STATE OF MARYLAND	*	IN THE
Applicant	*	CIRCUIT COURT
v.	*	FOR
ADNAN SYED	*	BALTIMORE CITY
Respondent	*	CASE NOs. 199103042-46
	*	PETITION NO. 10432

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

RESPONDENT ADNAN SYED'S
CONDITIONAL APPLICATION FOR LEAVE TO CROSS APPEAL

Adnan Syed, through undersigned counsel, pursuant to Maryland Rules 8-202 and 8-204, conditionally applies for leave to cross appeal the Order of the Post-Conviction Court. Syed will argue in a forthcoming Response that the State's Application for Leave to Appeal should be denied, as it is neither necessary nor in the public interest. If, however, the Court grants the State's Application, Syed requests review of the issues presented here.

This Conditional Application stems from the Circuit Court's determination that it was deficient – but not prejudicial – for trial counsel to fail to contact and investigate an alibi witness, even though that alibi witness was with Syed at precisely the time when, according to the State, the murder took place. The Circuit Court reached this conclusion on the theory that, while the alibi would have undermined the State's timeline of the murder, it would not have undermined another aspect of the case *subsequent to the murder*. The Circuit Court cited no cases, and undersigned counsel are aware of none, in which trial counsel's failure to investigate an alibi covering the time of a murder was found deficient but not prejudicial.

Questions Presented

I. Whether, after finding that trial counsel's failure to investigate a potential alibi witness was deficient, the Circuit Court erred in concluding that counsel's failure to investigate that alibi witness was nevertheless *not* prejudicial?

II. Whether the Circuit Court erred in assessing the prejudice flowing from trial counsel's ineffectiveness individually, rather than considering the cumulative effect of counsel's multiple deficiencies?

Statement of the Case

Hae Min Lee, a student at Woodlawn High School in Baltimore County, disappeared on the afternoon of January 13, 1999. Nearly a month later, her body was found partially buried in Leakin Park in Baltimore City. Trial Tr. at 4, Feb. 23, 2000. The cause of death was strangulation.

In late February 1999, after receiving an anonymous tip and speaking with Jay Wilds, a recent graduate of Woodlawn and known drug dealer, police arrested 17 year-old Adnan Syed, another Woodlawn student, and charged him with first-degree murder, second-degree murder, kidnapping, robbery, and false imprisonment. After an initial mistrial,[1] Syed's second trial began in January 2000 before the Honorable Wanda K. Heard. Syed was represented by Cristina Gutierrez, a Baltimore criminal defense lawyer. The Syed trial turned out to be among Gutierrez's last; she was disbarred in 2001.

A. The State's Theory

The State's case against Syed relied primarily on the story of one witness—Jay Wilds—and cell phone records. Through Wilds' testimony, the State presented a timeline of Syed's purported movements on the day Lee disappeared. Wilds testified that Syed drove him to the mall that morning to buy Wilds' girlfriend a birthday present. Trial Tr. at 123, Feb. 4, 2000.

[1] The Circuit Court granted a mistrial in the first trial when a juror overheard the judge, during a bench conference, refer to Gutierrez as a "liar." Trial Tr. at 254-55, Dec. 15, 1999.

After returning to Woodlawn High School for class, Syed lent Wilds his car to continue shopping, and gave him his cell phone so that Syed could call for a ride after school. Trial Tr. at 125-26, Feb. 4, 2000.

According to the State's theory, Syed left school with the victim shortly after classes ended at 2:15 p.m. and drove in her car to the parking lot of a Best Buy. Trial Tr. at 65-66, Feb. 25, 2000. By 2:36 p.m., Syed had allegedly committed the murder and called Wilds from the Best Buy parking lot to ask to be picked up. Trial Tr. at 106, Jan. 27, 2000. According to the State, therefore, the murder occurred sometime between 2:15 p.m. and 2:36 p.m.. The State repeatedly emphasized this segment of its timeline to the jury. Trial Tr. at 106, Jan. 27, 2000; Trial Tr. at 54, Feb. 25, 2000.

