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

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

CONDITIONAL APPLICATION FOR LIMITED REMAND

The State of Maryland, by its attorneys, Brian E. Frosh, Attorney General of Maryland, and Thiruvendran Vignarajah, Deputy Attorney General, pursuant to Section 7-109(b) of the Criminal Procedure Article of the Maryland Code and Maryland Rule 8-204, conditionally applies to the Court of Special Appeals[1] for a limited remand under Section 7-109(b)(3)(ii)(2), in light of evidence previously unknown and unavailable to the State that bears on Respondent Adnan Syed's claim that his attorney was ineffective for failing to investigate a supposed alibi witness, Asia McClain.[2] Only in the event that this Court grants Syed's conditional application to cross appeal the McClain-alibi claim does the State request an opportunity to incorporate into the record the affidavits and, if requested by Syed, the testimony of two former classmates of McClain.

Affiant 1 and Affiant 2, who are sisters and graduates of Woodlawn High School, recall that shortly after Syed's arrest, Affiant 2 and McClain got into a charged conversation in class about why

[1] Pursuant to Rule 8-204(b)(1), the State is required to file this conditional application with the "clerk of the lower court," and thus the captions of the State's and Syed's applications refer to the Circuit Court for Baltimore City. The decision to grant or deny these applications, however, is before the Court of Special Appeals, and thus references to "this Court" in these filings denote Maryland's intermediate appellate court, the Court of Special Appeals, not the post-conviction court whose recent ruling is the subject of these filings.

[2] On August 11, 2016, Syed filed an application for leave to cross appeal this issue. Hence, what the State previously referenced, and continues to reference, as its *conditional* application is now contingent only upon this Court's grant of Syed's application for a cross appeal. *See infra* note 4.

McClain should not lie to help Syed avoid conviction. Affiant 1, who was better friends with McClain, intervened to deescalate the argument. Both witnesses first came to the State's attention in early July 2016, when Affiant 1 sent an email to the State one week after the publication of the post-conviction court's decision granting Syed a new trial. *See* Attachment 1. Both witnesses have spoken with police and executed sworn affidavits, *see* Attachments 2 & 3, which the State seeks to add to the post-conviction record; they are also both prepared to testify at a limited remand proceeding, if Syed or the court so requests. Should this Court decline Syed's request to cross appeal — which the State, <u>in part</u>, does not oppose[3] — no remand for the purpose of completing the record is needed.

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[3] Syed's conditional application for leave to cross appeal (filed August 11, 2016) asks this Court to consider <u>two</u> issues on appeal. The first question presented is the McClain-alibi claim that Syed raised in 2010, that the post-conviction court denied in 2013, that Syed sought and was granted leave to appeal in 2014, and that, after opening briefs were submitted, this Court remanded to the post-conviction court in 2015. Although the State maintains that this claim lacks merit, it does not, given the circuitous procedural history of this issue, *see infra* note 14, oppose Syed's application to resubmit this first question to this Court for review.

But the second question presented is a "cumulative error" claim that Syed unsuccessfully asserted in his original post-conviction petition in 2010, citing in fact the same precedent he cites now, *Bowers v. State*, 320 Md. 416, 436 (1990). *Compare* Post-Conviction Petition at 19 (Jun. 28, 2010), *with* Conditional Application for Leave to Cross Appeal at 16-18 (Aug. 11, 2016). When the post-conviction court agreed to reopen this matter, it did not list Syed's cumulative error claim as an issue it would reconsider. *See* Statement of Reasons and Order of the Court at 4-5 (Nov. 6, 2015) (enumerating specific issues it would consider on remand and expressly stating that it "finds no need to revisit other issues raised in the previously concluded post-conviction proceedings that are still pending before the Court of Special Appeals"). The court's order granting in part and denying in part Syed's petition also makes no reference to any allegation of cumulative error. *See* Mem. Op. II. Appellate courts ordinarily do not review a claim of error that has not been decided by a lower court. Md. Rule 8-131(a).

Under these circumstances, where Syed elected not to include that claim among those he sought leave to appeal in 2014, *see* Syed's Application for Leave to Appeal (Jan. 27, 2014), this Court should not permit him to use the limited remand previously authorized by this Court to resurrect a claim he already asserted and then abandoned. *See Smith v. Murray*, 477 U.S. 527, 536 (1986) ("[W]innowing out weaker arguments on appeal and focusing on those more likely to prevail . . . is the hallmark of effective appellate advocacy." (citations and internal quotation marks omitted)); *State v. Gross*, 134 Md. App. 528, 556 (2000) ("[T]he Supreme Court pointed out that the strategic selection of which appellate issues to raise and which to ignore is one entrusted to the strategic judgment of appellate counsel." (citing *Jones v. Barnes*, 463 U.S. 745, 752-53 (1983))). *Cf. also Holmes v. State*, 401 Md. 429, 466-67 (2007) (finding that petitioner could not revive a claim in a coram nobis petition after failing to raise the claim in an application for leave to appeal).

If requested, the State is prepared to provide further briefing, *see infra* note 13, on why Syed's application should be denied with regard to a cumulative error claim (*i.e.*, the second question

If, however, this Court agrees to review a twice-denied claim premised upon Asia McClain, this Court should decide whether the current record is adequate to ensure that justice is served. The State submits that supplementing the record with affidavits that directly undermine McClain's truthfulness would reinforce the grounds for denying Syed's petition (with respect to both prongs of *Strickland*) and would provide the post-conviction court an opportunity, with a more complete record, to resolve the McClain-alibi contention as a matter of law. *See Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (holding that, as a matter of law, a defendant cannot prove prejudice where the attorney declined to present false testimony). *Cf. Jones v. State*, 379 Md. 704, 707 (2004) (holding that the Court of Special Appeals can, in its discretion, remand an ineffective assistance claim to the post-conviction court to consider additional grounds that were consistent with the State's original position).[4]

Because an appellate court cannot supplement the record in a case pending before it, and because the State cannot file a motion to reopen under *Alston v. State*,[5] the State believes the proper mechanism to incorporate evidence into the post-conviction record is for the State, if an application

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presented), a catch-all claim that is difficult to confine. Otherwise, while not opposing Syed's application for leave to appeal on the first question, the State defers to this Court's judgment on whether further review of a claim that has now been twice considered and twice denied is warranted.

[4] In a separate application filed on August 1, 2016, the State asked this Court for leave to appeal the post-conviction court's order vacating Syed's convictions because of his attorney's alleged failure to more effectively cross examine the State's cellphone expert based on a disclaimer on a fax cover sheet. *See* State's Application for Leave to Appeal (Aug. 1, 2016). In that filing, the State referenced this Conditional Application for Limited Remand, which was not yet filed, advising that the State requested a remand to introduce the testimony of two previously unknown witnesses in the event that Syed persisted with his McClain-alibi claim. *See id.* at 2. In order to expedite and streamline the requested remand, the State now includes with this application affidavits by both witnesses, which they executed on August 4, 2016. The State respectfully asks that at a minimum the State be permitted to supplement the record with these affidavits and that the matter then be returned to this Court for further review. If Syed wishes on remand to cross examine the witnesses, they are prepared to testify.

[5] 425 Md. 326 (2012). A remand from the Court of Special Appeals appears to be the means by which the State is permitted to supplement the post-conviction record. Under *Alston*, the State cannot ask the post-conviction court to reopen post-conviction proceedings, since a motion to reopen is an avenue open only to criminal defendants whose petition for relief is denied. *Id.* at 336-37 ("The history of the reopening provision, § 7–104 of the Postconviction Procedure Act, demonstrates that the provision was simply to provide a limited exception, for the benefit of criminal 'defendants,' to the restriction upon the number of postconviction petitions which they could file.").

for leave to appeal is granted, to request from this Court a remand to the post-conviction court to enter into the record the proffered affidavits and, in that court's discretion, to accept additional testimony as needed. The post-conviction court could then choose to return the record to the appellate courts without additional findings, or in its discretion determine that Syed's claim may now be rejected as a matter of law in light of further evidence that Syed's ineffective assistance of counsel claim is premised on false testimony.

I. SUMMARY OF ARGUMENT

The post-conviction court denied Syed's petition for ineffective assistance of counsel with respect to the failure of Syed's trial counsel, Cristina Gutierrez, to incorporate a supposed alibi witness, Asia McClain, into Syed's defense. The court ruled that, while Gutierrez was deficient in her performance, her error did not prejudice Syed. Syed seeks to appeal this decision. If this Court agrees to review the decision, it should have the benefit of a factual record that is balanced and complete. That is particularly true here since Gutierrez is deceased, her private investigator, Andrew Davis, is deceased, and Syed has not called to testify any other member of Syed's defense team to present an explanation for why Gutierrez did not integrate McClain into an alibi defense for him. Absent an answer directly from Syed's trial counsel, the parties have been left to trade competing explanations for what was, according to the State, a reasonable decision to focus on stronger defenses.

In a very different case, *Griffin v. Warden*, 970 F.2d 1355 (4th Cir. 1992), a federal appellate court cautioned against fashioning in hindsight potential tactical reasons for an attorney's failure and then substituting those reasons for that attorney's on-the-record "unambiguous admissions of unpardonable neglect." *Id.* at 1358. In *Griffin*, however, the defense attorney on the record supplied as his reason for failing to contact any of five separate alibi witnesses identified by the client that he assumed the client would plead guilty on the morning of trial. Here, since Syed (the moving party with the burden of proof) has not called anyone from the defense team to provide a reason for

Gutierrez's putative error, both sides have had to propound "retrospective" explanations for why McClain was not part of Syed's defense.

