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| STATE OF MARYLAND,<br><br>Petitioner,<br><br>v.<br><br>ADNAN SYED,<br><br>Respondent. | IN THE<br><br>COURT OF APPEALS<br><br>OF MARYLAND<br><br>September Term, 2018<br><br>Petition Docket No. _____ |

## PETITION FOR WRIT OF CERTIORARI

The State of Maryland, Petitioner, by its attorneys, Brian E. Frosh, Attorney General of Maryland, and Thiruvendran Vignarajah, Special Assistant Attorney General, moves the Court under Md. Rule 8-301 for a writ of certiorari to the Court of Special Appeals to review the above-captioned case. In support of this petition, and in accordance with Md. Rule 8-303(b)(1) and (2), the State notes the following:

(A) The case was docketed as Case No. 199103042 to 046 in the Circuit Court for Baltimore City;

(B) On February 25, 2000, a jury in the Circuit Court for Baltimore City found Adnan Syed guilty of first degree murder, kidnapping, robbery, and false imprisonment. On May 28, 2010, Syed filed a Petition for Post-Conviction Relief, which was denied by the Post-Conviction court. Syed appealed and later filed a supplement to that appeal accompanied by an

affidavit from a putative alibi witness. The Court of Special Appeals remanded the matter, without affirmance or reversal, to the Circuit Court of Baltimore City to afford Syed the opportunity to file a request to reopen the previously concluded post-conviction proceedings.

Syed filed a request to reopen the post-conviction proceedings on June 30, 2015, followed by a supplement to that request on August 24, 2015. For a second time, the post-conviction court denied relief with respect to Syed's claim of ineffective assistance of counsel related to a potential alibi witness, this time finding that Syed had "failed to establish a substantial possibility that, but for trial counsel's deficient performance, the result of the trial would have been different." The post-conviction court granted relief, however, based on an added claim of ineffective assistance of counsel claim related to defense counsel's attack of cell phone evidence at Syed's trial. The State filed a timely application for leave to appeal on August 1, 2016, and Petitioner filed a conditional cross-application for leave to appeal. Both were granted.

With respect to all but one claim—including the sole ground on which Syed prevailed before the post-conviction court—the Court of Special Appeals ruled in the State's favor, concluding that Syed had waived the ineffective assistance of counsel claim relating to the cell phone evidence. However, the Court of Special Appeals, in a 2-1 decision, reversed the post-conviction

court's ruling with regard to the putative alibi witness, Asia McClain, and granted Syed a new trial. Judge Kathryn Graeff dissented.

(C) A copy of the docket entries documenting the judgments of the Circuit Court is attached;

(D) The reported opinion of the Court of Special Appeals reversing the conviction in *Adnan Syed v. State of Maryland*, No. 2519, Sept. Term 2013 (March 29, 2018) is attached;

(E) The judgment of the Circuit Court has adjudicated all claims, rights and liabilities of all parties in their entirety.

## QUESTIONS PRESENTED

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

## PERTINENT STATUTES, REGULATIONS, AND CONSTITUTIONAL PROVISIONS

United States Const., Amend. VI

## STATEMENT OF FACTS

After a first trial ended in a mistrial, respondent Adnan Syed was tried and convicted at a second trial in early 2000. At both trials, Syed was

represented by Cristina Gutierrez, a seasoned defense attorney whom Syed first retained six weeks after his arrest.

For consistency and ease of reference, the State again adopts and incorporates by reference its factual recitations from its prior pleadings, relevant excerpts of which are provided here:

**A**

> In preparation for trial in Syed's case, Gutierrez assembled a team consisting of a private investigator and law clerks to assist with the pretrial investigation. Fashioning an alibi for Syed's whereabouts that supported Syed's statements to police was a clear priority for Gutierrez. In fact, Gutierrez ... provided to the State a list of 80 potential alibi witnesses on October 5, 1999. According to the alibi notice[:]
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> "At the conclusion of the school day, the defendant remained at the high school until the beginning of track practice. After track practice, Adnan Syed went home and remained there until attending services at his mosque that evening. These witnesses will testify to [sic] as to the defendant's regular attendance at school, track practice, and the Mosque; and that his absence on January 13, 1999 would have been missed."
>
> Because Syed had spoken to police on multiple occasions before he was charged and before he retained counsel, the alibi framed in Gutierrez's notice to the State had the advantage of comporting with what Syed had already said to law enforcement.
>
> Asia McClain was a fellow student at Woodlawn High School. After Syed's arrest, McClain sent Syed two letters, dated March 1, 1999, and March 2, 1999, requesting to talk with him to explore the relevance of a conversation McClain recalls having on January 13, 1999, at the nearby public library. She does not say in this set of correspondence why she remembers that day or what precisely she recalls. Both letters express hope that Syed is innocent and simultaneously relay concerns that he is not: "I

> want you to look into my eyes and tell me of your innocence. If I ever find otherwise I will hunt you down and wip [sic] your ass .. I hope that you're not guilty and I hope to death that you have nothing to do with it. If so I will try my best to help you account for some of your unwitnessed, unaccountable lost time (2:15-8:00)" "The information that I know about you being in the library could helpful [sic], unimportant or unhelpful to your case. ... I guess that inside I know that you're innocent too. It's just that the so-called evidence looks very negative." In neither letter does McClain specify a particular time when she saw Syed at the library. She notes however that she aspires to become a criminal psychologist for the FBI. . . . Syed testified at the post-conviction hearing that he was "fairly certain" that his presence at the public library would have been to access his email account....
>
> Syed also introduced an affidavit McClain signed a year later, on March 25, 2000, in which McClain claimed she saw Syed at a specific time at the library on the day of Lee's murder, and that she was never contacted by Syed's defense team. [In this] affidavit, signed a month after Syed was convicted, McClain recalled with pinpoint accuracy that she had waited for her boyfriend at 2:20 p.m., that she held a 15-20 minute conversation with Syed, and then left at 2:45 p.m. Nothing in the affidavit explained why McClain was now able to provide a concrete, narrow alibi for Syed when details like this were notably absent from her original letters to Syed. Whatever the reason, the times neatly coincided with the State's postulation at Syed's trial as to when Syed may have killed Hae Min Lee.

Brief of Appellee at 12-15 (May 6, 2015) (citations omitted).

## REASONS FOR GRANTING THE PETITION

### A. The majority decision erred in imposing a new duty upon defense counsel to contact one specific potential alibi witness even when a different alibi strategy was selected.

The Court of Special Appeals has introduced specific constitutional obligations with potentially far-reaching consequences that are unmoored

from prevailing Sixth Amendment law. The new requirement implicates the scope of defense counsel's Sixth Amendment obligations to investigate specific avenues that are different from, and potentially incompatible with, other potential defenses, threatening to dramatically broaden the work required by the Constitution of defense counsel and stripping them of the discretion and presumption of reasonableness with respect to which leads they pursue and which they forego. *Sturdivant v. Maryland Dep't of Health & Mental Hygiene*, 436 Md. 584, 589, 84 A.3d 83, 86 (2014) (certiorari was appropriately granted when the case raises a legal question of public importance).

As part of Syed's overall trial strategy, his seasoned counsel developed and pursued an "alibi-by-routine" defense, seeking to place Syed on the evening of the victim's disappearance at school, followed by track practice and then services at his mosque. Because Syed's defense counsel was deceased, and because Syed elicited no testimony from any other member of his defense team, the record establishes no firm reason for why Gutierrez did not contact one particular potential witness in developing and deploying her chosen alibi strategy. The majority nevertheless found, over a dissent by Judge Graeff, that defense counsel was constitutionally obligated to speak to the witness.