Wilds' story continued. He claimed that, after the murder occurred, he met Syed in the Best Buy parking lot, where Syed showed him Lee's body in the trunk of her car. Trial Tr. at 130-31, Feb. 4, 2000. According to Wilds, the two then took Lee's car to the Interstate 70 Park & Ride in Baltimore City, *id.* at 132, and then went to buy some marijuana, *id.* at 134. Later that night, Wilds claims, he and Syed buried Lee's body in Leakin Park. *Id.* at 148-50. The State contended that two incoming calls to Syed's cell phone, at 7:09 p.m. and 7:16 p.m., confirmed that Syed was in the area of Leakin Park at this time. Trial Tr. at 109-110, Jan. 27, 2000. On this point, the State presented Abe Waranowitz, who testified as an expert on using cell tower location data to determine the location of a particular cell phone at a particular time. *See* Trial Tr. at 97-98, Feb. 8, 2000.

The jury found Syed guilty of first-degree murder, robbery, kidnapping, and false imprisonment. He was sentenced to life plus 30 years in prison.

B. Missing Alibi Evidence

The jury that convicted Syed, however, never heard a critical piece of evidence: the testimony of McClain, a fellow Woodlawn student. McClain has consistently stated that she was with Syed on the afternoon of January 13, 1999, during the precise time the State alleged that the murder occurred: she spoke with Syed in the Woodlawn Public Library adjacent to the Woodlawn High School campus between 2:20 and 2:40 p.m. *See* Ex. 5 (McClain's Mar. 25, 2000 Affidavit), Ex. 6 (McClain's Jan. 13, 2015 Affidavit).

McClain sent two letters to Syed while he was awaiting trial, stating that McClain remembered speaking with Syed in the library at the same time that the State's theory placed Syed with the victim. Ex. 6 (McClain's Jan. 13, 2015 Affidavit); *see* Ex. 3 (McClain's Mar. 1, 1999 letter to Syed), Ex. 4 (McClain's Mar. 2, 1999 letter to Syed). McClain's letters stated that McClain's boyfriend and his best friend both remembered seeing Syed in the library, too, and the letter noted that Syed's presence in the library also may have been captured by the library's surveillance system. *See* Ex. 3 (McClain's Mar. 1, 1999 letter to Syed). In her letters, McClain provided multiple contact numbers, in addition to a street address, and stated that she was trying to meet with Syed's lawyer. *See* Ex. 3 (McClain's Mar. 1, 1999 letter to Syed), Ex. 4 (McClain's Mar. 2, 1999 letter to Syed).

Syed sent these letters to Gutierrez, his trial counsel, and asked her to contact McClain. *Syed v. Maryland*, No.199103042-046, Slip Op. at 12 (Md. Cir. Ct. Baltimore City Jun. 30, 2016) (hereafter, "Slip Op."). Gutierrez received this information and Syed's request nearly five months prior to trial—as shown in notes obtained from her case file. Slip Op. at 12. She never contacted McClain. *See* Ex. 5 (McClain's Mar. 25, 2000 Affidavit), Ex. 6 (McClain's Jan. 13, 2015 Affidavit).

After Syed was convicted, McClain signed an affidavit in which she confirmed her recollection of the events of January 13, 1999, and confirmed that she had never been contacted by Gutierrez or her staff. *See* Ex. 5 (McClain's Mar. 25, 2000 Affidavit), Ex. 6 (McClain's Jan. 13, 2015 Affidavit). A friend of Syed's family, Rabia Chaudry, helped Syed's family send this affidavit to trial counsel, along with a letter urging her to use the statement to request a new trial. PC Tr. at 67-68, Oct. 11, 2011. Trial counsel never responded. *Id.* at 69; *see* Ex. 5 (McClain's Mar. 25, 2000 Affidavit), Ex. 6 (McClain's Jan. 13, 2015 Affidavit).