For his part, Syed claimed Gutierrez was past her prime and speculated that she was perhaps beset and distracted by management and medical problems during this trial. The State has argued that Gutierrez — an acclaimed, coveted defense lawyer whose meticulous preparation and strategic deliberations in this case are reflected in months of pretrial efforts, dozens of internal notes and memoranda, and vigorous challenges at trial — could have reasonably avoided Asia McClain as a witness for several interrelated reasons. First, Gutierrez could have rightly questioned the legitimacy of the letters from McClain, reasonably interpreting them as an offer to fabricate an alibi or as evidence of collusion between Syed and McClain. Second, Gutierrez could reasonably have preferred an alibi strategy that did not carry the risks of placing Syed at the public library, which was (a) inconsistent with what Syed had told police, (b) a conspicuous deviation from his usual routine, and (c) a promising solution to a gap in the prosecution's case that Gutierrez intended to exploit. Finally, where Syed's investigator (while working with Syed's original attorneys) actually looked into the public library as part of a preliminary alibi investigation that collapsed when an accessory to the murder cooperated against Syed, Gutierrez was not required to reexamine each leg of that abandoned alibi defense.

The post-conviction court at once characterized the State's explanations as presenting "quite a compelling theory" and as "plausible," but at the same time declined to "favor one conjecture and ignore other equally plausible speculations," failing to appreciate, the State would argue, that the burden fell on Syed.[6] Mem. Op. II at 17, 19. Accordingly, it found Gutierrez's performance deficient but ultimately held that Syed had not been prejudiced.

[6] *See Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, that the defendant must overcome the presumption that, under the circumstances, the challenged action '*might be considered* sound trial strategy.'" (emphasis added) (citations omitted)).

Given the court's reasoning — and in light of the factual vacuum created by Gutierrez's absence in this case — a limited remand would undoubtedly serve the interests of justice, giving the State an opportunity to introduce affidavits (and testimony if needed) of two witnesses with whom McClain spoke soon after Syed's arrest in 1999 about McClain "lying" to protect Syed. Supplementing with firsthand evidence what the court already framed as "plausible" conjecture, these witnesses substantially reinforce each of the State's defenses of Gutierrez's performance, confirming the untrustworthiness of McClain's letters, compounding the hazards of pursuing her as an alibi, and corroborating the State's view that McClain was a contrived addition to an alibi that had to be laid to rest once Jay Wilds, an accessory to the crime, testified for the prosecution. *See infra* Part III.A.-C.

A limited remand to add these affidavits is also warranted in a case involving a possible fabricated alibi because the new information bears squarely on the analysis of prejudice, which is not limited to Gutierrez's perspective at the time and which may account for all evidence presented to the court.[7] Two classmates reporting that McClain had spoken to them about fabricating a story to help Syed avoid conviction would have significantly damaged her credibility. In addition, under *Nix v. Whiteside*, 475 U.S. 157 (1986), and *Lockhart v. Fretwell*, 506 U.S. 364 (1993), Syed cannot establish prejudice if his ineffective assistance claim is premised upon his attorney's failure to present false testimony. In *Lockhart*, explaining *Nix*, the Supreme Court stated:

> The respondent in [*Nix*] argued that he received ineffective assistance because his counsel refused to cooperate in presenting perjured testimony. Obviously, had the respondent presented false testimony to the jury, there might have been a reasonable probability that the jury would not have returned a verdict of guilty. Sheer outcome determination, however, was not sufficient to make out a claim under the Sixth Amendment. We held that "*as a matter of law*, counsel's conduct . . . cannot establish the prejudice required for relief under the second strand of the *Strickland*[8] inquiry."

[7] *See Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993); *Winston v. Kelly*, 784 F. Supp. 2d 623, 633 (W.D. Va. 2011) ("But unlike the rule of contemporary assessment which requires the court to review counsel's conduct from his perspective at the time of trial, in assessing prejudice . . . a post-conviction court considers the totality of the evidence — the evidence adduced at trial, and the evidence adduced in the [post-conviction] proceeding."); *see also United States v. Baker*, 719 F.3d 313, 322 (4th Cir. 2013).

[8] *Strickland v. Washington*, 466 U.S. 668 (1984).

Lockhart, 506 U.S. at 369-70 (quoting *Nix*, 475 U.S. at 186-87 (emphasis added)).

Applying these principles, direct evidence of McClain's statements about lying for Syed shortly after his arrest further establishes that Syed cannot satisfy his burden of showing that the alibi defense to which he claims a constitutional entitlement was not false or fabricated. And because Syed cannot prove that his petition for relief relies upon truthful information, as a matter of law, he cannot demonstrate prejudice recognized by the Constitution. *See Williams v. Taylor*, 529 U.S. 362, 391-92 (2000) ("Even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury." (citing *Nix* , 475 U.S. at 175-76)). For this reason as well, a limited remand prior to appellate review would be in the interests of justice. "To hold otherwise would grant criminal defendants a windfall to which they are not entitled." *Lockhart*, 506 U.S. at 366. *See infra* Part III.D.

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The State recognizes it previously opposed Syed's request to supplement the post-conviction record with testimony from McClain based on a second affidavit she executed in January 2015. The State maintains that requests for remand on the basis of new evidence should be granted sparingly. The unique character of the present circumstances, however, counsel a limited remand here. And, if a remand was appropriate on the basis of McClain's affidavit, *a fortiori*, the interests of justice, as well as fundamental fairness, dictate that the State should be now afforded an equal opportunity to make the record complete. Indeed, compared with the prior remand granted to Syed,[9] the State's instant request is more compelling for three reasons.

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[9] Central to Syed's prior request for a remand was McClain's allegation that one of the original prosecutors had discouraged her from participating in court proceedings. Syed's Supp. Application for Leave to Appeal at 5, 8-9 (Jan. 20, 2015). That remains no more than a bare allegation and went entirely unaddressed by the post-conviction court. Allowing a claim of misconduct alone to trigger a remand, while denying the State's request in these circumstances, would set a poor precedent. The

First, unlike the affiants presented in this application, McClain was known to Syed when he filed his original petition and could have been subpoenaed to testify at the post-conviction hearing, which was repeatedly postponed. Second, the content of the alibi information McClain purported to offer was contained in her letters to Syed and her original affidavit from 2000, all of which were entered into the post-conviction record prior to the remand — whereas the evidence brought forward by the affiants has never been presented in any form, in any forum. Lastly, the statements of the affiants, if accepted, indicate that Syed was deprived at most of a fabricated alibi, which would allow Syed's claim to be rejected as a matter of law under the principles of *Nix* and its progeny.

Whether McClain's offer was a sincere avenue to pursue in 1999 — or whether there was something unsettling, suspicious, and false about her offer to Syed — is the central question that has animated Syed's claim of ineffective assistance of counsel. Direct evidence of discussions McClain was having with classmates soon after Syed's arrest about lying to protect him bears on the veracity of McClain's account and her overall credibility. To balance and complete the record with this previously unavailable and unsolicited information would therefore serve the interests of justice.

II. BACKGROUND

A. The Alibi of Asia McClain

The procedural history and factual background of this case are set forth in the State's principal application and in its opening brief to this Court last year. The State herein only includes excerpts that, in light of the attached affidavits, are especially germane to Syed's claim regarding McClain:

> 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[:]

State respectfully submits that other considerations — *i.e.*, the prior unavailability, novelty, and legal significance of the proffered content — should instead be controlling.

> "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.

Gutierrez also pursued an alibi defense at trial, through subtle cross-examination of witnesses presented by the State, by substantiating a reliable routine that Syed followed every day, *i.e.*, attendance at school followed by track practice followed by services at the mosque, and by calling to testify for a specific alibi Syed's father . . . who asserted that on the evening of Lee's disappearance he went to the mosque with his son at approximately 7:30 p.m. . . . Importantly, the trial court agreed to give an alibi instruction to the jury, thus finding that an alibi defense had been generated by the facts established by Gutierrez at trial. . . .

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. . . .

> Kevin Urick, one of the original prosecutors, testified that McClain called him after the post-conviction was filed to say she had written the affidavit only because of pressure from the defendant's family and hoped that, by doing so, they would leave her alone. She expressed to Urick concerns about participating in the post-conviction hearing, and ultimately she did not testify. Urick's characterization of McClain's reticence is confirmed by Syed's present counsel who said that although he tried to produce McClain, she evaded service. . . .
>
> Syed testified at the post-conviction hearing that he received the letters from McClain within a week of his arrest and that the letters "fortified" the memory that he had of going to the library after school and staying there from 2:40 p.m. to 3 p.m. He further stated that he remembers exactly who he spoke with and what they spoke about. Syed's sharpened recollection nearly 14 years after the murder stood in contrast to the statements he gave police in the early days of the investigation and contradicted [Rabia] Chaudry's testimony of his statements to her that, even after he was convicted of murder, he had no memory of where he was after school on January 13, 1999.

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

B. The Emergence of New Evidence

On the basis of McClain's 2015 affidavit, this matter was previously remanded to the post-conviction court so that Syed could file a motion to reopen. The post-conviction court agreed to reopen proceedings and received testimony from McClain on the afternoon of February 3, 2016, and the morning of February 4, 2016. With respect to Syed's alibi claim, the post-conviction court again denied relief but, after hearing from McClain, altered its rationale and concluded that while Gutierrez was deficient in failing to investigate McClain, Syed suffered no prejudice. The order vacating Syed's murder conviction and granting him a new trial on other grounds was issued on Thursday, June 30, 2016. *See* Mem. Op. II.

One week later, on July 7, 2016, the State received an unsolicited email from a former high school classmate of McClain's. This individual — referred to here as Affiant 1 — stated:

> Hello,
> My name is [redacted].
> I'm not even sure if I'm contacting the right person but I'm hoping I am.
> I was going to stay out of it because I didn't think Adnan would be granted a new trail [sic] based on her fabricated story but seeing as he has, I felt it was important to come forward.
> Asia (McClain) Chapman's story about seeing Adnan in the library the day Hae was killed is a lie.

> I very much remember, as does [redacted] having a conversation with Asia in our co op class about Asia saying she believed so much in Adnan innocence that she would make up a lie to prove he couldn't have done it.
> Both my sister and I (more so my sister) argued with Asia about how serious this situation was. She just said that it wouldn't hurt anything-that if he was truly guilty then he would be convicted.
> I'm not sure what can come of this information but I felt I had to let someone know.
> Thank you for your time.
> [redacted]

See Attachment 1. (Note: The redactions at the beginning and end of this email contain the first and last name of the sender; the redaction in the body of the email is a reference to her sister, Affiant 2.)