This unprecedented holding was not based upon, as the majority opinion itself stated, any prior Maryland case: "Our research has revealed no Maryland case that has addressed directly the issue of a defense counsel's failure to investigate a potential alibi witness in the context of an ineffective assistance of counsel claim." Opinion at 78. The majority found guidance instead in three federal cases cited by a Maryland case, *In Re Parris W.,* 363 Md. 717 (2001). While framing *In Re Parris W.* as the "closest Maryland case," the majority acknowledged "that case involved defense counsel's failure to subpoena alibi witnesses for the correct trial date." *Id.*

The majority's position gains no additional support, however, from the three cited federal cases, each of which is inapposite. For example, in *Griffin v. Warden, Maryland Correctional Adjustment Center,* 970 F.2d 1355, 1356 (4th Cir. 1992), defense counsel failed to investigate (or develop any defense at all) on the assumption—which defense counsel explicitly stated—that the case would plead out before trial. This gross, overarching deficiency included failing to notify the State of any alibi defense at all and failing to contact any of five potential alibi witnesses shared with counsel. *Id.* The majority opinion in the case at bar relied on *Griffin* for the proposition that "courts should not conjure up tactical decisions an attorney could have made, but plainly did not." *Id* at 79. However, in *Griffin,* the reason for defense counsel's failure was known: he expressly admitted he made no effort to

investigate because he assumed the case would plead, did not want to take time to investigate, and hence was woefully unprepared to provide adequate representation to the client.

Similarly, in *Grooms v. Solem*, 923 F.2d 88 (8th Cir. 1991), a federal appellate court concluded it was deficient performance for defense counsel to fail to make any effort to secure a continuance when the reason for failing to seek a continuance was the attorney's judgment that the judge was unlikely to allow the introduction of the documentary evidence or the testimony of the alibi witness due to lack of statutory notice. There was no evidence in *Grooms* that defense counsel had, as here, investigated and significantly developed a different alibi defense—or that there could have been strategic reasons why pursuing a particular witness was unnecessary or unwise—only that the attorney believed it was not worthwhile to ask for additional time.

The third case cited by the Court of Special Appeals was *Montgomery v. Peterson,* 846 F.2d 407 (7th Cir. 1988). Here too ineffective assistance of counsel was found only because defense counsel admitted "his reason for not following the lead [of the unbiased sales clerk] was 'inadvertence' and his disbelief of the petitioner." *Id* at 411. The judge found that the "failure to investigate the Sears receipt was a serious error in professional judgment and 'was not related in any way to trial tactics or strategy." *Id* at 410.

In addition to the three cases cited in the *In re Parris W.* decision, the Court of Special Appeals also examined *Bryant v. Scott,* 28 F.3d 1411 (5th Cir. 1994). Similar to the other cases, in *Bryant,* defense counsel affirmatively stated he "would have loved to have the [alibi] evidence" and that his "failure to investigate potential alibi witnesses was not a 'strategic choice' that precludes claims of ineffective assistance." *Bryant* at 1417.

In sharp contrast, the record in this case is replete with evidence of defense counsel developing, investigating, and presenting at trial a battery of defenses, including an alibi defense that a seasoned attorney could reasonably have concluded would not have been aided—and more likely would have been compromised—by the proposed narrative of a single added witness.

The other case invoked by the majority opinion is *Lawrence v. Armontrout,* 900 F.2d 127 (8th Cir. 1990), also a federal appellate decision but one that concerned a defense counsel's failure to advance *any* alibi defense. In *Lawrence,* while defense counsel explained that she intended to rely on a misidentification defense, the court noted that "testimony from alibi witnesses would bolster rather than detract from a defense of misidentification . . . a tactical decision to rely on a misidentification defense in no way forecloses the concurrent use of an alibi witness." The majority's

reliance on this case is plainly misplaced given that, as part of Syed's defense, his attorney did in fact investigate, develop, and present an alibi defense.

Review by this Court is critical to clarify that, unlike the cases cited by the majority opinion, where a defendant has failed to establish his or her attorney's reason for a particular alleged failure, a reviewing court is not entitled to assume there was a defective justification for that judgment—quite the contrary, the presumption of *Strickland* demands that the attorney's decision be given the benefit of the doubt. *Strickland v. Washington,* 466 U.S. 668, 690 (1984).

