IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2018

No. 24

STATE OF MARYLAND,

Petitioner/Cross-Respondent,

v.

ADNAN SYED,

Respondent/Cross-Petitioner.

Appeal from the Court of Special Appeals of Maryland
September Terms, 2013, 2016
Case Nos. 1396, 2519

BRIEF OF RESPONDENT/CROSS-PETITIONER

C. Justin Brown
BROWN LAW
231 East Baltimore Street, Suite1102
Baltimore, Maryland 21202
Tel: 410-244-5444
Fax: 410-934-3208
brown@cjbrownlaw.com

Catherine E. Stetson (admitted *pro hac vice*)
James W. Clayton (admitted *pro hac vice*)
Kathryn M. Ali (admitted *pro hac vice*)
W. David Maxwell (admitted *pro hac vice*)
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
Tel: 202-637-5491
Fax:202-637-5910
cate.stetson@hoganlovells.com

September 20, 2018

Counsel for Respondent/Cross-Petitioner

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

CASES:

CONSTITUTIONAL PROVISIONS AND STATUTES:

QUESTIONS PRESENTED

1) Whether the Court of Special Appeals correctly held that trial counsel provided ineffective assistance by failing to contact a disinterested alibi witness who would have testified as to the Respondent's whereabouts during the time of the murder?

2) Whether the Court of Special Appeals drew itself into conflict with *Curtis v. State*, 284 Md. 132 (1978), in finding that Syed waived his ineffective-assistance claim based on trial counsel's failure to challenge cell-tower location data, where the claim implicated the fundamental right to effective counsel and was therefore subject to the statutory requirement of knowing and intelligent waiver?

SUMMARY OF ARGUMENT

Two Maryland courts have now concluded that Adnan Syed's trial counsel was ineffective and that Syed's Sixth Amendment right to counsel was therefore violated. Both agreed that the proper remedy is a new trial. The State provides no basis to disturb this conclusion or that remedy.

First, trial counsel performed deficiently. Faced with the undisputed fact that Syed's trial counsel knew of—but made no effort even to contact—a disinterested alibi witness before trial, the State proposes a new rule of law: no matter how deficient counsel's conduct, postconviction relief must be denied unless the petitioner "establish[es] on the record why trial counsel failed to act and then convince[s] the court that counsel's rationale was unreasonable." Br. 27. But the State misreads the applicable case law and identifies no decision imposing such a draconian result under similar circumstances. With good reason. The State's proposal would run afoul of the objective

inquiry set forth by the Supreme Court in *Strickland*, which focuses on counsel's *conduct* viewed from the perspective at the time. The State's proposed rule also would create an arbitrary regime in which petitioners are punished whenever (as here) their counsel happens to be deceased or otherwise unavailable at the time of the postconviction hearing.

Second, the Court of Special Appeals appropriately rejected the State's explanations for why Syed's counsel *could* potentially have believed it to be unnecessary to present the alibi *at trial*. The challenged conduct at issue was trial counsel's failure even to contact the alibi witness *before* trial. In any event, the State's various post hoc speculations are both impermissible and inconsistent with the extensive factual record developed in this case.

Third, the prejudice to Syed is clear. But for trial counsel's deficient performance, a disinterested witness would have provided Syed with an alibi for the entire time period when, according to the State, the murder took place. A long line of cases have held that the omission of such testimony gives rise to a finding of prejudice. As the Court of Special Appeals explained, the other weaknesses in the State's case at trial—including a vacillating and unreliable star witness and the absence of any eyewitness testimony, confession, or physical evidence linking Syed to the murder—only further undermine confidence in the verdict.

Syed has also brought a cross-petition presenting a waiver question. This Court should correct the Court of Special Appeals' waiver analysis and remand for consideration of Syed's claim of ineffective assistance based on trial counsel's failure to

use a disclaimer printed on the face of the critical document to cross-examine the state's expert on cell-phone location data. Because that ineffective-assistance claim is premised on the fundamental right to counsel, it can only be waived intelligently and knowingly. In holding otherwise, the Court of Special Appeals disregarded the plain language of the postconviction statute and this Court's prior jurisprudence.

STATEMENT OF FACTS

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. E000738 (T. 2/23/00). 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. 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.

[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." E000202–03 (T. 12/15/99).

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. E000341 (T. 2/4/00). 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. *Id*. at E000343–44.

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. E000776-77 (T. 2/25/00). 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. E000205 (T. 1/27/00). 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. E000205 (T. 1/27/00); E000775 (T. 2/25/00).

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. E000348–49 (T. 2/4/00). According to Wilds, the two then took Lee's car to the Interstate 70 Park & Ride in Baltimore City, *id*. at E000350, and then went to buy some marijuana, *id*. at E000352. Later that night, Wilds claims, he and Syed buried Lee's body in Leakin Park. *Id*. at E000366–67. 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. E000206–07 (T. 1/27/00). 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. E000476–77 (T. 2/8/00).

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 Asia 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* E001213 (McClain's 3/25/00 Aff.); E001215 (McClain's 1/13/15 Aff.).

McClain sent two letters to Syed while he was awaiting trial, stating that she remembered speaking with Syed in the library at the same time that the State's theory placed Syed with the victim. E001215 (McClain's 1/13/15 Aff.); *see also* E001208–09 (McClain's 3/1/99 letter to Syed); E001211a–c (McClain's 3/2/99 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* E001208–09 (McClain's 3/1/99 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* E001208–09 (McClain's 3/1/99 letter to Syed), E001211a–c (McClain's 3/2/99 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. 12 (Md. Cir. Ct. Baltimore City June 30, 2016) (hereafter, "Cir. Ct. Op."). Gutierrez received this information and Syed's request nearly five months prior to trial—as shown in notes obtained from her case file. Cir. Ct. Op. 12. She never contacted McClain. *See* E001213 (McClain's 3/25/00 Aff.); E001215 (McClain's 1/13/15 Aff.).

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* E001213 (McClain's 3/25/00 Aff.); E001215 (McClain's 1/13/15 Aff.).

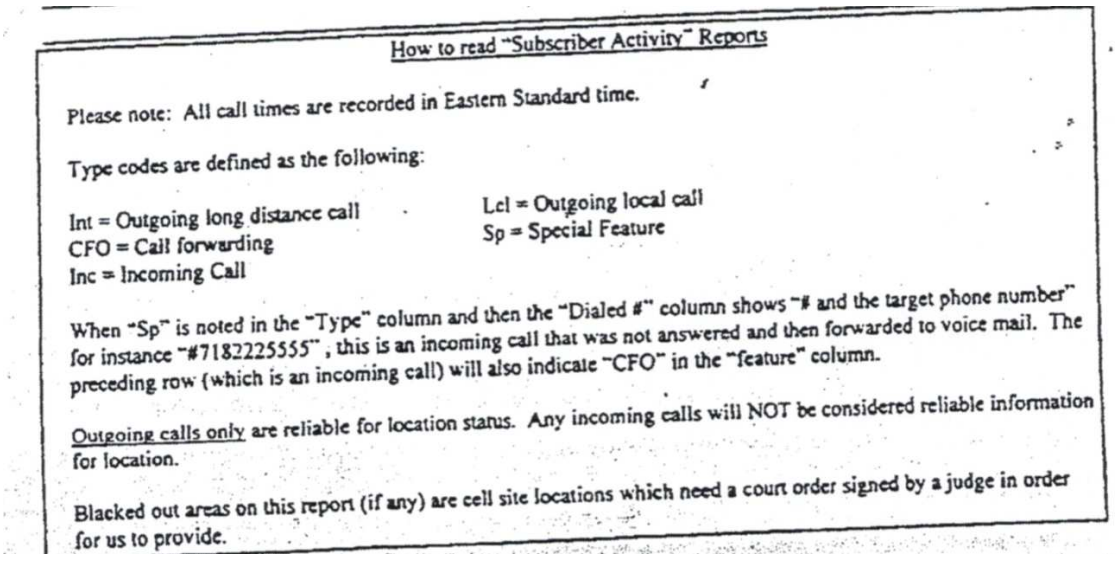
C. Missing AT&T Disclaimer

The jury that convicted Syed also never heard about an AT&T disclaimer stating that the incoming calls are not reliable indicators of a cell phone's location, contrary to the testimony of the State's expert on cell-phone location evidence.

The State's expert, Waranowitz, explained to the jury how cell phones communicated with cellular towers, and that the location of the cellular tower could be used to map an area where the cell phone may have been at the time of a particular call. *See* E000476–77 (T. 2/8/00). He then presented excerpted pages from phone records from AT&T, Syed's cell provider at the time, including records of two incoming calls—one at 7:09 p.m. and one at 7:16 p.m. E001357–61 (State's Trial Exhibit 31). Based on the cell

towers associated with those incoming calls, Waranowitz concluded that "it was possible that the cell phone was located in Leakin Park when the phone received the incoming calls." Cir. Ct. Op. 42. The State later made this evidence the centerpiece of its case, emphasizing at closing argument that the cell towers associated with the incoming calls were "reasonable circumstantial evidence" that Syed was in Leakin Park when the body was buried. *See* E000778 (T. 2/25/00).