The State relayed this information to police and asked law enforcement to verify the identity of the person and basic information in the correspondence. After aspects of the email were confirmed (*e.g.*, the sender and her sister were high school classmates with McClain), law enforcement made personal contact with Affiant 1 on July 22, 2016, and with her sister, Affiant 2, on July 24, 2016. Police obtained from the affiants Facebook messages with McClain that predate their contact with the State in this case and that provide context concerning their relationship with McClain.

Prior to the broadcast of the popular podcast, "Serial," neither affiant seemingly knew what active steps, if any, McClain had taken relating to Syed's case. Seeking to elicit a reaction, in November 2014, Affiant 1 sent a message through Facebook to McClain referencing the podcast:

> I came across this last night after my Aunt asked me about it. Apparently she has been following the story through the series, The Serial.
> I had ni [sic] idea you had been that involved all those years ago.
>
> I'm sending you the link.
> http://serialpodcast.org/

See Attachment 2.

It does not appear McClain responded to this message. Seven weeks later, McClain sent through Facebook three pages of a handwritten letter that Affiant 1 wrote to McClain at the end of their freshman year at Woodlawn High School. McClain added, in an apparent reference to a postscript in Affiant 1's letter, "I never did forget you honey. Thanks for the good advice[.]" *Id.*

On March 2, 2016 (about four weeks after McClain testified before the post-conviction court), McClain sent a photograph to the affiants in a group message, asking, "Which one of you is this? You remembee [sic] what class? [redacted]?" The same day, Affiant 2 responded, "I think that is [redacted]. That is Mrs. Graham, right? Was it our co-op class?" Affiant 1 then stated, "Pretty sure that's you, [redacted]. I have no idea what class that is though." McClain answered, "I thought it might be co-op[.] You had co op? What period? At the start of 3rd?" Affiant 1 replied to this: "Yes, Asia, we had co-op with you." McClain then said, "Nice! My memory is not perfect but I thought ao [sic] when I saw the pic[.]" In that message, McClain also asked two questions: "So we had to go to 3rd period and wait to be dismissed right? Because we had to wait for busses and the other kids to get into the cafeteria, right?" Affiant 1 said, "Yes, that's right." McClain then concluded the group message: "Thank God I been going crazy! The stuff people expect me to remember." Attachments 2 & 3.

The final messages shown to police came the day after the post-conviction court issued its decision granting Syed a new trial. On July 1, 2016, at 9:30 a.m., Affiant 1 wrote to McClain:

> I was going to try to stay out of it because I seriously thought they'd be no way he would be granted a new trail [sic] but seeing as he is, I have to get this off my chest. Do you remember when you, [redacted] and I were talking in Mrs Graham's class about how you believed so much in his innocence that you would make up a little lie to prove he couldn't have done it? My sister and you actually starting arguing over it. I do. So does [redacted]. That's why he never told anyone, the police or his attorney to pursue you in the investigation because he knew you were full of it–he knew that never happened. Your letter to him, asking him why he never said he talked to you in the library, that was your way on [sic] getting him on board with your story . I think it's sad he may actually be set free because of you and this fabricated story. I'm not getting anymore involved besides writing this message to you but I hope if he gets set free because of your testimony, you're able to lived [sic] with that[.]

See Attachment 2. After sending the message, Affiant 1 activated the block feature of the Facebook Messenger application, precluding further messages from McClain.

On July 1, 2016, at 10:38 a.m., McClain wrote a message to Affiant 2: "Did your sister's FB acct get hacked? I got a crazy message from her that doesn't sound like her talking about me in ways

that doesn't sound like me and when I tried to respond I had been blocked[.]" Two minutes later, at 10:40 a.m., Affiant 2 "missed a call from Asia" over Facebook. Affiant 2 replied to McClain:

> No it wasn't hacked. She and I have been struggling with whether we should contact the SA who is handling the case but decided against it because we assumed there was no way in hell he would be granted a new trail [sic]. Ive sat back at [sic] let you have your 15 minutes of fame on behalf of that poor girl because I didn't think anyone would actually entertainment [sic] you or your fabricated story about seeing him in the library. I remember that day in Ms. Graham's like it was yesterday. I remember getting into a heated argument with you about how serious the situation was and that a girl lost her life and ███ actually had to "break up" our verbal altercation. Me, ███ and you know darn well you never saw him that library. You need to one [sic] clean giving [sic] how young you were may play on your side but to continue with this story 17 years later and you being a grown woman with children is disgusting.

See Attachment 3.

In response, McClain wrote, "Wow…this is crazy. I'm not lyig [sic] about any of this." Affiant 2 ended the exchange: "Ok but you really are… no need to contact me back. You obviously have decided to stick by this story." There have apparently been no communications since.

On August 4, 2016, Affiant 1 and Affiant 2 executed affidavits with associated Facebook messages, redacted copies of which are attached.[10] *See* Attachments 2 & 3. Both affiants will participate in legal proceedings if necessary, but ask that their privacy be respected and wish to avoid media contact and publicity.[11]

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[10] Affiant 1 and Affiant 2 showed police these messages on their Facebook accounts, and later, at law enforcement's request, provided a printout. The sworn affidavits accompanying this application incorporate those messages by reference.

[11] The State has advised both affiants that the post-conviction court did not grant Syed a new trial because of the alibi claim or McClain's testimony, and that their affidavits would be part of a <u>conditional</u> application by the State, which asks that those affidavits be made part of the record only in the event that Syed's unsuccessful alibi claim is presented on appeal. They are also aware they may be required to testify if the State's request for a limited remand is granted.

C. The Posture of These Proceedings

On June 30, 2016, the post-conviction court granted relief to Syed on the sole ground that Gutierrez failed to use a disclaimer on a fax cover sheet to more effectively cross examine the State's cellphone expert.[12] On July 21, 2016, the State notified the parties of its intent to seek an appeal on this issue and asked the post-conviction court to stay its order vacating Syed's convictions and granting his request for a new trial. On August 1, 2016, the State filed its application for leave to appeal with respect to this issue, and on August 2, 2016, the post-conviction court issued a stay of its prior order granting Syed's petition for relief. *See* Attachment 4.

In its August 1st application, the State indicated, regarding the McClain-alibi issue on which the State had prevailed, that it was filing a conditional application for a limited remand in order to supplement the record with evidence from two previously unknown witnesses, if Syed continued to seek appellate review of that claim. On August 11, 2016, Syed conditionally applied for leave to cross appeal that issue.[13] Because of this Court's prior grant of leave to appeal this issue and the terms of its prior remand order,[14] the State does not oppose the Court granting Syed's renewed application with

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[12] Syed also asserted a related *Brady* violation, claiming the State withheld cellphone documents including the fax cover sheet that is the predicate of Syed's corresponding ineffective assistance claim. The court denied relief, finding that because the documents at issue, including the fax cover sheet, were in defense counsel's possession "at least since the time of trial," this claim was waived and without merit. Mem. Op. II at 30. Syed has not applied for leave to appeal this denial. Because this *Brady* claim (like the cellphone-*Strickland* claim) was raised for the first time after this matter was remanded, Syed (like the State) was required to apply for leave to appeal under Section 7-109(b). Since he has not done so, the State assumes he has abandoned this claim on appeal.

[13] In his August 11th conditional application to cross appeal, Syed indicated he would file a response to the State's August 1st application to appeal the grant of relief on the cellphone-*Strickland* claim. The State would request an opportunity to file a reply, if needed, within 15 days of Syed's forthcoming response. There are assertions in Syed's latest filing that the State disputes. To avoid serial pleadings, however, and because the State does not oppose Syed's application with respect to the first question presented, unless this Court requests briefing on specific issues at the application stage, *see supra note* 3, the State will answer Syed's arguments as needed in a single consolidated reply or at the merits stage.

[14] Whether Syed was required to apply for leave to cross appeal the second denial of his McClain-alibi claim is not exactly clear. For one thing, before this Court remanded the matter, it had already granted Syed's application for leave to appeal the original denial of that claim. Furthermore, this Court's remand order, contemplated that, if the post-conviction court reopened and conducted

respect to the first question presented. For reasons outlined in note 3, *supra*, the State opposes Syed's application with respect to the second question, a "cumulative error" claim Syed formerly asserted and abandoned, which this Court should not permit him to use this limited remand to revive.

Assuming the Court in its discretion grants Syed's application, the State respectfully requests a limited remand under Section 7-109(b)(3)(ii)(2) to supplement the post-conviction record before this Court conducts further proceedings. *See also* Md. Rule 8-604(a)(5) & (d); Md. Rule 8-204(f)(4). In that event, the State would ask the Court to postpone further briefing on the merits of these issues until after the post-conviction court has an opportunity to adopt the affidavits, or testimony, of the State's new witnesses into the record and, in its discretion or at this Court's direction, to update its findings accordingly. This would resemble the course the matter has just taken. Alternatively, the Court could hold the State's conditional application *sub curia* and determine after merits briefing and oral argument whether a limited remand is appropriate. That would be more like the remand directed by this Court and approved by the Court of Appeals in *Jones*, 379 Md. at 707.

The State recognizes this is an unusual request, in a case that has already been the subject of great interest, on an issue on which the State prevailed no less. To contextualize and support this application, the State sets forth in detail salient arguments it presented to the post-conviction court. Drawing from the content of McClain's letters, evidence in the original investigation, and documents

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further proceedings, the parties would be given, "if and when this matter returns to this Court, an opportunity to supplement their briefs and the record." Order at 4 (May 18, 2015). On remand, the post-conviction court reconsidered the same claim and again denied Syed's petition, but on different grounds than its original ruling. Thus, it is not obvious to the State whether Syed had to reapply *vel non* for leave to appeal the court's second denial of this claim — or whether, by virtue of the prior grant of leave to appeal and by operation of this Court's remand order, the claim was already back before the Court of Special Appeals.