Moreover, the majority opinion also ignored that, in the main cases it cites, the defendants established the reasons why their attorneys failed to do something, thereby providing a counterweight for a reviewing court to evaluate against the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 690.

In *Griffin,* defense counsel admitted he did not investigate any alibi witness (or any witnesses for that matter) because he thought the defendant would plea. In *Montgomery,* the defense counsel admitted the reason for lack of investigation was "inadvertence." In *Grooms* and *Bryant,* both counsels admitted that, even though the alibi would have been helpful, they didn't investigate because the trial was imminent. *Lawrence* relied on the court's

finding that the defense counsel readily admitted that there was no strategic reason not to investigate an alibi witness at all.

These concessions were cited by those courts to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland* at 689. In the present case, by contrast, the majority opinion itself recognized that "because of the trial counsel's death, there is no record of why counsel decided not to make any attempt to contact McClain and investigate the importance *vel non* of her testimony to Syed's defense." Opinion at 91.

Absent any such finding—which could also have been derived from other members of the defense team—the majority's opinion threatens to mint a new rule creating a broad obligation to investigate, essentially disregarding the presumption that a defense attorney's decisions are sound and instead shifting the burden to the State to establish affirmatively that there were valid strategic reasons for a particular investigative decision or oversight.

**B. Under settled Sixth Amendment jurisprudence, the majority erred, as the dissenting opinion notes, in finding that there was ineffective assistance of counsel.**

In addition, certiorari review is justified because the Court of Special Appeals' decision in this case is fundamentally inconsistent with the core principles of *Strickland.* As noted in Judge Graeff's dissent, it is well established that the performance prong of *Strickland* "is satisfied only where,

given the facts known at the time, counsel's 'choice was so patently unreasonable that no competent attorney would have made it.'" *State v. Borchardt*, 396 Md. 586, 623 (2007) (quoting *Knight v. Spencer*, 447 F.3d 6, 15 (1st Cir. 2006)). The dissent noted that courts are to apply a highly deferential standard in analyzing counsel's conduct "to avoid the *post hoc* second-guessing of decisions simply because they proved unsuccessful." *Evans v. State*, 396 Md. 256, 274 (2006). Accordingly, as the dissent correctly observed, the question should have been whether Syed has met his burden to overcome the presumption that counsel's decision was based on reasonable trial strategy. *See Coleman v. State*, 434 Md. 320, 335 (2013) ("Reviewing courts must thus assume, **until proven otherwise**, that counsel's conduct fell within a broad range of reasonable professional judgment, and that counsel's conduct derived not from error but from trial strategy." (quoting *Mosley v. State*, 379 Md. 548, 558 (2003) (emphasis added)).

In addition, as the State argued and as the dissent recognized, even setting aside firmly-established Sixth Amendment presumptions, there are good and substantial reasons evident in the record for a reasonable attorney not to contact a potential alibi witness. Dissenting Opinion at 5. The dissent points to a variety of cases where, like the case at bar, it was not ineffective assistance to decline to investigate an alibi witness. In *Broadnax v. State*, 130 So.3d 1232 (Ala. Crim. App. 2013), the Court specifically states that it is

extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record. *Id* at 1255. It continued by concluding that "if the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim. *Id* at 1256. In *Broadnax,* there were five alibi witnesses identified, none of which had been contacted by defense counsel or an investigator from the defense. *Id* at fn. 3. The court noted however, that the alibi "was inconsistent with what Broadnax told the police and his attorneys, i.e. that he was at Welborn, not the work release facility." Dissenting Opinion at 8. Similarly, the alibi at issue in the matter before the court contradicted what Syed told the police and his attorney. There were already inconsistencies in what Syed had told the police. Like the *Broadnax* court, this court "cannot say that any decision to forgo attempting to further impugn the client's credibility by presenting additional evidence of [defendant's] lying to the police was unreasonable." *Broadnax* at 1258.