What the State and Syed's attorney failed to present, however, was that the same phone records on which Waranowitz relied were accompanied by a fax coversheet, which contained instructions for "How to read 'Subscriber Activity' Reports." E001355 (AT&T disclaimer). That cover sheet explicitly warned that "[o]utgoing calls only are reliable for location status. Any incoming calls will NOT be considered reliable information for location." *Id*. (AT&T disclaimer). This page was never presented to the jury, and Waranowitz was never asked about it.



How to read "Subscriber Activity" Reports

Please note: All call times are recorded in Eastern Standard time.

Type codes are defined as the following:

Int = Outgoing long distance call
CFO = Call forwarding
Inc = Incoming Call
Lcl = Outgoing local call
Sp = Special Feature

When "Sp" is noted in the "Type" column and then the "Dialed #" column shows "# and the target phone number" for instance "#7182225555", this is an incoming call that was not answered and then forwarded to voice mail. The preceding row (which is an incoming call) will also indicate "CFO" in the "feature" column.

Outgoing calls only are reliable for location status. Any incoming calls will NOT be considered reliable information for location.

Blacked out areas on this report (if any) are cell site locations which need a court order signed by a judge in order for us to provide.

Syed first learned about AT&T's disclaimer some 16 years after his trial. *Id*. (AT&T disclaimer); *see* Cir. Ct. Op. 36. Syed was not the only person from the original trial who had been unaware of the AT&T disclaimer. When Syed's postconviction counsel contacted Waranowitz to ask about the AT&T disclaimer, Waranowitz responded, remarkably, that he had never been shown the AT&T fax coversheet that contained the warning, either. *See* E001363 (Waranowitz's 10/5/15 Aff.).

In an October 2015 affidavit, Waranowitz explained that the prosecutor, Kevin Urick, showed him State's Exhibit 31 "just prior" to testifying at trial. As a radio frequency engineer, Waranowitz did not work with "and had never seen" billing or legal records like those contained in that exhibit. In his affidavit, Waranowitz stated, unequivocally, that if he had been made aware of that piece of "critical information," he would not have corroborated the State's theory regarding the possible location of Syed's cell phone at the time of the incoming calls until he first learned why AT&T had issued the disclaimer. E001363 (Waranowitz's 10/5/15 Aff.).

D. 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* E001215 (McClain's 1/13/15 Aff.).[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 2:30 p.m. on January 13, 1999, and that neither trial counsel nor her staff ever contacted her. *See* E001215 (McClain's 1/13/15 Aff.).

The Court of Special Appeals 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 deemed appropriate. On remand, Syed filed a Motion to Reopen Post-Conviction Proceedings; after learning of the AT&T disclaimer page, he later supplemented that motion in August 2015 to request that the Circuit Court consider an additional ineffective-assistance claim concerning the reliability of the cell tower location evidence.

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

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, including ineffective assistance of counsel for failure to cross-examine the state's expert using the AT&T disclaimer.

The Circuit Court held a five-day evidentiary hearing in February 2016, at which the Circuit Court heard extensive testimony from McClain and experts on cell phone location techniques. The Court also heard testimony from David B. Irwin, an expert in criminal defense practice, who testified that "to meet the minimal objective standard of reasonable defense care[,]" trial counsel "had to go talk to Asia McClain." E001202–03 (T. 2/5/16); *see also id*. at E001198–99. Irwin further elaborated that attorneys cannot "make strategic decisions" regarding an alibi witness "without having first investigated." *Id*. at E0001200. Moreover, Irwin testified that, in his expert opinion, McClain was a highly credible witness. *Id*. at E001203.

E. The Circuit Court Grants a New Trial

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 declined to grant relief based on Syed's ineffective assistance of counsel claim relating to the alibi witness. The Circuit Court found that trial counsel's performance was deficient, because "[t]he facts in the present matter are clear; trial counsel made *no effort* to contact McClain in order to investigate the alibi[.]" Cir. Ct. Op. 22. But 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*. 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.

Instead, the Circuit Court granted a new trial based on Syed's ineffective-assistance claim stemming from trial counsel's failure to use the AT&T disclaimer to cross-examine the State's expert. As an initial matter, the Circuit Court found that Syed had not waived this claim, because the right to effective assistance of counsel was fundamental, and it therefore could only be waived knowingly and intelligently. *See id*. at 34–35. The Circuit Court found that Syed himself had not been made aware of the cell tower issue until around August 2015. *Id*. at 36. And because he had not known about the factual basis for this claim, Syed could not have raised it at an earlier proceeding. Nor could he have intelligently and knowingly waived it. *Id*. at 36–37.

On the merits, the Circuit Court agreed with Syed that trial counsel's failure to cross-examine the State's expert on cell-tower location evidence using the AT&T disclaimer violated his Sixth Amendment right to effective assistance of counsel. Cir. Ct. Op. 58. "A reasonable attorney," the Circuit Court said, "would have exposed the

misleading nature of the State's theory by cross-examining Waranowitz." *Id*. at 43. And the failure to do so could not be considered a reasonable strategic decision. *Id*. The Circuit Court found that this deficiency was prejudicial, in part because the incoming calls used to establish Syed's location were part of "the crux" of the State's case. *Id*. at 47.

F. The Court of Special Appeals Affirms

In August 2016, the State filed an application for leave to appeal the Circuit Court's decision, arguing that the Circuit Court erred in finding that trial counsel's failure to cross-examine the state's expert using the AT&T disclaimer constituted ineffective assistance of counsel. Syed then filed a conditional application for leave to cross-appeal on the issue of trial counsel's failure to contact McClain. The Court of Special Appeals granted both applications in January 2017, and ordered briefing and argument on both issues.

The Court of Special Appeals agreed with the Circuit Court that "trial counsel's failure to make any effort to contact McClain as an alibi witness fell below the objective standard of a reasonably competent attorney acting under prevailing norms[.]" *Syed v. Maryland*, Nos. 2519, 1396, Slip Op. 1 (Md. Ct. Spec. App. Mar. 29, 2018) (hereinafter, "Op."). Applying the deferential standards articulated in *Strickland*, the appellate court found that "no reasonable evaluation of the advantages or disadvantages of McClain's alibi testimony" relative to other potential strategies "could be made without first contacting McClain," *id*. at 89, and that "neither a review of the record nor the State's arguments provide a reasonable basis to justify such failure," *id*. at 93. The court also

concluded, contrary to the Circuit Court, that trial counsel's deficiency on this score *had* prejudiced Syed's defense because McClain's "testimony would have directly contradicted the State's theory of when Syed had the opportunity and did murder" the victim. *Id*. at 102. The Court of Special Appeals affirmed the Circuit Court's judgment on this basis.

On the cell-tower ineffective-assistance claim, however, the Court of Special Appeals disagreed with the Circuit Court's waiver analysis, finding that Syed's ineffective-assistance claim was not subject to the statutory requirement of knowing and intelligent waiver. *Id*. at 43–53. The appellate court acknowledged this Court's precedent holding that allegations of error premised on fundamental rights, such as a claim of ineffective assistance of counsel, may only be waived intelligently and knowingly. *Id*. at 38–40. But the appellate court found Syed's ineffective-assistance claim based on the AT&T disclaimer was "based on a non-fundamental right for the purpose of waiver." *Id*. at 50–51. It therefore applied a lower standard, and found that Syed's cell-tower claim had been waived by failing to raise it in his initial postconviction petition. *Id*. at 53.

In July 2018, this Court granted both the State's petition for writ of certiorari and Syed's cross-petition.

STANDARD OF REVIEW

The question 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). Maryland appellate courts "will not disturb the factual findings of the post-conviction court unless they are clearly erroneous." *Id*. (quoting

Wilson v. State, 363 Md. 333, 348 (2001)) (internal quotation marks omitted). Courts assessing constitutional challenges "'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)).

This Court reviews *de novo* postconviction courts' resolution of questions of law—including, for example, whether the statutory waiver standard applies to a particular claim of ineffective assistance of counsel. *See State v. Sanmartin Prado*, 448 Md. 664, 679 (2016) (citing *State v. Daughtry*, 419 Md. 35, 46 (2011)).

ARGUMENT

I. THE COURT OF SPECIAL APPEALS CORRECTLY CONCLUDED THAT TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO CONTACT A DISINTERESTED ALIBI WITNESS WHO WOULD HAVE TESTIFIED THAT SHE WAS WITH SYED AT THE VERY TIME OF THE MURDER.

A. Trial Counsel Performed Deficiently by Ignoring Her Client's Request to Investigate a Known Alibi Witness Prior to Trial.