If the alibi claim is already pending before the Court of Special Appeals by virtue of this Court's prior order, the State requests a limited remand under Section 7-109(b)(3)(ii)(2). If that claim is not already before the Court of Special Appeals, now that Syed has filed an application for leave to appeal, the State conditionally applies, under the same subsection of the Criminal Procedure Article, for a narrow remand in the interests of justice to supplement the record with evidence that was neither known nor available to the State before Affiant 1 contacted prosecutors in July 2016.

in Gutierrez's defense file (all of which have been included in the post-conviction record), the State presents the same position it took long before it learned of these affiants — that McClain was not just mistaken, but worse. The State's recitation of arguments is intended to show that the affiants' statements confirm the very inferences the State had already drawn, and likewise that the existing record establishes the *prima facie* reliability of those affiants. In fact, the very conclusion the post-conviction court originally reached after reading McClain's letters — "that Ms. McClain was offering to lie in order to help [Syed] avoid conviction," Mem. Op. I at 12 — is precisely what the affiants were told by McClain in 1999. In these circumstances, the State believes it is proper and in the interests of justice to bring this information to the Court's attention and to seek to incorporate it into the post-conviction record prior to further proceedings. At the same time, the State does not seek to rewrite the procedural rules that govern post-conviction petitions and ultimately defers to this Court on whether a limited remand would aid appellate review by clarifying and completing the record.

III. ARGUMENT

The course of proceedings in this case has been unusually winding, and the State does not wish to unduly delay appellate review. It is in receipt, however, of unsolicited information that was previously unknown to the State that bears on key arguments that were considered by the post-conviction court. In these circumstances, the State respectfully requests an opportunity to supplement the post-conviction record so that an incomplete, and arguably misleading, record is not before the appellate courts should this Court agree to consider the McClain-alibi claim on appeal.

The affiants present information with special relevance to *both* whether Gutierrez was deficient in her performance and whether Syed suffered prejudice as a result of her supposed failure. With respect to the first prong of *Strickland*, to justify a limited remand, the State summarizes three sets of arguments it presented in defense of Gutierrez's performance — that McClain's letters were reasonably interpreted as a unilateral or collusive offer to falsify an alibi; that McClain's proposed alibi

was saddled with risks that Gutierrez's chosen alibi defense did not bear; and that Gutierrez was not obligated to reconsider elements of a discarded alibi strategy that depended on Wilds' complicity. Each point would be materially and meaningfully enhanced by the information the State seeks to add to the post-conviction record.[15] *See infra* Part III.A.-C.

The proffered affidavits also have special relevance as to whether Syed suffered true prejudice because Gutierrez did not pursue an alibi premised upon McClain. On this issue, the post-conviction court concurred with the State that McClain's alibi, even if it had been presented, was unlikely to alter the jury's verdict. *See* Mem. Op. II at 26. An expanded record containing evidence concerning McClain's statements in 1999 would reaffirm the court's conclusion on prejudice and, should this Court agree to review that determination, ensure that the appellate record is complete. For one thing, classmates reporting that McClain had spoken to them about lying to assist Syed avoid conviction directly impairs McClain's value and credibility as an uncorroborated alibi, especially in light of the

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[15] The State also advanced certain reasons why Syed's alibi claim should be denied that are not directly implicated by the new information the State seeks to introduce on remand. The State asserted, for example, that Syed had not satisfied his burden of presenting a coherent account of when and how information was given to Gutierrez, since Syed insisted he received McClain's letters "within the first week of being arrested" and "immediately" gave them to Gutierrez. *See* Attachment 5 (T. 10/25/12 at 28, 31). But two other attorneys represented Syed at that time, *id.* (A-0374); there is nothing in the memos of those original attorneys that reference McClain (A-0516-A-0547, A-0553-A-0565); Gutierrez only became Syed's attorney six weeks after his arrest, *id.* (A-0369); and Syed's conditional application now states that Gutierrez received the information five months before trial, *i.e.*, in July, *not* in March soon after Syed's arrest. *See* Conditional Application for Leave to Cross Appeal at 4, 9.

The State also argued, because ineffective assistance of counsel must be evaluated based on what the attorney knows at the time of the decision at issue, *see Strickland*, 466 U.S. at 689, that Gutierrez was not ineffective for failing to pursue a nebulous offer of an alibi corresponding to a broad indefinite period of time, when the State was unable to specify a time of death, even after Gutierrez inquired, until prosecutors postulated a possible timeline at trial. *Compare* Attachment 5 (A-0006) (Gutierrez asking, on July 7, 1999, for: "15. All information regarding when alleged victim was killed. Defendant can't possibly mount a defense or determine if an alibi disclosure is needed without being on notice of the alleged time of death.") *with id.* (A-0008) (responding, on July 8, 1999, to Gutierrez: "15. To the best of the State's information, the victim was murdered the afternoon of the day she was reported missing, shortly after she would have left school for the day, January 13, 1999. If further investigation narrows the time down, the State will provide that more specific time to the defense.").

Because arguments like these, though important, are neither directly improved nor undermined by the State's new evidence, they are not discussed in this application in detail.

suspicious circumstances surrounding her offer to help. For another, prejudice cannot be found when the defendant has only been deprived of false testimony, and the State's proffered witnesses disable Syed from proving that the alibi of Asia McClain was not just that. *See infra* Part III.D.

A. New Evidence Strongly Supports a Reasonable Interpretation of McClain's Letters as an Offer to Fabricate or as Evidence of Collusion.

The State maintained that Gutierrez could reasonably have construed McClain's letters either (1) as an offer to lie or (2) as evidence of collusion between Syed and McClain. The proffered affidavits would confirm the reasonableness of these interpretations, as they contain direct evidence of what McClain said to classmates, in 1999, about lying to aid and assist Syed.

1. <u>Gutierrez could reasonably have interpreted Asia McClain's letters as an offer by a high school classmate to falsify an alibi</u>.

The State argued to the post-conviction court that McClain's letters, in particular the letter dated March 1, 1999, could be understood by a veteran criminal defense attorney as an offer from McClain to falsely account for whatever period of time Syed needed an alibi. In the first letter, which is conspicuously devoid of details, McClain wrote, "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; Jan 13th)." Attachment 6 (Ex. 4). In its original decision, *i.e.*, before McClain testified, the post-conviction court reached the following conclusion:

> In the first letter, sent on March 1, 1999, Ms. McClain recounted that she saw Petitioner in the public library on January 13, 1999, but did not state the exact time during which the encounter took place. The only indication of Ms. McClain's potential to be an alibi witness for Petitioner is in Ms. McClain's offer to "account for some of [Petitioner's] un-witnessed, unaccountable lost time (2:15 - 8:00; Jan 13th)." . . . To require counsel to interpret such *vague language* as evidence of a concrete alibi would hold counsel to a much higher standard than is required by *Strickland*. In addition, trial counsel could have *reasonably concluded that Ms. McClain was offering to lie in order to help Petitioner avoid conviction*.

Mem. Op. I at 12 (emphasis added).

A limited remand to supplement the record would be in the interests of justice insofar as the appended affidavits would essentially confirm the post-conviction court's original conclusion that Gutierrez could have "reasonably concluded that Ms. McClain was offering to lie"; in fact, the "vague language" noted by the post-conviction court mirrors the dearth of information that McClain possessed according to her classmates. *See* Attachments 2 & 3 (attesting that McClain did not tell the affiants she saw or spoke to Syed at all on the day Hae Min Lee went missing). Thus, two witnesses affirming that McClain told them exactly what the court originally thought Gutierrez could reasonably have feared, *i.e.*, "that Ms. McClain was offering to lie" for Syed, should restore confidence in the court's earlier conclusion that Syed's attorney acted reasonably in failing to pursue McClain.

2. Gutierrez could reasonably have seen in Asia McClain's letters evidence that her client was colluding, directly or indirectly, to manufacture an alibi.

The State submitted that, with the knowledge and documents available to Gutierrez when she eventually became Syed's lawyer in April 1999, she could easily have detected in the letters — in particular in the March 2nd letter, *see* Attachment 7 (Def. Ex. 6) — subtle as well as clear warning signs that would have prompted this experienced criminal attorney to fear that her client was coordinating, either directly or indirectly, with McClain to falsify an alibi. *Cf. State v. Lloyd*, 48 Md. App. 535, 541 (1981) (recognizing that it is improper for defense counsel to call alibi witnesses when the attorney knows or is convinced that these witnesses will offer perjured testimony). Several items in particular, including some documents the State only saw after gaining access to Gutierrez's file two weeks before the February 2016 hearing,[16] contain troubling indicia of possible coordination or collusion:

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[16] *See* State's Application for Leave to Appeal at 10 n.7 ("In the course of the original post-conviction hearing in 2010, the State requested, but was denied, an opportunity to review the defense file. Prior to the February 2016 hearing, the State filed a consent motion, reiterating its earlier position that Syed had waived attorney-client privilege and adding that Syed had widely shared documents from his attorney's file. The Court granted the consent motion, and on January 15, 2016, defense counsel provided to the State what it represented was the complete electronic and paper files of Gutierrez and her team.").

a) On March 6, 1999, less than a week after Syed's arrest, in an internal memo to the file, one of Syed's original defense attorneys noted talking with Syed about the address of the jail, a "self-addressed stamped and 1 piece paper," as well as "how mail scrutinized" *See* Attachment 7 (A-0531).[17]

b) On April 9, 1999, police interviewed Ju'uan Gordon — described by Syed's brother, according to another internal memo, as Syed's "best friend outside of the muslim community" Attachment 7 (A-0150). Detective notes from that interview indicate that Gordon told police that Syed had written him a letter and called the previous day, but that he wasn't home and that he had written Syed back. *See* Attachment 7 (B-0133). Gordon also told police that Syed:

   WROTE A LETTER TO A GIRL TO
   TYPE UP WITH HIS ADDRESS ON IT
   BUT SHE GOT IT WRONG
   101 EAST EAGER STREET
   ASIA? 12TH GRADE
   I GOT ONE, JUSTIN AGER GOT ONE

c) In the middle of the post-conviction hearing, Syed presented to the court an affidavit from Gordon in which he verified speaking with police on April 9, 1999, but claimed he "was not suggesting that Adnan or anyone else did anything deceptive." He similarly confirmed that he "recall[ed] telling police that Adnan talked about asking Asia to write" a letter but suggested it was a "character letter." Gordon added that Syed "may have asked [Asia] by letter (just like he did with me and Justin)," but stated in his affidavit that he did not know whether Syed ever sent McClain the letter, nor did he know "if she ever received it." *See* Attachment 7 (PC2-60).[18]

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[17] To prevent any misunderstanding, the State in no way suggests that Syed's original attorneys encouraged or facilitated Syed's or McClain's actions, or had the faintest idea what either may have been contemplating. There is plainly nothing problematic with a request from a new client for paper, self-addressed stamped envelopes, the address of the jail, or an understanding of how mail is scrutinized. It would only be after, *inter alia*, warrants were executed in late March 1999 and McClain's letters arrived that a defense attorney could reasonably suspect that Syed, directly or indirectly, was seeking to manufacture a false alibi. All of Syed's lawyers, from his very first attorneys through present counsel — including Cristina Gutierrez — have performed their sworn oath with distinction and have been zealous advocates for their client.

