write them to please Syed's family or to get them off my back. What actually happened is that I wrote the affidavit because I wanted to provide the truth about what I remembered. My only goal has always been, to provide the truth about what I remembered.

30. I took, and retained, contemporaneous notations of the telephone conversation with Urick.
31. Sometime in January of 2014, I had a conversation with Sarah Koenig, a reporter for National Public Radio. I spoke to her on the phone and she recorded the conversation. It was an impromptu conversation and I misunderstood her reasons for the interview and did not expect it to be broadcasted to so many people. While Ms. Koenig did not misrepresent herself or the purpose of the conversation and interview, it is fair to say that I misconstrued that it was a formal interview that would be played on the Serial Podcast. I rather thought that it was a meticulous means of information gathering, for a future (typed) online news article. Due to dialogue with Jerrod Johnson in 2011 concerning Derrick Banks, I recommended that Sarah Koenig reach out to both Jerrod Johnson and Derrick Banks, to see if they remember January 13, 1999. Later on, when Sarah Koenig asked to re-record my statement in a professional sound studio, I became confused and unwilling to participate in any further interview activity. As a result my interview with Sarah Koenig was incomplete in the Serial Podcast.
32. After I learned about the podcast, I learned more about Koenig's reporting, and more about the Syed case. I was shocked by the testimony of Kevin Urick and the podcast itself; however I came to understand my importance to the case. I realized I needed to step forward and make my story known to the court system.
33. I contacted Syed's lawyer, Justin Brown, on December 15, 2014, and told him my story. I told him I would be willing to provide this affidavit.
34. I am also willing to appear in court in Maryland to testify, if subpoenaed.
35. I am now married, and my legal surname is no longer McClain. However, due to the wealth of publicity that this case has had, and the fact that all previous mention of my name has been with my maiden name, I am signing below as Asia McClain.
36. I have retained counsel in Baltimore, Gary Proctor, and I respectfully ask that any attempts to contact me be made through him.
37. I have reviewed this affidavit with my attorney before providing it to Syed's attorney, Justin Brown.

Asia McClain

ASIA McCLAIN

DATE 1/13/15