C. Post-Conviction Proceedings

Syed filed a Petition for Post-Conviction Relief in May 2010, and a Supplement to the Petition in June 2011. In these filings, Syed raised nine grounds for post-conviction relief, including ineffective assistance of counsel based on trial counsel's failure to investigate Asia McClain as a potential alibi witness. The Circuit Court held an evidentiary hearing in October 2012. McClain did not testify. She later explained that the prosecutor who tried the case, Kevin Urick, had convinced her that Syed's claim for post-conviction relief had no merit and that she should not participate in ongoing proceedings. *See* Ex. 6 (McClain's Jan. 13, 2015 Affidavit).[2] The Circuit Court denied post-conviction relief.

Syed filed an Application for Leave to Appeal this decision in January 2014, arguing that the Circuit Court erred in rejecting his claim of ineffective assistance of counsel based on the (1) failure to investigate a possible alibi witness and (2) failure to seek a plea offer. Syed later filed a Supplement to the Application for Leave to Appeal, supported by a second affidavit from McClain. McClain's affidavit confirmed that she spoke with Syed in the public library around

[2] The Circuit Court found it unnecessary to address whether this constituted prosecutorial misconduct, because McClain was subsequently afforded an opportunity to testify. Slip Op. at 12 n.10.

2:30 p.m. on January 13, 1999, and that neither trial counsel nor her staff ever contacted her. *See* Ex. 6 (McClain's Jan. 13, 2015 Affidavit).

This Court granted Syed's Application for Leave to Appeal, but subsequently stayed the appeal and remanded the matter to the Circuit Court, "in the interest of justice," to allow that court to reopen post-conviction proceedings in light of McClain's new affidavit and to "conduct any further proceedings it deems appropriate." Ex. 8 Remand Order at 3-4 (May 18, 2015). On remand, as this Court instructed, Syed filed a Motion to Reopen Post-Conviction Proceedings; he later supplemented that motion in August 2015 to request that the Circuit Court consider additional claims concerning the reliability of cell tower location evidence.

The Circuit Court granted Syed's Motion to Reopen Post-Conviction Proceedings. The court limited the scope of the reopened proceedings to two issues: (1) ineffective assistance of counsel for failure to contact a potential alibi witness and (2) claims related to the reliability of cell tower location evidence. The Circuit Court held a five-day evidentiary hearing in February 2016, and took testimony from McClain; experts on cell phone location techniques; and other witnesses.

D. The Circuit Court's Decision

On June 30, 2016, the Circuit Court granted Syed's Petition for Post-Conviction Relief, vacated his conviction, and granted Syed a new trial. The Circuit Court agreed with Syed on his claim that trial counsel's failure to cross-examine the State's expert on cell tower location evidence violated Syed's Sixth Amendment right to effective assistance of counsel. Slip Op. at 58. But the Circuit Court denied Syed's other claims for relief. *Id.* at 58.

On Syed's ineffective assistance of counsel claim relating to the alibi witness, the Circuit Court found that "[t]he facts in the present matter are clear; trial counsel made *no effort* to

contact McClain in order to investigate the alibi[.]" *Id.* at 22. The Circuit Court thus concluded that trial counsel's performance was deficient. *Id.* at 14-23 (citing, among others, *In re Parris W.*, 363 Md. 717, 720-23, 727-30 (2001); *Griffin v. Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355, 1358 (4th Cir. 1992); *Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991); *Lawrence v. Armontrout*, 900 F.2d 127, 128-30 (8th Cir. 1990); *Montgomery v. Petersen*, 846 F.2d 407, 413-14 (7th Cir. 1988); *United States v. Debango*, 780 F.2d 81, 85 (D.C. Cir. 1986)).

Nonetheless, the Circuit Court concluded that trial counsel's failure to investigate the alibi did not prejudice Syed's defense. *Id.* at 23 (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). Although the Circuit Court found that McClain's testimony could have undermined the State's theory that Syed murdered Lee between 2:15 and 2:36 p.m., *id.* at 24-25, it determined that "the crux of the State's case" was not the time and place of the murder. *Id.* at 25. Rather, according to the Circuit Court, it was the State's theory that Syed "buried the victim's body in Leakin Park at approximately 7:00 p.m." *Id.* at 25. Because the Circuit Court concluded that McClain could not have undermined this aspect of the State's theory, it found that counsel's failure to contact her did not "undermine confidence in the outcome" of the trial. *Id.* at 25-26.