[18] To be sure, Syed's defense team had at one point in 1999 collected character letters, but they were for a bail review that had already taken place by the time police spoke to Gordon. It is not just the timing, however, that casts doubt on Gordon's explanation; Gordon's claim that Syed was asking McClain for a character letter is also belied by McClain's statements in her letter and at the hearing that she did not hear from Syed after his arrest and barely knew him, making her a poor candidate for a character reference. Absent a better explanation from Syed, who carried the burden in these proceedings, the court was left to wonder: what a curious combination of friends for Syed to personally contact a week after his bail hearing — two of his closest friends and a girl who could not spell his first name — if Syed was in fact just soliciting character letters.

d) The State also explained that Gutierrez — a savvy, seasoned defense attorney — would have readily discerned a number of warnings in McClain's second letter, which McClain purports to have written on March 2, 1999, just two days after Syed's arrest. The State observed that, in the letter itself, McClain indicates she is composing the letter while sitting in class; at the post-conviction hearing, however, she said for the first time that she actually first prepared a handwritten draft in school (which she did not keep) and then later that night, at home, typed the letter she sent to Syed, admitting it was possible that she accumulated additional facts between class and when she typed up the letter. The State argued that this was notable because the letter contains a number of pieces of information about the crime and the investigation that would have been difficult, if not impossible, for anyone to collect and synthesize within 48 hours of Syed's arrest.

   For example, the third page of McClain's March 2nd letter makes a peculiar reference, *not* to familiar forensic evidence like fingerprints or DNA, but to "fibers on Hae's body"; the letter also proposes a specific version of the murder of Hae Min Lee and her burial: "I don't understand . . . how the police expect you to follow Hae in your car, kill her and take her car to Leakin Park, dig a grave and find you [sic] way back home." *See* Attachment 7 (Def. Ex. 6). How, on March 2, McClain predicted forensic interest in fibers is not apparent. Why McClain adopted a particular order of events relating to the murder is also not obvious. At the hearing, McClain could not give specific sources for this information — nor for other details like Syed's state identification number or the address of the jail — except to ascribe some of it to gossip circulating at school.

e) Finally, the State emphasized search warrants executed by police in Syed's case. These, the State argued, provided a more plausible explanation for when and where certain facts in McClain's second letter originated. After all, unlike the initial statement of charges (which only indicated that Hae Min Lee was strangled and buried in Leakin Park by Syed and stated that the witnesses would remain anonymous until trial),[19] the warrants outlined the chain of events of the crime, reporting that Syed showed a witness Hae's body in the back of her car, then drove the victim's car to Leakin Park, buried the victim, and later returned to Baltimore County. Unless the warrants' contents were being relayed, directly or indirectly, to McClain, it is hard to explain the close resemblance between the sequence of events a student outlined in a letter she claimed to have written two days after Syed's arrest when few facts were publicly known and the sequence of events that actually happened — or at least so Gutierrez might reasonably have thought.

   One specific warrant best illustrates this point. After executing a general warrant on Syed's vehicle on March 9, 1999, and searching Syed's home on March 20, 1999, police conducted a *second* search of Syed's vehicle on March 25, 1999, this time solely seeking evidence of "fiber samples from the carpet, seats, headliner" (B-0115, B-0118); that same day, police executed a warrant on Syed himself to obtain blood and hair samples.[20]

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[19] A recitation of the statement of charges found in the defense file reflects the limited information set forth in the original charging document. *See* Attachment 7 (A-0145) ("Statement of Probable Cause. Interviewed several people regarding the death of Hae Min Lee. Indicated defendant strangled victim to death and buried remains within Leakin Park. Witness anonymous until trial.").

[20] *See* Attachment 7 (documents related to search warrants).

> The strangely specific interest in "fibers on Hae's body" in McClain's March 2nd letter is far less strange if Syed transmitted information from the "fibers" warrant to McClain and if she had "type[d] up" the letter sometime after March 25, 1999.[21] This would also bring the timing closer to April 9, 1999, when Gordon told police about Syed writing a letter to a 12th grade girl named Asia to type up. And consistent with Gordon's report to police that she had gotten the address wrong, there was in fact a discrepancy between the address at the top of her March 2nd letter, "301 East Eager Street," and the address Gordon referenced to police: "101 EAST EAGER STREET." *Compare* Attachment 7 (Def. Ex. 6) *with id.* (B-0133).

In light of this constellation of facts, the State suggested that McClain's letters could have raised serious red flags for Gutierrez as she developed a defense strategy for a high school student charged with murdering his ex-girlfriend. In its assessment of the State's theory that Syed relayed information to McClain to "'type up' as part of a scheme to secure a false alibi," the post-conviction court said that "the State presents quite a compelling theory." Mem. Op. II at 17. The court proceeded, however, to conclude that, "[w]hile the State's speculation is plausible, the State is essentially asking the Court to favor one conjecture and ignore other equally plausible speculations." *Id.* at 19. Respectfully, the State submits that the post-conviction court improperly assigned the burden to the State, and not Syed, in reaching that conclusion. If the State's "compelling theory" is one among several "equally plausible speculations," then Syed has not met *his* burden of demonstrating that his lawyer's actions and inaction — which enjoy a "strong presumption" of reasonableness — were constitutionally defective. *See Strickland*, 466 U.S. at 689.

B. New Evidence Reveals Added Risks to the McClain-Library Alibi That Was Already Riskier Than the Alibi Strategy Gutierrez Chose to Pursue.

The State also reasoned that adopting an alibi that conformed with Syed's daily routine and his prior statements to police sidestepped three risks created by McClain's placement of Syed at the

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[21] The March 25th "fibers" warrant included new information that Syed reportedly told a witness (Jay Wilds) that he had planned but failed to discard his clothing from the night of the crime, and that he was "concerned about forensic evidence" that may have been "exchanged" between him and the victim. Reading this the same day police took fiber samples from his car and blood and hair samples from his person would presumably amplify Syed's focus on this specific forensic subject.

library, and a seasoned defense attorney like Gutierrez was not required to explore a riskier alibi strategy to render effective assistance of counsel. Gutierrez's judgment to avoid these risks would appear even more reasonable if the State is permitted to supplement the record with information from the affiants that illuminates additional hazards of the alibi proposed by McClain — from the chance that a fabrication is uncovered to the folly of hinging an alibi strategy on a lone high school acquaintance who was speaking with classmates about lying for Syed.

1. <u>Pursuing the alibi proposed by McClain risked creating another discrepancy with the account Syed had already given to police and his own attorneys</u>.

The State argued that the alibi proposed by McClain presented significant risks, especially compared to the alibi strategy Gutierrez adopted, according to which Syed stayed at Woodlawn High School until track practice after which he attended prayers at his mosque. This alibi had at least three advantages: it was consistent with Syed's daily routine; it covered a broader range of time, which was important since prosecutors could not narrow time of death even after Gutierrez inquired, *see supra* note 15; and it conformed with what Syed had already told police. Conversely, pursuing the alibi proposed by McClain — that she and Syed spoke to one another at the public library that afternoon — risked producing another inconsistency with what Syed had told police (as well as his defense team).

Syed initially told police he was at school and then went to track practice, never mentioning a visit to the public library at the edge of the high school's campus. *See* Attachment 8 (B-0003). He provided to Gutierrez and her staff a similar account of where he was, failing to suggest that he stopped by the public library on that day or any other. As reported in a memo documenting one of many interviews, Syed apparently told a member of Gutierrez's staff that "he believes he attended track practice on that day because he remembers informing his coach that he had to lead prayers on Thursday." Attachment 8 (A-0153). This interview took place on August 21, 1999, months after Syed

says he received the McClain letters that "fortified" his memory of being in the library.[22] Furthermore, Syed recalled details both from the school day and after his ex-girlfriend went missing, but the summary of his interview makes no reference to talking with McClain or being at the public library:

> Hae's brother called Adnan on his cell phone. He initially asked for Don (thinking it was the current boyfriend's number) and then realized it was Adnan. He asked if Adnan had seen Hae and then a police officer got on the phone. Adnan does not remember where he was when Hae's brother called, but he believes he was in his car with Jay. He states he keeps his cell phone in the glove compartment and recalls reaching over Jay to get the phone from the glove compartment.