Both the Circuit Court and the Court of Special Appeals have now found that trial counsel's failure to contact a disinterested alibi witness was deficient based on the following findings of fact:

- Lee was murdered on January 13, 1999 sometime between 2:15 and 2:36 p.m. Cir. Ct. Op. 11 n.9; Op. 99.
- Prior to the start of trial, Syed gave trial counsel two letters he received from McClain. Cir. Ct. Op. 12; Op. 66–69; *see also* E001208–09 (McClain's 3/1/99 letter to Syed); E001211a–c (McClain's 3/2/99 letter to Syed).
- In her letters, McClain indicated that she was with Syed at the Woodlawn Public Library during the "window when the victim was allegedly murdered." Cir. Ct. Op. 12.

- McClain's March 1, 1999 letter also provided "phone numbers through which she could have been contacted." *Id*. at 23; Op. 86; *see also* E001208–09 (McClain's 3/1/99 letter to Syed).

- Trial counsel's file confirms that, by July 13, 1999, she was aware that McClain could account for Syed's whereabouts from 2:15 to 2:45 p.m on the day in question. Cir. Ct. Op. 12; Op. 86; *see also* E001255; E001257 (note from trial counsel's file dated "7/13").

- "[T]rial counsel had nearly five months before trial to contact McClain[.]" Cir. Ct. Op. 23; *see also* Op. 73.

- "[N]either [trial counsel] nor her staff ever contacted McClain." Cir. Ct. Op. 12; Op. 87; *see also* E001213 (McClain's 3/25/00 Aff.); E001215 (McClain's 1/13/15 Aff.).

These findings of fact cannot be disturbed absent clear error. *See Jones*, 138 Md. App. at 209. And the State does not challenge the factual finding at the center of the Circuit Court's holding—that "trial counsel made *no effort* to contact McClain[.]" Cir. Ct. Op. 22.

Both the Circuit Court and the Court of Special Appeals also concluded that, had she testified, McClain "would have directly contradicted the State's theory of when Syed had the opportunity and did murder Hae." Op. 102; *see also* Cir. Ct. Op. 25. Under the circumstances, "trial counsel's failure to make any effort to contact McClain as an alibi witness fell below the objective standard of a reasonably competent attorney acting under prevailing norms, taking into consideration all of the circumstances existing at the time of counsel's conduct with a strong presumption of reasonable professional assistance." Op. 93; *see also* Cir. Ct. Op. 16.

In response to all of this, the State cites *not one case* in which a court found an attorney's performance adequate despite the failure to contact a potential alibi witness

who was identified prior to trial. Similarly, the State failed to call any witness to counter David B. Irwin, who was admitted as an expert in criminal defense practice and who testified that "to meet the minimal objective standard of reasonable defense care[,]" trial counsel "had to go talk to Asia McClain." E001202–03; *see also id*. at E001198–99.

Instead, the State now seeks to undercut this common-sense conclusion by manufacturing a new rule: a petitioner's ineffective-assistance claim stemming from the failure to contact an alibi witness must be rejected unless he presents, and then presumably rebuts, evidence at the post-conviction hearing as to the possible reasons *why* his trial counsel might have failed to try and make contact with an alibi witness before trial. Br. 3, 33. The State's proposed rule is contrary to existing law and fundamentally flawed in several respects.

1. The Court of Special Appeals Correctly Analyzed Syed's Ineffective-Assistance Claim Based On Counsel's Failure To Contact a Critical Alibi Witness.

Before affirming the Circuit Court's finding that counsel had performed deficiently when she failed to contact a critical alibi witness, the Court of Special Appeals meticulously reviewed *Strickland* and a long line of decisions after it, including three federal decisions that this Court has previously discussed with approval. Op. 75–86; *id*. at 78 (citing *In Re Parris W*., 363 Md. 717 (2001)); *Griffin v. Warden, Maryland Corr. Adjustment Ctr*., 970 F.2d 1355 (4th Cir. 1992); *Grooms v. Solem*, 923 F.2d 88 (8th Cir. 1991); *Montgomery v. Petersen*, 846 F.2d 407 (7th Cir. 1988). In each of these decisions, the reviewing court appropriately focused on whether counsel's decision not to investigate a potential alibi defense was reasonable based on the facts available at the

time. *See Strickland*, 466 U.S. at 689 (court reviewing an ineffective-assistance claim should "evaluate the conduct from counsel's perspective at the time").

In *Grooms*, for example, Grooms was convicted of selling stolen Native American artifacts based on the testimony of a police informant. 923 F.2d 88. Grooms told his counsel on the day of trial that he spent the day in question at a mechanic's shop, waiting for the transmission to be replaced on his truck. Counsel failed to investigate this alibi. At the postconviction hearing, the technicians who worked on Grooms' transmission testified that they did not finish working on Grooms' truck until after the crime supposedly occurred. *Id*. at 90. On these facts, the Eighth Circuit articulated a clear standard: "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." *Id*. This standard neither suggests nor leaves room for a requirement that petitioners develop—and then disprove—potential post hoc explanations for the missing contact.

In *Griffin*, Griffin was identified by two security guards as being a participant in an armed robbery. 970 F.2d at 1356. Before trial, Griffin provided his trial counsel with a list of five alibi witnesses. *Id*. Defense counsel, however, failed to contact these witnesses, a lapse that "easily met" *Strickland*'s deficiency prong. *Id*. at 1358. That left the question whether some "cogent tactical or other consideration justified" counsel's failure. *Id*. (quoting *Washington v. Murray*, 952 F.2d 1472, 1476 (4th Cir. 1991)) (internal quotation marks omitted). On postconviction review, the state habeas court supplied one possible tactical consideration, opining that "it may have been sound trial

strategy" not to call one of the witnesses, because the witness might have been an accomplice, which might in turn have hurt Griffin's case. *Id*.

The federal district court adopted the state court's reasoning; but the Fourth Circuit sharply rejected it, explaining that the "'cogent tactical considerations' that the state court bestowed on [counsel] for failing to present Griffin's alibi witnesses are exercises in retrospective sophistry." *Id*. at 1358. "[C]ourts should not conjure up tactical decisions an attorney could have made, but plainly did not." *Id*. And where the attorney's deficient "performance deprived him of the opportunity to even make a tactical decision about putting [the witness] on the stand," after-the-fact speculation cannot cure that deficiency. Rather, a court must "evaluate the conduct from counsel's perspective at the time." *Id*. (quoting *Strickland*, 466 U.S. at 689). "Tolerance of tactical miscalculations is one thing; fabrication of tactical excuses is quite another." *Id*. at 1359.

In *Montgomery*, Montgomery was charged with committing two burglaries in two different counties on the same day. 846 F.2d at 408. At the trial for one burglary, Montgomery's wife testified that she and her husband spent the afternoon of the robbery shopping for a bicycle, and that Montgomery was at home the rest of the day and evening. *Id*. at 409. But defense counsel failed to investigate or call the sole disinterested witness—the Sears clerk who sold Montgomery and his wife the bicycle. *Id*. at 409–10. The Seventh Circuit framed its holding in objective terms: "counsel does have a duty to contact a potential witness unless counsel can make a rational decision that investigation is unnecessary." *Id*. at 413 (internal quotation marks and citations omitted). The tense, again, is important; counsel's duty to contact a witness may be excused if counsel "*can*

make a rational decision that investigation is unnecessary"—not if the parties in a postconviction proceeding can gin up an after-the-fact notion why an investigation *might* have been unnecessary. *Id*. (emphasis added) (internal quotation marks and citations omitted).

Many other cases are to the same effect. In *Lawrence v. Armontrout*, 900 F.2d 127 (8th Cir. 1990), the defendant was convicted of multiple murders. *Id*. at 128. After his convictions were affirmed on appeal, Lawrence brought a post-conviction ineffective assistance claim, arguing that counsel "failed to interview or call as witnesses several people who would have corroborated his alibi on the evening of the murders." *Id*. At the evidentiary hearing, defense counsel testified that she had interviewed two witnesses but made no effort to locate or interview the remaining two, believing instead that they would be hard to locate or would not come to court. *Id*. at 129. The court of appeals held that, "once Lawrence provided his trial counsel with the names of potential alibi witnesses, it was unreasonable of her not to make some effort to interview all these potential witnesses to ascertain whether their testimony would aid an alibi defense." *Id*. Counsel's belief at that time that they might not be easily located, or might not attend, was irrelevant.

The same was true in *Bryant v. Scott*. In that case, the Fifth Circuit determined that Bryant's counsel provided ineffective assistance by failing to interview alibi witnesses about whom his counsel became aware three days before trial. 28 F.3d 1411 (5th Cir. 1994). The district court initially rejected Bryant's claims after his counsel testified that Bryant had not assisted with the defense by providing the names and addresses of any alibi witnesses. *Id*. at 1415. The Fifth Circuit disagreed and reversed. Even if his counsel

viewed Bryant as generally unhelpful, the appellate court explained, it was dispositive that defense counsel "knew of three alibi witnesses before trial and" therefore "should have made some effort to contact or interview these people in furtherance of Bryant's defense." *Id*. at 1418. The formulation of these standards is critical. Counsel's failure to contact a known alibi witness before trial is deficient performance, which may thereafter be rebutted based on record evidence of counsel's rationale—not *post-hoc* speculation. None of these cases suggests, much less holds, that the petitioner bears the burden to present and then rebut all possible reasons for why his counsel *might* have disregarded a request to investigate.