Syed now respectfully submits this Conditional Application for Leave to Cross Appeal from the Circuit Court's ruling on his claim that trial counsel's failure to investigate McClain as a potential alibi witness constituted ineffective assistance of counsel.[3]

Standard of Review

"[T]he Court of Special Appeals must exercise its discretion to determine whether or not to grant an [application for leave to appeal]." *Grayson v. State*, 354 Md. 1, 15 (1999); *see also*

[3] Although not discussed in this Conditional Application for Leave to Cross Appeal, the Circuit Court found that Syed's *Brady* claim had been waived or, in the alternative, that the allegedly suppressed evidence could have been discovered through reasonable and diligent investigation by trial counsel. Slip Op. at 58.

Md. Rule 8-204(f). Leave to appeal is rarely granted and should be reserved for those cases that present legal issues of potentially broad import. In contrast to the fact-intensive issues presented by the State's Application for Leave to Appeal, Syed's Conditional Application for Leave to Cross Appeal presents legal issues far more suited to appellate review: (1) whether the Circuit Court erred in finding that trial counsel's failure to investigate *an alibi witness* – a witness who states she was with Syed in a library at the time the murder was committed – was deficient, but nevertheless *not prejudicial*; and (2) whether the Circuit Court incorrectly limited its prejudice analysis to the effect of trial counsel's failure to investigate the alibi, rather than considering the cumulative effect of that deficiency in combination with trial counsel's other deficiency. These are the types of legal errors that warrant discretionary appellate review.

A determination of whether counsel was ineffective "is a mixed question of law and fact." *State v. Jones*, 138 Md. App. 178, 209 (2001) (quoting *Strickland*, 466 U.S. at 698) (internal quotation marks omitted). Courts owe deference to findings on underlying factual issues, but "must recognize [their] own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any." *Jones*, 138 Md. App. at 209 (citing *Oken v. State*, 343 Md. 256, 285 (1996)). "As a question of whether a constitutional right has been violated, courts make their own independent analysis by reviewing the law and applying it to the facts of the case.'" *Id.* (quoting *Cirincione v. State*, 119 Md. App. 471, 485 (1998)).

Argument

I. The Circuit Court Correctly Found that Trial Counsel's Failure to Investigate a Potential Alibi Witness Rendered Her Performance Deficient.

The Circuit Court correctly found that trial counsel's performance was deficient. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's

judgments." *Strickland*, 466 U.S. at 691. Here, Syed received two letters from McClain in which she provided her contact information and offered to assist with Syed's defense. *See* Ex. 3 (McClain's Mar. 1, 1999 letter to Syed), Ex. 4 (McClain's Mar. 2, 1999 letter to Syed). After receiving these letters, Syed expressly asked trial counsel to investigate the potential alibi offered by McClain, and the defense file confirms that, nearly five months before Syed's first trial, counsel was aware that McClain could have placed Syed in the Woodlawn Public Library at the time of the murder. *See* Ex. 1(Note found in Gutierrez's file); Ex. 2 (Ali Pournader Affidavit); Ex. 7 (Note found in Gutierrez's file). Yet, "trial counsel made *no effort* to contact McClain[.]" Slip Op. at 22 (emphasis in original). Under the circumstances, the Circuit Court appropriately concluded that "trial counsel's failure to contact and investigate McClain as a potential alibi witness fell below the standard of reasonable professional judgment." *Id.* at 16; *see also Grooms*, 923 F.2d at 90 ("Once a defendant identifies potential alibi witnesses, it is unreasonable not to make some effort to contact them to ascertain whether their testimony would aid the defense."); *Griffin*, 970 F.2d at 1358 (counsel's failure to contact, interview, or present the testimony of a potential alibi witness was deficient).