Id. At the bottom of this memo is a note indicating that Syed also provided "a handwritten account of his recollection of his whereabouts on Jan 13." The accompanying handwritten page, *id.* (A-0154), appears to be Syed's description of his day with a number of details of what happened in certain classes, when he left to drop off his car to Wilds, where and with whom he had left his cellphone, what time he returned, and even a reference to remembering that he arrived a few minutes late to his last class "cause it took some time in the guidance office." The rest of the page, however, like Syed's memory as to what he did next, is blank. *Id.*

Generating another incongruity between what Syed had told police and his narrative at trial would compound a problem that Gutierrez's team had already diagnosed and documented in another internal memo: "***Possible discrepancy as to whether Adnan stated Hae or Jay were going to pick up Adnan***" Attachment 8 (A-0145). This notation is followed by a description of Syed's conflicting accounts to Officer Adcock on whether he had planned to leave with Hae Min Lee or get a ride from Wilds after school. *See id.* This proves that Syed's defense team affirmatively appreciated the trial risks of a

[22] At the original post-conviction hearing, Syed testified: "And, when I received these letters, it kind of fortified the memory that I had of after school that day. School ended at 2:15, that after school that day, I went to the public library. And I stayed there between approximately 2:40 to 3:00, and then I went to track practice. So, these letters essentially, they verify in my mind what my memory was of that day." Attachment 5 (T. 10/25/12 at 27). *See also supra* note 15.

shifting story, and thus pursuing an alibi based upon McClain and the public library when Syed had consistently neglected to mention either would only exacerbate this problem.

The dangers of discrepancies in Syed's story, as noted in this defense memo, echo the rationale adopted by the post-conviction court in its original decision:

> [T]he information in Ms. McClain's letters stating the Petitioner was present at the public library contradicted Petitioner's own version of the events of January 13th, namely Petitioner's own stated alibi that he remained on the school campus from 2:15 p.m. to 3:30 p.m. Based on this inconsistency, trial counsel had adequate reason to believe that pursuing Ms. McClain as a potential alibi witness would not have been helpful to Petitioner's defense and may have harmed the defense's theory of the case.

Mem. Op. I at 12.[23]

2. <u>Adopting an alibi away from Syed's school risked a precarious and inexplicable deviation from his settled daily routine</u>.

As Syed's alibi notice expressly indicates, Gutierrez adopted and pursued an alibi based upon routine: "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 noticed." *See* Attachment 9 (State's Ex. 1). Gutierrez's commitment to this strategy was conscious, clear, and consistent. *See, e.g.*, Attachment 9 (A-0695, A-0230, A-0264). In addition to preferring an alibi that comported with Syed's story to police, Gutierrez could reasonably have feared that deviating from

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[23] Syed has argued, and the post-conviction court has indicated, that the potential inconsistency would have been minor because of the close proximity between the high school campus and the public library. Mem. Op. II at 21. But there is no reason to think Gutierrez and her team made strategic decisions about Syed's defense without knowing the layout of the school and its environs or the distance between locations. In fact, on a detailed defense team task list, *see* Attachment 8 (A-0261-A-0266) — which includes an "urgent" entry about making a "determination regarding alibi" and contains handwritten notes that refer to school, track practice, and the mosque, *id.* (A-0264) — there is also a long section of "maps" corresponding to 19 locations of interest with separate entries for, *inter alia*, Woodlawn High School, Woodlawn High School Track practice, and two pages later, the Woodlawn Library, *id.* (A-0264-A-0266). Thus, Gutierrez's staff seems to have been cognizant of the difference between the public school and the public library as well as their proximity to one another.

Syed's daily routine to visit the Woodlawn Public Library on the day of the murder would raise vexing and unwanted questions that Syed would not want to answer at trial.

For one thing, Gutierrez would have seen in detectives' notes interviews of two high school employees, Virginia Madison and Cheryl Metzger, who advised police that Syed was a "regular" at the high school library, that he went there "frequently," that he and the victim would visit there "often," and that the school library had computers with internet access. *See* Attachment 9 (B-0247-B-0248, B-0251). During the first post-conviction hearing, Syed testified that he was "fairly certain" that he "was accessing e-mail from the library." Attachment 5 (T. 10/25/12 at 30). But, neither Syed himself nor any other witness besides McClain has placed Syed at the *public* library on that fateful day or any other. Claiming that on the very day he is accused of strangling his ex-girlfriend he diverged from his routine of school-track-mosque or that he decided on that particular day to visit the public library to check his email instead of the school library where he was a regular would generate unnecessary questions in the mind of the jury as to both whether his deviation from a routine was plausible and, if so, why he deviated on that particular day.

But there was another precarious risk — of which Gutierrez and her team would have been cognizant — of having Syed break from his ordinary routine. The post-conviction court pointed out that "the alibi notice does not specify which witness, if any, could have accounted for Petitioner's regular routine in between school and track practice." Mem. Op. II at 22. The Defendant himself, however, had told Gutierrez's team what he often did during this time period. According to a memo in the defense file addressed to Gutierrez, on the topic of where he and Hae Min Lee had been intimate, Syed reported: "They also frequented the *Best Buy parking lot* next to Security Square Mall (this was their designated spot when school started)." Attachment 9 (A-0191) (emphasis in original). He told his defense team that "[o]n average they saw one another 4,5,6 times a week and . . . [s]ince

Hae was responsible for picking up her niece after school, they would have sex in the Best Buy parking lot close to the school after school," and that Hae would then "leave to get her niece." *Id.* (A-0192).

In this regard, Syed himself had "accounted for [his] regular routine in between school and track practice." Mem. Op. II at 22.[24] While it was understood that Syed and the victim had broken up two weeks earlier, Gutierrez could reasonably have concluded, in the context of a turbulent high school romance, that a deviation on that particular day from Syed's school-track-mosque routine risked jurors questioning whether the change implicated Syed in Hae Min Lee's murder. After all, if the jury learned what Syed had told his attorneys about where he normally went between school and track practice, any departure from the school would not place him at the public library — it would place him with the victim in the very location he was accused of killing her. Thus, if Syed pursued an alibi that required him to modify his standard routine, the State already had witnesses (Virginia Madison and Cheryl Metzger) who could point out that deviation, and the defense was aware of where, in the past, Syed had gone when he left school — and with whom. *Cf. Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("[W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether."). Chasing an uncertain alibi witness that carried these myriad risks is not an investment or tactic required by the Constitution.

[24] Another internal defense memo from an interview between Syed's trials suggests that Syed himself connected the alleged location of the murder with the place he and Hae Min Lee would have sex: "Jay allegedly met him at the Best Buy parking lot around 3:30. So how did Adnan get into her car or have Hae meet him, kill Hae, pick her up drag her from the car to the trunk (how could he lift her??) between 2:15 and 3:30 with noone [sic] seeing him. *Where in the Best Buy parking lot did this allegedly take place?? If Jay said it occurred on the side where they would have sex*, Adnan would not then walk all the way to the phone booth (it is a long walk and Adnan does not like walking)." Attachment 9 (A-0234-A-0235) (emphasis added).

3. Placing Syed at the Woodlawn Public Library right after school risked curing what Gutierrez identified as a flaw in the prosecution's case.

The State also argued that a review of Gutierrez's notes and her approach at trial indicated that she believed it was a problem for the prosecution that two of its witnesses had told police that they had seen Hae Min Lee by herself soon after school on the day she went missing. According to notes from an interview in late March 1999, Inez Butler, a school employee, told police she saw the victim at around 2:30 p.m. *See* Attachment 10 (B-0191, B-0193). Debbie Warren, a fellow student, also told Baltimore County police that she saw the victim at around 3:00 p.m. "by herself" and that "she was inside the school near the gym." *Id.* (B-0006). Warren was less certain about this at Syed's second trial, but Gutierrez pressed her and succeeded in having her acknowledge that she had told police she saw the victim near the gym at about 3 p.m. *See* Attachment 10 (T. 2/17/00 at 69-70).

Gutierrez's notes confirmed she thought these facts created a wrinkle for the prosecution. Directly above where Gutierrez had written "Debbie Warren saw Hae at 3:00 pm," she wrote: "How did Adnan get in Hae's car." Attachment 10 (A-0775) (emphasis in original). Appreciating this gap in the State's case, Gutierrez could reasonably have sought to avoid an alibi that placed Syed at or near the public library, where students were regularly picked up and where Hae Min Lee could have picked up Syed.[25] Hence, McClain's offer of assistance to place Syed at the public library — which did not

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[25] Syed himself apparently perceived this same problem in the prosecution's case; between his two trials, Syed shared several "points he wanted to make with regard to the first trial." Attachment 9 (A-0234-A-0235). Under "Jay Wilds," the memo summarizes his questions thus:

(1) When Hae left school she left by herself, as noted by Butler. Butler said she saw her by herself. Where was Adnan?? If he was with Hae or had broken into her car at school someone would have seen him because the school day had ended and people were outside. Both Adnan and Hae were in Psychology class from 12:45-2:15. That is when school ended.
Jay allegedly met him at the Best Buy parking lot around 3:30.
So how did Adnan get into her car or have Hae meet him, kill Hae, pick her up drag her from the car to the trunk (how could he lift her??) between 2:15 and 3:30 with noone [sic] seeing him.

Attachment 9 (A-0235) (emphasis added). *See also supra* note 24.

ripen until after Syed was convicted — could reasonably have been discarded by Gutierrez as a poisoned chalice, leaving McClain as much an asset for the prosecution as an alibi for the defense.

4. Evidence previously unavailable to the State reveals additional risks to Syed's defense that Gutierrez was not compelled to take.

The constitutional guarantee of effective assistance of counsel did not require Gutierrez to explore an alibi that carried trial and tactical risks that her chosen defense strategy avoided, and a post-conviction record augmented to include information recently presented to the State would more fairly reflect the true magnitude of those risks. Already, an alibi consistent with habit and routine, and corroborated by known, reliable witnesses like Syed's father and Syed's track coach, was less risky than an alibi that depended upon an unfamiliar classmate who placed Syed at the public library where no one suggested Syed ever went. The affidavits of McClain's classmates reaffirm Gutierrez's judgment on which alibi to pursue by illustrating the dangers of following an incongruous lead.