Other decisions that the Court of Special Appeals did not cite are to the same effect. In *Towns v. Smith*, the defendant was convicted for participating in a robbery and murder. 395 F.3d 251, 253 (6th Cir. 2005). Before trial, another individual, Richard, admitted that he drove the get-away car while the defendant's two brothers, but not defendant, robbed and shot the victim. Defense counsel "never made any attempt to contact" Richard despite learning of his existence before trial. *Id*. at 253–54.

The Sixth Circuit affirmed that counsel provided ineffective assistance by failing to investigate Richard as a potential witness. First, it rejected the respondent's laches argument. Although the petition was filed nineteen years after the defendant's conviction and, by then, his counsel was deceased, *id*. at 255, 257, "[t]he records of the trial and habeas proceedings" were nonetheless "sufficient to permit . . . th[e] Court to adjudicate" the defendant's "ineffective assistance of counsel claim." *Id*. at 257. The Sixth Circuit then proceeded to the merits. "Without even attempting to interview Richard, counsel

simply decided not to call him as a witness." *Id*. at 259. "That decision was *objectively unreasonable* because it was a decision made without undertaking a full investigation into whether Richard could assist" the defense. *Id*. (emphasis added) (internal quotation marks and citations omitted).

The Court of Special Appeals drew the appropriate lesson from all these cases: "[O]nce a defendant identifies potential alibi witnesses, defense counsel has the duty to make some effort to contact them to ascertain whether their testimony would aid the defense." Op. 85 (internal quotation marks and citations omitted). In other words, these cases depend upon a common, objective question—namely, did the defendant identify a potential alibi witness for counsel in advance of trial? If so, then counsel is duty bound to investigate by making some *effort* to contact the witness—hardly an onerous burden. In this case, Syed triggered this duty when he gave trial counsel letters that offered multiple ways of contacting McClain and stated that McClain was with Syed when the murder supposedly occurred. *Id*. at 86–87, 92. Trial counsel ignored her client's request and, by doing so, "abdicated" the constitutional duty she owed to Syed. *Bryant*, 28 F.3d at 1417.

After concluding that trial counsel failed to fulfil this duty to investigate, the Court of Special Appeals, like others before it, went on to consider whether the record evidence demonstrated a cogent tactical justification for that failure. Op. 87 ("The failure to investigate a particular lead may be excused if a lawyer has made a reasonable decision that makes particular investigations unnecessary.") (quoting *Washington v. Smith*, 219 F.3d 620, 631 (7th Cir. 2000)). But, when analyzing trial counsel's possible justifications, the Court of Special Appeals rightly proceeded with caution. *See Griffin*, 970 F.2d at

1358; *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990) (courts should "not construct strategic defenses which counsel does not offer[,]" but should "evaluate the conduct from counsel's perspective at the time.") (internal quotation marks and citations omitted). In this case, trial counsel's failure to contact McClain is not justified by a shred of evidence in the record purporting to explain the basis for that lapse. And because counsel failed even to contact McClain, her "incompetent performance deprived h[er] of the opportunity to even make a tactical decision" about whether to present McClain as an alibi witness. *Griffin*, 970 F.2d at 1358. As the Court of Special Appeals explained, Op. 88–89, "the bottom line is that no reasonable evaluation of the advantages or disadvantages of McClain's alibi testimony . . . could be made without first contacting McClain." *See also* Cir. Ct. App. 16–22.

2. The Court of Special Appeals' Holding Is Consistent with *Strickland*.

The State broadly contends that *Strickland* requires the rejection of an ineffective-assistance claim any time counsel has not explained why she failed to discharge a constitutional duty, and that the Court of Special Appeals' decision clashes with *Strickland* in this respect. Br. 31–32. But *Strickland* does nothing of the sort, and the Court of Special Appeals followed *Strickland* to the letter. *See Strickland*, 466 U.S. at 690–91 (requiring postconviction courts to analyze whether, at the time counsel decided not to investigate, that decision was objectively reasonable under the circumstances); Op. 76–87 (discussing *Strickland* at length and consequently analyzing whether (1) trial

counsel failed to contact an alibi witness Syed identified before trial and (2) there was any basis in the record to excuse that failure under the circumstances).

The Supreme Court has long recognized pre-trial investigation as a crucial prerequisite to competent representation. *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (explaining that investigation is required "to make the adversarial testing process work"); *Strickland*, 466 U.S. at 691 ("[C[ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). As a result, *Strickland* instructs that "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." *Id*. This Court has advanced a similar formulation while articulating the burden of proof petitioners like Syed face: "To prove deficient performance, the defendant must identify acts or omissions of counsel that were not the result of reasonable professional judgment." *In re Parris W.*, 363 Md. at 725 (citations omitted); *see also* Op. 76 (courts must "assess counsel's performance under an objective standard of a reasonably competent attorney acting under prevailing norms").

Strickland also dictates the temporal perspective for evaluating counsel's performance. The challenged conduct must be reasonable, "viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. The Supreme Court has since reiterated the importance of anchoring the court's inquiry to the time of the conduct. In *Kimmelman*, counsel "conducted no pretrial discovery" and was thus unaware of the prosecution's strategy at trial. 477 U.S. at 385. The state argued that this failure to engage

in discovery was nonetheless reasonable in light of the evidence later introduced, and counsel's performance at, the subsequent trial. *Id*. at 385–87. But the Supreme Court rejected the state's reliance on "hindsight": "At the time [the defendant's] lawyer decided not to request any discovery, he did not—and, because he did not ask, could not—know" the case the state would present at the later trial. *Id*. at 387. "Viewing counsel's failure to conduct any discovery from his perspective at the time," the Supreme Court found that failure unreasonable. *Id*. at 385. In this case, the Court of Special Appeals adhered to the temporal limitations on its inquiry, remembering to "guard against 'the distorting effects of hindsight'" and the temptation "'to conjure up tactical decisions an attorney could have made, but plainly did not.'" Op. 87 (quoting *Strickland*, 466 U.S. at 689 and *Griffin*, 970 F.2d at 1358).

The Court of Special Appeals also well understood that its review was to be deferential, and that counsel's strategic decisions come with a "strong presumption of reasonable professional assistance." Op. 76; *see also id*. at 87, 93. But even deferential review has its limits. As does the presumption of reasonableness. A tactical judgment that a particular line of investigation is unnecessary is entitled to deference so long as it remains "within the wide range of reasonable professional assistance[.]" *Strickland*, 466 U.S. at 689. As "guides to determining" the bounds of constitutionally-adequate performance, the Supreme Court relies on the American Bar Association's Standards for Criminal Justice. *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). Those Standards make it "the duty of the lawyer . . . to explore all avenues leading to facts relevant to the merits of the case[.]" *Id*. (quoting ABA Standards For Criminal Justice 4-4.1 (2d ed. 1982 Supp.)).

Here, trial counsel abandoned an entire avenue of investigation. Not just any avenue either. Syed's trial counsel ignored his pre-trial request to contact McClain—an easily-reachable, disinterested alibi witness who could account for Syed's whereabouts throughout the time period when the murder supposedly occurred. The record in this case reveals no contemporaneous tactical consideration that could have justified trial counsel's failure to even contact McClain. And because of this failure, trial counsel had no "opportunity to even make a tactical decision about putting [the witness] on the stand[.]" *Griffin*, 970 F.2d at 1358; *see also Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991) ("reject[ing] the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."). Because there is no evidence of any contemporaneous judgment that trial counsel made in reaching this decision—only a resounding lack of follow-through—there *is* no tactical decision meriting a presumption of reasonableness, and no strategic call to defer to.

The State takes a different tack. It contends that whenever the record is silent on the "reason or motivation for trial counsel's decisions," the presumption of reasonableness controls, and the petitioner loses. Br. 27. In support, the State cites a handful of out-of-state cases. *Id*. at 28. They have no bearing on this one, for multiple reasons. To begin with, they are all grounded in markedly different circumstances. The State's lead-off case, *Jones v. State*, 500 S.W.3d 106, 114 (Tex. App. 2016), involved counsel's decision not to cross-examine a witness at trial, which his client later challenged as deficient performance. But as the Texas court explained, "[c]ross-examination is inherently risky . . . .Thus, unless there is a good basis on which to cross-

examine . . . it can be more effective to refrain from cross-examining a damaging witness to minimize the impact of his testimony." *Id*. at 115 (citations omitted). Counsel's decision not to cross-examine a witness, even in the absence of contemporary explanation, was afforded the presumption of reasonableness because that decision *was* in the realm of reasonableness.