II. The Circuit Court's Analysis of Whether Syed Suffered Prejudice From His Trial Counsel's Ineffective Assistance Contravenes Settled Precedent.

A. The Circuit Court's Prejudice Analysis

Despite finding trial counsel deficient for failing to investigate the potential alibi, the Circuit Court concluded that this deficiency did not prejudice Syed. The court made this finding notwithstanding the fact that the McClain alibi put Syed in the Woodlawn Public Library at precisely the time the State theorized the murder took place.[4]

[4] At no point in its Opinion did the Circuit Court question the validity or veracity of McClain's testimony.

To reach this conclusion, the Circuit Court acknowledged that McClain's testimony could have undercut the State's theory regarding the timing of Lee's murder. As the Court explained, the State's theory regarding the time of the murder was "relatively weak[]" and was "premised upon inconsistent facts[,]" meaning that McClain's testimony "could have undermined" it. Slip Op. at 25. That should have been the end of the ineffective-assistance analysis; if an uninvestigated alibi witness can call into question the defendant's very presence at the purported time of the murder, it plainly was prejudicial to the defendant for that alibi witness to go un-contacted and uncalled. Yet the Circuit Court determined otherwise. According to the Circuit Court, "the crux of the State's case *did not rest on the time of the murder*"; rather, "the crux of the State's case" was that Syed "buried the victim's body in Leakin Park at approximately 7:00 p.m. on January 13, 1999." *Id.* at 25 (emphasis added). The Circuit Court found that McClain's testimony would not have undermined this "crucial link" – presumably because McClain was prepared to testify about where Syed was at the time of the murder, as opposed to some later time period. *Id.* at 26. Based upon its finding, the Circuit Court concluded that Syed "failed to establish a substantial possibility that, but for trial counsel's deficient performance, the result of the trial would have been different." *Id.*

B. The Circuit Court's Analysis was Flawed in Several Respects.

1. Trial counsel's failure to investigate the potential alibi caused sufficient prejudice on its own to warrant a new trial.

The prejudice flowing from trial counsel's failure to investigate McClain as an alibi witness is, alone, sufficient to mandate a new trial. McClain was a disinterested witness who knew both Syed and Lee, but was not particularly close with either. Ex. 6 ¶ 5 (McClain's Jan. 13, 2015 Affidavit); *see also* Ex. 4 (McClain's March 2, 1999 letter to Syed). Her testimony would have provided an alibi for the entire time period when the State said the murder took place.

Compare Slip Op. at 6 (noting that the State argued that a 2:36 phone call to Syed's phone "was the call that Petitioner made . . . after strangling the victim in the Best Buy parking lot"), *with id.* at 11, 12 (McClain "spoke with Petitioner at the library sometime between 2:20 p.m. and 2:40 p.m."). Indeed, the Circuit Court did not cite to a *single case* in which a court has found that failure to present such testimony is not prejudicial within the meaning of *Strickland* – nor are undersigned counsel aware of any such case. That should come as no surprise, given that prejudice attaches whenever counsel's failures "undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. It is incomprehensible how – as a matter of law – trial counsel's failure to present the testimony of an unbiased witness who would have provided an alibi for the entire time of the murder could have not undermined confidence in the outcome of Syed's trial.

Although courts generally do not presume prejudice under *Strickland* except in extreme circumstances, *see Strickland*, 466 U.S. at 692 (citing *United States v. Cronic*, 466 U.S. 648, 658 (1984)), they come quite close to doing so in circumstances like these. Indeed, in *Grooms*, 923 F.2d 88—a case on which the Circuit Court relied heavily, *see* Slip Op. at 14-16—the court held that prejudice based on trial counsel's failure to investigate an alibi witness "can be shown by demonstrating that the uncalled alibi witnesses would have testified if called at trial and that their testimony would have supported [the defendant's] alibi." 923 F.2d at 91.