The dissent cited several additional cases—each far more germane than those cited by the majority—that reached the same conclusion. *See, e.g.*, *Commonwealth v. Rainey*, 928 A.2d 215 (Pa. 2007) (not ineffective assistance of counsel when defense attorney does not investigate alibi witnesses because

"[client] had never persuaded [attorney] that he had witnesses, reliable witnesses to alibi" and where purported alibi evidence would have contradicted defense strategy); *Weeks v. Senkowski*, 275 F. Supp. 2d 331, 341 (E.D.N.Y. 2003) (not contacting alibi witnesses was not ineffective assistance of counsel where sound overall trial strategy existed); *State v. Thomas,* 285 Mont. 112 (1997) ("a claim of failure to interview a witness may sound impressive in the abstract, but it cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel," citing *U.S. v. Decoster*, 624 F.2d 196 (D.C. Cir. 1976)).

Where the record is silent on a defense counsel's reasoning, a defendant cannot overcome the presumption that counsel acted reasonably. Where there are a number of valid strategic reasons not to pursue a particular witness—among them that the witness's account is inconsistent with the defendant's—a defendant cannot establish that it was ineffective not to speak to that witness. And where pretrial investigation is extensive and strategic, and where the strategy by seasoned counsel at trial is sound, a court should not second guess those judgments on the ground that investigation of an additional witness might have led to a different trial strategy that may have proven more successful. That kind of analysis in hindsight is exactly what *Strickland* and its progeny forbid.

The Court of Special Appeal's distortion of the *Strickland* standard erodes one of the bedrock principles of Sixth Amendment jurisprudence, and issuance of a writ of certiorari in Syed's case is necessary and justified to correct the erroneous ruling.

**C. The majority decision erred in reversing what the post-conviction trial court concluded—that, even if defense counsel's performance was deficient, there was no prejudice.**

Finally, certiorari review is justified because the Court of Special Appeals' decision in this case is inconsistent with a proper application of the prejudice analysis under *Strickland*. In the decision below, the post-conviction court found that Syed should be denied relief because he "failed to establish a substantial possibility that, but for trial counsel's deficient performance, the result of the trial would have been different." Memorandum Opinion II at 26.

To reverse this conclusion, the majority opinion placed undue emphasis on one feature of the State's presentation (time of death) among the many elements that formed the State's case. Syed was convicted by a unanimous jury whose decision was supported by, *inter alia*, a clear motive, the testimony of an accomplice, numerous corroborating witnesses, Syed's own inconsistent statements, and forensic evidence, including cell phone records and Syed's palm print. Under these circumstances, to find prejudice in the face of "overwhelming evidence" based on the uncertain value of a putative

alibi witness where a broader alibi was attempted was error. *See* Brief of *Amici Curiae* of State's Attorneys in Support of the State's Application for Leave to Appeal, *State of Maryland v. Adnan Syed* (No. 199103042-46) (Filed October 4, 2016) (listing significant evidence of guilt and concluding, "[r]epresented by more-than-competent trial counsel who mounted a fierce defense of him, Mr. Syed was convicted by a jury of his peers based on crushing evidence of his guilt."). This too reinforces the need for this Court's review.

As set forth above, the need for clarity and correct guidance with regard to the scope of defense counsel's duty to investigate particular witnesses and the proper analysis of prejudice justifies this Court's review.

## CONCLUSION

The State of Maryland respectfully asks the Court to grant this petition for a writ of certiorari.

Dated: May 14, 2018

Respectfully submitted,

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## CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH THE MARYLAND RULES

This filing was printed in 13-point Century Schoolbook font; complies with the font, line spacing, and margin requirements of Md. Rule 8-112; and contains 3679 words.

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## CERTIFICATE OF SERVICE

I certify that on this day, May 14, 2018, a copy of the foregoing "Petition for Writ of Certiorari" was mailed by first-class U.S. Postal Service, postage prepaid, to C. Justin Brown, Esquire, Law Office of C. Justin Brown, 231 East Baltimore Street, Suite 1102, Baltimore, Maryland 21202.

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