In *Broadnax v. State*, an Alabama case, the petitioner challenged his counsel's failure to investigate one potential alibi defense—not the failure to contact a particular, identified alibi witness. 130 So.3d 1232, 1250–51 (Ala. Crim. App. 2013). Worse yet, the late-breaking alibi defense the petitioner named as a ground for his ineffective assistance claim "directly contradict[ed] the alibi defense presented at [his] trial," *id*. at 1249, and was "inconsistent with what Broadnax told trial counsel" at the time, *id*. at 1256–57. And on top of that, the petitioner *had the opportunity to*—but failed to—question his attorneys about their investigation. *See id*. at 1256. All of those particulars are a far cry from this case, where Syed identified an alibi witness before trial; there was no alternative alibi defense presented at trial, *see* Op. 89; and no evidence exists for why Syed's trial counsel did not even contact the witness.

Finally, *Williams v. Head*, 185 F.3d 1223, 1244 (11th Cir. 1999), involved a challenge to a lawyer's representation of the petitioner in connection with a motion for new trial. The lawyer's file had been turned over to petitioner's prior postconviction counsel, and then was lost. In the habeas proceeding, counsel explained at length his approach to the new-trial motion and, to the best of his recollection, the decisions he made and why he made them. *Id*. at 1227–28. The Eleventh Circuit concluded that

petitioner had failed to refute the presumption that his former counsel's tactical decisions were reasonable. *Id*. at 1228. That—again—is a far cry from this case, where counsel's deficient performance cannot be attributed even to a decision *at all*; it was an abject failure to contact a known, critical alibi witness.[3] *See* T. 2/5/16 at 125:11-15 (Irwin testifying that attorneys cannot "make strategic decisions without having first investigated"); *see also Griffin*, 970 F.2d at 1358; *Horton*, 941 F.2d at 1462.

The State also invokes *Cullen v. Pinholster*, 563 U.S. 170 (2011), a federal habeas case subject to the heightened burdens imposed by the Antiterrorism and Effective Death Penalty Act (AEDPA). The question there was whether counsel should have pursued and presented an alternative *mitigation* strategy. *Id*. at 190. The petitioner's counsel already had devoted the "considerable time and effort investigating avenues for mitigation[.]" *Id*. at 190-91. The Supreme Court therefore held that "[t]here comes a point where a defense attorney will reasonably decide that another strategy is in order, thus 'mak[ing] particular investigations unnecessary.'" *Id*. at 190–91, 197 (internal citation omitted).[4] In Syed's

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[3] The State shoehorns a few other cases into a string-cite footnote. There is a reason they are in a footnote. None of them presents anything close to the set of circumstances here. *Sallahdin v. Mullin*, 380 F.3d 1242, 1248 (10th Cir. 2004) (claim of failure to present mitigating evidence of the defendant's steroid use); *Chandler v. United States*, 218 F.3d 1305, 1309 (11th Cir. 2000) (claim of failure to present a character witness at sentencing); *Henry v. Dave*, No. 4:07-CV-15424, 2010 WL 4339501, at *5 (E.D. Mich. Oct. 25, 2010) (claim of failure to call an expert witness at trial); *Hughley v. State*, 769 S.E.2d 537, 542-44 (Ga. App. Ct. 2015) (claim of failure to call a character witness and impeach witnesses at trial).

[4] The State also quotes *Cullen* as purportedly granting permission to fashion justifications after the fact. But that excerpt from *Cullen* cannot be read the way the State suggests without bringing it into conflict with *Strickland* and *Kimmelman*. The better reading is to permit courts to ask after counsel's real-time rationales. *See Rompilla*, 545

case, however, trial counsel could not even have reached that point without conducting at least *some* investigation into the McClain alibi before trial. Likewise, in *Rogers v. Zant*, 13 F.3d 384 (11th Cir. 1994), also an AEDPA case, counsel made a preliminary investigation into a particular defense and potential mitigating circumstance. *Id*. at 387. That circumstance was voluntary intoxication—namely, that the defendant regularly used PCP. That sort of double-edged-sword mitigation evidence is (again) a far cry from the failure to even contact a critical defense witness at the core of Syed's case, who would have supplied a potential alibi for the entire time when the crime supposedly took place.

Each of the State's cases, despite arising in different contexts, have something in common: two sides of a story, and a record that is mute as to counsel's reasons. In all those events, the presumption of reasonableness tips the scale in favor of counsel. A decision not to cross-examine a witness might be unreasonable; but it might also be reasonable. *Jones*, 500 S.W.2d at 114. A decision not to present a new alibi defense when it undermined an existing alibi defense might be unreasonable; but it might also be reasonable. *Broadnax*, 130 So.3d at 1258. Decisions to pursue and press certain issues at trial, or in post-trial motions, or on sentencing, or on appeal, *see Williams*, 185 F.3d at 1244; *Walker v. State*, 194 So.3d 253, 298 (Ala. 2015), might be unreasonable; but they might also be reasonable. Here, there is one side to the story: Syed's trial counsel did not *contact* a disinterested alibi witness before trial after her client specifically requested she did so. The court need not afford a presumption of reasonableness to an objectively

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U.S. at 381 ("hindsight is discounted by pegging adequacy to counsel's perspective at the time investigative decisions are made") (internal quotation marks and citations omitted).

*un*reasonable lapse. *See Grooms*, 923 F.2d at 90 ("[I]t is unreasonable not to make some effort to contact" an alibi witness the defendant identified before trial); *Lawrence*, 900 F.2d at 129 ("[I]t was unreasonable of [counsel] not to make some effort to interview all these potential" alibi witnesses); *Towns*, 395 F.3d at 259 (finding it "objectively unreasonable" not to contact a known witness who would have testified that someone other than the defendant committed the crime).

In any event, this Court should not, for several reasons, adopt a new rule requiring counsel to explain her thought process before her performance can be deemed deficient. First, postconviction courts repeatedly have found in favor of the petitioner without requiring counsel to testify as to her subjective motivations. *See*, *e.g.*, *Towns*, 395 F.3d at 257 (finding ineffective assistance over the respondent's objection "that his ability to defend against [the] ineffective assistance claim has been compromised by virtue of the fact that [the defendant's] trial counsel is now deceased"); *Powers v. United States*, 446 F.2d 22, 24 (5th Cir. 1971) (remanding for an evidentiary hearing on ineffective assistance claims, even though petitioner's counsel was deceased); *People v. Upshaw*, 89 N.E.3d 1049, 1060–61 (Ill. Ct. App. 2017) (finding substantial showing of deficiency because the "record" of affidavits from the defendant and an alibi witness "suggests no strategic reason that counsel may have decided . . . not to even interview" the alibi witness); *Ex parte Tate*, No. AP-75,596, 2007 WL 171873, at *1 (Tex. Crim. App. Jan. 24, 2007) (affirming finding of ineffective assistance even though the trial court could not "make the findings . . . regarding counsel's . . . reasons for not calling the witnesses" because counsel was deceased); *Ex parte Love*, 468 S.W.2d 836, 836–37 (Tex. Crim.

App. 1971) (concluding that a since-deceased counsel rendered ineffective assistance); *see also Stone v. State*, 17 S.W.3d 348, 352 (Tex. App. 2000) (finding remand unnecessary "to ask [the defendant's] attorney what his strategy was" because "nothing trial counsel could say would make this court believe that it was sound trial strategy"). Thus, the State is simply incorrect in contending that, where the reasons why counsel failed to act are unclear, "state and federal courts have *uniformly concluded* that a petitioner cannot overcome the strong presumption required by" *Strickland*. Br. 3 (emphasis added).

Second, insisting on counsel testifying after the fact about what subjectively motivated her prior conduct would violate *Strickland*'s and this Court's directives to assess counsel's conduct objectively from the perspective at the time the conduct occurred. 466 U.S. at 690 ("[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."); *In re Parris W.*, 363 Md. at 725 (explaining that "[t]he standard by which counsel's performance is assessed is an objective one") (citation omitted). When applying this standard in *In re Parris*, this Court found "instructive" three decisions that also adhered to *Strickland*'s demand for an objective and temporally-limited inquiry. 363 Md. at 730–733 (citing *Griffin*, 970 F.2d 1355; *Montgomery*, 846 F.2d 407; *Grooms*, 923 F.2d 88). The Court of Special Appeals, in turn, correctly summarized the holdings from these and other decisions as "[o]nce a defendant identifies potential alibi witnesses, defense counsel has the duty to make some effort to contact them to ascertain whether their testimony would aid the defense." Op. 85

(citations omitted). Thus, there is no room under this standard, this Court's precedent, or *Strickland* for the creation of a new rule that would deny relief absent belated testimony from counsel about her thought process in reaching a decision made years before.