That test is plainly satisfied here. McClain repeatedly asserted—in two letters, in two affidavits, and in her post-conviction hearing testimony—that, had she been called as a witness at trial, she would have testified that she was with Syed in the Woodlawn Public Library at precisely the time when the murder supposedly took place. *See* Ex. 3 (McClain's March 1, 1999 letter to Syed); Ex. 4 (McClain's Mar. 2, 1999 letter to Syed); Ex. 5 (McClain's Mar. 25, 2000

Affidavit); Ex. 6 (McClain's Jan. 13, 2015 Affidavit). If trial counsel had only contacted her, McClain could have laid the perfect foundation for an alibi defense.[5]

But "trial counsel made *no effort* to contact McClain." Slip Op. at 22 (emphasis in original). That fundamental error resulted in the complete omission of an alibi defense at trial. Instead, Syed was left with only evidence of habit and custom as to what he typically did on days like January 13, 1999 – the day of Lee's disappearance. In this way, trial counsel's failure to call McClain as a witness arguably was *more* prejudicial than the situation at issue in *Grooms* and other cases, where the uncalled witness would have simply corroborated a preexisting alibi defense. *See, e.g.*, *Stewart v. Wolfenbarger*, 468 F.3d 338, 358-59 (6th Cir. 2006), *as amended on denial of reh'g and reh'g en banc* (Feb. 15, 2007) (finding prejudice where trial counsel failed to call alibi witnesses where testimony "would not have been cumulative and 'would have added a great deal of substance and credibility to' Petitioner's alibi defense," particularly because the uncalled alibi witness was friends with both petitioner and the victim); *Clinkscale v. Carter*, 375 F.3d 430, 445 (6th Cir. 2004) (finding prejudice where counsel failed to call alibi witness who would have corroborated defendant's otherwise uncorroborated testimony regarding alibi, noting that "[h]ad even one alibi witness been permitted to testify on [the defendant's] behalf, [the defendant's] own testimony would have appeared more credible because it coincided in important respects with those of his alibi witness").

Syed's counsel's failure to present an alibi defense was all the more damaging because such an alibi would have rebutted the "relatively weak" theory the State offered regarding the timing of the murder. Slip Op. at 24. The fragility of the State's theory means that it is "more likely to have been affected by errors" of trial counsel. *Strickland*, 466 U.S. at 696; *see also*

[5] That alibi could have been bolstered by additional information McClain provided, including two other alibi witnesses and, potentially, video surveillance.

United States v. Agurs, 427 U.S. 97, 113 (1976) ("[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.").

The Circuit Court's explanation for why, in its view, trial counsel's failure to investigate McClain as a potential witness was *deficient but not prejudicial* was based on its view that the "crux" of the State's case was the burial of the victim's body, which McClain's testimony would not have accounted for. *See* Slip Op. at 24-25. But the crux of a murder case is the murder. And the timing of the murder was a critical component of the State's case at trial. The State committed at trial to a timeline under which the murder occurred between 2:15 p.m. and 2:45 p.m., a timeline it supported with cell phone records supposedly showing a call that Syed made to Wilds at 2:36 p.m. from the Best Buy parking lot where the murder purportedly occurred. *See* Slip Op. at 11 & 11, n.9. Indeed, by relying on phone records to corroborate Wilds' meandering story, it would have been practically impossible for the State to construct a timeline with any other time for the murder to have taken place.

The 2:15 p.m. - 2:45 p.m. timeline figured prominently in the State's case against Syed, including in both their opening statement and closing argument. *See* Trial Tr. at 54, Feb. 25, 2000 (arguing that Lee left school around 2:15 p.m. and "was dead in 20 to 25 minutes from when she left school"), *id.* at 66 (discussing the 2:36 p.m. call to Wilds and contending that the murder had taken place by 3:32 p.m.); Trial Tr. at 106, Jan. 27, 2000 (committing to a timeline in which the murder supposedly occurred between "2:15, 2:20" p.m. and "2:35, 2:36" p.m.). Obviously—and as the Circuit Court even acknowledged—there is a reasonable probability that McClain's testimony could have undermined the State's theory as to the timing of the murder. Slip Op. at 25. That is sufficient to constitute prejudice. *See Griffin*, 970 F.2d at 1359 ("If a

petitioner establishes a *reasonable probability* that the result would have been different, prejudice is established. Moreover, a 'reasonable probability' is simply 'a probability sufficient to undermine confidence in the outcome.'") (emphasis in original) (citation omitted).