Perhaps most acute, pursuing McClain as part of an alibi carried the risk of the fabrication being detected. For two key aspects of Syed's story to police — (a) from whom he was expected to get a ride and (b) where he was after classes ended — to notably shift would raise the specter of fabrication, for Syed's attorneys, for a jury, *and* for the prosecution. The affidavits of McClain's classmates convert this potential specter from what the post-conviction court already characterized as "quite a compelling theory" into a concrete and bona fide fear. Unlike most defense witnesses, alibi witnesses are subject to a disclosure rule meant to give prosecutors an opportunity to investigate them. *See* Md. Rule 4-263(e)(4). How that would have ended, especially in light of the proffered affidavits, involves a gamble that Gutierrez was not required by the Constitution to make.[26]

[26] In fact, for the decade *after* Syed was convicted, Asia McClain remained out of sight. Syed's attorneys reportedly had McClain's letters sometime before trial and her first affidavit a month after he was convicted; Syed's parents also apparently wrote to Gutierrez on March 30, 2000, and asked her to include McClain in a motion for new trial. *See* Attachment 11 (Ex. 6). Yet, there are no references to McClain in any correspondence with the court or the State; and neither Gutierrez nor Syed's

Evidence that McClain was engaged in conversations about lying to help Syed avoid conviction would only validate the wisdom of selecting an alibi strategy that did not depend on the unpredictable motives and volatility of a high school student. Difficult decisions about what defense to adopt, where to invest resources, and what pitfalls to avoid lie at the foundation of the expert judgments criminal defense attorneys are entrusted to make. *See Strickland*, 466 U.S. at 693 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). And as the State has previously argued, the promise of the Sixth Amendment is not an invitation to second guess tactical decisions and trial strategy from the comfortable perch of history and hindsight, particularly in indeterminate circumstances like these. *See* Brief of Appellee at 33.

C. Gutierrez Was Not Required to Pursue McClain When Syed's Original Attorneys Had Already Conducted Some Investigation of the Public Library.

Finally, the State argued that the billing record of Syed's private investigator shows that the public library angle was initially explored and that Gutierrez, when she became Syed's attorney six weeks later, was not required to retread where her predecessors had gone — particularly once Syed's planned line of defense was compromised by Wilds' cooperation with the State. The affidavits of McClain's classmates would reinforce the State's position that McClain, in coordination with Syed,

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attorney at sentencing nor his attorney on direct appeal mentioned McClain in any pleadings. Thus, until Syed's present counsel first raised the McClain-alibi ineffective assistance of counsel claim in his original post-conviction petition in 2010 — after Gutierrez was dead — no one from the prosecution knew who Asia McClain was or what she purported to know. Had Gutierrez placed McClain on Syed's alibi notice to the State and indicated that McClain remembered seeing Syed at the public library for 20 minutes after school, Gutierrez could reasonably have expected police and prosecutors to investigate McClain, by for example talking to her classmates. Where that would have ended — whether in bolstering Syed's alibi, in the State modifying its postulated timeline, *see* Brief of Appellee at 25 n.8, or in the judge advising the jury about falsifying an alibi and consciousness of guilt, rather than giving an alibi instruction, *see* Attachment 12 (T. 2/25/00 at 32-33) — remains a subject of debate. At a minimum, however, the new information provided by McClain's classmates makes clear that the risk profile of the McClain-library alibi was even worse than originally contemplated.

may have been a late addition to an alibi strategy that had already been abandoned once the anchor of that alibi — Jay Wilds — had been dislodged.

The State pointed out to the post-conviction court that, within a week of his arrest, Syed's original attorneys had in fact preliminarily investigated Syed's presence at the Woodlawn Public Library — and that the constitutional guarantee of effective representation did not require his original team or Gutierrez to later revisit this facet of Syed's purported alibi by further pursuing McClain. Moreover, the individuals to whom Syed first directed his investigator were part of Syed's original alibi defense; but without Wilds on their side, those witnesses proved more helpful to the State as corroborative of Wilds' testimony than components of Syed's alibi.

Contained in Gutierrez's file was a billing record by Syed's investigator, Andrew Davis, captioned "Billing Summary for Adnan Syed," followed by the statement: "The following is a summary of the man-hours and miles used to investigate this case while Attorneys Doug Colbert and Chris Flohr were Adnan's council [sic]." Attachment 12 (A-0374). Syed was arrested on Sunday morning, February 28, 1999. The first two entries on the billing summary reflect meetings, a "[f]irst meeting" on Tuesday, March 2, 1999, billed at 3 hours, and a second meeting on Wednesday, March 3, 1999, billed at 1.75 hours, which reads, "met with attorneys and met Mr. Syed[.]" *Id.* The third entry, billed at 4 hours, is for the same day (Wednesday, March 3, 1999), and states: "drove the area of Woodlawn High and Leakin Park, *Balt. Co. Library*, *Interviewed Wackenhut Off. Steven Mills*, interviewed Coach Michael Sye" (emphasis added). For the following day (Thursday, March 4), the billing summary indicates a 6-hour interview with Syed. *Id.*

The State only learned of this billing summary on January 15, 2016, when the document was provided by defense counsel pursuant to an order by the post-conviction court to disclose Gutierrez's file. *See supra* note 16. Until then, the State was not aware of either "Wackenhut" or Mills. The State subsequently located Mills and learned that Wackenhut was a private security firm. At the hearing in

February, Mills testified that he worked as a private security officer for Wackenhut, that he was employed by them in 1999, and that he was assigned to the Woodlawn Public Library both when Hae Min Lee went missing (January 1999) and when the billing summary indicates he was interviewed by Syed's private investigator (March 1999).[27] Thus, the State reasoned that where Syed's original attorneys and investigators, according to a record in the defense file, conducted *some* investigation of the Woodlawn Public Library — *i.e.*, at a minimum, driving the area of the high school, the victim's burial site, *and* the public library, as well as interviewing the private security officer who worked at that library at the relevant time — Gutierrez was not required to invest additional investigative resources to explore the public library aspect of Syed's alibi.

Furthermore, the State argued that this billing record revealed that Syed's defense team first explored an alibi that Syed had started to construct the day of the murder, which became untenable once Wilds became a witness for the State. Those witnesses whom Syed had originally hoped would serve as his alibi proved at trial only to reinforce and corroborate the account Wilds told the jury. Most telling, in addition to interviewing the security officer at the Woodlawn Public Library, the defense's private investigator spoke with or attempted to interview exactly five other individuals in the first ten days after Syed's arrest: (a) Coach Michael Sye, (b) Nisha Tanna, (c) Stephanie McPherson, (d) Yasser Ali, and (e) Jay Wilds. *See* Attachment 12 (A-0374). As Davis's billing record reflects,

[27] Mills acknowledged during his testimony that he did not remember whether or not he was interviewed in 1999 and that he was not sure if there was a security camera at the library separate from one he remembered on an adjacent building. The State had called him principally to clarify what "Wackenhut" was and to confirm he was employed at the Woodlawn Public Library as a private security officer during the relevant period referenced in the billing summary. Through Mills, the State confirmed that Syed's investigator had performed some investigation of the public library. But, to be clear, it is Syed's burden to establish that his trial attorney failed to give him an adequate defense. Thus, the State is not required to prove that Davis, Syed's investigator, did in fact interview Mills, a security officer at the public library; it is Syed who must prove that he did not, *see supra* note 6 — a burden he cannot satisfy in the presence of a billing summary that states "Interviewed Wackenhut Off. Steven Mills," especially where the State confirmed through testimony that Steven Mills worked for Wackenhut, a private security firm, as a security officer at the Woodlawn Public Library in 1999.

those witnesses are where Syed's defense team began. The State argued that, so long as the anchor of Syed's alibi for the night of the murder (*i.e.*, Wilds) remained steadfast, each of these individuals was someone Syed expected could confirm his whereabouts or corroborate that he was with Wilds on January 13, 1999. Syed had not counted on Wilds turning him in and testifying against him, but otherwise Syed was not wrong.[28] After all, even before the State had produced his cellphone records in discovery, he succeeded in directing his investigator to individuals who saw or spoke to him the very night in question — and who, if Wilds had not cooperated with police, would have reinforced the alibi that he had endeavored to put in place:

a) <u>Coach Michael Sye</u> (interviewed March 3, 1999). Wilds testified that Syed wanted to be dropped off at track practice because "he needed to be seen," Attachment 12 (T. 2/4/00 at 142), and Syed told his attorneys "he remembers informing his coach that he had to lead prayers on Thursday." Attachment 12 (A-0153). At trial, Coach Sye testified for Syed as part of the track practice alibi, but also corroborated Wilds' testimony in the process.

b) <u>Nisha Tanna</u> (interviewed March 8, 1999). According to detectives' notes, Tanna told police she remembered Syed getting a cellphone in mid-January, calling her a "day or two after he got cellphone," and "hand[ing] phone to Jay to talk to me." *See* Attachment 12 (B-0138, B-0140). At trial, Tanna testified for the State, corroborating Syed's cellphone records and the testimony of Wilds.

c) <u>Stephanie McPherson</u> (interviewed March 10-11, 1999). During Davis' first interview with McPherson, she did not recall speaking to Syed, but a report in Gutierrez's file documented a follow-up interview with McPherson on March 11, where Davis wrote: "McPherson advised PD Davis that she now remembers speaking to Jay and Adnan on January 13, 1999 between 4:15 and 5:30 p.m. She advised that she called Adnan on his cell phone and Jay was with him at the time." *See* Attachment 12 (A-0360).

d) <u>Yasser Ali</u> (interviewed March 10, 1999). At trial, the State called Ali to testify. He was able to confirm that his phone number corresponded to two outgoing calls on Syed's cellphone records for January 13, 1999 (6:59 p.m. and 10:02 p.m.), but had no specific recollection of either call. *See* Attachment 12 (T. 2/3/00 at 79-82).

[28] Syed's private investigator attempted several times to make contact with Wilds at his workplace. *See* Attachment 12 (A-0374). As of September 3, 1999, Davis still sought to speak with him, but Wilds declined to talk with Davis about the investigation. *See* Attachment 12 (A-0359).