Third, if there were ever a situation to impose the State's broad rule, Syed's is not that situation. Two of the State's cases required explanations from counsel where they were available and, in fact, testified, but simply "were never questioned about their investigation of [the defendant's] alibi defense." Op. 88 n.37 (citing *Broadnax*, 130 So. 3d at 1256); *Dunaway*, 198 So.3d at 547 (defendant's "trial attorneys were asked very few questions at the evidentiary hearing"). And in *Jones*, there was no indication that counsel was unavailable. Rather, the court simply found the record on direct appeal incomplete because the "appellant did not adduce evidence to support his ineffective assistance claims in a motion for new trial[.]" *Jones*, 500 S.W.3d at 114; *see also In re Parris W.*, 363 Md. at 726 ("a claim of ineffective assistance of counsel is raised most appropriately in a post-conviction proceeding[,]" not on direct appeal). Here, the situation is markedly different, and there is no need for testimony from trial counsel, where she is long deceased and the extensive record is clear as to the challenged conduct. *See In re Parris W.*, 363 Md. 717, 727 (review of counsel's performance is appropriate where "none of the critical facts surrounding counsel's conduct is in dispute"). To hold otherwise would foster arbitrary results. Postconviction claims often are by necessity litigated years or even decades after trial. Relief on those claims does not, and should not, depend on whether counsel happens to be alive and available to testify.

In this case, what trial counsel did and did not do is undisputed. Based on the record evidence, two courts have now concluded that Syed requested that his trial counsel investigate McClain's potential testimony. She ignored that request. Op. 86–87, 92; Cir. Ct. Op. 22. And "neither a review of the record nor the State's arguments provide a reasonable basis to justify such failure." Op. 93. That should be the end of the matter.

3. The State's Theories For Why Trial Counsel Might Not Have Investigated McClain Fail.

The State contends that because there exist possible reasons why trial counsel might have concluded that *presenting* the McClain alibi theory *at trial* "'could have been more harmful than helpful to Syed's defense,'" Syed cannot prevail on his ineffective assistance claim. Br. 34. (internal citation omitted). But counsel's dereliction of duty was in "ma[king] *no effort* to contact" Asia McClain. Cir. Ct. Op. 22. She never even reached the point of making strategic judgments about whether or how to use McClain's testimony at trial. And the State has never identified a potential tactical disadvantage to Syed that could have arisen from his counsel simply *contacting* McClain. Because the courts below determined that trial counsel was ineffective based on *that* finding—that "trial counsel made no effort to contact McClain," *id.*—the State's various speculative theories are beside the point. *See Griffin*, 970 F.2d at 1358 ("retrospective" justifications cannot cure counsel's deficiency). In any event, the courts below were correct to reject them.

First, the State contends that trial counsel *might* have decided not to contact McClain because the alibi she offered was supposedly inconsistent with what Syed had

told police. Br. 34. Yet, given the "close proximity" of the school campus and the public library, testimony about Syed staying on campus could have been presented along with McClain's testimony about speaking with him in the library, with only "minor inconsistency." Cir. Ct. Op. 21.

Second, the State posits that trial counsel *might* have concluded that it was unnecessary to investigate McClain because she "could not testify to Syed's daily habit and routine." Br. 36–37. This theory depends on a false premise: that trial counsel presented an alibi defense at trial based on Syed's habit and routine. As the Court of Special Appeals recognized, "in her opening statement and closing argument, trial counsel did not raise *any* alibi defense for Syed[.]" Op. 89.

More fundamentally, the State's theory makes no sense. Trial counsel could not reasonably have concluded that an "alibi" based on vague testimony that Syed usually went to track practice and the mosque in the evenings was a better defense strategy than an actual alibi from a disinterested witness for the precise time on the precise day the State says the murder occurred—particularly without conducting any investigation into the alibi. *See Griffin*, 970 F.2d at 1358 (counsel could not have made a reasonable strategic decision without speaking to the alibi witness); *see also* E001200 (T. 2/5/16) (Irwin testifying that attorneys cannot "make strategic decisions without having first investigated"). The absurdity of this theory is illustrated by the State's argument that because McClain offered only a "narrow alibi" for a short window of time, trial counsel could reasonably have concluded it was not worth investigating. Br. 37. That "narrow"

window of time was the entire window of time in which the State claimed the crime took place.

Third, the State theorizes that trial counsel *might* have decided not to investigate McClain because she opted to challenge the State's theory of when the crime occurred, rather than accept that timeline. Br. 38–39. This misses the point. Had trial counsel conducted any investigation into McClain *and then* decided—for whatever reason—that the sounder trial strategy was to attack the State's timeline, that might have been a reasonable decision. But she did not make any such investigation, and therefore could not have made any such tactical decision. Without that necessary step, trial counsel could not have reasonably weighed the advantages and disadvantages of two possible strategies.

Fourth, the State hypothesizes that presenting McClain's alibi testimony might have precluded trial counsel from probing a weakness in the State's case, *i.e.*, the uncertainty regarding how, if at all, Syed got into the victim's car. Br. 41. The State contends that, if Syed were at the library, this weakness would disappear because "students were picked up" at the library. *Id.* at 42. Notably absent from the State's brief is citation to any testimony showing that trial counsel ever actually tried to exploit this supposed vulnerability. And in any event, Inez Butler and Debbie Warren, the two witnesses on whom the State relies, presumably would have affirmed that they saw the victim by herself after school, *id.* at 41—meaning that trial counsel still would have had the opportunity to exploit the dearth of evidence placing Syed and the victim together on the day in question.

Finally, the State argues that trial counsel may have decided not to contact McClain because she might have thought the alibi was fabricated. Br. 42. No witness, expert or otherwise, testified in support of this theory at the February 2016 post-conviction hearing, so the State's theory rests primarily on McClain's March 2, 1999 letter. The State contends that the letter contains details that could only have come from Syed. *Id*. at 43–44. But two courts have already considered—and rejected—this argument. Cir. Ct. Op. 16–17; Op. 91. And, more fundamentally, trial counsel's duty to her client did not permit her, based simply on a review of McClain's letter and other hearsay statements found in trial counsel's file, to ignore Syed's request that she contact McClain. *See Lawrence*, 900 F.2d at 129–30 (counsel improperly relied on hearsay to justify not investigating alibi witness). As the Circuit Court explained, if trial counsel harbored doubts about McClain's credibility, she "could have spoken to McClain about these concerns instead of rejecting the potential alibi outright." Cir. Ct. Op. 23; *see also Montgomery*, 846 F.2d at 412 (finding deficient performance where counsel failed to investigate an alibi because he "simply didn't believe" the defendant).

The State's various post-hoc theories are meritless.

4. The State's Argument That Trial Counsel Conducted Some Investigation Into The McClain Alibi Distorts The Record.

The State next argues that trial counsel did not need to investigate because she already "had a meaningful sense of what the potential witness would say." Br. 47. But that is precisely the point. While it perhaps would be reasonable for counsel not to investigate a witness who could not provide an alibi for the relevant period, here, trial

counsel *knew* that McClain had offered to provide an alibi for the precise time when the State claims the crime occurred. That trial counsel knew what McClain would say hurts, not helps, the State's argument. The State also tries to minimize the potential value of McClain's potential testimony by contending that her testimony would only have accounted "for a short time immediately after school on one particular day." *Id*. at 48. What the State omits is, obviously, that the "particular day" at issue is the day of the crime and the "short time" is the window of time in which the State said the crime took place.

Next, the State halfheartedly argues that Syed's first set of attorneys (his bail attorneys) "conducted *some* investigation of the Woodlawn Public library," which obviated the need for trial counsel to contact McClain. *Id*. at 48. The extent of this investigation, as the State concedes, was "driving the area of the high school, the victim's burial site, and the public library," and interviewing a security officer "who worked at the library at the relevant time." *Id*. Needless to say, driving around the library is not, somehow, a substitution for contacting a potential alibi witness. *See Foster v. Wolfenbarger*, 687 F.3d 702, 708 (6th Cir. 2012) (counsel failed to reasonably investigate despite *interviewing* the alibi witness for twenty minutes).

B. Trial Counsel's Failure to Investigate the Alibi Was Prejudicial.

McClain was a disinterested witness whose testimony would have provided Syed with an alibi for the entire period when, according to the State, the murder took place. It is inconceivable that trial counsel's failure to contact her and present her testimony to the jury could not have "undermine[d] confidence in the outcome" of Syed's trial, as is

sufficient to demonstrate prejudice under *Strickland*. *See also Skakel v. Comm'r of Correction*, 188 A.3d 1, 70 (Conn. 2018) (identifying the decision of the Court of Special Appeals as one in a unanimous line finding prejudice based on counsel's failure to "present the testimony of a credible, noncumulative, independent alibi witness"). That the State fails to cite even a single case where counsel's failure to investigate a witness who would have provided an alibi accounting for the time of the crime was deemed not prejudicial speaks volumes. In fact, the State does not cite a single case in support of any of its prejudice arguments at all.