The importance of the State's timeline is underscored by how heavily the State relied on that timeline in its closing argument. As the Court of Appeals explained in conducting a similar prejudice review in the *Brady v. Maryland* context, materiality "is best understood by taking the word of the prosecutor . . . during closing argument." *Ware v. State*, 348 Md. 19, 53 (1997) (citing *Kyles v. Whitley*, 514 U.S. 419, 445 (1995)).

By redirecting the prejudice inquiry to focus on whether McClain's testimony would have disturbed the State's theory as to Lee's burial, the Circuit Court improperly assumed the jury could (indeed, would) have disregarded the State's theory as to the timing of the murder. That improperly substitutes the court's own judgment for that of the jurors and invades the province of the jury.

The Circuit Court's reorientation of the State's case to focus on the time of the burial also is completely illogical. It removes from the analysis the act supporting a murder charge—murder—in favor of Syed's allegedly incriminating behavior after the fact. Even accepting the (unusual, to say the least) theory that the burial was somehow the "crux" of the State's murder case, that evidence "suggests, at most" that Syed "may have been involved in events related to the murder *after* it occurred." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (emphasis in original). That is not enough to support a guilty verdict when the charge is murder. As the Supreme Court recently explained:

> Beyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry's conviction. . . . The dissent asserts that . . . there was independent evidence pointing to Wearry as the murderer. But all of the evidence the dissent cites suggests, at most, that someone in Wearry's group of friends may have

> committed the crime, and that Wearry may have been involved in events related to the murder *after* it occurred. Perhaps, on the basis of this evidence, Louisiana might have charged Wearry as an accessory after the fact. But Louisiana instead charged Wearry with capital murder.

Id. So too here.

Finally, even if reframing the prejudice inquiry to focus on the burial were appropriate (it was not), the Circuit Court still reached the wrong result. Trial counsel's failure to investigate McClain as an alibi witness *did* prejudice Syed with respect to the State's broader timeline and theory of the crime. Had McClain been contacted and testified at trial, her testimony not only would have dismantled the State's timeline regarding the murder itself; it would have undermined the credibility of the State's star witness, Wilds. The State acknowledged at trial that its case "hinge[d] on [Wilds'] testimony." Trial Tr. at 57, Feb. 25, 2000. That included Wilds' conflicting testimony regarding the timeframe for when the murder occurred. *Compare, e.g.*, Trial Tr. at 130, Feb. 4, 2000 (Wilds testifying that the murder occurred closer to "3:45 or something like that") *with id.* at 134-135 (Wilds acknowledging that the murder had occurred well before 3:21 p.m.). McClain's testimony would have rebutted at least one of Wilds' versions of the timeline, *see* Trial Tr. at 62, Feb. 14, 2000 (Wilds testifying that he told detectives the murder was completed by "about 2:30"), thereby highlighting the inaccuracies that pervaded his account of the events of January 13, 1999, and drawing into question the veracity of other parts of his narrative, including his testimony that supposedly "corroborated" the cell phone location evidence, Slip Op. at 25.