The State contended that the common thread of the individuals first contacted by Syed's investigator indicates that Syed's defense team was focused on an alibi from the outset of their representation of him. These witnesses may in fact have proven helpful to Syed's defense as components of the original alibi Syed had planned. But the spine of Syed's original alibi was broken once Wilds cooperated with police and testified against him. Thus, placing the interview of Mills in this context reinforces the State's contention that Syed's original defense team conducted <u>some</u> investigation of the Woodlawn Public Library alibi. Furthermore, after Syed's original alibi became a liability for the defense, his attorney was not required to compound Syed's miscalculation about Wilds by pursuing an alibi angle that would (i) create yet another discrepancy with Syed's account to police, (ii) have him inexplicably depart from his routine on the day of the murder, and (iii) resolve a key wrinkle in the State's case that, unless Syed is picked up from the public library, prevented the State from being able to put Syed and Lee together leaving school that afternoon.

New information that, soon after Syed's arrest, McClain was talking about lying for Syed would further bolster the State's contention that Syed had concocted an original alibi centered on Wilds and, shortly after being arrested, pointed his private investigator to individuals whom Syed expected would — truthfully (*e.g.*, Nisha Tanna) or falsely (*e.g.*, Jay Wilds, Asia McClain) — support his originally conceived alibi. The post-conviction record already contains the frank assessment of others (of whom Gutierrez was aware) that Syed was adept at this kind of fabrication and manipulation,[29] but two

[29] For example, according to a defense summary, Syed's sibling told his defense team that Syed was a "very good liar," that he could "lie about anything, and you would not be able to tell he is not telling the truth," and that Syed "could be very convincing." Attachment 7 (A-0152). Gutierrez was also aware of Sharon Watts, the school nurse, who testified as an expert at the first trial (but was successfully blocked by Gutierrez at the second trial) that Syed feigned catatonia after learning of the discovery of Hae Min Lee's body and told Watts that the victim had called him the night before she disappeared and wanted to get back together with Syed. *See* Attachment 12 (T. 12/13/99 at 231-233).

At sentencing after his conviction at the second trial, the Honorable Judge Wanda Heard reached and relayed a similar conclusion: "The evidence was, there was a plan, and you used that intellect. You used that physical strength. You used that charismatic ability of yours that made you the president or the -- what was it, the king or the prince of your prom? You used that to manipulate people. *And*

affiants now present direct evidence that Syed's counterparty, Asia McClain, was also talking about fabricating a lie to help Syed avoid conviction.

D. Supplementing the Record Would Reinforce the Conclusion that Syed Suffered No Prejudice Since, as a Matter of Law, Prejudice Cannot be Based on False Testimony.

The Supreme Court has clarified that in most cases a showing that an attorney's error would have changed the outcome of a trial satisfies the *Strickland* requirement to show prejudice. *See Glover v. United States*, 531 U.S. 198 (2001). Concurring with the State on this issue, the post-conviction court ruled that Syed has not met this requirement and therefore denied relief. Syed has conditionally asked this Court to reconsider that assessment. But even assuming *arguendo* that incorporating McClain into Syed's alibi defense would have made a difference at trial — a position on the merits that the State would dispute — the Supreme Court has also made clear that "in some circumstances a mere difference in outcome will not suffice to establish prejudice," *id.* at 202, and that criminal defendants are unable as a matter of law to establish prejudice where their claim is predicated on a falsity or an improper ground they are not permitted to exploit.

In *Nix v. Whiteside*, the Supreme Court was asked to approve an ineffective assistance of counsel claim where the defense attorney refused to sponsor false testimony. There, the defendant consistently told his attorney that he stabbed the victim because he believed the victim owned a gun and that the victim was reaching for the gun when the defendant stabbed him. 475 U.S. at 160-61. On the eve of trial, the defendant, concerned that the jury would not credit his claim of self-defense if he did not purport to have seen the gun, told his counsel for the first time that he saw something metallic in the victim's hand. *Id.* His counsel refused to allow him to offer this newly-remembered detail in his testimony, believing it to be perjury. In post-conviction proceedings, the defendant

even today, I think you continue to manipulate even those that love you, as you did to the victim. You manipulated her to go with you to her death." Attachment 12 (T. 6/6/00 at 16) (emphasis added).

claimed that the failure to allow him to offer this evidence was ineffective assistance of counsel, causing prejudice to him because it could have affected the outcome of the trial.

The Supreme Court disagreed. "Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." *Id.* at 166. Chief Justice Burger noted that "at most, [the defendant] was denied the right to have the assistance of counsel in the presentation of false testimony." *Id.* at 174. This, however, does not qualify as a form of prejudice protected by the Sixth Amendment to the Constitution. "We hold that, as a matter of law, counsel's conduct complained of here cannot establish the prejudice required for relief under the second strand of the *Strickland* inquiry." *Id.* at 175.

Likewise, in *Lockhart v. Fretwell*, the Supreme Court addressed the impact of a new development in the law on evaluating prejudice under *Strickland*, once more emphasizing that a defendant cannot establish prejudice if the result would reward him with an unjust windfall. 506 U.S. at 366. In that case, even though the attorney failed to make an objection that would have succeeded and benefitted the defendant under the then-prevailing law, the state of the law was subsequently corrected. *See Lockhart*, 506 U.S. at 374 (O'Connor, J., concurring). Thus, by the time the defendant was seeking to establish that his attorney's failure had prejudiced him, it was apparent that his Sixth Amendment claim was rooted in an interpretation of the law that no longer had merit. *Id.*[30] On this basis, the Supreme Court found that the defendant could not establish prejudice: "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* at 372; *see also Perry v. State,* 357 Md. 37, 80 (1999)

[30] The Supreme Court confirmed that although the "perspective of hindsight" and the "natural tendency to speculate as to whether a different trial strategy might have been more successful" are not proper considerations in evaluating counsel's performance, the analysis of prejudice "does not implicate these concerns" and thus, with respect to the second prong of *Strickland*, the "use of hindsight" is permitted and proper. *Lockhart*, 506 U.S. at 371-72. *See also supra* note 7.

(noting that prejudice is not always judged solely by whether the outcome would have been affected but also "whether the result of the proceeding was fundamentally unfair or unreliable." (citations and quotation marks omitted)).

Thus, under *Nix* and *Lockhart*, to satisfy his burden of establishing prejudice, Syed was required to prove not only (a) that there is a reasonable probability he would have been acquitted but for the alleged error, but also (b) that McClain's testimony was not fabricated or false: "Even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury." *Williams v. Taylor*, 529 U.S. 362, 391-92 (2000) (citing *Nix*, 475 U.S. at 175-76). Because it ruled that Syed had not established "a substantial possibility that . . . the result of his trial would have been different," Mem. Op. II at 26, the post-conviction court had no occasion to assess — at least, not in the context of prejudice — the second question: whether Syed had shown that McClain's proposed testimony was not false.

The court indirectly shared, however, its appraisal of McClain in the context of evaluating deficient performance. Faced with rival conclusions about the veracity of McClain's recollection and whether her letters were produced in concert with Syed, the post-conviction court found that the State's theories and evidence, on the one hand, and more innocent explanations that favored Syed, on the other, both required the court to engage in speculation and were essentially in equipoise: "While the State's speculation is plausible, the State is essentially asking the Court to favor one conjecture and ignore other equally plausible speculations." *See* Mem. Op. II at 17. But, if it is just as possible that McClain's purported alibi was false or manufactured as it is that she is telling the truth, then Syed has not satisfied his burden and, as a matter of law, he cannot demonstrate prejudice.

Moreover, unlike *Griffin v. Warden*, where the Fourth Circuit criticized the "retrospective sophistry" of producing in hindsight possible justifications for an attorney's error where the attorney himself had candidly supplied his reason for being derelict in his professional duties (970 F.2d at 1358),

here, in the absence of testimony from any member of the defense team explaining the decision to forego Asia McClain, Syed and the State have both been left to present narratives and furnish evidence to support them. But it is emphatically not the State's burden to fill that gap. Still, if the question is close, previously unknown information that has only now been brought to the State's attention critically alters the balance in the State's favor. The State has already presented substantial evidence that the letters and statements of McClain were suspect and thus that Syed has no legitimate constitutional reason to be disappointed in the defense his attorney deployed. *See supra* Parts III.A.-C. Augmenting the record with affidavits from two of McClain's classmates would, in the interests of justice, cement that conclusion. Prejudice, after all, cannot be founded on false testimony.

IV. Conclusion

To review Syed's petition on the uncorroborated assumption that McClain has been truthful in the face of mounting evidence to the contrary is to grant Syed a "windfall" to which the Constitution does not entitle him. The burden of proof falls on Syed in these proceedings because the burden of proof to convict him was met by the State over 16 years ago. Otherwise, the passage of time, the vagaries of memory, and the seductive lens of hindsight make it all too easy to imagine a story of what might have been, especially when — long after the crime was committed, the investigation concluded, the defendant convicted — so many of those who lived the true story are not here to tell it.

The fashioning of a false alibi is not a novelty in criminal cases, and Syed would hardly be the first defendant charged with murder who sought to improve his position by manufacturing one. Already, the post-conviction court has characterized as "quite a compelling theory" the State's position that Asia McClain typed a letter as part of a scheme with Syed to create a false alibi. Courts operate under the comfortable assumption that a person ordinarily would not be willing to lie to assist someone charged with murder. Two witnesses who were previously unknown to the State have now

come forward and affirmed that this assumption does not apply in the case of Asia McClain. To correct that assumption prior to appellate review is in the interests of justice.

WHEREFORE, in accordance with the Criminal Procedure Article, Section 7-109(b)(3)(ii)(2), and Maryland Rules 8-604(d) and 8-204(f)(4), the State respectfully asks this Court, in the event that it agrees to review Syed's ineffective assistance claim based upon his lawyer's failure to pursue Asia McClain, to permit a limited remand in order to supplement the post-conviction record with the affidavits — and, if requested by Syed, testimony subject to cross examination — of two individuals who were previously unknown to the State and whose information was previously unavailable but materially bears on the validity of Syed's Sixth Amendment claim of ineffective assistance of counsel.

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Respectfully Submitted,

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