Instead, the State makes two arguments. First, it tries to minimize the substance of McClain's testimony, contending that the majority's finding of prejudice "is rooted in the erroneous belief that Syed's whereabouts during a narrow frame of time was indispensable, or even important, to the jury's verdict." Br. 49. This is—candidly—absurd. The "narrow frame of time" at issue is the ***entire period when the State says the murder took place***. Of course Syed's whereabouts during that "narrow frame of time" would have been "important" to the jury's verdict. Indeed, as the majority found, McClain's testimony "would have been direct evidence that Syed was not at the Best Buy parking lot" (where the State contends the murder took place) "between 2:15 p.m. and 2:35 p.m." (when the State contends the murder took place). Op. 100. It is difficult to overstate the importance of this sort of testimony, particularly in light of the fact that, as the majority acknowledged, the State repeatedly emphasized its theory of when the crime took place throughout the trial, including during its closing argument. *Id*. at 96–97. At the very least, there is a reasonable probability that a disinterested alibi witness's testimony

would have "create[d] a reasonable doubt as to [Syed's] involvement," which is enough to demonstrate *Strickland* prejudice. *In re Parris W.,* 363 Md. at 729.

The State next argues that "[p]rejudice simply cannot be shown" where there existed other "evidence of guilt." Br. 50.[5] But again, the testimony of the witness no one contacted would have punctured both the "when" and the "where" of the State's core theory.[6] Trial counsel's failure to investigate or even contact a witness who swears she would have provided an alibi for the period when the State says the crime took place cannot possibly be *not* prejudicial. The State's position is even more remarkable, given that, as the majority explained, there was "no eyewitness testimony, video surveillance, or confession of the actual murder," no physical or other "forensic evidence linking Syed" to the murder, the case rested heavily on the testimony of a "problematic" "key witness," and the testimony from other witnesses "often conflicted with the State's corroborating evidence." Op. 23–26, 101; *see also United States v. Agurs*, 427 U.S. 97,

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[5] The State's recitation of the evidence against Syed, Br. 50–52, is misleading at best. The following are just a few examples: (1) the State cites to the 2012 postconviction hearing to argue that Syed never attempted to contact Lee after she went missing, but the record does not support that contention and, regardless, evidence from the postconviction proceeding is irrelevant when assessing the strength of the State's case at trial; (2) the State contends that Syed was overheard asking Lee for a ride on the day she went missing, but the record does not contain testimony of any witness overhearing such a request; and (3) the fact that Syed's palm prints were found in Lee's car is neither surprising nor evidence of anything other than that Syed had been in Lee's car, which he had been many times over the course of their relationship.

[6] Indeed, as the majority observed, the State "implicitly conceded the strength of McClain's testimony and its potential impact on the jury when it attempted to present a new timeline for the murder at the second hearing." Op. 102–03. This rightly "solidifie[d] [the majority's] conclusion" that trial counsel's failure to investigate the McClain alibi was prejudicial. *Id.* at 103.

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 decision of the Court of Special Appeals should be affirmed.

II. THE COURT OF SPECIAL APPEALS ERRED IN HOLDING THAT SYED WAIVED HIS INEFFECTIVE-ASSISTANCE CLAIM RELATING TO CELL-PHONE LOCATION EVIDENCE.

The Court of Special Appeals concluded that Syed waived his claim of ineffective assistance of counsel based on trial counsel's failure to use an AT&T disclaimer to cross-examine the state's expert on cell-phone location data. That was legal error. Syed's cell-phone claim is a separate "allegation of error" that independently entitles Syed to relief under the postconviction statute. And because the allegation of error is premised on the fundamental right to counsel, the postconviction statute, as interpreted by this Court in *Curtis*, 284 Md. 132, provides that it can only be waived intelligently and knowingly. *See* Md. Code Ann., Crim. Proc. § 7-106(b)(1)(i). This Court should correct the appellate court's waiver analysis and remand for consideration of Syed's cell-phone claim.

A. The Postconviction Statute Requires Intelligent and Knowing Waiver of Syed's Claim of Ineffective Assistance of Counsel.

The Maryland Post-Conviction Procedure Act states that "an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation" in a prior proceeding. Md. Code Ann., Crim. Proc. § 7-106(b)(1)(i). In *Curtis*, this Court interpreted the scope of this provision, finding that the legislature intended to require intelligent and knowing waiver of allegations of error premised on fundamental constitutional rights. 284 Md. at 148, 150 n.7. This Court specifically held

that one such allegation of error is that of ineffective assistance of counsel. *Id*. at 150–51. "It is settled that a criminal defendant cannot be precluded from having this issue considered because of his mere failure to raise the issue previously." *Id*. at 150.

This Court's analysis in *Curtis* remains good law and makes good sense. Because the postconviction statute does not explicitly limit the scope of claims to which the intelligent and knowing waiver standard applies, this Court looked to the common-law background against which the legislature enacted the waiver provision, and found that, traditionally, the intelligent and knowing standard only governed waiver of certain fundamental constitutional rights. *Id*. at 473–474. The Sixth Amendment right to counsel is one such fundamental right. *See id*. at 474–475; *see also Strickland*, 466 U.S. at 684–685 (the assistance of counsel "plays a crucial role in the adversarial system embodied in the Sixth Amendment" and is necessary "to protect the fundamental right to a fair trial."). The Court therefore reasoned that—whatever its other limits—the statutory wavier standard at least applies to a claim of ineffective assistance of counsel. *Curtis*, 284 Md. at at 474–475.

In the years since *Curtis* was decided, numerous decisions of this Court and the Court of Special Appeals have reaffirmed this interpretation and recognized that the right to counsel is sufficiently fundamental to fall within the scope of the statutory waiver provision. *See, e.g*., *State v*. *Smith*, 443 Md. 572, 605 (2015) ("We have not departed from [*Curtis*'s] construction of the waiver scheme in the post-conviction statute."); *Oken v*. *State*, 343 Md. 256, 271–272 (1996) (comparing right at issue to holding in *Curtis* that

right to "effective assistance of counsel" requires intelligent and knowing waiver).[7] There is no sound reason to abandon this established precedent now.

Here, Syed did not raise his ineffective-assistance claim relating to cell-phone location evidence until the Circuit Court re-opened postconviction proceedings in 2015. But as the Circuit Court found, the record shows that Syed was unaware of the AT&T disclaimer until "shortly before August 24, 2015," when he filed his Supplement to Motion to Re-Open Post-Conviction Proceedings raising the issue. Cir. Ct. Op. 36. He therefore could not have knowingly and intelligently waived his ineffective-assistance claim earlier in the proceedings. Accordingly, under *Curtis*, the claim had not been waived. The Court of Special Appeals' finding to the contrary was wrong.

B. The Court of Special Appeals' Distinction Between "Issues" and "Claims" is Inconsistent with Both the Statute and *Curtis*.

Notwithstanding this Court's precedential decision in *Curtis*, the Court of Special Appeals held that Syed's ineffective-assistance claim relating to cell-phone location data was "based on a non-fundamental right for the purpose of waiver" and therefore was not subject to the statutory knowing and intelligent waiver standard. Op. 50–51. This holding is inconsistent with *Curtis* and the post-conviction statute.

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[7] *See also State v. Rose*, 345 Md. 238, 244 (1997) (*Curtis*'s interpretation of the waiver statute "has been reaffirmed on numerous occasions"); *Robinson v. State*, 410 Md. 91, 107–08 (2009) (the right to counsel is "absolute and can only be foregone by the defendant's 'intelligent and knowing' waiver") (internal quotation marks and citation omitted); *Davis v. State*, 285 Md. 19, 33–34 (1979) (the "intelligent and knowing" standard has been held to apply to the waiver of the right to counsel).

The Court of Special Appeals justified its departure from *Curtis* by drawing a novel distinction between "the issue of a violation of a fundamental right"—which is subject to the statutory waiver standard—and "the grounds supporting such a claim"—which are not. *Id*. at 45. The Court of Special Appeals classified Syed's cell-phone claim as merely a "ground" supporting the "issue" of ineffective assistance and thus held that Syed waived the claim simply because he failed to raise it in a prior proceeding. *Id*. at 45, 50, 53. This distinction between "issues" and "grounds" was erroneous for several reasons.

First, the distinction is semantic and has no basis in the statute. Section 7-106(b) describes the waiver rule in terms of "allegations of error," not issues or grounds. The proper question for assessing waiver, therefore, is whether there is an "allegation[] of error" that is premised on a fundamental right, such as the right to effective assistance of counsel. *See McElroy v. State*, 329 Md. 136, 140 (1993) (noting the intelligent and knowing waiver standard applies "to errors which deprived a petitioner of fundamental constitutional rights"). Whether the allegation can also be described as an "issue" or "ground" is not relevant.