In sum, there is a reasonable probability that McClain's testimony would have created a reasonable doubt in the minds of jurors that Syed could have committed the murder because her testimony would have (i) provided an alibi for the entire period when the murder supposedly occurred and/or (ii) called into question the State's enumerated timeline and the testimony of its

star witness, thereby making its entire case less plausible. Either way, trial counsel's failure to investigate McClain as a witness was sufficient to undermine confidence in the verdict. *See Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (relevant question is whether counsel's failure rendered the trial "fundamentally unfair" and "unreliable"); *In re Parris W.*, 363 Md. at 729 ("[T]he pertinent question for the purposes of prejudice under *Strickland* is . . . whether there is a substantial possibility that their testimony . . . would have been sufficient, in conjunction with the other evidence, to create a reasonable doubt as to Appellant's involvement"); *Raygoza v. Smith*, 474 F.3d 958, 965 (7th Cir. 2007) ("[A] trier of fact approaching this case with fresh eyes might choose to believe the eyewitnesses and reject the alibi defense, but this trier of fact never had the chance to do so. This undermines our confidence in the outcome of the proceedings.").

ii. The Circuit Court erred by assessing the prejudice resulting from trial counsel's failure to investigate in isolation.

The Circuit Court also independently erred by not placing into proper context the prejudice resulting from trial counsel's failure to investigate. When analyzing whether counsel's deficient performance caused prejudice to a defendant, a court must consider "the totality of circumstances" and the "cumulative effect of all errors." *Schmitt v. State*, 140 Md. App. 1, 19 (2001); *see also Wearry*, 136 S. Ct. at 1007 (reversing denial of postconviction relief in part because "the state postconviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively"); *Kyles*, 514 U.S. at 421 (noting, in the context of *Brady* claims, for which the same prejudice standard applies, that courts must consider "the cumulative effect of all such evidence suppressed by the government"). In this case, however, the Circuit Court's "approach was to consider each charge of deficient performance and consequent prejudice[.]" *Bowers v. State*, 320 Md. 416, 436 (1990). "That approach was incorrect." *Id.* Instead, the Circuit Court should have "ruled on all alleged deficiencies in trial

performance and then [weighed] the cumulative prejudicial effect of all of [trial counsel's] performance deficiencies[.]" *Schmitt*, 140 Md. App. at 18.

When assessed cumulatively, it is clear that Syed was prejudiced by trial counsel's ineffective assistance. In addition to her failure to investigate the potential alibi, trial counsel "rendered deficient performance when she failed to properly cross-examine Waranowitz [the State's cell tower expert] about [AT&T's] disclaimer[]" regarding the reliability of using incoming calls as evidence of a cell phone's location. Slip Op. at 40. As the Circuit Court explained, had trial counsel cross-examined the State's expert on that crucial disclaimer, the expert's admission could have "undermined" the State's case; counsel's failure to conduct that cross "allowed the jury to deliberate with the misleading impression that the State used reliable information to approximate the general location of [Syed's] cell phone during the time of burial." Slip Op. at 46, 50. The possibility that the jury lent undue weight to the State's cell tower location evidence is substantial; as the Court of Appeals has explained, juries are predisposed to afford "considerable weight" and even a "mystic infallibility" to scientific evidence. *Reed v. State*, 283 Md. 374, 386 (1978) (internal quotation marks and citations omitted). That is why the Circuit Court concluded, correctly, that "trial counsel's deficient performance in failing to confront the State's cell tower expert regarding the disclaimer created a substantial possibility that the result of the trial was fundamentally unreliable." Slip Op. at 55.

In other cases, "[e]ven when individual errors may not be sufficient to cross the threshold [into prejudice], their cumulative effect may be." *Bowers*, 320 Md. at 436 (collecting cases). Here, there is no need for careful calculation. Because Syed was prejudiced by one of his trial counsel's errors, he was all the more prejudiced when the consequences of trial counsel's two errors are added together. But for trial counsel's deficiencies, there is a substantial possibility

that Syed could have persuasively undermined the State's case – both as to the timing of the murder and his presence near where the victim was found. When properly considered together, the prejudice resulting from trial counsel's errors is easily sufficient to warrant a new trial.

This Court should reverse the judgment of the Circuit Court denying Syed's ineffective assistance of counsel claim based on trial counsel's failure to investigate an alibi witness.

Conclusion

For the foregoing reasons, in the event this Court grants the State's Application for Leave to Appeal from the Order of the Circuit Court, Syed respectfully requests that this Court also grant his Conditional Application for Leave to Cross Appeal from the same Order.

Respectfully submitted,

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