Here, Syed's "allegation of error" is that his counsel rendered ineffective assistance when she failed to cross-examine a key State witness on the reliability of critical cell-phone location. That ineffective-assistance claim is a freestanding and factually distinct "allegation of error," and would independently entitle Syed to relief under the post-conviction statute, even if the other allegations of ineffective-assistance failed. *Compare* Cir. Ct. Op. 59 (granting a new trial based on the cell-phone claim), *with*

Op.104–105 (granting a new trial based on the alibi claim). Because Syed's ineffective-assistance claim relating to cell-phone location data is premised on the violation of Syed's fundamental right to effective assistance of counsel, the postconviction statute provides that it cannot be waived unless Syed intelligently and knowingly failed to raise it.[8] Md. Code Ann., Crim. P. § 7-106(b).

Second, the Court of Special Appeals' distinction is inconsistent with how ineffective-assistance claims are analyzed in analogous contexts. For example, when applying the federal habeas exhaustion requirement—a concept similar to waiver, in that a petitioner in both circumstances must be found to have previously pressed a claim in order to be entitled to pursue it later—courts have held that ineffective-assistance claims with different factual predicates must be treated separately. *See Wood v. Ryan*, 693 F.3d 1104, 1120 (9th Cir. 2012) ("[A] general allegation of ineffective assistance of counsel is not sufficient to [satisfy the exhaustion requirement for] separate specific instances of ineffective assistance."); *Pole v. Randolph*, 570 F.3d 922, 934–935 (7th Cir. 2009) (ineffective-assistance claim premised on one set of facts does not "exhaust" an ineffective-assistance claim premised on another). These cases recognize that, while ineffective-assistance claims may share the same legal standard, they are factually distinct—often radically so—and thus should not be treated as the same claim.

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[8] If, instead, the Court treats Syed's ineffective-assistance claim related to cell-phone location evidence as effectively the same general "allegation of error" raised in the original petition, then there is no waiver issue at all. Syed properly raised an ineffective-assistance allegation in the original proceeding, which has now been reopened. That allegation therefore has not been waived.

Third, the Court of Special Appeals' framework undermines the purpose of the statutory waiver provision. As this Court recognized in *Curtis*, by enacting Section 7-106(b), the legislature intended to incorporate the heightened common-law waiver standard, which is designed to ensure that parties do not unwittingly waive certain fundamental rights that are necessary for a fair trial. *Curtis*, 284 Md. at 147–150. Under the Court of Special Appeals' approach, however, any allegation of error based on the same legal theory and fundamental right as a previous allegation of error—such as Syed's cell-phone claim—would not receive this intended protection. That would be so regardless of how factually distinct the claim was from prior claims, as long as it shared the same legal standard as a claim raised previously. There is no indication that the legislature intended such inconsistent treatment of claims premised on fundamental rights.

The Court of Special Appeals cited the legislative history of the postconviction statute in support of its analysis, but nothing in that record suggests the legislature intended to dilute the statutory waiver provision in Section 7-106(b) by excluding certain claims implicating fundamental rights. The Court of Special Appeals is correct that the 1995 amendments to the postconviction statute indicate a concern with finality. *See* Op. 51–52. The legislature addressed that concern, however, by reducing the number of postconviction petitions allowed from two to one, and providing that a petition may only be re-opened "in the interests of justice." *Id.*; *see also* Md. Code Ann., Crim. P. § 7-104. It did not alter the statutory waiver provision in Section 7-106 as interpreted by this Court in *Curtis*. Thus, if anything, the 1995 amendments indicate that the legislature intended to

preserve the extra protection for claims affecting fundamental rights that the statutory waiver provision affords, trumping the general interest in finality in those narrow circumstances. *See Stachowski v. State*, 416 Md. 276, 291 (2010) ("The General Assembly is presumed to be aware of [the Court of Appeals'] interpretation of its enactments.") (internal quotation marks and citation omitted); *see also Poole v. State*, 203 Md. App. 1, 10–11 (2012) (rejecting argument that addition of ten-year limitations period to the Post-Conviction Statute altered prior judicial interpretation allowing amendments to petitions).

The Court of Special Appeals' hypothesis that applying the statutory waiver standard to factually distinct ineffective-assistance claims would allow petitioners to raise new claims *ad infinitum*, contrary to the legislature's intent, is also misplaced. *See* Op. 52–53. The postconviction statute already provides other mechanisms for courts to prevent abusive successive petitions: Courts retain discretion to decline to re-open petitions where doing so would not be in the "interests of justice," Md. Code Ann., Crim. P. § 7-104, and even for claims premised on fundamental rights, petitioners must overcome the statutory presumption that the failure to raise the claim previously was intelligent and knowing, *id*. § 7-106(b)(2). Whether any further restrictions are warranted is an issue for the legislature, not the courts, to decide.

Fourth, the Court of Special Appeals' reliance on *Wyche v. State*, 53 Md. App. 403 (1983) and *Arrington v. State*, 411 Md. 524 (2009) was mistaken. In *Wyche*, the Court of Special Appeals ventured in a footnote that a new allegation of error concerning a fundamental right that was also implicated by prior allegation of error will not be

subject to the statutory waiver standard. 53 Md. App. at 407 n.2. But as the Court of Special Appeals itself recognized here, that footnote was *dicta* (there was no fundamental right at issue in the case) and unsupported by any legal authority. Op. 45. In any event, the Court of Special Appeals' assessment in *Wyche* was wrong for the same reasons that its analysis was wrong here. Similarly, this Court's analysis in *Arrington* is inapposite. In that case, the Court addressed the scope of proceedings re-opened under a special provision of the postconviction statute, § 8-201, which allows courts to consider new DNA evidence. *See Arrington*, 411 Md. at 533–34. The Court did not discuss whether the intelligent and knowing standard applies to ineffective assistance claims like Syed's, and did not even cite this Court's decision in *Curtis*. *Wyche* and *Arrington* thus do not support the Court of Special appeals' manufactured distinction between "issues" and "grounds" for purposes of applying the statutory waiver standard.

Properly viewed, Syed's cell-phone claim is a freestanding "allegation of error" arising from his right to ineffective assistance of counsel. Under *Curtis* and Section 7-106(b), this allegation of error can only be waived if Syed intelligently and knowingly failed to raise it in a prior proceeding. He did not. Accordingly, the Court should reverse the appellate court's assessment of waiver and remand for consideration of the merits of the cell-phone claim.

CONCLUSION

For the foregoing reasons, the Court of Special Appeals' decision to grant Syed a new trial should be affirmed.

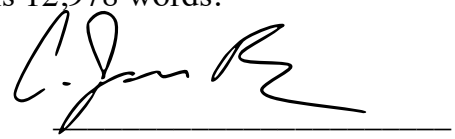
Respectfully submitted,

C. Justin Brown
BROWN LAW
231 East Baltimore Street, Suite1102
Baltimore, Maryland 21202
Tel: 410-244-5444
Fax: 410-934-3208
brown@cjbrownlaw.com

Catherine E. Stetson (admitted *pro hac vice*)
James W. Clayton (admitted *pro hac vice*)
Kathryn M. Ali (admitted *pro hac vice*)
W. David Maxwell (admitted *pro hac vice*)
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
Tel: 202-637-5491
Fax:202-637-5910
cate.stetson@hoganlovells.com

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH MARYLAND RULES

Pursuant to Maryland Rule 8-504(a)(9), Respondent/Cross-Petitioner states that this brief was prepared in Times New Roman 13-point font. Further, this brief complies with the font, margin, and line spacing requirements of Maryland Rule 8-112; and the brief of Respondent/Cross-Petitioner contains 12,978 words.



C. Justin Brown

PERTINENT PROVISIONS

Md. Code Ann., Crim. P. § 7-104

The court may reopen a postconviction proceeding that was previously concluded if the court determines that the action is in the interests of justice.

Md. Code Ann., Crim. Proc. § 7-106(b)(1)

(b)(1)(i) Except as provided in subparagraph (ii) of this paragraph, an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation:
1. before trial;
2. at trial;
3. on direct appeal, whether or not the petitioner took an appeal;
4. in an application for leave to appeal a conviction based on a guilty plea;
5. in a habeas corpus or coram nobis proceeding began by the petitioner;
6. in a prior petition under this subtitle; or
7. in any other proceeding that the petitioner began.
(ii) 1. Failure to make an allegation of error shall be excused if special circumstances exist.
2. The petitioner has the burden of proving that special circumstances exist.

Md. Code Ann., Crim. P. § 7-106(b)(2)

(b)(2) When a petitioner could have made an allegation of error at a proceeding set forth in paragraph (1)(i) of this subsection but did not make an allegation of error, there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were delivered by first-class mail, postage prepaid, this 20th day of September, 2018 to:

Thiruvendran Vignarajah
DLA Piper LLP (US)
100 Light Street, Suite 1350
Baltimore, Maryland 2102

Brian E. Frosh
Attorney General of Maryland
200 St. Paul Place
Baltimore, Maryland 21202

C. Justin Brown